Litigation As A Last Resort: How Can Arbitration Help Small Businesses?

Chair: Julia Rampen

New Statesman and Chartered Institute of Arbitrators

Bill Esterson MP: Shadow Minister for International Trade

Dr Subo Shanmuganthan: Director of Education and Research, CIArb

Lewis Shand Smith: Chief Executive, Ombudsman Services

John Fletcher: RICS Product Group Director ADR

Rampen introduces the panel and hands over to Fletcher.

Fletcher explains that those on the panel will probably be quite critical of the arbitration process in its current form in the UK, as it has become legal, formal and very expensive. He says he wants to explore ways to mitigate the expense of dispute resolution, especially on SMEs. It is not uncommon for RICS to find small firms who are involved in big contracts and who have then become involved in disputes. The legal fees for these disputes can be £100k plus, and if they lose they will be put out of business. The cost and time involved in litigation are both major issues.

Esterson then explains the importance of arbitration for smaller firms, which face a major issue when it comes to waiting for late payments. He says that the overall impact of litigation on smaller firms is significant, especially when SMEs play such a crucial role in the economy. He goes on to address the steps which have so far been taken by the government, and says there has been very little progress in this respect. He refers to the prompt payment code, but says most of the people who sign up are public sector bodies. He then describes the situation in Australia where they have binding arbitration and where the payment times have come down. Esterson then discusses the Labour suggestion of an adjudicator, similar to pubs code adjudicator, but says that even in that sector you still see huge inequality between smaller and larger players. He then raises the relationship between banks and smaller business customers, a relationship where banks have a very bad reputation. He says that this relationship needs to be repaired too – banks can call in lending which puts the relationship on an uneven basis.

Shanmuganthan explains the CIARB’s role. She says they welcome the suggestion of a small business commissioner, and also supports their involvement in a culture change. She explains that many people have a view of arbitration in which it is for legal professionals, but CIARB trains a whole variety of professionals, which means those techniques will be used more widely within a variety of organisations. She says she’d like to see professionals trained in this much earlier.

Smith explains the role of the ombudsman service, which is a not for profit organisation which practices forms of out of court resolution via adjudication. He says it is a business that’s been growing hugely over last 10 years and is becoming more established, and explains the different businesses that the ombudsman covers. This includes micro businesses, but they can’t take complaints from businesses which are classed as SME. He gives an example of how a small business approached them about a dispute with a large supplier. The supplier agreed they could take the complaint and the ombudsman ruled in favour of the small business, which stopped that business from going into liquidation. Ombudsman can work quickly and expertly, so would be a quick win for regulators if they could also accept disputes from SMEs.

Rampen asks Esterson about the thinking behind labour policy on dispute resolution:

Esterson agrees you have to treat businesses in the same way when it comes to dispute resolution. He explains that a lack of regulation has enabled the RBS scandal to take place, in which businesses were asset stripped across the country – these relationships between banks and businesses aren’t regulated and FCA doesn’t have ability to properly regulate it. So question is how to bring business relationships into a regulated environment, possibly with a different ombudsman’s role. On the note of small business commissioner – he says this was due to be appointed months ago and interviews have happened. However he doesn’t think the commissioner role goes far enough, it needs to go further and include regulation.

Rampen asks whether the ombudsman model will become more important for SMEs:

Shanmuganthan explains she thinks it will. The CIARB works to support more regulation and agrees commissioner needs to have more teeth to support this.

Rampen asks what options are available to small business in terms of fees:

Fletcher says he thinks they need to be careful not to polarise the options open to people. If you’re a reasonably sized SME involved in a dispute for half a million, you don’t automatically need to go for a completely free dispute resolution strategy; you will probably want a detailed process which may not be for an adjudicator to resolve. In terms of fees, they vary massively depending on the type of service which is needed, and there’s a scale of fees.

Rampen asks about Shand Smith’s example of a dispute he handled for a small business which was outside the ombudsman’s normal scope in terms of its size. How do you enforce an agreement that you come to in those situations?

He says you enforce it in the same way as if they are within your normal scope as companies are bound to the decision. He explains that their record on getting decisions implemented is better than the courts. He goes on to say that it’s about making sure the form of dispute resolution is relevant for the dispute – it starts with the two parties involved and they need to recognise the different options for different disputes.

Rampen asks how Brexit will change the shape of dispute resolution:

Esterson says that Brexit isn’t the only thing going on – business is continuing. There are things that should be done to help smaller firms regardless of Brexit. He says that the question touches on getting the best possible arrangement going through Brexit but there are other issues with regards to international courts.