



North-West Branch of the Chartered Institute of Arbitrators

The Professional Organisation for Arbitrators, Mediators and Adjudicators

Welcome to the second newsletter of the North-West Branch of the Chartered Institute of Arbitrators. It is hoped that the newsletter will become a regular feature in future and keep members informed of events and news within the branch and about ADR generally.

IT DOES WHAT IT SAYS ON THE LABEL - WHEN ADJUDICATORS USE THEIR OWN EXPERTISE

By KT Salmon solicitor Supreme Court of England and Wales; solicitor Eire; MCI Arb

You can lead an adjudicator to the evidence and he must read it. Both parties put forward their arguments, as to what inferences are to be drawn, or what the contract means and so forth. The adjudicator must consider those views but is quite entitled to choose either or neither. He can in fact use his own expertise to decide what it all means. Heresy you say? What about **Balfour Beatty and London Borough of Lambeth** you cry? You may as well save your breath.

In the recent case of *Dr Rankillor and Perco v Igoe*, the Referring Party Igoe claimed a declaration as to the proper sum due to its sub-contractor Perco for auger boring work; and that the sum due was the sum it had already paid. Perco said it was entitled to extra payment due to unforeseen difficult ground conditions.

Dr. Rankillor looked at the evidence. He saw and read what Perco said. He saw and read what the referring party Igoe was saying. It all depended (as he later found) on the interpretation of lab test results about the condition of the soil. In the event, the good doctor using his own expertise and experience decided, that the exceptionally dense soil was "virtually incapable of being displaced by (the) machine". He found that with proper site investigation and tests a geotechnical engineer could have predicted this in advance. This was not something that Perco had contended for in its response.

This was an adjudication under the ICE Adjudication Procedure which expressly entitled Dr Rankillor to use his own expertise and experience. He dismissed Igoe's claim for a declaration and awarded Perco extra

money for the more difficult conditions. However he had not given any advance warning of the findings he intended making and gave Igoe no opportunity of dealing with his different views about the soil conditions. Igoe cried foul (breach of the rules of natural justice). They said basic fairness demanded the good doctor tell them what he was thinking and give them a chance to comment. They refused to pay the sum awarded to Perco or Dr Rankillor's fees.

You will remember that in **Balfour** the court said the adjudicator was obliged to put his provisional views to the parties for comment - because his findings would make good an omission in the referring party's case. In effect the adjudicator was making the referring party's case for him.

In **Carillion and Devonport Dockyard** the court of appeal approved Jackson J's guidelines. It said an adjudicator is not to be expected to put his provisional findings to the parties for comment in every case. There is not time. He will often adopt a position somewhere between those contended for by the parties. That is to be expected. He is entitled to do it. He is only required to go the parties and give them a chance to comment when not to do so would be obviously unfair. Balfour was regarded as an extreme case.

The facts of the three cases are all very different. The result next time could be different but don't bet on it. If you ask the adjudicator to decide the dispute on the evidence and using his own expertise and experience you can hardly complain if the decision does just what it says on the label.

MEDIATION BY TECHNOLOGY AND CONSTRUCTION COURT JUDGES

By Mark Mattison, CI Arb and CEDR registered mediator

In June of last year His Honour Judge Toulmin QC was asked to look into a proposal that TCC Judges should offer their services as mediators in appropriate cases. Early proposals were modified following discussions with TCC judges, the Lord Chief Justice and the President of the Queens Bench Division.

A consultation paper was then issued in January of this year upon which comments were invited.

The consultation paper proposed that TCC Judges be given the power to offer a "Court Settlement Process" (CSP) equivalent to mediation which, if successful would lead to a "Court Settlement Order". If unsuccessful the judge conducting the CSP would be disbarred from taking any further part in the proceedings.

In February of this year the Chartered Institute of Arbitrators responded to the consultation paper. A full copy of the response can be found on the CI Arb website. The institute submitted that the proposal should not be accepted for the following reasons:

- The Court Settlement Process referred to is in fact Mediation.
- Mediation by judges is inconsistent with the overriding objective of the CPR to deal with cases justly.
- 3 Mediation by judges is not a judicial function.
- 4 Mediation by judges threatens public confidence in the court
- The proposal is no improvement on the existing availability of early neutral evaluation.

The response concluded that unless mediation is isolated from judicial decision makers, it is likely to cause considerable and irreparable damage to the public perception of the judiciary.

The consultation period has ended and further developments are awaited. However, it seems to the writer that the likelihood of these proposals being implemented in the foreseeable future is remote.

The concept of Judges or arbitrators being able to act in more than one capacity is not a new one. Professor John Uff presented a paper at the Chartered Institute conference in Dublin some years ago in which he advocated that the term "arbitration" should be promoted with a wider meaning so that it became understood to embrace most of the common forms of ADR. John's vision was that arbitrators would be trained so that they were capable of acting as arbitrator, adjudicator, mediator or early neutral evaluator. In light of their response to the consultation paper one must conclude that the Institute do not share that vision.

COST EFFECTIVE ARBITRATION?

By Keith Miller

Many people do not know that judges can be appointed as Arbitrators. Whether this allowance is due to the turndown in cases going through the Courts since the Woolf reforms bit into the workload of the Courts, I do not know. This well kept secret has been let out of the bag on a few occasions, but it is not possible to tell on how many occasions this particular feline has been de-bagged.. The latest annual report of the TCC (Technology and Construction Court) for the period 1st October 2004 to 30th September 2005 states that the London Court had 364 cases commence in that period, of which 19 (5%) were Arbitration claims under Section 62 of the Civil Procedure Rules (It may come as a shock to some that the CPR includes Arbitration rules together with a Practice Direction). This figure is not broken down further and may consist of claims such as does a valid Arbitration agreement exists, is a Tribunal is properly constituted, or is an Award binding on a Party.

In Birmingham, 2 out of 114 cases commenced were Arbitration cases (2%) and in Manchester and Leeds no Arbitration cases were heard out of 127 and 50 new cases respectively. If my suggestion at the start of this article is correct, it means that our TCC judges are too busy with their day job to provide an Arbitration service (at least in this part of the world) – or perhaps local solicitors have not ‘court on’ to the Court service. The final possibility is that local Arbitrators always get it right!

This may not be normal bedtime reading for the non-legal Arbitrator, but it is interesting to compare the fee of a judge acting as an Arbitrator compared with the fee of a Lay Arbitrator.

According to Guide to the Court website, the Civil Proceedings Fees from 10 January 2006, judge Arbitrator’s fees are described at section 9.4. A fee is due “On the appointment of - 9.4(a) a judge of the Commercial Court as an arbitrator or umpire under section 93 of the Arbitration Act 1996(c)” is £1,800. However, at 9.4(b), the document states that “a judge of the Technology and Construction Court as an arbitrator or umpire under section 93 of the Arbitration Act 1996” attracts a fee of £1,400. Where fee 9.4 has been paid on the appointment of a judge of the Commercial Court, or a judge of the Technology and Construction Court as an arbitrator or umpire, but the arbitration **does not proceed to a hearing or an award**, the fee shall be refunded (does this mean that if a case is abandoned part way through a Hearing so that no Award is made, there is no fee to pay?). Thereafter, for every day or part of a day (after the first day) of the hearing (which includes preliminary and interlocutory hearings), the above appointment fee is the daily fee for the judge in each respective Court.

It seems to me that a judge of the Commercial Court will give 28.57% better decisions than a judge from the TCC! This relates to the daily rate of the judge in Court for the Hearing (but only charged after the first day). In the Courts, the judge’s fee includes the courtroom, usher, MRU etc., which the above does not. The above fee also includes for the judge’s reading time associated with a Hearing and the time involved in publishing the Award. I estimate, for two Interlocutory Hearings and a 2 day Hearing, the cost of a TCC judge will be £5,600 (including the use of the Court) and a Commercial Court judge will cost the Parties £7,200.

If one considers the two day Hearing for a Lay Arbitrator, it could be that 25% of the time is spent in preliminary and interlocutory matters (2

hearings in total), 40% on the Hearing (2 days) and 35% on the Award. If that is correct, then the cost of the Lay Arbitrator can be calculated. But what is the hourly rate for an Arbitrator?

I understand that an Architect Arbitrator’s fee is possibly averaging, say, £160 per hour. This would make the fees on an Arbitration which lasts two days approximately £4,000 in total, whereas a Silk may be charging out at £450 per hour (or probably more); this figure becomes £11,250.

However, if a Party attends a Court Preliminary Hearing, and automatic directions are issued which state:-

- “6.2 A defendant who wishes to rely on evidence before the court must file and serve his written evidence –
- (1) within 21 days after the date by which he was required to acknowledge service; or,
 - (2) where a defendant is not required to file an acknowledgement of service, within 21 days after service of the arbitration claim form.
- 6.3 A claimant who wishes to rely on evidence in reply to written evidence filed under paragraph 6.2 must file and serve his written evidence within 7 days after service of the defendant’s evidence.”

then, if a defendant does not like the evidence adduced in response to a Claim Form, he can abandon the Claim, with very little of his own money spent.

How can Arbitration, in whichever forum, offer better value for money?

Recent research undertaken by Eugene Lenehan found that the average Arbitration lasted just over 14 months! Mr Lenehan suggests that to get a quicker (and therefore cheaper) decision, first find your flexible Arbitrator. Your **flexible** Arbitrator should be able, and willing, to use the full armoury of the 1996 Act to streamline the proceedings. These include:-

- dispensing with Pleadings or Statements of Case,
- confining the scope of disclosure,
- having a fast-track timetable for the Arbitration,
- using written submissions rather than having Interlocutory hearings, and,
- using inquisitorial powers as appropriate.

Worryingly, some Arbitrators fail to use the powers available under the Act:-

- more than 34% of Arbitrators had never dispensed with Pleadings and of the Arbitrations scrutinised, 89% had Pleadings or Statements of Case.
- 8% of Arbitrators confessed to never having used Fast-Track timetables,

It is not possible to say, however, how much quicker and cheaper a case will be if all the above measures are adopted, but the Arbitration fraternity must owe it to the users of Arbitration services to ensure justice is not delayed.

FORTHCOMING EVENTS

11th September	Dinner Meeting De Vere Daresbury	16th January 4.00pm	“Joint Arbitrators’ and Adjudicators’ Surgery” Hanover International Hotel, Stretton, Warrington Speakers: Derek Pye and Paul Jensen
17th October 6.00pm	“Party Representation- The Dos & Don’ts” Hanover International Hotel, Stretton, Warrington Speakers: Peter Kerrigan & Neil Birchall	13th February 6.00pm	Debate: “The Use of Electronic Programming in Dispute Resolution is About As Helpful As a One Legged Man At An Arse Kicking Competition?” Hanover International Hotel, Stretton, Warrington
7th November 6.00pm	The Quality of Adjudicators is Extremely Strained Hanover International Hotel, Stretton, Warrington Speaker: Lindy Patterson	7th March	AGM De Vere Daresbury
16th November	Annual Dinner De Vere Daresbury Speaker: Robbie Glen	28th March 6.00pm	Problems With Costs In Arbitration Hanover International Hotel, Stretton, Warrington Speaker: Michael O’Reilly

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