

100 Day Arbitration 'The Final Frontier'

KIM FRANKLIN

Barrister, Chartered Arbitrator

Crown Office Chambers

www.crownofficechambers.com

Arbitration, the final frontier ...



100 Day Arbitration Procedure

Key Features



- Short flexible procedure
- Resolution of all matters referred within 100 days
- Restricted hearing
- Award within 30 days
- Time periods can be extended or reduced

Where did it come from?



- Increasing need for flexible forum
- Clearly defined procedure
- Final and binding decision
- Enforceable

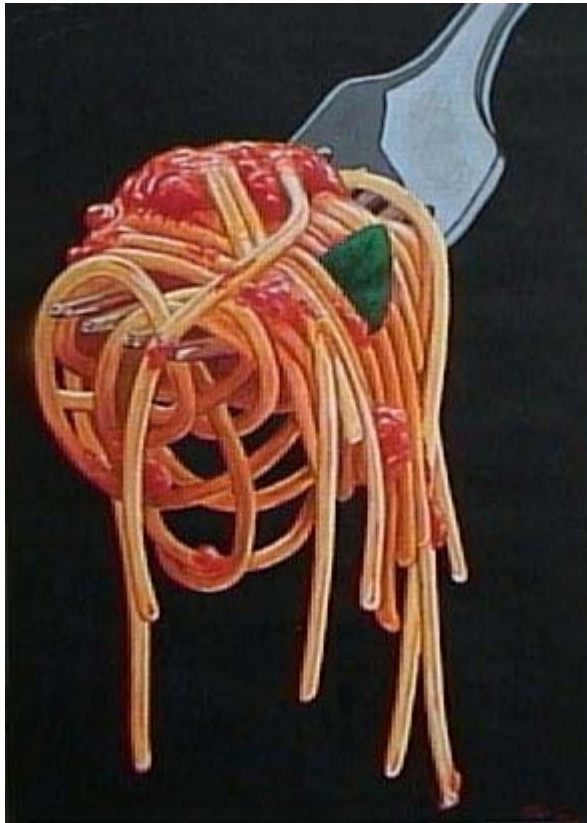
Why do we need it?

- Adjudication is not suitable for all types of cases
- Protracted and costly
- Adjudicators' fees have increased disproportionately
- Uncertain outcome
- Interim not final
- Problems with enforcement
- An expensive way to flip a coin'

London & Amsterdam Properties v. Waterman

- A complex shopping centre project
- Works completed in 2000
- A sizeable claim in excess of £10m
- Allegations of professional negligence against structural engineers

Waterman resisted enforcement on the following grounds



- There was no dispute
- The adjudication had been conducted in breach of natural justice

Historically two views of the meaning of 'dispute'

- Halki – The wide view
“'dispute' was to be given its ordinary meaning and included any claim which the other party refused to admit or did not pay whether or not there was any answer to the claim in fact or law”
- TCC – The narrow view
“For there to be a dispute for the purposes of exercising the statutory right to adjudication it must be clear that a point has emerged from the process of discussion or negotiation has ended and that there is something which needs to be decided.”



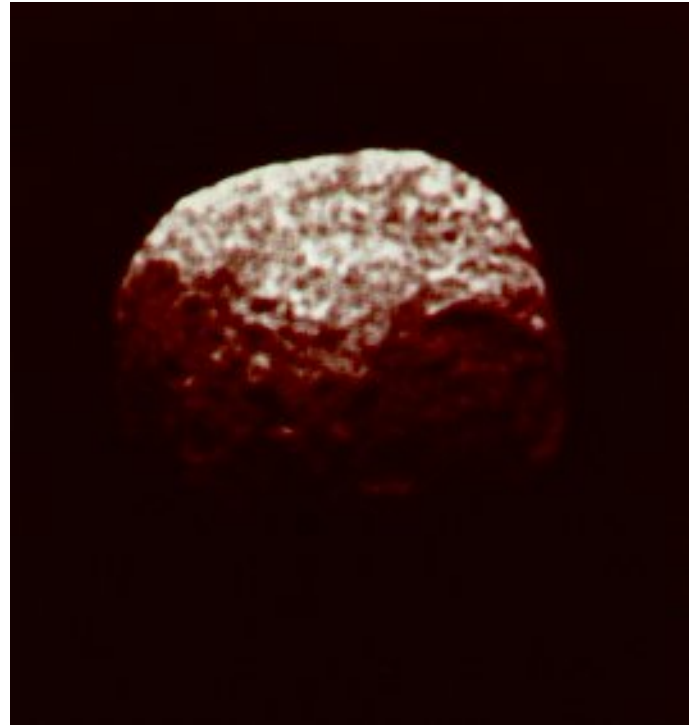
AMEC v Secretary of State for Transport



- ‘Dispute’ – ordinary meaning
- No hard edged rules
- Claim not automatically give rise to dispute
- Imposition of a deadline is not sufficient
- Dispute may be inferred from silence

Proteus

- The circumstances from which it may emerge that a claim is not admitted are Protean



Nebulous

- If the claim is so nebulous and ill defined that the respondent can not respond to it, silence or non admission is unlikely to give rise to a dispute



“Mere ambush, however unattractive does not amount to procedural unfairness. There was clearly a deliberate evidential ambush. The adjudicator ought either to have excluded the late evidence in reply or to have given Waterman a reasonable opportunity of dealing with it. Instead he avoided a decision as to whether or not the evidence should be admitted and then based his decision on the late evidence without giving Waterman an opportunity to deal with it. That was a substantial and relevant breach of natural justice”

LAP v. Waterman Judgment paragraph 179

Recent cases

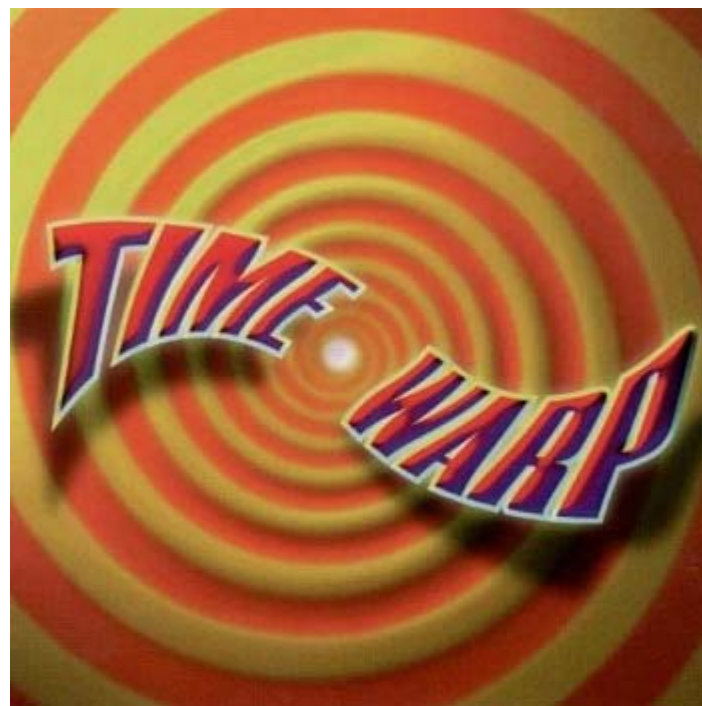
- Amec Capital Projects Ltd v Whitefriars City Estates Ltd CA
- CIB Properties Ltd v Birse Construction Ltd
- Carillion Construction v Devonport Royal Dockyard

AMEC v Whitefriars

- ‘George Ashworth of DLE’
- RIBA appointed Michael Biscoe
- Awarded AMEC £508,000 plus VAT
- TCC – wrong adjudicator
- Geoffrey Ashworth passed away
- RIBA appointed Michael Biscoe
- Awarded AMEC £508,000 plus VAT

Court of Appeal

- Rules of natural justice apply to adjudication
- Adjudicator rightly appointed
- No apparent bias or breach of natural justice
- Adjudicator could be forgiven for thinking ...

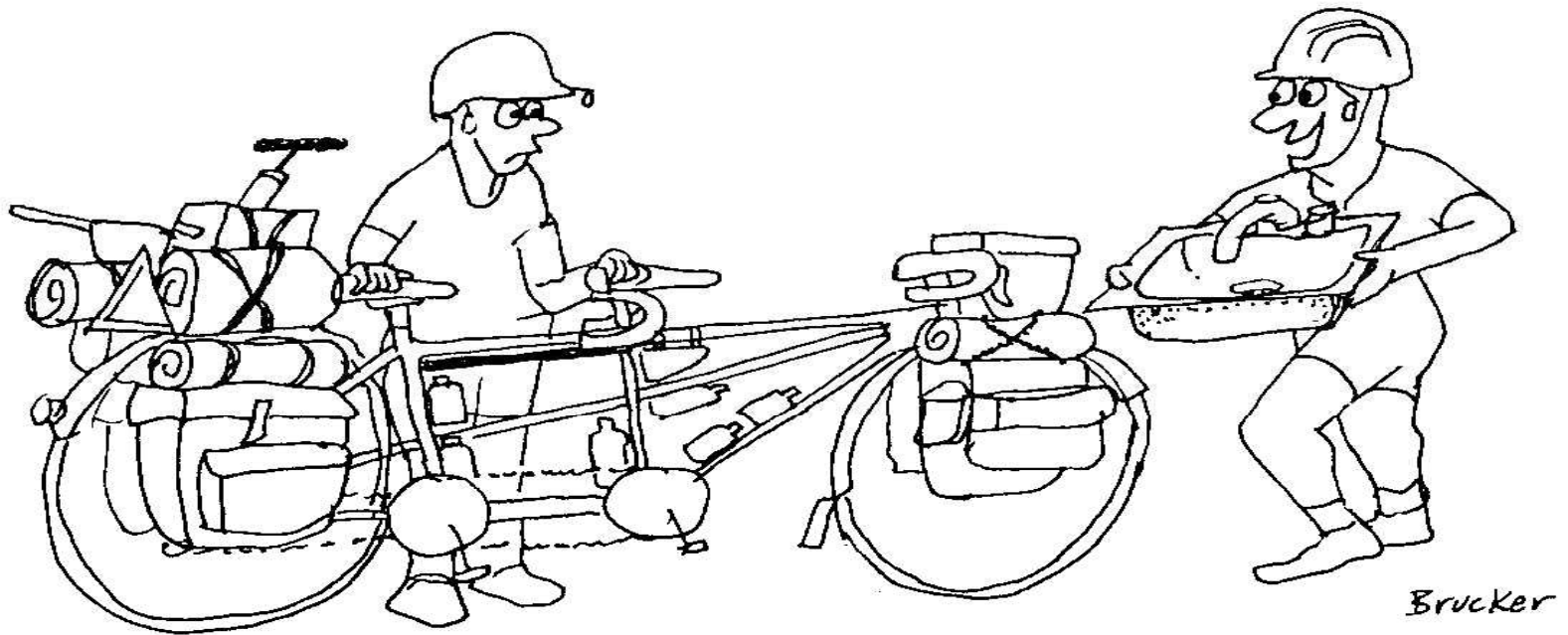


CIB Properties v Birse Construction



- ‘Tactical manoeuvring’
- Costs £1m
- Claim £16m
- 52 files of documents
- 6 experts meetings, schedules, applications for further disclosure
- Adjudication extended to 3 months

Claim had everything including ...



"I knew I forgot something."

CIB v Birse

- The adjudicator retained control and was able to ensure that despite the complexities of the claim he was able to reach a fair decision
- The test for determining whether a dispute was suitable for adjudication was not whether the dispute was too complex but whether an adjudicator could reach a fair decision within the agreed time limit

Carillion v Devonport

- Failure to consider irrelevant evidence not a breach
- Failure to put provisional conclusions not a breach
- No duty to give reasons
- Brief statement of reasons sufficient

Mr Justice Jackson

Judges must be astute to examine technical defences with a degree of scepticism.

Errors of law, fact or procedure by an adjudicator must be examined critically before the court accepts they constitute serious breaches of the rules of natural justice.

Adjudication is unsuitable for:

- Sizeable complex claims
- Involving allegations of professional negligence
- Long after completion of the project.

Mr Justice Jackson

Jackson J advised against the use adjudication for large final account claims and complex professional negligence disputes.

‘Don’t be lured to the land of the sirens’



Did he mean the land of
the lotus eaters?



Will the Act be changed?

- CUBATG reported July 2004
- Construction Minister response October 2004
- Issues as to scope will not go to consultation:
 - Residential occupiers
 - PFI
 - Process Plant

Consultation Paper

- Should adjudicators have power to rule on their own jurisdiction?
- Should adjudicators have immunity from third party claims?
- Should there be a ‘double test’ of impartiality and independence?
- www.dti.gov.uk/construction/hgcra/hgcralead.htm

Matters not addressed

- Meaning of ‘contract in writing’
- Imposition of single adjudication procedure
- Right to refer disputes ‘at any time’
- Scope of Act
- Professional negligence claims

The future of adjudication



‘Adjudication’

- Protracted procedure with increasing number of written submissions. No pleadings.
- Not cheap
- Adjudicator unlikely to have legal/procedural training
- Decision interim not final.
- Uncertainty as to enforcement.

'Arbitration'- 100 Day Procedure



- Simple procedure can be adopted at any time
- 100 days runs from close of pleadings
- Limited disclosure
- Restricted hearing
- Arbitrator can reduce time
- Parties can extend time
- Arbitrator can control evidence
- Arbitration Act applies

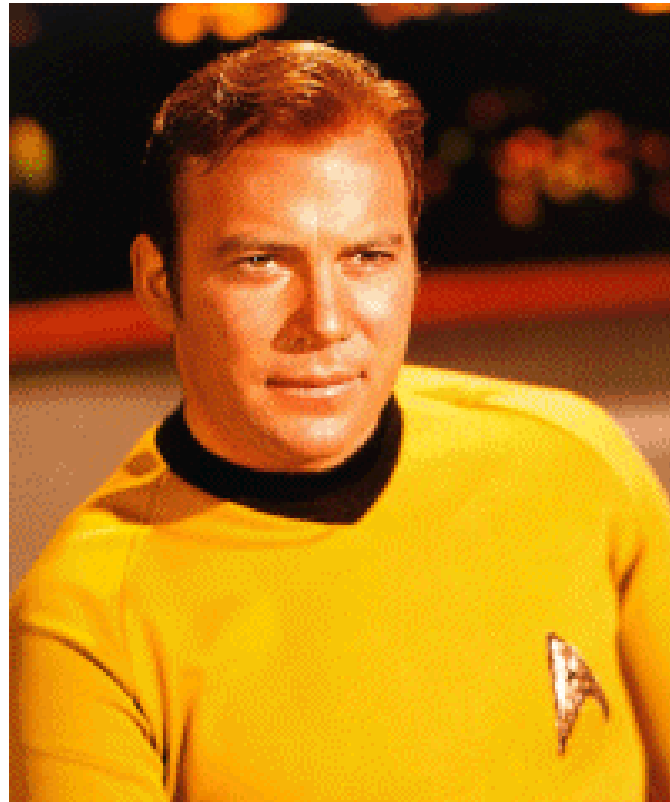
100 Day Procedure

- www.arbitrators-society.org

Construction arbitrators



ARBITRATION



ADJUDICATION

