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Arbitration – determining construction disputes

When two parties are in dispute, it can often be cheaper and more effective to use arbitration that to go to court, explains Niall Lawless.

Dispute resolution like any other service industry must deliver what its customers want. Alternative Dispute Resolution (ADR) approaches such as adjudication, conciliation, expert determination and mediation are effective but where companies find themselves with an intractable dispute or remain in conflict, they have two real choices, arbitrate or litigate.

It has been said that 'arbitration is no more or no less than litigation in the private sector'. In domestic disputes arbitration has unique advantages but where the parties come from different jurisdictions it can be well argued that it is without equal.

Arbitration is as old as commerce; beginning with merchants submitting disputes to be resolved by a peer, someone, who understood their custom, practices and trade. Modern arbitration is entrenched in party autonomy and is consensual; parties choose the arbitrator or the body which will choose the arbitrator, the procedural law for the arbitration, the substantive law governing the contract, the place of the arbitration, the country and the language.

Arbitration is powerful formal justice in that the award is enforceable across international boundaries but it is also less formal as it is not presided over by an impartial third party in an impersonal manner. Arbitration is often much faster that litigation, the parties are not at the mercy of the state court calendar and when managed in a businesslike way, less expensive. Arbitration is private.

Arbitration requires a written agreement to refer the dispute to a third party (appointed by a process agreed by the parties) to decide matters. The arbitration agreement is important because it establishes the obligation to arbitrate; it establishes the jurisdiction and is also the basic source of the powers of the arbitration tribunal.

Although arbitration is not necessarily a cheaper method of resolving a dispute than litigation, it offers advantages :-

- Universal enforceability. In most counties there is real choice between a national court and national arbitration; but where there is the potential for the commercial dispute to be international in character it is only arbitration which can provide a universally enforceable decision.

- Flexibility. Arbitration is flexible in that procedures can be adopted to suit the dispute. Indeed in England and Wales or Northern Ireland the Arbitration Act (1996) Section 33 mandates that the tribunal shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
- Confidentiality. Arbitration is a private process and this is one of the features that attract so many parties to use it. There are many aspects of disputes that the parties do not want to be publicised and this can not be controlled if the matters are discussed in an open court.
- Choice of arbitrators. One or more arbitrators may be chosen for their special skill and expertise. For example it is reasonable that an experienced engineer acting as arbitrator should be able to quickly grasp complex building services issues and to save the parties both time and money, delivering a sensible award. Also the tribunal can offer continuity, in that it is chosen for a particular dispute and deals with it from beginning to end.

The most important product of arbitration is a written reasoned award which is binding upon the parties and which may if required be enforced through an application for summary judgment. The award serves no useful purpose if it is not enforceable and therefore it must be certain, consistent, comply with the submissions, be capable of performance and be final. It should consider all the issues required and determine them.

The arbitrator has a general duty to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent. The award should demonstrate that the tribunal has done this.

Arbitrators need to have knowledge of the laws of contract, tort and evidence. They must understand and be able to use the applicable procedural law. They must be able to evaluate the arguments and evidence which seemingly supports conflicting points of view and determine the award. Where disputes revolve around issues of law, lawyers often make the best arbitrators. However, where issues of fact dominate the dispute many businesses prefer to have an arbitrator who is skilled in the particular technology involved.

In the UK the Chartered Institute of Arbitrators (C.I.Arb.) introduced Chartered status for Arbitrators as a "gold standard" for practitioners. There are at present about 400 Chartered Arbitrators and of these about forty percent are lay arbitrators (non lawyers - engineers and the like). Becoming a Chartered Arbitrator is a rigorous process and for me comprised passing the College of Estate Management postgraduate diploma in arbitration, study for the Chartered Institute of Arbitrators fellowship exam followed by three years pupillage.

During pupillage you shadow experienced arbitrators at work and learn from them. One of my pupil masters explained to me that 'good arbitrators are not afraid to stick the boot in!' and this seems to sit well with many. The American Arbitration Association reported that in a survey of all its commercial awards issued in 2000, arbitrators made decisions clearly in favour (less than 20% or more than 80% of the amount claimed) of one party in 75% of the cases. Only 9% of the awards fell into the 41 to 60% category.

Some say that arbitration is on the wane, for example because in the JCT 2005 and 1998 Standard Forms of Building Contract it is no longer the automatic method of dispute resolution and for it to apply it must be expressly stated in the contract particulars. I say that businesses creating domestic and particularly international construction contracts are recommended to consider arbitration: it is more relevant than ever. Arbitration allows companies to avoid lengthy entanglement with the courts, its aim being to provide a predictable commercial outcome in line with international norms.

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