Restoring Arbitration – The New Model?

In a construction journal this month I read an article called "Restoring Arbitration". It tells the story of the failure of arbitration in construction and engineering disputes in the 1990's and how allegedly parties are now interested in a new modern restored arbitration process, which is now promoted as an alternative to adjudication or the Court. Aiming romantically at somewhere between the two providing an alternative that is commercial. Hopeful...?

"Commercial", in the context of dispute resolution processes, means the driving forces behind getting the dispute resolved. The two forces are TIME and COST. Thus any dispute resolution process will succeed based on quality in the quickest time and at the lowest cost. These forces are fundamental to the evolution of any commercial process and all dispute resolution processes, rather like a mutating virus, the changes, use and improvements all come about because of time and cost. Hold this thought now when reading on about arbitration's characteristics as a dispute resolution process and current vibes.

The arbitration schemes promoted, says the article include a "Select Arbitration Service" and a "Fast Track Arbitration Service". The former for claims over £100,000 being no different than it has always been; and the latter under £100,000. Under the "Fast Track" scheme, the maximum hourly rate of the arbitrator is £175 and he is capped to 60 hours. The recoverable costs are capped at £5,000 for 20% of the claim value, plus any counterclaim value and an award on the substantive issues done within six months. Control and improvement on issues of time and cost, n'est-ce pas? It is commendable that nominating bodies are trying to promote arbitration and are trying to find a practical commercial use for the process. As an arbitrator myself my colleagues and I have had a lot of discussions about the idea of bringing arbitration back after adjudication has now taken over as the most used dispute deciding process.

My initial thoughts on the "Fast Track" scheme example above, is that it could be further refined on the scale of dispute and include restrictions on all arbitrations to control and improve time and cost. For example, we adjudicate disputes of £500,000 or more regularly, so perhaps the threshold of dispute value is low at £100,000; the Arbitrator rate is low and the use of time and cost caps should stop timetable and fee abuse all of which is positive. However, what happens to those in the "select" service, it's the same as usual for them by the look of it? No rules to control time and cost.

So what went wrong in the 1990's? Has the position changed? The period up to the 1990's was when the dinosaur arbitrators ruled the earth and I will tell you what I mean by that below and

having been involved in arbitrations recently, we know that not much has changed since the 1990's. Arbicon who predominantly are experts in adjudication, were recently involved in arbitrations as party reps, where there we no rules to control time and cost other than the Arbitration Act 1996. We can unfortunately report that the 1990's dinosaur is still out there alive and well.

So what do I mean by 1990's dinosaur arbitrators? I mean the reason why arbitration fails as a dispute resolution process commercially. I mean some arbitrators and the processes they have been trained to adopt to conduct proceedings, which are not even remotely commercial. Often these people are barristers or lawyers with little or no construction qualifications or experience, past their sell by date and completely sold on adopting the same long winded process and culture of the legal profession, CPR and Court protocol. Arbitration, as all ADR processes is not Court and should not involve lawyers as arbitrators. The costs escalate, time runs from weeks to years with no resolution to the dispute that becomes deeply engrained in each party and leads to despair. There is an overriding problem in the belief that there should be formal expert reports, witnesses, trials, submissions, submissions, submissions all taking weeks, months and years with no thought for the time, cost and drawn out anxiety. There is also an unwarranted obsession with bias and natural justice, plus I am sorry to say that greed comes into the equation too. The arbitrator that conducts proceedings in this way is the dinosaur from the 1990's; and why arbitration conducted in this way was and is a total failure. The dinosaurs are not extinct in 2016 and are the reason why arbitration has been dropped in the commercial evolutionary process in favour of processes like adjudication, which came into effect in the late 1990's.

The advantage arbitration has over adjudication is costs can be recovered and evidence can be considered in more detail so in order to satisfy the forces of commercial evolution surely all arbitration has to do is be quick or almost as quick as adjudication. It can use more time, but it must deal sharply with parties indulging in legal delaying excuses and nonsense. Directions need to be ruthlessly imposed and submissions closed down quickly.

The dinosaur has to be replaced by a fast, practical, no nonsense new model who does not believe in CPR, does not indulge in formal trials, witnesses and experts and is an expert in the field relating to the dispute. The new model should adopt an "adjudicator" type approach. For example, where the arbitration is about a final account including variations, time issues, etc. in a typical dispute the arbitrator should be qualified as a QS to deal with it without the need for witness any expert evidence. Any party would be free to provide expert or witness evidence within their pleadings if they wish to submit such, just as is done in adjudication. The arbitrator should then simply hold a site inspection and/or a meeting to go through the account and hear evidence without all the formality, doing Q&A just like the adjudicators meeting taking account of any witness or expert evidence insisted upon by the parties. All of the pleadings, meetings and evidence even in the most complex of cases can be done within a few weeks easily together with an award on the substantive issues in the very least. The arbitrator can do all of this in any way he wants pursuant to section 34 of the Arbitration Act 1996 unless agreed otherwise by the parties; the arbitrator has the power to run the case how he wants. There is a clear mandate too

in section 33 of the Act to adopt procedures that prevent unnecessary delay and cost. This is the no nonsense simple approach Arbicon Arbitrators like to take and why arbitration is popular with us. Getting to a decision on any dispute quickly and at the lowest cost is paramount.

Dressing up arbitration by offering schemes is something being offered by many nominating bodies now. Incorporating them will be difficult, as parties in my experience agree to nothing when war breaks out, thus unless the schemes are written into the contract in the first place they cannot be adopted without consent. Whilst caps and rates are a welcome proposal, the original problem of arbitrator risk is perhaps not being tackled, I have seen no evidence that it has or even if such is on the agenda by nominating bodies. It is not clear if nominating bodies even engage in feedback from parties after a case is completed, I have not seen it in all the arbitrations and adjudications I have been involved in past 20 years. On that basis do they know anything about those appointed and how they run cases?

It is clear that arbitration has been dropped from standard forms of contracts and I do not see any evidence that the 1990's dinosaurs are extinct thus appointing bodies will have to convince the parties wanting change that the dinosaurs are all gone. Confidence in using the arbitration process can only recover if the standard equates to the new model of arbitrator and a new model arbitration process, arbitration industry wide will then perhaps recover in popularity.

The easy answer is to put Arbicon into your arbitration clauses or apply to Arbicon for an arbitrator!

If you have any queries or would like to know more about arbitration or the service provided by Arbicon call **01733 233737** or visit us at www.arbicon.co.uk.

Article by: Jonathan Nugent
Managing Director at Arbicon

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