



SORTING OUT DISPUTES OVER THE DEALS BREXIT HAS TURNED SOUR

By VICTORIA MASTERSON

DISPUTE resolution is a growing industry in Scotland and with Brexit continuing to fuel economic uncertainty lawyers are reporting rising caseloads both in and out of court.

“If there is any kind of economic downturn, then you typically see a rise in disputes,” explains Graeme MacLeod, a partner at law firm CMS. It has one of Scotland’s biggest dispute teams, with around 50 lawyers and 13 partners.

“In the past, that has tended to mean more claims by and against banks; claims against professionals and their insurers – and claims which come out of insolvency scenarios, where money has gone missing or been misspent and needs to be clawed back.

“Whatever the outcome of the Brexit negotiations, we would expect to see some disputes on the back of them,” MacLeod continues. “There are likely to be disputes over deals which have gone sour because of Brexit and questions about whether

it is a sufficient change to allow businesses to wriggle out of contracts which have become unprofitable or unworkable.”

Longer-term, MacLeod also predicts an increase in ‘digital age’ disputes.

“We are going to see more and more claims coming out of data breaches, from artificial intelligence-assisted technology, and from online activity – particularly in the

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Graeme MacLeod, CMS (below)

reputation sphere,” he predicts.

The traditional image of dispute resolution is people fighting cases in court. But businesses are increasingly turning to alternative methods of dispute resolution that are typically quicker, less expensive and more private than court proceedings. These include mediation – essentially a form of assisted negotiation helped

by a third party, the mediator – and arbitration, which is much like court but conducted in private and with more flexible rules.

In practice, MacLeod says this means being involved in court, but also in running internal and external investigations, facing off against regulators, and being called in at short notice to manage crises and reputational issues.

Choosing the right dispute resolution method can minimise disruption, maintain confidentiality over a dispute, and manage the legal costs, according to Sheila Webster, partner at **Davidson Chalmers**.

“Traditionally, the main method of resolving disputes was through litigation, which is public, lengthy and expensive, with the risk of not getting the outcome desired,” Webster says. “This is becoming less popular, while mediation and arbitration are increasing in popularity. Mediation offers confidentiality and significant flexibility over the outcome – agreed between the parties – and can be dealt with very swiftly. It is also increasingly encouraged by courts, which is leading to an increase in its



► use.” Arbitration has also become more popular in Scotland since the introduction of the Scottish Government’s Arbitration (Scotland) Act 2010. This replaced outdated legislation laid down in the 19th century and aimed to promote Scotland as a centre for international arbitration.

Unlike the position in most jurisdictions, arbitration in Scotland is a confidential process and the duty to treat proceedings as confidential is backed up by legislation. To reduce unnecessary court challenges, the Scottish act limits appeals to the court. There is no appeal to the Supreme Court and no appeals on points of law for international arbitrations.

Other forms of alternative dispute resolution include adjudication, which is often used in disputes over contracts to give a swift, interim resolution using a 28 to 42 day procedure.

“In the construction sector adjudication is still a popular option for swift outcomes to improve cashflows in the industry,” Webster adds. “Though the outcome can be rough justice, which may require time and expense to challenge in the long run.”

Expert determination – where an expert is instructed to rule on a technical issue – is particularly favoured for technical disputes – for example, a dispute over rent values.

Scottish property and construction consultancy **Thomas & Adamson** has been offering specialist dispute resolution services in relation to construction contracts for more than 80 years and has offices in Edinburgh, Glasgow, London, Kiev, Abu Dhabi and the US. Current cases include advising a government agency in the United Arab Emirates on the resolution of a construction claim.

“For us dispute resolution is the process associated with advice and support in the preparation, attack or defence of a construction contract dispute,” explains international director Andy Mason. “This is where time and money generally impact commercial decisions made by our clients – whether employer or contractor – and where the aim is to resolve the dispute by the most efficient means.”

In the UK, the Construction Act, which introduced adjudication, only arrived in the 1990s, so the UK



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Sheila Webster, Davidson Chalmers (below)

remains a ‘developing market’ in terms of dispute resolution history. “We see a greater volume in dispute resolution in jurisdictions like the Middle East, as the regions – and other parts of the world – continue to adopt the use of standard form contracts and work with new legislation and amendments to suit their own locality,” Mason adds.

One of the most interesting trends in alternative dispute resolution is the proliferation of sectoral regulators dealing with disputes, says John MacKenzie, a partner in **Shepherd and Wedderburn’s** commercial dispute team.

“There are now many specialist regulators who deal with specific issues,” MacKenzie says. “The Information Commissioner deals with data disputes; the Financial Ombudsman was set up by parliament to sort out complaints between financial businesses and their customers and the Energy Ombudsman is approved by the energy regulator Ofgem to independently handle disputes between energy companies and their customers. Many complaints are dealt with by specialist service

providers, which reduces the number of cases that might otherwise go through lawyers and the courts.”

Another interesting dynamic is the global competition for disputes.

“France has set up an English language commercial court. Singapore is at the forefront of offering commercial courts that adopt the very latest technology. And China now has three specialist internet courts that deal with tens of thousands of cases a year,” MacKenzie adds. “Governments are recognising that the dispute resolution system in a country is an important aspect of doing business in that country and can influence whether businesses invest there.”

The Scottish Arbitration Centre in Edinburgh was set up in 2011 as a result of the Arbitration (Scotland) Act and has established a network of around 6,000 arbitration professionals worldwide. The centre works to promote arbitration in Scotland and is to host the 2020 congress for the International Council for Commercial Arbitration, the global non-governmental organisation dedicated to promoting and developing arbitration, conciliation and other forms of international dispute resolution.

“We saw off competition from established arbitral institutions in Copenhagen, Stockholm, St Petersburg, Vancouver, Mexico and Vienna,” explains Scottish Arbitration Centre chief executive Andrew Mackenzie. “The conference will give Scotland an unprecedented profile



in the international legal sphere as we welcome around 1,200 of the world's most influential lawyers to Edinburgh for a week. VisitScotland estimates that ICCA 2020 will be worth over £2 million to the Scottish economy."

Arbitration is generally on the increase in Scotland and the Scottish Arbitration Centre is aware of it being used as the default dispute clause in various contracts, with bodies like the Scottish Government and the Scottish Building Contracts Committee adopting arbitration.

"This is not surprising, given that Scotland now has one of the most modern systems of arbitration in the world with its state-of-the-art law, cost effective process, flexibility and restricted appeals process," Mackenzie adds.

Tim Edward, partner and head of commercial dispute resolution at **Dentons** in Scotland, believes alternatives to litigation are becoming ever more popular because of the cost and timescale associated with court action. But the new Civil Litigation (Expenses and Group Proceedings) Act 2018 – which was introduced to address the mounting cost of court action – may have an impact on that trend.

"With the door wider open to lawyers offering 'no-win no-fee' approach, litigation could become a low risk option for businesses seeking redress," Edward suggests. "This may bring some cases back to the courts."

That said, the expense and timeframe associated with litigation has seen other forms of dispute resolution growing in popularity for some years – and there are no signs of this trend abating.

"We are also seeing strong growth in arbitration and expert adjudication – where the parties agree to be bound by the judgement of a neutral third party such as a QC – even though these options are relatively high risk," Edward adds.

"Many businesses are now building dispute escalation protocols into their contracts, to avoid the cost and uncertainty of matters going to court. These typically involve an escalation to management and senior management, followed with arbitration if necessary."

Law firm **Pinsent Masons** says it has seen a resurgence in large litigations in the Court of Session being fought to some form of substantive hearing before the

court, rather than being resolved by settlement at an earlier stage.

"Although it is difficult to generalise across cases about why this might be, we sense that in part it is due to case management by the court splitting cases up so that they can be heard in chunks rather than all issues having to be addressed in one go," suggests Jim Cormack, one of the firm's two solicitor advocates.

"To some extent, this mitigates cost and cost risk and enables parties, for example, to get a judicial decision on a key issue or issues, which they can then try to use to settle other issues in negotiations or mediation. In other words, taking a hybrid approach to dispute resolution options."

Aberdeen-based **Aberdein Considine** has a national dispute resolution team who advise clients on avoiding disputes, as well as acting in the Sheriff Courts, Court of Session and Lands Tribunal where necessary.

Recent cases have included acting for a national distributor in the food and drink sector to help them resolve a dispute with a shareholder and former director and to implement a new debt recovery process designed to enhance cash flow.

"We are seeing clients more willing to take advice at an earlier stage and working closely with us to map potential outcomes and cost exposures," says Ross Webb, dispute resolution partner at Aberdein Considine. "This approach allows for more effective management of risk

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Fiona Pask, Harper Macleod (below)

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throughout the dispute resolution process.

"Clients are also keen to explore other means of dispute resolution, whether by negotiation or mediation. However many of our clients take comfort from the fact that, should it be necessary to resolve matters through the courts, we have a team of specialist commercial litigation solicitors who are able to ensure the best possible outcome is achieved."

Mediation specialist **Core**



Solutions is seeing more and more businesses and lawyers opting for mediation.

"Mediation enables the real decision-makers to sit down together and explore the underlying commercial issues as well as the legal and technical points," says the firm's senior mediator, John Sturrock QC. "They are able to condense, usually into one day, negotiations that might otherwise never happen or which have got bogged down in deadlock or adversarial litigation."

Mediation has a very high rate of success in enabling people to get satisfactory results in disputes speedily and efficiently, Sturrock adds. Good lawyers are aware of the benefits which accrue for clients and are making increasing use of it.

"In one recent case where parties had been at loggerheads for months, in the course of a day the chief executives came up with a new arrangement for the future," Sturrock says. "In another, long-running management issue, where parties were headed for court, directors were able to sort out a different direction for the business. Sometimes it's just about managing the end of a relationship in the most effective way."

Over the past 24 months, law firm **Harper Macleod** says it has seen uptake in arbitration and formal mediation.

"Businesses are attracted by the level of control offered by the appointment of an arbitrator with specialist industry knowledge – as well as the expedited procedure, which results in prompter, and as a result more economical, resolutions," explains Fiona Pask, partner in the dispute resolution team at Harper Macleod.

"We are seeing now more than ever an increasing appetite for formal mediation to resolve contentious disputes. When parties mediate, whether it be during the course of a lengthy litigation or in the early part of a dispute, there is a shared desire to bring the dispute to an end. That joint purpose may be one of the few issues parties are prepared to agree on – but it's that desire to end the dispute that can drive successful resolution and broker a settlement. This would never be achievable in structured court proceedings or arbitration. Businesses wanting a resolution on their own terms are seeing the advantages in formal mediation." ■

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Why use mediation?

*"I just thought I would drop you a quick note to thank you for today. I had real concerns about how it would go. It could have been very different. It needed exactly what you as mediator brought. Our client is very relieved. I'm not sure I can stretch to "pleased"! But certainly content. **He knows he could not have got to a better solution.**"*

*"I wanted to express my deepest thanks for your invaluable contribution to the mediation process with our clients and the other party. In 15 years we have achieved not one single concession and **to achieve an outcome such as that we have done is flabbergasting.**"*

*"Our client is very happy with the outcome – and I couldn't agree more about this freeing him to get on with his life. **This was a perfect example of the benefits of collegiate working through the mediation process to achieve a resolution which would have been virtually impossible through the traditional litigation route.**"*

*"I found that the mediation process pretty well delivered what it promises on the tin and, should I in the future have any clients considering, or stuck in the middle of, a court action, **I will certainly be commending mediation to them.**"*

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John Sturrock, Founder and Senior Mediator, Core Solutions Group



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