



North West Branch of the Chartered Institute of Arbitrators

The Professional Organisation for Arbitrators, Mediators and Adjudicators

ABOUT US

The North West Branch is as the title suggests, a regional Branch of the Chartered Institute of Arbitrators.

The Branch aims to represent members of the Chartered Institute of Arbitrators that reside within its boundaries and we aim to promote the aims and objectives of the Institute at a regional level.

One of the many aims of the branch is to make the Chartered Institute more accessible to its membership and also to form closer links to the many professions embraced by the needs and skills of Arbitration, Mediation and Adjudication.

One of the primary functions of the Branch is to frequently arrange educational events for its members. These range from specific educational topics that

are deemed to be of interest to those practicing in the fields of law, expert witnesses, adjudication, mediation and arbitration and can be full or half day events or evening events sometimes held over Dinner. Some of the events while being educational are also classed as training events for example our popular Arbitrators Surgeries where delegates discuss real-life situations in manageable sized groups that heighten the experience and in some cases provided one-to-one assistance by our experienced tutors and course leaders.

This will be the first of a regular newsletter provided by the North-West Branch of the Institute of Chartered Arbitrators which aims to keep members updated on various topical issues and informed of what's going on in their Branch.

BRANCH COMMITTEE

Our Chairman of Moore & Co. is Colin Moore BSc LLB (Hons) FRICS MCI Arb who is an experienced Construction Solicitor, Chartered Quantity Surveyor and Construction Adjudicator. Colin Moore has over 25 years experience of working in or directly associated with the construction and engineering industries.



Mr Moore has recently represented the Congress Meeting held in Cyprus. The Chairman participated and witnessed the Presidential Elections and voting for the Chairmanship of the Board of Trustees. In addition the Chairman participated in debates on various topics.

Our Branch Committee comprises of a number of well established and experienced qualified Arbitrators, Mediators and Adjudicators as follows: -

Kevin P Hayes of Blake Newport - Vice Chairman
Keith N Miller of Byrom Clark Roberts - Secretary
Mike D Evans of Tweeds - Treasurer
Mark Mattison of CEDR - Immediate Past Chairman
James T Burns - Branch and Northern Regional Representative
Michael A Conway of Michael Conway Consulting Ltd - Chairman of Education
Peter W Dale of PW Dale Consulting Ltd - Dinner Committee Chairman
Ian W Williams of Advent Project Management Ltd
H Michael Cummings
Derek Pye of Pye Consulting Group Ltd - Education Committee Member
Daniel Brawn of Brabners Chaffe Street
Andrew Glover of Trett Consulting
Kenneth T Salmon of Mace & Jones

Should you require further information regarding our Committee Members or any other aspect of the work the Branch undertakes on behalf of its members, please contact our Chairman on 0161 877 6777 or any other member of the committee which are listed on the Committee page.

For further information and contact details please visit our website below.

www.arbitrators-nw.org.uk

THE REVIVAL OF DOMESTIC ARBITRATION?

Arbitration has been dismissed by some as a means of Alternative Dispute Resolution (“ADR”) of the past. Certainly the popularity of adjudication as a method of dispute resolution in the construction industry has seen a major decline in the number of domestic arbitrations (albeit that international Arbitration continues to flourish). Arbitration has not gone away, however, and there are suggestions that the ‘fight back’ has begun. A recent survey by Legal Week magazine found that 64% of senior corporate counsel predicted an increase in the use of Arbitration over the next five years. Part of the reason for this it seems is the ever increasing rise in the cost of litigation. Over the last few years, we have seen the government ever keener to make the Court process self-funding which in turn has seen a quite dramatic rise in Court fees. On the horizon we also have the prospect of paying for Judge’s time; when this happens, it is likely we will see Arbitration come back into ‘fashion’ over litigation as the primary route to resolving major construction disputes.

Construction Adjudication

Adjudication has without doubt been the nemesis of domestic Arbitration. However, despite its obvious popularity, Adjudication is not everybody’s cup of tea. Concerns in relation to the limited time available to deal with complex matters, the increasing complexity of the process and the quality and lack of legal knowledge of some Adjudicators have, in part, began to undermine the process. To add to Adjudication’s woes, we have the Government it seems (via the D.T.I.) unwilling to make the changes in legislation that many consider are necessary to ensure Adjudication remains the viable and popular form of dispute resolution that it presently is.

The 100 Day Arbitration Procedure

Earlier this year we saw the Society of Construction Arbitrators launch the ‘100 Day Arbitration Procedure’. Many see this as seen as an attempt to ‘modernise’ domestic arbitration in order to provide the construction industry with viable alternative to litigation, and maybe even adjudication. In the past, domestic arbitration has largely fallen into disrepute as becoming little more than litigation albeit in private. In comparison to the

latest trends in alternative dispute resolution, arbitration clearly no longer offered the construction industry the speed and flexibility that mediation and adjudication are now offering. The considerable decrease over the last several years in the number of institutional Arbitrator appointments has merely reinforced this view.

The reality is that parties are only likely to bypass their right to refer disputes to adjudication or even litigation if there is a real alternative available that they can rely upon. Perhaps Arbitration via the 100 Day procedure could in time become such an alternative? An arbitral award is final whereas an Adjudicator’s decision is an interim decision pending the stamp of approval from the Court. The ease of enforcement of an arbitral award should not be under-estimated given that enforcement of an Adjudicator’s award is now often a complex and expensive process. All too often adjudication proceedings are now hi-jacked by jurisdictional and legal issues. Often parties will pursue these challenges in Court once an adjudicator’s decision has been made in an attempt to avoid enforcement. Over the last few years we have seen the Court’s become ever more willing to agree with such challenges and to refuse to enforce Adjudicator’s decisions.

Whether or not a dispute proceeds in litigation or adjudication, parties have the right to demand quality and binding decision making. The 100-day arbitration procedure offers finality as well as great flexibility. The longer period of time over the normal 28 day period in adjudication will give the arbitral tribunal time to tailor the most suitable procedure for the dispute. In addition, section 50 of the Arbitration Act 1996 permits the parties to extend the time limit whereas in adjudication such extension is dependant upon both parties agreement once the 42 maximum has been exceeded. It may only be a matter of time before the Courts refuse to enforce an Adjudicator’s Decision for a breach of natural justice in that it may be insufficient time to explore the merits of the dispute. The case of CIB Properties Limited –v- Birse Construction Limited is arguable authority that the Courts have already addressed this point. In that case an extended timetable of 15 weeks was deemed inadequate time for reaching a fair decision.

Presuming that a valid arbitration agreement is in place, the new 100 day procedure allows for a structured timetable that includes:-

- Service of Pleadings, Witness Statements and Expert Evidence
- Service of Reply Statements and further documents relied upon
- Service of documents under disclosure
- An oral hearing not exceeding 10 days
- Final written submissions
- Arbitral Award within 30 days of the end of the oral hearing

SUMMARY

Only time will tell whether domestic arbitration has returned to favour and whether the 100-day arbitration will prove to be a popular method of dispute resolution in the construction industry. Adjudication has been an outstanding success, however, the honeymoon period appears to be over, certainly as far as the Court’s and the Government are concerned. Adjudication may well remain as a popular form of dispute resolution. However, there are certain types of dispute for which it is simply not appropriate. The 100-day arbitration procedure may provide a realistic alternative for such disputes. However, although the new procedure gives power back to the parties to decide how they want to dispose of their dispute, its success largely depends on the robust approach adopted by arbitrators.

MEDIATION AND OTHER FORMS OF ADR

by
MARK MATTISON

Immediate past chairman of the North West branch of the Chartered Institute of Arbitrators



In 1992 I attended a lecture given in Manchester by a Californian Professor of Law. He told the audience that it was not possible to secure a hearing date for a commercial dispute in the Californian courts without first having taken part in a mediation with a view to achieving a voluntary settlement.

I formed the view then that sooner or later mediation would catch on in a big way in this country.

Since then the legal landscape in this country has changed out of all recognition. Mediation and other forms of ADR are firmly on the agenda.

The most significant change has come about as a result of the introduction in 1999 of the Civil Procedure Rules (CPR). This was a radical overhaul of the way in which disputes are handled by the courts. Historically it was the parties to an action who dictated the pace by which a case proceeded. That resulted in delay and unnecessary expense. Now it is the Judge who dictates the pace.

Parties to disputes are encouraged to treat litigation as a remedy of last resort. Different types of disputes have their own "pre action protocols" which require the Claimant to supply details of the claim to the Defendant and to afford an opportunity for a response and for a meeting to discuss possible settlement before proceedings are launched. These protocols encourage the use of alternative forms of dispute resolution such as mediation to achieve resolution of disputes.

If Court proceedings are issued, the Judge drives the case forward by giving directions at a case management conference. The Judge has the power to stay a case for a period of time to allow the parties to try mediation and he can exercise that power despite the objection of one or more of the parties.

Parties to litigation are expected to act reasonably. If they fail to do so they can be criticised and also penalised by awards of costs. There have now been a series of high profile cases where exactly that has happened.

The Government is firmly committed to alternative forms of dispute resolution. They have given a pledge to incorporate appropriate dispute resolution clauses into all Government contracts. Further information can be obtained from the website of the Office of Government Commerce, the address of which is: ogc@gov.uk

Dispute resolution clauses which provide a structure for dispute resolution without the need for litigation are now increasingly found in Local Government contracts.

So what are the alternative forms of dispute resolution available to you?

Far and away the most common is mediation. This is described at its simplest as structured negotiation assisted by a third party neutral (the mediator). It operates along the following lines. The parties sign up to a mediation agreement which regulates the process. A day is fixed for the mediation and the parties exchange in advance and supply position papers to the mediator together with a bundle of essential documentation.

On the day of the mediation the parties meet in a neutral venue for a without prejudice confidential meeting. It is essential that someone with

authority to settle attends from each side to the dispute.

The day begins with a joint meeting chaired by the mediator who explains the process and the ground rules. He then affords each party the opportunity to make an opening statement. Typically thereafter the mediator has private meetings with each party. The mediator gives an undertaking not to disclose to any other party anything told to him in confidence during these private meetings. Thus the mediator can explore strengths and weaknesses of a party's case, can reality test and can help parties to come to terms with their dispute.

Very often the mediator will be used as a go between and will convey offers and counter offers between parties. Mediation training includes techniques to break deadlock in negotiations.

The process remains without prejudice unless and until a settlement is achieved. If terms are agreed they are reduced to writing with the help of the mediator. The parties sign the agreement at which point the process ceases to be without prejudice and a binding enforceable agreement is achieved. Very often such agreements contain a confidentiality clause so that the outcome of the dispute remains confidential.

The success rate of mediation is high. Research has indicated that well over 70% of cases going to mediation settle on the day or within the following weeks. This is because the parties at the conclusion of the mediation have a greater appreciation of their prospects of success, the likely costs implications of a court hearing and so on.

A great advantage of the process is that the mediator can secure, as part of the settlement, elements that are not open to a Judge to order. For example, often an important element of a settlement for a Claimant is to have an apology for some wrong doing.

The mediator will often look wider than the narrow confines of the dispute. Many negotiated settlements result in the rebuilding between contracting parties of commercial relations damaged by a dispute.

Mediation has certainly become popular since the introduction of the CPR in 1998. It is suitable for virtually all forms of disputes.

Two other forms of ADR are worthy of brief mention.

Firstly, early neutral evaluation. Sometimes the outcome of a case can turn on the meaning of a clause in the contract where the parties are advancing different interpretations leading to very different results. Here a Judge, retired Judge or Senior Barrister is asked to hear argument either in written or oral form (or both) and then invited to indicate which interpretation he would favour if he was hearing the case and why. Such an evaluation assists the parties to achieve a negotiated settlement.

Secondly, Expert determination. Very often a dispute can concern highly technical matters. Here the parties identify a qualified expert in whom they both have confidence. They agree to put the dispute to the expert for a determination and to be bound by that determination

Mark Mattison

DO ADJUDICATORS DREAM OF THE PERFECT CASE?

by
KENNETH T SALMON



There is one read a week that is not to be missed - Tony Bingham's page in *Building*. He's erudite, amusing, witty and concise. But he does leave me asking myself why I still think adjudication is 'a good thing'. Week after week it all goes so horribly wrong: unsuitable case; no proof; maverick adjudicator; bad or no preparation or advice. Am I responsible for some (albeit a tiny part of the total), of the hundreds of thousands if not a million of pounds, wasted on adjudication each year? Are we wandering into a nightmare landscape when we set foot on the road to adjudication? The answer is "yes" and "no". Yes I am responsible if only a wee bit - when I fail to convince a client with an unmeritorious claims or defence not to waste costs on the process. But the process itself, is not to blame.

Look at the alternatives. The Civil Procedure Rules have failed to cut out gamesmanship, hired - gun experts, maniac litigators, or reduced costs. On the contrary, the CPR has succeeded in front-loading costs making cases harder to settle. The District Judges (bless them) may be so under-employed, as to refuse to order a stay (to mediation), until the parties have exchanged witness statements. By which time the Lord Chancellor has had almost all of the fees (sorry contribution to the true cost of access to justice) and the parties are in the trenches awaiting the whistle.

The Arbitration Act 1996 has not convinced disputants' that it offers a better solution. It may now be quicker, and not much more expensive than litigation but it also provides 'party autonomy' (for which read - party power) with the ability to delay and frustrate the process and rack up an alarming amount of costs on the way.

If the parties will mediate - fine. If not, adjudication should offer a cheap and cheerful remedy. It should but it doesn't - if Tony's column is anything to go by. Back to those horror stories. Read all about them in *Building*, *BLR* and - blatant plug - *Arbitration*.

But surely these cases are the extremes and not the norm. My personal experience suggests so. Of the 80 or so adjudications I have been involved in, the adjudicator usually got it right (even if my client didn't always win hands down). And if the adjudicator got it wrong, the parties were often able to recognise that fact and achieve an equitable compromise. At least it was quick and not so painful as the alternatives.

The Review of the Housing Grants etc Act 1996 could have achieved much but probably won't. Minor ailments, will be salved but the more chronic problems of the Act / Scheme are unlikely to be cured.

How to avoid the horror stories? Keep on reading *Building*, (and *BLR* and *Arbitration*), and learn from others' mistakes and prepare thoroughly. Above all, don't have nightmares, do sleep well!



FORTHCOMING EVENTS

The events are an excellent opportunity to meet up with fellow members of the Institute and also bring along guests for a social evening

- **Chartered Institute of Arbitrators NW Branch Annual Dinner**
- **Thursday 17 November 2005 at 7 pm**
- **The De Vere Daresbury Hotel, Warrington, Cheshire**

The branch organises four dinner events throughout the year the intention of which is to bring members and guests together for a sociable evening capped off with an interesting talk from a well known speaker generally from the legal profession or the Institute itself. The events comprise two branch dinners in March and September, a joint dinner with the NE/Yorkshire branch in May and the Annual Dinner in November. The dinners are held at the De Vere Daresbury Hotel, Warrington, with the exception of the joint dinner, which is held at the Cedar Court, Huddersfield. The format for the dinners is informal with the exception of the Annual Dinner, which is Black Tie.

This year's Guest Speaker is Paul Darling QC who has been involved with many high profile construction law cases. The occasion promises to equal the outstanding success of last year's Dinner. Whilst formal in nature, the Dinner provides a very relaxed and enjoyable atmosphere for both ladies and gentlemen.

Early booking is recommended. Guests are welcome and a discount for bookings of whole tables of 10. Individual bookings are of course warmly welcomed.

- **National Mediation Awareness**
- **Tuesday 25 October 2005 at 1.30pm – 5pm**
- **Law Society's North West Regional Office, Manchester**

The presenters are Mark Mattison, former partner at Eversheds and now CEDR Consultant and Quentin Smith, Partner at Addleshaw Goddard, both are experienced mediators.

Mediation has become a popular and effective method of dispute resolution. This seminar will update you on the most recent case law and will cover the current issues and enable you to use mediation to best effect.

This seminar is a joint event between Manchester Law Society and the Chartered Institute of Arbitrators North West Branch and is being held during National Mediation Awareness week which is a government sponsored initiative.

- **Arbitrator's Surgery**
- **Friday 18 November 2005 at 12.45 pm**
- **Queens Hotel, Leeds**

This half day seminar is to be chaired by John Campbell Q.C. and the speakers are Dominic Helps, Anthony Glaister, Paul Jensen and Nigel Robson. If you wish to attend, please contact Lisa Ryan of Eversheds Solicitors on 0113 200 4692.

- **Who Wants to be an Expert Witness?**
 - **Wednesday 11 January 2006 at 6 pm**
 - **Hanover International Hotel, Stretton, Warrington, Cheshire**
- The presentation will address issues relating to the instruction of an expert witness and the scope of such instructions.

- **Party Representation – the Do's and Don'ts**
- **Wednesday 15 February 2006 at 6 pm**
- **Hanover International Hotel, Stretton, Warrington, Cheshire**

- **2006 Branch AGM and Dinner Meeting**
- **Monday 6 March 2006**
- **De Vere Daresbury , Daresbury Park, Warrington, Cheshire**

For further details on upcoming events, please visit our website.