



# MINIMISING THE STRAIN OF DISPUTE RESOLUTION

By PERRY GOURLEY

**I**T'S 3am, and after many hours of negotiations the pressure is on to get that business deal finalised and signed off. The only thing left to agree is the dispute resolution clauses just in case something goes wrong between the parties in the future.

While there may be a temptation to quickly insert some standard wording to get the deal over the line, **Shepherd + Wedderburn's** international disputes partner Jane Wessel argues it is definitely a case of a stitch in time saves nine.

"When deals are being negotiated between businesses everyone is focused on reaching an agreement and they are not really thinking of what would happen if things go wrong," she explains.

Deciding from the outset which law governs an agreement and where and how the parties want to resolve disputes if they arise is crucial to prevent costly issues arising in the future.

"In 90 per cent of cases these

dispute resolution clauses won't be needed but when they are it is vital they are appropriate or it could be enormously expensive," Wessel warns.

The issue can be particularly relevant in cross-border agreements.

"I was involved in a case where a UK plc had a business deal with an Indian firm and where the dispute

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Bruce Craig, Pinsent Masons (below)

resolution clauses said that if a problem arose the Indian partner could call for arbitration in their country.

"It was very cheap for the Indian side to bring that claim and although we eventually won, the whole experience was very time consuming for the company."



**Brodies'** partner Joyce Cullen says having an escalation procedure included in contracts can prove valuable.

"Such a procedure sets out who will speak to who from both parties if a problem occurs and who it will be escalated to well before you see a lawyer," she explains.

"In long-running contracts in particular where companies are looking to work in partnership you don't want a situation where someone 'downs tools' early on in the relationship because of a problem. You want to be able to put a red circle round the particular issue and for the partnership to continue while efforts to resolve it are going in."

When businesses can't settle disputes between themselves, they have a wide range of options at their disposal to try to resolve them.

While going to court may be most appropriate in some cases – particularly higher value disputes – there are a number of quicker and less costly options available to parties.

Alternative Dispute Resolution (ADR) has becoming increasingly

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► popular with commercial clients in Scotland in recent years.

ADR - including negotiation, mediation and arbitration - can offer many advantages over the court process including a much quicker outcome.

The Arbitration (Scotland) Act 2010, which provides a statutory framework for domestic and international arbitration in Scotland, was introduced to try and encourage wider use of the method for resolving disputes and the Scottish Government now has arbitration as its default mechanism for resolving disputes.

Under arbitrations, an impartial arbitrator makes a decision on a dispute. One advantage is that parties can appoint someone with specialist knowledge of their particular industry.

Brodies' Cullen says although many lawyers used to be unwilling to recommend arbitration as it was seen as costly and complicated, they were now much more comfortable with it although she said take-up remains relatively limited.

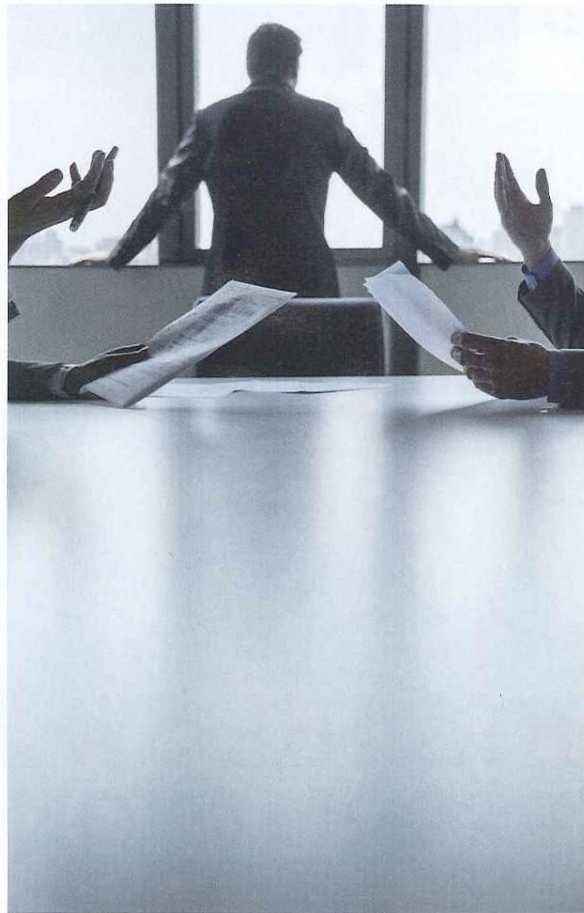
"Certainly when contracts are being drafted arbitration clauses are now much more widely used although it will take time for that to filter through to actual cases after disputes have arisen."

Although it is widely used in the construction industry, Cullen says there is real scope for it to be extended to other sectors in Scotland.

"In industries such as oil and gas, the experts who could be involved in arbitrations are already here in Scotland," she points out.

Bruce Craig of **Pinsent Masons** argues that with legal costs in Scotland being markedly lower than in London, there are market drivers in appropriate cases for arbitrations to take place in Scotland rather than for the case to go to court or to arbitration elsewhere.

"The huge advantage of arbitration in an appropriate case is that the decision - although binding between the parties - is confidential unlike court judgements which are publicly available. Win or lose, receiving a confidential judgement can of course be extremely important commercially."



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Mediation has also continued to gain ground with specialist firms such as Edinburgh's Core Mediation helping raise awareness of the process which can often quickly resolve disputes, although unlike arbitration it is non-binding on parties.

The private nature of the process means getting a handle on how many cases go to mediation and how many are resolved is difficult but Valerie Allen of CMS says in her experience "perhaps 60 per cent-plus of commercial disputes that go to mediation are resolved on the day".

"The growing familiarity with mediation, in particular, and the



recognition of the commercial benefits of achieving a quicker and often cheaper result, where unlike in court the business remains in control of the terms of any resolution, has led to a significant rise in alternatives to litigation being used when settling commercial disputes," she says.

Brodies' Cullen says that smaller disputes are where "ADR really comes into its own".

"For disputes involving large sums of money, the costs of being involved in a long-running case may not be that significant a factor for those involved"

A focus on making it cheaper and easier to resolve smaller value disputes was behind last year's introduction of the Court Reform (Scotland) Act 2014 which brought in a raft of new civil court measures including higher financial thresholds for claims raised in sheriff courts and changes to the ability to recover fees.

Previously, claims for more than £5,000 could be raised in the Court of Session in Edinburgh but under the new act, disputes involving sums less than £100,000 are raised in the Sheriff Court where they may be heard by sheriffs with specialist commercial experience.

Pinsent Masons' Craig said the change was an important one for those considering bringing a case.

"The effect of a very low limit in the past was that, especially in personal injury damages claims, court action would be raised in the Court of Session with the need for both sides to instruct counsel.

"This could result in the court costs exceeding the value of the claim.

Now, pursuers need to be extremely careful before raising an action at the Court of Session because even if it is successful but the final award or settlement sum is less than £100,000, the pursuer is at a real risk of not being able to recover counsel's fees."

Upcoming court reforms which could impact on disputes involving businesses include the Simple Procedure Rules, which will govern the way cases of less than £5,000 are litigated in Scotland from 28 November.

Simple Procedure will be offered through an online portal currently

being developed by the Scottish Courts and Tribunals Service.

Initially, it will make online processing available for most payment actions up to £5,000 and an online portal will enable the legal profession and the public to start actions, submit case documents, pay fees and track progress online. It is planned to extend this to all areas of simple procedure by mid-2017, allowing over 60 per cent of all civil business in the sheriff courts to be processed online.

Alan Sinclair, a partner at **HBJ Gateley**, said that the new rules were a welcome step to try and bring down the cost and delays associated with low value claims.

“The issue of cost is often more sharply felt in disputes over more modest sums. The costs of pursuing a four-figure sum through the courts can quite quickly exceed the amount being fought over,” he says.

“The Simple Procedure Rules are written in plain English, to make it easier - in theory - for parties to deal with cases themselves. Sheriffs are empowered to make more decisions without hearing arguments in expensive hearings. Orders can be made by the court which encourage parties to negotiate or find an alternative way of settling their differences.”

While exactly how Brexit negotiations will progress over the months ahead is unknown, Shepherd + Wedderburn's Wessel believes the UK's eventual withdrawal from the UK will see “business boom for dispute resolution lawyers”.

“Contracts may have been signed between companies for long-term agreements based on the parties' understanding of the environment,” she explains.

“Brexit could change that significantly and in some cases make the fundamental business case of an agreement not financially viable any more.”

Tony Jones, head of **BTO's** commercial dispute resolution team in Edinburgh, said there were a number of issues being debated among lawyers in the sector following the referendum vote.

“The suggestion that the UK will retain all existing EU-derived law post-Brexit will create interesting new arguments for litigators,” he says.

“UK courts will be at liberty to develop EU-derived law that remains part of UK law in very different ways from what may be done within the EU.”

Valerie Allen at **CMS** says that although there has been no obvious impact so far from the vote, she anticipates some possible challenges ahead.

“This could potentially include changes of the rules on governing law, jurisdiction, service of proceedings and enforcement of dispute-related judgments.”

Pinsent Masons' Craig believes it is too early to tell what, if any, effect Brexit will have on commercial disputes in Scotland.

“Typically, a commercial contract will set out which law applies and where disputes will be determined - whether in court or by way of arbitration. The UK has always been extremely well regarded internationally for the independence of its judiciary and the reputation of its arbitration panels and it does seem to me that this is unlikely to change if or when Brexit occurs.”

One sector in Scotland where external factors have led to a rise in disputes is oil and gas.

**CMS's** Allan says as well as an increase in the number of disputes arising in the low oil price environment, the nature of them had also shifted.

“Given the current financial constraints facing the sector, many companies have far less flexibility and are therefore being much more rigid on the terms and conditions of their contracts. That said, there remains a strong desire to achieve negotiated solutions, although these are often proving to be difficult and taking longer to achieve.”

Pinsent Masons' Craig has also seen a “marked increase in commercial disputes in the sector”.

“Whereas in the past parties may have done an early deal, shaken hands and moved on in the hope and expectation of maintaining the solid business relationship, our experience has been that with the oil and gas sector in a state of flux, parties have been far more willing to fight their corner,” he says.

“Some business relationships have suffered badly in the present market, with parties far more willing to fight than compromise when a dispute has arisen, which impacts on how they maintain relationships with customers, suppliers, clients and service providers.” ■

### IN FOCUS: Court Fees

THE SCOTTISH Government is currently consulting on proposals to raise fees payable in Scottish courts with the aim of ensuring they cover the costs involved.

The consultation has proposed approaches including a flat rise where all court fees are increased by the same percentage across the board, with the current proposed level being 24 per cent.

An alternative is targeted increases where only selected fees will be increased.

Under small claims or simple procedure, as it will be known from November, the fee for lodging a claim would rise from £18 to £22.

However, for actions raised in the Court of Session, the proposed increases are significantly higher. To lodge an action, the current fee of £214 will rise to £266 under the flat rise and to £300 under the targeted increase. ■