DeVARGA COMMENTARY – FEBRUARY 2013

Thank You Harold, Thank You Mark

For the last couple of weeks I have been reading Court cases to establish a point of law. Absolutely riveting stuff! Personally, I find Wonders of the Universe and Wonders of the Solar System written by Professor Brian Cox to be far more interesting. However, as I said in my newsletter in May 2009, I was never particularly good at physics, the result being I have had to read his books three times!

The most recent Court case I have been reading is *O'Donoghue –v- Enterprise Inns Plc [2008] EWHC 2273(Ch) (29th September 2008).* This is concerned with a challenge to an Arbitrator's Award. So this newsletter stays with the theme of ADR. Property next time.

Any good Arbitrator will write to the parties about one week before the Award is ready advising them it is in draft form and giving them some indication of fees. They should do that because Section 56 of the Arbitration Act 1996 allows the Arbitrator to hold back the Award until their fees have been paid.

Now bear that thought in mind and take a look at Section 68 which directs you to Section 70. This says any appeal against the Award must be brought within 28 days of the date of the Award. So, what happens? The Arbitrator signs **and dates** the Award, writes to the parties and says it is available for collection upon payment of their fee (in cleared funds) and - the clock is ticking. No payment of fees and the Arbitrator can hold the Award for in excess of 28 days. If so, the parties lose the right to appeal.

So, you have got a maximum of 28 days to appeal. What do you do? Well, the first thing is to take a look again at Section 70(2) (b). (I am having feelings of déjà vu). This directs you to Section 57.

Section 57 is often known as the slip rule. It allows correction of mistakes which may inadvertently be made by the Arbitrator during production of the Award. You have to exhaust those remedies before you can lodge an appeal and - the clock is ticking.

When you have got over those hurdles you find yourself back at Section 68. Here it talks about serious irregularity and which could cause substantial injustice to the applicant.

Now let's go back and look at the O'Donoghue case. This raised a number of issues but the primary driving force was Mr O'Donoghue calling for and not getting the oral Hearing. Why? Well, when you undertake the autopsy on this one, the conclusion you come to is that the wounds, if you can call it that, were self inflicted. The Arbitrator, in my view, acted within his mandatory requirement to be impartial. He extended more than adequate opportunity for Mr O'Donoghue to pass information to him upon which a decision would be made as to whether a Hearing was appropriate. I have deliberately used the word appropriate. As the arbitrators actions were appropriate, the appeal was dismissed.

So the moral of the story in this instance is, if you are going to challenge an Award watch the 28-day deadline. You heard it at DeVarga.

Matthew S Martin FCIArb FRICS

STOP PRESS – We have added a column to our website and call it the MC² Column. It is dedicated to the memory of two Arbitrators, Harold Crowter and Professor Mark D Cato who had and still have a great influence in my career. My own practise would be that much poorer without their input. Its intention is to highlight a principle of ADR law or practise but in a manner which is slightly unusual. I trust you enjoy reading the column.

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