

# Restoring arbitration

10 November 2016

**The construction and engineering industries have been demanding a new approach to arbitration. Martin Burns outlines a solution**

---

By the late 1990s, arbitration in the construction and engineering industries had lost its way. It had become systematically formal and complicated, to the extent that it was more like litigation than a quicker and cheaper alternative to it. The procedure for arbitration was inordinately slow and immensely expensive. Parties tended to wait years for decisions, and costs often outweighed the value of the amounts in dispute.

Some of the blame was levelled at particular arbitrators, who were alleged to have allowed the process to get beyond their control and become a long, drawn-out affair. The overall quality of decisions was also considered patchy. Parties who applied to arbitral institutions for appointments were often uncertain whether they would get someone they considered to be a 1st-rate arbitrator or not. They felt they had no say in the matter.

## Client needs

Organisations and businesses are now demanding better control of their disputes. Parties want to be able to provide greater input into who will arbitrate their disputes, and desire the time and space to convince decision-makers of their case – something that a 28-day adjudication process does not allow. Parties want more detailed examination of issues and require decisions that are superior to adjudications in terms of overall depth and reasoning.

It would be foolish to suggest that the arbitration process that fell out of favour in the industry in the 1990s would be acceptable in 2016. A 2014 survey conducted by the RICS Dispute Resolution Service (DRS) demonstrated that parties who may today consider using arbitration demand highly experienced arbitrators who will manage timetables and costs with exceptional proficiency.

*Organisations and businesses are now demanding better control of disputes*

Parties want arbitrators who are immensely credible in the industry and require outcomes that are fair, sound and fully reasoned. So far as institutional appointments are concerned, parties would like more involvement in deciding who their arbitrators will be, and they also want clarity about how much arbitration will cost and how long it will take to get decisions.

So a new approach to arbitration in the UK is long overdue – but meeting the demands of parties today is not without its challenges.

The highly specialised nature of construction and engineering disputes and the requirements for commercially focused outcomes mean that parties are increasingly eager to refer to decision-makers who have unquestionable subject knowledge and practical expertise obtained over many years.

Anecdotal feedback and comments from our DRS panel of construction adjudicators all suggest that arbitration is making a comeback in construction and engineering, and that the market wants industry professionals to resolve their disputes. But what parties want in 2016 is not just an arbitration system that improves on the 1990s version: the restoration of arbitration in the 21st century is a matter of doing things differently, creating a procedure and a panel of high-quality arbitrators that breaks new ground.

In cases where disputes are relatively low in value and straightforward, then speed and cost will often be the main priorities. The arbitral process should be ? and be seen to be ? faster and cheaper than the courts, while at the same time it must be better than adjudication by allowing a thorough examination of the issues. Arbitration should routinely result in decisions that are commercially sound and offer better value than court judgments.

The results of the RICS survey suggest that while, for some, the cost and length of time it takes to get a resolution are the key concerns, other parties prioritise having more time to ensure there is comprehensive deliberation over the issues and an intensive assessment of the evidence. This is particularly the case where disputes are complicated in nature and involve huge sums of money.

## **A new approach**

To counter these trends and meet increased client needs, RICS is promoting arbitration as a viable and cost-effective approach to resolving disputes, and has developed panels and appointment services that are specifically for the construction and engineering industries.

*A modern service should demonstrate that it has overcome past problems*

This new approach to arbitration is innovative and engineered for a more demanding client base. Its development takes into account the views of law firms and of claims consultants who responded to the RICS survey. The survey revealed support for RICS proposals to underpin a regime of arbitration panels and appointments with more clarity on how long the process will take and how much it will cost.

To enable arbitration to address modern needs and make it more accessible to parties, RICS has therefore developed [2 new services](#) . The Select Arbitration Service is designed to determine complex disputes where the claim exceeds ?100,000, and to provide a viable alternative to the [Technology and Construction Court](#) . Arbitrators adhere to published RICS service levels and commit to working with the parties to achieve an award on their substantiated dispute within 12 months. While arbitrators' fees are not capped, they will be required to provide an estimate at the outset and to update this throughout the course of the arbitration.

The Fast Track Arbitration Service is in turn designed to resolve lower-value disputes, specifically where the value of the claim is below ?100,000. This service provides parties with an alternative to the county courts and adjudication. The fees for arbitrators are set at

a maximum hourly rate of £175, up to a maximum of 60 hours. The parties' recoverable costs are also capped at £5,000, or 20% of the value of the claim plus the value of any counterclaim. Arbitrators must work with the parties to enable the award to be published within 6 months.

Parties patently want arbitration services that give access to high-quality arbitrators who understand construction, engineering and relevant law. They also want arbitration appointments services, as commonly offered by professional institutions such as RICS, to be supported by high-quality customer service standards and access to information and guidance.

A modern arbitration service should be able to demonstrate that it has tackled the concerns of the past. Arbitrators need to submit to supervision, which ensures they use the powers given to them under the [Arbitration Act 1996](#) to manage time and costs in a rigorous manner.

For both the Select and Fast Track Arbitration Services, there are 2 panels of high-quality arbitrators representing a variety of professions. All of them are independently trained and assessed to ensure they are up to date with relevant law and practice, and can discharge the arbitrator's responsibilities sensibly and without delay.

Arbitrators must also strive to manage cases proactively while enforcing time limits, and combine this ability with greater flexibility throughout the arbitration process.

The arbitration process should be faster and be seen to be faster and cheaper than the courts, and at the same time be better than adjudication by allowing a detailed examination of the issues.

What is apparent from the RICS survey is that there is a renewed appetite and interest in arbitration, but it remains to be seen whether the construction and engineering sector will embrace a fresh approach such as that RICS has designed and begin to follow the arbitral route once more.

**Martin Burns is Head of [ADR](#) Research and Development at [RICS](#)**

## **Further information**

- Related competencies include [Conflict avoidance, management and dispute resolution procedures](#).
- This feature is taken from the RICS *Construction journal* (September/October 2016).