Restoring arbitration

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

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By the late 1990s, arbitration in the construction andengineering industries had lost its way. It had become systematically formal andcomplicated, to the extent that it was more like litigation than a quicker andcheaper alternative to it. The procedure for arbitration was inordinately slowand immensely expensive. Parties tended to wait years for decisions, and costsoften 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 andbecome a long, drawn-out affair. The overall quality of decisions was alsoconsidered patchy. Parties who applied to arbitral institutions forappointments were often uncertain whether they would get someone they consideredto be a 1st-rate arbitrator or not. They felt they had no say in the matter.

Client needs

Organisations and businesses are now demanding bettercontrol of their disputes. Parties want to be able to provide greater inputinto who will arbitrate their disputes, and desire the time and space toconvince decision-makers of their case ? something that a 28-day adjudicationprocess does not allow. Parties want more detailed examination of issues andrequire decisions that are superior to adjudications in terms of overall depthand reasoning.

It would be foolish to suggest that the arbitration processthat fell out of favour in the industry in the 1990s would be acceptable in2016. A 2014 survey conducted by the RICS Dispute Resolution Service (DRS)demonstrated that parties who may today consider using arbitration demandhighly experienced arbitrators who will manage timetables and costs withexceptional proficiency.

Organisations and businesses are now demanding better control of disputes

Parties want arbitrators who are immensely credible in theindustry and require outcomes that are fair, sound and fully reasoned. So faras institutional appointments are concerned, parties would like moreinvolvement in deciding who their arbitrators will be, and they also wantclarity about how much arbitration will cost and how long it will take to getdecisions.

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 andengineering disputes and the requirements for commercially focused outcomesmean that parties are increasingly eager to refer to decision-makers who haveunquestionable subject knowledge and practical expertise obtained over manyyears.

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

In cases where disputes are relatively low in value andstraightforward, then speed and cost will often be the main priorities. Thearbitral 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 athorough examination of the issues. Arbitration should routinely result indecisions that are commercially sound and offer better value than courtjudgments.

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 comprehensivedeliberation over the issues and an intensive assessment of the evidence. Thisis particularly the case where disputes are complicated in nature and involvehuge 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 toresolving disputes, and has developed panels and appointment services that arespecifically for the construction and engineering industries.

A modern service should demonstrate that it has overcome past problems

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

To enable arbitration to address modern needs and make itmore accessible to parties, RICS has therefore developed 2new services . The Select Arbitration Service is designed to determinecomplex disputes where the claim exceeds ?100,000, and to provide a viable alternativeto the Technologyand Construction Court . Arbitrators adhere to published RICS service levelsand commit to working with the parties to achieve an award on their substantivedispute within 12 months. While arbitrators? fees are not capped, they will berequired to provide an estimate at the outset and to update this throughout thecourse of the arbitration.

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

a maximum hourlyrate of ?175, up to a maximum of 60 hours. The parties? recoverable costs arealso capped at ?5,000, or 20% of the value of the claim plus the value of anycounterclaim. Arbitrators must work with the parties to enable the award to bepublished within 6 months.

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

A modern arbitration service should be able to demonstratethat it has tackled the concerns of the past. Arbitrators need to submit tosupervision, which ensures they use the powers given to them under the Arbitration Act1996 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 ofprofessions. All of them are independently trained and assessed to ensure they areup to date with relevant law and practice, and can discharge the arbitrator?sresponsibilities sensibly and without delay.

Arbitrators must also strive to manage cases proactivelywhile enforcing time limits, and combine this ability with greater flexibilitythroughout the arbitration process.

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

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

Martin Burns is Head of ADR Research and Development at RICS

Further information

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