MC MS Blog

Domestic Arbitration for Construction Disputes: The Comeback King?

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Last week brought together many of the worldwide community of arbitration practitioners **at** Paris Arbitration Week which, year on year, does a fantastic job at promoting Paris as the home of international ICC arbitration. But, in this week's blog, my attention is turned to arbitration (and specifically in relation to construction disputes) a little closer to home ….

There's no denying that, when it comes to domestic construction disputes, arbitration has seen a marked decline across the UK. Since its inception alongside the Arbitration Act 1996 in England and Wales, anecdotally some say adjudication has as good as killed off arbitration as the preferred method of dispute resolution. However, with the recent arbitration reforms and increasing delays in the TCC, perhaps it's time to take a second look at arbitration's place in the domestic construction arena?

The Legislative Landscape

Despite its reduced popularity over the last 30 years, arbitration in domestic construction in the UK and Ireland remains underpinned by robust statutory regimes:

England, Wales, and Northern Ireland: The *Arbitration Act 1996* remains in force, but following a Law Commission review, it has now been updated by the *Arbitration Act 2025*, which seeks to modernise the framework to reflect best practice – have a read of Jonathan's recent blog about the reforms and his views on the impact on domestic construction disputes.

Ireland: The *Arbitration Act 2010* incorporates the UNCITRAL Model Law on International Commercial Arbitration, providing a modern and internationally harmonised framework for both domestic and international disputes (Arbitration Act 2010 (Ireland)).

Scotland: The *Arbitration (Scotland) Act 2010* codifies principles of arbitration into a comprehensive and accessible statute, while retaining flexibility and party autonomy.

All of these frameworks provide a solid legal backbone, but in each of these jurisdictions, they arguably remain under-utilised in comparison to adjudication, which continues to dominate statistically for construction industry disputes.

The Adjudication Effect

Indeed, since the introduction of statutory adjudication under the *Housing Grants, Construction and Regeneration Act 1996* the popularity of adjudication — driven by its speed and enforceability — has overshadowed the flexibility and finality of arbitration. Adjudication, with its' fast-track, "pay-now-

argue-later" model has suited the construction industry's cash flow sensitivities and rapidly become the dispute resolution forum of choice, in turn contributing to the reduced uptake of arbitration in domestic cases.

The side effect? A shortage of trained domestic arbitrators. Unfortunately, the success of adjudication has perhaps led to two unintended consequences: (i) underdevelopment of arbitration expertise in the domestic construction sphere; and (ii) a generation of professionals who have grown up and trained primarily in adjudication, with limited exposure to arbitral procedure or case management.

Why consider domestic arbitration now?

One of the enduring criticisms of arbitration — particularly in the pre-1996 era — was that it was simply "litigation in suits" but I think that view is outdated. Arbitration can still often be seen as a formal, slow, and expensive process and it, of course, can be. However, modern arbitration, especially when led by a proactive and experienced arbitrator, can be flexible, efficient and in many cases, faster than court. When done well, it can be relatively quick, proportionate, and cost-effective versus other forums, and has its own special place for good reason:

Confidentiality: Arbitration protects sensitive commercial information, unlike public court proceedings, so no public judgments or reputational risk.

Choice of arbitrator: Parties can appoint a sole arbitrator (or a 3 personal tribunal if the case merits the expense of a panel) with relevant subject-matter or legal knowledge.

Procedural Flexibility: Parties select the procedural rules, and shape the process to suit the dispute - whether fast-track for simpler claims or a detailed inquiry for complex ones. Bespoke timetables, remote hearings, early meetings or site visits are all possible.

Avoiding Court Delays: With growing backlogs in courts, arbitration offers a way to control the timeline and avoid prolonged litigation - with the Technology and Construction Court in London now having a 2-year wait for trial, parties are understandably seeking alternatives.

Finality: Awards are generally final and binding with limited rights of appeal (including a general lack of appeal on law).

It's also important to remember that not all construction contracts are covered by statutory adjudication. Residential owner-occupier contracts, for example, are excluded under s.106 of the *Construction Act* and in such cases, arbitration may offer a vastly preferable forum to the County Court, especially where technical evidence or a neutral expert forum is needed.

Limitations and procedural considerations

As we can all attest, no forum of dispute resolution is perfect, and arbitration certainly isn't a silver bullet, however, its limitations aren't insurmountable:

Multi-party disputes: Arbitration can become complicated when multiple contracts or parties are involved, though joinder provisions in institutional rules (e.g., CIArb, ICC and CIMAR) are evolving to address this and now allow for third-party participation subject to party consent or tribunal discretion.

Interim powers: Most modern rules now enable the tribunal to provide interim relief, although I accept that courts may be more effective and quicker.

Not suitable for every dispute: For certain disputes—e.g., those requiring summary determination, interim declarations, or injunctive relief—the Part 8 CPR procedure may remain more appropriate, albeit at the cost of confidentiality.

Contenders, ready? Arbitrators, ready?

I think the key to success to the suitability of domestic arbitration, lies not just in the process, but in the arbitrator. A passive, overly formal approach will inevitably reinforce outdated perceptions and frustrations of arbitration. What's needed is an arbitrator who:

- Understands the need for momentum and is willing to actively case manage, set timetables, and push parties toward resolution. As I've mentioned, arbitration often gets an unfair reputation — usually based on outdated perceptions or, occasionally, poor execution. I've seen both ends of the spectrum, and the difference comes down to one thing: how the arbitration is run. I was appointed as arbitrator recently in a significant defects dispute where the parties and I recognised early that the case would benefit from proactive intervention, and we convened a site inspection shortly after the statements of case were exchanged, which brought the parties together early into proceedings and lead to settlement.
- Has the confidence and experience to handle hybrid processes, perhaps borrowing from adjudication models. A recent example I was involved in was a final account dispute which the parties, following a series of four adjudications, agreed to refer to arbitration. As the appointed arbitrator for the 4-day hearing, I was asked to conduct proceedings as if it were an adjudication with me asking questions and taking the lead – enabling me to draw on experience of dealing with such disputes relating to time, money, loss and expense, defects etc. in a much shorter period had the hearing been conducted in a traditional manner with cross examination of factual witnesses and experts.
- Has experience to know where procedures suggested by the parties are likely to result in expensive, lengthy and disproportionate proceedings and to guide the parties to adopt procedures where the costs and time involved are proportionate to the sums in dispute. Recently I have adopted procedures in a residential building dispute which dispensed with the need for the expense of expert evidence and limited questioning by the parties in order to reduce costs and the time required to dispose of the dispute referred.

Adjudication + Arbitration

I think it's fair to say that adjudication isn't going anywhere any time soon, not least because it provides sufficient resolution for about 95% of cases. However, that leaves the remaining 5%, which could lead to negotiation/mediation, litigation or arbitration. As with all dispute resolution, it can be more successful when there's joined up thinking, which aligns well with tiered dispute resolution mechanisms under NEC and other standard form contracts, where conciliation or mediation may precede formal proceedings.

So, rather than viewing arbitration and adjudication as competitors, I think we should view them as working in tandem - adjudication addressing the urgent cash-flow issues or individual claims, with arbitration fitting naturally as the final tier and offering finality without resorting to litigation, especially in cases where confidentiality, procedural control, or specialist expertise are valued.

Domestic Arbitration 2.0?

Domestic arbitration hasn't disappeared entirely – it's simply been overshadowed and remains underused — despite offering real advantages in the right circumstances. So, in a landscape dominated by adjudication and burdened courts, I do think it's time to take another look. The tools are already there. The legal frameworks are sound. What's needed now is a culture shift, more training, more diverse arbitrator appointments and a willingness to reimagine what arbitration can look like — flexible, fair, and fit for purpose in today's construction world.

The key? Arbitrators with the right mindset: professionals who understand construction, can manage a case proactively and at speed, and meet today's demands. With a new generation of professionals

trained in adjudication, the skills and mindset are already there and there's an opportunity to translate those skills into a new era of efficient, industry-savvy domestic arbitration — not as a throwback to “litigation in suits”, but as a modern, proactive, efficient route to justice.

With construction disputes growing more complex, law reform imminent and delays in the courts continuing to mount, it’s a timely opportunity to rethink domestic arbitration as a flexible, confidential, and cost-effective alternative to court proceedings, particularly when combined with adjudication in a tiered approach. Quietly present, often overlooked, but increasingly relevant, domestic arbitration has the real potential to reassert itself and pull off a bigger comeback than Rory McIlroy …

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