



Western Counties Branch of the Chartered Institute of Arbitrators

Newsletter

Welcome

Since becoming Chair of the Western Counties Branch at our AGM, this is my first newsletter and so a warm welcome to all and trust you have had a good summer and “staycation”. It has been a challenging 18 months for all in dealing with the impact of the coronavirus however, hopefully, we are now at a time when the relaxation of coronavirus restrictions and increasing numbers of the population having been vaccinated, means we can start to get back to some semblance of normality in our work, family, and social lives.

It is amazing how watching the football Euros and the Olympics this summer has provided so many of us with a mental lift, even if, supporting Team GB, or a home nations football team, can be stressful! We would not be British without that never ending optimism in our athletes’ or our football teams’ ability. Oh well, the Football World Cup is only next year.

Before that, in the coming year we are working hard to provide an interesting programme of ADR training, CPD and other events.

Your committee

The Western Counties Committee organising these events and your point of contact comprise:

Trevor Drury MCI Arb	(Chair)
Sean Gibbs FCI Arb	(Vice Chair)
Damian Croker MCI Arb	(Immediate Past Chair and Treasurer)
Nigel Puddicombe FCI Arb	
Mike Bennett MCI Arb	
Darren Queenan FCI Arb	
Kai von Pahlen MCI Arb	

Our Patron

We are delighted to announce that one of our long standing and respected Fellows of the Western Counties Branch, John Papworth, has been confirmed as our Patron. John has considerable experience in ADR as an Arbitrator, Adjudicator and Dispute Board Member. John will be installed as Patron shortly at an event to mark the occasion.

Events

We have a Western Counties Page which can be accessed via the main Chartered Institute of Arbitrators website [CI Arb - Western Counties](#) which will have details of committee members and events and a LinkedIn page [\(1\) The Chartered Institute of Arbitrators - Western Counties branch | Groups | LinkedIn](#) which will have details of events and matters of interest.

We are moving forward cautiously with our events and gradually bringing back in-person CPD and training, so that we can meet our fellow branch members, who we have not seen for many months, or at least not in-person, and provide some networking opportunities. We now appreciate the things that we use to take for granted, like meeting and chatting to people at events. We must also be thankful for modern technology and the way it has kept us in contact. Whilst meeting in-person again will be great, Zoom, Teams and other internet-based platforms have brought us greater reach for our events, is more convenient for many and at a lower cost. Therefore, there will be a blended programme.

Our events schedule is currently:

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| 22 September 2021 | 18.00 to 20.00 - Adjudication Workshop for Contractors and Consultants. This is an online event being held jointly with the Chartered Institute of Building (CIOB) and supported by the Institution of Civil Engineers (ICE) and Chartered Institution of Civil Engineering Surveyors (CICES). |
| 20 October 2021 | 18.00 to 19.00 – How to become a Dispute Board Member. Although we are hoping to have this as an in-person event, this may have to be an online event as coronavirus infection rates are on the rise. |
| January 2022 | JCT v NEC event. At the end of January, in conjunction with CIOB and supported by ICE and CICES, we will be having a half day contract event, covering the differences between the practice, procedure and culture of the JCT and NEC forms of contract. This will be held in Bristol. |
| Quarter 2 2022 | We plan to have a Regional ADR Conference in the first half of next year and further details will be published once a programme has been confirmed. |

Booking information and details of each event can be found on the CI Arb website.

Article

Our latest article is by Kai Von Pahlen MCI Arb, a solicitor-advocate and senior associate at VVW. He looks at the landmark judgment in **Toppan Holdings Limited & Abbey Healthcare (Mill Hill) Limited vs Simply Construct (UK) LLP [2021] EWHC 2110 (TCC)** which provides guidance on when adjudication under a collateral warranty is permitted.

A contractor succeeded in defending adjudication enforcement proceedings brought by a tenant under a collateral warranty (Toppan & Abbey vs Simply [2021]). The TCC dismissed the tenant's claim, ruling that the collateral warranty was not a construction contract and that the dispute should not have been referred to adjudication.

In order to fully understand the importance of the TCC decision, it is important to look back at how adjudication first entered the construction industry, what it was originally intended for and how it developed over the years.

Back in the nineties, the construction industry was facing a serious challenge. Employers often withheld money from their contractors, feeling secure in the knowledge that the contractor would lack the resources to fund expensive and lengthy court proceedings. Many contractors, especially smaller construction companies, were unable to enforce payment of sums that were owed to them.

The solution came in the form of the Housing Grants, Construction and Regeneration Act 1996, better known as the Construction Act, which introduced a statutory right for parties to a construction contract to refer their disputes to adjudication. The Construction Act defined a construction contract as an agreement for the carrying out of construction operations. The exact definition has been debated by legal commentators, but it seems to relate to ongoing construction operations, notably expressed in the present and future tense. Whatever the exact definition, the Construction Act was good news for contractors because adjudication was specifically intended (and used) to assist them with cash-flow during a construction project, allowing them to swiftly enforce an outstanding payment and continue the project. Adjudication also was (and remains) relatively inexpensive when compared to lengthy court proceedings.

However, even though adjudication became very popular with unpaid contractors, it was a double-edged sword. Contractors could now potentially become embroiled in an adjudication years after they had completed the works under a construction contract. Even though adjudication had been primarily intended to help contractors maintain cash-flow during the course of construction projects, the Construction Act also (perhaps inadvertently) permitted the parties to use adjudication long after completion of the works.

The potential drawbacks in adjudication for contractors did not end there though. In 2013, it transpired (to the shock of many commentators) that not only could the contractor be taken to adjudication by its employer, but also by a beneficiary under a collateral warranty (e.g., a tenant or funder), who had not been a party to the original construction contract. Mr Justice Akenhead (who was in charge of the TCC at the time) gave his judgment in [Parkwood v Laing \[2013\]](#), holding that the parties' collateral warranty was a construction contract under the Construction Act and the parties therefore had a right to refer a dispute to adjudication. Akenhead notably placed emphasis on the contractor having warranted that it "has carried out

and shall carry out" the works, meaning that the collateral warranty did not merely relate to a past state of affairs but to an ongoing construction project that had not been completed yet. The collateral warranty was therefore an "agreement for the carrying out of construction operations". Again, the use of the present and future tense is important here.

Move forward to 2016, a construction project was completed by a contractor. The tenant in the new building obtained a collateral warranty from the contractor, but crucially not until 2020. The tenant then used its recently acquired collateral warranty to refer a defects claim to adjudication. The contractor challenged the adjudicator's decision in the TCC, who sided with the contractor and declined to enforce the adjudicator's decision. Mr Martin Bowdery QC (sitting as a Deputy Judge of the High Court in Toppan & Abbey vs Simply [2021]) held that the collateral warranty was not a construction contract and that there was no right to adjudicate under the Construction Act. There were similarities to Akenhead's decision in Parkwood, but the case was ultimately distinguished on the facts. The TCC thus drew a line in the sand, providing important guidance as to when a collateral warranty would not be a construction contract:

- Like Akenhead before him, Bowdery had to consider whether a collateral warranty was a construction contract, as in an agreement for the carrying out of construction operations.
- Like in Parkwood, the claim related to defects in construction works, but the crucial difference was that the collateral warranty was executed four years after completion of the construction project and 8 months after the remedial works had been completed by another contractor.
- Like in Parkwood, the collateral warranty referred to present and future obligations, but Bowdery considered that the wording of a collateral warranty is not necessarily sufficient to turn it into a construction contract and that the timing as to when it is executed is "also important".

Bowdery succinctly summarised his conclusions as such: *"On the facts of this case I cannot see how applying commercial common sense a collateral warranty executed four years after practical completion and months after the disputed remedial works had been remedied by another contractor can be construed as an agreement for carrying out of construction operations."*

He also provided the following guidance for future cases:

- *"Where a contractor agrees to carry out uncompleted works in the future that will be a very strong pointer that the collateral warranty is a construction contract, and the parties will have a right to adjudicate."*

- *where the works have already been completed, and as in this case even latent defects have been remedied by other contractors, a construction contract is unlikely to arise and there will be no right to adjudicate.*

Whilst the extended use of adjudication for defects claims is permitted (albeit not originally intended) under the Construction Act, even years after completion, the recent judgment in Abbey shows that there is a limit to what the courts will tolerate and enforce. If a collateral warranty is executed after completion of the construction project, it may not be a construction contract (as in an agreement for the carrying out of construction operations) at all. In that case, the beneficiary will have no right to adjudicate under the Construction Act and would have to take its claim to court instead.

Please let me have any news items, interesting cases, new practices, procedures or innovations for consideration that concern ADR and would be of interest to the branch membership.

I look forward to seeing new and old faces at our events over the forthcoming months and please check the website and LinkedIn page for future updates on our events.

Trevor Drury MCI Arb

Chair - Western Counties Branch