CIArb

CLB Notes of Talk for East Anglian Branch AGM – 18th April 2013

The Future of the Chartered Institute of Arbitrators

"*We live in interesting times*"

I was asked an interesting question a few weeks ago – how many dispute resolvers are there in the world? I have repeated this question to a number of audiences and now it is your opportunity.

To give you a clue, the AAA in North America claims to appoint arbitrators to in excess of 150,000 disputes and estimates suggest the PRC (China) has more than 250,000 arbitrations a year.

The average guestimate is about 7.5 million.

This is the context in which CIArb operates as the only truly global dispute resolution organisation and we currently have 12,500 members.

In 2000 there were about 8,000 members, of which 60% (4,800) were members of the 12 branches that were then operating in England and Wales.

At the end of 2012 we have over 12,500 members worldwide and the 11 branches that now operate in England and Wales still have about 4,800 members, but this now represents under 40% of the global membership.

The reason for this is not so much membership loss in England and Wales but more a case of spectacular growth overseas, especially in the UAE, Africa and the far East.

We are an international body and there has been a significant concentration on the growth of membership around the world but there is now a growing realisation within the Institute and in a number of the overseas branches that the 11 branches in England and Wales have specific problems. My intention this evening is to concentrate on the branches in England and Wales.

Clearly the membership is at best, static and at worst, is slowly reducing. Why is this?

- A mature ADR market. We have had Arbitration Acts for over 150 years and have been at the cutting edge of mediation development over the last 50 years.

- The construction sector has traditionally provided well over 50% of the total number of arbitrations in England and Wales (shipping is the next largest user of arbitration). Construction arbitration became increasingly lengthy and costly throughout the 1970's and 80's and in the 90's found itself in the middle of a perfect storm with on the one hand a demand for simple, immediate and relatively inexpensive dispute resolution and on the other hand a court system that was prepared to reform its procedure including that of its specialist court for construction matters (the TCC), provide quality justice in a relatively short period of time and at a lower cost than arbitrationn. The result was the CPR 1996 in the courts and the HGCRA 1996 that established statutory adjudication. The combined result was that by the year 2000 the number of construction arbitrations had reduced by at least 90%. This meant a lot less work for Institute arbitrators, thus calling into question the value of going to the trouble and expense of becoming a fellow of the Chartered Institute. While some members turned into adjudicators this did not offset the loss of arbitrators.

- Internally and with the benefit of hindsight I would suggest the creation of the Chartered Arbitrator and the Presidential Panel Arbitrators was an error because overnight this devalued the traditional status of a Fellow and created the problem that every branch in England and Wales has encountered, - that of the "*stranded Fellow*", namely Fellows who do not have sufficient arbitration experience to apply to be Chartered Arbitrators, far less panel members, and who cannot get the experience because there simply is not enough arbitration taking place.

- The demographics of the Institute's members have changed. When I became a member in 1980 lawyers made up the largest group within the membership, probably around 35-40%. Surveyors of one type or another were about the same percentage, architects and engineers were perhaps another 25%. Today the primary professions of those becoming Fellows of this Institute are lawyers 65%; surveyors including project managers 25%; others 10%. The increase in the proportion of lawyer members has perhaps inevitably made the Institute more procedurally prescriptive and may discourage non-lawyers who feel themselves to be at a disadvantage.

- The construction sector has shrunk and consolidated considerably during my 35 years in practice to the point where there are probably no more than 75 companies that I would have recognised in 1980 as "*main contractors*". Few of these companies do any more than sub-contract the work to specialist designers, sub-contractors and suppliers. Inevitably with delivery chains that have the same contractors dealing with the same sub-contractors again and again it is commercially unacceptable for disputes to turn into issues requiring final determination in arbitration.

Before moving to a consideration of the future I need to invite you to consider one further issue. Our Royal Charter provides that the objective of the CIArb is to promote and facilitate worldwide the determination of disputes by arbitration and alternative means of private dispute resolution other than resolution by the court. The main means by which we promote this is by training dispute resolvers and our unique selling point is that we aim to do so throughout the world to the same standard so that those who are entitled to the letters FCIArb have achieved the same standards whether they are in Cambridge, Cambodia, Cape town or California. Our training courses leading to those letters after the name are divided into three pathways; arbitration, adjudication and mediation. Arbitration and mediation are of course universally accepted methods of dispute resolution but adjudication is a completely different creature. Firstly it is in practice reserved to one industry, construction. Secondly, unlike an arbitral award or a successful mediation it only produces a temporarily binding decision (albeit one that is usually enforceable by the courts). Thirdly and most critically, construction adjudication is only

practiced in the UK, Australia and New Zealand, Malaysia and more recently, Ireland. By my calculation only 15 of the Institute's 36 branches find adjudication relevant, therefore no more than half the Institute's membership have any real interest in it. But for the branches in England and Wales adjudication since 2000 has been a very important aspect of dispute resolution.

What of the future, are there any reasons for optimism? If there are, can the Chartered Institute and in particular the branches of England and Wales take advantage? What, if anything, is the Institute already doing or planning to do to be in the forefront of such opportunities as may now exist?

The reasons for optimism are:

- The Government (and this is not unique to the UK but applies to all first world countries) have structural deficits and whilst there may be differences at the pace with which such deficits should be reduced, there appears to be general agreement that the movement must be downward not a continuing increase. The result is Government cutbacks anywhere and everywhere within the areas for public expenditure and without being unduly political I would suggest cutbacks in civil justice and the access to civil justice are frankly a soft target which no government is going to ignore. The indications are that the County Courts which deal with the vast majority of civil disputes are in some cases close to meltdown. The new cost reforms are ostensibly to reduce the cost of litigation, but in practice the Jackson reforms simply place limits not on what litigants can spend on costs but on the level of costs they can recover if successful from the unsuccessful party. If, as many predict, this makes access to justice more difficult and less popular and reduces the workload of the courts, the advantage for Government is a significant saving in judges' salaries, pensions and the requirement for new and improved court buildings etc. It is not for the Institute to enter the political arena or express views as to whether or not the cuts should be made but I suggest it provides a once in a lifetime opportunity to offer a real alternative to litigation. Think of the possibility of making provision for adjudication for any form of civil dispute not simply those relating to the construction industry, with decisions within 28 days. You might have to pay the adjudicator but a 28 day process will always cost a lot less than one taking 9 months or more in court. One of

the areas where the changes are being most acutely felt is in the area of family law and in particular the distribution of property on divorce, and this is an area where the Institute is already involved.

- Financial Services is an even bigger potential area for growth. Disputes in this sector range from a need for schemes to deal with mis-selling of financial products to large numbers of individuals where the individual compensation will be relatively modest but the volume of claimants is large. At the other end of the spectrum the largest financial intuitions stand accused of serious breaches of regulatory codes with the potential for the institutions to be fined millions of pounds and a public perception that the individuals in charge should be accountable. Such accountability ranges from the removal of peerages, the threat of prison and the removal of financial benefits obtained whilst mismanaging such institutions or fines. Not all of these issues need necessarily go through the criminal courts and arbitration and mediation undoubtedly has a role to play. Another area where new ADR products may well be successful is in relation to property disputes. The traditional form of expert determination is in many cases not seen to be fit for purpose and arbitration can be a much fairer and therefore acceptable way of resolving such disputes.

- In the construction sector itself the limited statistics available suggest that adjudication has peaked and in fact since 2011 the number of adjudications is decreasing. A growing criticism of adjudication is that it is increasingly formalised and legalistic, with the result that the costs are increasing to the point where it is no longer a commercially realistic procedure, particularly for those at the bottom end of the food chain for whom arguably adjudication was invented in the first place. At the high value end judges and practitioners alike have considerable reservations as to whether an adjudicator can possibly do justice to a multi million pound dispute in 28 days. The courts have accepted there could in theory be situations in which the is too complex to be adjudicated in 28 days but in practice not a single dispute has been found to be too complex so far. Nevertheless for relatively sophisticated parties involved in disputes of high value a temporarily binding decision in 28 days is probably not what they want. For them a

finally binding decision, but nevertheless within a fixed period of time, may be preferable. There is no reason why arbitration should not be conducted within a fixed period and leading practitioners including Paul Darling QC have set out how for example a 100 day arbitration would in practice work.

- Mediation, having grown exponentially over the last 20 years, now faces some serious issues. Some of the main mediation appointing bodies stand accused of being more interested in making fees for themselves than the quality of the mediation itself. Secondly, a recent court decision casts doubt whether statements made or documents provided during the mediation enjoy privilege in the event of subsequent litigation. Despite these problems mediation is clearly a very important tool in the ADR box.

- DRB/DAB has been a feature of large international infrastructure projects especially those with world bank and other public funding for many years. In the UK the Olympic construction, Crossrail and similar large projects use DAB procedures, but many in the construction industry believe that DAB's of one form or other may offer an alternative to adjudication and a means of addressing issues before they become real disputes. Other industries with long on-going contractual relationships are increasingly attracted to the DRB/DAB concept.

So I believe these are reasons for optimism and that the CIArb not only can, but is beginning to focus its future plans to take advantage of these opportunities.

- The Institute is training family law arbitrators to be available to divorcing couples who want to resolve property and maintenance disputes without waiting up to a year to go through the courts. It is estimated that 25% of all divorces in the UK could find this scheme attractive and the project has the support of the judges of the Family Division. The Institute is arranging the training courses and examination of the senior practitioners (including retired High Court and even Court of Appeal judges) to provide a body of suitably qualified arbitrators. The awards will be incorporated by the divorce judge within the Decree Absolute.

- The Institute already has a City Dispute Panel which is in detailed discussions with financial institutions with a view to providing an arbitral scheme to resolve some of the volume claims for mis-selling and the Institute has and continues to make proposals to the post-Leverson discussions about a suitable arbitration scheme for press complaints.

- The Institute has completed the preparation of a Property Dispute Service which I understand will be rolled out within the next few weeks. It will comprise 5 panels including Rent Review and lease renewals and involve a mix of Arbitration and Expert Determination.

Finally, the Institute has embarked on a review of the training the members want. The consistent response is that they want continuing education programmes. At the entry level to the Institute there is a general view that we should offer a greater range of introductory courses as a route to Associate membership. With so many new members arriving from the legal profession, branch relationships with law firms and law faculties in universities etc are an increasingly important source of new members. To meet the views of both existing members and potential new members the Institute has embarked on the preparation of a number of courses which do not form part of the pathways and which it is intended would be of perhaps one day's duration and could be put on for under £200 per head. The first course is for the "*party representative*" and will look at the duties of a party representative in arbitration, adjudication and mediation. Evidence suggests that more than half the new Fellows in the Institute have no intention of practicing as arbitrators, adjudicators or mediators but instead need to understand how they can represent their organisations or clients in such procedures.

The second course in preparation relates to costs and the award of costs. This will mainly concentrate on arbitration and adjudication and with the Jackson reforms moving the basis for awarding costs in court from "reasonable" costs to "proportional" costs, this is likely to be a very important area for arbitrators and potentially adjudicators in future.

Other courses are currently being planned.

The South East branch has volunteered to market test the party representative course and the Institute's intention is that these courses should be run by the branches using approved trainers.

This provides you with a taster of things to come. We live in interesting times. The Chartered Institute has and can develop interesting and innovative products and thereby assist its existing members and I believe attract new blood into the branches in England and Wales.

Charles L Brown FCIArb
Chartered Arbitrator
Chairman of the Board of Management of CIArb

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