# CONSTRUCTION ARBITRATION TODAY

**Text of a Lunchtime Talk by John Uff at The Athenaeum, 8 February 2007**

The weather conditions today indicate a small attendance and I have therefore decided to prepare a Note which can achieve rather wider circulation.

I believe the question of what is to be regarded as construction arbitration today is one of the more important questions which the Society needs to address, both in terms of what the Society represents and what is aims to achieve. There was a time when the Society's members represented the decision-makers in the great majority of construction disputes which reached a formal hearing, particularly with the aid of the Crouch case which prevented the Official Referees deciding matters such as EOT. That was also a time when there was very obviously much reform to be pursued. Cases regularly ran on for years and hearings for many weeks.

It is a sad but inevitable reflection that those *"great"* Arbitrators who conducted these cases, including Norman Royce, Alwyn Waters, Ian Menzies, who are no longer with us, have passed into history along with their procedures.

So what is construction arbitration today? Plainly adjudication cannot be ignored. On any view it represents the major engine of decision-making in construction disputes today. Fortunately, many of our current members are already prominent Adjudicators and one of the positive benefits is to inject into arbitration proper, the realisation that speed (if not economy) is truly achievable in most cases. The debate as to whether the Society should embrace members who are primarily if not exclusively Adjudicators is for another place. I take the view, however, that it is vital that the Society should have within its rank those who can be regarded as leaders in the field of adjudication as well as in construction arbitration.

Exactly the same points could be made about the other major Dispute Resolution Procedures, particularly Mediation and DRBs. Again it is fortunate that we already have within the membership people who can be regarded as leaders in these fields. Equally, arbitration has much to gain from these alternative methods, just as they have drawn inspiration from what I suggest is still to be regarded as the root of Dispute Resolution: Arbitration.

The attention rightly generated by adjudication tends to conceal the fact that a substantial part of the traditional construction industry still lies outside the ambit of the Construction Act, including oil and gas, nuclear processing and power generation, water and effluent and plant and materials excluding installation. There are also relevant exclusions under PFI and transport, including railways, generally falls outside the Act. However, the fact is that in some of these areas the parties have chosen to write adjudication provisions into their Contracts. This surely requires us to ask why the parties wish to avoid the traditional formula of arbitration. Is it because of the attraction of decisions which are not finally binding? Or is it still a spin-off from the bad press created at the time of the Construction Act? These are matters we should keep under review and from which we should seek to learn lessons.

Despite all this there remains a substantial volume of commercial arbitration relating to construction where the parties, perhaps from a more traditional background, are content to move straight from the traditional *"negotiation"* phase to arbitration proper. This certainly

includes insurance disputes, shipbuilding and other commercially important fields. We still have a job to do as Arbitrators.

However, the major point which still have to be made is that arbitration, beyond these shores, continues to thrive and many of the Society's members have a regular practice in international arbitration. Those who practice internationally will know that disputes in the Middle East, the Far East and South East Asia, and other places as well, regularly employ Arbitrators, lawyers and experts from the UK. It is a great curiosity that parties in these jurisdictions still look to the UK as one of the foundations of the arbitration system, which is after all based on our laws. I have particular experience of this in Australia where I am regularly asked to talk on arbitration matters in the UK. It is somewhat refreshing to be able to do this without the talk necessarily being dominated by adjudication.

So my brief conclusion is that we have every interest in maintaining our tradition and expertise in construction arbitration which continues to be in demand throughout the world. This is demonstrated not only by our individual practices, but by the increasing numbers of foreign members who have applied to join the Society. We should welcome them and continue to support and maintain the expertise which the UK (particularly England) has developed over the centuries.

**John Uff**
**President**