



**THE CHARTERED INSTITUTE OF ARBITRATORS**  
SCOTTISH BRANCH

Patron: The Rt. Hon. The Lord Cullen of Whitekirk

**NEWSLETTER**

Issue No. 013 ~ January 2006

***From the Editor***

Another busy start to the New Year awaits our members as always!

We now have a full calendar of interesting events, from which we are sure all our members, including Adjudicators and Arbitrators, will enjoy and benefit. Our evening events schedule for Spring is now complete and includes a wide variety of topics such as Mediation, followed by a discussion on the future of the UK Construction Industry and at a later date a major Conference in June 2006 Future of Commercial Dispute Resolution in Scotland.

The Education and Events schedule for the spring months ahead has also been published commencing with the CI Arb Entry Course Examinations leading to Associate Membership, which will be held on 20<sup>th</sup> and 27<sup>th</sup> January 2006.

Details of the Arbitrators Workshop is to be held on Friday 24 March 2006 are included in the Newsletter.

The Annual Dinner will be held in Glasgow at the Hilton Hotel, Glasgow on 28<sup>th</sup> March 2006. This is an important date for your diary so please get your table booked now to ensure you have a place due to the rapidly increasing demand for tickets for what is now the largest social event of our year!

Finally, as this is the start of the New Year for 2006, we want to hear your views. What would you like to see in the world of dispute resolution? Do you have any strong views? Perhaps you would like to advance to a higher grade in the Institute? If so, please write to us or e-mail us and let us know what you think and what you want to see in the future role of the Institute as well as Arbitration and Adjudication in the dispute resolution process in Scotland.

*Alan McAleer*  
Honorary Editor

***A Message from the Chairman***

Tuesday, 1<sup>st</sup> December 2005 was a good day. I paid off the mortgage, Pakistan's cricketers comprehensively beat England in the Test Match and the Chartered Institute launched its Scottish Construction Arbitration Code. The Scottish Branch owes a great debt to the authors of and contributors to this document and I thank them on your behalf. Ian Strathdee outlines the main points elsewhere in this newsletter. I suggest that some disputes are inherently unsuitable for adjudication and would be better dealt with by arbitration. The new Code has already proved to be successful in practice and I commend its use in Scotland.

The launch of the Fair Traders' Scheme for service providers and traders within Angus Council is another landmark in the Chartered Institute's range of services to resolve smaller civil disputes without recourse to the courts. Our Past Chairman, Jane Irvine, was instrumental in setting up this initiative and I have every confidence that the Scheme will prove to be both popular and effective, leading to its adoption throughout Scotland.

The autumn programme of events was very well attended with 60 attendees at one meeting. The spring programme is even more varied and exciting and I commend it to you. The joint conference with the Law Society on The Future of Commercial Dispute Resolution is not to be missed.

The Annual Dinner, like Topsey, has just "grewed and grewed". Whilst we are most grateful for corporate support it is very important that individual members and their guests are made equally welcome. Composite tables will be arranged and I look forward to seeing you in the Glasgow Hilton on Tuesday, 28<sup>th</sup> March 2006. So far we have 100 members and guests booked for the highlight event of our year.

*Ian Trushell*  
Chairman

***Forthcoming Events January -March***

*Flyers on all events included with Newsletters*

<b>Date</b>	<b>Venue</b>	<b>Speakers</b>	<b>Event Description</b>	<b>Cost</b>
24 <sup>th</sup> Jan 2006	Strathclyde University, Glasgow	John Sturrock QC	Mediation And Construction Disputes - A Perfect Fit	free
21 <sup>st</sup> Feb 2006	Strathclyde University, Glasgow	Various	Discussion on the future of the UK Construction Industry	free
6 <sup>h</sup> March 2006	Scottish Executive, Regent Road, Edinburgh	Various	Discussion on the content of the Arbitration Bill	free
24 <sup>th</sup> March 2006	McLay Murray & Spens, Glasgow	Lord Dervaird and T Gordon Coutts QC	Arbitrators' Workshop	t.b.a
28 <sup>th</sup> March 2006	Hilton Hotel, Glasgow	Professor Joe Thomson	CI Arb Annual Dinner	£60.00

## **NEW SCOTTISH CONSTRUCTION ARBITRATION CODE [NOW ON THE CIARB WEBSITE]**

**by Ian C Strathdee**

The first version of this new Code (dated 1 December 2005) was launched on 1<sup>st</sup> December 2005 in Glasgow. The starting point for the modernisation was the Scottish Arbitration Code of 1999 along with the 100 day Arbitration Draft Rules produced by CIMAR (Construction Industry Model Arbitration Rules). The main changes from the 1999 Code are:-

1. Following the success of Adjudication, where the starting point is a crystallised dispute and following the examples of both the TCC Court and Scottish Court of Session Commercial Cause, which both now require pre-action protocol (i.e. crystallisation of the disputes), the new Code requires at 1.3(c), a full statement of the Claimants claim and all documents they wish to rely upon, including any expert reports.
2. The Notice of Arbitration requires to include the proposal by the Claimant of the name of the Arbitrator. The Respondent shall within 7 days after receipt of the Notice, either intimate acceptance or propose the name of their own suggested Arbitrator. Clause 1.3(g).
3. Under Clause 1.3.1, the Respondent has 21 days, after receipt of the Notice, to deliver their defence. Under Clause 1.4(b) it requires to be a full statement, also accompanied by all documents they seek to rely upon, including Expert Reports. Under Clause 1.6, it may also include a counter-claim which shall be a similar full statement as provided for the Claimants claim.
4. Under Clause 1.12, it provides for the Parties supplying the Arbitrator, immediately following his appointment, all the documents they have submitted to the other side.
5. The word correspondence has been changed to communications.
6. Under Clause 3.5, the de-faulting appointing body is the Chartered Institute of Arbitrators (Scottish Branch).
7. Under Clause 4.5, the Arbitrator, prior to accepting appointment, requires to confirm in writing that he will make available sufficient time to, and to so conduct the Arbitration within the timescales provided in the Code.
8. Under Clause 8.4, reference to appointing a Clerk is changed to appointing a Legal Advisor. It is envisaged that the Arbitrator will administer his own Arbitration.
9. Under Clause 14.3, the phrase “amiable compositeur nor ex bons et acquo” has been superseded with the phrase “mediator between the parties nor reach a decision on a basis other than the one founded in the law which applies”.
10. Under Clause 15.2, there is a statement that “written pleadings in the normal form used in ordinary cases in the Scottish courts are not necessary unless the tribunal so orders, having been shown good cause for their use by one or more of the parties”.
11. New Clauses 15.6-15.9, provide that the award is to be issued no later than 6 months from the date of appointment of the Arbitrator, as a maximum time and period states “the parties agree to co-operate and take every opportunity to save time where possible”. It makes it clear that the date by which the final award must be made and issued is in all cases a long-stop and the tribunal should at all times endeavour to complete the arbitration as quickly as reasonably possible. There is a provision where if the Arbitrator determines the dispute to be complex he may grant himself an extension of a maximum of a further 2 months.
12. Under Clause 17.1, an advanced submission of an outline of the evidence to be presented, including details of the witnesses and the estimate of the amount of time required for direct testimony, is required to be provided.
13. Under Clause 21.4, the Arbitrator shall send to the parties his reasonable estimate of his total fees and expenses incurred and likely to be incurred in the making of the final award, no later than 18 days before the date the final award is due and provided the parties have paid this sum to account, the Arbitrator shall have no lien on his award.
14. Under Clause 22.9, the parties and the Arbitrator consent to the registration of the award for execution in the Books of Council and Session.

This new Construction Code has been designed to fill the perceived gap between construction disputes considered by parliament to be suitable for adjudication and the more complicated final account disputes, including extensions of time, direct loss and expense,

### **FUTURE COMMUNICATIONS!!**

*Your E-mail addresses are required **please!!** The Branch, in common with HQ in London and many other organisations, wishes to communicate with members by email whenever possible. This method is faster, cheaper and more efficient, and will reduce the Branch's administrative work substantially. At present, we have email addresses for a relatively small proportion of the membership. Please help by immediately forwarding your address to the Hon Secretary, David Allan, at [dallan@a-h.uk.com](mailto:dallan@a-h.uk.com).*

**ADJUDICATION UPDATE**

Carillion Construction Limited v. Devonport Royal Dockyard Limited arose out of a very high-value construction dispute which was referred to adjudication and duly decided thereon, the Adjudicator making a substantial award to Carillion. Devonport failed to pay and commenced proceedings in the TCC seeking declarations that the adjudicator's decision was invalid and unenforceable. Jackson J gave judgment on 26 April 2005 substantially upholding the Adjudicator's decision, granting summary judgment for £12.4m and refusing permission to appeal. Devonport applied for leave to appeal and a full Court has now delivered judgment substantially upholding Jackson J (and the Adjudicator) in refusing on Devonport's three principal grounds.

In doing so, the CoA set out some important (re) statements of the law governing the adjudication process. I extract the decision as follows (further edited for the newsletter):-

1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).
2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law: see *Bouygues*, *C&B Scene* and *Levolux*;
3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: see *Discain*, *Balfour Beatty* and *Pegram Shopfitters*.
4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see *Pegram Shopfitters* and *Amec*."

(86) It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice"

(87). In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense - as, we suspect, the costs incurred in the present case will demonstrate only too clearly."

Comment

None necessary!

*Hew Dundas*

Please send any request for further information on the above cases to [dundas.energy@btinternet.com](mailto:dundas.energy@btinternet.com). Is there a case you would like reviewed? We would like to hear from you. Contact us at [scottish-arbitrators.org](http://scottish-arbitrators.org).

**ARBITRATORS WORKSHOP**

The Arbitrators Workshop is to be held on Friday 24 March 2006 from 1 pm – 4.30 pm, at the offices of Maclay Murray and Spens, 151 St Vincent Street, Glasgow.

This Workshop is for the current members of the Chairman's Arbitration panel. However depending on numbers, places may also be available for current Pupils, or anyone seeking Pupillage.

The programme for this Workshop is not yet finalised but we are delighted to announce that Lord Dervaird [Professor John Murray QC] and T Gordon Coutts QC have agreed to present two of the planned sessions.

*The Chairman has requested a full attendance from existing Panel Members who should reserve a place by writing to the Secretary. Further details will be available by the end of January 2006.*

## **EDUCATION NEWS FROM THE BRANCH**

16 delegates attended the Adjudication Training day in October, and we have had excellent feedback on the Course. The Branch provided an Entry Course to the RICS Agricultural Arbitrators in November, and we had 12 delegates in attendance all of whom are seeking membership at Associate level.

Our Entry Course attracted 8 delegates and all are progressing to Associate membership in 2006.

We now have 4 candidates progressing to the Part II, and three to the part III.

Consideration is being given to a Fast Track Course for Solicitors.

This Newsletter is for **You** the Branch **Members**, please contact us with any queries or contributions. Your Branch contacts are as follows:-

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We want to hear *YOUR* contributions.  
Please contact any of the above members.

*Alan McAleer*  
*Honorary Editor*

## **SCOTTISH BRANCH WEBSITE**

We are pleased to announce that the website has been revamped. The new Scottish Construction Arbitration Code is online, as are the Appointment Forms for Arbitrators and Adjudicators and our Chairmans Panel of Adjudicators and Arbitrators.

This now includes a full listing of Committee Members, a link to the Newsletter, and to the whole CIARB training and education programme for all levels of membership in the UK. The website can be found at [www.scottish-arbitrators.org](http://www.scottish-arbitrators.org)

## **NEW CONSUMER ADR SCHEME FOR SCOTLAND**

Finding a way of resolving consumer complaints about goods and services is always problematic. Any scheme needs to be affordable, fair to the parties and provide a real remedy.

The Chartered Institute operates a series of ADR schemes to meet consumer needs. For example, through DRS-CI Arb (the dispute resolution services division of the Chartered Institute) it provides over 90 low cost, speedy ADR schemes, providing final awards in financial services, holiday and surveying disputes; binding decisions in communications disputes; recommended solutions in funeral disputes and negotiated outcomes via mediation in county courts in England & Wales. To date however there has not been any generic scheme. Nor a specifically Scots scheme.

The past Chairman, Jane Irvine, sought to remedy this by publishing and promoting Scots ADR rules for consumer disputes and now there is a pilot to test a new Scots ADR scheme for consumers.

In conjunction with Angus Council Trading Standards who have set up a "Fair Traders" membership scheme for service providers and traders within Angus, DRS-CI Arb is managing a pilot adjudication scheme to provide an effective, economic and fair way of resolving disputes between traders and their customers in Angus.

If the Scheme is a success it may be adopted in other areas. This is an important step and proves that the Chartered Institute, working with Scottish Trading Standards officers, is at the forefront of developing new routes to resolve smaller civil disputes outside the more formal and often prohibitively expensive court processes within Scotland.

For Further Information Contact: Jane Irvine at [Jane.Irvine@btconnect.com](mailto:Jane.Irvine@btconnect.com)

## **AND FINALLY AGAIN FOR YOUR DIARY! – THE ANNUAL DINNER**

The Branch Annual Dinner will take place in the Hilton Hotel, Glasgow on 28 March 2006. A flyer, including an application for tickets was recently issued, and members are encouraged to support the Branch by taking a table of 10 or 12.

Please note that composite tables will be arranged for members and their guests who do not wish to take whole tables.

Time is fast running out - Book your Tickets **NOW!!**

