This document on Dispute Resolution outlines the four main approaches to resolving contractual disputes.

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When trading partners fall out they will be unable to agree that Christmas falls on 25 December, let alone how to resolve their differences. Typical disputes are over time and money, where tensions can run high.

Purchasers have many options when drafting dispute resolution clauses in their contracts. Some appear very similar but not all are suitable for every project. Whichever is most appropriate, buyers must ensure contracts set out a dispute escalation process and specify the method. If the contract is silent on this point each party will treat the other’s proposals with suspicion, assuming that there is an agenda or advantage behind a recommendation to, for example, arbitrate rather than adjudicate. There would also be the opportunity for the party receiving the claim to stall the process by refusing to agree.

Here are the four main approaches to resolving contractual disputes.

**Adjudication**

A single adjudicator will review written evidence and arguments set forth by opposing parties without the need for a hearing. The parties agree the powers of the adjudicator, such as the ability to make award on costs for pursuing or defending the dispute.

Depending on the industry, the appointment of the adjudicator is normally left to an independent individual named in the contract, such as the president of the British Computer Society for an IT dispute. Contracting parties could agree the name of a particular adjudicator in advance; however, there could be problems if they are not available when a dispute arises.

Adjudicators will be experts in a particular sector. Their use has grown dramatically in the past decade, most notably in construction, an extremely litigious sector where millions are spent each year on fighting disputes.

**Pros:**
- This approach is confidential and not a matter for public record;
- It is usually undertaken while the contract is still live, allowing resolution and payment at the time;
- It is quick to resolve - construction contracts include mandatory adjudication with a 42-day resolution period. Other sectors should specify a timetable in the contract, if not the adjudicator will advise;
- It is cheaper than arbitration and litigation, as it may not require the use of lawyers.

**Cons:**
- Adjudication is enforceable at the time, but only final and binding if agreed in advance of the dispute;
- It produces no case law;
- It is prone to ambush: a party could spend months preparing their claim and due to short timescales the defendant may struggle to respond in time;
- An adjudicator can only preside over the matter before him. There is no opportunity to counter-claim on a different issue - in that instance a separate action would be raised.
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Arbitration
Disputes are heard by a lone arbitrator or a panel, and are resolved outside the courts. If arbitration is to be used on high-value contracts you may prefer to opt for a panel (which is always made up of an odd number to ensure you do not get a tied-decision). This removes the reliance on an individual, but is likely to be cost-prohibitive on smaller contracts. The Chartered Institute of Arbitrators or industry-specific bodies can make appointments. There could be a hearing which follows a mini-trial format where both parties submit documentation. For international contracts, the applicable law and seat of the arbitration needs to be agreed in the contract. In the UK, the use of arbitration is subject to the Arbitration Act.

Pros:
- It is confidential;
- A court is unlikely to overturn an arbitrator’s decision unless they were acting in bad faith or negligent;
- The arbitrator is likely to be an expert in the disputed field;
- There is the option to have more than one person make a decision.

Cons:
- This is a potentially a lengthy, formal process and can be expensive when external advisers such as claims consultants, lawyers and barristers are involved;
- Arbitrators are not bound to give reasons for a decision and there are limited grounds for appeal;
- This process usually only takes place at the end of a contract which can leave the claimant party without restitution for some time. It is final and binding, requiring all matters to be concluded before a decision can be made.

Litigation
This is the 'traditional' process for resolving legal disputes on civil matters. It is used where the party starting an action (the plaintiff), seeks a legal or equitable remedy. A defendant is required to respond to the plaintiff’s complaint. If the plaintiff is successful, judgment will be given in its favour, and a range of court orders may be issued to enforce a right, award damages, or impose an injunction to prevent an act or compel an act. A party can make an offer to settle at any stage, but it cannot be resolved through negotiation, it will be heard in court.

Pros:
- It is tried and tested with a vast body of case law;
- It imposes a final decision that parties are obligated to respect. The outcomes of litigation are, without exception, binding and enforceable, while being subject to appeal;
- It is institutionalised (meaning a party with a complaint needs no-one’s permission to bring a lawsuit against another party).

Cons:
- It is lengthy and expensive;
- Litigation requires a significant management overhead, distracting resources from their roles and duties;
- Control of the process is removed from the parties and delegated to the lawyer and the court where the judge may not be a subject matter expert;
Dispute Resolution - White Paper

- It often drives parties apart because of its adversarial nature. This process usually only takes place at the end of a contract which can leave the claimant party without restitution for some time. It is final and binding, requiring all matters to be concluded before a decision can be made.

Mediation
With a third-party mediator, going to court can be avoided. There are regional associations of mediators who can appoint an expert in a particular field. It is good practice to include mediation in contracts as a precursor to proceeding to 'formal' dispute resolution to allow the parties to attempt to negotiate a settlement.

Pros:
- This approach is quicker, cheaper and less adversarial;
- The outcome is confidential and within the control of the parties;
- The process is 'without prejudice'. If settlement is not reached there is no risk of having 'given away' anything that the other could use in court.

Cons:
- It is not final and binding;
- If both parties are entrenched, mediation will not work and it will add time and costs to resolve disputes;
- Litigation, with lawyers protecting client interests and rules ensuring full disclosure of information, can be seen to ensure fairness more than the informal and variable process of mediation;
- Settlement is voluntary, so you cannot be certain of getting a result. There is no outside party imposing a solution, and a cynical opponent could exploit the process.

For alternative methods please see Alternative Dispute Resolution.