# Dispute resolution and access to justice with particular reference to the construction industry in the United Kingdom.

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# Dispute Resolution and Access to Justice With Particular Reference to The Construction Industry in the United Kingdom

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## ABSTRACT

# DISPUTE RESOLUTION AND ACCESS TO JUSTICE WITH PARTICULAR REFERENCE TO THE CONSTRUCTION INDUSTRY IN THE UNITED KINGDOM

This work examines dispute resolution in the construction industry, namely arbitration under the Arbitration Act 1996 and adjudication under the Housing Grants Construction and Regeneration Act 1996, in the light of The Right Honourable the Lord Woolf's definition of access to justice.[1] Both a theoretical and an empirical approach have been adopted by this study so as to provide a robust analytical methodology.

The theoretical analysis of arbitration and adjudication conducted by this work highlights both the potential successes and failures of the reforms with regard to the promotion of access to justice. Broadly speaking, whilst both statutes were compliant with Woolf's criteria for affording access to justice, three main areas of concern were highlighted, calling into question the compliance of the mechanisms with the civil procedure reforms. These areas of concern were identified as relating to: procedure; cost; and juridification.

Turning to consider the procedural concerns, loopholes were uncovered in both Acts that demonstrated a potential avenue for exploitation by disputing parties who were seeking to gain a tactical advantage over their opponent. For example, the speed with which proceedings must be conducted once notice to arbitrate or adjudicate has been given provides parties with the ability to prepare their case in advance and then ambush their opponent with dispute resolution proceedings. In a complex dispute, such ambushing tactics may confer a procedural advantage that may be exploited so as to confer a unilateral benefit.

With regard to issues of cost, the financial structure of arbitration and adjudication was seen to raise issues as to the equal access of parties to proceedings. That is, without state aid, can it be said that all parties to a dispute have an equal opportunity to pursue the method of dispute resolution of their choice?

[1] See Lord Justice Woolf "Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales / By the Right Honourable the Lord Woolf, Master of the Rolls" (1995) HMSO

In so far as the juridification element is concerned, the role of the legal profession in methods of dispute resolution outside the realm of the court, may be seen to be an influencing factor that colours the nature of alternative dispute resolution. That is, will the involvement of a legal practitioner in arbitration and / or adjudication serve to over-formulise proceedings that are in essence designed to facilitate an understandable and responsive mechanism?

The empirical research subsequently undertaken answers these and other theoretical questions posed, by comparing arbitration and adjudication to litigation and then examining such in the light of Woolf's eight criteria for access to justice. In short, whilst arbitration and adjudication were broadly compliant with Woolf's criteria, the theoretical concerns highlighted above were proved to be factors of varying significance that may serve to prevent access to justice as prescribed by Woolf.

# DECLARATION & STATEMENTS

## DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

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## STATEMENT 1

This thesis is the result of my own investigations, except where otherwise stated. Where correction services have been used, the extent and nature of the correction is clearly marked in a footnote(s).

Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.

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## PREFACE

Modern civil procedure has been shaped by the period of reform that began in earnest in the early 1990's. The construction industry in particular, has been at the forefront of that reform. Latham's report into modernising the industry culminated in the first statutory embodiment of adjudication under the Housing Grants Construction and Regeneration Act 1996. At the same time, arbitration law in general was reformed by way of the Arbitration Act 1996. Court procedure also received statutory attention by way of the Woolf Reforms that established the new Civil Procedure Rules 1998. Given the inherent nature of disputes in the construction industry, it was foreseeable that this particular industrial sector of Britain would provide the setting in which such statutory reform may be monitored and evaluated. Furthermore, given that Latham's Report preceded the Woolf reforms, an analysis of dispute resolution in the construction industry would enable the robustness of the CPR to be tested in a particular context.

The empirical data presented in this work is the result of primary empirical research that was undertaken during the period 2002/2003. This research sought the views and experiences of respondents post-reform and up to the present date. The purpose of this research was to highlight by way of theoretical evaluation, the likely success / failure of the 1996 reforms as they apply to the construction industry. Due to their forming the basis upon which civil procedure in general was reformed under the CPR 1998, Woolf's eight criteria for access to justice were adopted as the benchmark by which such theoretical evaluation would take place. The empirical research would then investigate and answer the issues raised by the theoretical examination and

would provide a profile of litigation in the construction industry against which the ability of arbitration and adjudication to facilitate access to justice could be measured.

Despite the reforms having some success, this study has highlighted that many difficulties persist still and many questions have been raised that await to be answered, namely: issues of funding and juridification.

This is the law as at 1st June 2005.

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Thank you also to my family who have encouraged me to keep on going and thank you to my husband Chris for the endless cups of tea when I have had a moment of inspiration! I dedicate this work to you.

# ABBRIEVIATIONS

"CIC" Construction Industry Council

"Construction Act" – Housing Grants Construction and Regeneration Act 1996

"CPR 1998" – Civil Procedure Rules 1998

"HRA" – The Human Rights Act 1998

"SPSS" – Statistical Package for the Social Sciences

# CHAPTER ONE: THE CONSTRUCTION INDUSTRY & DISPUTE RESOLUTION MECHANISMS

The contemporary construction industry in Britain is responsible for the building and maintenance of the infrastructure of the country, including roads, airports and domestic, commercial and public accommodation. Not only is the industry of social importance in the provision of such facilities, but it is also of economic importance, in that approximately 3% of the total working population in Britain is employed in the construction sector at present.[1] As shall become clear, however, it was not until the post-industrial revolution[2] period that there could be said to have been a construction "industry".[3] Until this time, building and construction works were conducted on a less structured and less regulated basis.

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[1] Based upon Standard Occupational Code of "Construction Trade" Period March – May 2003. See Office for National Statistics.

[2] Arnold Toynbee coined the phrase 'Industrial Revolution' in 1882

[3] For a detailed exposition of the industrial revolution and the history of the construction industry in Britain, see Berg "The Age of Manufacturers, 1700 – 1820: Industry, Innovation and Work in Britain" (1994) Routledge; Bowley "British Building Industry" (1966) Cambridge University Press; Earle "Black Top: A History of the British Flexible Roads Industry" (1974) Blackwell; McCord "British History: 1815 – 1906" (1991) OUP; Pearce & Stewart "British Political History, 1867 – 2001: Democracy and Decline" (2002) Routledge; Powell "An Economic History of the British Building Industry, 1815 – 1979" (1980) Architectural Press; Pragnel "Industrial Britain: An Architectural History" (2000) Ellipsis; Wrigley "Continuity, Chance and Change: The Character of the Industrial Revolution in England" (1988) Cambridge University Press.

## The Legislative Development of the Construction Industry In Context

Until the 1700s much of England and Wales was rural, with only traditional village industries such as farming, corn milling and blacksmithing.[4] Agricultural engineering industries were predominantly confined to larger towns and so a nexus of national and international trade existed in only a limited form. Indeed, due to the inability to compete with continental technology, British manufacturers repeatedly experienced difficulties expanding in to European markets and so woollen cloth comprised the only significant export.[5] Correlated with the development of factories, the expansion of manufacturing and the increasing importance of heavy industry in the late eighteenth and early nineteenth centuries, however, was the requirement for an effective transport and communication system. Thus, railways, canals and docks were built, bringing with them new opportunities for economic growth. Brick and cement industries amongst others emerged across Britain and electricity was discovered and was in general use by the late 1870's. This in turn led to the invention of electric

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[4] See Addyman & Roskams (ed.) "Medieval Europe, 1: Urbanism" (1992) York; Blair & Ramsay (Eds.) "English Medieval Industries" (1991) Hambledon Press; Britnell "The Commercialisation of English Society: 1000-1500" (1993) Manchester University Press; Crossley (Ed.) "Medieval Industry" (1981) CBA Research Report no.40; Green "Town Life in the Fifteenth Century" (1894) Macmillan; Hatcher "Plague, Population and the English Economy: 1348-1530" (1977) Macmillan; Hatcher & Britnell (eds.) "Progress and Problems in Medieval England: Essays in Honour of Edward Miller" (1996) Cambridge University Press; Hatcher & Bailey "Modelling the Middle Ages: The History and Theory of England's Economic Development" (2001) Oxford University Press; Hodges "Dark Age Economics: The Origins of Towns and Trade, 600-1000" (1982) Gerald Duckworth & Co. Ltd; Miller & Hatcher "Medieval England - Rural Society and Economic Change: 1086-1348" (1978) Longman; Miller & Hatcher "Medieval England, Towns, Commerce & Crafts: 1086-1348" (1995) Longman; Palliser (ed.) "The Cambridge Urban History of Britain Vol 1: 600 – 1540" (2000) Cambridge University Press; Sawyer (ed.) "English Medieval Settlement" (1979) Arnold; Short (ed) "The English Rural Community: Image and Analysis" (1992) Cambridge University Press; Taylor "Village and Farmstead: A History of Rural Settlement in England" (1983) G. Philip.

[5] See Carus-Wilson "The English Cloth Industry in the Late Twelfth and Early Thirteenth Centuries" (1944) XIV *Economic History Review;* Higham "Some Evidence For 12th- and 13th-Century Linen and Woollen Textile Processing" (1989) XXXIII *Medieval Archaeology;* Miller "The Fortunes of the English Textile Industry in the Thirteenth Century" (1965) XVIII *Economic History Review* 1; Pritchard "Late Saxon Textiles from the City of London" (1985) XXVIII *Medieval Archaeology.*

motors, generators and turbines, which sparked further technological innovation, the motor vehicle being perhaps the most significant. Gas works, water works, power stations, mills, machine houses and other such industrial architecture developed, creating new economies on previously green field sites. In short, the nature of British industry began to move away from reliance upon village enterprise, to encompass new and diverse technology that depended upon an extensive and organised nexus of national and international trade. Clearly, such developments impacted upon the infrastructure of the Country. Not only was there a demand for commercial buildings, but also the migration of workers increased the demand for housing. As hamlets and villages grew into towns and cities, so the demand for public buildings increased. Indeed, by 1851 Britain had become urbanised - half the population[6] of Britain inhabited towns and cities, increasing to three-quarters of the population by 1901. With the increase in building activity, came an increase in legislation affecting the work of tradesmen.

Legislation affecting the work of tradesman can be traced back to the middle ages. In 1189 the first recorded attempt to legislate for fire safety took place, whereby the Mayor of London stated that houses in the city were to be built of stone, thatched roofs were not permitted, and party walls were to be of a minimum height and thickness.[7] Following the Great Fire of London in 1212, in which an estimated 3000 people died, requirements affecting the construction of alehouses, bakeries and brew-houses were also established. From hereon, numerous local acts continued to be

[6] Britain had a population of nearly 21 million in 1851, increasing to 37 million by 1901. See Census of Population 1851 and Census of Population 1901.
[7] The Assize of Buildings Planning Act 1189. See Knowles & Pitt "History of Building Regulation in London: 1189 – 1972" (1973) Architect; Schofield "The Building of London: From the Conquest to the Great Fire" (1999) Sutton Publishing.

passed, giving the authorities in larger towns power over public health.[8] For example, the Royal Proclamation of 1580 enacted into law in 1592, forbade any new building within three miles of the city of London and forbade the subdivision of houses. Following the Second Great Fire of London in 1666, London acquired its first complete code of building regulations and the means for its implementation. On September 13th 1666, King Charles II issued a proclamation[9] that prohibited the rebuilding of houses after the Great Fire of London without conforming to the General Regulations contained therein. For example, it was stated that the walls of all new buildings were to be formulated of brick or stone, the main streets were to be widened to prevent the spread of fire and existing narrow alleyways were to be reduced in number. It was also proclaimed that a survey of every ruin and ownership of every plot was to be conducted. Following the proclamation, on the 8th February 1667 the Act for the Rebuilding of the City of London received Royal Assent. The Act concerned the construction of streets, buildings and the movement of traffic. Scheduled tables set out the thickness of the brick walls, heights from floor to ceiling, the depth of cellars, the sufficiency of party walls and scantlings of timber for each type of house as defined by the Act. Stipulations were made for the construction of sewers and spouting gutters were abolished and replaced with down pipes. Conduits causing an obstruction to the free-flow of traffic were also to be removed and most of the principle streets of London were widened. Thames Street and the land between it and the River Thames were to be raised by three feet and building within a distance of forty feet from the Thames was prohibited. A prohibition on noisome trade was also

[8] See Garside "Capital Histories: A Bibliographical Study of London" (1998) Ashgate; Lubbock "The Tyranny of Taste: The Politics of Architecture and Design in Britain 1550-1960" (1995) Yale University Press; Tittler "For the Re-Edification of Townes: The Rebuilding Statutes of Henry VIII" (1990) Appalachian State University.

[9] See Birch "The Historical Charters and Constitutional Documents of the City of London" (1897) Whiting. See also Reddaway "Rebuilding of London After Great Fire" (1951) E Arnold.

introduced by the Act. Indeed, the Great Fire provided the catalyst that addressed the long-term concerns that previous administrations had failed to attend.[10]

Further legislation affecting the construction of buildings came into being by way of The Fires Prevention (Metropolis) Act 1774.[11] This Act listed buildings into seven categories with the thickness of external walls and party walls laid down for each class. The Act also included provisions that determined the maximum area of warehouses and London boroughs were to appoint Surveyors. In 1884 the seven classes were reduced to three, namely Dwelling Houses, Warehouses and Public Buildings and the class of Warehouse was limited to a size of 200,000 cubic feet (undivided).[12] Thus, with demographic and economic change, came piecemeal reform that sought to ensure the safety of those residing and operating in populous towns.[13]

The origins of modern building legislation did not emerge however, until 1845 when the first general[14] Public Health Act was passed. The Public Health Act 1845 sought to reduce the risks to the public posed by damp conditions, inferior construction, insanity conditions and the risk of fire, as well as the lack of adequate light and ventilation. This was to be achieved, for example, by discouraging the building of

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[10] See Hobhouse & Saunders "Good and Proper Materials: Fabric of London Since the Great Fire" (2004) London Topographical Society; Perks "Essays on Old London" (1927) Cambridge University Press.

[11] See Mort & Ogborn "Transforming Metropolitan London: 1750-1960" (2004) 43 *Journal of British Studies* 1.

[12] See The Metropolitan Building Act 1884

[13] For example, prohibition of building houses without privies (Newcastle-upon-Tyne, Burnley, 1846); provision of public lavatories (Northampton 1843; Chester 1845; Southport 1846); regulations for minimum size of cellar dwellings (Liverpool 1842, Wallasey 1845); prohibition on building houses without drains and authority to inspect new drains (Sr. Helens, 1845; Chester 1845; Wallasey 1845; Burnley 1846); appointment of local sanitary inspectors (Manchester 1845, Southport 1846); minimum height of rooms in new houses (Liverpool 1842, Wallasey 1845; Belfast 1845); inspection of lodging houses (Glasgow 1843, Manchester 1845).

[14] The Act applied only to areas outside London. See Ley "A History of Building Control in England and Wales: 1840 – 1990" (2000) RICS Books.

houses in tightly confined spaces and the encouragement of the use of sanitation facilities - every newly built house had to have a water-closet, privy or ash pit. The next twenty-five years witnessed rapid reform. For example, the Public Health Act of 1858 disbanded the General Board of Health that had been established under the first Act and required the formation of public boards to oversee water supply, sewage,[15] highways and lighting and to deal with infectious diseases and nuisances. The 1858 Local Government Act also gave urban authorities the power to make building bye-laws subject to confirmation by the Home Office. However, in 1872[16] the country was divided into rural and urban districts[17] for the purposes of sanitation and building bye-laws and the power of the urban authority to make building bye-laws was transferred to the Local Government Board who drafted the model bye-laws which were intended as a guide to councils constructing new streets and buildings.[18] In 1875 the law was digested by way of the Public Health Act 1875. Local authorities were conferred the right to make local bye-laws controlling the standard of building construction relative to safety, fire prevention, health and sanitation. So as to ensure the enforcement of these building standards by local councils, legislation was introduced in 1936 that required all local authorities to make and enforce their own building bye-laws,[19] although it was not until 1952 that a new set of bye-laws outlined a range of mandatory measures to be followed by all councils.[20] These measures set out the minimum structural standards and performance of a number of materials, helping to enforce national, rather than regional standards. So as to further pursue a

[15] Following this Act, drainage was introduced in London in 1865
[16] See Public Health Act 1872
[17] In terms of sanitation, in urban areas the Local Board was the sanitary authority, whilst in rural areas the Board of Guardians was the sanitary authority. Building bylaws also differed in their requirements so as to suit rural and urban areas.
[18] The Model Bylaws were first issued in 1887 and were subsequently extended under the Public Health Act of 1890. See Gaskell "Building Control: National Legislation and the Introduction of Local Bye-laws in Victorian England" (1983) Phillimore & Co Ltd.
[19] The Public Health Act 1936
[20] These were known as the Model By-Laws

more uniform approach to building standards across the nation, a new set of building regulations for England and Wales were included in the 1961 Public Health Act. These regulations permitted the creation of one set of building regulations to replace the 1400 sets of local byelaws. These were finally codified in 1965 and implemented by law on 1 February 1966, thereby creating the first building regulations for England and Wales.[21] In the intervening period until the present day, these "Building Regulations" have undergone a series of changes and revisions. For example, the adoption of metric measurements in Great Britain in the early Seventies required a redrafting of the 1966 regulations. Furthermore, in an attempt to make the regulations more comprehensible, they subsequently underwent a period of major restructuring, culminating in the current Building Regulations 2000, which came into force on 1 January 2000.

As this complicated nexus of trade and regulation grew, so institutes representing the work and interests of specific tradesmen were established. For example, in the early and late nineteenth century, the Institute of Civil Engineers and the Royal Institute of Chartered Surveyors were formed, each seeking to educate, train and regulate the activities of their members. Many other such interest groups have since been formed and have more recently sought to work together under representative forums such as the Construction Industry Council.[22] Thus, whilst the origins of the industry may have its roots in the pre-industrial revolution era, the concept of the "construction industry" as a diverse yet cohesive body that is both dynamic and self-regulating is a fairly recent phenomenon.

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[21] Building Regulations 1965

[22] Formed in 1988, the Construction Industry Council is a pan-industry body that is concerned with all aspects of the built environment. It is the representative forum for the industry's professional bodies, research organisations and specialist trade associations.

## The Structure of the Contemporary Construction Industry

The structure of the contemporary construction industry is somewhat complex. In terms of business ownership, construction businesses may be categorised into four groups: sole proprietorships; partnerships; companies and public corporations; and general government and non-profit making businesses. Upon analysis of VAT based enterprises in the construction industry in the year 2003,[23] it can be seen that sole proprietorships accounted for 46% of such businesses, with companies and public corporations accounting for 37%, partnerships making up 17% of the industry and general government and non-profit making businesses accounting for less than 1%.

However, whilst the majority of VAT based construction enterprises are sole proprietors, it is interesting to note that their turnover in 2003 was by and large limited to below one million pounds.[24] Indeed, less than 1% of VAT based sole proprietors recorded a turnover in excess of one million pounds, with 65% of such businesses recording a turnover of less than £99k. Conversely, although accounting for a lesser percentage of business ownership structures, the turnover sizeband of partnerships, companies and public corporations and general government and non-profit making businesses were largely concentrated in the £100 – 249 thousand sizeband. In short therefore, whilst the sole proprietor accounts for a large percentage

[23] Statistics derived from ONS "Commerce, Energy and Industry: Size Analysis of UK Businesses Data for 2003" ONS June 2003.
[24] Ibid

of the construction industry, the turnover generated by such a group is largely limited to the lower-end of the turnover scale.[25]

Micro-analysis of the construction sector, whereby the turnover of VAT based enterprises is analysed according to SIC code divisions, demonstrates that in terms of finances, the industry is dominated by three industrial categories: the General Buildings and Civil Engineering sector (accounting for 34% of the industry's turnover); the Electrical sector (accounting for 12% of the industry's turnover); and

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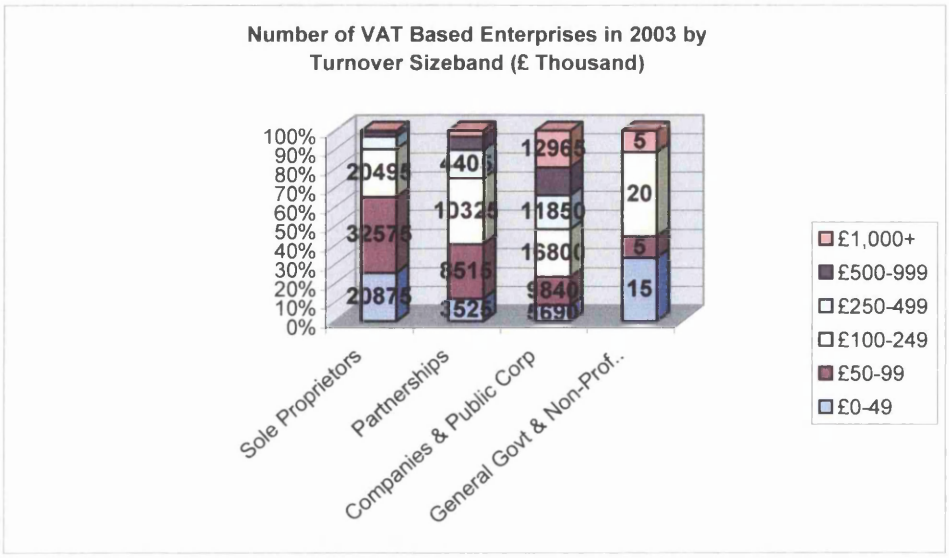


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the Plumbing sector (accounting for 11% of the industry's turnover).[26] Further analysis of the construction industry according to Employment Sizeband, shows that 78% of VAT based enterprises employed between 0-4 employees. When analysing such figures on a regional basis, it becomes clear that a significant proportion of both the turnover and employment for the year 2003 was found to be located in the south of England.

In combining the macro and micro data, a generalised picture of the construction industry emerges. That is, the industry is based largely upon the Small to Medium Sized Enterprise[27] (hereafter SME) and as such functions upon a complicated nexus of trade between the main-contractor and sub-contractor, who then tenders work to the sub-sub contractor. Whilst businesses from every construction discipline are active within the industry, there are few main parties and in terms of both turnover and employment, the South of England is the most active. It is due to such a complex structure that disputes are an inevitable part of the construction industry. Given the SME focus of the construction sector, any factor likely to impinge upon free cash

[26] **Construction Industry SIC divisions by Turnover Sizeband (£ Thousand) in 2003**

| Construction (Division 45)[26] | £0-49 | £50-99 | £100-249 | £250-499 | £500-999 | £1,000-4,999 | £5,000 | Total |
|---|---|---|---|---|---|---|---|---|
| ***11*** | 130 | 195 | 295 | 185 | 165 | 225 | 60 | 1250 |
| ***12*** | 15 | 50 | 35 | 20 | 10 | 15 | 0 | 140 |
| ***21*** | 9960 | 14525 | 16615 | 8150 | 5135 | 4995 | 1425 | 60805 |
| ***22*** | 715 | 1895 | 1785 | 730 | 455 | 440 | 60 | 6075 |
| ***23*** | 160 | 305 | 445 | 265 | 195 | 265 | 90 | 1725 |
| ***24*** | 20 | 35 | 35 | 30 | 20 | 20 | 10 | 170 |
| ***25*** | 2185 | 3985 | 4130 | 2000 | 1275 | 1020 | 155 | 14745 |
| ***31*** | 4970 | 6695 | 5265 | 2255 | 1435 | 1235 | 250 | 22105 |
| ***32*** | 90 | 165 | 220 | 165 | 130 | 125 | 25 | 925 |
| ***33*** | 3230 | 7360 | 4885 | 1865 | 1105 | 1015 | 170 | 19625 |
| ***34*** | 770 | 1975 | 1795 | 775 | 450 | 325 | 25 | 6120 |
| ***41*** | 595 | 915 | 650 | 260 | 215 | 170 | 15 | 2820 |
| ***42*** | 3090 | 5150 | 4075 | 1675 | 955 | 740 | 150 | 15835 |
| ***43*** | 660 | 1320 | 1105 | 545 | 380 | 280 | 30 | 4315 |
| ***44*** | 1505 | 3400 | 3580 | 1585 | 865 | 510 | 60 | 11505 |
| ***45*** | 875 | 2290 | 2125 | 900 | 595 | 430 | 70 | 7285 |
| ***50*** | 1140 | 670 | 595 | 300 | 185 | 195 | 40 | 3130 |
| ***Total*** | **30105** | **50935** | **47640** | **21695** | **13570** | **12000** | **2630** | **178580** |

[27] Defined as being a business or company that has fewer than 250 employees and a turnover or balance sheet total of less than Euro 50 million.

flow that may jeopardise the survival of a commercial enterprise must be quashed. Hence effective resolution of disputes is critical to the construction industry and the wider British economy.

## Disputes – a By-Product of a Construction Project?

It is often said that disputes[28] are a by-product of the construction industry, in that it is an expected part of any building contract that a disagreement will emerge between the parties. This is largely due to the nature of the construction industry itself. The scope of construction works is so diverse so as to range from purely building work, to pure engineering, with a host of activities in between. Thus, a single construction project will require the provision of a variety of materials and plant from a number of specialist merchants and suppliers, not to mention the technical knowledge and skill of the main contractor, as well as a plethora of specialist sub-contractors. In short, the professional parties involved in building and engineering works, will often be as numerous as they are diverse. Indeed, such technical diversification poses a threat to the success of the construction project in that the high number of participating parties means that there will be split responsibility between specification of the project on the one hand and design on the other. It is not difficult to envisage the situation whereby the final "product" is defective, giving rise to the question where should the liability fall? As with all questions of liability, determination is not always easy, but in a case where there is a division between the very similar functions of specification and design, where there are numerous sub-contracts and string contracts each seeking to

[28] See Miller & Sarat "Grievances, Claims & Disputes: Assessing the Adversary Culture" (1981) 15 *Law & Society Review* p525 where it is contended that "[a] dispute exists when a claim based on a grievance is rejected in whole or part".

restrict and / or defer liability and where more often than not the work will be of a prototypical nature, the question may be near impossible to resolve.

In evidentiary terms the resolution of such disputes may be problematical. Latent defects in the standard of work may not arise for several years, meaning that evidence may have been destroyed or misplaced and those personnel involved in the building and engineering works are no longer traceable. Even if the defect becomes apparent relatively soon after completion, the diversity and volume of evidentiary material will still render the task of resolving the dispute a complex one, as evidential documents range from site investigation reports to weather reports, all of which may be haphazard and may not assist the determination of liability in any meaningful way. Thus, before work has even begun, the problem of contractual liability poses the threat of a long and complex dispute.

The nature of a construction project also renders a dispute likely, in that the delivery of a product in a construction contract is a "process" and not an "event". Indeed, due to the number of contractual parties, the sequencing of activities may become somewhat difficult, thereby giving rise to delay. This is especially so given that each party to a construction contract depends upon the activities of others to complete their work and a single missed deadline may forestall the completion date by several months, if not years. Practical difficulties such as adverse weather conditions, strikes and the demands of Health and Safety legislation, all serve to exert external pressure that may also frustrate the contract. Consequently, disputes as to the financial responsibility for such delays thereby arise and are further exacerbated by the fact that many sub-contractors work on "day rates" and thus disputes are expanded so as to

concern the efficiency of work carried out and the record of hours worked. Additionally, the essence of construction in the UK is to allow the customer to change its mind once work has commenced, as variations and programme changes are accepted under the contract. Since the documents allow employers to alter the scope of the work and since that turn of events allows claims for additional costs, disputes often arise as to the sums liable for those additional costs.

Given its common law tradition and the similarity of the American and British economies[29], an analysis of the nature of legal society in the United States of America may be seen to be an indicator of future trends in the United Kingdom. Indeed, due to the inter-play of factors such as over-legislation, the over-litigation of citizens and the subsequent over-involvement of the judiciary, a "culture of dispute" has emerged in America that has become so entrenched so as to be almost impossible to reverse.[30] Recent developments affecting the British construction industry may provide an opportunity for such a cycle of dispute to be replicated in England and Wales if they are left unchecked. For example, as already demonstrated, the twentieth century witnessed an increase in the legislation and regulations affecting construction works. Furthermore, the re-growth of internationalism within a nation state and the emergence of corporations have meant that the close-knit community that used to be the construction industry, has been superseded by an international market that is both anonymous and distrustful and one which has served only to compound the numbers

[29] The origins and industrialisation of the American economy was greatly influenced by the Industrial Revolution in the United Kingdom, as it was encouraged as a means for ensuring both the political independence and economic well-being of the United States. Both the United Kingdom and America share the economic theories of capitalism, free trade and free markets. The official policies of the Roosevelt and Johnson administrations involving deficit spending and its various corollaries were based on the theories of British economist John Maynard Keynes. See Fallon "UK – USA: The British Character of America" (2001) 3 *The Social Contract Press* p91

[30] See Galanter "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious & Litigious Society" (1983) 31 *UCLA Law Review* p.6

of disputes.[31] Should such factors be met with a the over-litigation of the citizen and the subsequent over-involvement of the judiciary in such disputes, then it is conceivable that the culture of dispute as witnessed in the United States may become entrenched in British construction. This is not to say, however, that disputes are a phenomenon of contemporary society alone. Indeed, as will become clear, legal history demonstrates that dispute resolution mechanisms have been of concern to the industrial sector for many centuries.

## The Development of Dispute Resolution Mechanisms In Context

Dispute resolution mechanisms have been of paramount importance to the commercial sector since the establishment of a formalised system of trade. Indeed, the origins of the British courts are long established[32] and it was out of commercial need that the first seeds of alternatives to court proceedings, namely arbitration[33] and

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[31] Ibid

[32] For a full exposition of early litigation see: Avery "The History of the Equitable Jurisdiction of Chancery Before 1460" (1969) XLII *Bulletin of the Institute of Historical Research* p.129-44; Blatcher "The Court of the King's Bench 1450 – 1550: A Study in Self-Help" (1978) Athlone Press; Bonfield "The Nature of Customary Law in the Manor Courts of Medieval England" (1989) 31 *Comparative Studies in Society and History* p.514-34; idem "Procedural Innovation and Institutional Change in Medieval English Manorial Courts" (1992) 10 *Law and History Review* p.197-252; idem "Trial by Ordeal: the Key to Proof in the Early Common Law" in M. Arnold et al., eds, On the Laws and Customs of England. Essays in Honour of Samuel E Thorpe (Chapel Hill, NC, 1981) 90 – 126; Chapman "Litigation in the Boroughs: the Shrewsbury Curia Parva 1480 – 1730" (1994) 15 *Journal of Legal History* 3 p.201-222; Davies and Fouracre "The Settlement of Disputes in Early Medieval Europe" (1992) Cambridge University Press; Harding "The Law Courts of Medieval England" (1973) Allen and Unwin; Johnstone "Disputes and Democracy: The Consequences of Litigation in Ancient Athens" (1999) University of Texas Press.

[33] For a full exposition of the development of arbitration see: Asouzu "International Commercial Arbitration and African States: Practice, Participation and Institutional Development" (2001) Cambridge University Press; Beckerman "Towards a System of Medieval Manorial Adjudication: The Nature of Customary Judgements in a System of Customary Law" (1995) 13 *Law and History Review* p.1-22; Kavass and Lilvak "UNCITRAL Model Law of Internation Commercial Arbitration: A Documentary History" (1985) William S Hein & Co; Kellor "American Arbitration: Its History, Functions and Achievements" (1972) Kennikat Publishing; Moore "International Adjudications Ancient and Modern History and Documents Together With Mediatorial Reports, Advisory Opinions and Decisions of Domestic Commissions" (1996) William S Hein & Co; Sir M. J. Mustill "Arbitration: History and Background" (1989) 6 *Journal of International Arbitration* p.43-56; Parker "The History and Development of Commercial Arbitration and Recent Developments in the Supervisory Powers of

later adjudication, were sown. As analysis will demonstrate, contemporary alternatives to litigation have in effect returned to their medieval beginnings: following a period in which dispute resolution was strictly confined by the hand of the State, contemporary mechanisms now seek to employ less rigid, more industry-led solutions.

The use of dispute resolution methods outside the commercial courts can be traced to the initial emergence of national and international trade.[34] During the Middle Ages, merchant traders were extensively engaged in the importing and exporting of goods such as cloth and metals, basing much of their trade on credit terms via bills of exchange which were valid throughout Europe. The emergence of such a complicated nexus of trade and finance obviously brought with it disputes concerning goods and payment. However, the concern of the early Royal Courts primarily involved disagreements over land and conduct detrimental to the King' peace. Thus, any contract or commercial credit formed with a foreign trader was almost wholly unenforceable in England. Moreover, any writ that was issued against a tradesman was of little practical effect, as the writ issuing procedure was so lacking in expedition, that by time the aggrieved party had obtained the writ, the offending tradesman had already passed through the jurisdiction and onto another town. Worse still, should the trading agreement involve a foreign party, the jurisdiction of the English Court could be ousted from the outset by the necessity to prove venue in

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the Courts Over Inferior Tribunals" (Lionel Cohen Lectures, 5th Series) (1959) Oxford University Press; Powell "Settlement of Disputes by Arbitration in Fifteenth-Century England" (1984) 2 *Law and History Review* p.21-43; idem "Arbitration and the Law in England in the later Middle Ages" (1983) 33 *Transactions of the Royal Historical Society 5th Ser.* p.49-67; Roebuck "Sources for the History of Arbitration: A Bibliographical Introduction" (1998) 14 *Arbitration International* 3 p.237- 343; Sanders "New Trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other International Institutions" (1983) ICCA Congress Series, Kluwer Law International.

[34] See Parker "The History and Development of Commercial Arbitration and Recent Developments in the Supervisory Powers of the Courts Over Inferior Tribunals" (Lionel Cohen Lectures, 5th Series) (1959) Oxford University Press p5

England. Thus, the lack of support from the Royal Courts meant that the merchant traders began to rely upon specialised tribunals to resolve their domestic and international trading disputes - The Borough Courts,[35] The Fair Courts[36] and The Staple Courts.[37]

**The Development and Evolution of the Specialist Tribunals**

Whilst The Borough Courts were not concerned solely with commercial matters, commercial disputes did prevail at The Fair Courts and the Staple Courts and it is here that the first seeds of contemporary arbitration were sown. For whilst usually under the control of an officer of the manor or borough where the trading fair was held, on occasion, The Fair Court did permit the declaration of the law and its subsequent enforcement by the merchants themselves.[38] Moreover, the desire for expediency in such cases led to the gradual relaxation of strict procedure, such as the commencing of pleas without writ.[39]

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[35] So called as they were convened under the jurisdiction of the surrounding locality.

[36] Often referred to as "piepowder" courts as the procedures were so swift that the participants still had dust from the fairground on their feet. See Stewart "Arbitration and Insurance Without the Common Law" (2004) 3 *ARIAS-US Quarterly*

[37] So called as they were convened in staple towns.

[38] See Baker "The Law Merchant and The common Law Before 1700" (1979) 38 *Cambridge Law Journal* 295; Bermen "Law and Revolution: The Formation of the Western Legal Tradition" (1983) Harvard University Press; Bewes "The Romance of the Law Merchant" (1923) Sweet &Maxwell; Mitchell "*An Essay on the Early History of the Law Merchant: Being the Yorke Prize Essay For the Year 1903*" (1904) Cambridge University Press; Teetor "England's Earliest Treaties on the Law Merchant: The Essay on Lex Mercatoria From the Little Red Book of Bristol (circa AD 1280)" (1962) 6 *American Journal of Legal History* 178

[39] See Burdick "What is the Law Merchant?" (1902) 2 *Columbia Law Review* 470

Similarly, the Staple Courts under the Statute of Staples 1353, provided for the determination of merchant disputes according to the Law Merchant.[40] Most significant, however, was that whilst the tribunal usually consisted of the Mayor who had a knowledge of the law merchant and two "convenienable constables", where the interests of an alien merchant were affected, they were to be associated with two "merchant strangers" who had been elected by the merchantile community. Where the dispute concerned the quality of a good, six commercial assessors were to be appointed,[41] the decision of whom was to be final and binding upon the mayor and constables. Interestingly, this theme of industrial self-regulation was continued by the merchant guilds themselves, who often maintained arbitral tribunals for the use of their members.

With the social, political and economic turbulence of the sixteenth century, however, there began a gradual decline of industrial self-regulation and the introduction of greater state regulation and control. Following the industrial revolution came the evolution of the financier, the entrepreneur and the joint stock company and there began the resolve of the common law courts to involve themselves with commercial matters.[42] Contrary to popular mythology, state regulation of arbitration did not emerge so as to merely further the interests of an all-prevailing government. Rather, it developed in response to the business community's distrust and dislike of court intervention in arbitral proceedings.[43] Despite the fact that the common law conferred

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[40] See Parker "The History and Development of Commercial Arbitration and Recent Developments in the Supervisory Powers of the Courts Over Inferior Tribunals" (Lionel Cohen Lectures, 5th Series) (1959) Oxford University Press p5

[41] Four of whom were to be of non-English origin.

[42] See Parker "The History and Development of Commercial Arbitration and Recent Developments in the Supervisory Powers of the Courts Over Inferior Tribunals" (Lionel Cohen Lectures, 5th Series) (1959) Oxford University Press p5

[43] By the Seventeenth Century, the common law courts had passed enough judgements on the nature and character of arbitration, that a detailed body of law on the elements necessary for arbitration could

great power upon the arbitrator and gave to him the freedom to judge according to legal and non-legal principles,[44] the courts assertion of a role in the settlement of business disputes was not universally accepted by an industry that had functioned on the basis of self-regulation. By utilising statutory regulation, Parliament initially attempted to forge a partnership between legal professionals on the one hand and the business community on the other. Indeed, in 1571 legislation was passed to confer bankruptcy jurisdiction upon a tribunal of commissioners composed partly of lawyers and partly of merchants. Such coalition legislation was furthered in 1601, when a special court consisting of both lawyers and merchants was established for the settlement of insurance issues in London. Thus, prima facie, an equal balance was struck between the desire of the common law Courts to intervene and the desire of the business community for self-regulation.

By the turn of the Eighteenth Century, however, judicial intervention began to extend beyond the bounds of coalition. The exact reason for such is unknown, but three differing theories have been espoused in explanation: nature; nurture; and necessity.[45] The naturalist theory of court intervention presumes that the extension of court jurisdiction was a result of the natural desire of the judiciary to keep all adjudications within their sphere. Similarly, the nurture theory purports that the extension of judicial intervention was in reaction to the fear that a new system of law was developing beyond their control. So as to regulate such and thereby maintain the

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be identified. Indeed, many of these "elements" remain a requirement of contemporary arbitration. For example, it remains the case that the arbitral award must be lawful and must not interfere with an Order of the Court. Moreover, legislative provision has frequently identified the fact that an arbitral award is to be final and binding on the parties and must be produced within a specified period of time.

[44] See Davis & Fouracre "The Settlement of Disputes in Medieval Europe" (1992) Cambridge University Press; Powell "Settlement of Disputes by Arbitration in Fifteenth Century England" (1984) 2 *HLR* 21-43

[45] Loc Cit 42

position of the court in the legal hierarchy, the court began to extend its jurisdiction over arbitral proceedings. More convincing than such theories of insecurity, however, is the theory that the growing intervention of the court was due to the need of arbitral parties to secure the assistance of the courts in pursuing their claim, which in turn led to the courts exacting a price for their assistance. That is, although there were several means of pursuing a claim through arbitration,[46] the only method that afforded any success was in making a submission to arbitration an Order of the Court, as failure to abide by the arbitral award could then result in prosecution for contempt of Court. In utilising the powers of the judiciary, therefore, compliance with arbitral proceedings was almost guaranteed.

The importance of judicial powers to the success of arbitration was recognised by the Arbitration Act 1698 which extended the scope of submission to arbitration. For as Lord Mansfield exemplified in *Markham v Wilton*[47] the Act served to "put submissions to arbitration in cases where there was no cause depending, upon the same foot as those where there was a cause depending". This meant that informal arbitrations that were previously seen to be mere personal obligations assumed by the parties were accorded status by the 1698 Act. In addition to such statutory recognition, however, legislative provision was also made as regards supervision of the proceedings. That is, the Act provided that "any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect and accordingly be set aside by any court of law or equity". Thus, the introduction of the 1698 Arbitration Act marked the introduction of greater judicial intervention into arbitral proceedings.

[46] By covenant; condition; parol contract; or by consent at Assizes, the submission being made a Court Order.
[47] (1759) 2 Burr 701

Such judicial intervention soon extended to encompass the monitoring of arbitrators so as to ensure that they acted within the submission.[48] As exemplified in the 1703 case of *Morris v Reynolds*[49] it was not long before the integrity of an arbitrator could also be examined via the judicial process. Whilst such examination was initially confined to whether or not the arbitrators were "manifestly corrupt",[50] it was not long before the judiciary were willing to "take into consideration such legal objections as appear on the face of the award and such as go to the misbehaviour of the arbitrators".[51] However, as stated by Lord Commissioner Wilson in *Morgan v Mather*[52], in order for the arbitral award to be set aside on the grounds of mistake as to law, the arbitrator need first admit his mistake. By 1802 the rules had widened further, enabling an arbitral award to be set aside for mistake where the mistake was apparent on the face of the award or in the reasoning provided by the arbitrator at the time of the award.[53] However, it was not until the Common Law Procedure Act 1854 that the control of the commercial tribunal came to fall under the jurisdiction of the ordinary law courts. Under the 1854 Act, authority was conferred upon the judiciary to stay proceedings to arbitration where arbitration was the agreed method of dispute resolution, thus avoiding the pursuit of unnecessary claims through the courts. Moreover, provision was made so as to permit the court to appoint both arbitrators and umpires in the event of difficulties arising on default and authority was conferred so as to enable the judiciary to remit an award back to an arbitrator who was then able

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[48] It should be noted that questions of procedure affecting "natural justice" were not considered (*Matthew v Ollerton* (1693) 4 Mod 226)
[49] (1703) 2 Ld Rayon 857
[50] *Anderson v Coxeter* (1720) 93 ER 534
[51] *Lucas ex d Markham v Wilton* (1759) 2 Burr 701
[52] (1792) 2 Ves Jun 15 at p.18
[53] *Kent v Elstob* (1802) 3 East 18 (Kings Bench in banc. See also *Blennerhasset v Day* (1811) 2 Ball & B. 104; *Steff v Andrews* (1816) 2 Mad. 6; *Ames v Milward* (1818) 8 Taunt. 637; *Stimpson v Emmerson* (1847) 9 L.T. (O.S) 199; *Hodgkinson v Fernie* (1857) 3 CB (N.S) 189.

to state a question of law for the determination of the court.[54] Thus, as can be seen, it was the Common Law Procedure Act of 1854 that marked the true beginning of "state controlled arbitration".

Ironically and as will become clear, it was commercial development that led to the further extension of state restrained arbitration. With the increasing complexity of commercial matters came the need for the implementation of greater comprehensive provisions to govern the resolution of disputes. An example of such can be seen in the development of the steam ship which made London the capital of the trading world, as the increase in trade brought about by more expedient transportation led to an increase in disputes that required speedy resolution.[55] Indeed, dissatisfaction with the arbitration process during the industrial revolution was apparent in that when discussing the resolution of an insolvency dispute, it was stated that:

> "..something better might be found than arbitration, which is well known to all who have tried it to be at once costly, uncertain, and unsatisfactory".[56]

**The Development of the Modern Law**

So as to alleviate the situation whereby commercial matters were being dealt with in an arena unsuited to the needs of industry, the closing stages of the Nineteenth Century witnessed several reforms. Codification of the commercial law heralded a new approach to the method by which the law was created, interpreted and

[54] Known as the Case Stated Procedure
[55] See Parker "The History and Development of Commercial Arbitration and Recent Developments in the Supervisory Powers of the Courts Over Inferior Tribunals" (Lionel Cohen Lectures, 5th Series) (1959) Oxford University Press p19
[56] Letter to the Editor, *The Times*, Thurs, Apr 04, 1872; pg. 6; Issue 27342; col B

implemented. In short, codification sought to both state and reform the existing law. Specialist courts were also developed to deal with the specific needs of an increasingly diverse economy and in addition to such centralised reforms, the commercial sector developed it own solution to the increasing numbers of disputes - the standard form contract.

The codification of the Law

Given the profound social, political and economic effects of the industrial revolution, continental countries and later the United States of America, sought to codify the entire body of their mercantile law. Such codification attempted to lay down abstract principles that were of general application so as to present the law in a logical and easily accessible fashion. Due to the effects of legal precedent, however, the codification of British law was less complete. Rather than codify an entire body of law, it was anticipated that codification could be achieved by passing legislation on specific topics. It is often believed that Sir MacKenzie Chalmers was responsible for the codification of commercial law. Indeed, it was he who drafted the Companies Act 1862, the Bills of Exchange Act 1882,[57] the Sale of Goods Act 1893[58] and the Marine Insurance Act 1906.[59] However, codification was also enacted on the impetus of other interest groups. For example, Sir Frederick Pollock drafted The Partnership Act

[57] The Bills of Exchange Act was the first Act to codify any branch of common law. The formation of the Bill was instructed by the Institute of Bankers and the Associated Chambers of Commerce. It was introduced into the House of Commons by Sir John Lubbock (afterwards Lord Avebury) and was referred to a committee of lawyers and bankers over which Herschell presided. Its passage through Parliament was rapid. See Chalmers "Bills of Exchange Act 1882" (1967) Waterlow.

[58] In consultation with Lord Herschell, Chalmers drafted the Bill that led to the creation of the Act. It substantially formulated the method of transfer of personal property. See Mackenzie, Dalzell, Edwin, Stewart & Chalmers "Sale of Goods Act, 1893, including the Factors Acts, 1889 & 1890" (1957) Butterworth.

[59] See Ivamy and Hardy "Chalmers Marine Insurance Act 1906" (10th Ed) (1993) Witherby's Publishing

1890 and the legislation appertaining to arbitration in 1889 was both initiated by and prepared at the expense of the London Chamber of Commerce. In short, codification of the commercial law in the nineteenth century was personality-led.[60]

Turning to consider the codification of arbitral law, although a contentious decision, it was perhaps a consequence of the decision of the Court in *Scott v Avery,*[61] together with the procedural shortfalls experienced by the commercial community when utilising arbitration, which highlighted the need for the consolidation of the law of arbitration. Thus, in 1889, statutory legislation was introduced in the form of the "Act for Amending and Consolidating the Enactments Relating to Arbitration". The passage of the Arbitration Bill through Parliament was rapid. Presented for a first reading on the 22nd February 1889, the Bill received royal assent on the 26th August. The 1889 Arbitration Act repealed all previous legislation on arbitration and sought to extend the power and authority of the court. This was achieved by conferring upon the court a statutory power to set aside an arbitral award on the grounds of misconduct[62] and enabling the court to require an arbitrator to state his award in the form of a special case,[63] thereby permitting the court to "adjudicate on any point of law arising in the reference". Thus, in so doing, intentionally or otherwise, the British judiciary were in effect promoted to the position of "state police" of the arbitral process.

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[60] See Alan "The Codification of Commercial Law in Victorian Britain" (1992) 108 *LQR* p.570-90; Boss and Fry "Divergent or Parallel Tracks: International and Domestic Codification of Commercial Law" (1992) 47 *The Business Lawyer* p.1505-15; Goode "The Codification of Commercial Law" (1988) 14 *Monash University Law Review* p.135-57

[61] In 1856 the House of Lords decided in *Scott v Avery* that an arbitration agreement that attempted to oust the court's jurisdiction would be contrary to public policy and thereby void. However, it was held that a provision making the arbitrator's award a condition precedent to the right to bring an action before the court, was enforceable. In short, under *Scott v Avery* the jurisdiction of the Court cannot be ousted, but it may be deferred. See Thomas "Scott v Avery Agreements" (1991) 4 *Lloyd's Maritime & Commercial Law Quarterly* p.508-30.

[62] S11

[63] S10

Aside from the ensuing theoretical issues, such judicial intervention brought with it problems of a practical nature. For the court system was already in undated with trial cases on practice and procedure that resulted from the introduction of the Rules of the Supreme Court 1883 and not enough preparation had been made to deal with the resulting caseload that emerged from the special case procedure. This situation was exacerbated by the fact that many judges dealing with commercial cases were ignorant of commercial matters. Indeed, as Lord Justice Scrutton contended in *Butcher, Wetherby & Co Ltd v Norman:*[64]

> "One of the objects of justice is to satisfy the litigants that their cases are fairly and properly heard, and unfortunately, some classes of commercial cases are so complex in their nature that a Judge who is not conversant with that class of commercial business has to have a great many explanations made to him in the course of a case..."

The Introduction of Specialist Courts

Given the increasing complexity of commercial disputes and the difficulties thereby created, two new offices were introduced in the closing stages of the nineteenth century. In 1873 the office of the Official Referee was created and further reform followed in 1895 with the introduction of the commercial "court" and publication of the rules for commercial causes.

The office of the Official Referee was created by s83 of the Judicature Act 1873 and was initially strictly limited to the investigation and reporting on matters of fact which

[64] 47 LI LR 324

had been referred by the Court to the Official Referee for that purpose.[65] In so far as the commercial court was concerned, its inception was largely accounted for by the will of the judiciary of the Queens Bench Division who determined that cases which had been commenced in their division and which contained commercial matters should be transferred to a special list known as the "commercial list". The list was managed by a single Queens Bench judge who alone took charge of the list and heard applications for transfer to that list and the interlocutory matters and trials of the cases which were subsequently entered on it. It was anticipated that in providing a specialist judge to identify the issues involved at an early stage without protracted hearings or multiple interlocutory applications, then the swifter resolution of commercial disputes would be achieved.[66] Indeed, it would prima facie appear that upon its creation, the commercial court achieved its ambition:

> "It is gratifying to have to record at a time when so much complaint is being made about the stagnation of business in the Queen's Bench Division, that the Commercial Court is at any rate an exception to the general rule. Mr Justice Matthew had set down for hearing yesterday morning a list of 45 summonses in commercial causes, all of which he disposed of in about two hours and a-half."[67]

[65] See His Honour Edgar Fay QC "Official Referees Business" (2nd ed) (1988) Sweet & Maxwell p9 – 22.

[66] It is interesting to note that within fifty years of its inception, the number of trials entering the commercial list began to decline. Indeed the numbers fell from 32 cases in 1952 to 15 in 1957. Given this rate of decline, a Commercial Court User's Conference was convened to investigate the decline and to determine the future of the commercial court. In 1962 it concluded that subject to certain reforms, the Commercial List should continue. Following provision for the direct entry onto the list, a steady increase in numbers of actions entered on the List and the numbers of actions listed for trial ensued. By way of example, the numbers of cases listed for trial rose from 128 in 1975 to 408 in 1980.

[67] See *The Times* Saturday Dec 14th 1895; pg 7; Issue 34760; col B

It is interesting to note that as the cost and duration of commercial litigation increased and as the hand of the state further extended into arbitral proceedings, so the construction industry devised another mechanism of self-governance that remains today – the standard form contract.[68]

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[68] For an exposition of the need, use and role of standard form contracts, see: Abdel-Latif and Nugent "Transaction Cost Impairments to International Trade: Lessons from Egypt" (1996) 14 *Contemporary Economic Policy* 2 p1-14; Ayres and Gertner "Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules" (1992) 101*Yale Law Journal* 4 p729-74; Banwell "The Placing and Management of Contracts for Building and Civil Engineering Works" (1964) HMSO; Beale and Dugdale "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 *British Journal of Law and Society* p45-60; Becker "The Cost of General Conditions" (1993) AACE Transactions; Bennett "Construction Project Management" (1985) Butterworths; Bick "Statutory Reform of Aspects of Construction Law in Australia" (1997) 15 *Construction Management and Economics* 6 p549-58; Bourn "Modernizing Construction" (2001) HC 87 Session 2000-1, London: National Audit Office; Bowdery "New age contract" In Uff (Ed.) "Contemporary Issues in Construction Law 2 - Construction Contract Reform: A Plea for Sanity" (1997) Centre for Construction Law and Management; British Standards Institution "Design Management Systems - Part 4, Guide to Managing Design in Construction" (1997) British Standards Institution; Cabinet Office Efficiency Unit "Construction Procurement by Government: An Efficiency Office Scrutiny (the Levene report)" (1995) HMSO; Construction Industry Board "Constructing Success: Code of Practice for Clients of the Construction Industry" (1997) Thomas Telford; Cooter "Unity in Tort, Contract, and Property: The Model of Precaution" (1985) 73 *California Law Review* 2 p.1-51; Cox and Thompson "Is the NEC Going to Succeed? An Examination of the Engineering and Construction Contract" (1996) 13 *International Construction Law Review* p.327-37; Cox and Townsend "Latham as Half-Way House: A Relational Competence Approach to Better Practice in Construction Procurement" (1997) 4 *Engineering, Construction and Architectural Management* 2 p.143-58; Eggleston "The New Engineering Contract: A Commentary" (1996) Blackwell Science; Emmerson "Survey of Problems Before the Construction Industry" (1962) HMSO; Gaitskell "Is Latham Correct? A Survey of Construction Industry Opinion" In: Uff (Ed.) "Construction Law Yearbook" (1995) Chancery Law Publishing Ltd; Galbraith "Designing Complex Organizations" (1973) Addison-Wesley; Gray and Flanagan "The Changing Role of Specialist and Trade Contractors" (1989) Chartered Institute of Building; Greenwood "Contractual Arrangements and Conditions of Contracts for the Engagement of Specialist Engineering Contractors for Construction Projects" (1993) University of Northumbria/Confederation of Associations of Specialist Engineering Contractors; Grimsey and Graham "PFI in the NHS" (1997) 4 *Engineering, Construction and Architectural Management* 3 p.215-31; Hughes "Analysing Plans of Work" (2001) 8 *Engineering, Construction and Architectural Management* 4 p.272-83; Hughes and Greenwood "The Standardization of Contracts for Construction" (1996) 13 *International Construction Law Review* 2 p.196-206; Hughes and Maeda "Construction Contract Policy: Do We Mean What We Say?" (2001) 6 *RICS Research Papers* 7; Hughes, Gray and Murdoch "Specialist Trade Contracting: Report" (1997) Special Report SP 138, Construction Industry Research and Information Association; Huxtable "Corruption of the Commercial Process. Report from the Confederation of Construction Specialists" (1983) CCS Services Ltd; Langford and Murray "Construction Reports 1944-1998" (2003) Blackwell Publishing; Latham "Constructing the Team: Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry" (1994) HMSO; Lingard, Hughes and Chinyio "The Impact of Contractor Selection Method on Transaction Costs: A Review" (1998) 4 *Journal of Construction Procurement* 2 p.89-102; Matthews, Tyler and Thorpe "Pre-Construction Project Partnering: Developing the Process" (1996) 3 *Engineering, Construction and Architectural Management* (1/2) p.117-31; McGowan, Horner, Jones and Thompson "Allocation and Evaluation of Risk in Construction Contracts" In: Harlow (Ed.)

The purpose behind the introduction of standard form contracts was so as to remove the necessity for each building or engineering contract to be individually negotiated and drafted. Not only were such contracts intended to lessen the expense incurred in the formulation and administration of the project, but they also served to ensure an equal balance of power between the parties in the apportioning of responsibility and contractual expectations. Furthermore, such contracts were seen to improve project co-ordination and were thought to be an efficient method of reducing information and documentation requirements. However, the use of such contracts has been and remains controversial in that they do not force parties to a contract to think about roles and responsibilities at the outset of each project and as such, are a barrier to effective risk allocation.[69] Furthermore, doubt has been expressed as to whether standard contractual terms could simultaneously be clear, flexible and fair.[70] Indeed, it would appear that the standard form contract has done little to reduce the numbers of disputes. A precursory glance at the nature of the construction industry provides an explanation, in that construction practices frequently change, thereby subjecting

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"CIOB Occasional Papers" (1992) Chartered Institute of Building; Nettleton "Best Value and Direct Services" (2000) 139 *ICE Proceedings: Municipal Engineer* 2 p.83-90; Omoto "A Comparative Study of British and Japanese Construction Contracts" (1996) 13 *International Construction Law Review* 4 p.451-81; Pasquire and Collins "The Effect of Competitive Tendering on Value in Construction" (1996) 2 *RICS Research Papers* 5 p.1-32; Posner and Rosenfield "Impossibility and Related Doctrines in Contract Law: An Economic Analysis" (1977) 6 *Journal of Legal Studies* p.83-118; Rooke and Seymour "The NEC and the Culture of the Industry: Some Early Findings Regarding Possible Sources of Resistance to Change" (1995) 2 *Engineering, Construction and Architectural Management* 4 p.287-305; Royal Institution of British Architects "Plan of Work for Design Team Operation" (1997) RIBA Publications Ltd; Sidney "Japanese Construction: An American Perspective" (1990) Van Nostrand Reinhold; Thompson and Perry Eds. "Engineering Construction Risks: A Guide to Project Risk Analysis and Risk Management" (1992) Thomas Telford; Uff "Contract Documents and the Division of Risk" In: Uff and Odams (Eds.) "7th Annual Construction Law Conference: Risk Management and Procurement in Construction, King's College, London" (1994) Centre for Construction Law and Management p49-69; Uff "Compulsory Adjudication and its Effects on the Construction Industry" In: Uff (Ed.) "Construction Contract Reform: A Plea for Sanity" (1997) Centre for Construction Law and Management; Wearne "Contract Administration and Project Risks" (1992) 10 *International Journal of Project Management* 1; Yates "Standard Business Contracts: Exclusion and Related Devices" (1986) Sweet and Maxwell; Yule "Back to Back Contracting" In: Harlow (Ed.) "Construction Papers" (1995) Chartered Institute of Building.

[69] See Thompson and Perry "Engineering Construction Risks: A Guide to Project Risk Analysis and Risk Management" (1992) Thomas Telford; Yule "Back to Back Contracting" (1995). In: Harlow (Ed.) 48 "Construction Papers" Ascot: Chartered Institute of Building.

[70] Ibid.

projects to many new situations that a standard form contract cannot deal with, or cannot deal with without legal interpretation. Furthermore, whilst standard form contracts may stipulate payment provisions, disputes will always continue as to whether such payment is indeed due under the terms of the contract. Thus, whilst standard forms may lessen the initial financial outlay in the negotiation stage, they cannot be seen as a guarantee of a dispute-free project.[71]

## Legislative Reform in the Twentieth Century

Despite the attempts to reform the civil justice system in the Nineteenth Century, difficulties in the resolution of commercial disputes persisted. Thus, in 1950 and 1979 arbitration received significant statutory attention once more. However, it was not until the closing stages of the twentieth century that legislation was enacted so as to effectively reform access to justice: namely the Arbitration Act 1996, The Housing Grants Construction and Regeneration Act 1996 and the Civil Procedure Rules 1998.

[71] So as to minimise the effects of such, standard form contracts are periodically reviewed and recent history has witnessed the overhaul of a number of such documents. Furthermore, in recognition of the limitations of such contractual undertakings, the JCT has recently endorsed a new approach to contract formation and is expected to adopt such an approach as the basis of their future contract-drafting policy.

**The Arbitration Act 1950**

When debating the effect of the Arbitration Bill that was presented to Parliament in 1950, it was stated that:

> "...I think a very good job has been done. It was a job which required doing. It will be of great help to the legal profession and will give help to the public".[72]

It is clear from such sentiment that the intention of the 1950 legislation was to simplify the law surrounding arbitration proceedings so as to render arbitration accessible to all. However, whilst the 1950 Act did consolidate the Arbitration Acts 1889 to 1934, a number of legislative lacunas remained, producing undesirable results.

Primarily, the drafting of the statute was such that its structure was illogical. Rather than following the process of arbitration and beginning with the appointment procedure of the arbitral tribunal, for example, the 1950 Act began with the irrevocability of the authority of arbitrators, moving on to the effect of the death of a party in s2 and proceeding on to the effect of bankruptcy in s3. Moreover, the powers of the Court to deal with challenges to the arbitral process were spread out over four non-consecutive sections. Thus, parties wishing to use the Act for clear and concise guidance as to how the arbitral process ought be conducted were left confused. Furthermore, not only was the language of the 1950 Act obscure and unnecessarily complicated, but some of the principles enshrined in the Act were also unintelligible to the layman. For example, so confusing was the "deeming provision" to foreign

[72] Parliamentary Debates, House of Commons, 1950 Vol 478 p824

users of the 1950 Act that several arbitration agreements in England and abroad were rendered unenforceable.

Despite being a long established mechanism of dispute resolution, the 1950 Act also failed to provide a definitive code of arbitration law. For example, s10[73] failed to confer a power upon the court to appoint an arbitrator where the contract specified an appointing body that subsequently failed or refused to make an appointment.[74] The 1950 Act also said little about the powers of the arbitrator and failed to provide guidance as to the conduct of the reference and the procedural problems incurred therein. Indeed, whilst the 1950 legislation conferred upon the arbitrator a number of discretionary powers,[75] it failed to give guidance on when and how these powers should be exercised. Rather, these issues and more were left to the individual contract and the interpretation of the arbitrator. Such practice led to a number of very different and far-reaching problems. Firstly, due to the structure of arbitration being based upon both common law and statute, the resolution of technical disputes necessarily became the province of those skilled in the law, rather than those with expertise in the construction industry. Secondly, in not providing a complete and methodical exposition of the law, the legislature served only to permit excessive judicial intervention into the arbitral process, as the lack of legislative provision gave forth to the belief amongst some contracting parties that the arbitrator lacked 'legislative

[73] S10 empowers the High Court to appoint an arbitrator or umpire in the case various circumstances.
[74] See *National Enterprises Ltd v Racal Communications Ltd* [1974] 2 Lloyd's Reports 21. It is interesting to note that s9(1) was also unpopular with the commercial sector in that where an arbitration agreement provides that the reference to arbitration should be to three arbitrators, one to be appointed by each of the parties to the dispute and the third to be appointed by those arbitrators, s9(1) converts the third arbitrator into an umpire. The effect of such a conversion is that the third appointee is devoid of jurisdiction unless and until there is a disagreement between the two party-appointed arbitrators. Commercial entities were dissatisfied with such a provision on the grounds that had they wanted an umpire, they would have appointed one. In short, Parliament had denied parties of their right to determine how their dispute is to be resolved.
[75] For example, the power to make an interim award and an award as to costs.

authority'. This situation was worsened by the fact that under the auspices of the 1950 Arbitration Act, contracting parties had wide grounds to appeal an arbitrator's actions. Not only could an arbitrator's interpretation of the law be challenged by implementation of the stated special procedure under s21 of the 1950 Act,[76] but any subsequent award could also be challenged by appeal to the Court, either to remit the award to the arbitrator for re-consideration, or to set it aside for his 'misconduct'.[77]

Whilst the case stated procedure suited the needs of industry in that it reduced the time and resources lost to the complete re-arbitration of proceedings upon the quashing of an appeal and also served initially to provide consistency, coherence and predictability,[78] the procedure soon came to be abused. For as the Solicitor-General[79] later asserted, although the Arbitration Act 1950 prima facie gave the arbitrator a discretion as to whether or not to state his award in the form of a special case,[80] the reality was that the arbitrator usually adopted the special case procedure on the application of any of the parties to the arbitration. Indeed, case law suggested that where a point of law arose, the arbitrator should adopt the special case stated procedure even if the financial sums involved were minimal, no point of general importance was raised, or even where the answer to the question was reasonably

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[76] The Special Case Stated Procedure was a nineteenth century adaptation of a similar procedure utilised by the criminal courts of Quarter Sessions and was originally applied to arbitration by the Common Law Procedure Act 1854. S21 applied to all arbitrations conducted within England and Wales where the question concerned English law. Under this section, an arbitrator may, and if so directed by the High Court, must state his award or part of that award or any question of law arising in the course of the reference, in the form of a special case for the opinion of the High Court. Under *Czarnikow v Roth, Schmidt and Company* [1922] 2 K.B. 478 it was determined that on public policy grounds, parties to an arbitration agreement could not contract out of their statutory right to obtain an order for an arbitrator to state his award in the form of a special case.

[77] In contrast to the suggestion of such terminology, misconduct does not simply apply to dishonesty or a breach of business morality on the part of the arbitrator. It also applies to errors of procedure, fact or law. Consequently, the use of such terminology was both unpopular and misleading.

[78] So as to ensure the certainty of rights and duties in a system in which individual arbitrators are not bound by the decisions of others, extensive judicial review was seen to be essential.

[79] Solicitor-General p.637 Hansard 14/3/79

[80] Subject to a discretion in the High Court to order him to do so.

clear.[81] Moreover, where an arbitrator refused, the Court would invariably order him to do so. As a result, it soon became clear to unscrupulous parties involved in large disputes, that such a system could be manipulated for financial gain.[82] For in delaying the date upon which the award made by the arbitrator would become due, the interest added to the sum in question would far outweigh the financial implications of pending litigation. Thus, frivolous and vexatious claims were launched so as to delay the day of reckoning, adversely affecting the dynamics of the commercial market.

Indeed, in challenging the arbitrator's decision, the appealing party lengthened the time required to bring the dispute to a full conclusion. This obviously had financial implications, for not only were the parties responsible for the payment of the court fees incurred whilst pursuing the appeal, but they also had to remunerate the arbitrator for his time at court and any subsequent expenses incurred. The cost of arbitration, therefore, began to substantially rise and it was not inconceivable that the cost of settling a dispute could exceed the value of the claim. Indeed, the rising arbitral costs often meant that the wealthier the contracting party, the more able the party to pursue the case to a unilaterally favourable conclusion. Thus, as with pure litigation, contracting parties ran the risk of arbitral proceedings dispensing what can only be termed, "rough justice". A further damaging consequence was that not only did such activity create uncertainty as to the finality of the arbitral award, but it also undermined the valuable effect that privacy had upon the arbitration proceedings. Indeed, parties could no longer be assured that the disclosure given in the course of arbitration would remain inaccessible to non-contracting parties and thus there was a

[81] See *Halfdan, Grieg & Co. A.S. v Sterling Coal Navigation Corp (The Lysland)* [1973] 1 QB 843.
[82] See Diplock "Use and Abuse of the Case Stated" (1978) 44 *Arbitration* 107

general reluctance to co-operate fully with the arbitrator. As Sir Patrick Neil QC[83] later stated:

> "It would be difficult to conceive of any greater threat to the success of English arbitration than the removal of the general principles of confidentiality and privacy".

Upon examination, therefore, it becomes clear that arbitration under the Arbitration Act 1950, failed to encompass the traditionally perceived arbitral advantages over litigation, namely speed, low costs, finality and the ability to select the individuals who are to resolve the dispute. Due to the inconsistency of the reality of arbitration with the needs and desires of businessmen, British arbitration began to lose its attractiveness to those at home and abroad.

**The Arbitration Act 1979**

Towards the end of the 1970's it had become clear that the process of judicial review was undermining the usefulness of tribunal decisions. Academic writers, interest groups such as the London Arbitration Group, the Institute of Arbitrators and the Joint Committee of the London Court of Arbitration, together with the judiciary[84] voiced their concerns with regard to arbitration and proposed methods for its reform. Significantly, in 1977 the Lord Chancellor established the Commercial Court

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[83] Bernstein Lecture 1995, as cited at p.9 of DAC Report 1996.

[84] The judiciary voiced their concerns and methods of reform in the exercise of both their judicial duties (see for example, *Hodgkinson v Fernie* (1857) 3 C.B. (N.S.) 189 at pp.202, 205 as per Williams and Willes JJ; *Champsey Bhara & Co Ltd v Jivraj Balloo Spinning and Weaving Co* [1923] AC 480, 487 as per Lord Dunedin; *R v Northunberland Compensation Appeal Tribunal* [1951] 1 K.B. 711, 721 as per Lord Goddard CJ; *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357, 362 as per Lord Denning MR; *Provimi Hellas A.E v Warinco A.G* [1978] 1 LR 67, 80 as per Mocatta J; *Tradax Export SA v Andre & Cie SA* [1978] 1 LR 639, 642-643 as per Donaldson J) and their extra-judicial undertakings (see letter by Donaldson J to *The Times*, 3 March 1978. Of particular importance, see the Alexander Lecture delivered by Lord Diplock "The Case Stated – Its Use and Abuse" (1978) 44 *Arbitration* 107-116).

Committee, the purpose of which was to establish a link between the Commercial Court and its users. It was the recommendation of this Committee that reform be made to the system of arbitration and a Report ensued highlighting several recommendations.[85] As a result, Lord Hacking commenced parliamentary debate[86] upon the issues identified and the Report of the Commercial Court Committee was published as a Command paper. Indeed, the value of arbitration to the British economy was widely recognised by Parliament and was succinctly described by the Solicitor-General Mr P Archer who stated:

> "The UK is a country which lives by trade to an extent greater than does any other major industrialised country, and for that reason alone it is important that our arbitration law and procedure should be efficient and effective. But there is a further important reason why our arbitration arrangements should compare well with those of other countries. Efficient arbitration is a part of the range of legal, financial and trading services offered here, particularly in the city of London, and, as such, it can be a valuable source of income and foreign exchange".[87]

However, case law and a change in arbitral practice had demonstrated that arbitration under the 1950 Act was unable to provide for the changing needs and wishes of the commercial community. Indeed, it was stated by the Solicitor-General[88] that the "case stated procedure... has become a real deterrent to the use of London as an arbitration centre" both in terms of the abuse of the provision by unscrupulous parties and the reluctance of foreign governments who were often involved in the trading disputes of supranational concerns, to submit to the jurisdiction of a foreign power. Moreover, the English system of arbitration was at procedural odds with its foreign counterparts. Whereas foreign systems of arbitration advocated arbitral autonomy,

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[85] Cmnd.7284
[86] In the House of Lords
[87] Parliamentary Debates, House of Commons, 1979 p.636
[88] Ibid at p.637. See also Diplock "The Case Stated – Its Use and Abuse" (1978) 44 *Arbitration* 107; Hacking "A New Competition – Rivals For Centres of Arbitration" [1979] *LMCLQ* 435

the historical approach of English and Welsh arbitration was that of growing judicial interventionism.[89]

Thus, a new Arbitration Bill was introduced into Parliament, which rapidly became the Arbitration Act 1979. The Act sought to strike a balance between competing needs by reducing the deterrents to arbitration in England and Wales, whilst allowing the continued development of commercial law on a coherent basis. It was observed that the resulting Arbitration Act 1979 "...stands as a significant milestone in the history of English arbitration law" and has served as a model which has been replicated in many foreign common law jurisdictions.[90] Whilst this may be so, analysis demonstrates that fundamental flaws remained still.

Reforming the Constitution of the Arbitral Tribunal

In an attempt to promote procedural efficiency and reduce the cost incurred in arbitral proceedings, the 1979 Act made several amendments to the Arbitration Act 1950 in so far as matters relating to the constitution of the arbitral tribunal were concerned. Under the 1950 Act,[91] an implied term was incorporated into every contract that where a reference was to two arbitrators, upon their appointment the arbitrators should immediately appoint an umpire.[92] Given the required immediacy of such an appointment, no provision could be made to avoid the situation whereby such an appointment was subsequently rendered unnecessary by the agreement of the two party-appointed arbitrators as to the nature of the Award to be made. S6(1) of the

[89] See Kerr "Arbitration and the Courts – The UNCITRAL Model Law" (1984) 50 *Arbitration* 4.
[90] See Thomas "The Law and Practice Relating to Appeals From Arbitration Awards" (1994) LLP pvii
[91] S8(1)
[92] Such an implied term could be displaced by an express term to the contrary.

1979 Act avoided such unnecessary appointments by requiring two arbitrators to appoint an umpire only in the event of non-agreement as to the terms of the Award, prior to which the appointment of an umpire is a discretionary power only.

In so far as three-arbitrator tribunals were concerned, in an attempt to accurately reflect the intentions of the arbitral parties, the 1979 Act removed the legal rule / implied term that favoured umpirage where the third arbitrator was appointed by two party-appointed arbitrators. In short, where it was the intention of arbitral parties to appoint a three arbitrator tribunal, s6(2) facilitated such intention regardless of the procedure adopted for their appointment. Not only did the Act seek to reduce unnecessary tribunal appointments, therefore, but also it sought to remove the bureaucracy that created an arbitral tribunal whose constitution was not in line with party expectation.

Reform Affecting the Judicial Review of Awards

Of greater importance to arbitral efficiency, the 1979 Act sought to realign and restructure the functionality of the court and the arbitral process with regard to questions of law by introducing a new, constrained appellate procedure where a question of law arose from an arbitral award. Indeed, judicial review of an award based upon the common law proposition of "errors of fact or law on the face of the award" and the statutory provided "special case procedure",[93] were both repealed by the 1979 Act in favour of a limited appeal procedure from reasoned awards based

[93] The consultative case procedure was maintained, however, albeit with procedural changes (s2). The advantage of this procedure is that it enables disputed questions of law to be determined at an early stage in the arbitral process so as to facilitate the speedy conclusion of arbitral proceedings and so as to increase the likelihood of a final settlement to the dispute.

upon unanimous party consent[94] or leave of the High Court.[95] This new appeal procedure had two distinct phases: the first being application for leave to appeal;[96] and the second being the substantive appeal.[97] Whereas the first stage of appeal was summary in nature, the second stage was conducted in line with traditional court hearings, with the employment of full legal argument in an open court environment. When determining such an appeal, the court had the power to confirm, vary or set aside the award in question[98] or it could remit the award to the reconsideration of the arbitrator together with the courts opinion on the question of law that was the subject of the appeal.[99]

Not only did such reforms restructure the links between the arbitrator, the award and the court with regard to questions of law, but the Act also redefined the relationship between the arbitrator and the court, creating a greater acceptance of both the finality of arbitral decisions with regard to questions of law and the autonomy of the arbitral process.[100] This was achieved in two ways: firstly, application to the court and appeals from awards on a question of law could be excluded by agreement between the parties; [101] and secondly, appeals without consent were required to be given leave

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[94] S(1)(3)(a)
[95] S1(3)(b)
[96] If leave to appeal was refused, the matter came to a conclusion subject to a limited right of appeal contained in s1(6)(a). The restriction of on-appeals was based upon the policy decision that to prevent cases ascending the hierarchy of the courts, only in exceptional circumstances should leave be granted to appeal a decision of a commercial judge. See Kerr "The Arbitration Act 1979" (1980) 48 *MLR* 45 p.52. See also the opinion of Lord Wilberforce in *Campagnie d'Armement Maritime SA v Campaigne Tunisiemme de Navigation SA* [1971] AC 572 p600.
[97] It was necessarily the case that the second stage of the appeal process only applied where leave to appeal (the first stage) had been granted.
[98] S1(2)(a)
[99] S1(2)(b)
[100] See Thomas "The Law and Practice Relating to Appeals From Arbitration Awards" (1994) LLP
[101] This was a clear change in public policy. See Mann "Private Arbitration and Public Policy" (1985) 4 *CJQ* 257; Mustill "Transnational Arbitration in English Law" pp15-35, in "International Commercial and Maritime Arbitration" (ed Rose) (1987) Sweet & Maxwell; Staughton "Arbitraton Act 1979 – A Pragmatic Compromise" [1979] *NLJ* 920; Thomas "The Law and Practice Relating to Appeals From Arbitration Awards" (1994) LLP Chapter 13

by the High Court.

In respect of the first point, by way of an exclusion agreement, parties were able to contractually exclude the right to apply for leave to appeal a question of law arising out of an award,[102] the right to seek leave to apply for an order for reasons or further reasons,[103] as well as the right to request the court to determine a preliminary question of law arising in the course of a reference under s2.[104] Whilst the power to enter into such an agreement was constrained by the Act,[105] the possibility of contractual severance of the arbitral process from the intervention of the court with regard to questions of law and reasoned awards, rendered some arbitrators the authoritative word on both questions of law and fact.

With regard to the second point, in requiring appeals without consent to be given leave by the High Court, an opportunity was afforded to the judiciary to affirm the finality of arbitral awards.[106] This opportunity was seized and as a result, the ability to appeal an award for error of law was significantly reduced.[107] Indeed, as stated by

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[102] Under s1(2) and s1(3)
[103] Under s1(5) and s1(6)
[104] S3(1)
[105] S3 requires the agreement to be in writing (s3(1)). Whether the agreement constitutes an exclusion agreement will be a question of construction (3(4)), as will be any question as to the scope of a valid exclusion agreement (s3(2)). It is important to note, however, that an exclusion agreement cannot affect the review powers of the court that arise under statutory provisions or common law. The two qualifications with regard to exclusion agreements that arise under the Act are: firstly, where an award is made on or a question of law arising in the course of a reference and which arises under a domestic arbitration agreement, an exclusion agreement is of no effect unless entered into after the commencement of the arbitration in which the award is made or the question of law arises (s3(6)). Secondly, where an award or question of law relates to a special category case (defined as Admiralty jurisdiction of the High Court, contracts of insurance, or commodity contracts), exclusion agreements are of no effect unless either the exclusion agreement is entered into after the commencement of arbitral proceedings or the award or question of law relates to a contract which is expressly governed by a system of law other than that of England and Wales (s4(1)).
[106] See *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* [1989] 1 Lloyds Rep 473, 479 per Hirst J
[107] See Schmitthoff "Commerical Arbitration and the Commercial Court" in "Commercial Law in a Changing Economic Climate" (2nd ed) (1981) Sweet & Maxwell

Sir Thomas Bingham MR:[108]

> "It is generally accepted that those who entrust decisions to arbitrators do so because they wish to rely on the judgement, skill and fairness of those arbitrators. If a decision of the court was what the parties had wanted they would not have chosen to arbitrate. While, therefore, a power in the courts to review arbitral awards on grounds of legal error is preserved, it is, as the authorities show, a power to be exercised with the utmost caution."

This is not to say, however, that the 1979 Act created a wholly autonomous arbitral process. Rather it sought to balance much of the historical ethos of interventionism with the need for greater freedom and finality, producing what has been termed, a legislative compromise.[109]

Such a balance can be seen when examining the interpretation by the judiciary of their discretion to grant leave for judicial review. Prima facie, the discretion accorded by the Act appears unfettered. S1(4) simply states that a Court may grant leave where "the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement" and in granting leave the court may attach any conditions it "considers appropriate". The phrase "substantially affect" was not given a statutory definition and it was left to the Courts to establish its criteria. Despite the discretion afforded, the judiciary interpreted such so as to be in line with the greater finality of arbitration awards, although the criteria subsequently established was so numerous and generalised, so as to allow little predictability about the susceptibility of the award to judicial review.[110]

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[108] *Everglade Maritime Inc v Schiffahrtsgesellschaft Detlef von Appen M.B.H* (The Maria) [1993] 3 All ER 748, 754

[109] See Kerr "The Arbitration Act 1979" (1980) 43 *MLR* 45; Kerr "Commercial Dispute Resolution" in Bos & Brownlie "Liber Amicorum for Lord Wilberforce" (1987) OUP; Staughton "Arbitration Act 1979 – A Pragmatic Compromise" [1979] *NLJ* 920

[110] Ibid

The Conferring of a New Judicial Discretionary Power - Reasoned Awards

The balance between the need for interventionism on the one hand and freedom on the other was furthered in so far as the appeal procedure was implicitly based upon "reasoned" awards. The need for a reasoned award is clear: without documentary evidence as to the reasons of the arbitrator in reaching the award, an exposition of an error of law becomes impossible. So as to effect the new appeal provisions, the 1979 Act conferred upon the judiciary a new discretionary power to direct an arbitrator to give reasons where none have been made,[111] or to give further reasons where insufficient or inadequate reasons have been provided.[112] However, the Act stipulates that the court may not intervene and make such an order on its own volition - the jurisdiction is exercisable only on the instigation of a party to the reference.[113]

An application under this section was usually a precursor to an appeal from an award on a question of law.[114] However, the granting of an order under s1(5) by no means guaranteed that leave to appeal a question of law would be granted – the Court still retained its discretion under s1(3) to refuse leave to appeal. Given that the provision of reasons may serve to validate the legal correctness of the arbitral award, the independence of these two statutory provisions is wholly justifiable. It is important to note however, that s1(5) did not establish a general statutory obligation to make a reasoned award. The common law position whereby an arbitration award would be

[111] Where no reasons have been provided by the arbitrator, the Court must be satisfied that before the award was made, a party to proceedings gave notice to the arbitrator that a reasoned award was required or otherwise that there exists a special reason why such notice was not given. S1(6).
[112] S1(5)
[113] The application for such must be made with the consent of all parties to the proceedings, or leave of the Court is required. S1(5)
[114] See Thomas "The Law and Practice Relating to Appeals From Arbitration Awards" (1994) LLP

considered legitimate without the provision of reasons, together with the right of the parties to contract for unreasoned awards if they so wished, was preserved. It is arguably the case, however, that the effect of s1(5) was to encourage the provision of such. In failing to require an arbitral award to be supported by documented reasoning, English and Welsh arbitration remained at odds with foreign arbitral proceedings.

The Limitations of the 1979 Act

Whilst the provisions of the Arbitration Act 1979 may be seen to accord the arbitral process a greater finality and certainty than was previously the case, rather than resolving the difficulties created by the 1950 Arbitration Act, the 1979 Act had a number of serious consequences upon the construction industry in particular. Although the frequency of appeal against an arbitral award may have been high, before the passing of the Arbitration Act 1979 relatively few opportunities were taken by the construction industry to require an arbitrator to state a case for the decision of the High Court. Thus, unlike the field of maritime law, the construction industry failed to obtain wide ranging judicial comment and interpretation of the standard documents so as to make the contracting parties aware of the approved meaning of the contractual terms and provisions. Importation of principles and procedures from other industrial sectors was not possible due to the unique character of the construction industry. Thus, as a consequence of the 1979 Arbitration Act, the construction industry was denied the means of clarifying difficult issues of law on a case-by-case basis and in submitting to arbitration, disputing parties ran the risk of being subjected

to inconsistent arbitral decision-making.[115]

Moreover, it is expressly stated in s1(2) that the substantive appeal procedure is confined to "any question of law arising out of an award made on an arbitration agreement". However, despite the fact that the section stipulates the parameters within which the new appeal process was to operate, statutory definition as to what constituted a "question of law" was not provided.[116] Consequently, such a concept was defined by reference to general principles and case law that had arisen surrounding the distinction. However, authority on the distinction was often incoherent, irreconcilable and without uniformity[117] and given its origins outside the field of arbitration law, its applicability and relevance to arbitration proceedings was doubtful.[118] Given the close relationship between the concepts of fact and law, even arbitral case law on the point was unable to indisputably clarify the distinction. Thus, it often became the case that questions of fact and law were inextricably linked and as such, both were theoretically capable of being open to judicial review.[119]

Further damaging the interests of certainty, the 1979 Act left unaffected the power of the High Court to remit an award for 'misconduct' by the arbitrator. The effect of such an error of judgement can be seen in *King v Thomas McKenna Limited*[120] where it was stated by the Court of Appeal that the powers of the Court to remit an award for

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[115] It was determined in *The Chrysalis* [1983] 1 Lloyd's Rep 503, 508 per Mustill J, however, that in submitting to arbitration, parties voluntarily agreed to assume the risk of inconsistent decision making.
[116] Neither was it provided by way of a residuary definition, as the concept of a "question of fact" was also left without statutory definition.
[117] See Thomas "The Law and Practice Relating to Appeals From Arbitration Awards" (1994) LLP p.86. See also De Smith "Judicial Review of Administrative Action" (4th ed) (1980) Stephens & Son Ltd, Chapter 3.
[118] See *Geogas S.A v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215, 231 Steyn L.J "what is a question of law in a judicial review case may not necessarily be a question of law in the field of consensual arbitration".
[119] See *Torbell Investments Ltd v Williams (Inspector of Taxes)* (1986) 56 T.C 357
[120] [1991] 2 QB 480

misconduct were 'open-textured'. Indeed, in *Antaios Cia Naviesa SA v Salen Rederierna AB*[121] the Court made clear that where an arbitrator had acted ex aequo et bono, the Court would consider itself to have jurisdiction to intervene in the award. Moreover, the confusion that surrounded the legality of 'equity clauses', meant that arbitrators did not apply principles of fairness and justice at the expense of legal rules, for fear of the award being struck out for misconduct. Thus, in reality, there were no practical boundaries beyond which the Court could stray and this had a profound affect upon the execution of arbitral proceedings.

There were other procedural problems too. For the 1979 Act left unaddressed many of the reforms called for by the Departmental Advisory Committee in 1979. Principally, in failing to provide for arbitral procedure, it was left to the Courts to intervene once more. For example, the Act neglected to specifically provide the default powers of arbitrators, leaving this area of arbitration incompletely developed and uncertain.[122] Indeed, due to the omission of the Act, such jurisdiction could only be derived from the express or implied terms of the contract. As it was unusual for default jurisdiction to be expressly provided for by the terms of the contract, the question often became whether an implied default jurisdiction had been conferred upon the arbitrator.[123] In short, despite the efforts of the 1979 Act, arbitration law remained both "incoherent and fragmentary".[124] Moreover, it was not until the Courts and Legal Services Act 1990 that arbitrators were granted the power to terminate a reference on the grounds of unreasonable delay. Thus, until very recently, contractual

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[121] [1985] AC 191 as cited in Davies "Textbook on Commercial Law" (1992) Blackstone Press at p.468
[122] See Thomas "Default Powers of Arbitrators" (1996) LLP
[123] See *Kirkawa Corp v Gaitoil Overseas Inc [1990] 1 Lloyd's Rep 154.* See also *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909
[124] See Mustill "Transnational Arbitration in English Law" in "International Commercial and Maritime Arbitration" (ed Rose) (1987) Sweet & Maxwell p.18

parties were free to invoke arbitral proceedings after prolonged periods and unless the individual contract provided for such, arbitrators were powerless to object - even where the delay meant that a fair hearing of the dispute was impossible.

Thus, as can be seen, both the 1950 Act and the 1979 Act marked the culmination of centuries of judicial growth. For now the arbitral process was under the complete scrutiny and control of the state, leaving little room for arbitral manoeuvre. This clearly affected the operation of arbitration as an efficient system of commercial dispute resolution and thus an investigation was launched into the dispute resolution process in both the commercial field generally and the construction industry in particular. Indeed, in commenting upon the state of the civil justice system, Lord Irvine declared:

> "Delay and procedural complexity, ridiculed by Dickens a century-and-a-half ago, are largely unchecked, despite the attempts to remedy them. Expense can run out of control, the client on a financial rollercoaster. Of themselves, these are bad enough. But what if one party is richer than the other? They can exploit every procedural device to add to their opponent's financial woes. And it is not only people of average means who are suffering; business is becoming more and more conscious of the cost of litigation, both in purely financial terms and in terms of management time. Moreover, it is always in one or the other party's interest to prolong the proceedings to the greatest extent: money withheld is money which can be put to other uses."[125]

Such an opinion was reflective of the attitude of society at large and ultimately led to a far-reaching investigation of the civil justice system, culminating in the Departmental Advisory Committee on Arbitration Law, the Latham Report and the Woolf Report. All three investigations concluded that meaningful reform was urgently needed. However, the conclusions of such work differed as to the practical

[125] Lord Irvine of Lairg "How I'll Give the Law Back to the People" *The Times*, Sat October 18, 1997

means of achieving such.

**Towards the Modern Position**

As one would expect in times of change, those wishing to revise the system of British arbitration suggested a number of possible reforms. Perhaps the most popularly advocated means of reform suggested, was the adoption of the UNCITRAL[126] Model

[126] The United Nations Commission on International Trade Law. UNCITRAL is the core legal body of the United Nations system in the field of international trade law, specialising in commercial law reform on an international basis. The ambition of UNCITRAL is to formulate a modern, fair and harmonised system of rules appertaining to commercial transactions, so as to facilitate a global market in which restrictions on trade are minimised. Clearly, the arbitration of international disputes plays a significant part in the reduction of obstacles to trade and hence in 1979 the UNCITRAL Rules for International Arbitration were published, with the final text of a Model Law being published in 1985. The function of the UNCITRAL Model Law is to assist States in reforming and modernizing their laws on arbitral procedure so as to meet the needs of international commercial arbitration. The Model Law has been enacted into law by a large number of jurisdictions – almost 40 states - from both developed and developing countries. However, such enactment typically occurs where there is no long standing arbitral tradition, or where the domestic experience of arbitration is within recent history, for example Canada, Cyprus, New Zealand and Ireland. Countries with a long-standing arbitral history such as England, France, the Netherlands and Switzerland, have not enacted the Model Law but it has served as a useful tool against which domestic arbitral reform may be measured. There are of course exceptions to such a trend, for example Germany enacted the Model Law by incorporating it in the reform of Book 10 of the Zivilprozessordnung (ZPO).
See Annan "The 1958 New York Convention as a Model for Subsequent Legislative Texts on Arbitration" (1999) 15 *Arbitration International* 3 p.319-321; Ashman. "UNCITRAL: Evolving Issues in International Commercial Arbitration" (1999) 222 *New York Law Journal* 48 p.1-4; Asouzu "The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards" *(1999) 3 Journal of Business Law* p.185-204; Baker and Davis "The UNCITRAL Arbitration Rules in Practice: the Experience of the Iran-United States Claims Tribunal" (1992) Kluwer Law and Taxation Publishers; Bakshi "UNCITRAL Model Arbitration Law and Indian Law [Arbitration Act, 1940]" (1995) 29 *ICA Arbitration Quarterly: Journal of the Indian Council of Arbitration* 4 p.1-5; Becker "For an Autochthonous Federal Arbitration Act" (1991-1992) *Arbitration & the law: AAA General Counsel's Annual Report* (Irvington-on-Hudson, N.Y.) p.240-249; Beraudo "The United Nations Convention on Contracts for the International Sale of Goods and Arbitration" (1994) 5 *ICC International Court of Arbitration Bulletin* p.60-64; Berger "The Implementation of the UNCITRAL Model Law in Germany" (1998) 2 *Tijschrift Voor Arbitrage* ('s-Gravenhage) p.41-46; Bezen "Recent Developments in International Commercial Arbitration in Turkey" (2001) 16 *Mealey's International Arbitration Report* 3 p.32-64; Binder "International Commercial Arbitration in UNCITRAL Model Law Jurisdictions. An International Comparison of the UNCITRAL Model Law on International Commercial Arbitration" (2000) Sweet & Maxwell; Biukovic "Impact of the Adoption of the Model Law in Canada: Creating a New Environment for International Arbitration" (1998) 30 *Canadian Business Law Journal* 3 p.376-414; Böckstiegel "Experiences as an Arbitrator Using the UNCITRAL Arbitration Rules" in Dominice, Patry and Reymond, *eds. Etudes de Droit International en L'honeur de Pierre Lalive*: Recueil (1993) Helbing & Lichtenhahn; Burnard "The New Zealand Law Commission's Report on the UNCITRAL Model Law" (1992) 8 *Arbitration International* 3 p.281-285; Caron and Reed "Post Award Proceedings Under the UNCITRAL Arbitration Rules" (1995) 11 *Arbitration International* 4 p.429-454; Ceccon "UNCITRAL Notes on Organizing Arbitral Proceedings and the Conduct of Evidence: A New Approach to

Law on International Arbitration into British law. Indeed, the Model Law provides a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. However, in June 1989, the Departmental Advisory Committee on Arbitration Law[127] recommended against such. For it was considered that the substantially different nature of the Model Law compared to domestic law, would be a serious detriment to be weighed against the potential benefits of enacting the Model Law. That is, the significant amount of case law and legal rules built up by centuries of practice, would become obsolete upon the adoption of the Model Law into British society, throwing the law into turmoil and chaos until new legal rules and procedures could be established. Thus, it was recommended that there should be a new and improved Arbitration Act for England, Wales and Northern Ireland.

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International Arbitration" (1997) 14 *Journal of International Arbitration* 2 p.67-79; Chibueze and Oraeki "The Adoption and Application of the Model Law in Canada: Post-Arbitration Challenge" (2001) 18 *Journal of International Arbitration* 2 p.191-210; Christie "The UNCITRAL Model Law in Southern Africa" (1998) 64 *Arbitration* 4 p.272-274; Cobb "Article 16(1) of the UNCITRAL Model Law: the Related Doctrines of Kompetenz-Kompetenz and Separability" (2001) 16 *Mealey's International Arbitration Report* 6 p.32-40; Coulson "A Critique of the UNCITRAL [Arbitration] Rules" (1992/93) 4 *Arbitration Times: American Arbitration Association Dispute Resolution News New York* 8; Daly and Brooks "Correction and Interpretation of Arbitral Awards Under the ICC Rules of Arbitration" (2002) 13 *ICC International Court of Arbitration Bulletin* 1 p. 61-71; Davidson "The new Arbitration Act : a Model Law?" (1997) 3 *Journal of Business Law* p.101-129; Dervaird "The UNCITRAL Model Law and Judicial Control of Arbitration in Scotland" (1993) 9 *Arbitration International* 1 p. 97-102; Gharavi "The 1997 Iranian International Commercial Arbitration Law: the UNCITRAL Model Law à l'iranienne" (1999) 15 *Arbitration International* 1 p.85-96; Hacking and Baron "Arbitration Law Reform: the Impact of the UNCITRAL Model Law on the English Arbitration Act 1996" (1997) 63 *Arbitration* 4 p.291-299; Herrmann *and* Sekolec "UNCITRAL Arbitration Rules Under Sniper Fire Prove to be Fire-Proof: Rebuttal to R. Coulson" (1993) 4 *World Arbitration & Mediation Report: Covering Dispute Resolution in the United States and Around the World* 4 p.93-96; Herrmann "Does the World Need Additional Uniform Legislation on Arbitration? The 1998 Freshfields Lecture" (1999) 15 *Arbitration International* 3 p.211-226; Kwok "The Meaning of 'Commercial' and 'International' in the UNCITRAL Model Law: the Status in Ontario" (1998) 3 *Arbitration and Dispute Resolution Law Journal* 224-240; Warren "A Response to R. Coulson: Rebuttal II" (1993) 4 *World Arbitration & Mediation Report: Covering Dispute Resolution in the United States and Around the World* 4 p.96.

[127] DAC "Departmental Advisory Committee on Arbitration Law: Report on the Arbitration Bill" (1989) p.10

To such an end, the Departmental Advisory Committee on Arbitration Law issued a statement of the features that a new Arbitration Act would require.[128] Firstly, it was considered that the new legislation should comprise a statement of the more important, uncontroversial, legislative and common law principles of arbitration. Secondly, the new legislation should be required to set out the law in a logical order, using clear language that was free from technicality so as to be readily comprehensible to the layman. To facilitate such, consideration should be given to ensuring that any new statute should, so far as possible, follow the structure and language of the Model Law so as to enhance its accessibility to those who are familiar with the Model Law, although the scope of the new legislation should not be limited to the contents of such. It was advanced that by enacting such provisions, not only would there be a consolidation of the law, but that the numerous inadequacies that time and practice had illuminated, would be amended and eradicated. Thus, after substantial amendment, the Department of Trade and Industry introduced an Arbitration Bill into Parliament in the latter half of 1995. February 1996, witnessed the publication of the Departmental Advisory Committee's Report on Arbitration Law, illustrating the reasoning behind the proposed reforms. Four months later, the Bill was enacted, becoming perhaps the greatest overhaul of arbitration law in all time - the Arbitration Act 1996.[129]

Just as the need for reform of arbitral procedure and practice became apparent, so the needs of the construction industry came to the forefront. The catalyst for the review of the industry was principally the effect of the economic recession in the early 1990s

[128] Op Cit at paragraph 108
[129] See generally Tweeddale and Tweeddale "Arbitration of Commerical Disputes: International and English Law and Practice" (2005) Oxford University Press.

upon the British economy in general and the construction sector in particular.[130] Whilst the construction industry had been plagued by difficulties for many years,[131] such perplexities were exacerbated by the downturn in the economic climate. For example, much domestic construction work is ultimately determined by government policy. In a depressed economic climate, public expenditure is reduced, thereby diminishing the amount of work available. When work is scarce, parties to a construction project may not produce consistent quality and value for money, adversely affecting the Client – Contractor relationship.

Given such a scenario, on 5th July 1993 the Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry was announced in the House of Commons.[132] The initial stages of the Review sought to identify the main issues affecting the industry and as such, invited comments and proposals, culminating in the publication of an interim report on 13th December 1993.[133] In 1994 the Final Report[134] was published, recommending methods by which the problems identified in the consultation process could be tackled.

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[130] By 1993 construction output for the construction sector was 39% below its 1990 peak. Compare against the manufacturing sector, where the reduction in output was only 3% and as against the service sector, which rapidly regained its lost growth.

[131] As already outlined in the Chapter

[132] Hansard Written Answers, Column 4. Government and the construction industry, with the participation of Clients, commissioned the Report jointly

[133] Latham "Trust and Money: Interim Report of the Government / Industry Review of Procurement and Contractual Arrangements In The UK Construction Industry " (1993) HMSO. The main areas identified were namely the need to improve industry performance and teamwork, the need to provide better value for money and the need to move away from the adversarial culture that had permeated the sector. Indeed, the consultation revealed that it was the view of the Client that the performance of the industry is unreliable as projects run neither to time nor budget and that too much effort and resource is invested in making good defects, premature repair and replacement and in commencing / defending litigation proceedings.

[134] Latham "Constructing The Team: Final Report of the Government / Industry Review of Procurement and Contractual Arrangements In The UK Construction Industry" (1984) HMSO

With regard to the inherent nature of disputes in the construction industry, Latham contended that the primary solution was to combat the adversarial culture that permeated the sector. Clearly, this required improved procedures for procurement and tendering, placing a contractual emphasis upon teamwork and partnering to solve problems, and the pre-pricing of variations so as to reduce the causes of conflict. Where conflict did arise, however, the use of adjudication was advocated as an efficient and cost effective mechanism of resolution. As exemplified by Latham,[135] such an approach to contractual grievances and disputes was founded by the judgement of Lord Justice Lawton[136] who stated:

> "The Courts are aware of what happens in these building disputes; cases either go to arbitration or before an official referee; they drag on and on; the cash flow is held up... That sort of result is to be avoided if possible".

Indeed, the consultation had revealed that arbitration was seen as being slow and nearly always deferred until after the contract was completed. Thus, Latham submitted that arbitration should remain as a respected mechanism of appeal, but not as the main method of dispute resolution. Due to their consensual nature, it was concluded that conciliation and mediation were not suitable mechanisms of compulsory dispute resolution. Rather, following widespread consultation it was concluded that adjudication was the key. For whilst existing in only limited form, organisations that represented both main contractors and specialist contractors lent their support to such a mechanism.

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[135] Latham "Act of Wisdom" 27 *Building* 2002
[136] In the case *Ellis Mechanical Services v Wates Construction Limited* [1976] 2 B.L.R. 57

Consequently, recommendations for the operation of adjudication were established. Firstly, there should be no restriction on the issues that may be referred to adjudication. Secondly, the award of the adjudicator should be implemented immediately, with appeals being deferred until after the completion of the contract, unless immediate and exceptional issues arise requiring immediate referral to the court. For example, immediate resort to the Court should be available if a party to the dispute refuses to implement the award of the adjudicator. It was also recommended that a training procedure be devised for adjudicators, with the establishment of a Code of Practice in due course. Following the Latham review was the Egan Report,[137] which continued the momentum of reform. Consequently, adjudication received its first statutory footing by way of the Housing Grants Construction and Regeneration Act 1996, which gave adjudication its first statutory footing.

It was not, however, merely consensual methods of dispute resolution that attracted legislative attention in the final years of the Twentieth Century. Markedly, there was a high degree of acceptance by the Government, the judiciary, legal practitioners, administrators and the public of the need to reform litigation procedure and practice. It had been recognised that for many years, the court system had become excessively protracted and costly, creating a two-tier system of justice with access being conferred only upon those at the most disadvantaged end of the social spectrum in receipt of public funds, or upon those of significant private finance. Given the financial implications of court action, even the latter group only commenced litigation where

[137] Egan "Rethinking Construction: The Report of the Construction Task Force to the Deputy Prime Minister, on the Scope for Improving the Quality and Efficiency of UK Construction" (1998) DTI. The Report was commissioned by Deputy Prime Minister John Prescott and recommended a commitment to the continuous improvement of the construction process with the whole supply chain involved. That is, through the application of best practices, the industry and its clients must collectively act to improve their performance.

considerable sums of money or fundamental principles were involved and even then the protracted length of proceedings rendered some such actions uneconomic to pursue or defend. Clearly such denial of access to the courts created many an injustice.

As such, accompanying the reforms to arbitration and adjudication, were the 1994[138] and 1995[139] amendments to the Sale of Goods Act 1979, which made commercial litigation in Britain a more attractive prospect. More importantly, on 28 March 1994 Lord Woolf was appointed by the Lord Chancellor to review the rules and procedures of the civil courts in England and Wales. The aims of his review were threefold. Firstly, to improve access to justice and reduce the cost of litigation, secondly to reduce the complexity of the rules and modernise terminology, and lastly to remove any unnecessary disticntions of practice and procedure.[140] Following the publication of an interim report and an extensive period of consultation,[141] in July 1996 the final report on access to civil justice was published.[142] The final report included draft general rules for the reformation of the civil justice system and advocated the case management of disputes by the judiciary. Whilst not universally endorsed,[143] such recommendations were largely accepted by the Conservative Government of the time

[138] The amendment abolished the rule of law relating to the sale of goods in open market. Thus, s22(1) of the Sale of Goods Act 1979 was repealed.
[139] The law relating to the sale of unascertained goods forming part of an identified bulk and the sale of undivided shares in goods was amended.
[140] Lord Woolf "Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales / By the Right Honourable the Lord Woolf, Master of the Rolls" (1995) HMSO p1.
[141] Attention was focused on the civil justice system in general, in addition to the specialist jurisdictions and special areas of litigation that were deemed to be problematical.
[142] Woolf "Final Report to the Lord Chancellor on the Civil Justice System in England and Wales / By the Right Honourable the Lord Woolf, Master of the Rolls" (1996) HMSO.
[143] See the series of speeches and articles by Professor Michael Zander QC where doubt was cast upon the prudence of extensive case management by the judiciary. Concern was also expressed by those engaged with clinical negligence issues, such as The Association of Personal Injury Lawyers. The Law Society, in addition to members of the judiciary, requested that the introduction of such measures be delayed. Despite such concerns, however, the reforms pressed ahead.

and following review by Sir Peter Middleton,[144] were subsequently accepted by the new Labour Government. As such, the recommendations formed the core of the new, combined code of rules for civil procedure - the Civil Procedure Rules 1998[145]- which amounted to the most significant overhaul of the civil justice system since the great reforms of 1872 and 1875.

Thus, the final stages of the twentieth century opened new possibilities for the construction industry. For the first time in history, every potential avenue of access to justice had received statutory attention and / or reform. Litigation and arbitration had been overhauled and adjudication had been given a new statutory footing. Even the self-regulatory mechanisms of the construction industry received attention and an air of reform emerged. Prima facie one may suggest that dispute resolution was returning to its medieval roots. Following centuries of judicial growth, the needs and desires of industry required a freer, more flexible resolution of commercial disputes as designed in the fourteenth century. The central issue, therefore, is whether the reform of consensual dispute resolution mechanisms achieved their ambition. That is, can arbitration and adjudication be seen to meet the needs of the industry, whilst securing the necessities for access to justice?

In this chapter consideration has been given to the development of the construction industry and to the development of dispute resolution mechanisms that were necessary to ensure the success of such. In the following Chapter, consideration shall now be given to the ability of those mechanisms, namely arbitration and adjudication, to achieve civil justice in accordance with the criteria set down by Lord Woolf.

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[144] Sir Peter Middleton "Review of Civil Justice and Legal Aid" (1997) HMSO
[145] On Monday April 26 1999, the new Civil Procedure Rules came into force in England and Wales.

# CHAPTER TWO: ACCESS TO JUSTICE

It is a commonly accepted principle that "civil justice" is the cornerstone of British dispute resolution. Indeed, as Brougham has declared:

> "...all the establishments formed by our ancestors, and supported by their descendants, were invented and are chiefly maintained, in order that justice may be duly administered between man and man".[1]

Many definitions of justice have been advanced throughout the ages.[2] However, as demonstrated by the Chief Justice of the Supreme Court of Canada,[3] central to each notion of justice is the concept of "access to justice". In short, if dispute resolution mechanisms are to be seen to facilitate civil justice, their outcome must be that they provide "access" to such:

> "It is an unfortunate fact that legal proceedings in the civil and criminal courts, at the trial and appellate levels, have become increasingly lengthy and protracted. We must accept and deal with this phenomenon to the extent that it simply reflects the increasing complexity of our modern law and modern society. But we should maintain a healthy scepticism of the need for longer and more protracted proceedings and constantly strive to contain and simplify the trial and appellate processes. The aim above all must be that the courts remain accessible to the ordinary Canadian. Lawyers should always recall that their duty to defend and maintain their client's interest must be balanced with their

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[1] See Jacob "The Reform of Civil Procedure Law" (1982) Sweet & Maxwell p.215

[2] The literature is voluminous and as such the following suggested literature is merely a snapshot. See Andrews "English Civil Procedure – Fundamentals of the New Civil Justice System" (2003) Oxford University Press; Damaska "The Faces of Justice and State Authority: A Comparative Approach to the Legal Process" (1991) Yale University Press; Fazzalari, Fortin, Eakin "Civil Justice in the Countries of the European Union" (1998) Trenton Publishing; Hazard "American Civil Procedure" (1995) Yale University Press; Jones-Pauly & Elbern "Access to Justice: Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts" (2002) Kluwer Law International; Rawls "Collected Papers" (1991) Harvard University Press; Rawls "A Theory of Justice: Revised Edition" (1999) Harvard University Press; Rawls "Justice As Fairness: A Restatement" (2001) Harvard University Press; Ed Strang & Braithwaite "Restorative Justice and Civil Society" (2001) Cambridge University Press; Ed Zuckerman "Civil Justice In Crisis – Comparative Perspectives of Civil Procedure" (1999) Oxford University Press.

[3] From an address on "Access to Justice" to the graduating class of the Faculty of Law, University of Windsor on June 8, 1998 by then Chief Justice of the Supreme Court of Canada, Right Honourable Brian Dickson, P.D. (Windsor Review of Legal and Social Issues, Vol 1)

professional duty, as an officer of the court, to ensure that matters proceed as expeditiously as possible."

It was this concept of "access to justice" that underpinned the most far-reaching reforms of the English and Welsh civil justice system to date[4] and it is to such a concept that we now turn.

## Defining Access to Justice – Lord Woolf

In his interim report on the civil justice system in England and Wales, Lord Woolf[5] contended that there are a number of principles that must be fulfilled if access to justice is to be facilitated:[6]

1. The mechanism of dispute resolution must be *just* in the result that it delivers;
2. It must be *fair* in the way that it treats litigants;
3. It must offer appropriate procedures at reasonable *cost*;
4. It must deal with cases with reasonable *speed*;
5. It must be *understandable* to those who use it;
6. It must be *responsive* to the needs of those who use it;
7. It must also provide as much *certainty* as the nature of particular cases allow;
8. It must be *effective*, that is adequately resourced and organised.

[4] See the Civil Procedure Rules 1998

[5] See Lord Justice Woolf "Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales / By the Right Honourable the Lord Woolf, Master of the Rolls" (1995) HMSO p2

[6] Such principles were derived from his observations of the problems of the civil justice system.

Should a method of dispute resolution fail to meet one or more of these requirements, its ability to facilitate access to justice becomes questionable. Indeed, such a theory is reflected in the writings of the civil proceduralist Jacob,[7] who advanced that the notion of civil justice is founded upon three components: the political aspect;[8] the social aspect;[9] and the moral aspect,[10] all of which seek to establish an effective and holistic mechanism of dispute resolution as latterly described by Woolf.

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[7] See Jacob "The Reform of Civil Procedure Law" (1982) Sweet & Maxwell

[8] Jacob contended that "the political aspects of civil justice stem from "the importance of the administration of civil justice in the life and culture of a civilised community". That is, civil justice plays a vital societal function that must be maintained and developed, as not only can it be seen to be a method of social control, but it also serves as an instrument for the adjusting or regulating of social relations within the legal framework. Indeed, the social utility of civil justice was that not only would it enhance respect for the law, but any gulf that may exist between the law and social reality will be illuminated by the procedures implemented to serve civil justice. Given the importance of civil justice therefore, it is a matter of legal and social necessity that the administration of such lies in the hands of the state, as effective administration of justice requires that dispute resolution mechanisms fall under the remit of a single accountable body and not under the control of numerous and possibly fractious interest groups and organisations. This being so, what better agency to maintain and develop dispute resolution in Britain than the state, whose agents have been democratically elected by the people for the people? This is not to say, however, that dispute resolution is a form of state monopoly without exception. For as Jacob has conceded, arbitration is a mechanism of dispute resolution which falls under only supervisory jurisdiction of what he terms the "Third Branch of Government" - the judiciary - whose only role is to ensure that there has been due compliance with the relevant rule of law. Thus, Jacob would seem to suggest that within the political aspect of civil justice, a two-tier system of dispute resolution - the court system and alternatives to such - is theoretically justifiable.
As to what is to be deemed to be fulfilling of the political aspect of civil justice, Jacob contended "the state must provide an effective and efficient system of courts and tribunals to enable the members of its society to seek and obtain justice as between themselves and as between any of them and the State itself". Thus, not only must the state afford the resolution of disputes between citizens and citizens and the state, but it must also strive to improve the quality of the administration of justice by such mechanisms. This would seem to suggest the employing of both state funds and the revision of procedure and practice at regular intervals. Moreover, in addition to providing access to justice, the method of dispute resolution must also provide for the impartial resolution of disputes. In the absence of a definition of "impartial" from Jacob, it is contended that by "impartial" the process should be free from bias and issue-obscuring procedures. See Jacob "The Reform of Civil Procedure Law" (1982) Sweet & Maxwell p216-218.

[9] Dispute resolution mechanisms must enable members of the community to "assert and maintain their reasonable and well-founded rights or claims, or to defend themselves against unreasonable or unfounded claims". In short, civil wrongs must not be conferred impunity and resolution mechanisms must be accessible, expedient and efficient. That is, the state, corporations and individuals alike must be afforded the same opportunities and experience of the dispute resolution process. See Jacob "The Reform of Civil Procedure Law" (1982) Sweet & Maxwell p218

[10] The civil justice system should not be regarded as having a merely legal connotation or application, but should also be taken to reflect and respond to social and moral utility. Thus, dispute resolution should promote the good or greater happiness of the community and should operate towards the attainment of justice between man and man. Indeed, the moral imperatives that Jacob believed to create justice between man and man, require the method of dispute resolution to be "fair and open, equitable, efficient and effective, free from mystifying technicalities and formalistic sophistries, simple, speedy and cheap, accessible and intelligible". The justification for such requirements were given to be the complementary character of civil justice; the protective character of civil justice; and the remedial or practical character of civil justice. See Jacob "The Reform of Civil Procedure Law" (1982) Sweet & Maxwell p220-222.

Given the importance of the Woolf Report to the reformation of Court procedure at the turn of the twenty-first century, it is clear that Woolf's prerequisites for access to justice have defined the standard by which dispute resolution mechanisms must be judged. For if an accurate measure of their outcomes are to be obtained, then court proceedings and alternatives to such must be subjected to the same controls. Thus, the question to be answered must be whether the legislative reforms affecting arbitration and adjudication can be seen to meet Woolf's requirements for access to justice?

## Arbitration and Access to Justice

As already demonstrated, it was the intention of the Arbitration Act 1996 to develop a coherent, responsive and intelligible arbitration system that could afford access to justice. In applying each of Woolf's eight criteria[11] in turn to the statutory provisions embodied in the Act, it may be seen that prima facie, arbitration does in theoretical terms facilitate such access.

[11] See p.56 above

**The First Two Criteria: Procedural Fairness and a Just Result**

It has often been contended that if access to justice is to be facilitated, then procedural fairness should be championed and a just result ensured.[12] Such requirements are paramount in the pursuit of access to justice, as the resolution of a dispute by a third party will result in action that may have far reaching consequences for the disputant. As such, any denial of a perceived right must be done on a basis that is both ethically and legally correct, lest an unjust conclusion be reached, the dispute is lengthened by appeal, or the disputing parties and their representatives lose faith in the dispute resolution mechanism creating further discord.

Fundamental to the notions of fairness and justice is the need for the "independence" and "impartiality" of the arbitrator. Whilst used interchangeably, the notions of independence and impartiality are two distinct concepts.[13] For example, an impartial tribunal is one that is not biased in favour of, or prejudiced against, a particular party or its case.[14] An independent tribunal however, is one that does not have a close

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[12] See generally "Achieving Justice in Arbitration: a Symposium" (1991) 65 *Tulane Law Review* p.1303-660; Burger "Using Arbitration to Achieve Justice" (1985) 40 *Arbitration* p.3-6; Charles "Natural Justice and Alternative Dispute Resolution" (1986) 60 *Law Institute Journal* p.1078-82.

[13] See Yu & Shore "Independence, Impartiality, and Immunity of Arbitrators – US and English Perspectives" (2003) 52 *ICLQ* pp 935 – 967. See also Bishop and Reed "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration" (1998) 14 *Arbitration International* 395; Redfern and Hunter "The Law and Practice of International Commercial Arbitration" (1999) Sweet & Maxwell p220-221.

[14] When seeking to expressly define the qualitative concept of impartiality, the notion of "neutrality" would prima facie seem to be of significance. Indeed, literature on alternative dispute resolution mechanisms is littered with the phrase. It is both used as a noun to refer to the third party charged with resolving the dispute and as an adjective to refer to the dispute resolution process itself. However, experience informs belief and as such, individuals cannot be expected to act outside of their value / belief system, thereby prohibiting them from behaving in a true neutral state. The use of neutrality as an indicator of impartiality should, therefore, be limited in scope to a broad definition. In short, impartiality should not be construed so as to imply an absence of values, rather it should be deemed to indicate an absence of bias or partiality. See Brown and Marriott "ADR Principles and Practice" (1999) Sweet & Maxwell p.460. See also Evans "Of Judges and Arbitrators" (2001) 67 *Arbitration* 3 p.254-262; Marriott "Conflicts of Interest" (2002) 68 *Arbitration* 1 p.31-41; Paulsson "Ethics, Elitism, Eligibility" (1997) 14 *Journal of International Arbitration* 4 p.13-21; Rau "On Integrity in Private Judging" (1998) 14 *Arbitration International* 2 p.115-155; Reynolds "Impartiality and Independence of

relationship with a party or its counsel. In short, impartiality is an abstract concept that is difficult to measure but which is best described as an attitude of mind, whereas independence is an external manifestation of an attitude that is capable of objective examination.[15] As summarised by Bishop and Reed:[16]

> "An arbitrator who is impartial but not wholly independent may be qualified, while an independent arbitrator who is not impartial must be disqualified... The absolutely inalienable and predominant standard should be impartiality".

Such markers of procedural fairness and a just result were enshrined in the 1996 legislation. Indeed, the general principles applicable to arbitration as outlined in s1 of the Act, stipulate that the object of arbitration is to obtain the "fair resolution of disputes by an impartial tribunal".[17] Guidance as to what shall be deemed to be both a fair and impartial resolution can be found in s33, which places a general duty upon the arbitral tribunal to act fairly and impartially as between the parties, giving "each party a reasonable opportunity of putting his case and dealing with that of his opponent."[18] Under s37(1)(b) this is extended so as to include that the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any experts or legal representatives appointed by the tribunal to report to it, or any assessors appointed by the tribunal to assist on technical matters. Indeed, the tribunal

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Arbitrators" (1998) 3 *Construction & Engineering Law* 2 p.6-10; Simmons & Simmons "Allegations of Bias: Should Umpires be Removed for Being Tainted with Alleged Bias?" (1998) 12 *P & I International* 5 p105. See also *Locabail (UK) Ltd v Bayfield Properties Ltd (Leave to Appeal)* [2001] QB 451 (CA); *Fletamentos Maritimos SA v Effjohn International BV (No 2)* [1997] 2 Lloyd's Rep 302 (CA).

[15] See Yu & Shore "Independence, Impartiality, and Immunity of Arbitrators – US and English Perspectives" (2003) 52 ICLQ p396

[16] Bishop and Reed "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration" (1998) 14 Arbitration International p400

[17] S1(a).

[18] S33(1)(a). See *Guardcliffe Properties Ltd v City & St James* [2003] EWHC 215

is required to comply with such a duty both in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.[19]

So as to ensure compliance with such, s24 enables an arbitral party to apply to the Court for the removal of an arbitrator where there are justifiable doubts as to his impartiality,[20] or where he has refused or failed to properly conduct the proceedings causing a substantial injustice to the applicant.[21] Furthermore, by virtue of s68 arbitral awards may be challenged on the grounds of "serious irregularity", to which greater consideration shall be given later. In recognition of the fact that such provisions may encourage the arbitral tribunal to adopt overly protracted proceedings, a counter-balance is provided in the form of s29, which confers statutory immunity upon the arbitrator in the execution of his duties.[22] In short, the 1996 legislation strove to achieve a balance between the need for, and enforcement of, a fair procedure and just result, as against the possible consequences of such requirements upon the process.

**The Third and Fourth Criteria: Reasonable Cost and Speed**

Inextricably linked to the notions of a fair procedure and a just result are the requirements for an efficient system of dispute resolution. Efficiency is essential both in terms of time and finance.[23] Principally, a delay in the resolution of a dispute will

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[19] S33(2). See Karali "Procedure and Evidence Under the Arbitration Act 1996" (1998) 12 *P & I International* 4 p.90-91.
[20] S24(a)
[21] S24(d)
[22] Except where an act or omission is shown to have been in bad faith.
[23] See Lord Mackay "Why We Should Avoid Spending Public Money Where the Market Can Provide" (1997) 63 *Arbitration* 1 p.8-10; Saville "The Origin of the New English Arbitration Act 1996: Reconciling Speed With Justice in the Decision Making Process" (1997) 13 *Arbitration International* 3

create or exacerbate "primary difficulties". For example, where the subject of arbitration is a defective works dispute under a contract that has yet to be completed, a delay in the determination of liability may result not only in the project exceeding its contractual completion deadline, but the financial implications of such a delay may be disproportionately increased. In short, protracted arbitral proceedings will serve only to exacerbate the original, or primary, subject matter of the dispute. Furthermore, protracted arbitral proceedings also create "secondary difficulties". That is, not only will arbitral parties have to withstand the financial implications created by the dispute itself, should the process of resolving that dispute become unnaturally extended, then disputing parties will find themselves subject to further financial penalty in the form of increased arbitrator and / or party representative fees. Such procedural delay and the financial implications of such, were contributing factors to the decline in the use of arbitration under the 1950 and 1979 legislation.[24]

Indeed, the need for proceedings to be conducted "without unnecessary delay or expense" was stated as a general principle of the arbitral process in s1 of the Act.[25] Both the arbitral tribunal and the parties to the dispute are under a general duty to facilitate such.[26] Principally, s33(1)(b)[27] states that it is a general duty of the arbitral tribunal to ensure that the procedures adopted should be tailored to the case in hand so as to achieve an expedient resolution to the dispute. As with the duty to act fairly and impartially, the necessity to avoid delay and expense is to be implemented by the

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p.237-251; Segalla "Survey: the Speed and Cost of Complex Commercial Arbitrations" (1991) 46 *Arbitration* p.12-18; "Handling the Complex Commercial Case" (1991) 46 *Arbitration* p.5-18.

[24] See Chapter 1 at pp.32, 33 &44

[25] See Reynadson "Reconciling Cost Control With Justice" 1 *International Arbitration Law Review* 3 p.115-120.

[26] See Karali "Procedure and Evidence Under the Arbitration Act 1996" (1999) 13 *P & I International* 3 p.60-62.

[27] S33(1)(b) states that procedures should "be suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."

arbitral tribunal both in its decisions on matters of procedure and evidence, and in the exercise of all other powers conferred on it.[28] Such a duty is empowered by s34(1) which provides that it is for the arbitral tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. So as to further ensure expedition on behalf of the arbitrator, s24 permits a party to apply to court for the removal of an arbitrator where he has refused or failed to use all reasonable despatch in conducting the proceedings or making an award, causing a substantial injustice to the applicant.[29]

A correlating duty is placed upon arbitral parties by s40, which states that parties must "do all things necessary for the proper and expeditious conduct of the arbitral proceedings". This includes complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law.[30] So as to ensure compliance with such, s41(1) states that the parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration. In the absence of party agreement on the matter, the Act confers a number of powers upon the tribunal. For example, party non-compliance may result in an award dismissing the claim, the continuance of proceedings in the absence of a party, or, as the case may be, without any written evidence or submissions on behalf of the offending party. If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for

[28] S33(2)
[29] S24(d)
[30] See s32 and s45

compliance with it as the tribunal considers appropriate.[31] Such provisions are supported by the powers of the Court in relation to arbitral proceedings[32] and the arbitral award.[33] Thus, the comprehensive provisions of the Arbitration Act 1996 may prima facie be said to fulfil Woolf's criteria for expediency and efficiency. All parties to proceedings are required to act with expediency thereby limiting the cost of proceedings and so as to ensure such, enforcement measures have been provided.

It should be noted, however, that the 1996 Act could be seen to have created an opportunity for exploitation that might undermine the attainment of such. Indeed, the effect of the 1996 Act is that disputing parties may commence several arbitration proceedings on the same dispute, as s35(1) provides that arbitral parties are free to agree whether arbitral proceedings shall be consolidated with other arbitral proceedings, or whether concurrent hearings shall be held. Thus, disputing parties may dissect a single dispute into many component parts and choose to arbitrate each part separately if they so wish. Clearly, such a method of dispute resolution places a financial burden upon the disputing parties and therefore the question of the bargaining position becomes of central importance, as it is conceivable that one party to a contract may exert pressure upon another to consent to concurrent proceedings. Given the effect of s9,[34] such provisions have created a lacuna that does little more

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[31] S41(5)

[32] See ss42-45 which provide powers as to the enforcement of peremptory orders of the tribunal, powers as to the securing the attendance of witnesses, court powers exercisable in support of arbitral proceedings and powers as to the determination of a preliminary point of law. See Cato "Arbitration Practice and Procedure: Interlocutory and Hearing Problems" (2003) 19 *Arbitration International* 3 p.405-406. See also *Huyton SA V JakilSpA* [1998] CLC 937 (CA). For case comment see Chambers "Arbitration: Delay in Remitted Arbitration Proceedings – Delay in Bringing Appeal" (1998) 5 *International Maritime Law* 4 p.121-123.

[33] See ss66 – 71 which provide powers as to the challenging and appeal of the award.

[34] A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. On an application under

than equip unscrupulous parties with a means of gaining tactical advantage. Whether such concerns have manifested themselves in practice remains to be seen.

**The Fifth and Sixth Criteria: Understandable and Responsive**

A motivating force behind the Arbitration Act 1996 was the need to create a mechanism that was both understandable and responsive to the needs of disputing parties and the wider economic community. Such a desire found embodiment in s1(b) of the Act which provides that parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. To effect such a balance, s4 states the mandatory provisions which have effect notwithstanding any agreement to the contrary, together with the non-mandatory provisions that allow the parties to make their own arrangements by agreement, but which provide rules that apply in the absence of such agreement. In recognition of commercial practice in which standard form contracts are often utilised, s4(3) states that parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.

So as to facilitate a responsive mechanism in which unforeseen events are expediently dealt with, the Act confers a number of management powers upon the arbitral tribunal and the court. Turning to consider the management powers of the tribunal, s30 can be seen as a mechanism by which delay at the outset of proceedings is contained without

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this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. See Newman "Arbtiration Case Law Still Flowing Fast" (2001) 12 *Construction* Law 9 p.20-23. See also *Capital Trust Investments Ltd v Radio Design TJ AB* [2002]EWCA Civ 135; *Inco Europe Ltd v First Choice Distribution* [1999] 1 WLR 270 (CA). For case comment see Timmons "Appeals From a Refusal of Stay: s9 of the 1996 Arbitration Act" (1999) 65 *Arbitration* 2 p.110-112.

impinging upon party autonomy to determine how the dispute is to be resolved. Indeed, under s30 it is stated that unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction.[35] That is, as to whether there is a valid arbitration agreement, whether the tribunal is properly constituted, and what matters have been submitted to arbitration in accordance with the arbitration agreement.[36] If procedural delay is to be ousted at the outset, then such an ability to determine jurisdictional issues in the first instance is essential. This balance between the provision of a reactive mechanism and the need to protect the self-determination of arbitral parties is continued under s34, where it is stated that subject to the right of the parties to agree to any matter, the tribunal has the authority to decide all procedural and evidential matters.[37] These include the location, timing and language of proceedings, the documentation to be provided, the questions to be answered and the nature of proceedings. Crucially, it is specified that the tribunal may decide whether to apply the strict rules of evidence,[38] whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law[39] and whether and to what extent there should be oral or written evidence or submissions.[40] Thus, matters of procedure may be determined on a case-by-case basis, taking into consideration external factors that may alter the scope of the dispute. Extending the powers of the tribunal to respond to matters as they arise, s39 states that the parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award, including the payment of

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[35] Under s31 parties may raise objections to the substantial jurisdiction of the arbitral tribunal. See *Azov Shipping Co v Baltic Shipping Co* [1999] 1 All ER 476 (QBD (Comm Ct)).
[36] It should be noted that under s30(2) any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.
[37] See Needham "The Road to Kilkenny" (1996) 62 *Arbitration* 1 p.25-28.
[38] S34(2)(f).
[39] S34(2)(g). See Critchlow "Arbitrator's Power to Procure Third Party Assistance" (1998) 9 *Amicus Curiae* p.22-23.
[40] S34(2)(h).

money or the disposition of property[41]. Given the complicated nexus of trade that forms the basis of the construction industry,[42] such case management powers are vital. As without interim relief, a restriction in cash flow may adversely affect the financial status of a business and in some instances, result in liquidation.

Further to such provisions are the powers of the court. S12 is demonstrative of the reactive jurisdiction of the court in that where an arbitration agreement to refer future disputes to arbitration specifies that proceedings must be commenced within a fixed time lest the claim shall be barred, or the claimant's right extinguished, an extension of time for the beginning arbitral proceedings may be possible. Where the circumstances resulting in delay are such as were outside the reasonable contemplation of the parties when they agreed the provision in question and where it is just to extend the time, or where the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question, the court may extend the time for such period and on such terms as it thinks fit. Thus, the circumstances leading to a failure of compliance with contractual time limits are taken into account before a party is denied the right to resolve their dispute by arbitration. Other external factors that may frustrate arbitral procedure are also provided for in the Act. For example, under s18 provision is made for a failure of the appointment procedure[43] and where issue is had with regard to the jurisdiction of the tribunal, s32 provides that the court may[44] determine any question as to the substantive jurisdiction of the tribunal.[45]

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[41] Unless the parties agree to confer such power on the tribunal, the tribunal has no such power.
[42] See Chapter 1
[43] See *Virdee v Virdi* [2003] EWCA Civ 41 (CA). For case comment, see Dundas "Arbitration Agreements and the Jurisdiction of the Court of Appeal: *Virdee v Virdi*" (2004) 70 *Arbitration* 1 62-68.
[44] On the application of a party to arbitral proceedings and upon notice to the other parties.
[45] S32(2). It is important to note that an application under this section shall not be considered unless (a) it is made with the agreement in writing of all the other parties to the proceedings, or (b) it is made with the permission of the tribunal and the court is satisfied- (i) that the determination of the question is likely to produce substantial savings in costs, (ii) that the application was made without delay, and (iii)

Determination of any question of law arising in the course of the proceedings is also permitted where the court is satisfied that it substantially affects the rights of one or more of the parties[46] and powers in support of the tribunal are provided so as to counter party non-compliance with proceedings. Indeed, s42 states that unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal. S43 confers upon the Court the authority to secure the attendance of witnesses and under s44 the Court may[47] grant orders for the taking and preservation of evidence and orders relating to property, including the sale of any goods which are the subject of the proceedings and the granting of an interim injunction or appointment of a receiver.[48] As with the management powers of the tribunal, therefore, statutory provision has sought to provide the means by which arbitration proceedings are responsive to the needs of disputants and procedural developments, without sacrificing the right of parties to determine matters of procedure. Whether such provisions have achieved such a balance remains to be seen and may only be uncovered by means of empirical research.[49]

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that there is good reason why the matter should be decided by the court. See *ABB Lummus Global Ltd v Keppel Fels Ltd* (Unreported, 1998) (QBD).

[46] S45 – unless otherwise agreed by the parties

[47] Unless otherwise agreed by the parties

[48] If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets – s44(3). If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties – s44(4). In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively (s44(5)).

[49] See later chapters

**The Seventh Criteria: Certainty**

If a mechanism of dispute resolution is to facilitate the criteria for certainty, then its requirements are two fold: firstly, it must be capable of reaching a final and binding resolution to disputes in the majority of cases; and secondly it must promote certainty in the wider community with regard to case precedent and questions of law.[50]

Upon initial examination, arbitration may be seen to fulfil the first requirement in that in the majority of cases referred a settlement is reached.[51] This is because in providing a neutral, penetrating and analytical examination of the case in hand, an honest view as to the result likely to be attained in court will be provided, laying the dispute to rest in most construction cases. This is not to say, however, that every dispute shall be settled or finally determined by arbitration. Indeed, economic analysis of the arbitral process suggests that arbitration creates a "chilling effect".[52] That is, arbitration chills the bargaining process as it creates incentives for the parties to present information of limited usefulness to the arbitrator, whilst encouraging them to present extreme demands. Information presented to an arbitrator can be one of two forms: either the information provided by the parties is consistent; or parties to the

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[50] See Arnold "If You Are Right, You Will Win" (2003) 24 *Maritime Advocate* p.7-9.
[51] See Edwards "ADR: Pancea or Anathema?" (1986) 99 *HLR* 673
[52] See Chappe "Arbitration and Incentives: How to Preclude the Chilling Effect?" (2001) 12 *European Journal of Law and Economics* 1 p.39-45. See also Ashe "Arbitration Finality: Myth or Reality?" (1983) 38 *Arbitration Journal* p.42-51; Ashenfelter "Arbitration Behaviour" (1987) 77 *American Economic Review, Papers and Proceedings* p.342-346; Benson "Arbitration" in Bouckaert & De Geest (eds) Encyclopaedia of Law and Economics (2000) Edward Elgar; Benson "To Arbitrate or Litigate: That is the Question" (1999) 8 *European Journal of Law and Economics* p.91-151; Bloom and Cavanagh "An Analysis of the Selection of Arbitrators" (1986) 76 *American Economic Review* p.408-422; Brams "Negotiation Games: Applying Game Theory to Bargaining and Arbitration" (1990) Routledge; Crawford "The Role of Arbitration and the Theory of Incentives" in Roth (ed) "Game Theoretic Models of Bargaining" (1985) Cambridge University Press; Farber and Bazerman "The General Basis of Arbitrator Behaviour: An Empirical Analysis of Conventional and Final-Offer Arbitration" (1986) 54 *Econmetrica* 6 p.1503-1528; Lambert-Mogiliansky "Optimal Arbitration Mandates in Joint-Production Contracts" (1997) Mimeo; Rubinfeld and Sappington "Efficient Awards and Standards of Proof in Judicial Proceedings" (1987) 18 *Rand Journal of Economics* 2 p.308-315

dispute offer inconsistent information. In such a circumstance, the arbitrator may experience difficulty in ascertaining the facts and/or reaching a decision and must invoke measures aimed at controlling parties' incentives so as to effectively manage the dispute. For example, where a party to proceedings seems unwilling to comply with the spirit of arbitration, the arbitrator may use the prospect of "costs" as a means by which compliance may be extracted. Where an arbitrator of experience conducts proceedings, then such game theory shall naturally and automatically be employed. However, where the arbitrator is of little or no experience in conducting arbitration, then the deployment of such measures may prove difficult. Of further consideration is the fact that even where an arbitrator has determined fact and a decision is reached, one or both parties to the proceedings may be unwilling to accept the result. The likelihood of a challenge to the arbitral award is increased where the information presented by the parties to the dispute is inconsistent. Thus, the degree to which arbitral decisions are final and binding upon the parties becomes of significance. That is, what is the scope for the opening up of an arbitral decision to judicial review?

Arguably, the state is under a duty to evaluate whether the grounds upon which arbitral decisions are made can be seen to be "just", for inexpensive, expeditious and informal dispute resolution is not always synonymous with fair and just dispute resolution. [53] However, this need for evaluation must not be extended so as to confer an unlimited right to appeal an arbitral award. Indeed, a balance must be struck between the juridicial interest of national governments to ensure the integrity of the process and the protection of public interest, as against the rights of participants to

[53] See Edwards "ADR: Pancea or Anathema?" (1986) 99 *HLR* 676

maintain autonomy of the arbitration process.[54] Further, as the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense, some limitation must be placed upon the appeal mechanism. Too liberal a right of appeal would jeopardise expedition and efficiency, as volumous appeals to court would increase the delay and expense in resolving a dispute and worse still, may provide unscrupulous parties with a means of gaining tactical advantage. Conversely, too restricted a right of appeal may permit a travesty of justice to pass unchecked. In short, a balance must be stuck between the need for justice and the commercial need for the final and expedient resolution of a dispute. To this end the Arbitration Act 1996 provides for the appeal of an arbitral award[55] under the following heads: substantive jurisdiction[56]; serious irregularity[57]; and appeal

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[54] See Chukwumerije "Judicial Supervision of Commercial Arbitration: the English Arbitration Act of 1996" (1999) 15 *Arbitration International* 2 p.171-191.

[55] See generally Raeside "The Arbitration Act 1996: Jurisdiction of the Court of Appeal" (1999) 2 *Commercial Law Journal* 2; Sandy "The Arbitration Act 1996 and Appeals on Points of Law: a New Approach" (2001/02) 14 *European Lawyer* Supp *(International Arbitration 2001)* p.13-15; Shackleton "Global Warming: Milder Still in England: Part 3" (2000) 3 *International Arbitration Law Review* 3 p.59-84; Zekos "The Role of Courts in Commercial and Maritime Arbitration Under English Law" (1998) 15 *Journal of International Arbitration* 1 p.51-73.

[56] S67 Arbitration Act 1996. See *Virdee v Virdi* [2003] EWCA Civ 41 (CA). For case comment, see Dundas "Arbitration Agreements and the Jurisdiction of the Court of Appeal: *Virdee v Virdi*" (2004) 70 *Arbitration* 1 p.62-68. See also *Athletic Union of Constantinople (AEK) v National Basketball Association (Application to Strike Out)* [2002] 3 All ER 897 (CA). For case comment see Altaras "Right to Appeal: *Athletic Union of Constantinople v National Basketball Association & Others*" (2003) 69 *Arbitration* 1 p.63-64. See also *Azov Shipping Co v Baltic Shipping Co* [1999] 1 All ER 476 (QBD (Comm Ct)). For case comment see "Jurisdiction – Award Under s30 of the Arbitration Act 1996" (1999) 1 *Arbitration and Dispute Resolution Law Journal* p.47-50.

[57] S68 Arbitration Act 1996. See Tweeddale "Recent Cases on Serious Irregularity" (2000) 66 *Arbitration* 4 p.313-319. See also *Virdee v Virdi* [2003] EWCA Civ 41 (CA). For case comment, see Dundas "Arbitration Agreements and the Jurisdiction of the Court of Appeal: *Virdee v Virdi*" (2004) 70 *Arbitration* 1 p.62-68. See also *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84. For case comment see "Serious Irregularity – Use if Own Knowledge by Arbitrators" (2003) 3 *Arbitration Law Monthly* 6 p.3-7. See also *Hawk Shipping Ltd v Cron Navigation Ltd* [2003] EWHC 1828 (QBD (Comm Ct)). For case comment see "Serious Irregularity: Procedural Errors" (Dec 2003 / Jan 2004) *Arbitration Law Monthly* p.7-9. See also *Icon Navigation Corp v Sinochem International Petroleum (Bahamas) Co Ltd* [2003] 1 All ER (Comm) 405 (QBD (Comm Ct)). For case comment see "Arbitration – Charterparty – Dispute as to Contractual Responsibility for Temperature of Cargo – New Argument Raised at Late Stage" (2003) 3 *Shipping and Trade Law* 2 p.7-8. See also *Ocean Marine Navigation Ltd v Koch Carbon Inc (The Dynamic)* [2003] EWHC 1936. For case comment see Harris "The Arbitration Appeals Debate" (2003) 4 *Shipping & Transport Lawyer International* 2 p.6-8. See also Shackleton "Annual Review of English Judicial Decisions on Arbitration – 2002" (2002) 6 *International Arbitration Law Review* 6 p.220-236. See also *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All ER 730 (QBD (OR)).

on point of law.[58] Theoretically, such provisions should enable a party to challenge the actions and decisions of the arbitral tribunal where an injustice or irregularity may have occurred, without opening too wide the floodgates of litigious opposition.[59]

Given the ability of parties to appeal a decision on a point of law, it may be assumed that arbitration also facilitates the second criteria for certainty: certainty as to case precedent and questions of law. Indeed, procedural transparency has been of central importance to the debate surrounding access to justice, largely due to the principle that civil wrongs must not be conferred immunity and members of a community must be able to assert and maintain their reasonable and well-founded rights and claims, as well as defend themselves against those of others.[60] Such a proposition has led to the belief that an integral role of dispute resolution mechanisms that seek to administer

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[58] S69 Arbitration Act 1996. See Needham "Appeal on Point of Law Arising Out of an Award" (1999) 65 *Arbitration* 3 p.205-211. See also *Virdee v Virdi* [2003] EWCA Civ 41 (CA). For case comment, see Dundas "Arbitration Agreements and the Jurisdiction of the Court of Appeal: *Virdee v Virdi*" (2004) 70 *Arbitration* 1 p.62-68. See *also CMA CGM SA v Beteiligungs KG MS Northern Pioneer Schiffahrtsgesellschaft MbH & Co* [2003] 1 WLR 1015 (CA); *HOK Sport Ltd (Formerly Lobb Partnership Ltd) v Aintree Racecourse Co Ltd* [2003] BLR 155 (QBD (T&CC)). For case comment see Dundas "Appeals on Question of Law: Section 69 Revitalised" (2003) 69 *Arbitration* 3 p.172-183. See also *Skanska Construction (Regions) Ltd v Anglo Amsterdam Corp Ltd* 84 Con LR 100 (QBD (T&CC)). For case comment, see Dundas "Construction Contracts Made Easy: Who Occupied the Site? *Skanska Construction (Regions) Ltd v Anglo-Amsterdam Corp Ltd*" (2003) 69 *Arbitration* 3 p.223-235; Thompson & Dundas "Discussion: Hew Dundas's Casenote" (2004) 70 *Arbitration* 1 p.41-44. See also Holmes & O'Reilly "Appeals From Arbitral Awards: Should s69 be Repealed?" 69 *Arbitration* 1 p.1-9. See also Altaras "Right to Appeal: *Athletic Union of Constantinople v National Basketball Association & Others*" (2003) 69 *Arbitration* 1 p.63-64. See also *BLCT (13096) Ltd v J Sainsbury Plc* [2003] EWCA Civ 881; *Icon Navigation Corp v Sinochem International Petroleum (Bahamas) Co Ltd* [2003] 1 All ER (Comm) 405 (QBD (Comm Ct)). For case comment see "Arbitration – Charterparty – Dispute as to Contractual Responsibility for Temperature of Cargo – New Argument Raised at Late Stage" (2003) 3 *Shipping and Trade Law* 2 p.7-8. See also *North Range Shipping Ltd v Seatrans Shipping Corp (The Western Triumph)* [2002] EWCA Civ 405. For case comment see "Error of Law: the Application for Permission to Appeal" (2003) 3 *Arbitration Law Monthly* 9 P.7-11. See also *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (Leave to Appeal)* [2000] 3 WLR 1824 (CA). For case comment see Ambrose "Court of Appeal's Jurisdiction to Grant Leave to Appeal" (2001) 4 (Nov) *Lloyd's Maritime and Commercial Law Quarterly* p.485-486.

[59] See Seitler "Levelling the Land" (2004) 18 *Lawyer* 6 Supp (*The Real Estate Lawyer*) RE7. Suggests that the chance of a rent review arbitration appeal succeeding has risen since 2002, but that does not mean that the arbitration process is flawed.

[60] See Jacob "The Reform of Civil Procedure Law" (1982) Sweet & Maxwell at p.218. See also CMS Cameron McKenna "How Confidential is Arbitration?" (2004) 33 *Chartered Institute of Patent Agents Journal* 5 p.271-272.

justice, must be to enhance community involvement in the dispute resolution process.[61] For as Lord Hewart contended in *R v Sussex Justice ex p McCarthy*[62], in any civil procedure justice must be done and "should manifestly and undoubtedly be seen to be done." However, an advantage attributed to arbitral proceedings has traditionally been that of confidentiality.[63] The reason underpinning the need for confidentiality is clear. Many construction disputes concern sensitive information such as intellectual property disputes, which if allowed to enter the public domain, would cause great financial loss and competitive disadvantage. Consequently, one must question whether the aspect of societal certainty of arbitral procedure has been compromised by the confidentiality of proceedings?

Indeed, in theoretical terms it should be questioned whether confidentiality of arbitral proceedings should be maintained as a matter of course, or whether it should be

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[61] See Goldberg, Sanders, and Rogers (eds) "Dispute Resolution: Negotiation, Mediation and Other Processes" (1992) Little, Brown and Company. See also Alviano "Environmental Conflict and the Failure of Community Participation" (1995) 6 *Australian Dispute Resolution Journal* 1 p23-42; Bidol, Bardwell and Manring (eds) "Alternative Environmental Conflict Management Approaches: A Citizen's Manual" (1986) University of Michigan, School of Natural Resources, The Environmental Conflict Project; Bingham "Resolving Environmental Disputes: A Decade of Experience" (1986) Conservation Foundation, Donnelly & Sons; Bryson and Crosby "Three Cases Involving Strategies for Managing Public Disputes" (1987) National Institute for Dispute Resolution; Burton and Dukes "Conflict: Practices in Management, Settlement, and Resolution" (1990) St Martin's Press (The Conflict Series No 4); Carpenter and Kennedy "Managing Environmental Conflict by Applying Common Sense" (1985) 1 *Negotiation Journal* 2 p149-161; Crowfoot and Wondolleck "Environmental Disputes: Community Involvement in Conflict Resolution" (1990) Island Press; Peace Review "Development and the Environment & Other Features" (1994) 6 *Peace Review: The International Quarterly of World Peace* 3; Susskind "A Negotiation Credo for Controversial Siting Disputes" (1990) 6 *Negotiation Journal* 4 309-314.

[62] [1924] 1 KB 256 at p.259

[63] See Lalonde "Confidentiality in Canada: a Case of the Emperors New Clothes?" (2002) 21 *International Financial Law Review* 5 Supp (*Experts in Commercial Arbitration)* p.16-17; Oakley-White "Confidentiality Revisited: is International Arbitration Losing One of its Major Benefits?" (2003) 6 *International Arbitration Law Review* 1 p.29-36; Packard "To Publish or Not to Publish?" (1999) 13 *P & I International* 3 p.59-60; Trakman "Confidentiality in International Commercial Arbitration" (2002) 18 *Arbitration International* 1 p.1-18. For exceptions to the implied / voluntary duty of confidentiality in arbitration proceedings see Fortier "The Occasionally Unwarranted Assumption of Confidentiality" (1999) 15 *Arbitration International* 2 p.131-139; Neill "Confidentiality in Arbitration" (1996) 12 *Arbitration* 3 p.287-317; Sheridan "Private & Confidential: a Benefit of Arbitration" (1996) 12 *Construction Law Journal* 2 p.74-82. See also Ali *Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 (CA).

reserved for sensitive cases alone.[64] As when seeking to arbitrate upon an individual's rights, surely openness needs to be maintained so as to ensure justice is achieved. However, as evidenced by the limited attendance at court by members of the public, even when society is given free access to dispute resolution proceedings, rarely is the opportunity taken up. Could it be therefore that the need for community involvement in the resolution of disputes has been overstated? As whilst the opportunity for social regulation of litigation has been provided, rarely has it been utilised. Moreover, one needs to consider the validity of this perceived "need" for confidentiality. For in maintaining the confidentiality of arbitral awards, any opportunity to develop a body of precedent that may expedite arbitral proceedings and disputes arising therefrom, together with the opportunity to improve upon procedure and practice, will be lost. As a result, the same dispute may be arbitrated several times over, with a host of different outcomes. Given that the number of construction disputes resulting in litigation is declining in favour of mechanisms such as arbitration, the body of law that had developed to guide the construction industry may be near to being lost.

Perhaps the answer to such a question lies in seeking to achieve a fine balance between the commercial need for privacy on the one hand and society's / industry's need to monitor justice on the other. The concept of confidentiality in an arbitral context does not necessarily undermine the attaining of such a balance, as arbitral

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[64] Such as matters of national security and matters which the court deems should be dealt with in private. See *Moscow City Council v Bankers Trust Co* [2004] EWCA Civ 314. For case comment, see Dundas "Confidentiality in Arbitration: The Story Continues – Department of Economic Policy & Development, City of Moscow v (1) Bankers Trust Company and (2) International Industrial Bank" (2003) 69 *Arbitration* 4 p.296-304. See also *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 (PC (Berr)). For case comment see Altaras "Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich" (2003) 69 *Arbitration* 3 p.210-213. See also *Kalmneft JSC v Glencore International* AG [2002] 1 All ER 76 (QBD (Comm Ct)).

proceedings are confidential in nature lest an appeal be made to Court.[65] Given the theoretically limited right of appeal, only in the most deserving of cases will confidentiality be breached, thereby opening the procedure to the scrutiny of the community and continuing the development of a sustainable body of law. It is submitted that it is this commercial / community balance that ensures access to justice, as opposed to the concept of openness alone. In short, the preservation of confidentiality under the Arbitration Act 1996 can be seen to have little adverse effect upon the attainment of certainty as required by Woolf.

**The Eighth Criteria: Effective Resourcing and Organisation**

Under the terms of The Arbitration Act 1996, it is the responsibility of the parties to provide the funding for the arbitral hearing. Unlike litigation, this responsibility does not just involve the payment of legal representation and witness fees, but it also extends to cover the fees and expenses of the arbitrator himself, as well as the cost of securing the premises in which the proceedings may be conducted.

Given the financial implications of arbitration, debate has evolved as to whether parties to arbitral proceeding should be self-financing or in receipt of state aid. The reasoning for state finance is persuasive. As advocated by Roberts[66] "investment in dispute management has been a life long involvement for government" and as such should be extended to arbitration. When one considers the fact that in litigation, many

[65] See *Moscow City Council v Bankers Trust Co* [2004] EWCA Civ 314 in which it was considered whether the judgement of the High Court following a challenge to an arbitrators decision should be made public or only made available to the parties themselves.
[66] See Roberts "Mediation in the Lawyers Embrace" (1992) 55 *MLR* p.263

of those involved in small claims disputes are "one shotters against repeat players"[67] and that inequality in resourcing has led to many an injustice, the case for state funding of arbitral proceedings becomes compelling. Indeed, as can be seen in American legal culture, the individualistic nature of society has encouraged the assertion of legal rights as an entitlement of citizenship, but has distributed them according to the ability to pay. [68] If this inequality is not to be repeated and exacerbated in the British arbitral process, then it would appear essential that state funding of the arbitral process be supplied lest Woolf's definition of access to justice fails to be attained.

It should be noted, however, that should the state accept responsibility for the funding of arbitral proceedings, it would then be under a duty to the taxpayer to ensure that such proceedings are conducted fairly, efficiently and expediently. This will require the extensive supervision and auditing of the arbitral process by the courts, a move that may prove to be more damaging than good for a number of reasons. Firstly, one should have regard to the possible consequences upon society of state funding of the arbitral process, as it is conceivable that in making financial assistance open to those engaging in arbitration, legal contentiousness will be encouraged, which will in turn lead to an increase in social fragmentation. Secondly, if one accepts that arbitration emerged as an alternative to litigation that was designed to overcome litigious deficiencies, one should question whether it would be prudent to attach arbitral proceedings to that which it was intended to escape. Indeed, it was envisaged by S1(b) of the Arbitration Act 1996 that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public

[67] See Fricker & Walker "ADR: State Responsibility or Second Best?"(1994) 13 *CJQ* p.29 - 49
[68] See Auerbach "Justice Without Law: Resolving Disputes Without Lawyers" (1986) Oxford University Press p.10

interest." Yet greater court involvement in the arbitral process will not only extend the hand of the state further into private affairs, but it may also lead to the juridification of the arbitral process. That is, arbitration may become a form of government by lawyers that is conducted in the interests of lawyers. Indeed, as contended by Auerbach:[69]

> "...the more elaborate and sophisticated our legal culture, the more serious is the problem of access to justice".

Clearly the intention of the 1996 Act was to circumvent such an ambush of procedure and as Fricker & Walker[70] have contended:

> "..alternative dispute resolution should not become a short-term expedient which will only prove to be yet another turn in the process of reinventing the wheel."

Given the many mechanisms by which parties may fund proceedings, for example by way of legal expense insurance and dispute resolution syndicates,[71] the effects of the burden placed upon parties to finance arbitration are preferable to the circumvention of the legislative reforms. On balance therefore, arbitration cannot be seen to fall foul of Woolf's criteria for effective resourcing and organisation.

**The Limitations of Woolf**

It has been seen that in terms of construction, the statutory provisions of the Arbitration Act 1996 may be prima facie seen to meet the eight criteria of Woolf for

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[69] Ibid at p.140
[70] Loc Cit 67
[71] See generally Beynon, Davies and Moore "Intellectual Property and Legal Expense Insurance" (2003) IP Wales.

access to justice. However, mere application of statutory phraseology is inadequate if a robust theoretical analysis of arbitration is to be conducted. For excluded from such analysis are two issues that may serve to frustrate the attainment of Woolf's criteria: the theoretical justification for state involvement in the arbitration process; and the subsequent juridification debate. Both of these issues shall now be considered in turn.

State Involvement in Arbitration

In theoretical terms, given the historical development of arbitration in which the procedure emerged as an alternative to court proceedings, the involvement of the state in arbitration via the intervention of the court becomes questionable on two fronts. In consideration of the first point, the justification of the formal system of law rests upon the notion of justice, yet by definition the notion of justice has an indeterminate meaning. Given the absence of a universal definition, it must therefore be questioned how is justice ever possible within a legalised setting and further what is there to justify its autocratic and centralistic existence?[72] In consideration of the second issue, the success of arbitration can be seen to rest on the notion that it is a mechanism which effects the resolution of contractual disputes without issue-obscuring procedures and which seeks to assert contractual norms, thereby increasing the chance that the settlement will be met with party satisfaction. However, should arbitration fall under the remit of the state, then such a consensual and co-operative atmosphere may be replaced by that of the need for strict adherence to procedure and autocratic rules, thereby impairing the efficiency of arbitration as a mechanism which facilitates

[72] See Auerbach "Justice Without Law: Resolving Disputes Without Lawyers" (1986) Oxford University Press p.10

a mutual understanding and respect between parties.[73] Thus, given the statutory embodiment of arbitration and the powers of the court over arbitral procedure and the award, advocates of a system of arbitration free from state governance would question the ability of the mechanism to satisfy any one of the eight criteria as determined by Woolf.

Prima facie such assertions may seem to hold theoretical weight, requiring the freedom of arbitration from state intervention. However, such theories are hedged with difficulty. Firstly, to contend that the concept of "justice" has an indeterminate meaning is a fiction, for the notion of civil justice is capable of definition. That is, whilst the concept may hold varying significance from individual to individual, there are a number of common threads detectable in each definition. For example, all definitions of civil justice express the need for access to justice: that is a fair and just result and a procedure that is expedient and effective. This being the case, there can be no justification for the assertion that justice is not possible in a legalised setting. Secondly, without extensive empirical research, the contention that by being subjected to state regulation arbitration risks adopting both an autocratic and centralistic existence, is unconvincing. As already exemplified, on technical construction the Arbitration Act provides both for the resolution of a dispute according to legal and non-legal considerations.[74] This dual approach to dispute resolution was a deliberate attempt by the legislature to prevent arbitration from adopting an autocratic and centralistic character. Rather, it was the ambition of the Arbitration Act 1996 to encourage party autonomy and the resolution of disputes according to commercial

[73] See Werner "When Arbitration Becomes War. Some Reflections on the Frality of the Arbitral Process in Cases Involving Authoritarian States" (2000) 17 *Journal of International Arbitration* 4 p.97-103. See also Benson "The Enterprise of Law: Justice Without the State" (1990) Pacific Research Institute.
[74] S46(1)(b)

practice.

There are many other justifications for state involvement in the arbitral process. Principally, it has been contended that the state is not only under a duty to provide dispute resolution mechanisms, but that it is also under a duty to improve upon legal procedure. It is doubtful whether it could convincingly be argued that to maintain and develop litigation as the sole method of resolving disputes would adequately fulfil such an obligation. Thus, the state is necessarily required to both introduce and support new methods of dispute resolution, such as arbitration for example. Indeed, the provision and development of an efficient and diverse system of dispute resolution may be achieved either by: providing a choice of resolution processes; by requiring litigants to use alternatives to litigation; or by subsidising such alternatives.[75]

The merits of providing a "choice" of resolution processes are indisputable, as in legislating for alternatives to litigation such as arbitration, the individual is empowered to determine how their dispute shall be resolved, which is undoubtedly a natural right. Moreover, the state via both legislation and the judiciary may also ensure that independent bodies are not encouraging abuses of justice. The "requirement" for litigants to use alternatives to litigation cannot, however, be so readily justified. To compel a disputant to concede their vested legal rights or expectations of legal conventions is a coercion against will which cannot administer justice. Indeed, it is submitted that such "compulsion" may either be by active encouragement by the state or the judiciary, or by restrictive legislation. Recent legislative reforms affecting arbitration may be seen to be a combination of the two.

[75] See Fricker and Walker "ADR: State Responsibility or Second Best?" (1994) 13 *CJQ* p. 32-34.

For s9 of the Arbitration Act 1996 provides the judiciary with the power to stay legal proceedings to arbitration, with or without the consent of the parties. Moreover, under the Civil Procedure Rules 1999, litigating parties are obliged to consider alternatives to litigation, such as arbitration. At first glance, it would therefore appear that contemporary arbitration cannot be seen to facilitate procedural fairness, in that the freedom to determine how a dispute is to be resolved has been removed. If this is indeed the case, then s9 may be seen to frustrate the purpose behind s1(b) of the very same legislation. However, it must be noted that the power of the judiciary to stay proceedings to arbitration, may only be enforced where there is an arbitration clause in the contract. Consequently, it may be argued that party consent to arbitration had already been granted and that the use of s9 cannot be seen to represent the compelling of disputants to concede vested legal rights or expectations of legal conventions, so as to achieve procedural efficiency. In short, the process of commencing arbitration and the encouragement of such by the state cannot be said to be an aberration of justice.

A further consideration lending weight to the need for state involvement in arbitral proceedings is that state regulation of the arbitral process is necessary so as to prevent the erroneous arbitration of public law issues that may lead to the replacing of the rule of law with non-legal values.[76] That is, in a construction dispute for example, it may be alleged that a contravention of environmental protection standards has occurred. Should this dispute be arbitrated, the strict standards necessarily imposed by legislation may be compromised by the imposition of weaker standards, leading to the application of values that are inconsistent with the rule of law.[77] So as to ensure that the arbitral result attained is consistent with the public interest and that standards are

[76] See Edwards "ADR: Pancea or Anathema?"(1986) 99 *HLR* 676
[77] Ibid at p.677

maintained, intervention by the court via appeal is essential. Moreover, without express regulation to govern it's functioning, the arbitral process may become the victim of 'bullyboy' tactics. That is, should arbitration seek to function outside the statutory arena, what incentive is there for parties to accept the validity of the award? Parties to the proceedings may seek to pressure the arbitrator into deciding a certain way, lest the resulting award be referred to court and the arbitrator rendered liable for negligence, breach of contract or some other claim. In contemplation of arbitration as an absolute autonomy, Kerr[78] perceived judicial review to be a:

> "bulwark against corruption, arbitrariness, bias, improper conduct and – where necessary – sheer incompetence".

Only by statutory intervention can the sanctity of arbitration be ensured and the arbitrator accorded sufficient legislative protection so as to execute his duties in a just and fair manner without fear of reprisal. Thus, not only can the state be said to be under a duty to provide access to arbitration, but it can also be said to be under a duty to regulate arbitration. But if arbitration is to meaningfully satisfy Woolf's criteria for access to justice, one must question how far should state regulation of arbitration go[79] and how are the powers of the Court in relation to arbitration under the 1996 Act to be perceived? It is anticipated that empirical research shall provide some guidance to the answering of such a question.

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[78] See Kerr "Arbitration and the Courts – The UNCITRAL Model Law" (1984) 50 *Arbitration* 4. See also *The Derby* [1985] 2 Lloyd's Rep 325, 333 per Kerr LJ

[79] Precisely where the balance is to be struck between arbitral autonomy and judicial review is a matter of debate and one on which national laws differ. See Park "The Lex Loci Arbitri and International Commercial Arbitration" (1983) 32 *ICLQ* 21; Staughton "Arbitration Act 1979 – A Pragmatic Compromise" [1979] *NLJ* 920; Thomas "The Law and Practice Relating to Appeals From Arbitration Awards" (1994) LLP.

As already exemplified, a concern with the legislative reform of arbitration was to avoid the over-extension of the hand of the judiciary and the legal profession into arbitral proceedings. Anecdotal evidence suggests that such concerns may be well-founded, as many have asserted that juridification of the arbitral process has already taken place. Juridification usually occurs when under s1(b) of the Act, parties abdicate their decision-making powers to their legal representatives. For as exemplified by Parratt[80] some lawyers are unfamiliar with arbitration procedure and thus:

> "feel out of their depth with anything other than standard court procedures and tend to resist any suggestions for methods which have a prospect of achieving rapid progress by innovative means."

As a result, arbitration may fall victim to expensive and long-winded procedures. Given that Parratt explained such a mischief as stemming "primarily from a culture of conflict where winning is more important than finding a fair solution at minimum cost", turning the tide of juridification may be difficult.

Indeed, when seeking to apply Woolf's prerequisites for access to justice, it becomes clear that the requirements overlap one another, causing a potential conflict of interest.[81] That is, Woolf's criterion for successful arbitration includes both issues of procedure and substantive issues and examination of arbitration in practice has shown a marked polarisation of the two. This polarisation of substance and procedure can be

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[80] See Parratt "Is Construction Arbitration Failing?" (2001) 17 *Const.LJ* 3 p.209

[81] Tyler "Procedure or Result: What Do Disputants Want From Legal Authorities?" in Mackie "Handbook of Dispute Resolution: ADR in Action" (1991) Routledge

seen in the results of Tyler's[82] research and gives cause for concern. For upon examination of the attitudes of those involved in the dispute resolution process, Tyler discovered that it was the perception of the lawyers that it was the end result which was of greatest importance to not only themselves in a professional capacity, but also in so far as the client was concerned. Ironically however, examination of client attitude to dispute resolution indicated that it was the process itself and not the result that was of greatest significance. That is, in contradiction of the lawyers perception, clients were relatively unconcerned with the result attained, provided the process was procedurally fair. Whether or not a procedure was deemed to be "fair" was inextricably linked to the opportunity to participate in the process.

As one will appreciate, the results of such a study may indicate that a grave future lay ahead for arbitral proceedings, as it was the over-concern of the legal profession with substantive issues that created the situation in America whereby litigation statistics were mushrooming, despite the fact that the majority of cases were being settled out of court. [83] Such a phenomenon can be accounted for by the view of the legal profession that to compromise was tantamount to an admission of weakness. Thus, the initiation of negotiation was delayed as long as possible, so as to place the onus of suggesting a settlement upon opposing counsel.[84] Moreover, this culture of "substantiveness" led to the situation whereby lawyers became so convinced of the merits of their Client's case, that they developed unrealistic expectations as to the result that should be attained. [85] What this means for arbitration in England and Wales, is that whilst s9 of the Act 'may' be utilised so as to prevent an inordinate

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[82] Ibid
[83] See Edwards "ADR: Pancea or Anathema?" (1986) 99 *HLR* 669
[84] Ibid at p.670.
[85] Ibid

delay in the commencing of arbitral proceedings, once proceedings have commenced and an arbitral award has been made, such legally represented parties may seek to appeal the tribunals' decision on the grounds of a serious irregularity[86] or point of law[87]. Such action motivated only by a culture of substantiveness, would clearly delay the resolution of the dispute, thereby undermining the purpose of the Act.

However, an examination of the American attitude to justice has illustrated that there are also dangers in becoming too concerned with issues of procedure. For in contemporary American society, the notion of justice has become in essence about giving the least offence to the most people.[88] This has created the opposite situation to Tyler's research, whereby it is the legal profession who are concerned with the bargaining and negotiating process itself, rather than the result that it brings. As Levine[89] has contended, this has led to the situation whereby justice in a commercial age is "merely a problem of correct book keeping".

It must be questioned, however, whether the removal of legal representatives from the arbitration process would alleviate such a situation. That is, given the extent of the arbitral tribunals jurisdiction and powers of determination, is it justifiable for the legal profession to share their monopoly of the dispute resolution process with lay people? Is it justifiable, for example that an arbitral tribunal convened to determine a contractual dispute, may consist solely of quantity surveyors or other construction professionals, who are devoid of any formal legal training? Such a question clearly

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[86] S68 Arbitration Act 1996
[87] S69 Arbitration Act 1996
[88] See Auerbach "Justice Without Law: Resolving Disputes Without Lawyers" (1986) Oxford University Press p.11
[89] See Manuel Levine "The Concilliation Court of Cleveland" (1918) 2 *Journal of Arner Judicial Society* 10

underpins the validity of the arbitral process. However, it should be noted that given the parties freedom to select the identity of an arbitrator and / or the method by which an arbitrator is to be appointed, it is the disputants alone who may hold the key to such a question. Given the complexity of construction disputes and the conventions surrounding the industry, an individual free from legal constraints may be best placed to determine a commercial dispute. Moreover, it would be foolhardy to suggest that non-legal arbitrators do not have an understanding of the law - given the number of regulations and requirements that a construction project may encompass, it is a prerequisite for construction professionals to undertake basic legal training. Thus, the tide of juridification must be countered, as it is without both theoretical and practical justification. That is not to say, however, that the last vestiges of the law need be removed from the arbitral process, for injustice within the law is a travesty, but injustice without law is worse still. [90]

[90] Loc Cit 88

Interestingly, the Human Rights Act 1998[91] can be seen to embody the principles of justice as described by Woolf. The three main provisions of the Act are: that in so far as it is possible, the Courts must interpret legislation consistently with the Convention; where such a consistent interpretation is not possible, the judiciary must apply existing legislation but the High Court, Court of Appeal, or the House of Lords are free to make a declaration of incompatibility which will assist Parliament in the decision as to whether the law needs amending; and lastly that except where legislation compels otherwise, all public authorities must act compatibly with the Convention. Significantly for the purposes of resolving a dispute, incorporated into the Act[92] is Article 6 of the Convention, which relates to the "right to a fair trial". Indeed, Article 6 states that:

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[91] This Act was introduced on the 2 October 2000 and incorporates the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the Convention) into UK domestic law. The treaty was created in 1950 and the UK signed up to it in 1951. Until the introduction of the Human Rights Act in 2000, liberties in England and Wales were residual rather than fundamental and positive in nature. That is, apart from the Magna Carta (1297), the Petition of Right (1627), the Bill of Rights, and the Act of Settlement, which stated general provisions ensuring the peaceful enjoyment of property and the freedom of the individual from legal detention, duress and punishment of taxation – in effect regulating relations between the Crown and the people – and apart from legislation conferring particular rights, the fundamental rights and liberties of British individuals were not expressly defined in any law or code. In short, theory indicated that one was permitted to do anything that was not expressly prohibited. Indeed, before the implementation of the Act (and after 1966), individuals who considered that their rights or freedoms under the Convention had been infringed and who could not obtain adequate redress through the UK courts, could bring their case before the Commission (now abolished) and the European Court of Human Rights in Strasbourg. This was clearly a costly and time consuming practice. With the introduction of the Human Rights Act however, the Convention can now be enforced in England and Wales without the need to travel to Strasbourg. It should be noted that the Act confers rights upon both natural and legal persons, including companies, against the state / public authorities.

[92] Rights incorporated from the Convention and the Protocols were, amongst others: Article 2, Right to Life; Article 3, Prohibition of Torture; Article 4, Prohibition of Slavery and Forced Labour; Article 5, Right to Liberty and Security; Article 6, Right to a Fair Trial; Article 7, No Punishment Without Law; Article 8, Right to Respect Private and Family Life; Article 9, Freedom of Thought, Conscience and Religion; Article 10, Freedom of Expression; Article 11, Freedom of Assembly and Association; Article 12, Right to Marry; Article 14, Prohibition of Discrimination. It is interesting to note that Article 13 – the Right to an Effective Remedy – was not incorporated into the Act, as the Government perceived the Act itself to provide an effective remedy and hence the provision was deemed unnecessary.

> "in the determination of his civil rights and obligations ... every one is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly..."

There is a right of appeal to anyone who can show that the tribunal has failed to conduct proceedings in a fair and impartial way or to ensure that submissions, arguments and evidence are properly examined. Further, Article 6 requires that a party has real and effective access to Court, has a reasonable opportunity equal to his opponents to present his case and is given a reasoned decision.

Should the Act apply to arbitration, the implications are clear. For example, not only will the confidentiality of such proceedings be deemed to be unlawful, but also if the statutory period for the completion of proceedings is too short for a fair hearing, then the time must be extended lest the outcome be deemed unlawful. The capping of costs and the exercise by the arbitrator of his power to determine his own jurisdiction may also be called into question. Indeed, under the Act the Courts may grant any relief or remedy or make orders as it considers just and appropriate, provided the remedy is within the power of the judiciary.[93] If for example, the judiciary were to hold that the arbitral timescale as provided under the Arbitration Act was incompatible with the convention, the Court may order that the legislation be amended so as to remove the incompatibility. In short, if the Human Rights Act were to apply to arbitration, the ramifications for the construction industry would potentially be wide reaching.

[93] Damages are exceptionally allowed – where the Court has the power to award damages and considers such an award necessary to afford satisfaction to the person whose rights have allegedly been infringed.

In so far as the applicability of the Act to arbitration is concerned, there are two issues that need to be considered. Firstly, is the arbitral tribunal subject to the provisions of the Convention and secondly, aside from any obligation placed upon the arbitral tribunal, what impact does the Human Rights legislation have upon the statutory supervisory and enforcement role of the Court in arbitration proceedings? Given that the Human Rights Act provides for the taking into account of the jurisprudence of the former Commission and the European Court of Human Rights, the answer to such questions must lie in the jurisprudence of those institutions.

In *Mousaka Inc v Golden Seagull Maritime Inc and Another*[94] the judge observed that:

> "The tentacles of the Human Rights Act 1998 reach into some unexpected places. The Commercial Court, even when it is exercising its supervisory jurisdiction as regards arbitration, is not immune".

Furthermore, in *Bramelid and Malmstrom v Sweden*,[95] the Commission noted that a distinction must be drawn between voluntary and compulsory arbitration and that:

> "If ... arbitration is compulsory in the sense of being required by law, ... the [arbitration] board must offer the guarantees set forth in Article 6 paragraph 1".

Thus, both the Court and the arbitral tribunal of a compulsory arbitration required by law can be seen to be subject to the provisions of the Convention.

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[94] Commercial Court, 30 July 2001

[95] Application Nos 8588/79; 8589/79 Report and Opinion of Commission 12 December 1983

Given that arbitration under the Arbitration Act 1996 is a consensual and thereby "voluntary" process, this would seem to prima facie indicate that such arbitration is not directly subject to the provisions of the Human Rights Act. Moreover, as noted by the judge in *Mousaka Inc.*:

> "The parties have agreed to arbitrate their disputes. They have thereby largely renounced (in the interests of privacy and finality) the application of Article 6 (albeit some incidents of this Article are of course preserved by s68 of the Arbitration Act 1996)".

Indeed, in *Deweer v Belgium*[96] and *KR v Switzerland*[97] it was stated that an arbitration agreement entered into voluntarily should be treated as a waiver of Article 6(1) to the extent that it amounts to a renunciation of the right to have a dispute dealt with by an ordinary court of the land. However, it was stated by the ECHR in *Suovaniemi v Finland*[98] that a convention right may be waived only where the waiver is both "clear" and "permissible". In certain circumstances, for example where public policy dictates, the waiver may be deemed to be ineffective. Furthermore, the Court stated that whilst a clear and voluntary waiver of public court proceedings in favour of arbitration is generally permissible under Article 6, it should not necessarily be considered to be a waiver of all rights under that Article as there were minimum levels of procedural safeguards which the state must guarantee in relation to arbitration.

Indeed, when examining the supervisory and enforcement powers of the Court in relation to arbitral proceedings, a divergence of opinion can be seen to emerge. In

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[96] (1980) 2 EHRR 439

[97] Application No. 10881/84: Decision of the Commission as to Admissibility 4 March 1987

[98] Application No. 31737/96: Decision of HER Court (sitting as a Chamber) as to Admissibility 23 February 1999. See also Welex AG V Rosa Maritime Ltd [2003] LR 509 for an example of the application of such a principle by the British court.

*Nordstrom v Netherlands*[99] it was held that the convention cannot require national courts to ensure that arbitration proceedings are conducted in accordance with Article 6. However, in *Jakob Boss Sohne KG v Germany*[100] it was stated that the role of the national courts required them to guarantee the correctness and fairness of arbitral proceedings and to ensure that proceedings are carried out in accordance with fundamental rights, principally the right to be heard. This latter view was supported by the case of *Suovaniemi* and the role of the court was further extended in *Axelsson and Others v Sweden*[101], *Stran Greek Refineries and Stratis Andreadi v Greece*[102] and *Molin v Turkey*[103] so as to place a duty upon the national court when exercising their supervisory or enforcement function in relation to arbitral proceedings, to comply with Article 6 (saved to the extent specifically waived by a party). Indeed, the British courts have adopted this latter view, stating that Article 6 can be invoked during the appeal process from arbitration, even where the party seeking to rely on such is a company situated outside the United Kingdom.[104]

In short, therefore, a standard arbitration agreement should be interpreted as a waiver of the right to a public court hearing alone and should not be perceived to be a waiver of the right to a fair trial. Whilst not directly subject to Article 6, the arbitral tribunal must have regard to the principles contained therein and the state, via the national courts, has a duty to ensure such compliance. Furthermore, the state is also under a duty to ensure that in the exercise of its supervisory and enforcement powers, the court also adheres to such principles. Further litigation on this point is expected,

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[99] Application No. 28101/95: Decision of the Commission as to Admissibility 27 November 1996
[100] Application No. 18479/91: Decision of Commission as to Admissibility 2 December 1991
[101] Application No. 11960/86: Decision of Commission as to Admissibility 13 July 1990
[102] (1994) 19 EHRR 293
[103] Application No. 23173/94: Decision of Commission as to Admissibility 22 October 1996
[104] See North Range Shipping Ltd v Seatrans Shipping Corporation [2002] 2 LR 1.

although it should be noted that if arbitration is to satisfy the criteria for justice as established by Woolf, then regard to such principles as enshrined by the Human Rights legislation will be necessary in any event.

## Adjudication and Access to Justice

As already demonstrated in Chapter One, it was the intention of the Construction Act 1996 to develop a coherent, responsive and intelligible adjudication system that could afford access to justice. In applying each of Woolf's eight criteria in turn to the statutory provisions embodied in the Act, it may be seen that in theoretical terms, adjudication prima facie facilitates such access. However, as will be illustrated, concern has been expressed as to the operation of adjudication that may serve to undermine the requirements of access to justice as established by Woolf

### The First Two Criteria: Procedural Fairness and a Just Result

In defining access to justice, Jacob stated that if civil wrongs are not to be conferred immunity, then members of a community must be able to assert and maintain their reasonable and well-founded rights and claims, as well as defend themselves against those of others.[105] In short, procedural fairness should be ensured so as to facilitate a just result. It has been contended by Mr Justice Forbes[106] that the quantitative assessment of procedural fairness may be achieved via a three-stage test. Firstly, regard must be had to the terms of adjudication agreement as contained in the contract

[105] See Jacob "The Reform of Civil Procedure Law" (1982) Sweet & Maxwell at p.218
[106] Stated extra-judicially at a recent meeting of the Adjudication Society, as reported by Bingham "Keep It Clean" *Building Magazine* 6th December 2002.

between the parties. Secondly, the events that occurred during the adjudication procedure must then be established. That is, one must question whether the adjudicator, when forming a decision, has regard to the principles of natural justice before denying a man of his rights.[107] For example, when conducting proceedings, does the adjudicator ensure that all parties have been conferred an equal opportunity to present their case and to answer that of the other?[108] As stated by Judge Seymour in *RSL (South West) Ltd v Stansell Ltd:*[109]

> "It is absolutely essential, in my judgment, for an adjudicator, if he is to observe the rules of natural justice, to give the parties to the adjudication the chance to comment upon any material, from whatever source, including the knowledge or experience of the adjudicator himself, to which the adjudicator was minded to attribute significance in reaching his decision".

Moreover, does he further guard against any bias that may result in the final decision? As stated by the Court of Appeal in *Director General of Fair Trading v Proprietary Association of Great Britain,*[110] culpable bias should be defined as including both "actual bias" and "apparent bias".[111] Once these steps have been executed, a

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[107] Essentially, the rules of natural justice comprise two principles. Firstly, nemo judex in causa sua (no man should be a judge in his own cause – this element is often defined to include bias) and secondly, audi alteram partem (no man should be condemned unheard). See Halsbury's Laws of England, Volume 1(1) at para. 4. See also Sheridan & Helps "Construction Act Review" (2004) 20 *Construction Law Review* 4 p.206-214. See also *Project Consultancy Group v Trustees of the Gray Trust* [1999] B.L.R. 377 (QBD (T&CC)); *Homer Burgess Ltd v Chirex (Annan) Ltd* [2000] S.L.T. 277 (OH); *Discain Project Services Ltd v Opecprime Development Ltd* [2001] B.L.R. 285 (QBD (T&CC)); *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] B.L.R. 207 (QBD (T&CC)); *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] B.L.R. 272 (QBD (T&CC)); *Balfour Beatty Construction Ltd v Lambeth LBC* [2002] EWHC 597; [2002] B.L.R. 288 (QBD (T&CC)); *Edmund Nuttall Ltd v RG Carter Ltd* [2002] EWHC 400; [2002] B.L.R. 312 (QBD (T&CC)); *Try Construction Ltd v Eton Town House Group Ltd* [2003] EWHC 60; [2003] B.L.R. 286 (QBD (T&CC)); *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390; [2003] C.I.L.L. 2012 (QBD (T&CC)); *Dean & Dyball Construction Ltd v Kenneth Grubb Associates Ltd* [2003] EWHC 2465 (QBD (T&CC)).

[108] See *Woods Hardwick Ltd v Chiltern Air Conditioning Ltd* [2001] BLR 23; *London & Amsterdam Properties Ltd v Waterman Partnerships Ltd* [2003] EWHC 3059

[109] See [2003] EWHC 1390

[110] [2000] All E.R. 2425

[111] The Court of Appeal observed that "apparent bias" would be an appropriate finding where the court decides that, looking at the matter objectively, the material facts give rise to a "legitimate fear" that the tribunal may not have acted impartially. See also *Discain Project Services Ltd v Opecprime*

'control' will then be created by which a comparison may be made between the events surrounding the adjudication procedure and the terms of the contract. Natural justice demands that adjudication operates as "a transparent process sensibly and pragmatically agreed by the parties".[112] If the turn of events is deemed to have exceeded the agreement between the parties, then procedural fairness will not have been achieved.

Clearly, if adjudication is to facilitate access to justice under this head, then it must be seen to operate as a shield with which to prevent any man from being deprived of or suffering any loss of his rights, except by due process of law. This requires that procedural equality is championed and privilege and unfairness is vanquished. Practical application of such necessities can be found in s108(2)(e) which confers protection upon disputing parties by way of imposing a duty upon the Adjudicator to act "impartially". Not only does such impartiality protect against attitudinal bias, but it also serves to protect against procedural bias by ensuring that both parties have been conferred an equal opportunity to present their case and to answer that of the other. It would appear therefore, that statutory provision provides for a fair procedure that culminates in a just result. It is important to note however, that the ability of adjudication to provide for such may be undermined on two counts. Firstly, such requirements include both issues of procedure and substantive issues and an emerging trend in the adjudication process is for there to be a polarisation of the two.[113] Indeed,

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*Development Ltd* [2001] B.L.R. 285 (QBD (T&CC)); *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] B.L.R. 207 (QBD (T&CC)); *Pring & St Hill Ltd v C. J. Hafner* [2002] EWHC 1775.

[112] See H.H. Judge Wilcox *Try Construction Ltd v Eton Town House Group Ltd* [2003] B.L.R. 295, para.[63].

[113] See Tyler "Procedure or Result: What Do Disputants Want From Legal Authorities?" in Mackie "Handbook of Dispute Resolution: ADR in Action" (1991) Routledge.

a legitimate fear was recently expressed at an adjudication conference[114] that due to their duty of "impartiality", adjudicators would find themselves subjected to claims of bias or procedural impropriety. This it was agreed, focused the minds of the adjudicator upon procedural issues, rather than the final decision. Conversely, it was stated that the main concern of construction parties was the final decision of the adjudicator. Only where the decision was unfavourable and there were clear implications of bias, were proceedings invoked by construction parties to overturn the decision. Given this potential conflict of interest, the fulfilment of Woolf's criteria for access to justice becomes questionable.

Notwithstanding such, the attainment of procedural fairness and a just result may also be undermined by s108(2)(a). That is, under this section a party is enabled to give notice "at any time" of his intention to refer a dispute to adjudication. Whilst such a provision will not be problematic in most instances, unscrupulous parties who are seeking tactical advantage may come to abuse it. For example, having decided to refer a dispute to adjudication, a disputing party may stall the referral until preparation for proceedings has been concluded. In other words, s108(2)(a) may be utilised as an "ambush" tactic, which unless countered by the courts, will thereby confer unilateral advantage.[115] Furthermore, even where an adjudication clause has not been included in the construction contract, s108(5) provides that parties to the contract may invoke adjudication proceedings under the Scheme for Construction Contracts. Thus, for a dispute to be referred to adjudication, it needs only the consent of one party and should the other party disagree with such, they will nonetheless be compelled to

[114] RICS CPD March 2002

[115] See *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] BLR 272; *Edmund Nuttall Ltd v R.G. Carter Ltd* [2002] BLR 312; *R.G. Carter Ltd v Edmund Nuttall Ltd* (No 2) [2002] BLR 359; *London & Amsterdam Properties Ltd v Waterman Partnership Ltd* [2003] EWHC 3059 (QBD (T&CC))

comply. It would appear, therefore, that the element of consent has been removed from the adjudication process, calling into question the ability of the mechanism to treat disputants "fairly".

However, it should be noted that s108 may be seen to merely protect a party's right to invoke adjudication. That is, if a statutory right to adjudication did not exist, larger, wealthier companies may seek to take advantage of their smaller counterpart and bypass adjudication altogether, as they may see an advantage to invoking the threat of expensive litigation proceedings so as to extract a unilaterally beneficial outcome to a dispute.[116] Moreover, s108 only provides parties with an option to invoke adjudication, it by no means requires all disputing parties to take their disputes to an adjudicator – positive action is required on behalf of a disputing party, lest the provisions of the Construction Act lay dormant. On balance, the statutory provisions affecting the right to adjudication should be seen to give teeth to the sentiment behind the civil justice reforms – that the adverse effects of bargaining position should be countered so as to ensure that disputants have an equal access to justice in the resolution of their dispute.

Whilst adjudication under the Construction Act may be seen to give rise to a "fair procedure", judicial administration of the process has cast doubt upon the ability of adjudication to facilitate a "just resolution". Namely, there are an increasing number of reported cases in which the courts have enforced the decision of an adjudicator

[116] See Menkel-Meadow "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" (1985) 33 *UCLA LR* 485

even where it is demonstrably erroneous and wrong.[117] Authority for such a stance has been derived from the case of *Nikko Hotels (UK) Ltd v MEOC Plc*[118] in which Knox J stated:

> "If he has answered the right question the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity".

Clearly in adopting such an approach, there is a risk that a party will be subjected to an irreversible injustice. For example, the wrongly disenfranchised party may become insolvent during the intervening period prior to any corrective judgement or award.

However, as illustrated by the judgement of Bowsher J in *Director General of Fair Trading v Proprietary Association of Great Britain*[119], the application of such a stance is not a blanket rule and the court may depart from it where adjudicators have failed to comply with the rules of natural justice[120]:

> "... I do not think it right that the court should enforce a decision reached after substantial breach of the rules of natural justice. I stress that an unsuccessful party in a case of this sort must do more than merely assert a breach of the rules of natural justice to defeat the claim. Any breach proved must be substantial and relevant."

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[117] See *Bouygues (United Kingdom) Ltd v Dahl-Jensen (United Kingdom) Ltd* [2001] 1 All ER (Comm) 1041; *Macob*; *VHE Construction Plc v RBSTB Trust Co Ltd* [2000] BLR 187; *Civil Engineering Ltd v Morrison Construction Ltd* [1999] CLC 739.

[118] [1991] 2 EGLR 103 (Ch D)

[119] [2000] All E.R. 2425.

[120] Whilst a plethora of case law has emerged on the application of the first rule of natural justice, the nemo judex in causa sua principle, to adjudication, there remains relatively little case law dealing with the applicability of the second rule of natural justice, the audi alteram partem principle. However, there have been recent indications that where an adjudicator acts in breach of that rule the courts may, depending upon the circumstances of the case, characterise such a breach as a failure to act impartially. See *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth* [2002] EWHC 597

It is important to note, that we still await clarity on the extent of the application of the rules of natural justice to adjudication. Although at present, authority exists to support the proposition that breaches of natural justice will be ignored unless they are sufficiently serious that they can be treated as likely to have influenced the outcome of the decision.[121] Indeed, the applicability of natural justice has been placed under practical limitation by the courts. For as stated by H.H. Judge Wilcox in *Try Construction Ltd v Eton Town House Group Ltd;*[122]

> "I accept that the principles of procedural fairness (or the need to observe the rules of natural justice) are not to be regarded as diluted for the purposes of the adjudication process. In an individual case, however, they must be judged in the light of such material matters as time restraints, the provisional nature of the decision and any conclusion or agreements made by the parties as to the nature of the process in a particular case".

As such, when seeking to determine whether adjudication proceedings have complied with Woolf's requirements for fairness and justice, one must take an analytical view in light of the constraints of the process. Given the intended interim nature of adjudication, one may assume that such a stance is correct. However, as empirical research shall demonstrate, adjudication is often the final resolution to a dispute.[123]

**The Third and Fourth Criteria: Reasonable Cost and Speed**

Annexed to the need for procedural fairness and a just result are the requirements of expediency and efficiency and the provisions of the Construction Act seek to eliminate or reduce delays, cost and vexation in the machinery of the civil justice

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[121] See for example, *Discain Project Services v Opecprime Development Ltd* [2000] BLR 402 and *Try Construction Ltd v Eton Town House Group* Ltd [2003] BLR 286 which demonstrate that the question as to a breach of natural justice is one of fact and degree in each case.
[122] See [2003] B.L.R. 292, para.[50].
[123] See Chapter Five

process which can be fatal to a just claim or defence. Indeed, s108(2)(b) of the Act requires the appointment of an adjudicator and referral of the dispute to him within 7 days of the giving of notice of intention to refer the dispute. Moreover, s108(2)(d) requires the adjudicator to reach a decision within 28 days of the referral, extendable to 42 days with the consent of the referring party, or such longer period as is agreed by the parties after the dispute has been referred (s108(2)(c)).[124] It will be appreciated that such timescales are exceedingly expeditious. Given the efficiency with which the proceedings are dealt, it is contended that adjudication will also limit the financial costs incurred by disputing parties.

However, as cautioned by Edwards, "inexpensive, expeditious and informal adjudication is not always synonymous with fair and just adjudication".[125] Indeed, complex technical cases may not lend themselves to resolution within such an expeditious timescale and there have been widespread claims that adjudicators will have little choice than to reach a hurried, or rather ill-considered decision. The economic ramifications of such for the construction parties concerned are clear and need little explanation. However, it should be remembered that the Construction Act does confer upon adjudicating parties, the ability to extend the time limit sufficiently so as to enable the adjudicator reach a fair and just decision. It is anticipated that when faced with such a technical dispute, the adjudicator himself shall request such an extension and in the majority of cases his request will be granted. Thus, only where parties are not prepared to sufficiently extend the time will any threat be posed

[124] For the effect upon an award where the adjudicator has failed to strictly comply with the time limits see Blunt "Adjudicators Time Defaults" (2001) 17 *Construction Law Journal* 5 p.371-377. See also *Simons Construction Ltd v Aardvark Developments Ltd* [2003] EWHC 2474; [2004] T.C.L.R. 2 (QB (T&CC))

[125] See Edwards "ADR: Pancea or Anathema?" (1986) 99 *HLR* 679

to justice. However, as exemplified by Judge Humphrey Lloyd[126], when faced with such a circumstance the adjudicator could decline to make a decision and resign. In any event, equity and justice should not, therefore, fall victim to the twenty-eight day timescale.

**The Fifth and Sixth Criteria: Understandable and Responsive**

Legislative provision to provide for an understandable and responsive procedure can be found in s108(2)(f) of the Construction Act which enables the adjudicator to "take the initiative in ascertaining the facts and the law." [127] Such a provision, when coupled with the fact that the adjudicator appointed may be of either a legal or construction background, shall facilitate an expert tailoring of adjudication procedure to the case in hand, so as to meet the needs of disputants. Indeed, the adjudicator may adopt either an inquisitive[128] or adversarial approach to matters of procedure depending upon the facts of the case. For example, in a technical dispute, the adjudicator appointed may be of a professional construction background and given their ability to determine matters of procedure, may dispense with oral hearings so as to adopt a document only procedure. Alternatively, where the dispute relates to a contractual issue such as payment, the adjudicator appointed may be of a legal background and circumstances may dictate the production of witness evidence and site investigation reports. In short, procedural issues will be decided by the nature of the dispute in hand and parties to adjudication should not find themselves subjected to formalistic and legalistic procedures that are both unintelligible and inappropriate. In

[126] *Balfour Beatty Construction Limited v London Borough of Lambeth* [2002] EWHC 597
[127] See Block & Parker "Decision Making in the Absence of Successful Fact Finding: Theory & Experimental Evidence on Adversarial Versus Inquisitorial Systems of Adjudication" (2004) 24 *International Review of Law and Economics* 1 p.89
[128] See *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] C.L.C. 739

theory, therefore, adjudication should fully comply with Woolf's requirements for access to justice under this head.

**The Seventh Criteria: Certainty**

If a mechanism of dispute resolution is to facilitate the criteria for certainty, then its requirements are two fold: firstly, it must be capable of reaching a final and binding resolution to disputes in the majority of cases; and secondly it must promote certainty in the wider community with regard to case precedent and questions of law.

A traditional benefit associated with adjudication is that it facilitates the settlement of a dispute in many cases. For in providing a neutral, penetrating and analytical examination of the case in hand, an honest view as to the result likely to be attained in court will be provided. This, it is submitted, would be sufficient to lay the dispute to rest in most construction cases.[129] What is of concern, however, is the degree to which adjudication decisions are final and binding upon the parties. That is, what is the scope for opening up an adjudicator's decision to judicial review?

The rationale of the Construction Act was to provide expedient interim resolution to disputes, as should adjudicators' decisions be evaluated before they could be enforced, then the effect of interim relief would be undermined. To this end, s108(3) provides that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration

[129] See Edwards "ADR: Pancea or Anathema?" (1986) 99 *HLR* 673

or the parties otherwise agree to arbitration) or by agreement.[130] However, the parties may agree to accept the decision of the adjudicator as finally determining the dispute. Thus, state involvement in the adjudication process via the court is theoretically and largely restrained until the issuing of the decision and the decision of the adjudicator is binding unless and until it is challenged.

Given the potential for a single dispute to proceed to adjudication, arbitration and litigation,[131] it is essential that a fine balance between the assertion of rights on the one hand and the right not to be subjected to a costly onslaught of dubious claims on the other, must be struck. Such a balance would appear to have been achieved in practice, as in a number of construction disputes, adjudication has become the final decision making process. As exemplified by Henchie,[132] whether the parties are satisfied with the adjudicator's decision or not, they rarely challenge the decision by way of arbitration or litigation – largely due to issues of cost. There have been instances however, where the prospect of bringing an application for Summary Judgement has been raised for purely tactical reasons. Commencing such proceedings can be attractive to an unsuccessful adjudicating party, as it might be seen as a lever by which a settlement at an amount lower than that awarded may be extracted. Further still, commencing such proceedings might be sufficient to dissuade the successful party from initiating enforcement proceedings on the grounds of cost. In simple terms, either by might or by right, adjudication often concludes the dispute.

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[130] See Nissen "The Format for Litigation and Arbitration After Adjudication" (2003) 19 *Construction Law Journal* 4 p.179 – 186; Tweeddale "Challenging Jurisdiction in Adjudication Proceedings" (2001) 17 *Construction Law Journal* 1 p.3-13.

[131] For the effect upon adjudication of concurrent court proceedings see *Herschel Engineering Ltd v Breen Property Ltd* [2000] B.L.R. 272.

[132] See Henchie "Redmond's Recipe For Fudge" *Building Magazine* 6th December 2002

Even where the actions of an adjudicator have been challenged, the intervention of the court has not been met with unanimous approval. Indeed, concern has been expressed as to the reluctance of the Court to overturn the decision of an adjudicator on a summary judgement application, even where it is established to have been legally incorrect or subject to mistake. For as witnessed in *Bouygues UK Ltd v Dahl-Jensen UK Ltd*[133] where an Adjudicator makes a mistake in reaching his Award, his award will still be binding and enforceable provided that the Adjudicator acted within the scope of his terms of reference. Thus, unless an adjudicator has acted outside his jurisdiction or has failed to comply with the principles of natural justice,[134] the Courts will not overturn the decision of an adjudicator on summary judgement application. Rather the issue can only be overturned upon the final resolution of the dispute at Court or via arbitration, which as has been seen, is an uncommon event in the construction industry. Thus, adjudication may be seen to fulfil the first criterion for certainty. Although if access to justice is to be holistically ensured, then perhaps the focus of the question should become are parties to adjudication proceedings accepting rough justice on the grounds of economic necessity, so as to undermine the assertion of their valid rights or the defence against illegitimate claims?[135]

[133] [2001] 1 All E.R. (Comm) 1041

[134] As already exemplified, natural justice requires the adjudicator to act impartially and to give each party an equal opportunity to present their case and respond to that of their opponent.

[135] Such shall be the subject of empirical research.

In so far as the second aspect of certainty is concerned, given the contention that justice must be done and should "manifestly and undoubtedly" be seen to be done, [136] whether adjudication can be seen to promote certainty in the wider community with regard to case precedent and questions of law, is a matter of construction. Indeed, adjudication proceedings are confidential unless and until they are challenged by way of court proceedings.[137] If "public assessment" is to be defined as requiring the conducting of procedures in an "open-house" environment, then adjudication cannot be seen to be compliant. If the establishment of case precedent is to include the official reporting of each adjudication decision then adjudication cannot be seen to be compliant. If, however, "public assessment" is to be determined as assessment by the Court of adjudication procedure, then adjudication may well fall within the bounds of "public justice". For should a party to adjudication proceedings allege a breach of adjudicator impartiality as imposed by s108, Court examination of the adjudication procedure will commence. Furthermore, if the establishment of case precedent is to be defined as the provision of guidance as to contentious issues, then given the ability to refer the dispute to court for final resolution, adjudication may be seen to fulfil the requirement for certainty. It is important to note, however, that for any assessment of adjudication proceedings, an action has to be brought by one of the parties. Thus, a carte blanche opportunity to evaluate adjudication practice and procedure does not exist. In short, whether adjudication can be seen to comply with the public justice aspect to certainty, is a matter of definition and circumstance.

[136] Lord Hewitt in R v Sussex Justice ex p McCarthy [1924] 1 KB 256 at p.259
[137] See *Pring & St Hill Ltd v C. J. Hafner* [2002] EWHC 1775.

As with arbitration, parties to adjudication proceedings are responsible for the financial implications of the mechanism on two fronts. Not only must the costs of any professional representation be met, but the costs of the adjudicator and associated costs must also be met by the parties to the dispute. [138] The exact apportionment of financial liability depends upon the terms of the contract. Turning to the first financial element, most contractual provisions provide that the parties cannot recover their own costs in the adjudication. That is, neither party can claim any fees incurred by lawyers, experts or other parties who have assisted in the preparation of the case.[139] Whilst the Scheme is silent on the parties' own costs, it has now been decided that whilst there is no implied term that the adjudicator may decide on payment of the parties costs, he can be given the power to do so during proceedings, for example by both parties claiming their costs. In so far as the second element is concerned, under the Scheme and most standard form contracts, the adjudicator may determine the liability for his fees and reasonable expenses in his decision. Usually, the successful party is not required to pay the adjudicator's fees,[140] although factors such as party behaviour and whether any other issues were won during the procedure may result in an apportionment of his fees between the parties. Alternatively, the adjudicator may apportion his fees equally between the parties.

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[138] See *Faithful and Gould Ltd v Arcal Ltd* (2001) TCC; *Griffin v Midas Homes Ltd* (2002) 18 *Construction Law Journal* 67; *Paul Jensen v Staveley Industries Plc* [2001] WN 101245; *R.G. Carter Ltd v Edmund Nuttal Ltd (No 2)* [2002] BLR 359; *Stubbs Rich Architects v W.H. Tolley & Son Ltd* (2001).

[139] See *Total M&E Services Ltd v ABB Building Ltd* [2002] EWHC 248. Contrast *R.G. Carter Ltd v Edmund Nuttall Ltd* [2002] B.L.R. 359.

[140] But should an unsuccessful party refuse to pay the adjudicator, he may lawfully claim the fee from the successful party.

Where the disputing parties are of equal and secure financial standing, such financial responsibility will not undermine the attainment of access to justice, as the costs are likely to be borne without financial implication. However, where there is an inequality of financial position, or where both parties to proceedings are not financially secure, then the costs incurred may limit such access to justice. Indeed, where there is an inequality in resourcing capability, the contractual provisions appertaining to financial liability may be exploited so as to gain unilateral tactical advantage. For example, the costs of adjudication proceedings may be artificially increased by a party so as to extract a unilaterally beneficial settlement to the dispute. Given that investment in dispute management has been a lifelong involvement for government and given the financial burden placed upon adjudicating parties should they be self-financing and the inequalities that this may bring, it should be questioned whether state finance should extend to cover adjudication.[141] Prima facie, the benefits of state investment in the adjudication system would seem to suggest that it must. For if access to justice is to be facilitated, then disputing parties should enter proceedings on a level footing and factors of cost should not prohibit the pursuance of a dispute to a fair and just conclusion.

However, it should be noted that if the state were to accept responsibility for the funding of adjudication proceedings, it would be under a duty to the taxpayer to ensure that such proceedings are conducted fairly, efficiently and expediently. This, it is submitted, would require the extensive supervision and auditing of the adjudication process by the courts, a move which may prove to be more damaging than good for a

[141] The Arbitration Act 1996 states that it is the responsibility of the parties to provide the funding for the hearing. Unlike litigation, this responsibility does not just involve the payment of legal representation and witness fees, but it also extends to cover the fees and expenses of the arbitrator himself, as well as the cost of securing the premises in which the proceedings may be conducted. See Roberts "Mediation in the Lawyers Embrace" 1992 55 *MLR* p.263

number of reasons. Firstly, one should have regard to the possible consequences upon society of state funding of the adjudication process. For it is conceivable that in making financial assistance open to those engaging in adjudication, legal contentiousness will be encouraged, which will in turn lead to an increase in social fragmentation. For if the minds of parties are not forced to focus upon the financial implications of invoking adjudication, frivolous and vexations claims could be referred to adjudication for reasons none other than tactical purpose. This, it is contended, will serve only to undermine the relationships of those participating in the construction industry and bring about an atmosphere of distrust, as opposed to one of cohesion. Secondly, if one accepts that adjudication emerged as an alternative to litigation that was designed to overcome litigious deficiencies, one should question whether it would be prudent to attach adjudication proceedings to that which it was intended to escape. It is not difficult to imagine the scenario whereby regulation of adjudication by the courts led to the permeation of adjudication by litigious procedures and practices. Indeed, greater court involvement in the adjudication process would not only extend the hand of the state further into private affairs, but it may also lead to the juridification of the adjudication process. That is, adjudication may become a form of government by lawyers which is conducted in the interests of lawyers.

**Juridification – A Potential Barrier to the Attainment of Access to Justice**

It is important to note, however, that such concerns may be of little practical significance. For many have asserted that juridification of the adjudication process

has already taken place. Indeed, as exemplified by Bingham[142], there are already signs of "judgitis" creeping into the adjudication process:

> "More than a few new boys are behaving as though the adjudicator is a magistrate in a big hat and low-cut dress. There is a bit of "lording it over" going on. They are playing at being adjudicator as if it were a Gilbert and Sullivan court process. Witnesses are heard; hearings held; expert reports ordered; some even ask for affidavits. There are formal submissions on law, opening statements, closing reports. Worse still is the idea of being terrified of meeting or even talking to one party without the other being present. That's not the idea at all."

Furthermore, as elucidated by Foster[143] not only are adjudicators holding full oral hearings of cases, but they are also being served with excessive documentation by the parties and frequently exceed the twenty-eight / forty-two day timescale. Thus, it may be contended that prima facie, adjudication has already begun to ape the worst aspects of both litigation and arbitration. If empirical research proves such to be the case, then not only will the ambition of the Construction Act and Woolf's criteria for access to justice have failed to be met, but the case for state funding of adjudication becomes a little more persuasive.

**The Human Rights Act – A Further Difficulty Facing the Construction Act 1996?**

As already illustrated above, the application of the Human Rights legislation to alternative mechanisms of dispute resolution may have far reaching consequences for the British Construction Industry. It has been generally assumed, however, that the Human Rights Act does not apply to adjudication. For in the preamble to Article 6 it

[142] See Bingham "Adjudication in Drag" *Building Magazine* 11 August 2000
[143] See Foster "Losing the Plot" *Building Magazine* 17 May 2002

states that the Act shall only have jurisdiction over decision-making bodies that are "public authorities" and over "any person, certain of whose functions are of a public nature". The Home Office defined a "public authority" as being government departments, local authorities, the police, prisons, immigration officers, public prosecutors, courts, tribunals and those who exercise a public function. In short, the Act allows for three kinds of body. Those which are obvious public authorities[144] and quasi public bodies[145] which are subject to the provisions of the Convention and those organisations that do not hold a public function and upon which the Act shall have no direct application.

In so far as adjudication is concerned, whilst the adjudicator by definition decides upon the "rights" of the parties and gains his authority to determine the dispute by virtue of an Act of Parliament, it cannot be said that he is a "public authority" nor are his duties of a "public nature". This is because the Construction Act does not confer upon the adjudicator any judicial powers, rather the adjudicator can be seen to be little more than a contract administrator. That is, the adjudicator only has authority to apply the rules in a contract to the dispute in hand and to announce the requirements of that contract. Indeed, s6(5) of the Human Rights Act states: "A person is not a public authority if the nature of the act is private." Adjudication is by definition a private procedure: the adjudicator is a private person performing a private function merely for the parties to the contract. .

[144] Such as the police, courts, and Government departments.
[145] Such as the BBC and other bodies that spend taxpayers money, fulfil a statutory function, or has government appointees on its governing body

Such opposition to the applicability of the Act was asserted in *Elanay Contracts Ltd v The Vestry*[146] where it was argued that the timescale of the adjudication procedure breached Article 6 of the Human Rights Act, as it was too quick and therefore, not reasonable. Vestry pointed to a phrase found in the judgment of a case in the Netherlands, which explained the requirement of "equality of arms" for the purpose of a fair hearing:

> "Each party must be offered a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantive disadvantage vis-à-vis his opponent."

The High Court judge in *Vestry*, Mr Justice Havery stated,

> "The question is whether article 6 applies to proceedings before an adjudicator. In the first place, the proceedings before an adjudicator are not in public, whereas the procedure under article 6 has to be in public. I can see that problems arise over whether one refers to a decision as a final decision or whether one has to consider whether article 6 applies to a decision that is not a final decision. But it seems to me that if article 6 does apply to proceedings before an adjudicator, it is manifest that a coach and horses is driven through the whole of the Housing Grants Construction & Regeneration Act... in my judgment, article 6 does not apply to an adjudicator's award or to proceedings before an adjudicator, because although they are a decision or determination of a question of civil rights, they are not in any sense a final determination."

Similarly, in *Austin Hall Building Ltd v Buckland Securities Limited*[147] it was argued by the Defendant that the adjudication process was incompatible with the convention in that it denied him the right to a fair and public hearing. Whilst declining to consider the general issue of whether the adjudication process was compatible with the Convention, HHJ Bowsher QC established four important principles. Firstly, it was held that because adjudication was intended to avoid, rather than constitute legal

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[146] [2000] WL 1421243
[147] [2001] BLR 272

proceedings, an adjudicator exercising the functions required by the Construction Act 1996 was not a public authority, thereby excluding the need to be compatible with the Convention. Indeed, the judge explained:

> "I do not regard an adjudicator under the 1996 act as a person before whom legal proceedings may be brought. Legal proceedings result in a judgment or order that in itself can be enforced. If the decision at the end of legal proceedings is that money should be paid, a judgment is drawn up that can be enforced. That is not the case with an adjudicator. The language of the 1996 act throughout is that the adjudicator makes a decision. He does not make a judgment. Nor does he make an "award" as an arbitrator does, although he can order that his decision be complied with. Proceedings before an arbitrator are closer to court proceedings because an award of an arbitrator can in some circumstances be registered and enforced without a judgment of the court. But the decision of an adjudicator, like the decision of a certifier, is not enforceable of itself. Those decisions, like the decisions of a certifier, can be relied on as the basis for an application to the court for judgment, but they are not themselves enforceable."

Secondly, in rebuffing the contention that the 28 day time limit within which the adjudicator must act was too short, HHJ Bowsher QC held that the exception in s6(2)(a) of the Human Rights Act applied. That is, s6(1) of the Human Rights Act does not apply where the provisions of primary legislation mean that the public authority could not have acted differently. As the time limits imposed upon the adjudicator were necessary so as to comply with the provisions of the Construction Act, s6(1) of the HRA was not applicable and as such a breach could not have occurred. Moreover, even if an adjudicator were a public authority, as court proceedings are needed so as to enforce his decision, the hearing as required by Article 6 would take place. Fourthly, in rebuking the contention that adjudication lacks publicity, it was held that parties consenting to adjudication proceedings had waived their rights to a public hearing by failure to request one when the opportunity was available.

Thus, the courts reluctance to apply the provisions of the Human Rights legislation may be seen to stem from the policy considerations that led to the introduction of the Construction Act – namely that construction disputes must be resolved both expediently and efficiently. However, the view that the Act does not apply to adjudication, is not a view that is shared by all. Indeed, the adjudicator's decision does affect the rights of the parties and the contention that it does so only on an interim basis has proved to be unfounded in the construction industry. As already demonstrated, the decision of the adjudicator is final and binding in the majority of cases. Thus, it is likely that further litigation shall be commenced and only time will bring further clarification.

# CHAPTER THREE: EMPIRICAL RESEARCH

In Chapter Two, a theoretical analysis of arbitration and adjudication was undertaken in the light of Woolf's requirements for access to justice. To put such analysis in context however, primary empirical data on how these mechanisms operate in practice must also be collated and invigilated. Such data will then permit the assessment as to whether arbitration and adjudication meet Woolf's requirements in both theory and practice.

In the first instance, reference should be had to two other significant empirical works on the subject of dispute resolution: the Report of the Construction Industry Council (hereafter CIC) on Adjudication under the Construction Act;[1] and the longitudinal study of Caledonian University.[2] It is interesting to note that the focus of both the Construction Industry Council research and the work of Caledonian University was not only limited to that of adjudication, but also to the experiences of the adjudicator alone.

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[1] CIC "Adjudication The First Forty Months: A Report on Adjudication Under the Construction Act" (2002) Construction Industry Council Adjudication Board

[2] Following the introduction of the Housing Grants Construction and Regeneration Act 1996, the Adjudication Reporting Centre was established at Glasgow Caledonian University. The ambit of the Centre was to gather data on the progress of adjudication via detailed questionnaires that were periodically distributed to adjudicator nominating bodies.
Report No 4 of The Adjudication Reporting Centre was issued in January 2002 and Report Number 5 in February 2003. Both Reports considered firstly the trends in the numbers of adjudicators and the number of adjudication referrals and secondly the nature of disputes and the adjudication process.
The first set of data was derived from feedback from the adjudicator nominating bodies (hereafter ANBs) and the second data set from information gathered from adjudicators themselves.
It must be noted, however, that due to the longitudinal nature of the study, reporting of the data has not always been consistent. Hence the statistics referred to must be treated with caution, particularly when seeking to establish a trend.

To summarise the findings of these two studies, the data collated would seem to suggest that on balance, adjudication complies with the definition of civil justice as espoused by Woolf. Indeed, it can be inferred that adjudication provides for the impartial resolution of disputes, as analysis of the data would appear to suggest that adjudicators are displaying evidence of impartiality and a desire to reach a balanced conclusion.[3] Furthermore, the data can be taken to indicate that adjudication is also accessible, expedient, efficient and free from mystifying technicalities.[4]

Despite such research outcomes however, the report of the CIC has highlighted an area of concern in that 68% of adjudicator's decisions are found in favour of the referring party.[5] Whilst such a phenomenon may encourage parties to refer their disputes to adjudication, such a fact may also serve to dissuade the responding party from engaging in such. Rather, they may prefer to negotiate to the point of settlement. It is not difficult to envisage that the soundness of such a settlement may be questionable, as the referring party may refuse to abort adjudication proceedings unless the offer made is one that is overly advantageous to their interests. In justification, one may seek to contend that it is the lower end of the contractual chain that is by and large engaging adjudication proceedings[6]. Thus, it is they who will benefit by any such action, not the larger, wealthier and potentially more aggressive party. However, such a contention may be refuted on three fronts. Firstly, any such inequality of bargaining power can never be justified, regardless of the beneficiary. Secondly, parties at the lower end of the contractual spectrum do not account for

[3] See Figures 3, 11, 12 and 13, Annexe 1
[4] See Figures 1,4 and 9, Annexe 1 and Figures 14 and 15 Annexe 2
[5] See Figure 10 Annexe 1
[6] See Figure 7 Annexe 1

every adjudication referral.[7] Moreover, given that 3% of decisions were reportedly based upon an oppressive agreement[8] the smaller contractual party may still suffer at the hands of injustice. For even upon a settlement, a party to the dispute may still insist on compliance with any payment conditions contained in the terms of the original dispute resolution clause.

Furthermore, the issue as to "costs" remains an item of controversy and one that casts doubt on the procedure's compliance with Woolf's definition of civil justice. As reflected in the data collated by Caledonian University, the procedural cost[9] of the adjudication process was frequently greater that the sum in dispute. Given that the procedure was intended to provide recourse against abuse for the sub-contractor, the implications of such excessive costs will be far reaching. Indeed, is it possible that the declining rate of adjudication as invoked by domestic sub-contractors[10] is due to the financial implications of the procedure? Whilst on balance the data from both the CIC and Caledonian University may seem to suggest that adjudication attains Woolf's definition of civil justice, those issues giving cause for concern must be effectively monitored before any assertion of fact can be made. The primary empirical research that follows expands upon such questions and seeks to place adjudication alongside both arbitration and litigation, so as to afford a robust analytical framework under which dispute resolution in England and Wales may be analysed in accordance with Woolf's requirements for access to justice.

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[7] As evidenced by Figure 7 Annexe 1
[8] See Figure 2 Annexe 1
[9] Excluding the costs of each party preparing their case and the costs of their advisors or managers spent on preparation.
[10] See Figure 7 Annexe 2

## The Pilot Study

As with any empirical research, before executing the final research tranche, a pilot study was undertaken so as to test the validity of the questions drafted, to test the usability of the questionnaires and so as to test the usefulness of the information returned.

### Objectives

So as to determine whether Woolf's eight criteria for access to justice had been satisfied, the pilot study identified four main objectives:

1. To assess the impact of the legislative reforms upon the practical mechanics of arbitration and adjudication. This would then facilitate an assessment as to the cost effectiveness, speed, clarity and responsiveness of the mechanisms. To this end litigation was included in the research as a mechanism of "control".

2. To determine the attitudes of those using such dispute resolution mechanisms, thereby illuminating any possible unilateral advantage conferred upon one particular type of "user", for example the main contractor. This would highlight any procedural unfairness and / or deficiency.

3. To determine the answers to the theoretical questions and fears that had been raised by many leading scholars in the field of dispute resolution.[11]

4. To facilitate a meaningful comparison between the mechanics of arbitration, adjudication and litigation.

**Methodology - Pre-Questionnaire**

So as to compile an accurate questionnaire which was capable of attaining the above mentioned objectives, several informal meetings were undertaken with legal professionals from each discipline: 2 firms of solicitors based in Swansea; 1 District Judge based in Swansea; and 1 Barristers' Chambers situated in Temple, London. The remit for each of the meetings was the same - each group of professionals were asked to recount their experiences and subsequent views of the arbitration, litigation and adjudication processes. In addition, half a day was spent in Court with the District Judge so as to gain first hand experience of the new litigation procedures.

By undertaking such, it was anticipated that the greatest areas of importance requiring investigation would be illuminated, thereby directing the questions to be raised in the questionnaire itself. Indeed, from reviewing the notes taken during the course of these meetings, it became clear that although of differing views, several common threads emerged during the discussions as regards arbitration, adjudication and litigation:

[11] See Chapter 2

1. The role of the judge / arbitrator / adjudicator
2. Concerns with regard to issues of procedure
3. Concerns with regard to the quality of the decisions / awards made
4. The expense incurred in pursuing the resolution of a dispute
5. The juridification of dispute resolution mechanisms

**Methodology - The Pilot Questionnaire**

Initially, in preparation for the pilot study, a general questionnaire concerning adjudication, arbitration and litigation was designed. This questionnaire was to encompass questions to be raised across the respondent groups, together with questions targeted at specific groups, such as the arbitrator for example. However, this was found to be too lengthy and complicated a questionnaire and thus several specific questionnaires were designed aimed individually at disputing parties, legal representatives and judges / adjudicators / arbitrators. Due to the depth of the information needed to be obtained, however, the length of these questionnaires were still substantial and it was for this reason that it was decided to undertake a postal questionnaire, as opposed to a telephone interview.[12]

In so far as the undertaking of the pilot study was concerned, "Chambers and Partners"[13] was utilized to compile a comprehensive list of those legal professionals who had experience of construction dispute resolution in the London and Swansea areas. It was decided to select London as a target area due to the extensive expertise present in all areas of dispute resolution: adjudication; arbitration; and litigation. If

[12] An example of the pilot questionnaires used in the research can be found at Annexe 3.
[13] "Chambers and Partners Directory of the Legal Profession" (1995) London

the results of the questionnaire were to be representative of the UK in general, a provincial target area need also be selected. The authors own locality therefore led to the random decision to select Swansea as the second target area.

The selection of construction parties was not such a straightforward task. After much discussion with construction professionals, it was decided that the criteria by which to codify the construction parties by size, must be that of sales figures. This was due to the anomaly that the turnover of a company did not always equate to the number of employees and the profit margin of the firm and vice versa. Moreover, due to modern technology, the traditional method of analysis by which the number of plant was taken into account, could no longer be employed. Thus, the most practical mode of codification was felt to be that of annual sales figures.

Upon analysis of "Key British Enterprises",[14] it was determined that a distinction need be made between not only large, medium and small businesses, but between international and domestic companies also. Of the 223 companies listed in the publication, 71 fell into the category 300 million sales to 100 million sales. As such figures accounted for 32% of those companies listed in the publication, it was taken that this figure equated to the medium sized company. To determine the international and domestic sales figures of the medium sized business, the highest and lowest sales figures for international and domestic organizations respectively were taken and an average was calculated.

[14] "Key British Enterprises" (2000) Dun & Bradstreet

To compute the sales figures of the large international and large domestic organization, the lowest figures above that of the medium sized company were taken and an average was calculated. Similarly, to determine the sales figures of the small international and small domestic firm, the highest sales figures of an international and domestic company that fell below the medium level threshold, were taken to be the upper limit of what constituted a "small" company.

The selection of adjudicators, arbitrators and members of the judiciary was somewhat more straightforward. The Academy of Construction Adjudicators kindly agreed to forward the questionnaires to a randomly chosen cross-section of their members, whilst the identity of arbitrators were obtained from The Society of Construction Arbitrators web-site. The identity of the judiciary was also gleaned from the Internet, via the Technology and Construction Court web site.

Those chosen to be the subjects of the pilot study were chosen at random from the above mentioned comprehensive lists. That is, 20 construction parties and 20 lawyers (10 barristers and 10 solicitors) were each sent questionnaires on adjudication, arbitration and litigation. 10 adjudicators, 10 arbitrators and 10 members of the judiciary were each sent a copy of the relevant questionnaire.

Of the 50 arbitration questionnaires piloted, 14 responses were received: 4 arbitrators; 5 lawyers; and 5 construction parties. Of the 50 adjudication questionnaires piloted, there were 12 responses composed as follows: 6 adjudicators; 4 lawyers; and 2 construction parties. Of the 50 litigation questionnaires piloted, 9 responses were received: 6 lawyers; and 3 parties. As was to be expected given their heavy workload

and need to maintain impartiality, the judiciary in its entirety declined to answer the litigation questionnaire. Hence the overall responses rate for arbitration, adjudication and litigation was 28%, 24% and 18% respectively.

Quantitative Analysis – Statistical Package for the Social Sciences

So as to achieve scientific findings of fact, it was decided to undertake a quantitative analysis of the questionnaire, as opposed to a qualitative analysis. To this end, a data set was created in SPSS into which the responses to the questionnaire were input. Statistical analysis was then undertaken on the data held. The results of the Pilot Study, together with the discussion thereof can be found in Annexe 4 to this Report.

## The Final Tranche

Following completion of the pilot study and analysis of the results, the final research tranche was prepared. As will become clear, so as to extract more meaningful information and a greater response rate, several methodological changes were introduced.

### Methodology

As exemplified in Annexe 4, the pilot study indicated two areas in which reform had to be introduced. Firstly, the variations of questionnaire according to party identity for arbitration, adjudication and litigation would be replaced by a singular questionnaire for each mechanism. Secondly, so as to engage a large sample

audience, electronic questionnaires, rather than postal, would be utilised. These were to be sent via e-mail.

Given that a singular questionnaire was to be utilised for each of the dispute resolution mechanisms, several questions contained in the pilot study had to be re-phrased so as to ensure universal applicability. Furthermore, following analysis of the pilot study results, those questions that had proved to be of little practical significance were discarded and several of the multiple-choice answers were re-categorised, thereby ensuring a more robust and analytical outcome.[15]

**Selection of the Target Audience**

The methodology of target audience selection was also further refined. Legal professionals listed in Chambers and Partners as being proficient in both construction law and various dispute resolution methods were sampled in their entirety. This it is submitted would secure both a representative and considered response to the research.

Using the Kompass Directory to select those listed under the category of "construction", information was provided as to the identity of construction professionals who were subsequently selected in their entirety.[16] In utilising such a sampling technique, it was anticipated that the representative nature of the results would be ensured.

[15] A hard copy of the electronic questionnaire for each mechanism can be found at Annexe 5.
[16] Where e-mail contact addresses had been provided

The identity of arbitrators and adjudicators was obtained via the nominating body websites for each region. So as to ensure a representative sample, in addition each of the nominating bodies were also contacted and asked whether they would participate in the research by forwarding the electronic questionnaires to their listed members.[17]

**The Design of the Questionnaires and the use of Information Technology**

It has already been seen that a quantitative approach was employed so as to generate data that could be invigilated via statistical analysis. To this end, the refined questionnaires were sent to their intended recipients via e-mail. Visual Basic Programming was utilised in Microsoft Access so as to create an executable questionnaire that would require the respondent to complete all questions before proceeding on to the next page and returning the form. This was so as to secure as complete a data set as possible. However, due to the fire-walls employed by some companies, not every recipient could receive such a version of the questionnaire. Thus, a more basic version was created in Microsoft Word that did not contain coding. This meant that recipients to the questionnaire would not have to complete each question before returning the form and as such the value –8 has been entered into SPSS where incomplete answers occurred.[18]

**The use of SPSS**

So as to invigilate the data collated, the responses to the questionnaire were codified and input into SPSS for analysis. The programming in Microsoft Access

[17] A list of participating bodies can be found in the acknowledgements at p.XVII.
[18] The use of such a value shall ensure that incomplete answers will not affect the validity of the statistics produced.

automatically codified the responses and hence they were input directly into SPSS. However, those responses collated by Microsoft Word required manual coding. So as to ensure that errors had not been generated which that would nullify the results, a rigid checking of manually input data was undertaken. Due to the format of the data generated, the statistical tests undertaken were Frequencies,[19] Cross-tabulations[20], Mann-Whitney U Tests[21] and Independent Sample T-Tests.[22]

The Chapters that follow provide details of the information collated, together with the statistical analysis of the data conducted via SPSS where appropriate. For ease of reference, the results of the arbitration questionnaire are considered in Chapter Four, adjudication is considered in Chapter Five and the litigation findings are outlined in Chapter Six.

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[19] In terms of the statistical hierarchy, frequencies fall into the category of "descriptive statistics". That is, they are utilised so as to describe the occurrence of a variable, as opposed to testing the statistical significance of it. Frequencies were calculated on all variables contained in the questionnaire. With few exceptions (due to the minimal number of respondents who purported to have made a claim under an intellectual property insurance scheme, frequencies concerned with the claim making process have not been reported), all frequencies calculated were of interest and have been presented in diagrammatic form

[20] Cross-tabulations are also deemed to be descriptive statistics. Their use is comparative, in that they demonstrate the occurrence of a variable within particular sectors. In this instance, cross-tabulations facilitate the comparison of the views of legal professionals as against the beliefs of the SME. As with frequencies, cross-tabulations do not purport to test the statistical significance of a variable. They are of reflective or "descriptive" use alone. Cross-tabulations were calculated on those variables, which according to frequency analysis, were of interest and benefit.

[21] A nonparametric equivalent to the t test. Tests whether two independent samples are from the same population. It is more powerful than the median test since it uses the ranks of the cases. Requires an ordinal level of measurement. U is the number of times a value in the first group precedes a value in the second group, when values are sorted in ascending order.

[22] Unlike frequencies and cross-tabulations, t-tests do seek to test the statistical significance of a variable. There are many forms of T-Test that may be performed, but due to the nature of the data generated by the empirical research, the independent sample t-test was employed. T-tests were calculated only on those variables, which from frequency and cross-tabulation analysis indicated a statistical difference between the legal professional sector and the SME. Those t-tests that were relevant at the 10% level of probability or lower have been reported.

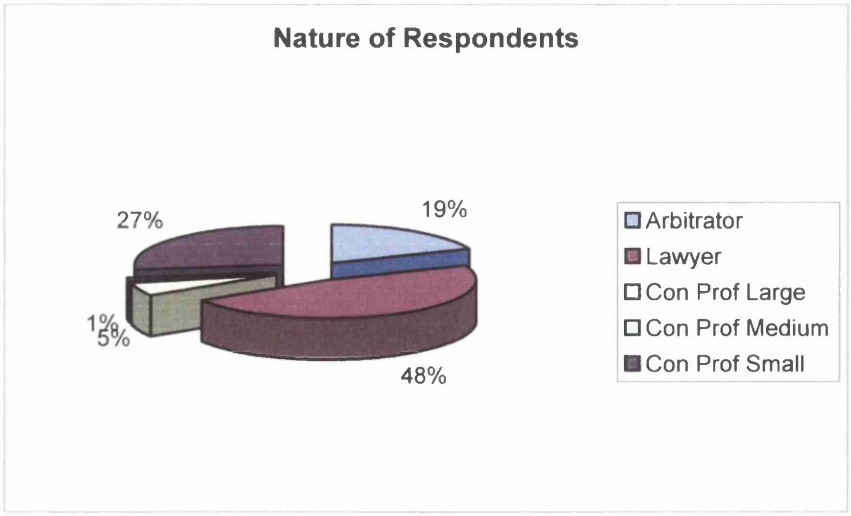
# CHAPTER FOUR: EMPIRICAL RESEARCH - ARBITRATION

Set out below is the result of the final research tranche into arbitration under the Arbitration Act 1996 as it operates within the construction industry. Following there from, is an analysis of the results to ascertain the compliance of arbitration with Woolf's eight criteria for access to justice.

## The Nature of Respondents

The identity of questionnaire respondents can be seen in Figure 1. Indeed, 48% of respondents stated that their occupation was that of lawyer, 27% stated that they were construction professionals working for a small business, with 19% representing themselves as arbitrators, 5% as construction professionals employed by a large business and 1% as construction professionals employed by a medium sized business.

**Figure 1**



However, it should be noted that some respondents fell into more than one employment category. As demonstrated by Figure 2 below, two respondents fell into three employment categories, eight respondents fell into two employment categories and fifty-two respondents fell into one employment category.

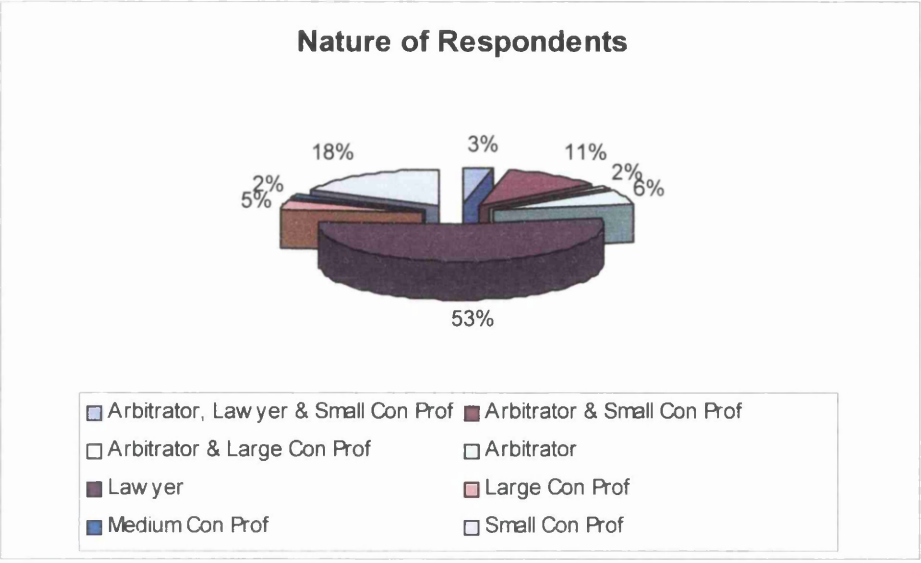
**Figure 2**

**SCORE**

| | | Frequency | Percent | Valid Percent | Cumulative Percent |
|---|---|---|---|---|---|
| Valid | 7.00 | 2 | 3.2 | 3.2 | 3.2 |
| | 8.00 | 8 | 12.9 | 12.9 | 16.1 |
| | 9.00 | 52 | 83.9 | 83.9 | 100.0 |
| | Total | 62 | 100.0 | 100.0 | |

Taking this crossover of employment category into account, the full nature of questionnaire respondents can be seen to be as follows:

**Figure 3**

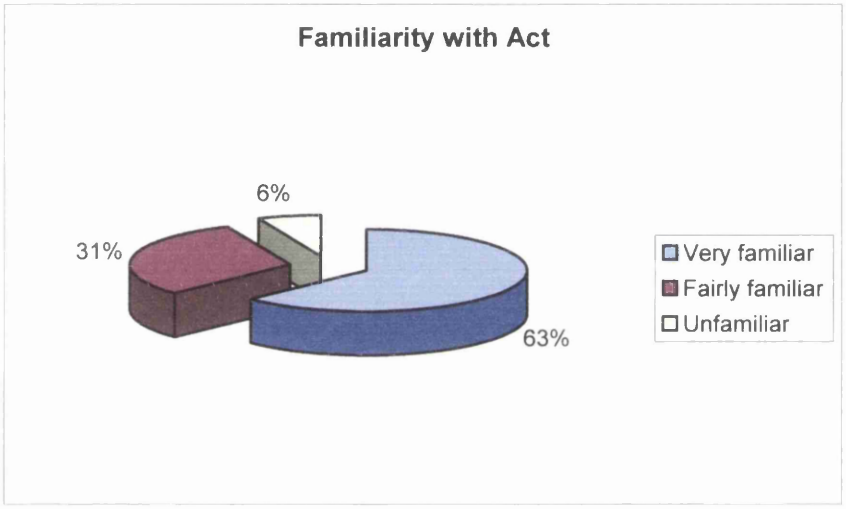



Indeed, as exemplified by Figure 3 above, 53% of questionnaire respondents were lawyers, 18% were construction professionals employed by a small organisation and 11% were respondents acting both as an arbitrator and a construction professional employed by a small business. Arbitrators accounted for 6% of questionnaire respondents, with those construction professionals employed by a large business accounting for 5%. 3% of questionnaire respondents fell into three employment categories (arbitrator, lawyer and construction professional working for a small business), with respondents employed both as an arbitrator and a construction professional working for a large business accounting for 2%, as did the construction professional acting for the medium sized business.

## Respondents Experience of Arbitration

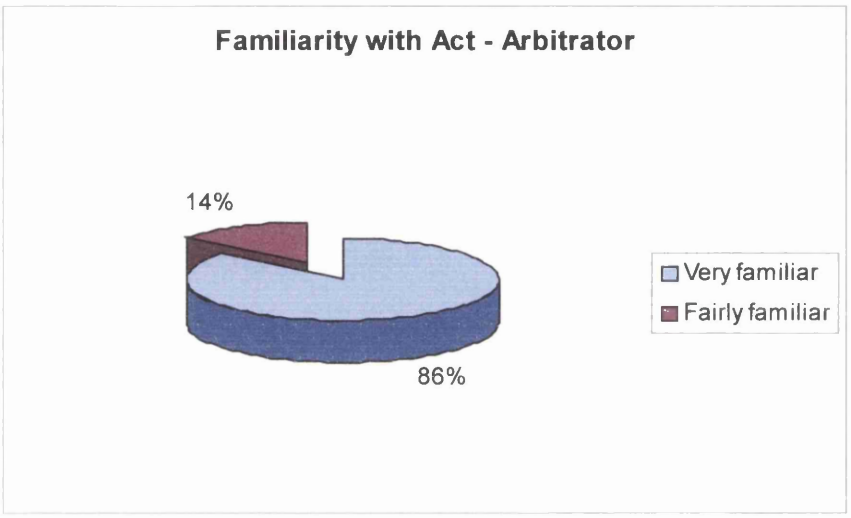
So as to assess familiarity with arbitration proceedings, respondents were asked to quantify their familiarity with the Arbitration Act 1996. As can be seen from Figure 4, 63% of questionnaire respondents stated that they were very familiar with the provisions of the Arbitration Act 1996.

**Figure 4**



When broken down by employment group, it can be seen that 86% of arbitrators professed to be very familiar with the provisions of the Act (Figure 5).

**Figure 5**




As demonstrated by Figure 6, 68% of lawyers professed to be "very familiar", with 29% stating that they were "fairly familiar" and 3% that they were "unfamiliar" with the provisions of the Arbitration Act 1996.

**Figure 6**

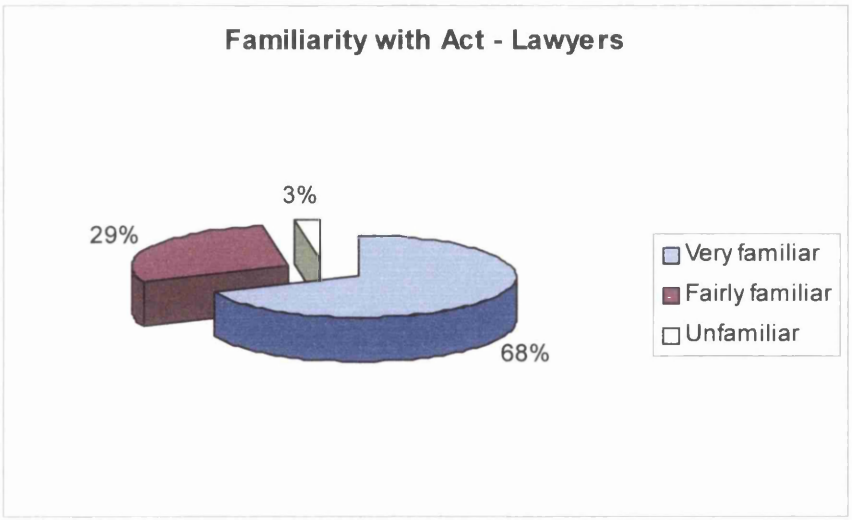
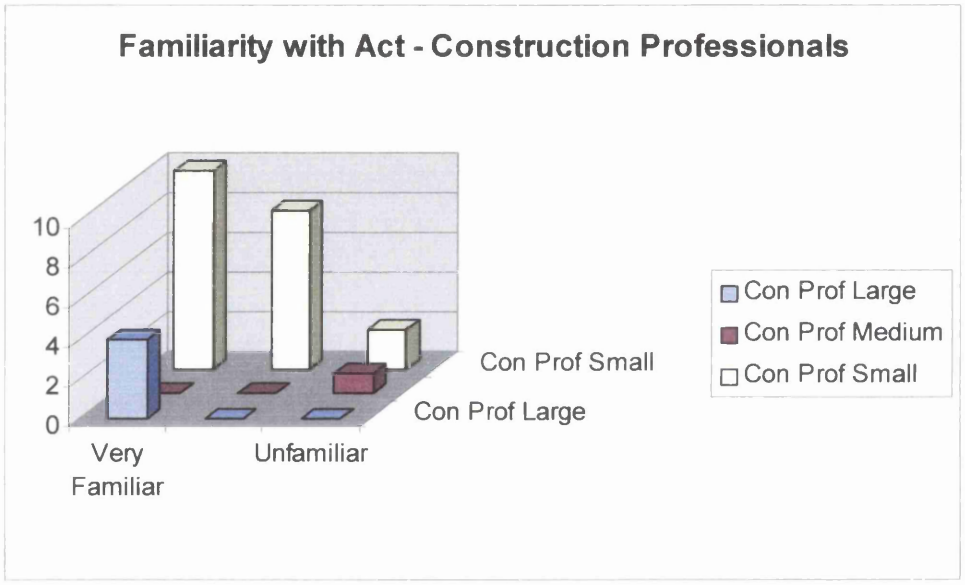


Figure 7 demonstrates that 100% of construction professionals employed by a large business were "very familiar" with the Act, whereas the construction professional employed by a medium sized business professed to be "unfamiliar" with such. However, a greater diversity can be found amongst those construction professionals employed by small businesses: 50% professed to be "very familiar"; 40% were "fairly familiar"; and 10% were "unfamiliar".

**Figure 7**



When comparing the familiarity levels of base employment group[1] questionnaire respondents, an interesting result can be found. As exemplified by the crosstabulation contained in Figure 8, whereas 86% of arbitrators stated that they were "very familiar" with the provisions of the Act, only 56% of non-arbitrators professed such a level of familiarity.

**Figure 8**

**arbitrator * familiarity with Act Crosstabulation**

Count

| | | familiarity with Act | | | |
|---|---|---|---|---|---|
| | | very familiar | fairly familiar | unfamiliar | Total |
| arbitrator | yes | 12 | 2 | | 14 |
| | no | 27 | 17 | 4 | 48 |
| Total | | 39 | 19 | 4 | 62 |

Indeed, as demonstrated by the Mann-Whitney U Test contained in Figure 9, such a difference in the level of familiarity can be seen to be relevant at the 5% level of probability. Thus, arbitrators are statistically more likely to be "very familiar" with the provisions of the Arbitration Act 1996, than non-arbitrators. It is interesting to note that no such level of statistical relevance was found when calculating the responses of lawyers as against non-lawyers.

[1] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 9**

**Ranks**

| | arbitrator | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| familiarity with Act | yes | 14 | 24.14 | 338.00 |
| | no | 48 | 33.65 | 1615.00 |
| | Total | 62 | | |

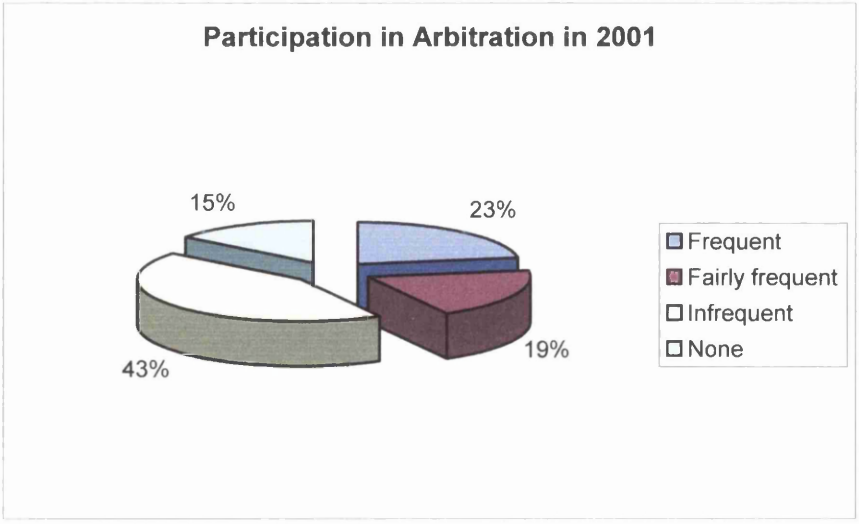
**Test Statistics[a]**

| | familiarity with Act |
|---|---|
| Mann-Whitney U | 233.000 |
| Wilcoxon W | 338.000 |
| Z | -2.040 |
| Asymp. Sig. (2-tailed) | .041 |

a. Grouping Variable: arbitrator

In addition to their familiarity with the provisions of the Arbitration Act 1996, questionnaire respondents were also asked to describe their level of participation in arbitration proceedings for the year 2001. As exemplified by Figure 10, 43% of respondents described their level of participation in arbitral proceedings for 2001 as being "infrequent", with 23% describing it as "frequent".

**Figure 10**



When comparing the participation levels of base employment group[2] questionnaire respondents, an interesting result can be found. Indeed, as exemplified in the crosstabulation contained in Figure 11, whereas 31% of lawyers described their involvement as being "frequent" for the period 2001, only 11% of non-lawyers proclaimed such.

**Figure 11**

**lawyer * participation in arb 2001 Crosstabulation**

Count

| | | participation in arb 2001 | | | | |
|---|---|---|---|---|---|---|
| | | frequent | fairly frequent | infrequent | none | Total |
| lawyer | yes | 11 | 8 | 15 | 1 | 35 |
| | no | 3 | 4 | 12 | 8 | 27 |
| Total | | 14 | 12 | 27 | 9 | 62 |

As demonstrated by the Mann-Whitney U Test contained in Figure 12, such a difference in the level of participation can be seen to be relevant at the 1% level of probability. Thus, lawyers are statistically more likely to have been engaged "frequently" or "fairly frequently" in arbitration proceedings in the year 2001, than non-lawyers.

[2] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 12**

**Ranks**

| | lawyer | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| participation in arb 2001 | yes | 35 | 25.84 | 904.50 |
| | no | 27 | 38.83 | 1048.50 |
| | Total | 62 | | |

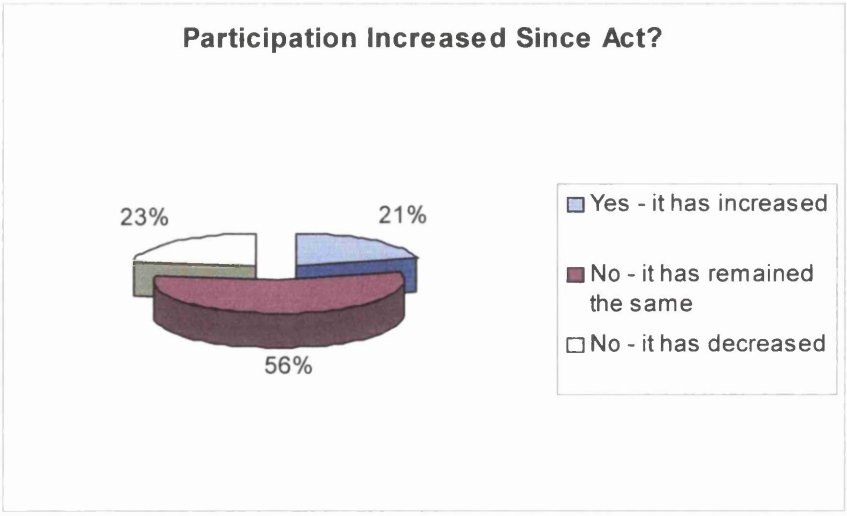
**Test Statistics[a]**

| | participation in arb 2001 |
|---|---|
| Mann-Whitney U | 274.500 |
| Wilcoxon W | 904.500 |
| Z | -2.970 |
| Asymp. Sig. (2-tailed) | .003 |

a. Grouping Variable: lawyer

So as to ascertain the impact of the Arbitration Act 1996 upon the level of arbitral proceedings employed by the industry, questionnaire respondents were then asked whether they had experienced an increase in arbitration since the introduction of the Act. As can be seen by Figure 13, 56% stated that their level of involvement in arbitration had remained the same since the introduction of the Act, with 23% reporting a decrease and 21% an increase in their level of involvement.

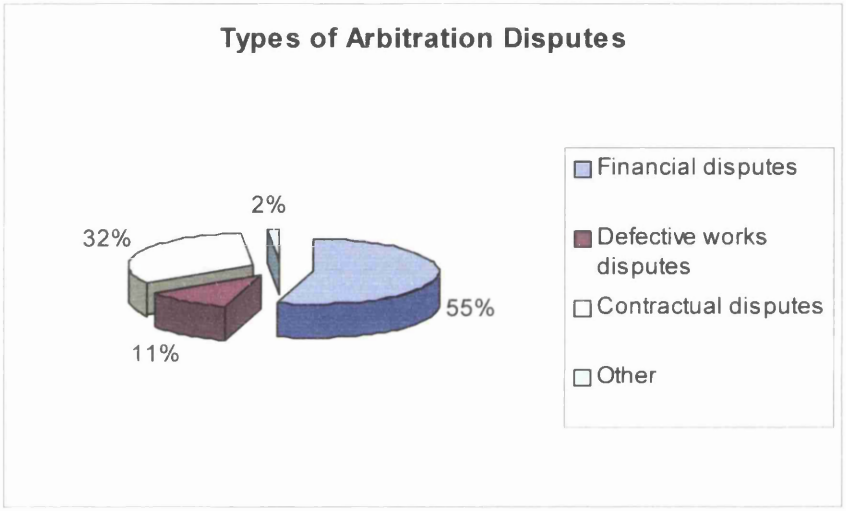
**Figure 13**



## The Nature of Disputes & Disputants

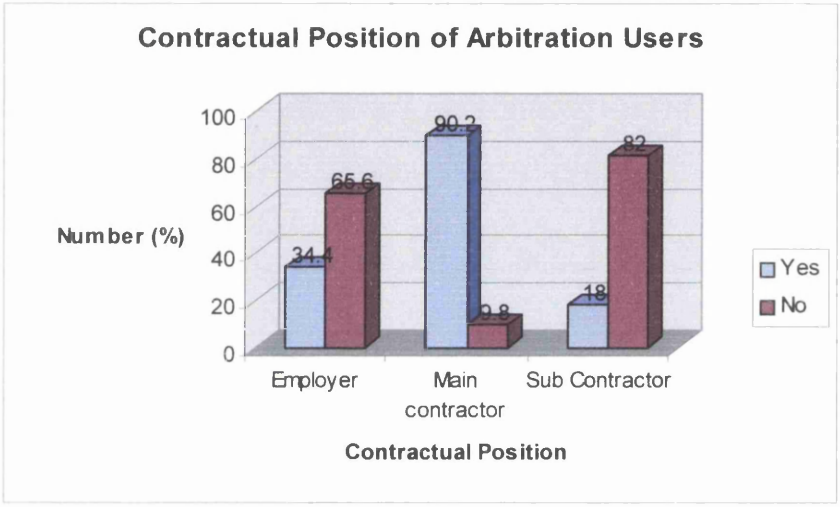
So as to ascertain information as to the type of disputes that proceed to arbitration, questionnaire respondents were asked to quantify the subject matter of their arbitration proceedings. As exemplified by Figure 14 below, 55% of arbitrations concerned financial disputes, with 32% accounting for contractual disputes.

**Figure 14**



The contractual position of arbitral users was also of interest. Thus, respondents were asked whether the contractual position of arbitration users was that of employer, main contractor, and / or sub-contractor.[3] As can be seen in Figure 15, 90.2% of respondents stated that arbitral users were main contractors, with 34.4% stating that arbitral users were employers and only 18% identifying them as being sub-contractors.

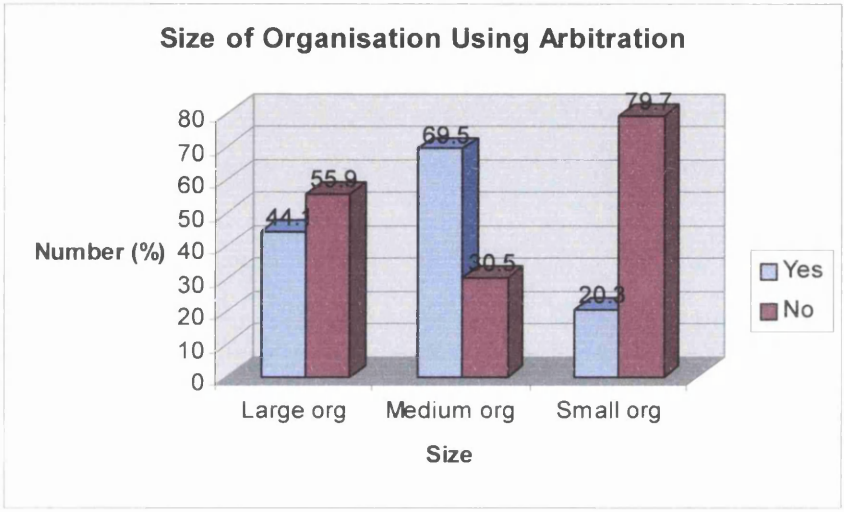
**Figure 15**




[3] More than one answer could be selected - respondents could select one category only, or select two or all three if they so wished. Thus, percentages have been worked on the basis that each contractual position be treated as an independent variable.

Similarly, respondents were asked to describe the size of organizations that in their experience use arbitration as a means of resolving disputes.[4] It can be seen in Figure 16 that 69.5% of respondents reported medium sized organisations as utilising arbitration, with 44.1% identifying large organisations as using the process and only 20.3% identifying small organisations as being users of arbitration.

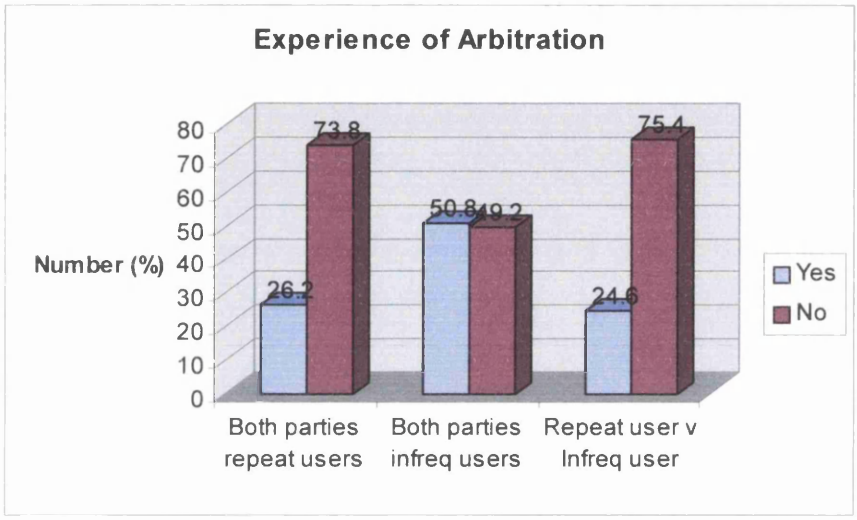
**Figure 16**




[4] More than one answer could be selected - respondents could select one category only, or select two or all three if they so wished. Thus, percentages have been worked on the basis that each organisational size be treated as an independent variable

The level of procedural experience of each arbitral party was also of interest.[5] As elucidated by Figure 17, 50.8% of respondents stated that both arbitral parties were infrequent users of the process, with 26.2% stating that both parties were frequent users of the procedure and 24.6% identifying a repeat user arbitrating against an infrequent user of the mechanism.

**Figure 17**




[5] Once more respondents were free to select more than one answer. Thus, percentages have been worked on the basis that each combination of arbitral experience be treated as an independent variable

When comparing the procedural experience of arbitral users as described by the base employment group[6] questionnaire respondents, an interesting result can be found. Indeed, as exemplified in the crosstabulation contained in Figure 18, whereas 34% of lawyers had reportedly been engaged in proceedings where both arbitral parties were "repeat users" of the process, only 15% of non-lawyers proclaimed such

**Figure 18**

**lawyer * both arb parties repeat users Crosstabulation**

Count

| | | both arb parties repeat users | | |
|---|---|---|---|---|
| | | yes | no | Total |
| lawyer | yes | 12 | 23 | 35 |
| | no | 4 | 22 | 26 |
| Total | | 16 | 45 | 61 |

As demonstrated by the T-Test[7] contained in Figure 19, this difference in perception can be seen to be relevant at the 10% level of probability. Thus, lawyers are statistically more likely to encounter arbitral parties who are both repeat users of the process, than non-lawyers.

[6] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.
[7] The Independent-Samples T Test procedure compares means for two groups of cases.

**Figure 19**

**Group Statistics**

| | lawyer | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| both arb parties repeat users | yes | 35 | 1.66 | .48 | 8.14E-02 |
| | no | 26 | 1.85 | .37 | 7.22E-02 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| both arb parties repeat users | Equal variances assumed | 13.269 | .001 | -1.670 | 59 | .100 | -.19 | .11 | -.42 | 3.74E-02 |
| | Equal variances not assumed | | | -1.738 | 58.936 | .088 | -.19 | .11 | -.41 | 2.87E-02 |

Furthermore, whereas 40% of lawyers had been engaged in proceedings where both arbitral parties were "infrequent users" of the process, 65% of non-lawyers had reportedly experienced such (Figure 20).

**Figure 20**

**lawyer * both arb parties infreq users Crosstabulation**

Count

| | | both arb parties infreq users | | Total |
|---|---|---|---|---|
| | | yes | no | |
| lawyer | yes | 14 | 21 | 35 |
| | no | 17 | 9 | 26 |
| Total | | 31 | 30 | 61 |

As demonstrated by the T-Test contained in Figure 21, this difference in perception can be seen to be relevant at approximately the 5% level of probability. Thus, non-lawyers are statistically more likely to encounter arbitral parties who are both infrequent users of the process, than lawyers.

**Figure 21**

**Group Statistics**

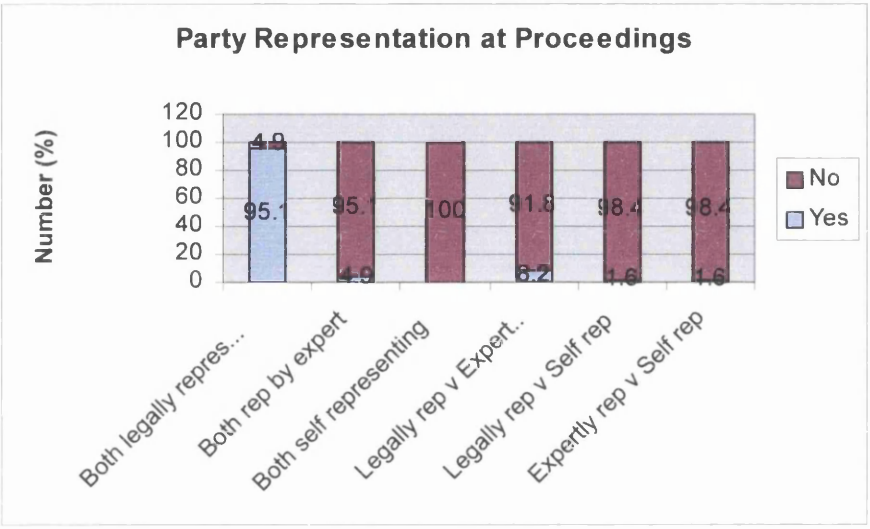
| | lawyer | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| both arb parties infreq users | yes | 35 | 1.60 | .50 | 8.40E-02 |
| | no | 26 | 1.35 | .49 | 9.51E-02 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| both arb parties infreq users | Equal variances assumed | .736 | .394 | 1.993 | 59 | .051 | .25 | .13 | -1.07E-03 | .51 |
| | Equal variances not assumed | | | 2.000 | 54.722 | .050 | .25 | .13 | -5.63E-04 | .51 |

When asked to recount the representation status of parties to arbitration, 95.1% of respondents stated that in their experience, both arbitral parties were legally represented. There were no instances in which respondents reported both parties as being self-representing at proceedings (Figure 22).

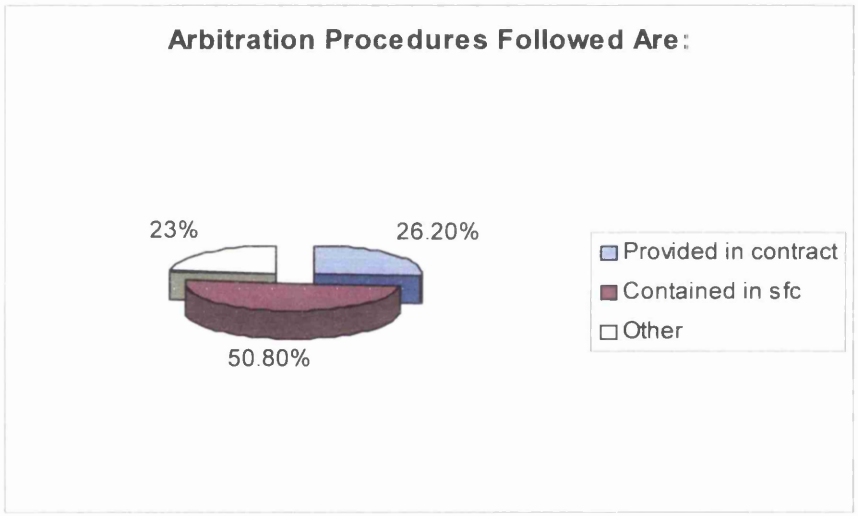
**Figure 22**



## The Nature of Proceedings

As elucidated by Figure 23, when asked the origin of arbitral procedure, 50.80% of respondents stated that the arbitration procedures followed were those contained in a standard form contract. 26.20% identified the construction contract as being the source of arbitral procedure, with 23% of respondents stating that arbitral procedures followed were determined by "other".

**Figure 23**



When comparing the source of arbitral procedure as described by the base employment group[8] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 24, whilst 34% of lawyers stated that the arbitral procedure followed was that provided by "other", only 8% of non-lawyers proclaimed such.

**Figure 24**

**lawyer * arbitration procedures followed are Crosstabulation**

Count

| | | arbitration procedures followed are | | | |
|---|---|---|---|---|---|
| | | those provided by con contract | those contained in sfc | other | Total |
| lawyer | yes | 5 | 18 | 12 | 35 |
| | no | 11 | 13 | 2 | 26 |
| Total | | 16 | 31 | 14 | 61 |

[8] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

As exemplified by Figure 25, this difference in experience may be accounted for by the response of the construction professional employed by a small business. For whilst 45% of such respondents identified the construction contract as being the source of arbitral procedure, only 17% of non-such professionals identified the contract as providing procedural provisions.

**Figure 25**

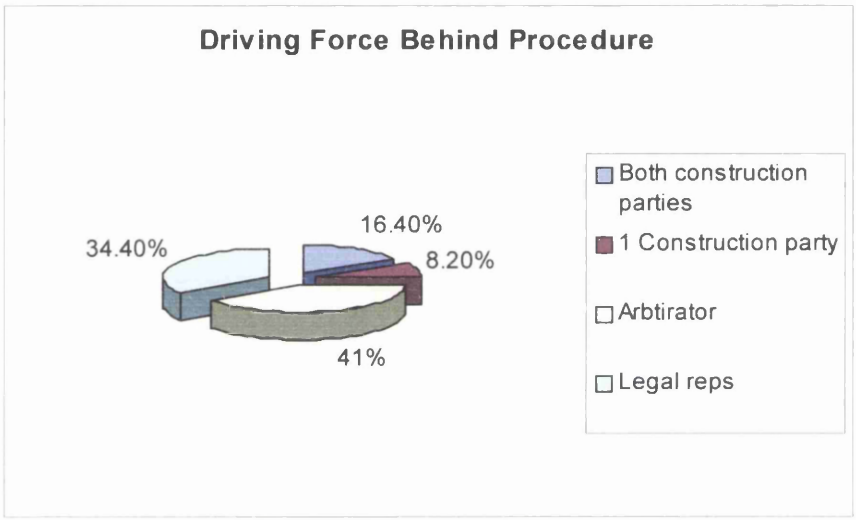
**construction prof - small * arbitration procedures followed are Crosstabulation**

Count

| | | arbitration procedures followed are | | | |
|---|---|---|---|---|---|
| | | those provided by con contract | those contained in sfc | other | Total |
| construction prof - small | yes | 9 | 8 | 3 | 20 |
| | no | 7 | 23 | 11 | 41 |
| Total | | 16 | 31 | 14 | 61 |

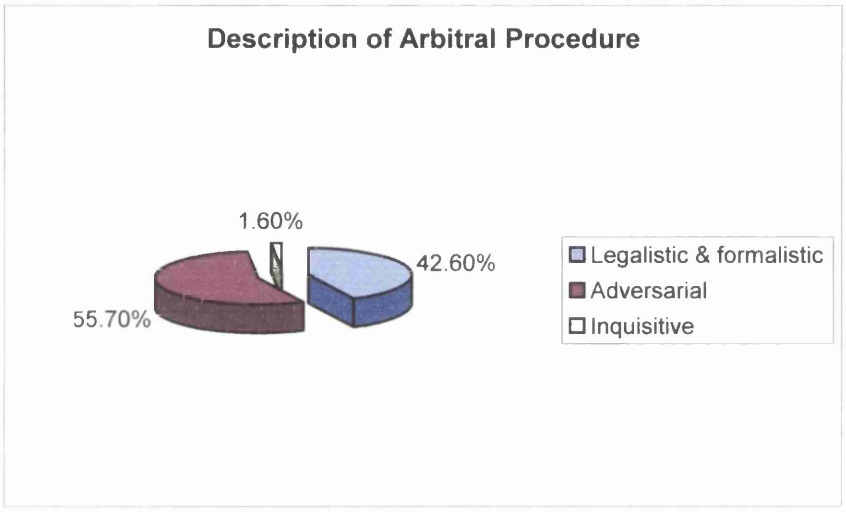
Of equal importance to the source of arbitral procedure, is the driving force behind proceedings. As identified by Figure 26, 41% of respondents stated that the arbitrator was the driving force behind the procedure, with 34.40% identifying legal representatives as being such. Only 16.40% identified both arbitral parties as being the driving force behind proceedings, with 8.20% identifying one arbitral party as being such.

**Figure 26**



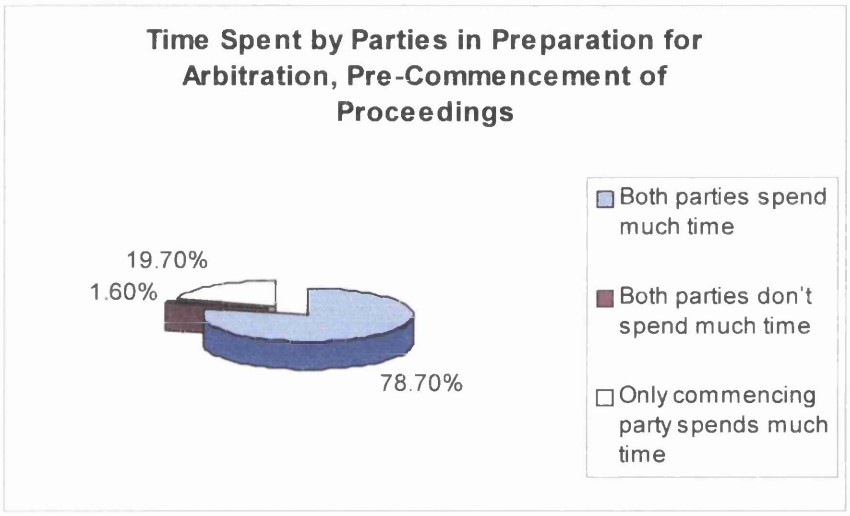
Having determined the source of arbitral procedure and the driving force behind such, respondents were asked to describe arbitration proceedings. As demonstrated by Figure 27, 55.70% of respondents stated that they believed arbitral proceedings to be "adversarial" in nature, with 42.60% of respondents describing the procedure as being "legalistic and formalistic".

**Figure 27**



So as to gain information on the way in which proceedings were initiated, respondents were asked to categorise the time spent by parties in preparation for arbitration pre-commencement of proceedings. As elucidated by Figure 28, 78.70% of respondents stated that both parties spent "much time"[9] in preparation for proceedings, with 19.70% of respondents claiming that only the party intending to commence arbitral proceedings spent "much time" in preparation.

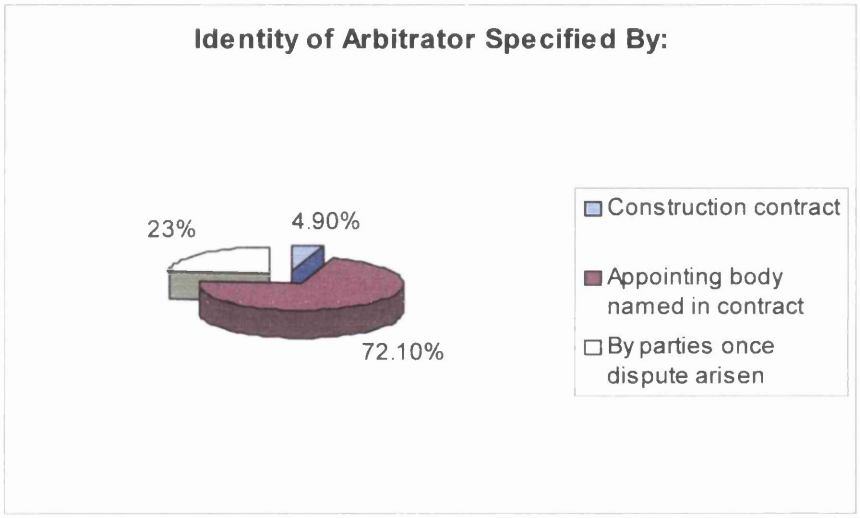
**Figure 28**




[9] Defined as being 2 weeks or more pre-commencement of proceedings.

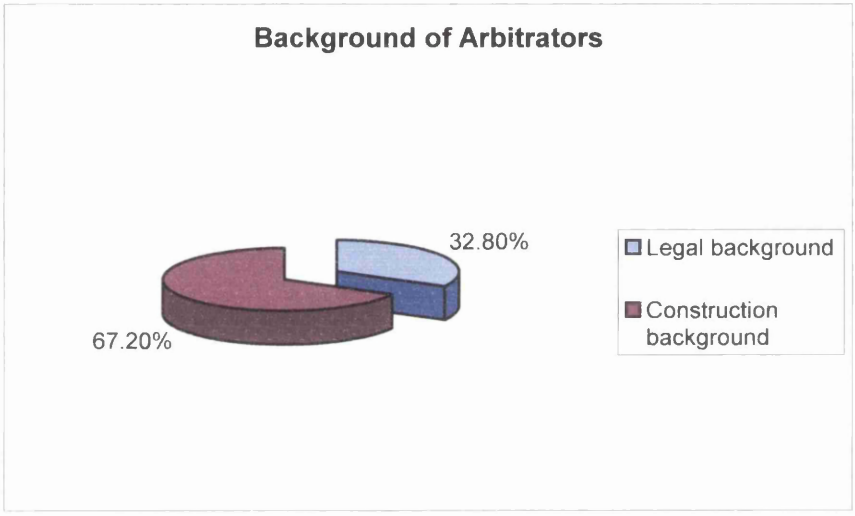
To further enhance the information concerning the initiation of arbitration proceedings, respondents were asked to recount the appointment procedure for arbitrators. As demonstrated by Figure 29, 72.10% of respondents stated that it was usual for an arbitrator to be appointed by a nominating body that was specified in the contract. 23% of respondents stated that the parties nominated an arbitrator once a dispute had arisen and only 4.90% reported that the identity of an arbitrator was specified in the construction contract.

**Figure 29**



In addition to the appointment of the arbitrator, respondents were also asked to provide information on the background of arbitrators. That is, are they generally of a legal or construction background? As demonstrated by Figure 30, 67.20% of respondents reported that in their experience, arbitrators were of a construction background.

**Figure 30**



When comparing the background of arbitrators as described by the base employment group[10] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 31 whilst 100% of arbitrators stated that they were of a construction background, only 57% of non-arbitrators stated that in their experience the arbitrator was of a construction background.

**Figure 31**

**arbitrator * background of arbitrators Crosstabulation**

Count

| | | background of arbitrators | | |
|---|---|---|---|---|
| | | legal background | construction background | Total |
| arbitrator | yes | | 14 | 14 |
| | no | 20 | 27 | 47 |
| Total | | 20 | 41 | 61 |

Indeed, the experience of the lawyer-respondents may be seen to account for such a difference. For as exemplified by the crosstabulation contained in Figure 32, whilst 46% of lawyers stated that in their experience the arbitrator was of a legal background, only 15% of non-lawyers experienced such. Thus, lawyers are more likely to encounter arbitrators of a legal background than other groups.

[10] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 32**

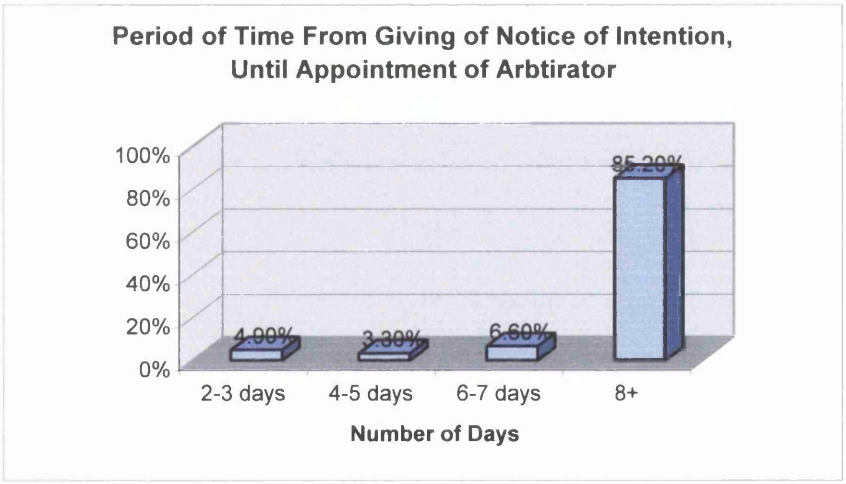
**lawyer * background of arbitrators Crosstabulation**

Count

| | | background of arbitrators | | |
|---|---|---|---|---|
| | | legal background | construction background | Total |
| lawyer | yes | 16 | 19 | 35 |
| | no | 4 | 22 | 26 |
| Total | | 20 | 41 | 61 |

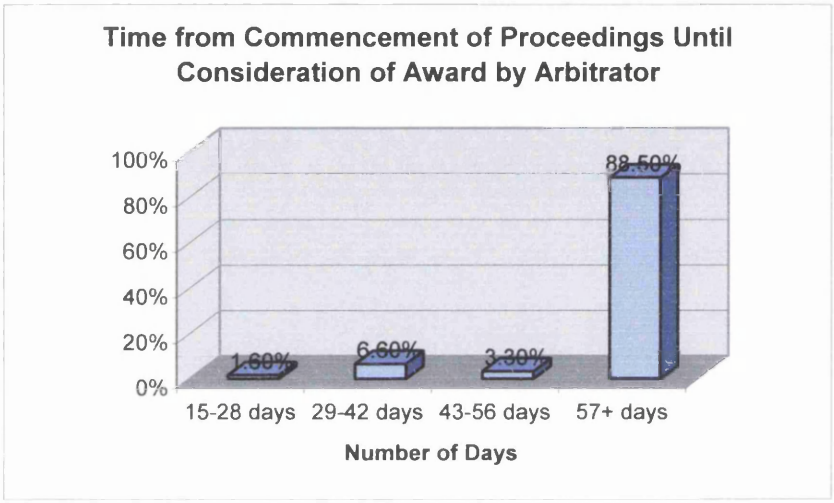
So as to assess the procedural efficiency of arbitration, information was also sought on the timescale within which the arbitrator was appointed once the notice of intention to proceed to arbitration had been given. It can be seen from Figure 33 that 85.20% of respondents reported a duration of 8+ days from the issuing of notice until the appointment of an arbitrator.

**Figure 33**



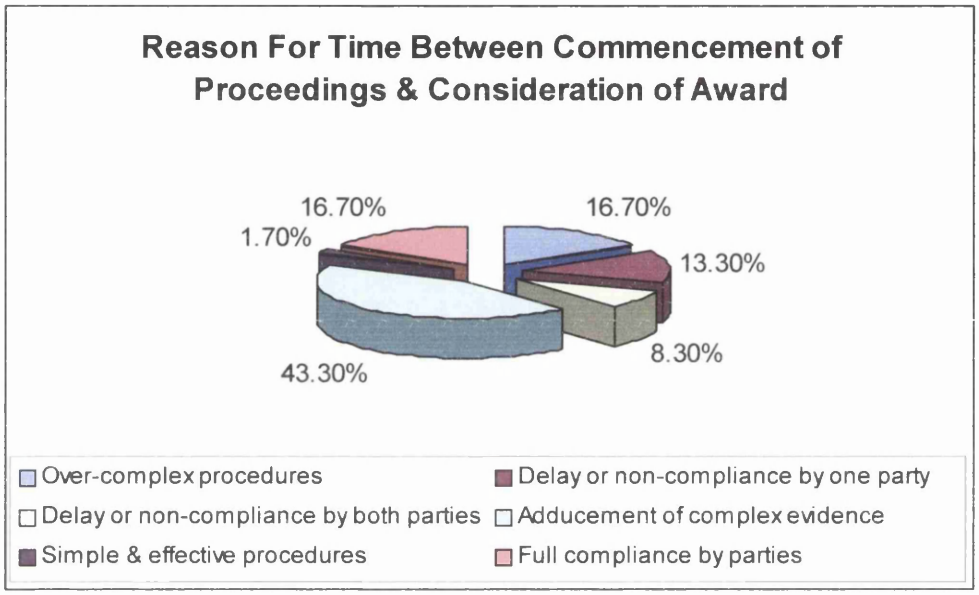
To further enlighten the assessment of procedural efficiency, respondents were asked to define the period of time from the commencement of arbitral proceedings, until the consideration of the award by the arbitrator. As exemplified by Figure 34, 88.50% of respondents stated that in their experience, it took 57+ days after commencement of proceedings for the arbitrator to be in the position to consider the award.

**Figure 34**



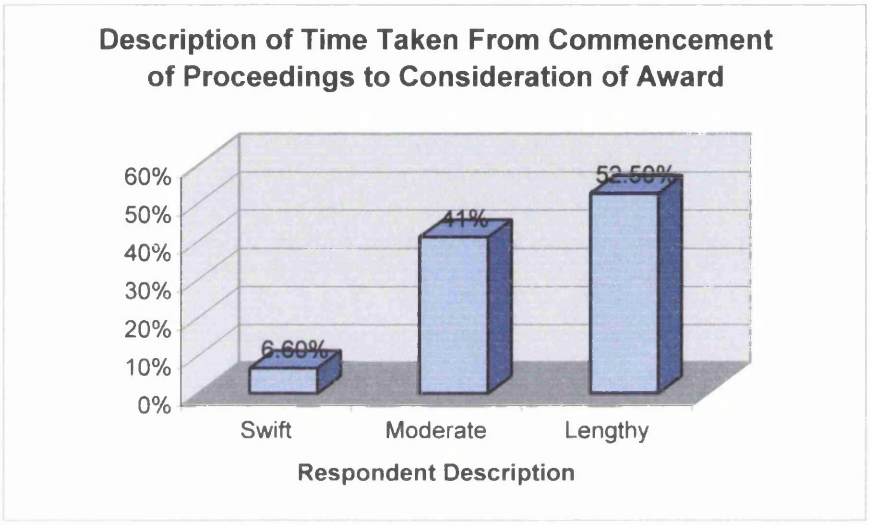
When asked to speculate on the reasoning for such a timescale as stated in Figure 34 above, 43.30% of respondents suggested that the adducement of complex evidence might provide the answer (Figure 35).

**Figure 35**



So as to place the above information in context, respondents were asked to quantify their opinion of the time taken from the commencement of proceedings until the consideration of the award. As can be seen in Figure 36, 52.50% of respondents stated that in their opinion such a timescale could be described as being "lengthy".

**Figure 36**



When comparing the time taken from commencement of proceedings to the consideration of the award as described by the base employment group[11] questionnaire respondents, an interesting result can be found. For it can be seen that whilst 70% of construction professionals employed by a small business viewed the period of time from commencement of proceedings to consideration of the award as being "lengthy", 44% of non-such respondents reported such a view (Figure 37).

**Figure 37**

**:onstruction prof - small * time btwn commencement & consid of award is Crosstabulation**

Count

| | | time btwn commencement & consid of award is | | | |
|---|---|---|---|---|---|
| | | swift | moderate | lengthy | Total |
| construction prof - small | yes | 1 | 5 | 14 | 20 |
| | no | 3 | 20 | 18 | 41 |
| Total | | 4 | 25 | 32 | 61 |

Indeed, as exemplified by the Mann-Whitney U Test contained in Figure 38, such a difference in perception can be seen to be relevant at the 10% level of probability. Thus, construction professionals employed by a small business are statistically more likely than non-such professionals, to consider the time between the commencement of proceedings until the consideration of the award, as being "lengthy".

[11] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 38**

**Ranks**

| | construction prof - small | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| time btwn commencement & consid of award is | yes | 20 | 36.22 | 724.50 |
| | no | 41 | 28.45 | 1166.50 |
| | Total | 61 | | |

**Test Statistics[a]**

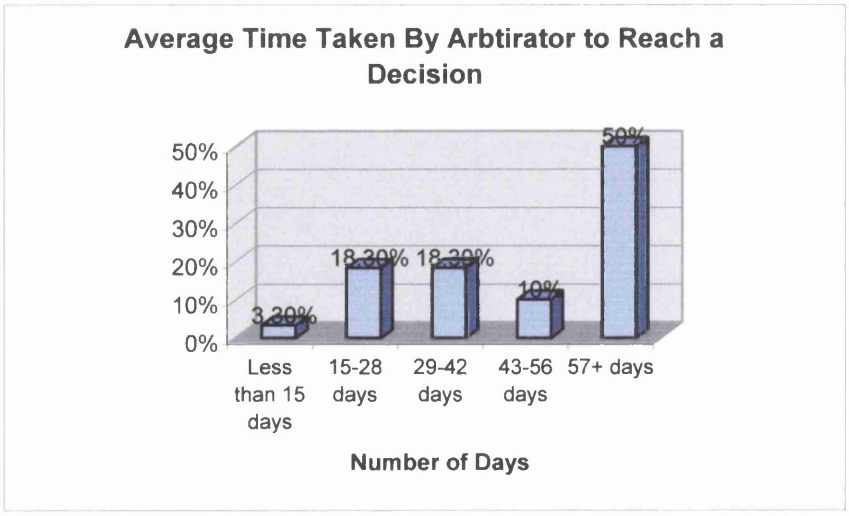
| | time btwn commencement & consid of award is |
|---|---|
| Mann-Whitney U | 305.500 |
| Wilcoxon W | 1166.500 |
| Z | -1.810 |
| Asymp. Sig. (2-tailed) | .070 |

a. Grouping Variable: construction prof - small

## The Arbitral Award

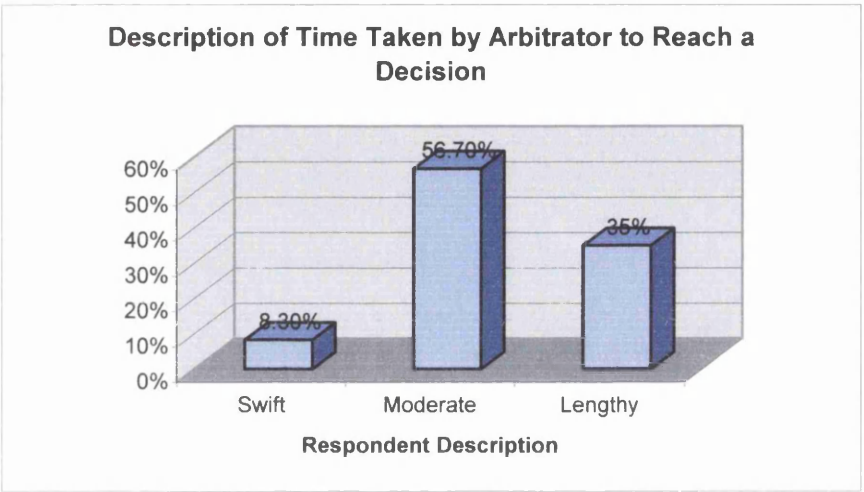
So as to continue the assessment of procedural efficiency, respondents were asked to state the average time taken by an arbitrator to reach a decision. It can be seen from Figure 39 that 50% of respondents reported a timescale of 57+ days as being required for the arbitrator to reach his decision.

**Figure 39**



So as to place the timescale into context, respondents were asked to quantify their opinion of the time taken by arbitrators to reach their decision. 56.70% of respondents viewed such a timescale as "moderate" (Figure 40).

**Figure 40**



When comparing the time taken by arbitrators to reach a decision as described by the base employment group[12] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 41, whilst 21% of arbitrators described the time taken to reach a decision as "swift", 4% of non-arbitrators described the time taken as being such.

**Figure 41**

**arbitrator * time taken by arb to reach decision is Crosstabulation**

Count

| | | time taken by arb to reach decision is | | | |
|---|---|---|---|---|---|
| | | swift | moderate | lengthy | Total |
| arbitrator | yes | 3 | 9 | 2 | 14 |
| | no | 2 | 25 | 19 | 46 |
| Total | | 5 | 34 | 21 | 60 |

As exemplified by the Mann-Whitney Test in Figure 42, this difference of opinion can be seen to be relevant at the 5% level of probability. Thus, arbitrators are statistically more likely to view the time taken to reach a decision as being "swift", than non-arbitrators.

[12] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 42**

**Ranks**

| | arbitrator | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| time taken by arb to reach decision is | yes | 14 | 22.25 | 311.50 |
| | no | 46 | 33.01 | 1518.50 |
| | Total | 60 | | |

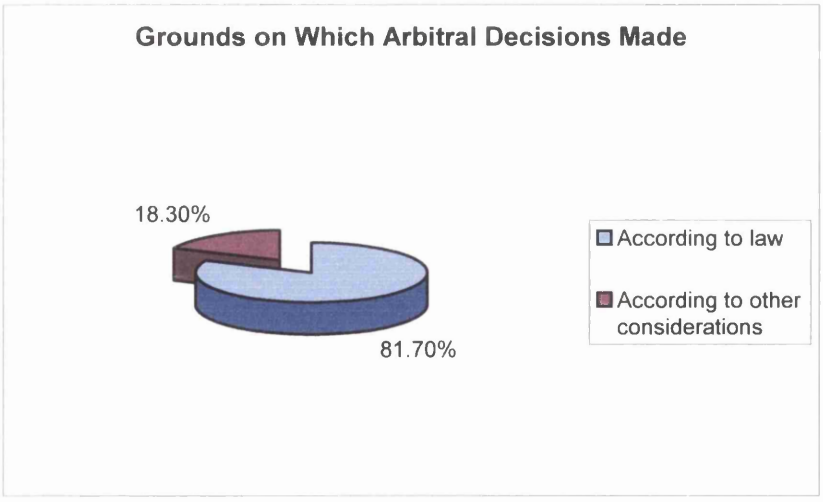
**Test Statistics[a]**

| | time taken by arb to reach decision is |
|---|---|
| Mann-Whitney U | 206.500 |
| Wilcoxon W | 311.500 |
| Z | -2.293 |
| Asymp. Sig. (2-tailed) | .022 |

a. Grouping Variable: arbitrator

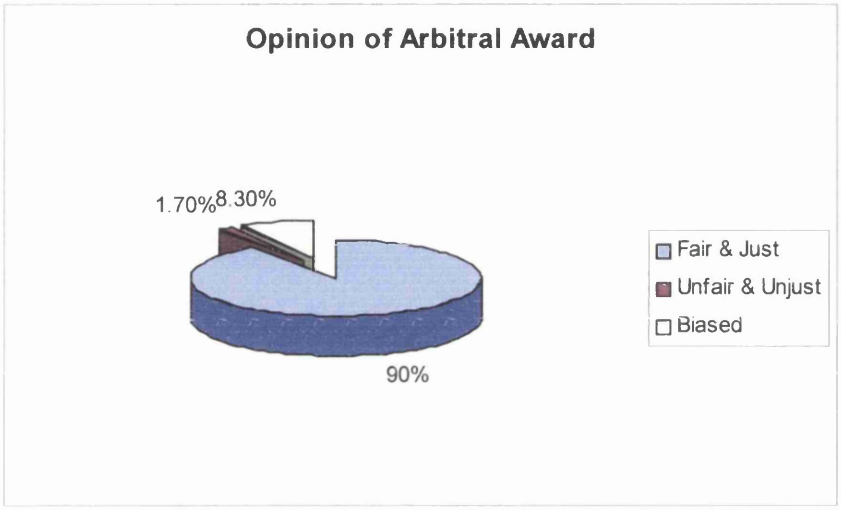
In addition to assessing the procedural efficiency of arbitration proceedings, it was also important to establish the grounds upon which arbitral decisions were made. As elucidated by Figure 43, 81.70% of respondents reported that arbitral awards were made according to legal principles.

**Figure 43**



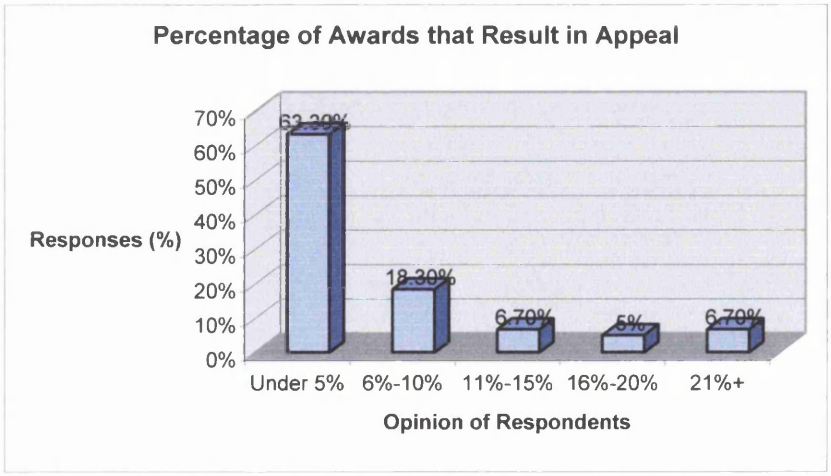
Respondents were also asked to quantify their opinion of the validity of the award. As demonstrated by Figure 44, 90% of respondents viewed the arbitral award as being "fair and just".

**Figure 44**



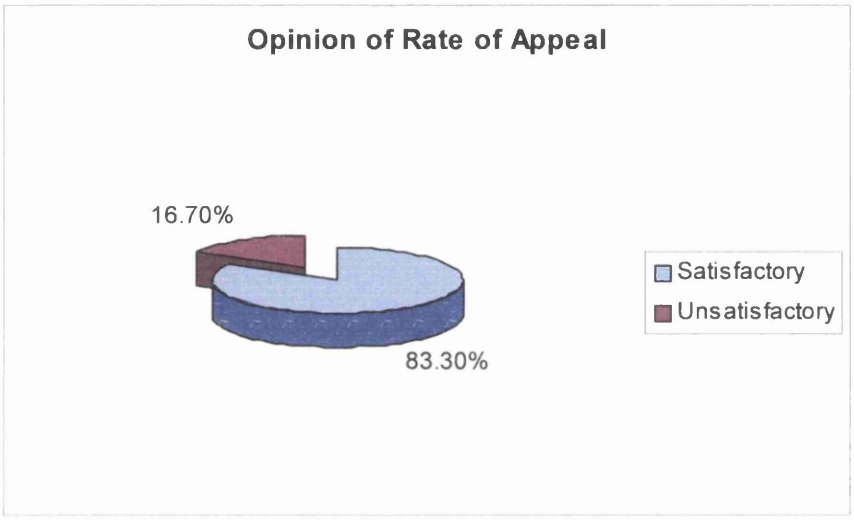

Having provided information on the way in which the Award was reached and the resulting impression it thereby created, respondents were then asked to estimate the percentage of arbitral awards that result in appeal. 63.30% of respondents stated that under 5% of arbitral awards result in appeal (Figure 45).

**Figure 45**



When asked their opinion of the rate of appeal, it can be seen by Figure 46 that 83.30% of respondents viewed such as being satisfactory.

**Figure 46**



When comparing the rate of appeal from arbitral awards as described by the base employment group[13] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 47, whilst 100% of arbitrators viewed the rate of appeal from arbitration as being "satisfactory", 79% of non-arbitrators described the rate of appeal as such.

**Figure 47**

**arbitrator * the rate of appeal from arb is Crosstabulation**

Count

| | | the rate of appeal from arb is | | |
|---|---|---|---|---|
| | | satisfactory | unsatisfactory | Total |
| arbitrator | yes | 13 | | 13 |
| | no | 37 | 10 | 47 |
| Total | | 50 | 10 | 60 |

As exemplified by the Mann-Whitney Test contained in Figure 48, this difference in opinion can be seen to be relevant at the 10% level of probability. Thus, arbitrators are statistically more likely than non-arbitrators to be satisfied with the rate of appeal from arbitration.

[13] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 48**

**Ranks**

| | arbitrator | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| the rate of appeal from arb is | yes | 13 | 25.50 | 331.50 |
| | no | 47 | 31.88 | 1498.50 |
| | Total | 60 | | |

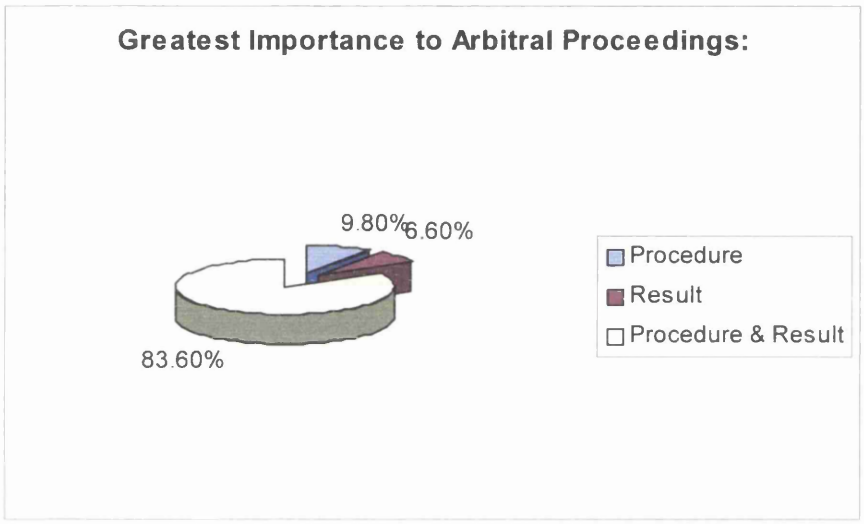
**Test Statistics[a]**

| | the rate of appeal from arb is |
|---|---|
| Mann-Whitney U | 240.500 |
| Wilcoxon W | 331.500 |
| Z | -1.807 |
| Asymp. Sig. (2-tailed) | .071 |

a. Grouping Variable: arbitrator

So as to assess the importance placed upon issues of procedure and the resulting award by the various parties to arbitration, respondents were asked to identify which they believed to be of greatest importance to arbitral proceedings: procedure; result; or procedure and result. It can be seen from Figure 49 that 83.60% of respondents believed both issues of procedure and the resulting award to be of importance in arbitral proceedings.

**Figure 49**



When comparing the importance of arbitral procedure and the arbitral award as described by the base employment group[14] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 50, whilst 65% of construction professionals employed by a small firm believed that both the procedure and the result was important to arbitral proceedings, 93% of non-such respondents reportedly held such a view. Thus, construction professionals employed by a small business are less likely to believe both the procedure and result to be of the greatest importance to arbitral proceedings, than non-such professionals.

**Figure 50**

**construction prof - small * greatest importance to arb proceedings is Crosstabulation**

Count

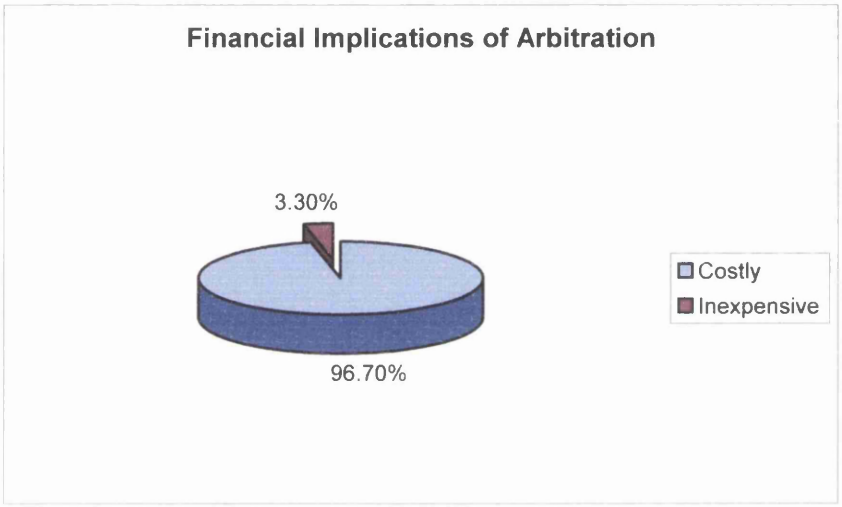
| | | greatest importance to arb proceedings is | | | |
|---|---|---|---|---|---|
| | | procedure | result | procedure & result | Total |
| construction prof - small | yes | 5 | 2 | 13 | 20 |
| | no | 1 | 2 | 38 | 41 |
| Total | | 6 | 4 | 51 | 61 |

[14] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

## The Financial Implications of Arbitration

So as to assess the financial impact of arbitration, respondents were asked to quantify the outlay involved in engaging proceedings. As can be seen by Figure 51, 96.70% of respondents viewed arbitration as being "costly".

**Figure 51**



To put the financial implications of arbitration into context, respondents were asked to compare the financial burden of arbitration as compared to litigation. 55.70% of respondents viewed arbitration as being "just as expensive" as litigation, with 24.60% reporting it as being "more expensive" (Figure 52).

**Figure 52**

When comparing the financial implications of arbitration and litigation as described by the base employment group[15] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 53, whilst 40% of lawyers viewed arbitration as being "more expensive" than litigation, only 4% of non-lawyers viewed arbitration in such a light.

**Figure 53**

**lawyer * as compared to litigaiton, arb is Crosstabulation**

Count

| | | as compared to litigaiton, arb is | | | |
|---|---|---|---|---|---|
| | | more expensive than litigation | just as expensive as litigation | less expensive than litigation | Total |
| lawyer | yes | 14 | 19 | 2 | 35 |
| | no | 1 | 15 | 10 | 26 |
| Total | | 15 | 34 | 12 | 61 |

As demonstrated by the Mann-Whitney U Test in Figure 54, such a difference in opinion can be seen to be relevant at the 1% level of probability. Thus, lawyers are statistically more likely than non-lawyers, to view arbitration as being "more expensive" than litigation.

[15] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 54**

**Ranks**

| | lawyer | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| as compared to litigaiton, arb is | yes | 35 | 24.01 | 840.50 |
| | no | 26 | 40.40 | 1050.50 |
| | Total | 61 | | |

**Test Statistics[a]**

| | as compared to litigaiton, arb is |
|---|---|
| Mann-Whitney U | 210.500 |
| Wilcoxon W | 840.500 |
| Z | -3.975 |
| Asymp. Sig. (2-tailed) | .000 |

a. Grouping Variable: lawyer

Indeed, such a difference in perception may be understood by the response of the construction professional employed by a small business. For as can be seen by the crosstabulation in Figure 55, whilst 40% of such construction professionals considered arbitration to be "less expensive than litigation", 10% of non-such professionals held such a belief.

**Figure 55**

**construction prof - small * as compared to litigaiton, arb is Crosstabulation**

Count

| | | as compared to litigaiton, arb is | | | |
|---|---|---|---|---|---|
| | | more expensive than litigation | just as expensive as litigation | less expensive than litigation | Total |
| construction prof - small | yes | 2 | 10 | 8 | 20 |
| | no | 13 | 24 | 4 | 41 |
| Total | | 15 | 34 | 12 | 61 |

As demonstrated by the Mann-Whitney U Test in Figure 56, such a difference in opinion can be seen to be relevant at the 1% level of probability. Thus, construction professionals employed by a small business are statistically more likely to consider arbitration as being "less expensive" than litigation, than non-such professionals.

**Figure 56**

**Ranks**

| | construction prof - small | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| as compared to litigaiton, arb is | yes | 20 | 39.25 | 785.00 |
| | no | 41 | 26.98 | 1106.00 |
| | Total | 61 | | |

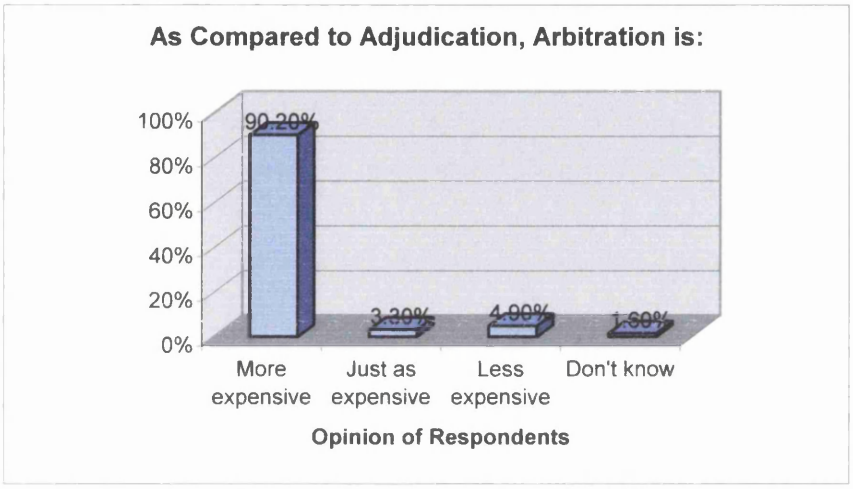
**Test Statistics[a]**

| | as compared to litigaiton, arb is |
|---|---|
| Mann-Whitney U | 245.000 |
| Wilcoxon W | 1106.000 |
| Z | -2.826 |
| Asymp. Sig. (2-tailed) | .005 |

a. Grouping Variable: construction prof - small

Respondents were also asked to quantify the financial impact of arbitration as compared to adjudication. As exemplified by Figure 57, 90.20% of respondents viewed arbitration as being "more expensive" than adjudication.

**Figure 57**

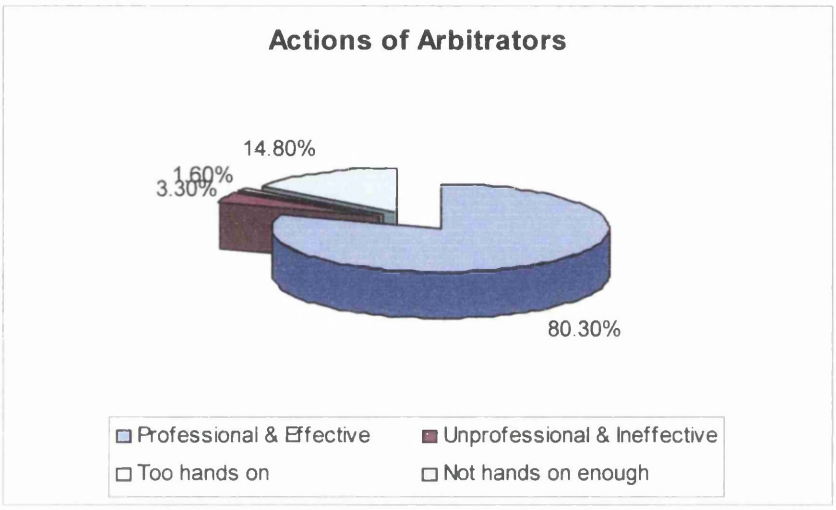



## The Conduct of Arbitral Players

A factor affecting procedural efficiency and fairness are the actions and attitudes of the various parties to arbitration proceedings. To this end, respondents were asked to comment on the actions and attitudes of arbitrators; representatives; and parties to the dispute.

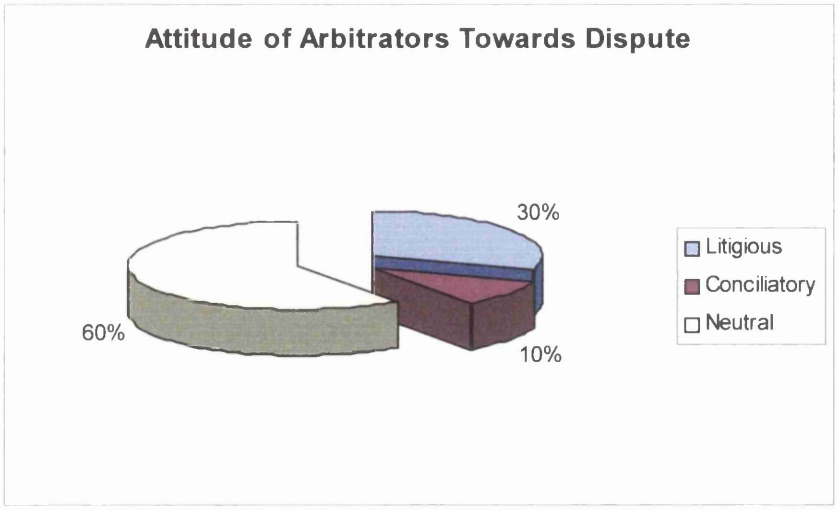
It can be seen from Figure 58 that 80.30% of respondents viewed the actions and conduct of arbitrators as being "professional and effective".

**Figure 58**




60% of respondents described the attitude of the arbitrator towards the dispute as being "neutral" (Figure 59).

**Figure 59**

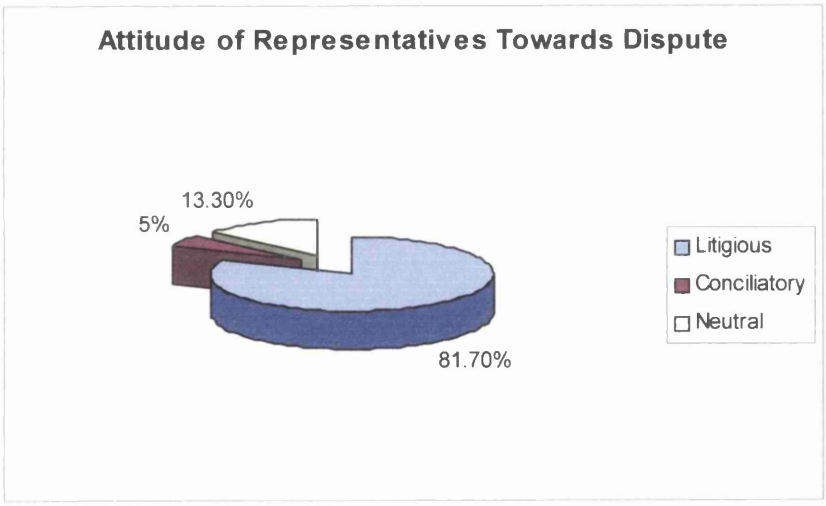


88.30% of respondents viewed the actions of the legal / expert representatives as being "professional and effective" (Figure 60)

**Figure 60**


81.70% of respondents viewed the attitude of the legal / expert representatives towards the dispute as being "litigious" (Figure 61).

**Figure 61**



When comparing the attitude of the party representatives towards arbitral proceedings as described by the base employment group[16] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 62, whilst 94% of lawyers viewed the attitude of party representatives as being "litigious", 65% of non-lawyers viewed their attitude as being such.

**Figure 62**

**lawyer * attitude of reps towards dispute is Crosstabulation**

Count

| | | attitude of reps towards dispute is | | | |
|---|---|---|---|---|---|
| | | litigious | neutral | conciliatory | Total |
| lawyer | yes | 32 | 2 | | 34 |
| | no | 17 | 6 | 3 | 26 |
| Total | | 49 | 8 | 3 | 60 |

Indeed, as illustrated in the Mann Whitney U Test below (Figure 63) such a difference in opinion maybe seen to be relevant at the 1% level of probability. Thus, lawyers are statistically more likely to view the conduct of party representatives as being "litigious" than non-lawyers.

[16] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 63**

**Ranks**

| | lawyer | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| attitude of reps towards dispute is | yes | 34 | 26.68 | 907.00 |
| | no | 26 | 35.50 | 923.00 |
| | Total | 60 | | |

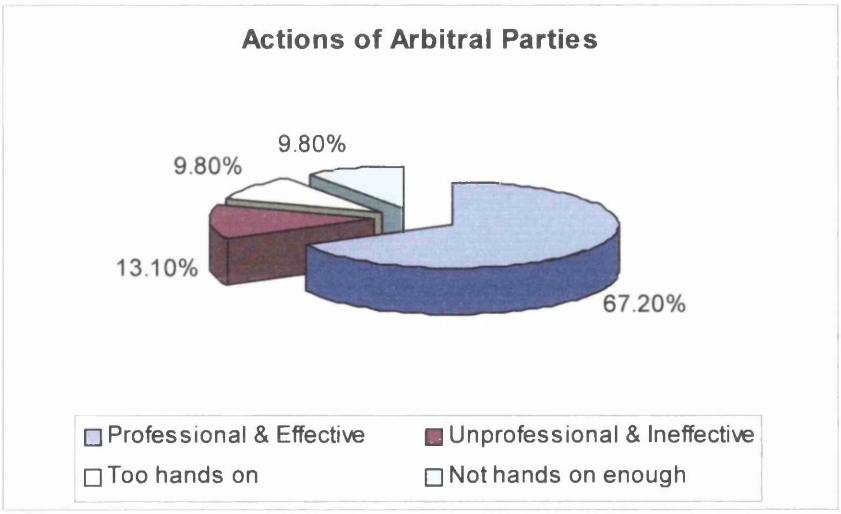
**Test Statistics[a]**

| | attitude of reps towards dispute is |
|---|---|
| Mann-Whitney U | 312.000 |
| Wilcoxon W | 907.000 |
| Z | -2.881 |
| Asymp. Sig. (2-tailed) | .004 |

a. Grouping Variable: lawyer

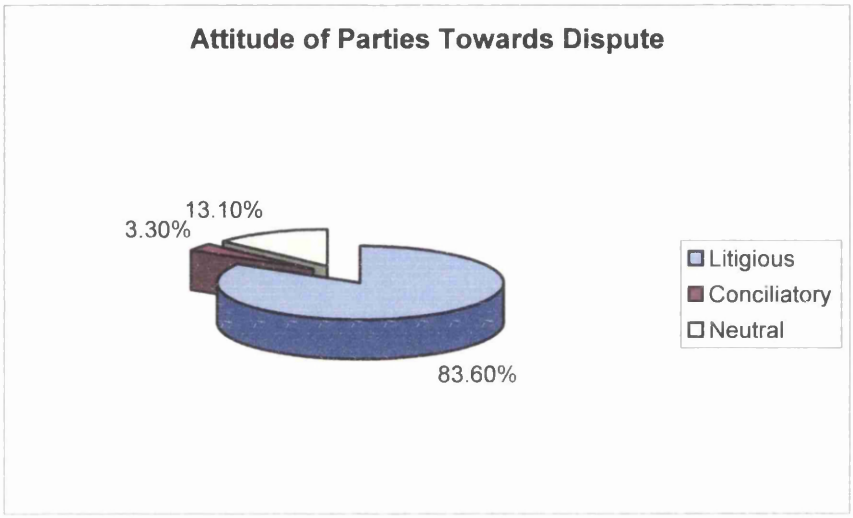
When asked to describe the actions of the arbitral parties, 67.20% of respondents stated that they believed them to be "professional and effective" with 13.10% describing them as being "unprofessional and ineffective" (Figure 64).

**Figure 64**



Similar to the attitude attributed to the legal / expert representative, 83.60% of respondents described the attitude of arbitral parties towards the dispute as being "litigious" (Figure 65).

**Figure 65**



When comparing the attitude of the disputing parties towards arbitral proceedings as described by the base employment group[17] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 66, whilst 91% of lawyers viewed the attitude of the disputing parties as being "litigious", 73% of non-lawyers viewed the conduct of the disputing parties as being such.

**Figure 66**

**lawyer * attitude of parties towards dispute is Crosstabulation**

Count

| | | attitude of parties towards dispute is | | | |
|---|---|---|---|---|---|
| | | litigious | neutral | conciliatory | Total |
| lawyer | yes | 32 | 3 | | 35 |
| | no | 19 | 5 | 2 | 26 |
| Total | | 51 | 8 | 2 | 61 |

As can be seen by the Mann Whitney U Test, such a difference in perception can be seen to be relevant at the 5% level of probability. Thus, lawyers are statistically more likely than non-lawyers, to view the conduct of the disputing parties as being "litigious" (Figure 67).

[17] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 67**

**Ranks**

| | lawyer | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| attitude of parties towards dispute is | yes | 35 | 28.53 | 998.50 |
| | no | 26 | 34.33 | 892.50 |
| | Total | 61 | | |

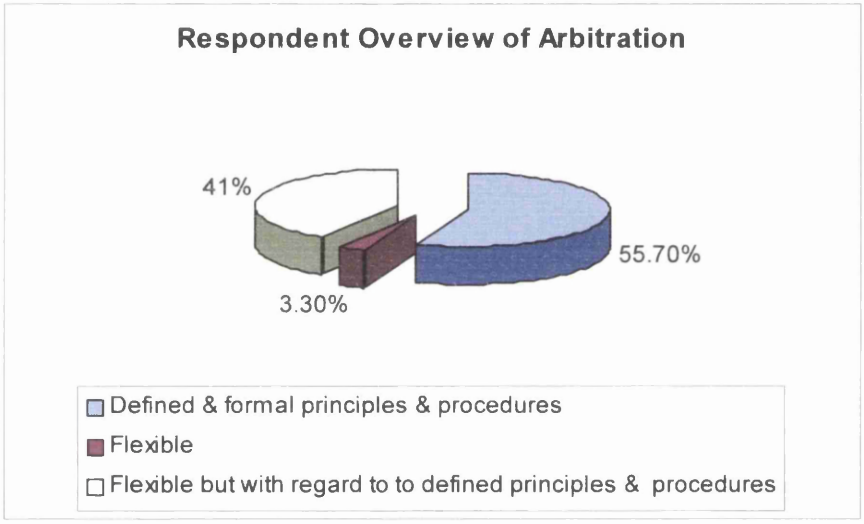
**Test Statistics[a]**

| | attitude of parties towards dispute is |
|---|---|
| Mann-Whitney U | 368.500 |
| Wilcoxon W | 998.500 |
| Z | -1.962 |
| Asymp. Sig. (2-tailed) | .050 |

a. Grouping Variable: lawyer

So as to place the actions and attitude of the parties to arbitration into context, respondents were asked to select one of three commonly held views concerning the nature of arbitration. As can be seen from Figure 68 below, 55.70% of respondents believed arbitration to be a mechanism that was based on defined and formal principles and procedures, with 41% of respondents believing it to be a flexible mechanism that had regard to defined principles and procedures.

**Figure 68**



When comparing the overview of arbitration as described by the base employment group[18] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 69, whilst 64% of arbitrators viewed arbitration as being a flexible procedure that had regard to defined principles and procedures, 34% of non-arbitrators held such a belief. Thus, arbitrators are more likely than non-arbitrators, to view arbitration as a flexible procedure that has regard to defined principles and procedures.

**Figure 69**

**arbitrator * to summarise arbitration, it is Crosstabulation**

Count

| | | to summarise arbitration, it is | | | |
|---|---|---|---|---|---|
| | | defined & formal principles & procedures | flexible | flexible but with regards to defined principles & procedures | Total |
| arbitrator | yes | 5 | | 9 | 14 |
| | no | 29 | 2 | 16 | 47 |
| Total | | 34 | 2 | 25 | 61 |

[18] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

## Discussion – Does the Empirical Evidence Suggest that Arbitration Complies With Woolf's Eight Criteria for Access to Justice?

From the good level of familiarity reported by questionnaire respondents on the Arbitration Act 1996,[19] one might assume that arbitration in the construction industry is operating within the criteria as established by Woolf for effective access to justice. Indeed, given that the majority of construction disputes proceeding to arbitration are financial in nature,[20] it is essential that arbitration operates to facilitate such. In applying the research findings to each of Woolf's eight criteria in turn, an indication as to the ability of arbitration to facilitate access to justice shall be achieved.

### The First Two Criteria: Procedural Fairness and a Just Result

It can be seen from Figures 15 – 16 that arbitration is often utilised by the top end of the contractual chain. The typical contractual position of arbitral users was reported to be that of the main contractor followed by the employer[21] and the size of organisations using the process was reported to be medium and subsequently large organisations.[22] When questioned as to the arbitral experience of parties to proceedings,[23] it was reported that in the majority of cases, both parties to proceedings are infrequent users of the mechanism. However, a significant number of proceedings were recounted in which both parties to the proceedings were frequent users of the process and further, a frequent user arbitrating with an infrequent user. Given the

[19] See Figures 4 - 9
[20] See Figure 14
[21] See Figure 15
[22] See Figure 16
[23] See Figures 17 - 21

possibility for an inequality in bargaining power and the ramifications that this may bring, it is essential that arbitration facilitate a fair procedure so as to achieve a just result.

As highlighted in Chapter 2,[24] a concern with the arbitral process was that it might be abused by a party to a dispute as a means of gaining tactical advantage. Evidence from the research would suggest, however, that this is not the case. Indeed, as elucidated by Figure 28, when questioned as to the time spent in preparation for proceedings, 78.70% of respondents stated that both parties spent "much time"[25] in preparation for proceedings, with 19.70% of respondents claiming that only the party intending to commence arbitral proceedings spent "much time" in preparation. As such, the commencement of arbitration is not seen as an ambush tactic designed to confer unilateral advantage. Moreover, given that both parties to arbitral proceedings are usually legally represented,[26] some external safe-guard is afforded against an abuse of bargaining position. Further, as indicated by Figure 44, 90% of respondents viewed the arbitral award as being "fair and just". Thus, from empirical data, it would appear that under this head arbitration is compliant with Woolf's requirements for access to justice.

[24] See p57.
[25] Defined as being 2 weeks or more pre-commencement of proceedings.
[26] See Figure 22

**The Third, Fourth and Eighth Criteria: Reasonable Cost and Speed & Effectiveness**

If procedural fairness and a just result are to be obtained, then proceedings must be executed with reasonable speed and cost. They must also be "effective", meaning adequately resourced and organised.

Turning to consider the financial implications of arbitration, it can be seen from Figure 51 that 96.70% of respondents viewed arbitration as being "costly". When asked to compare the cost of arbitration as against that of adjudication, 90.20% of respondents viewed arbitration as being "more expensive" than adjudication.[27] Moreover, when asked to contrast the cost of arbitral proceedings with that of litigation, 55.70% of respondents stated that it was "just as expensive" as litigation, with 24.60% identifying it as being "more expensive" than litigation.[28] It should be noted however, that the base employment group of lawyer largely accounted for this latter finding.[29] Thus, the reasons for such a belief must be considered carefully. For example, could such a view be held due to a prejudice against non-judicial methods of dispute resolution, due to the fact that legal representation in arbitral proceedings excessively escalates the cost associated with the procedure, or due to the fact that legal representation was only sought in instances where the financial implications of the dispute were severe, thus preventing such respondents from perceiving the true cost of the average process? When contrasted with the fact that construction professionals employed by a small enterprise were statistically more likely to view

[27] See Figure 57.
[28] See Figure 52.
[29] Lawyers were statistically more likely to view arbitration as being "more expensive than litigation" than other groups. See Figures 53 and 54.

arbitration as being "less expensive" than litigation, than other groups,[30] the latter two reasons seem persuasive.

In so far as the time element of arbitration is concerned, empirical data would seem to suggest that arbitration is an efficient mechanism in certain spheres, giving to protracted proceedings in other areas. Firstly, when questioned as to the appointment procedure of the arbitrator,[31] 72.10% of respondents reported that the nominating body that had been named in the contract had appointed the arbitrator. Only 23% of respondents reported that the parties appointed the arbitrator once a dispute had arisen. Thus, in the majority of proceedings, the appointment of an arbitrator by an impartial third party should mean that disagreement as to the identity of the arbitrator should not delay the onset of dispute resolution. However, when questioned as to the timescale within which the arbitrator was appointed once the notice of intention to proceed to arbitration had been given, matters were conducted on a less efficient basis. It can be seen from Figure 33 that 85.20% of respondents reported a duration of 8+ days from the issuing of notice until the appointment of an arbitrator.

Further, when asked to define the period of time from the commencement of arbitral proceedings, until the consideration of the award by the arbitrator, 88.50% of respondents stated that in their experience, it took 57+ days after commencement of proceedings for the arbitrator to be in the position to consider the award.[32] Adducement of both complex procedures and evidence were seen to be factors accounting for such a timescale,[33] which was deemed by over fifty per cent of

[30] See Figure 55 and 56.
[31] See Figure 29
[32] See Figure 34
[33] See Figure 35

respondents to be "lengthy".[34] Interestingly, although 50% of respondents reported the average time taken by the arbitrator to reach a decision as being in excess of 57 days, 18.30% of respondents recorded a timescale of 15 to 28 days and 18.30% reported a period of 29 to 42 days.[35] 56.70% of respondents described such timescales as being "moderate", with 35% categorising it as being "lengthy".[36] In short, whilst the length of time from the commencement of proceedings until the point of consideration of the award may be seen to be protracted in the majority of cases, the actual time taken by the arbitrator to reach his decision is not necessarily so.

Thus, in terms of satisfying this head empirical data would seem to suggest that arbitration is unsuccessful in providing a cost effective mechanism of dispute resolution. With regard to the ability of the mechanism to resolve a dispute with reasonable speed, analysis indicates that arbitration suffers from protracted proceedings, although the decision-making process itself is temporally satisfactory. It is doubtful therefore, whether arbitration could be seen to be effective in either organisational or financial terms. As such, arbitration fails to fulfill Woolf's requirements for access to justice under all three heads: cost; speed; and effectiveness.

[34] See Figures 36 - 38
[35] See Figure 39
[36] See Figure 40. It is interesting to note that arbitrators are statistically more likely to view this timescale as being "swift" than other parties to proceedings. See Figures 41 and 42.

**The Fifth and Sixth Criteria: Understandable and Responsive**

If arbitration is to facilitate access to justice, then arbitral procedure must be understandable to those parties engaging in such, and further it must be responsive to their needs.

It has already been established[37] that a key requisite to the success of arbitration under this head, has been to facilitate party autonomy with regard to the method by which their dispute is to be resolved. To this end, respondents were asked to recount the origins of arbitral procedure. As demonstrated by Figure 23, 50.80% of respondents stated that the arbitration procedures followed were those contained in a standard form contract. 26.20% identified the construction contract as being the source of arbitral procedure,[38] with 23% of respondents stating that arbitral procedures followed were determined by "other".[39] Given the bias towards contractually provided procedures, it is suggested that arbitral parties are exercising their ability to chose the source of procedure for the resolution of their dispute. As such, the procedures selected by the parties must be deemed to be understandable and responsive to their perceived future need.

However, when asked to identify the driving force behind matters of procedure, it was the arbitrator and subsequently the legal representatives who were identified as such.[40] Whether such a fact is indicative of an abuse of party autonomy to determine matters

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[37] See Chapter 2 at p.63. See also s1(b) Arbitration Act 1996.
[38] Respondents from the base employment group "small construction professional" were statistically more likely to select this category. See Figure 25.
[39] Respondents from the base employment group "lawyer" were statistically more likely to select this category. See Figure 24.
[40] See Figure 26.

of procedure, is an issue of construction. If party autonomy is to be defined as meaning that arbitral parties must determine each procedural issue, then arbitration cannot be compliant with such. Given the impracticality of such a definition in terms of expedition and clarity, however, it is suggested that party autonomy should be defined to mean that the parties to a dispute determine the broad procedural base, the finessing of which should be the responsibility of the arbitrator. Indeed, the Arbitration Act itself provides that the tribunal shall decide all procedural and evidential matters, subject to the right of the parties to agree any matter.[41] As such, the finding that arbitrators are the driving force behind matters of procedure cannot be seen to compromise the requirement for party autonomy and an understandable and responsive procedure. The finding that legal representatives play a part in determining procedural issues is however, a complicating factor in terms of the juridification debate and shall be considered later.

The description of arbitral procedure as "adversarial" and "legalistic and formalistic" also complicates matters in so far as the ability of arbitration to meet the requirements for access to justice under this head.[42] For if procedures are formalised and regimented, then by definition they cannot be responsive. However, the fact that the majority of arbitrators were reportedly of a construction, as opposed to a legal background, may provide respite from such a prospect.[43] As whilst an arbitrator of a construction background may conduct proceedings on a formal basis, they are less likely to be prejudiced by court procedure and tradition than an arbitrator who has undergone extensive legal training and who concurrently operates within the court

[41] See s34 Arbtration Act 1996.
[42] See Figure 27.
[43] See Figures 30 – 32. It is interesting to note that lawyers were statistically more likely to experience an arbitrator of a legal background than non-lawyers.

structure. In short, the commercial background of the arbitrator may temper the formulism with which proceedings are conducted. It should be noted, however, that whilst in possession of the ability to determine the dispute according to legal principle or other considerations, arbitrators are not taking advantage of such. For 81.10% of respondents stated that the arbitral award was reached according to legal principle.[44] Does this serve to undermine the prospect that arbitration is free from litigious influence?

Thus, in terms of the ability of arbitration to satisfy this head, judgement must be withheld until the impact of juridification has been considered.

**The Seventh Criteria: Certainty**

As already exemplified,[45] if a mechanism of dispute resolution is to satisfy the requirement for certainty, then it must be able to facilitate the final resolution of a dispute. Evidence of a binding resolution to a dispute can be found where the rate of appeal is minimal. It would appear from Figure 45 that arbitration has satisfied this head. For when questioned, 63.30% of respondents stated that under 5% of Awards result in appeal. When asked their opinion on such an appeal rate, 83.30% responded that it was "satisfactory" in their opinion.[46] Thus, not only may arbitration be seen to satisfy the need to provide a final and binding resolution to a dispute, but the rate of satisfaction amongst parties to arbitration proceedings would seem to suggest that only the most deserving of cases are referred to the courts. As such, arbitration may

[44] See Figure 43.
[45] See Chapter 2 at p.67.
[46] See Figure 46. Interestingly, arbitrators are statistically more likely to be satisfied with the rate of appeal than other groups. See Figures 47 - 48.

also be seen to satisfy the public justice aspect of certainty. Where needed, justice is done and is manifestly seen to be done.[47]

**The Barrier to Access to Justice: Juridification**

The influence of the legal profession over arbitration has already been demonstrated.[48] Further, in describing arbitration as being "adversarial" and "legalistic and formalistic", the influence of the court system over the procedure has also been seen.[49] Analysis of the empirical data uncovers further evidence of juridifcation. Firstly, although the actions of arbitrators, legal representatives and parties to the dispute were considered to be "professional and effective",[50] when questioned as to their attitude towards the dispute, the arbitrator was described as being "neutral",[51] whereas the legal representatives and arbitral parties were largely described as being "litigious".[52] Such a finding would seem to give credit to the notion that the spirit of arbitration is being corrupted so as to ape the worst features of litigation.

Further, some evidence to support Tyler's[53] polarisation theory was uncovered. When questioned as to the factor of greatest importance to arbitral proceedings, 83.60% of respondents stated that both procedure and result were of significance.[54] However, when analysed according to base employment group, it was discovered that construction professionals employed by a small business were less likely to hold such

[47] As required by Lord Hewart in *R v Sussex Justice ex p McCarthy* [1924] 1 KB 256 at p.259
[48] For example, see Figures 22 and 26
[49] See Figure 27
[50] See Figures 58, 60 and 64
[51] See Figure 59
[52] See Figures 61 and 65. It is interesting to note that the base employment group lawyer was statistically more likely to view such parties as being "litigious" than non-lawyers. See Figures 62 and 63 & 66 and 67. Such a finding may be accounted for as fact or as perception coloured by experience.
[53] See Chapter 2 at p.82
[54] See Figure 49

a view than other employment groups.[55] This would seem to suggest a polarisation of views that may lead the various parties to adopt differing goals and attitudes. However, given the fact that the majority of respondents viewed both elements to be of significance, as opposed to a singular element, any polarisation is not likely to cause significant effect and thus gives little cause for concern. What is significant, however, is the fact that when asked to describe arbitration,[56] 55.70% of respondents viewed it as being a defined and formal principle and procedure. Only 41% viewed it as being a flexible mechanism that has regard to defined principles and procedures and this finding can be largely accounted for by the response of arbitrators.[57]

Thus, upon evaluation of empirical data, strong indications of juridification emerge. Not only is the attitude towards the dispute of parties and their respondents indicative of a litigious influence, but the perception of arbitration as a mechanism of dispute resolution is clearly coloured by the structure of the court system.

[55] See Figure 50
[56] See Figure 68
[57] See Figure 69

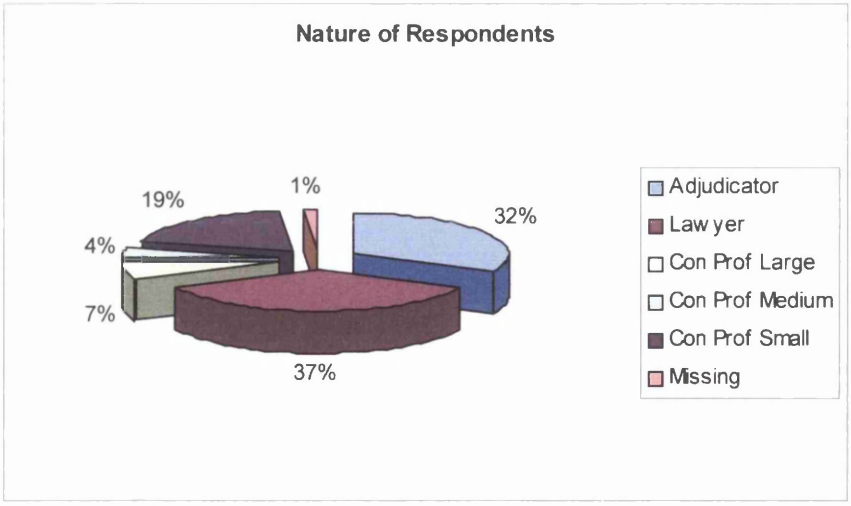
# CHAPTER FIVE: EMPIRICAL RESEARCH - ADJUDICATION

Set out below are the results of the final research tranche into adjudication under the Housing Grants Construction and Regeneration Act 1996 as it operates within the construction industry. Following there from, is an analysis of the results to ascertain the compliance of adjudication with Woolf's eight criteria for access to justice.

## The Nature of Respondents

The identity of questionnaire respondents can be seen in Figure 1. Indeed, 37% of respondents stated that their occupation was that of lawyer, 32% stated that they were adjudicators, with 19% representing themselves as construction professionals working for a small business, 7% as construction professionals employed by a large business and 4% as construction professionals employed by a medium sized business. 1% of respondents accounted for missing values.[1]

**Figure 1**




[1] Missing values account for respondents who fail to answer the question – hence no occupational details were supplied in these instances.

However, it should be noted that some respondents fell into more than one employment category. As demonstrated by Figure 2 below, three respondents fell into three employment categories, thirty respondents fell into two employment categories and seventy-eight respondents fell into one employment category. There were two missing values.

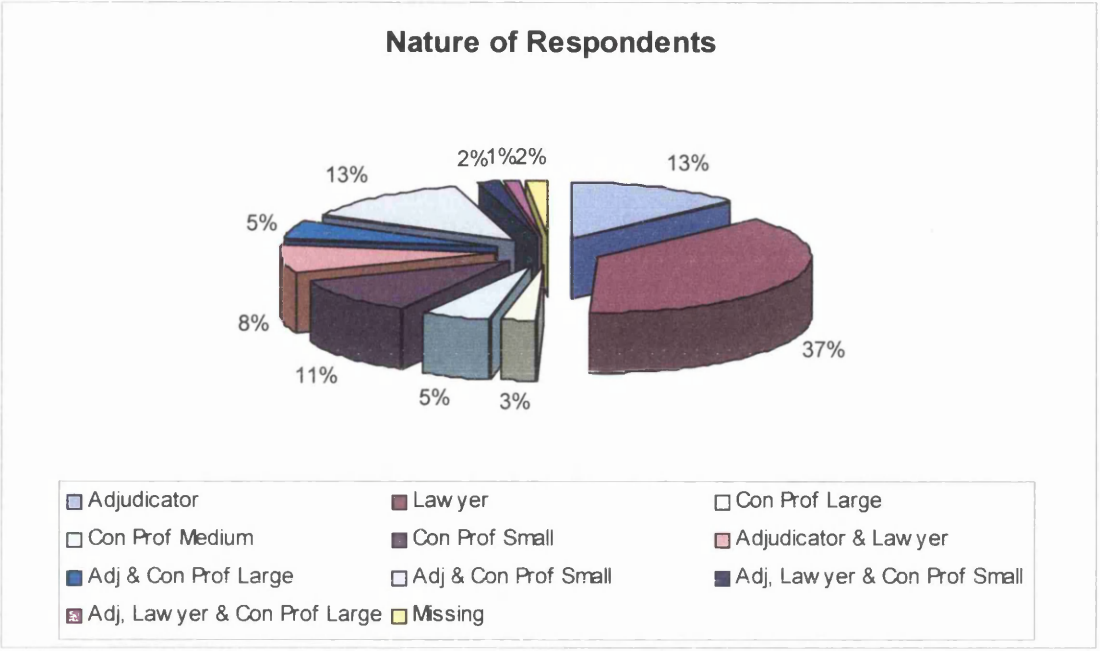
**Figure 2**

**SCORE**

| | | Frequency | Percent | Valid Percent | Cumulative Percent |
|---|---|---|---|---|---|
| Valid | 7.00 | 3 | 2.7 | 2.7 | 2.7 |
| | 8.00 | 30 | 26.5 | 27.0 | 29.7 |
| | 9.00 | 78 | 69.0 | 70.3 | 100.0 |
| | Total | 111 | 98.2 | 100.0 | |
| Missing | -8.00 | 2 | 1.8 | | |
| Total | | 113 | 100.0 | | |

Taking this crossover of employment category into account, the full nature of questionnaire respondents can be seen to be as follows:

**Figure 3**

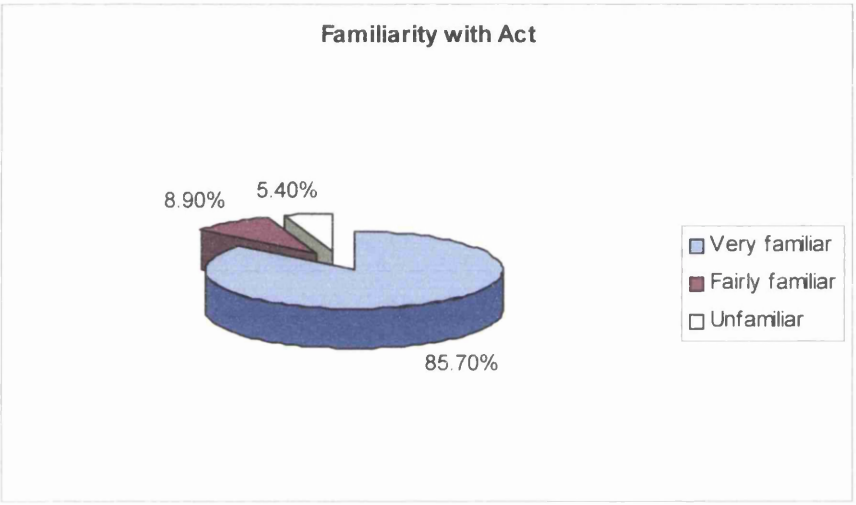



Indeed, as exemplified by Figure 3 above, 37% of questionnaire respondents were lawyers, 13% were adjudicators and 13% were also respondents who were acting both as an adjudicator and a construction professional employed by a small organization. 11% of respondents were construction professionals employed by a small business, with 8% of respondents acting both as an adjudicator and a lawyer. 5% of respondents can be seen to be construction professionals employed by a medium sized business, with 5% identifying themselves as adjudicators who were also employed as a construction professional for a large business. 3% of respondents were construction professionals employed by a large business, with 2% acting in a three-way capacity as an adjudicator, lawyer and construction professional employed by a small business. 1% of respondents acted in a three-way capacity as an adjudicator, lawyer and construction professional employed by a large business and 2% of respondents accounted for missing values.

## Respondents Experience of Adjudication

So as to assess familiarity with adjudication proceedings, respondents were asked to quantify their familiarity with the Housing Grants Construction and Regeneration Act 1996.[2] As can be seen from Figure 4, 85.70% of questionnaire respondents stated that they were "very familiar" with the provisions of the Construction Act 1996.

**Figure 4**




When broken down by employment group, it can be seen that 100% of adjudicators professed to be very familiar with the provisions of the Act (Figure 5).

**Figure 5**

**adjudicator * familiarity with Act Crosstabulation**

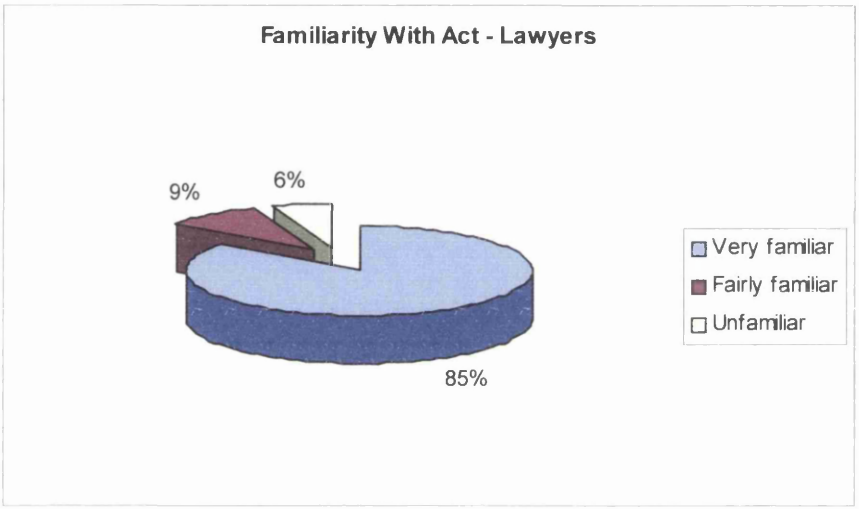
Count

| | | familiarity with Act | | | |
|---|---|---|---|---|---|
| | | very familiar | fairly familiar | unfamiliar | Total |
| adjudicator | yes | 48 | | | 48 |
| | no | 47 | 10 | 6 | 63 |
| Total | | 95 | 10 | 6 | 111 |

[2] Hereafter referred to as the Construction Act 1996

As demonstrated by Figure 6, 85% of lawyers professed to be "very familiar", with 9% stating that they were "fairly familiar" and 6% that they were "unfamiliar" with the provisions of the Construction Act 1996.

**Figure 6**

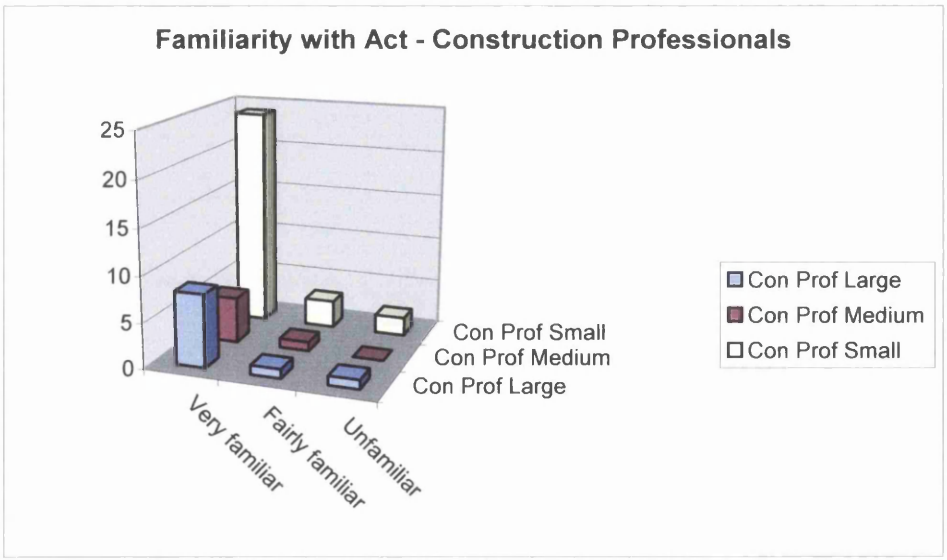


As can be seen from Figure 7, construction professionals also exhibited a good level of familiarity with the provisions of the Construction Act 1996. For 80% of construction professionals employed by a large business stated that they were "very familiar" with the provisions of the Act, with 10% professing to be "fairly familiar" and "unfamiliar" respectively.

83% of construction professionals employed by a medium sized business professed to be "very familiar" with the provisions of the Act, with 17% stating that they were "fairly familiar".

A similar level of familiarity can also be seen amongst construction professionals employed by small businesses: 83% professed to be "very familiar"; 10% were "fairly familiar"; and 7% were "unfamiliar".

**Figure 7**



When comparing the familiarity levels of base employment group[3] questionnaire respondents, an interesting result can be found. As exemplified by the crosstabulation contained in Figure 8, whereas 100% of adjudicators stated that they were "very familiar" with the provisions of the Act, only 75% of non-adjudicators professed such a level of familiarity.

**Figure 8**

**adjudicator * familiarity with Act Crosstabulation**

Count

| | | familiarity with Act | | | |
|---|---|---|---|---|---|
| | | very familiar | fairly familiar | unfamiliar | Total |
| adjudicator | yes | 48 | | | 48 |
| | no | 47 | 10 | 6 | 63 |
| Total | | 95 | 10 | 6 | 111 |

Indeed, as demonstrated by the Mann Whitney U Test contained in Figure 9, this difference in the level of familiarity with the provisions of the Act can be seen to be relevant at the 1% level of probability. Thus, adjudicators are statistically more likely to be "very familiar" with the provisions of the Construction Act 1996 than non-adjudicators. It is interesting that no such statistical significance could be found when comparing the familiarity levels of lawyers and non-lawyers.

[3] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 9**

**Ranks**

| | adjudicator | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| familiarity with Act | yes | 48 | 48.00 | 2304.00 |
| | no | 63 | 62.10 | 3912.00 |
| | Total | 111 | | |

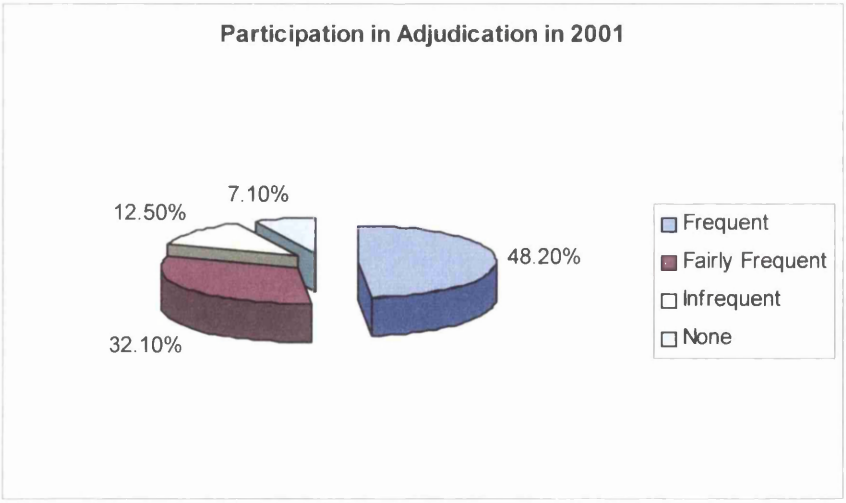
**Test Statistics[a]**

| | familiarity with Act |
|---|---|
| Mann-Whitney U | 1128.000 |
| Wilcoxon W | 2304.000 |
| Z | -3.746 |
| Asymp. Sig. (2-tailed) | .000 |

a. Grouping Variable: adjudicator

In addition to their familiarity with the provisions of the Construction Act 1996, questionnaire respondents were also asked to describe their level of participation in adjudication proceedings for the year 2001. As exemplified by Figure 10, 48.20% of respondents described their level of participation in adjudication proceedings for 2001 as being "frequent", with 32.10% describing it as "fairly frequent".

**Figure 10**



When comparing the participation levels of base employment group[4] questionnaire respondents, an interesting result can be found. Indeed, as exemplified in the crosstabulation contained in Figure 11, whereas 69% of adjudicators described their involvement as being "frequent" for the period 2001, only 33% of non-adjudicators proclaimed such.

**Figure 11**

**adjudicator * participation in adj 2001 Crosstabulation**

Count

| | | participation in adj 2001 | | | | |
|---|---|---|---|---|---|---|
| | | frequent | fairly frequent | infrequent | none | Total |
| adjudicator | yes | 33 | 12 | 3 | | 48 |
| | no | 21 | 23 | 11 | 8 | 63 |
| Total | | 54 | 35 | 14 | 8 | 111 |

As demonstrated by the Mann Whitney U Test contained in Figure 12, this difference in the level of participation can be seen to be relevant at the 1% level of probability. Thus, adjudicators are statistically more likely to have been "frequently" engaged in adjudication proceedings in the year 2001, than non-adjudicators. It is interesting that no such statistical significance could be found when comparing the familiarity levels of lawyers and non-lawyers.

[4] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 12**

**Ranks**

| | adjudicator | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| participation in adj 2001 | yes | 48 | 42.94 | 2061.00 |
| | no | 63 | 65.95 | 4155.00 |
| | Total | 111 | | |

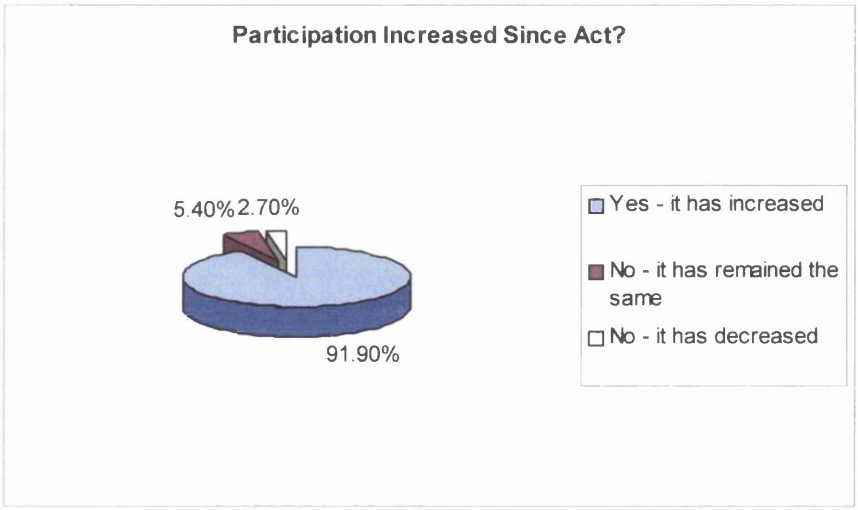
**Test Statistics[a]**

| | participation in adj 2001 |
|---|---|
| Mann-Whitney U | 885.000 |
| Wilcoxon W | 2061.000 |
| Z | -4.045 |
| Asymp. Sig. (2-tailed) | .000 |

a. Grouping Variable: adjudicator

So as to ascertain the impact of the Construction Act 1996 upon the level of adjudication proceedings employed by the industry, questionnaire respondents were then asked whether they had experienced an increase in adjudication since the introduction of the Act. As can be seen by Figure 13, 91.90% stated that their level of involvement in adjudication had increased since the introduction of the Act.

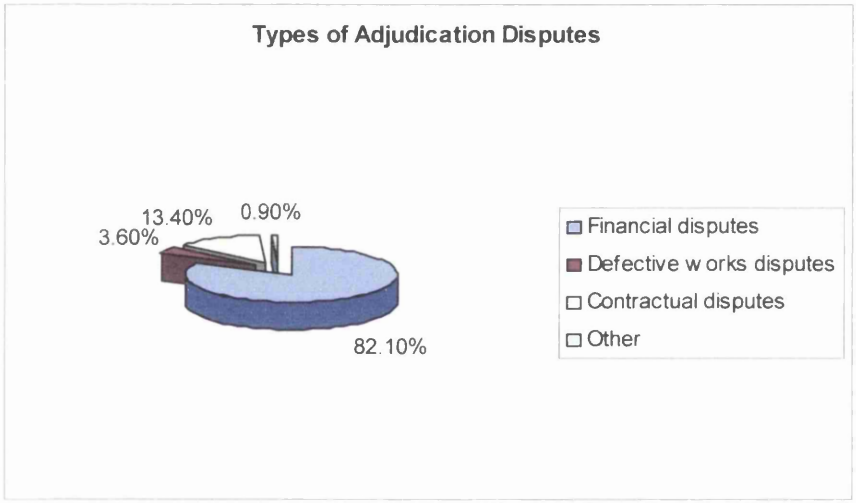
**Figure 13**



## The Nature of Disputes & Disputants

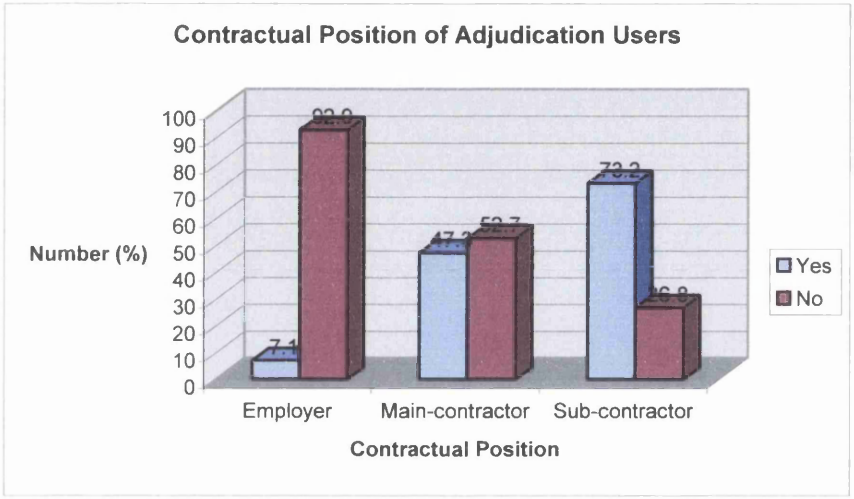
So as to ascertain information as to the type of disputes that proceed to adjudication, questionnaire respondents were asked to quantify the subject matter of their adjudication proceedings. As exemplified by Figure 14 below, 82.10% of adjudications concerned financial disputes, with 13.40% accounting for contractual disputes.

**Figure 14**



The contractual position of adjudication users was also of interest. Thus, respondents were asked whether the contractual position of adjudication users was that of employer, main contractor, and / or sub-contractor.[5] As can be seen in Figure 15, 73.2% of respondents stated that adjudication users were sub-contractors, with 47.3% stating that adjudication users were main-employers and only 7.1% identifying them as being employers.

**Figure 15**




[5] More than one answer could be selected - respondents could select one category only, or select two or all three if they so wished. Thus, percentages have been worked on the basis that each contractual position be treated as an independent variable.

When comparing the contractual position of adjudication users as reported by base employment group[6] questionnaire respondents, an interesting result can be found. Indeed, as exemplified in the crosstabulation contained in Figure 16, whereas 83% of adjudicators stated that adjudication users are "sub-contractors", 65% of non-adjudicators proclaimed such.

**Figure 16**

**adjudicator * adj user is sub-contractor Crosstabulation**

Count

| | | adj user is sub-contractor | | |
|---|---|---|---|---|
| | | yes | no | Total |
| adjudicator | yes | 40 | 8 | 48 |
| | no | 41 | 22 | 63 |
| Total | | 81 | 30 | 111 |

As demonstrated by the T-Test contained in Figure 17, this difference in perception can be seen to be relevant at the 5% level of probability. Thus, adjudicators are statistically more likely to encounter adjudication users who are "sub-contractors", than non-adjudicators.

[6] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 17**

**Group Statistics**

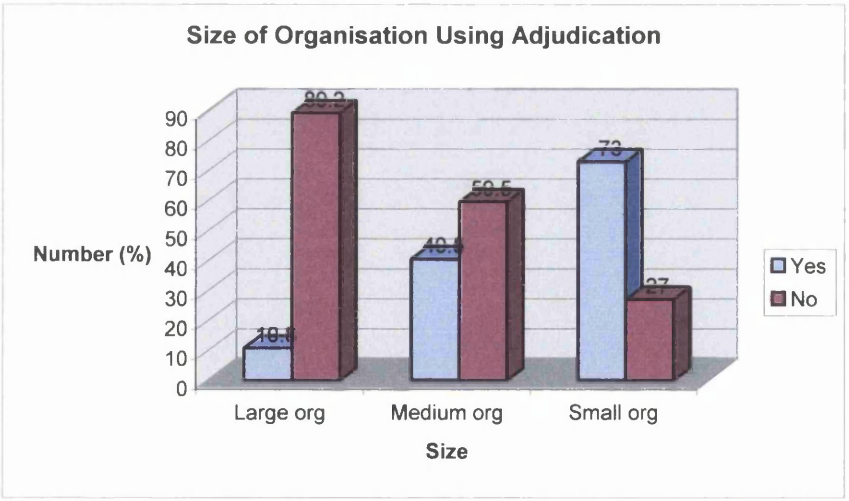
| | adjudicator | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| adj user is sub-contractor | yes | 48 | 1.17 | .377 | .054 |
| | no | 63 | 1.35 | .481 | .061 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| adj user is sub-contractor | Equal variances assumed | 21.749 | .000 | -2.171 | 109 | .032 | -.18 | .084 | -.349 | -.016 |
| | Equal variances not assumed | | | -2.243 | 108.898 | .027 | -.18 | .081 | -.344 | -.021 |

Similarly, respondents were asked to describe the size of organisations that in their experience use adjudication as a means of resolving disputes.[7] It can be seen in Figure 18 that 73% of respondents reported small sized organisations as utilizing adjudication, with 40.5% identifying medium organisations as using the process and only 10.8% identifying large organisations as being users of adjudication.

**Figure 18**




[7] More than one answer could be selected - respondents could select one category only, or select two or all three if they so wished. Thus, percentages have been worked on the basis that each organisational size be treated as an independent variable

**Differences in Perception of the Size of Adjudication Users – Medium-Sized**

When comparing the organisational size of adjudication users as reported by base employment group[8] questionnaire respondents, an interesting result can be found. Indeed, as exemplified in the crosstabulation contained in Figure 19, whereas 52% of lawyers stated that adjudication users are "medium-sized organisations", 30% of non-lawyers proclaimed such.

**Figure 19**

**lawyer * adj user is medium org Crosstabulation**

Count

| | | adj user is medium org | | |
|---|---|---|---|---|
| | | yes | no | Total |
| lawyer | yes | 28 | 26 | 54 |
| | no | 17 | 39 | 56 |
| Total | | 45 | 65 | 110 |

As demonstrated by the T-Test contained in Figure 20, this difference in perception can be seen to be relevant at the 5% level of probability. Thus, lawyers are statistically more likely to encounter adjudication users who are "medium-sized organisations", than non-lawyers.

[8] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 20**

**Group Statistics**

| | lawyer | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| adj user is medium org | yes | 54 | 1.48 | .504 | .069 |
| | no | 56 | 1.70 | .464 | .062 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| adj user is medium org | Equal variances assumed | 9.410 | .003 | -2.328 | 108 | .022 | -.21 | .092 | -.398 | -.032 |
| | Equal variances not assumed | | | -2.324 | 106.471 | .022 | -.21 | .092 | -.398 | -.032 |

As demonstrated by Figure 21, this difference in perception may be accounted for by the experience of the construction professional employed by a small business. For it can be seen that whilst 21% of such professionals reported that adjudication users were medium-sized organisations, 48% of non-such professionals reported such.

**Figure 21**

**construction prof - small * adj user is medium org Crosstabulation**

Count

| | | adj user is medium org | | |
|---|---|---|---|---|
| | | yes | no | Total |
| construction prof - small | yes | 6 | 23 | 29 |
| | no | 39 | 42 | 81 |
| Total | | 45 | 65 | 110 |

As exemplified by the T-Test contained in Figure 22, this difference in experience can be seen to be relevant at the 1% level of probability. Thus, whilst it may be the experience of lawyers that adjudication users are medium-sized organisations, construction professionals employed by small businesses are statistically more likely to disagree with such.

**Figure 22**

**Group Statistics**

| | construction prof - small | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| adj user is medium org | yes | 29 | 1.79 | .412 | .077 |
| | no | 81 | 1.52 | .503 | .056 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| adj user is medium org | Equal variances assumed | 40.616 | .000 | 2.638 | 108 | .010 | .27 | .104 | .068 | .481 |
| | Equal variances not assumed | | | 2.897 | 59.823 | .005 | .27 | .095 | .085 | .464 |

**Differences in Perception of the Size of Adjudication Users – Small-Sized**

Statistical relevance was also found when comparing the test variable of "small-sized organisation" by the grouping variables of adjudicator and lawyer. As exemplified in the crosstabulation contained in Figure 23, whereas 85% of adjudicators stated that users of the mechanism are "small-sized organisations", 65% of non-adjudicators proclaimed such.

**Figure 23**

**adjudicator * adj user is small org Crosstabulation**

Count

| | | adj user is small org | | |
|---|---|---|---|---|
| | | yes | no | Total |
| adjudicator | yes | 40 | 7 | 47 |
| | no | 41 | 22 | 63 |
| Total | | 81 | 29 | 110 |

As demonstrated by the T-Test contained in Figure 24, this difference in perception can be seen to be relevant at the 5% level of probability. Thus, adjudicators are statistically more likely to encounter adjudication users who are "small-sized organizations", than non-adjudicators.

**Figure 24**

**Group Statistics**

| | adjudicator | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| adj user is small org | yes | 47 | 1.15 | .360 | .052 |
| | no | 63 | 1.35 | .481 | .061 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| adj user is small org | Equal variances assumed | 27.710 | .000 | -2.398 | 108 | .018 | -.20 | .084 | -.366 | -.035 |
| | Equal variances not assumed | | | -2.499 | 107.995 | .014 | -.20 | .080 | -.359 | -.041 |

As demonstrated by Figure 25, this difference in perception may be accounted for by the experience of the lawyers. For it can be seen that whilst 59% of lawyers reported that adjudication users were small-sized organisations, 87.5% of non-lawyers reported such.

**Figure 25**

**lawyer * adj user is small org Crosstabulation**

Count

| | | adj user is small org | | |
|---|---|---|---|---|
| | | yes | no | Total |
| lawyer | yes | 32 | 22 | 54 |
| | no | 49 | 7 | 56 |
| Total | | 81 | 29 | 110 |

As exemplified by the T-Test contained in Figure 26, this difference in experience can be seen to be relevant at the 1% level of probability. Thus, whilst it may be the experience of adjudicators that users of the mechanism are small-sized organisations, lawyers are statistically more likely to disagree with such.

**Figure 26**

**Group Statistics**

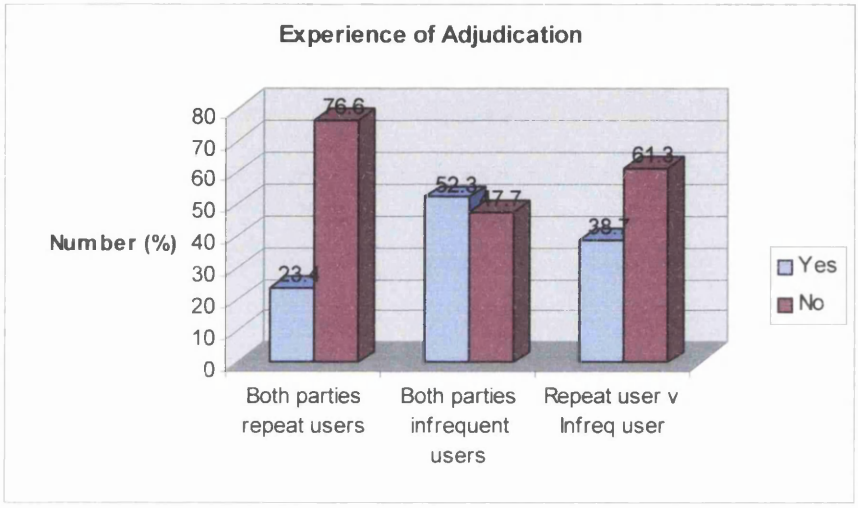
| | lawyer | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| adj user is small org | yes | 54 | 1.41 | .496 | .067 |
| | no | 56 | 1.13 | .334 | .045 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| adj user is small org | Equal variances assumed | 53.204 | .000 | 3.515 | 108 | .001 | .28 | .080 | .123 | .442 |
| | Equal variances not assumed | | | 3.491 | 92.406 | .001 | .28 | .081 | .122 | .443 |

The level of procedural experience of each adjudicating party was also of interest.[9] As elucidated by Figure 27, 52.3% of respondents stated that both adjudication parties were infrequent users of the process, with 38.7% identifying a repeat user adjudicating against an infrequent user of the mechanism. 23.4% of respondents reported that both parties were repeat users of the procedure.

**Figure 27**




[9] Once more respondents were free to select more than one answer. Thus, percentages have been worked on the basis that each combination of arbitral experience be treated as an independent variable

**Differences in Perception of the Experience of Adjudication Users - Both Parties Are Repeat Users**

When comparing the procedural experience of adjudication users as reported by base employment group[10] questionnaire respondents, an interesting result can be found. Indeed, as exemplified in the crosstabulation contained in Figure 28, whereas 11% of construction professionals employed by a small organisation stated that "both parties" to adjudication are "repeat users" of the mechanism, 28% of non-such professionals proclaimed such

**Figure 28**

**construction prof - small * both adj parties repeat users Crosstabulation**

Count

| | | both adj parties repeat users | | |
|---|---|---|---|---|
| | | yes | no | Total |
| construction prof - small | yes | 3 | 25 | 28 |
| | no | 23 | 59 | 82 |
| Total | | 26 | 84 | 110 |

Indeed, as demonstrated by the T-Test contained in Figure 29, this difference in perception can be seen to be relevant at the 10% level of probability. Thus, construction professionals working for a small-sized business are statistically less likely to encounter proceedings in which both parties are repeat users of the mechanism, than non-such professionals.

[10] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 29**

**Group Statistics**

| | construction prof - small | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| both adj parties repeat users | yes | 28 | 1.89 | .315 | .060 |
| | no | 82 | 1.72 | .452 | .050 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| both adj parties repeat users | Equal variances assumed | 20.978 | .000 | 1.877 | 108 | .063 | .17 | .092 | -.010 | .356 |
| | Equal variances not assumed | | | 2.231 | 67.241 | .029 | .17 | .078 | .018 | .328 |

## Differences in Perception of the Experience of Adjudication Users - Both Parties Are Infrequent Users

Statistical relevance was also found when comparing the test variable of "both parties are infrequent users of adjudication" by the grouping variables of adjudicator and lawyer. Indeed, as exemplified in the crosstabulation contained in Figure 30, whereas 66% of adjudicators stated that both parties to adjudication are infrequent users of the process, 43% of non-adjudicators proclaimed such.

**Figure 30**

**adjudicator * both adj parties infreq users Crosstabulation**

Count

| | | both adj parties infreq users | | |
|---|---|---|---|---|
| | | yes | no | Total |
| adjudicator | yes | 31 | 16 | 47 |
| | no | 27 | 36 | 63 |
| Total | | 58 | 52 | 110 |

As demonstrated by the T-Test contained in Figure 31, this difference in perception can be seen to be relevant at the 5% level of probability. Thus, adjudicators are statistically more likely to encounter proceedings in which both parties are infrequent users of the mechanism, than non-adjudicators.

**Figure 31**

**Group Statistics**

| | adjudicator | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| both adj parties infreq users | yes | 47 | 1.34 | .479 | .070 |
| | no | 63 | 1.57 | .499 | .063 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| both adj parties infreq users | Equal variances assumed | 3.469 | .065 | -2.444 | 108 | .016 | -.23 | .095 | -.418 | -.044 |
| | Equal variances not assumed | | | -2.458 | 101.337 | .016 | -.23 | .094 | -.417 | -.045 |

As demonstrated by Figure 32, this difference in perception may be accounted for by the experience of the lawyers. For it can be seen that whilst 37% of lawyers reported that adjudicating parties were both infrequent users of the process, 68% of non-lawyers reported such.

**Figure 32**

**lawyer * both adj parties infreq users Crosstabulation**

Count

| | | both adj parties infreq users | | Total |
|---|---|---|---|---|
| | | yes | no | |
| lawyer | yes | 20 | 34 | 54 |
| | no | 38 | 18 | 56 |
| Total | | 58 | 52 | 110 |

As exemplified by the T-Test contained in Figure 33, this difference in experience can be seen to be relevant at the 1% level of probability. Thus, whilst it may be the experience of adjudicators[11] that adjudicating parties are both infrequent users of the mechanism, lawyers are statistically less likely to agree with such.

**Figure 33**

**Group Statistics**

| | lawyer | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| both adj parties infreq users | yes | 54 | 1.63 | .487 | .066 |
| | no | 56 | 1.32 | .471 | .063 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| both adj parties infreq users | Equal variances assumed | 1.124 | .291 | 3.372 | 108 | .001 | .31 | .091 | .127 | .489 |
| | Equal variances not assumed | | | 3.370 | 107.467 | .001 | .31 | .091 | .127 | .490 |

[11] The experience of Construction Professionals employed by a small business supported the view held by adjudicators

**Differences in Perception of the Experience of Adjudication Users - Repeat User v Infrequent User**

Statistical relevance was also found when comparing the test variable of "repeat user v infrequent user of adjudication" by the grouping variable of construction professional employed by a small organisation. Indeed, as exemplified in the crosstabulation contained in Figure 34, whereas 25% of construction professionals employed by a small business stated that in adjudication it was a frequent user of the process v an infrequent user, 43% of non-such professionals proclaimed such.

**Figure 34**

**construction prof - small * repeat user of adj v infreq user Crosstabulation**

Count

| | | repeat user of adj v infreq user | | |
|---|---|---|---|---|
| | | yes | no | Total |
| construction prof - small | yes | 7 | 21 | 28 |
| | no | 35 | 47 | 82 |
| Total | | 42 | 68 | 110 |

As exemplified by the T-Test contained in Figure 35, this difference in experience can be seen to be relevant at the 10% level of probability. Thus, construction professionals employed by a small business are statistically less likely to encounter a situation where a frequent user is adjudicating against an infrequent user, than non-such professionals.

**Figure 35**

**Group Statistics**

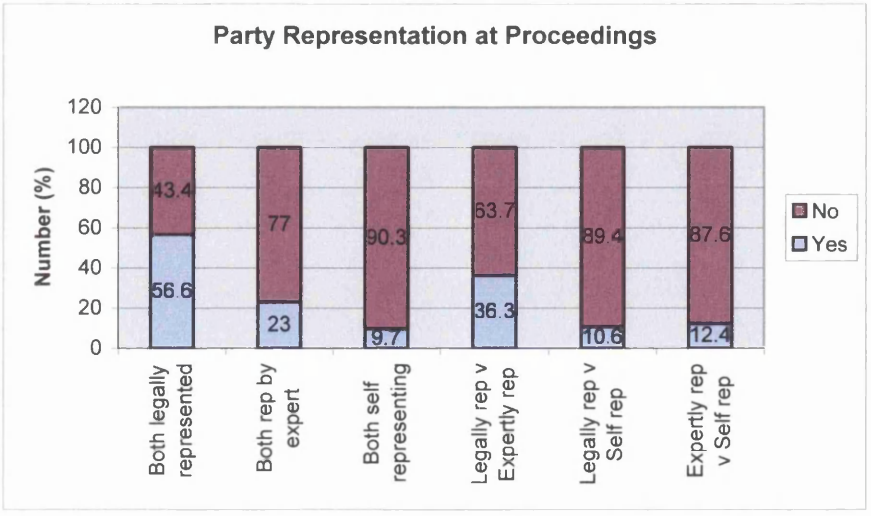
| | construction prof - small | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| repeat user of adj v infreq user | yes | 28 | 1.75 | .441 | .083 |
| | no | 82 | 1.57 | .498 | .055 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| repeat user of adj v infreq user | Equal variances assumed | 16.903 | .000 | 1.669 | 108 | .098 | .18 | .106 | -.033 | .387 |
| | Equal variances not assumed | | | 1.771 | 52.296 | .082 | .18 | .100 | -.023 | .377 |

When asked to recount the representation status of parties to adjudication, 56.6% of respondents stated that in their experience, both adjudicating parties were legally represented. 36.3% of respondents stated that they had encountered a legally represented party adjudicating against an expertly represented party and 23% of respondents reported that they had engaged in adjudication proceedings where both parties were represented by an industrial expert (Figure 36).

**Figure 36**



**Differences in Perception of the Representation of Adjudication Users - Both Parties Legally Represented**

When comparing the representation status of adjudicating parties as described by the base employment group[12] questionnaire respondents, an interesting result can be found. As exemplified in the crosstabulation contained in Figure 37, whereas 67% of lawyers had reportedly been engaged in proceedings where both adjudicating parties were legally represented, only 46% of non-lawyers proclaimed such

**Figure 37**

**lawyer * both adj parties legally represented Crosstabulation**

Count

| | | both adj parties legally represented | | |
|---|---|---|---|---|
| | | yes | no | Total |
| lawyer | yes | 36 | 18 | 54 |
| | no | 26 | 31 | 57 |
| Total | | 62 | 49 | 111 |

As exemplified by the T-Test contained in Figure 38, this difference in experience can be seen to be relevant at the 5% level of probability. Thus, lawyers are statistically more likely to encounter proceedings where both parties are legally represented, than non-lawyers.

[12] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 38**

**Group Statistics**

| | lawyer | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| both adj parties legally represented | yes | 54 | 1.33 | .476 | .065 |
| | no | 57 | 1.54 | .503 | .067 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| both adj parties legally represented | Equal variances assumed | 5.604 | .020 | -2.264 | 109 | .026 | -.21 | .093 | -.395 | -.026 |
| | Equal variances not assumed | | | -2.267 | 109.000 | .025 | -.21 | .093 | -.395 | -.026 |

As demonstrated by Figure 39, this difference in perception may be accounted for by the experience of construction professionals employed by a small business. For it can be seen that whereas 24% of such professionals reported knowledge of proceedings where both adjudicating parties were legally represented, 67% of non-such professionals proclaimed such

**Figure 39**

**construction prof - small * both adj parties legally represented Crosstabulation**

Count

| | | both adj parties legally represented | | |
|---|---|---|---|---|
| | | yes | no | Total |
| construction prof - small | yes | 7 | 22 | 29 |
| | no | 55 | 27 | 82 |
| Total | | 62 | 49 | 111 |

As exemplified by the T-Test contained in Figure 40, this difference in experience can be seen to be relevant at the 1% level of probability. Thus, whilst it may be the experience of lawyers that adjudicating parties are both legally represented at proceedings, construction professionals employed by a small business are statistically less likely to agree with such.

**Figure 40**

**Group Statistics**

| | construction prof - small | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| both adj parties legally represented | yes | 29 | 1.76 | .435 | .081 |
| | no | 82 | 1.33 | .473 | .052 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| both adj parties legally represented | Equal variances assumed | 3.765 | .055 | 4.287 | 109 | .000 | .43 | .100 | .231 | .628 |
| | Equal variances not assumed | | | 4.460 | 53.028 | .000 | .43 | .096 | .236 | .622 |

**Differences in Perception of the Representation of Adjudication Users - Legally Represented Party v Expertly Represented Party**

Statistical relevance was also found when comparing the test variable of "legally represented party v expertly represented party" by the grouping variable of adjudicator. Indeed, as exemplified in the crosstabulation contained in Figure 41, whereas 52% of adjudicators stated that they had experienced proceedings in which a legally represented party was adjudicating against an expertly represented party, 24% of non-adjudicators proclaimed such.

**Figure 41**

**adjudicator * legally rep party v expertly rep party Crosstabulation**

Count

| | | legally rep party v expertly rep party | | |
|---|---|---|---|---|
| | | yes | no | Total |
| adjudicator | yes | 25 | 23 | 48 |
| | no | 15 | 48 | 63 |
| Total | | 40 | 71 | 111 |

As exemplified by the T-Test contained in Figure 42, this difference in experience can be seen to be relevant at the 1% level of probability. Thus, adjudicators are statistically more likely to encounter proceedings in which a legally represented party is adjudicating against an expertly represented party, than non-adjudicators.

**Figure 42**

**Group Statistics**

| | adjudicator | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| legally rep party v expertly rep party | yes | 48 | 1.48 | .505 | .073 |
| | no | 63 | 1.76 | .429 | .054 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| legally rep party v expertly rep party | Equal variances assumed | 17.482 | .000 | -3.185 | 109 | .002 | -.28 | .089 | -.459 | -.107 |
| | Equal variances not assumed | | | -3.116 | 91.912 | .002 | -.28 | .091 | -.463 | -.102 |

## Differences in Perception of the Representation of Adjudication Users - Legally Represented Party v Self-Representing Party

Adjudicators were also found to be statistically more likely to encounter legally represented parties adjudicating against self-representing parties. For as exemplified by the crosstabulation in Figure 43, whilst 21% of adjudicators reported such an experience, only 3% of non-adjudicators reported such.

**Figure 43**

**adjudicator * legally rep party v self rep party Crosstabulation**

Count

| | | legally rep party v self rep party | | |
|---|---|---|---|---|
| | | yes | no | Total |
| adjudicator | yes | 10 | 38 | 48 |
| | no | 2 | 61 | 63 |
| Total | | 12 | 99 | 111 |

As can be seen in the T-Test contained in Figure 44, such differences in experience are relevant at the 1% level of probability. Thus, adjudicators are statistically more likely to encounter legally represented parties adjudicating against self-representing parties, than non-adjudicators.

**Figure 44**

**Group Statistics**

| | adjudicator | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| legally rep party v self rep party | yes | 48 | 1.79 | .410 | .059 |
| | no | 63 | 1.97 | .177 | .022 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| legally rep party v self rep party | Equal variances assumed | 48.698 | .000 | -3.066 | 109 | .003 | -.18 | .058 | -.291 | -.062 |
| | Equal variances not assumed | | | -2.790 | 60.306 | .007 | -.18 | .063 | -.303 | -.050 |

**Differences in Perception of the Representation of Adjudication Users - Expertly Represented Party v Self Representing Party**

Similarly, adjudicators were also found to be statistically more likely to encounter expertly represented parties adjudicating against self-representing parties. For as exemplified by the crosstabulation in Figure 45, whilst 21% of adjudicators reported such an experience, only 6% of non-adjudicators reported such.

**Figure 45**

**adjudicator * expertly rep party v self rep party Crosstabulation**

Count

| | | expertly rep party v self rep party | | |
|---|---|---|---|---|
| | | yes | no | Total |
| adjudicator | yes | 10 | 38 | 48 |
| | no | 4 | 59 | 63 |
| Total | | 14 | 97 | 111 |

As can be seen in the T-Test contained in Figure 46, such differences in experience are relevant at the 5% level of probability. Thus, adjudicators are statistically more likely to encounter expertly represented parties adjudicating against self-representing parties, than non-adjudicators.

**Figure 46**

**Group Statistics**

| | adjudicator | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| expertly rep party v self rep party | yes | 48 | 1.79 | .410 | .059 |
| | no | 63 | 1.94 | .246 | .031 |

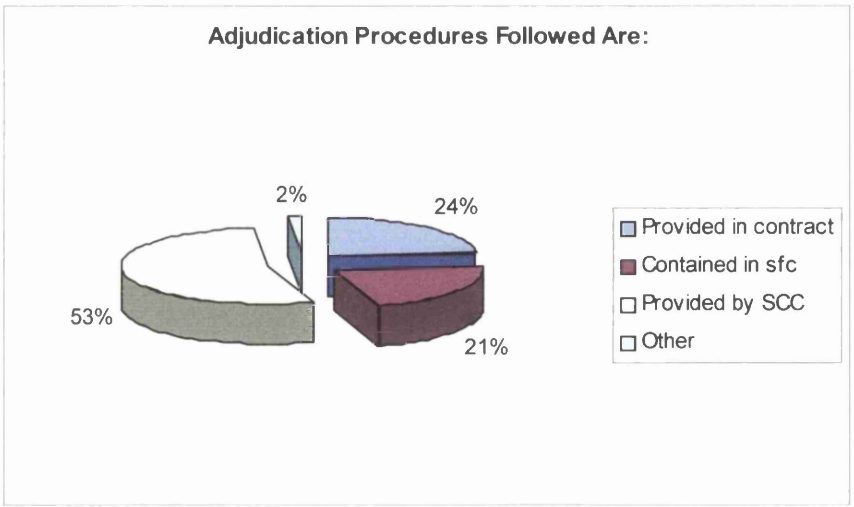
**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| expertly rep party v self rep party | Equal variances assumed | 23.812 | .000 | -2.311 | 109 | .023 | -.14 | .063 | -.269 | -.021 |
| | Equal variances not assumed | | | -2.167 | 72.117 | .034 | -.14 | .067 | -.278 | -.012 |

## The Nature of Proceedings

As elucidated by Figure 47 when asked the origin of adjudication procedure, 53% of respondents stated that the adjudication procedures followed were those provided under the Scheme for Construction Contracts. 24% identified the construction contract as being the source of adjudication procedure, with 21% of respondents stating that adjudication procedures followed were those provided under the terms of a standard form contract.

**Figure 47**



When comparing the source of adjudication procedure as described by the base employment group[13] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 48 whilst 63% of lawyers stated that the adjudication procedure followed was that provided by the Scheme for Construction Contracts, 44% of non-lawyers identified the Scheme as being the source of adjudication procedure. Thus, lawyers are statistically more likely to engage in adjudication where the proceedings have been determined by the Scheme for Construction Contracts, than non-lawyers.

**Figure 48**

**lawyer * adjudication procedures followed are Crosstabulation**

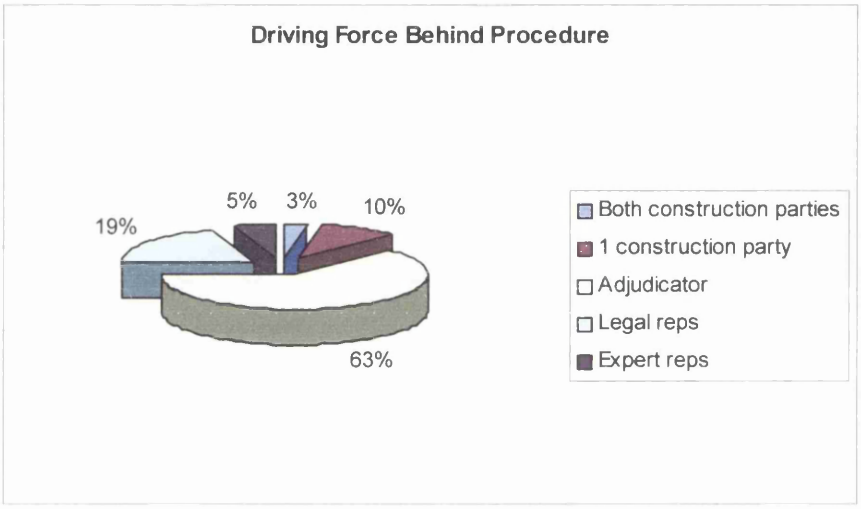
Count

| | | adjudication procedures followed are | | | | |
|---|---|---|---|---|---|---|
| | | those provided by con contract | those contained in sfc | those provided under the Scheme | other | Total |
| lawyer | yes | 9 | 10 | 34 | 1 | 54 |
| | no | 18 | 13 | 25 | 1 | 57 |
| Total | | 27 | 23 | 59 | 2 | 111 |

[13] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

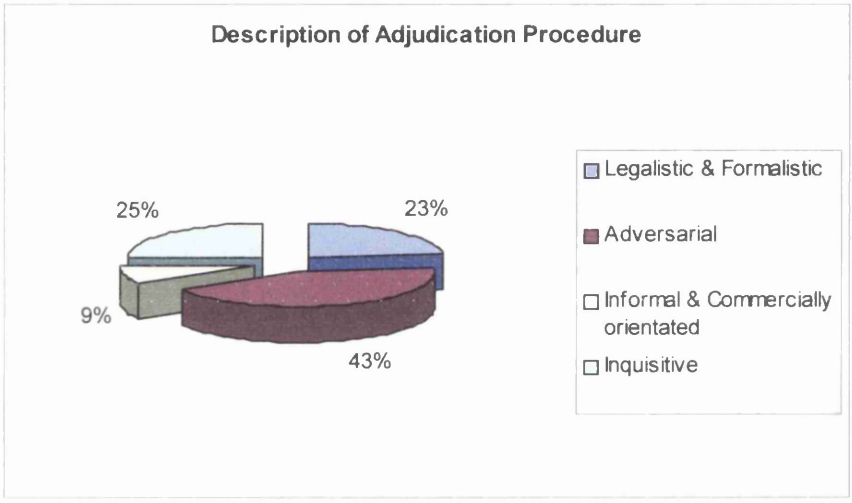
Of equal importance to the source of adjudication procedure, is the driving force behind proceedings. As identified by Figure 49, 63% of respondents stated that the adjudicator was the driving force behind the procedure, with 19% identifying legal representatives as being such. 10% identified one adjudicating party as being the driving force behind proceedings, with 5% and 3% identifying expert representatives and both adjudicating parties respectively.

**Figure 49**



Having determined the source of adjudication procedure and the driving force behind such, respondents were asked to describe adjudication proceedings. As demonstrated by Figure 50, 43% of respondents stated that they believed adjudication proceedings to be "adversarial" in nature, with 25% of respondents describing the procedure as being "inquisitive", 23% of respondents stating it to be "legalistic and formalistic" and 9% identifying it as "informal and commercially orientated".

**Figure 50**



## Differences in Perception of Adjudication Procedure - Adjudication Procedure is Inquisitive

When comparing the nature of adjudication proceedings as described by the base employment group[14] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 51, whilst 31% of adjudicators described the procedure as being "inquisitive", 21% of non-adjudicators described the procedure as such. Thus, adjudicators are statistically more likely to consider adjudication as being "inquisitive", than non-adjudicators.

**Figure 51**

**adjudicator * adjudication procedure is Crosstabulation**

Count

| | | adjudication procedure is | | | | |
|---|---|---|---|---|---|---|
| | | legalistic and formalistic | adversarial | informal & commercially orientated | inquisitive | Total |
| adjudicator | yes | 8 | 20 | 5 | 15 | 48 |
| | no | 18 | 28 | 4 | 13 | 63 |
| Total | | 26 | 48 | 9 | 28 | 111 |

[14] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Differences in Perception of Adjudication Procedure - Adjudication Procedure is Adversarial**

This difference in perception may be accounted for by the attitude of the lawyer respondents. For as demonstrated in the crosstabulation contained in Figure 52, whilst 52% of lawyers deemed adjudication procedure to be "adversarial", 35% of non-lawyers perceived such. Thus, lawyers are statistically more likely than non-lawyers, to view adjudication as being "adversarial".

**Figure 52**

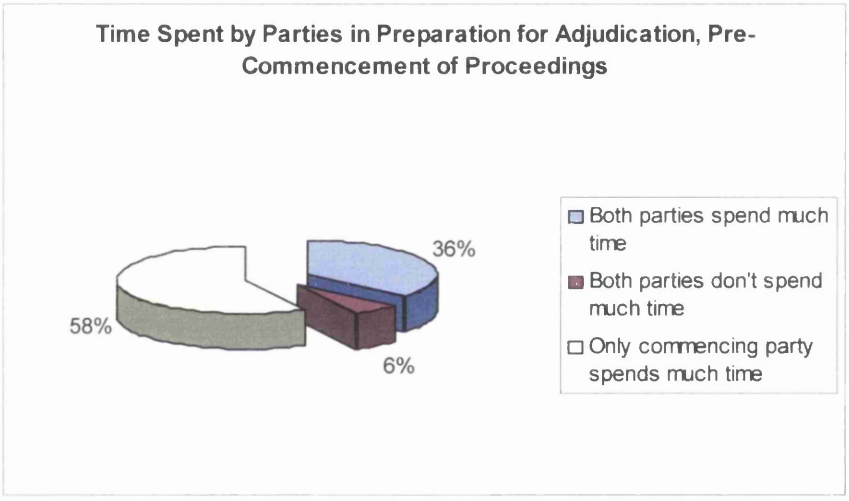
**lawyer * adjudication procedure is Crosstabulation**

Count

| | | adjudication procedure is | | | | |
|---|---|---|---|---|---|---|
| | | legalistic and formalistic | adversarial | informal & commercially orientated | inquisitive | Total |
| lawyer | yes | 14 | 28 | 3 | 9 | 54 |
| | no | 12 | 20 | 6 | 19 | 57 |
| Total | | 26 | 48 | 9 | 28 | 111 |

So as to gain information on the way in which proceedings were initiated, respondents were asked to categorise the time spent by parties in preparation for adjudication pre-commencement of proceedings. As elucidated by Figure 53, 58% of respondents stated that only the party commencing the action spent "much time"[15] in preparation for proceedings, with 36% of respondents claiming that both parties spent much time in preparation and 6% stating that both adjudication parties do not spend much time in preparation for adjudication pre-commencement of proceedings.

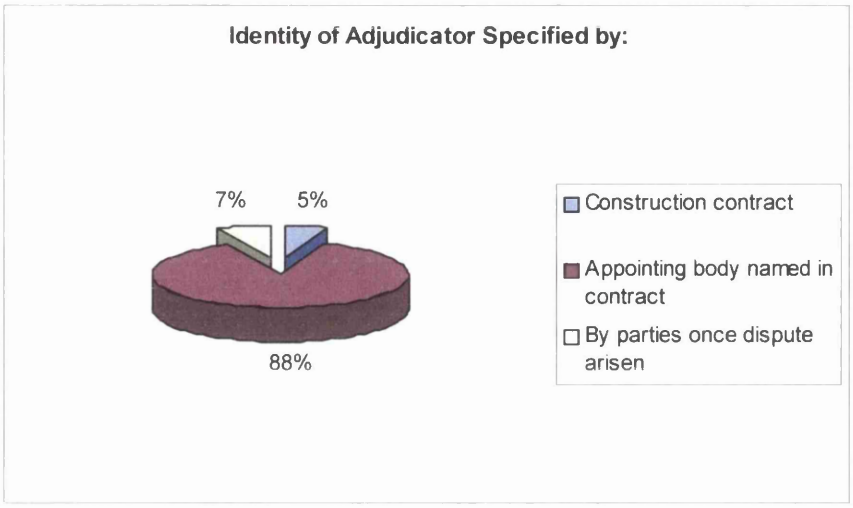
**Figure 53**




To further enhance the information concerning the initiation of adjudication proceedings, respondents were asked to recount the appointment procedure for adjudicators. As demonstrated by Figure 54, 88% of respondents stated that it was usual for an adjudicator to be appointed by a nominating body that was specified in the contract. 7% of respondents stated that the parties nominated an adjudicator once a dispute had arisen and only 5% reported that the identity of an adjudicator was specified in the construction contract.

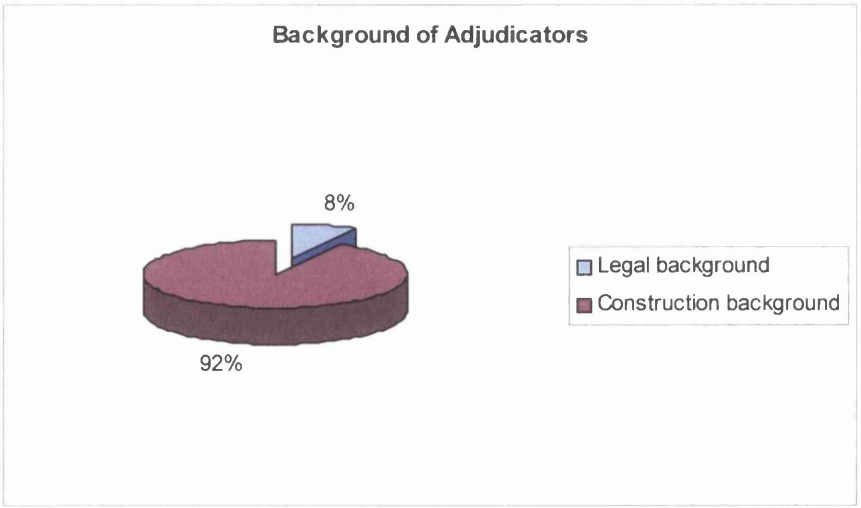
[15] Defined as being 2 weeks or more pre-commencement of proceedings.

**Figure 54**




In addition to the appointment of the adjudicator, respondents were also asked to provide information on the background of adjudicators. That is, are they generally of a legal or construction background? As demonstrated by Figure 55, 92% of respondents reported that in their experience, adjudicators were of a construction background.

**Figure 55**



When comparing the background of adjudicators as described by the base employment group[16] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 56, whilst 98% of adjudicators described the background of adjudicators as being "construction", 87% of non-adjudicators described the adjudicator background as such. Thus, adjudicators are statistically more likely than non-adjudicators, to view the background of adjudicators as being that of "construction".

**Figure 56**

**adjudicator * background of adjudicators Crosstabulation**

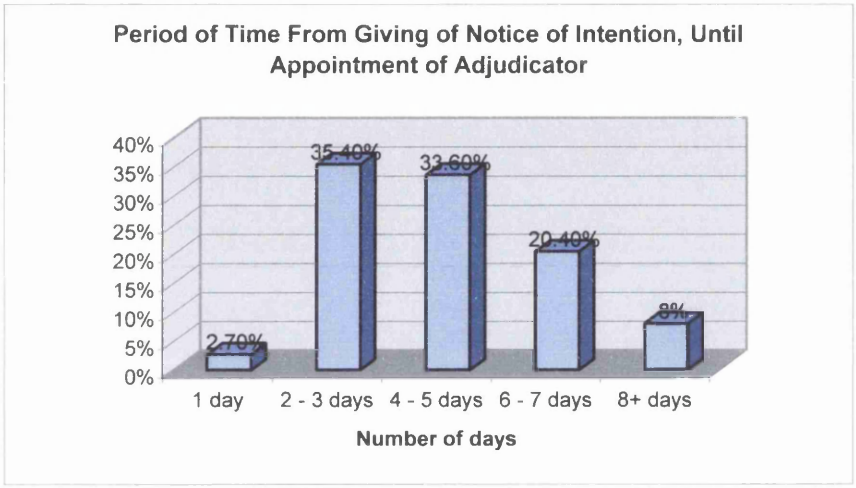
Count

| | | background of adjudicators | | |
|---|---|---|---|---|
| | | legal background | construction background | Total |
| adjudicator | yes | 1 | 46 | 47 |
| | no | 8 | 55 | 63 |
| Total | | 9 | 101 | 110 |

[16] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

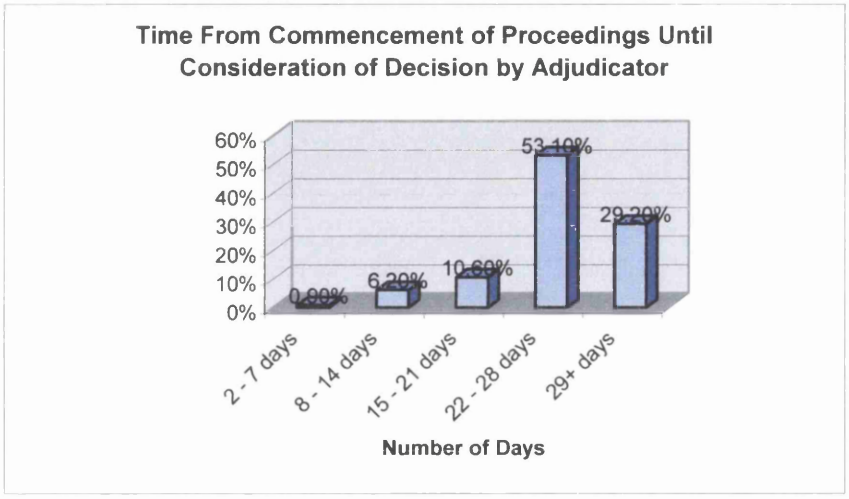
So as to assess the procedural efficiency of adjudication, information was also sought on the timescale within which the adjudicator was appointed once the notice of intention to proceed to adjudication had been given. It can be seen from Figure 57 that 35.4% of respondents reported a duration 2 – 3 days from the issuing of notice until the appointment of an arbitrator, with 33.6% and 20.4% reporting timescales of 4 – 5 days and 6 – 7 days respectively.

**Figure 57**



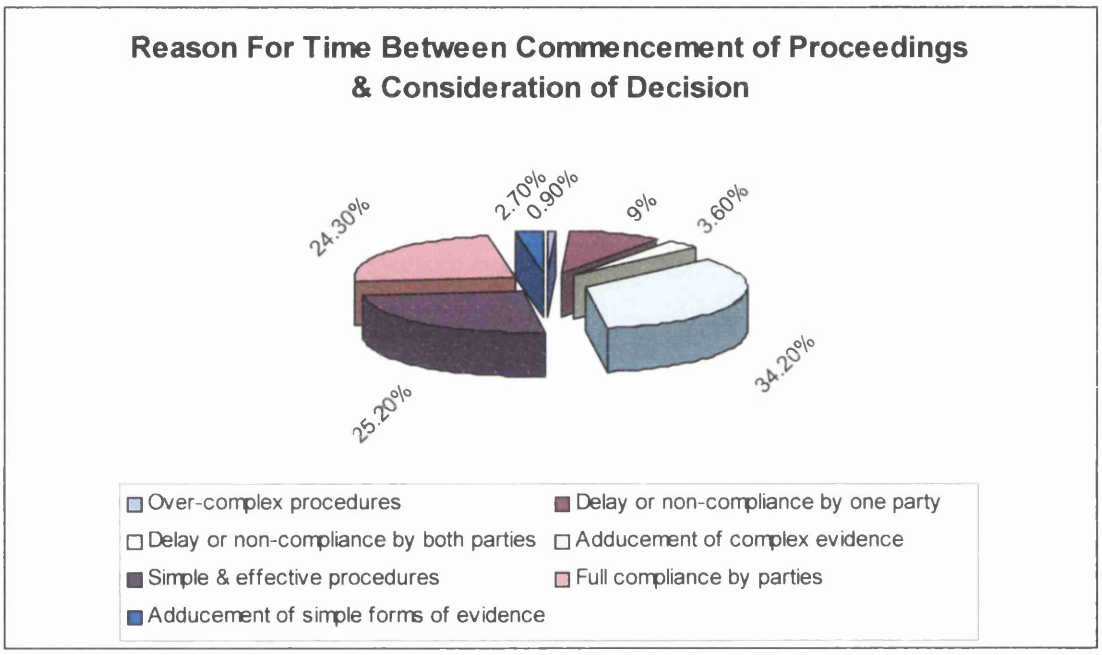
To further enlighten the assessment of procedural efficiency, respondents were asked to define the period of time from the commencement of adjudication proceedings, until the consideration of the decision by the adjudicator. As exemplified by Figure 58, 53.10% of respondents stated that in their experience, it took between 22 and 28 days after commencement of proceedings for the adjudicator to be in the position to consider his decision. 29.20% of respondents reported a timescale in excess of 29 days.

**Figure 58**



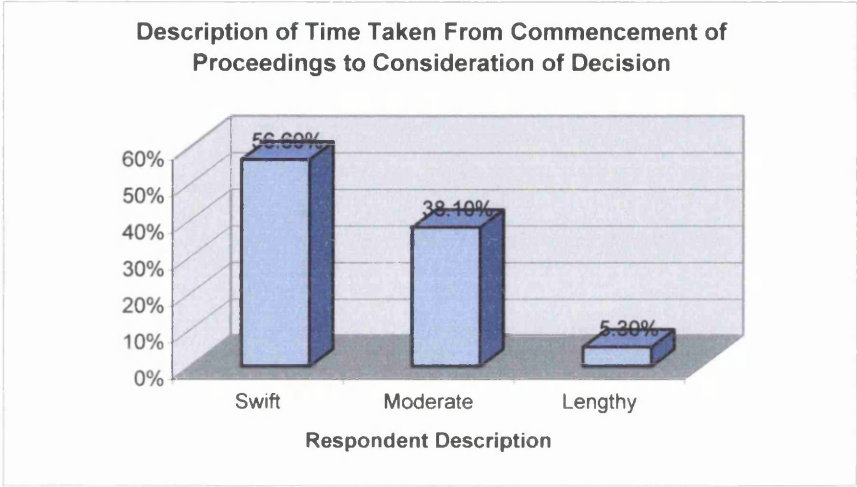
When asked to speculate on the reasoning for such a timescale as stated in Figure 58 above, 34.20% of respondents suggested that the adducement of complex evidence might provide the answer. 25.20% stated that simple and effective procedures might account for the timescale, with 24.30% suggesting full compliance by the parties as the answer (see Figure 59 below).

**Figure 59**



So as to place the above information in context, respondents were asked to quantify their opinion of the time taken from the commencement of proceedings until the consideration of the decision. As can be seen in Figure 60, 56.60% of respondents stated that in their opinion such a timescale could be described as being "swift".

**Figure 60**




When comparing the time taken from commencement of proceedings until consideration of the decision as described by the base employment group[17] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 61, whilst 48% of construction professionals employed by a small business viewed the period of time as being "moderate", 35% of non-such professionals described it as such.

[17] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 61**

**:onstruction prof - small * time btwn commencement & consid of award is Crosstabulation**

Count

| | | time btwn commencement & consid of award is | | | |
|---|---|---|---|---|---|
| | | swift | moderate | lengthy | Total |
| construction prof - small | yes | 12 | 14 | 3 | 29 |
| | no | 50 | 29 | 3 | 82 |
| Total | | 62 | 43 | 6 | 111 |

Indeed, as can be seen from the Mann Whitney U Test below, such a difference in opinion can be seen to be relevant at the 5% level of probability. Thus, construction professionals employed by a small business are statistically more likely than non-such professionals, to view the period of time from commencement of proceedings until consideration of the decision as being "moderate" or "lengthy" (Figure 62).

**Figure 62**

**Ranks**

| | construction prof - small | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| time btwn commencement & consid of award is | yes | 29 | 64.81 | 1879.50 |
| | no | 82 | 52.88 | 4336.50 |
| | Total | 111 | | |

**Test Statistics[a]**

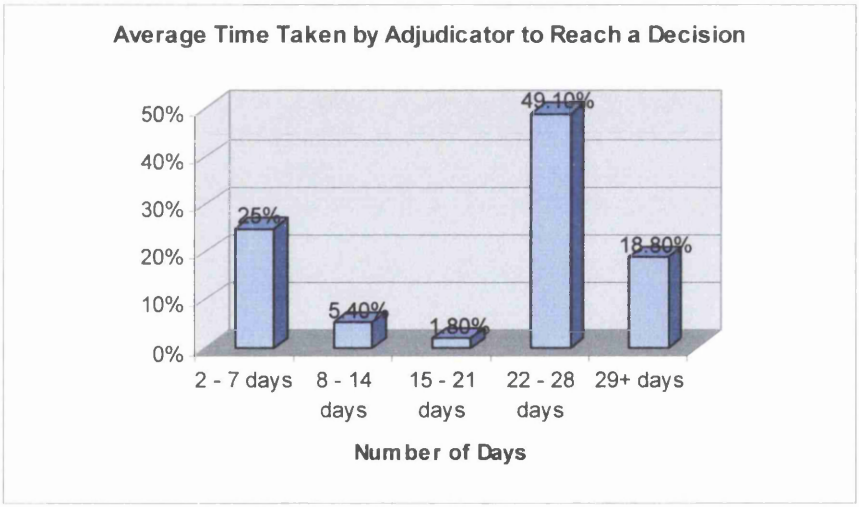
| | time btwn commencement & consid of award is |
|---|---|
| Mann-Whitney U | 933.500 |
| Wilcoxon W | 4336.500 |
| Z | -1.958 |
| Asymp. Sig. (2-tailed) | .050 |

a. Grouping Variable: construction prof - small

## The Adjudication Decision

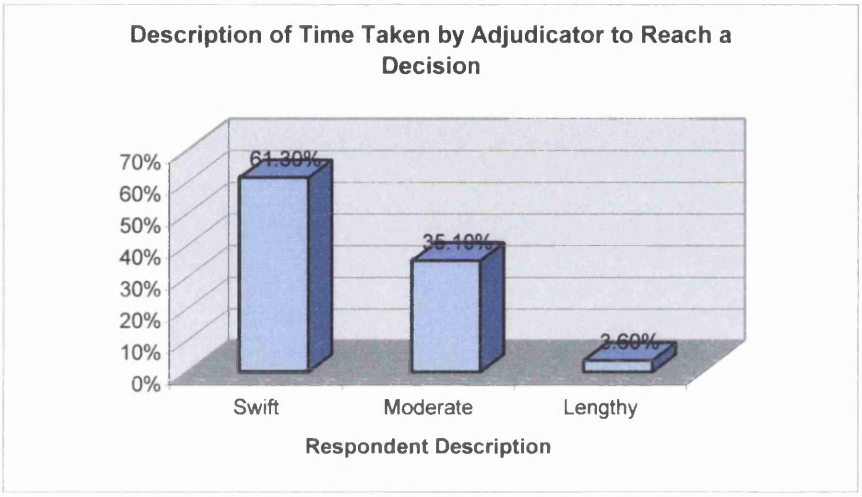
So as to continue the assessment of procedural efficiency, respondents were asked to state the average time taken by an adjudicator to reach a decision. It can be seen from Figure 63 that 49.10% of respondents reported a timescale of 22 – 28 days as being required for the adjudicator to reach his decision, with 25% of respondents reporting a timescale of 2 – 7 days. 18.80% of respondents reported a timescale of 29+ days as being required.

**Figure 63**



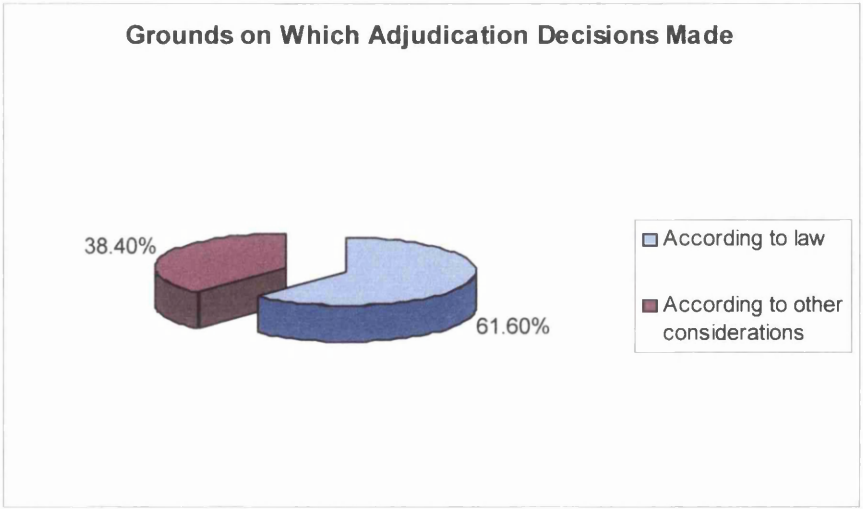
So as to place the timescale into context, respondents were asked to quantify their opinion of the time taken by adjudicators to reach their decision. As demonstrated by Figure 64, 61.30% of respondents viewed such a timescale as "swift".

**Figure 64**




In addition to assessing the procedural efficiency of adjudication proceedings, it was also important to establish the grounds upon which adjudication decisions were made. As elucidated by Figure 65, 61.60% of respondents reported that adjudicators' decisions were made according to legal principles.

**Figure 65**



When comparing the grounds upon which adjudication decisions were made as described by the base employment group[18] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 66, whilst 79% of adjudicators reported that decisions were formed according to legal principles, 48% of non-adjudicators reported such.

**Figure 66**

**adjudicator * grounds on which adj decision made Crosstabulation**

Count

| | | grounds on which adj decision made | | |
|---|---|---|---|---|
| | | according to law | according to other considerations | Total |
| adjudicator | yes | 38 | 10 | 48 |
| | no | 30 | 32 | 62 |
| Total | | 68 | 42 | 110 |

As can be seen by the T-Test contained in Figure 67, such a difference in perception can be seen to be relevant at the 1% level of probability. Thus, adjudicators are statistically more likely than non-adjudicators, to view decisions as being based upon legal principle.

[18] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 67**

**Group Statistics**

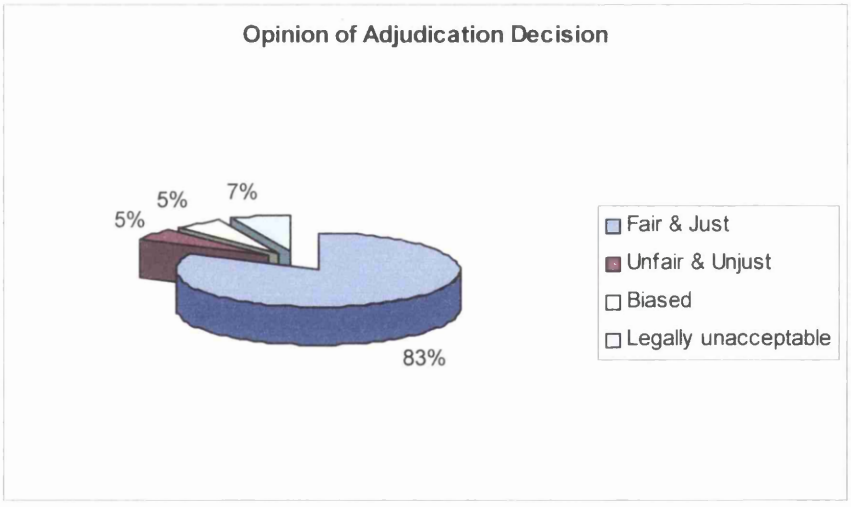
| | adjudicator | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| grounds on which adj decision made | yes | 48 | 1.21 | .410 | .059 |
| | no | 62 | 1.52 | .504 | .064 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| grounds on which adj decision made | Equal variances assumed | 31.020 | .000 | -3.439 | 108 | .001 | -.31 | .089 | -.485 | -.130 |
| | Equal variances not assumed | | | -3.530 | 107.696 | .001 | -.31 | .087 | -.481 | -.135 |

Respondents were also asked to quantify their opinion of the validity of the award. As demonstrated by Figure 68, 83% of respondents viewed the adjudicator's decision as being "fair and just".

**Figure 68**



**Differences in Perception of the Adjudication Decision - The Decision is Fair and Just**

When comparing the opinion of the adjudication decision as expressed by the base employment group[19] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 69, whilst 98% of adjudicators stated that the adjudication decision was "fair and just", 70% of non-adjudicators reported such. Thus, adjudicators are statistically more likely than non-adjudicators, to view the adjudication decision as being "fair and just".

**Figure 69**

**adjudicator * opinion of adj award Crosstabulation**

Count

| | | opinion of adj award | | | | |
|---|---|---|---|---|---|---|
| | | fair and just | unfair and unjust | biased | legally unacceptable | Total |
| adjudicator | yes | 47 | | | 1 | 48 |
| | no | 44 | 6 | 6 | 7 | 63 |
| Total | | 91 | 6 | 6 | 8 | 111 |

[19] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Differences in Perception of the Adjudication Decision - The Decision is Legally Unacceptable**

Such a difference in perception may be accounted for by the attitude of the lawyer respondents. For as can be seen by the crosstabulation contained in Figure 70, whilst 13% of lawyers viewed the adjudication decision as being "legally unacceptable", only 2% on non-lawyers reported such. Thus, lawyers are statistically more likely than non-lawyers, to view the adjudication decision as being "legally unacceptable".

**Figure 70**

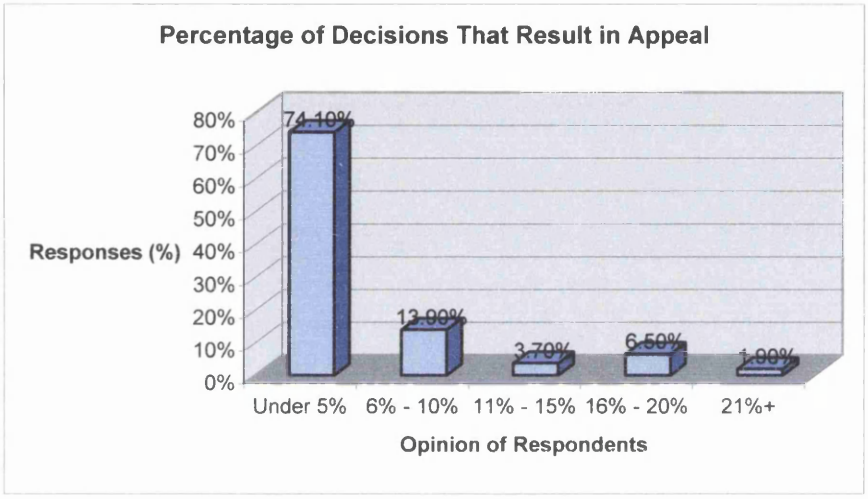
**lawyer * opinion of adj award Crosstabulation**

Count

| | | opinion of adj award | | | | |
|---|---|---|---|---|---|---|
| | | fair and just | unfair and unjust | biased | legally unacceptable | Total |
| lawyer | yes | 40 | 3 | 4 | 7 | 54 |
| | no | 51 | 3 | 2 | 1 | 57 |
| Total | | 91 | 6 | 6 | 8 | 111 |

Having provided information on the way in which the Award was reached and the resulting impression it thereby created, respondents were then asked to estimate the percentage of adjudication decisions that result in appeal. 74.10% of respondents stated that under 5% of adjudicators' decisions result in appeal (Figure 71).

**Figure 71**




## Differences in Perception of the Appeal Rate - Under 5% of Decisions Result in Appeal

When comparing the percentage of awards that result in appeal as reported by the base employment group[20] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 72, whilst 87% of adjudicators stated that under 5% of decisions result in an appeal, 64% of non-adjudicators reported such. Thus, adjudicators are statistically more likely than non-adjudicators, to view the rate of appeal as being under 5%

[20] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 72**

**adjudicator * percentage of awards that result in appeal Crosstabulation**

Count

| | | percentage of awards that result in appeal | | | | | |
|---|---|---|---|---|---|---|---|
| | | under 5% | 6% - 10% | 11% - 15% | 16% - 20% | 21% + | Total |
| adjudicator | yes | 39 | 5 | | 1 | | 45 |
| | no | 39 | 10 | 4 | 6 | 2 | 61 |
| Total | | 78 | 15 | 4 | 7 | 2 | 106 |

## Differences in Perception of the Appeal Rate - Over 11% of Decisions Result in Appeal

Such a difference in opinion may be accounted for by the beliefs of the lawyer respondent. For as demonstrated by the crosstabulation contained in Figure 73, a greater number of lawyer respondents than non-lawyers, reported the rate of appeal as being 11%+. Thus, lawyers are statistically more likely to view the rate of appeal from an adjudication decision as being higher, than non-lawyers.

**Figure 73**

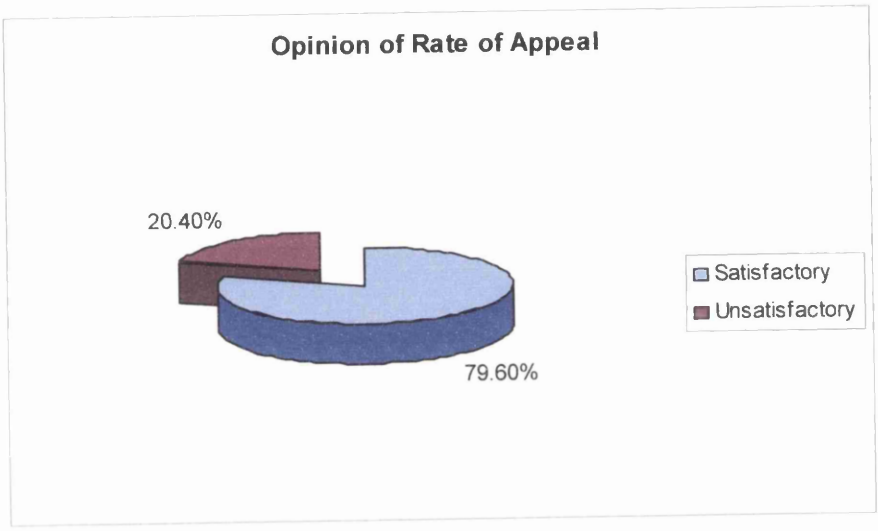
**lawyer * percentage of awards that result in appeal Crosstabulation**

Count

| | | percentage of awards that result in appeal | | | | | |
|---|---|---|---|---|---|---|---|
| | | under 5% | 6% - 10% | 11% - 15% | 16% - 20% | 21% + | Total |
| lawyer | yes | 32 | 9 | 4 | 5 | 2 | 52 |
| | no | 46 | 6 | | 2 | | 54 |
| Total | | 78 | 15 | 4 | 7 | 2 | 106 |

When asked their opinion of the rate of appeal, it can be seen by Figure 74 that 79.60% of respondents viewed such as being satisfactory.

**Figure 74**



When comparing the opinion of the rate of appeal as expressed by the base employment group[21] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 75, whilst 28% of lawyers stated that the rate of appeal was "unsatisfactory", only 13% of non-lawyers reported such.

**Figure 75**

**lawyer * the rate of appeal from adj is Crosstabulation**

Count

| | | the rate of appeal from adj is | | |
|---|---|---|---|---|
| | | satisfactory | unsatisfactory | Total |
| lawyer | yes | 38 | 15 | 53 |
| | no | 46 | 7 | 53 |
| Total | | 84 | 22 | 106 |

Indeed, as can be seen by the Mann Whitney U Test below, such a difference in opinion can be seen to be relevant at the 10% level of probability. Thus, lawyers are statistically more likely than non-lawyers, to view the rate of appeal as being "unsatisfactory" (Figure 76)

[21] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 76**

**Ranks**

| | lawyer | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| the rate of appeal from adj is | yes | 53 | 57.50 | 3047.50 |
| | no | 53 | 49.50 | 2623.50 |
| | Total | 106 | | |

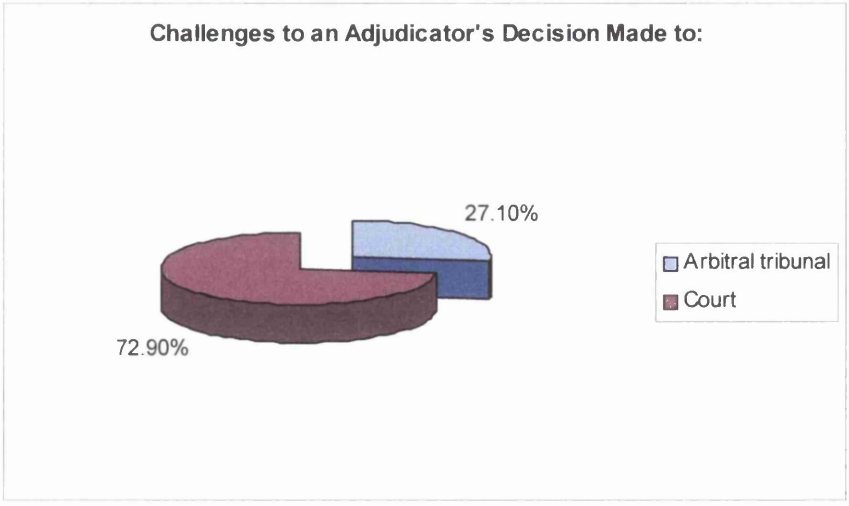
**Test Statistics[a]**

| | the rate of appeal from adj is |
|---|---|
| Mann-Whitney U | 1192.500 |
| Wilcoxon W | 2623.500 |
| Z | -1.907 |
| Asymp. Sig. (2-tailed) | .057 |

a. Grouping Variable: lawyer

Given the availability of arbitration as a means of resolving a dispute, respondents were also asked to provide information on where challenges to an adjudicator's decision were made. As can be seen by Figure 77, 72.90% of respondents stated that challenges to an adjudicator's decision were made to Court.

**Figure 77**



When comparing the location of challenges to adjudication decisions as reported by the base employment group[22] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 78, whilst 93% of adjudicators stated that adjudication decisions were referred to court for a final and binding decision, 58% of non-adjudicators reported such.

**Figure 78**

**adjudicator * appeals from adj are made to Crosstabulation**

Count

| | | appeals from adj are made to | | |
|---|---|---|---|---|
| | | arbitral tribunal | court | Total |
| adjudicator | yes | 3 | 41 | 44 |
| | no | 26 | 36 | 62 |
| Total | | 29 | 77 | 106 |

Indeed, as can be seen from Figure 79, such a difference in experience can be seen to be relevant at the 1% level of probability. Thus, adjudicators are statistically more likely than non-adjudicators, to experience a decision being referred to Court.

[22] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 79**

**Group Statistics**

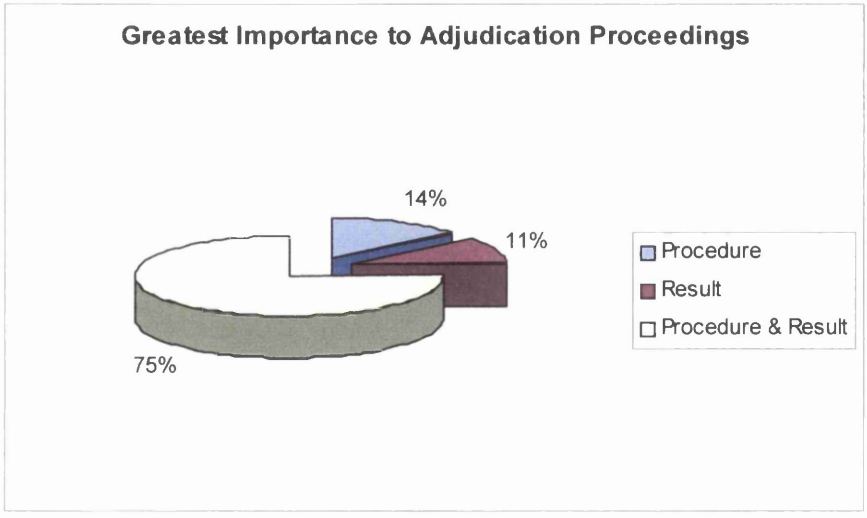
| | adjudicator | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| appeals from adj are made to | yes | 44 | 1.93 | .255 | .038 |
| | no | 62 | 1.58 | .497 | .063 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| appeals from adj are made to | Equal variances assumed | 139.939 | .000 | 4.295 | 104 | .000 | .35 | .082 | .189 | .513 |
| | Equal variances not assumed | | | 4.749 | 95.880 | .000 | .35 | .074 | .204 | .498 |

So as to assess the importance placed upon issues of procedure and the resulting award by the various parties to adjudication, respondents were asked to identify which they believed to be of greatest importance to adjudication proceedings: procedure; result; or procedure and result. It can be seen from Figure 80 that 75% of respondents believed both issues of procedure and the resulting decision to be of importance in adjudication proceedings.

**Figure 80**



**Differences in Perception of What is of Greatest Importance - Procedure and Result is of Greatest Importance**

When comparing the importance of adjudication procedure and result as identified by the base employment group[23] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 81, whilst 83% of lawyers viewed both procedure and result as being of the greatest importance, 68% of non-lawyers reported such. Thus, lawyers are statistically more likely than non-lawyers, to view both issues of procedure and the resulting decision as being of equal importance.

**Figure 81**

**lawyer * greatest importance to adj proceedings is Crosstabulation**

Count

| | | greatest importance to adj proceedings is | | | |
|---|---|---|---|---|---|
| | | procedure | result | procedure & result | Total |
| lawyer | yes | 4 | 5 | 45 | 54 |
| | no | 12 | 6 | 39 | 57 |
| Total | | 16 | 11 | 84 | 111 |

[23] That is comparing the answers of arbitrators against non-arbitrators, comparing the answers of lawyers against non-lawyers and comparing the answers of construction parties against non-construction parties. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Differences in Perception of What is of Greatest Importance - Procedure is of Greatest Importance**

Such a difference in opinion may be explained by the responses of construction professionals employed by a small business. For as exemplified by the crosstabulation contained in Figure 82, whilst 24% of such construction professionals viewed the "procedure" as being of greatest importance, 11% of non-such professionals expressed such an opinion. Thus, construction professionals employed by a small business are statistically more likely than non-such professionals, to view issues of procedure alone as being of greatest importance to the adjudication mechanism.

**Figure 82**

**construction prof - small * greatest importance to adj proceedings is Crosstabulation**

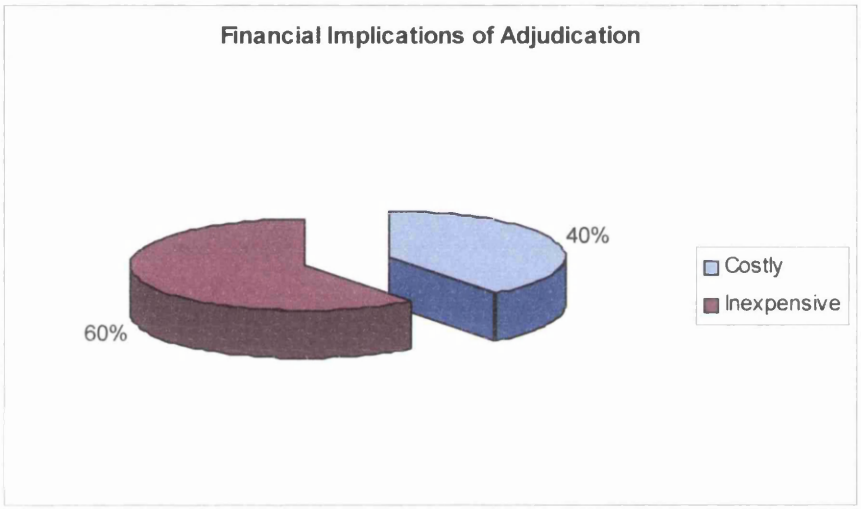
Count

| | | greatest importance to adj proceedings is | | | |
|---|---|---|---|---|---|
| | | procedure | result | procedure & result | Total |
| construction prof - small | yes | 7 | 4 | 18 | 29 |
| | no | 9 | 7 | 66 | 82 |
| Total | | 16 | 11 | 84 | 111 |

## The Financial Implications of Adjudication

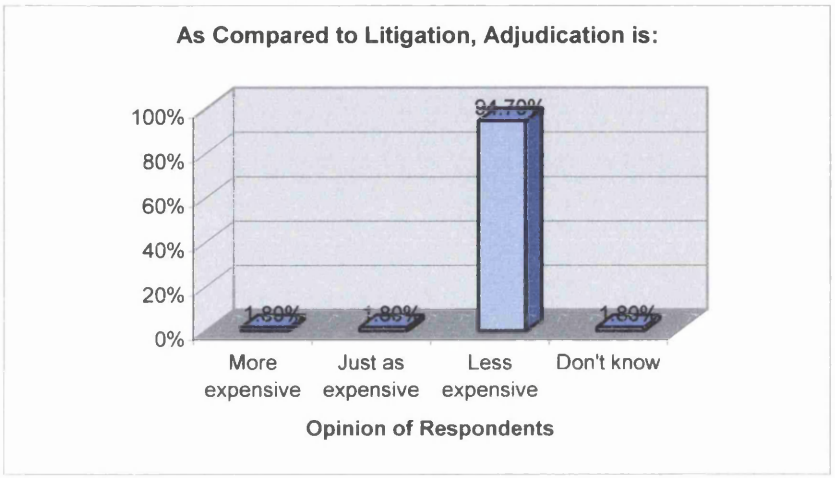
So as to assess the financial impact of adjudication, respondents were asked to quantify the outlay involved in engaging proceedings. As can be seen by Figure 83, 60% of respondents viewed adjudication as being "inexpensive".

**Figure 83**



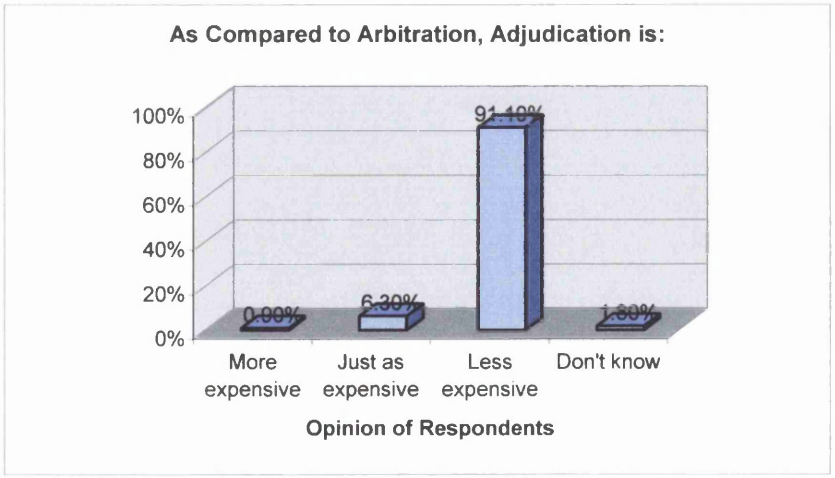
To put the financial implications of adjudication into context, respondents were asked to compare the financial burden of adjudication as compared to litigation. 94.70% of respondents viewed adjudication as being "less expensive" than litigation (Figure 84).

**Figure 84**




Respondents were also asked to quantify the financial impact of adjudication as compared to arbitration. As exemplified by Figure 85, 91.10% of respondents viewed adjudication as being "less expensive" than arbitration.

**Figure 85**

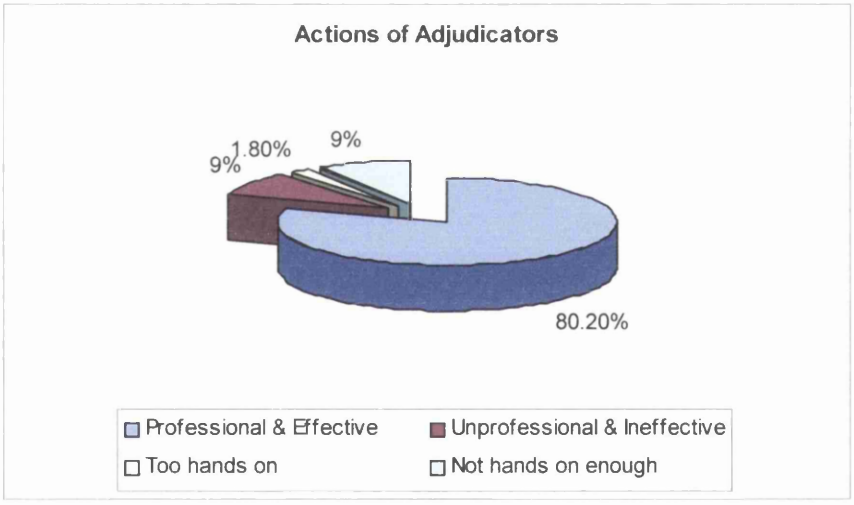


## The Conduct of Adjudication Players

Key to understanding procedural efficiency and fairness, are the actions and attitudes of the various parties to adjudication proceedings. To this end, respondents were asked to comment on the actions and attitudes of adjudicators; representatives; and parties to the dispute.

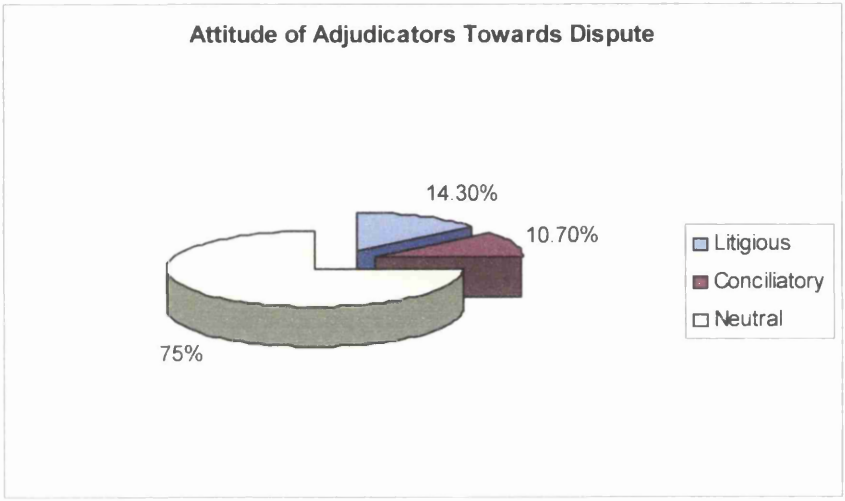
It can be seen from Figure 86 that 80.20% of respondents viewed the actions and conduct of adjudicators as being "professional and effective".

**Figure 86**



75% of respondents described the attitude of the adjudicator towards the dispute as being "neutral" (Figure 87).

**Figure 87**

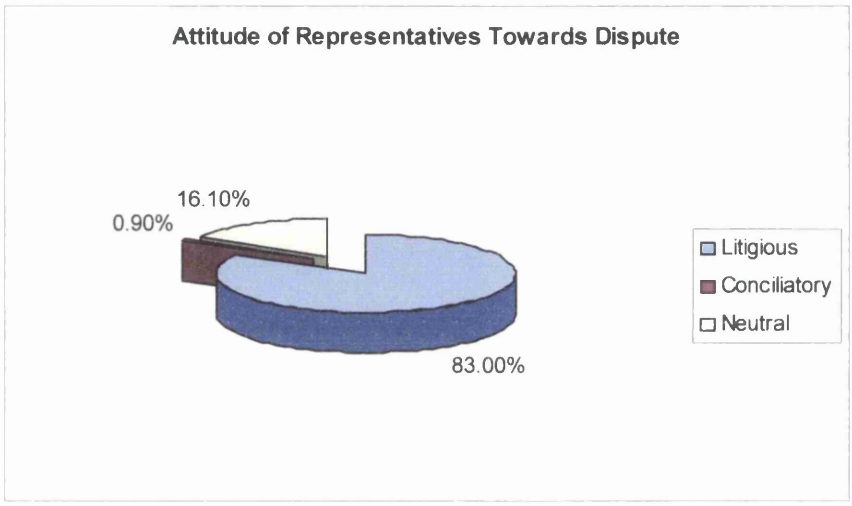



85.30% of respondents viewed the actions of the legal / expert representatives as being "professional and effective" (Figure 88).

**Figure 88**

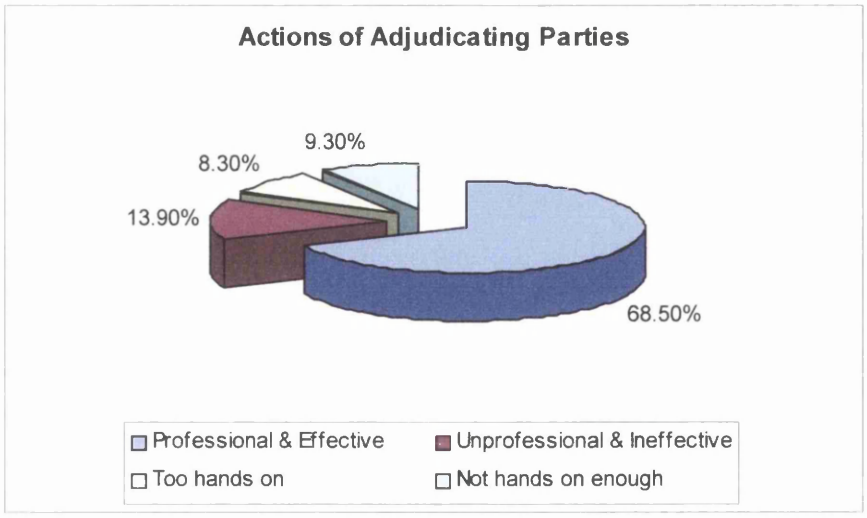
83% of respondents viewed the attitude of the legal / expert representatives towards the dispute as being "litigious" (Figure 89).

**Figure 89**



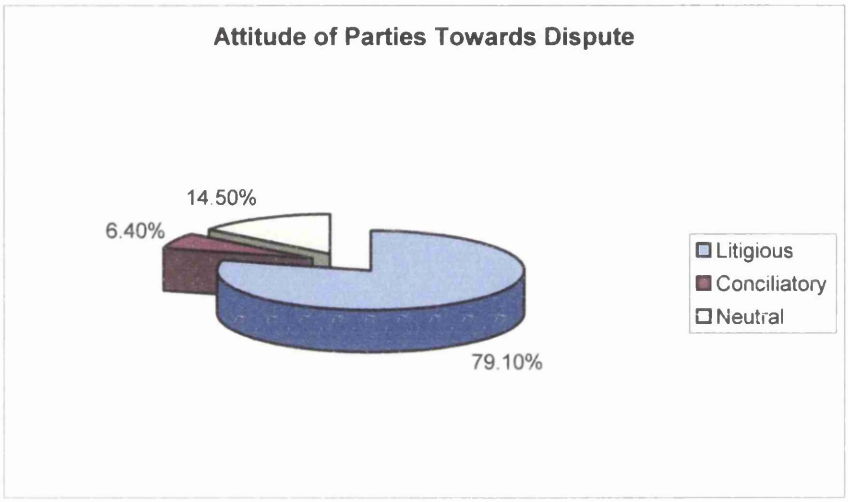

When asked to describe the actions of the adjudicating parties, 68.50% of respondents stated that they believed them to be "professional and effective" with 13.90% describing them as being "unprofessional and ineffective" (Figure 90).

**Figure 90**



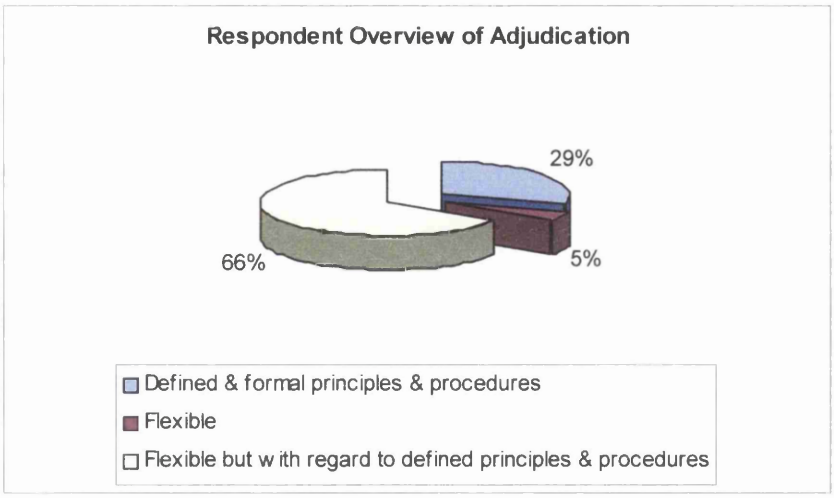
Similar to the attitude attributed to the legal / expert representative, 79.10% of respondents described the attitude of adjudicating parties towards the dispute as being "litigious" (Figure 91).

**Figure 91**




So as to place the actions and attitude of the parties to adjudication into context, respondents were asked to select one of three commonly held views concerning the nature of adjudication. As can be seen from Figure 92 below, 66% of respondents believed adjudication to be a flexible mechanism that had regard to defined principles and procedures, with 29% of respondents believing adjudication to be a mechanism based upon defined and formal principles and procedures.

**Figure 92**




## Discussion – Does the Empirical Evidence Suggest that Adjudication Complies With Woolf's Eight Criteria for Access to Justice?

From the good level of familiarity reported by questionnaire respondents on the Housing Grants Construction and Regeneration Act 1996,[24] one might assume that adjudication in the construction industry is operating within the criteria as established by Woolf for effective access to justice. Indeed, given that the majority of construction disputes proceeding to adjudication are financial in nature,[25] it is essential that adjudication operates to facilitate such. In applying the research findings to each of Woolf's eight criteria in turn, an indication as to the ability of adjudication to facilitate access to justice shall be achieved.

[24] See Figures 4 - 9
[25] See Figure 14

**The First Two Criteria: Procedural Fairness and a Just Result**

Adjudication is often utilised by the lower end of the contractual chain. The typical contractual position of adjudication users was reported to be that of the sub contractor followed by the main contractor[26] and the size of organisations using the process was reported to be small and subsequently medium sized organisations.[27] When questioned as to the adjudication experience of parties to proceedings,[28] it was reported that in the majority of cases, both parties to proceedings are infrequent users of the mechanism.[29] However, a significant number of proceedings were recounted in which a frequent user was engaged in adjudication with an infrequent user.[30] Given the possibility for an inequality in bargaining power and the ramifications that this may bring, it is essential that adjudication facilitate a fair procedure so as to achieve a just result.

As highlighted in Chapter 2,[31] a concern with the adjudication process was that it might be abused by a party to a dispute as a means of gaining tactical advantage. Evidence from the research would suggest that in a significant number of proceedings, this may indeed be the case. As elucidated by Figure 53, when questioned as to the time spent in preparation for proceedings, 58% of respondents stated that only the party commencing proceedings spends "much time" in

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[26] See Figures 15 - 17

[27] See Figure 18. It should be noted that Lawyers were more likely to experience medium-sized parties than other groups, with particular reference to construction professionals employed by a small firm (See Figures 19 – 22). Further, Adjudicators were more likely to experience small-sized organisations using the process than other groups, with particular reference to Lawyers (See Figures 23 – 26).

[28] See Figure 27

[29] Adjudicators were more likely to experience proceedings in which both parties to the dispute were infrequent users of the mechanism than other group, with particular reference to Lawyers (See Figures 30 – 33).

[30] Construction professionals employed by a small firm were less likely to experience such than other groups (See Figures 34 & 35).

[31] See Chapter 2 at p.93

preparation,[32] with only 36% stating that both parties spend "much time" in preparation. As such, in many disputes the commencement of adjudication may be seen as an ambush tactic designed to confer unilateral advantage.

A further concern expressed, was that due to the expeditious timescale associated with adjudication proceedings, rough justice may be dispensed. Given that in the majority of proceedings both parties employed some form of representation, legal or expert, external safeguards are afforded against both an abuse of bargaining position by a party to proceedings and against bias or unfairness on the part of the adjudicator.[33] However, in 23% of disputes, a legally or expertly represented party was engaged in adjudication with a self-representing party.[34] Could it be that in such cases rough justice is indeed dispensed? When questioned as to the perceived fairness or otherwise of the adjudication award, 83% of respondents viewed the majority of adjudication awards as being "fair and just".[35] Thus, from empirical data it would appear that whilst there are causes for concern, in the majority of cases adjudication is compliant with Woolf's requirements for access to justice under this head.

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[32] Defined as being 2 weeks or more pre-commencement of proceedings.
[33] See Figures 36 - 42.
[34] See Figure 36. It should be noted that Adjudicators were more likely to encounter legally or expertly represented parties adjudicating against self-representing parties than other groups (See Figures 43 – 46).
[35] See Figure 68. It should be noted that Adjudicators were more likely to view the award as being "fair and just" than other groups (See Figure 69). Lawyers were more likely to view the award as being "legally unacceptable" than other groups (See Figure 70).

**The Third, Fourth and Eighth Criteria: Reasonable Cost and Speed & Effectiveness**

If procedural fairness and a just result are to be obtained, then proceedings must be executed with reasonable speed and cost. They must also be "effective", meaning adequately resourced and organised.

Turning to consider the financial implications of adjudication, it can be seen from Figure 83 that 60% of respondents viewed adjudication as being "inexpensive". When asked to compare the cost of adjudication as against that of litigation, 94.70% of respondents viewed adjudication as being "less expensive" than litigation.[36] When asked to contrast the cost of adjudication proceedings with that of arbitration, 91.10% of respondents stated that it was "less expensive" than arbitration.[37] As such, adjudication can be seen to satisfy Woolf's requirements for a procedure to be conducted with reasonable cost.

In so far as the time element of adjudication is concerned, empirical data would seem to suggest that adjudication is an efficient mechanism in certain spheres, giving to protracted proceedings in other areas. Firstly, when questioned as to the appointment procedure of the adjudicator, 88% of respondents reported that the nominating body that had been named in the contract, appointed the adjudicator.[38] Thus, in the majority of proceedings, the appointment of an adjudicator by an impartial third party should mean that disagreement as to the identity of the adjudicator should not delay the onset of dispute resolution. Further, when questioned as to the timescale within

[36] See Figure 84.
[37] See Figure 85.
[38] See Figure 54.

which the adjudicator was appointed once the notice of intention to proceed to adjudication had been given, it was reported that in 92% of cases the adjudicator was appointed in under 8 days.[39] Indeed, in 35.40% of disputes, the adjudicator was appointed within 2 – 3 days of the notice of intention to refer the dispute being issued and in 33.60% of disputes, this timescale was reported to be 4 – 5 days.

Further, when asked to define the period of time from the commencement of adjudication proceedings, until the consideration of the decision by the adjudicator, 53.10% of respondents stated that in their experience, it took 22 – 28 days after commencement of proceedings for the adjudicator to be in the position to consider the decision.[40] In 29.20% of cases, this timescale was reported to have been in excess of 29 days. Adducement of complex evidence, simple and effective procedures and full compliance by the parties to the dispute were seen to be factors accounting for such a timescale,[41] which was deemed by 56.60% of respondents to be "swift" and by 38.10% to be "moderate".[42] Interestingly, the construction professional employed by a small organization was statistically more likely to view this timescale as being "moderate" or "lengthy" than other groups.[43] Thus, the perception of adjudication users as to the expediency of the mechanism, did not directly accord with that held by party representatives or adjudicators.

Diversity in the responses appertaining to the time taken by the adjudicator to reach their decision can also be seen. Indeed, whilst 49.10% of respondents reported the

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[39] See Figure 57. It should be noted that s108(2) requires the appointment of an adjudicator and the referral of the dispute to him within 7 days of the issuing of notice of an intention to proceed to adjudication.
[40] See Figure 58
[41] See Figure 59
[42] See Figure 60
[43] See Figures 61 and 62

average time taken by the adjudicator to reach a decision as being 22 – 28 days, 25% of respondents recorded a timescale of 2 - 7 days and 18.80% reported a period of 29+ days.[44] However, despite such diversity, 61.30% of respondents described this timescale as being "swift", with 35.10% categorizing it as being "moderate".[45]

Thus, in terms of satisfying this head, empirical data would seem to suggest that adjudication is successful in providing a cost effective mechanism of dispute resolution. With regard to the ability of the mechanism to resolve a dispute with reasonable speed, analysis indicates that whilst some disputes suffer from protracted proceedings, the majority of adjudication proceedings are conducted expediently and largely to the satisfaction of those engaged in the process. As such, adjudication can be seen to effective, that is, adequately resourced and organized.

**The Fifth and Sixth Criteria: Understandable and Responsive**

If adjudication is to facilitate access to justice, then adjudication procedure must be understandable to those parties engaging in such, and further it must be responsive to their needs.

It has already been established[46] that a key requisite to the success of adjudication under this head, has been to facilitate party autonomy with regard to the method by which their dispute is to be resolved. To this end, respondents were asked to recount the origins of adjudication procedure. As demonstrated by Figure 47, 53% of respondents stated that the adjudication procedures followed were those contained in

[44] See Figure 63
[45] See Figure 64.
[46] See Chapter 2 at p.98.

the Scheme for Construction Contracts.[47] 24% identified the construction contract as being the source of adjudication procedure, with 21% identifying a standard form contract. Only 2% of respondents stated that the adjudication procedures followed were determined by "other". Given the bias towards contractually provided procedures, it is suggested that adjudicating parties are exercising their ability to chose the source of procedure for the resolution of their dispute. As such, the procedures selected by the parties must be deemed to be understandable and responsive to their perceived future need.

However, when asked to identify the driving force behind matters of procedure, it was the adjudicator and subsequently the legal representatives who were identified as such.[48] Whether such a fact is indicative of an abuse of party autonomy to determine matters of procedure, is an issue of construction. If party autonomy is to be defined as meaning that adjudicating parties must determine each procedural issue, then adjudication cannot be compliant with such. Given the impracticality of such a definition in terms of expedition and clarity, however, it is suggested that party autonomy should be defined to mean that the parties to a dispute determine the broad procedural base, the finessing of which should be the responsibility of the adjudicator. Indeed, the Construction Act itself provides that the contract shall enable the adjudicator to take the initiative in ascertaining the facts and the law.[49] As such, the finding that adjudicators are the driving force behind matters of procedure cannot be seen to compromise the requirement for party autonomy and an understandable and

[47] Respondents from the base employment group "lawyer" were statistically more likely to select this category. See Figure 48.
[48] See Figure 49.
[49] See s108(2)(f) Housing Grants Construction and Regeneration Act 1996. It is interesting to note that unlike the Arbitraton Act 1996, this power is not qualified by the right of the parties to agree any matter.

responsive procedure. The finding that legal representatives play a part in determining procedural issues is however, a complicating factor in terms of the juridification debate and shall be considered later.

The description of adjudication procedure as "adversarial" and "legalistic and formalistic" also complicates matters in so far as the ability of adjudication to meet the requirements for access to justice under this head.[50] For if procedures are formalised and regimented, then by definition they cannot be responsive. Only 25% of respondents described adjudication as being "inquisitive" and as demonstrated by Figure 51, the base employment group of adjudicator was statistically more likely to return such an answer than other groups. However, the fact that the majority of adjudicators were reportedly of a construction, as opposed to a legal background, may provide respite from such a prospect.[51] As whilst an adjudicator of a construction background may conduct proceedings on a formal basis, they are less likely to be prejudiced by court procedure and tradition than an adjudicator who has undergone extensive legal training and who concurrently operates within the court structure. In short, the commercial background of the adjudicator may temper the formulism with which proceedings are conducted. It should be noted, however, that whilst in possession of the ability to determine the dispute according to legal principle or other considerations, adjudicators are not taking advantage of such. For 61.60% of respondents stated that the adjudication Decision was reached according to legal principle[52] and as demonstrated by Figures 66 and 67, adjudicators themselves were

[50] See Figure 50. It should be noted that lawyers were more likely to view the procedure as being "adversarial" than other groups. See Figure 52.
[51] See Figure 55. It is interesting to note that adjudicators were statistically more likely to describe adjudicators as being of a construction background than other groups. See Figure 56.
[52] See Figure 65.

statistically more likely to return such a response than other groups. Does this serve to undermine the prospect that adjudication is free from litigious influence?

In terms of the ability of adjudication to satisfy this head, judgement must be withheld until the impact of juridification has been considered.

**The Seventh Criteria: Certainty**

As already exemplified,[53] if a mechanism of dispute resolution is to satisfy the requirement for certainty, then it must be able to facilitate the final resolution of a dispute. Evidence of a binding resolution to a dispute can be found where the rate of appeal is minimal. At first sight it would appear from Figure 71 that adjudication has satisfied this head. For when questioned, 74.10% of respondents stated that under 5% of Decisions are referred. However, when analysed according to base employment group, it was discovered that whilst adjudicators were more likely to report that under 5% of Decisions are referred,[54] lawyers were statistically more likely to perceive the referral rate as being higher.[55] Indeed, lawyers were more likely to perceive in excess of 11% of Decisions being referred to arbitration or court. Thus, when examining the ability of adjudication to achieve a final and binding resolution to a dispute, account must be taken of the employment status of respondents. In short, from analysing the responses by base employment group, it would appear that where a lawyer is engaged in the adjudication process, the referral of an adjudicators Decision is more likely and as such, adjudication is less likely to achieve a final resolution to the dispute.

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[53] See Chapter 2 at p.99.
[54] See Figure 72.
[55] See Figure 73.

Furthermore, as stated in Chapter 2,[56] a concern with adjudication was that it could potentially exacerbate the time and expense associated with dispute resolution. For under the Construction Act, the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. Of course the parties may agree to accept the decision of the adjudicator as finally determining the dispute.[57] When questioned as to the destination of a disputed decision, 72.90% of respondents stated that an adjudicator's decision was referred to Court.[58] However, 27.10% of respondents stated that a dispute was referred to arbitration for final resolution. From the analysis of arbitration in the previous Chapter it has been seen that arbitration is not always final and binding. Thus, the spectre of a single dispute being referred to three separate forums for resolution is a reality in some instances. Such a prospect must be tempered however, by the fact that when questioned as to their opinion on the rate of referral of an adjudicators decision, 79.60% stated that it was "satisfactory".[59] Whilst 20.40% of respondents returned a view that it was "unsatisfactory", it can be seen from Figures 75 and 76 that the base employment group of lawyer was statistically more likely to return such a view than other groups. Thus, there would appear to be a divergence between the views of the users of the adjudication process and the opinions of their legal representatives.

Notwithstanding such, from a holistic perspective adjudication can be seen to satisfy the need to provide a final and binding resolution to a dispute in the majority of cases. Further, due to the overall rate of satisfaction amongst parties with regard to the rate

[56] See Chapter 2 at p.100
[57] S108(3).
[58] See Figure 77. It should be noted that adjudicators were more likely to report their decisions as being referred to Court than other groups. See Figures 78 and 79.
[59] See Figure 74

of referral, it would appear that only the most deserving of cases are referred to the courts or an arbitral tribunal. As such, adjudication may also be seen to satisfy the public justice aspect of certainty. Where needed, justice is done and is manifestly seen to be done.[60]

**The Barrier to Access to Justice: Juridification**

The influence of the legal profession over adjudication has already been demonstrated.[61] Further, in describing adjudication as being "adversarial" and "legalistic and formalistic", the influence of the court system over the procedure has also been seen.[62] Analysis of the empirical data uncovers further evidence of juridifcation. Firstly, although the actions of adjudicators, legal representatives and parties to the dispute were considered to be "professional and effective",[63] when questioned as to their attitude towards the dispute, the adjudicator was described as being "neutral",[64] whereas the legal representatives and adjudicating parties were largely described as being "litigious".[65] Such a finding would seem to give credit to the notion that the spirit of adjudication is being corrupted so as to ape the worst features of litigation.

Further, some evidence to support Tyler's[66] polarisation theory was uncovered. When questioned as to the factor of greatest importance to adjudication proceedings, 75% of

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[60] As required by Lord Hewart in *R v Sussex Justice ex p McCarthy* [1924] 1 KB 256 at p.259
[61] For example, see Figure 49
[62] See Figure 50
[63] See Figures 86, 88 and 90
[64] See Figure 87
[65] See Figures 89 and 91
[66] See Chapter 2 at p.82

respondents stated that both procedure and result were of significance.[67] However, when analysed according to base employment group, it was discovered that whilst the legal practitioner was statistically more likely to view both issues of procedure and the result as being of importance,[68] the construction professional employed by a small business was more likely to view the procedure alone as being of greatest significance.[69] This would seem to suggest a polarisation of views that may lead the various parties to adopt differing goals and attitudes. However, given the fact that the majority of respondents viewed both elements to be of significance, as opposed to a singular element, any polarisation is not likely to cause significant effect in terms of the juridification of adjudication. Moreover, when asked to describe adjudication, 66% reported that it was a flexible procedure that had regard to defined principles and procedures.[70] The recognition that adjudication should not operate as a formal procedure, provides some respite from the mounting evidence of juridification and the damaging effect this may have on the adjudication mechanism. In short, whilst judgitis is creeping into the adjudication system, it has yet to change its character beyond recognition.

[67] See Figure 80
[68] See Figure 81
[69] See Figure 82
[70] See Figure 92

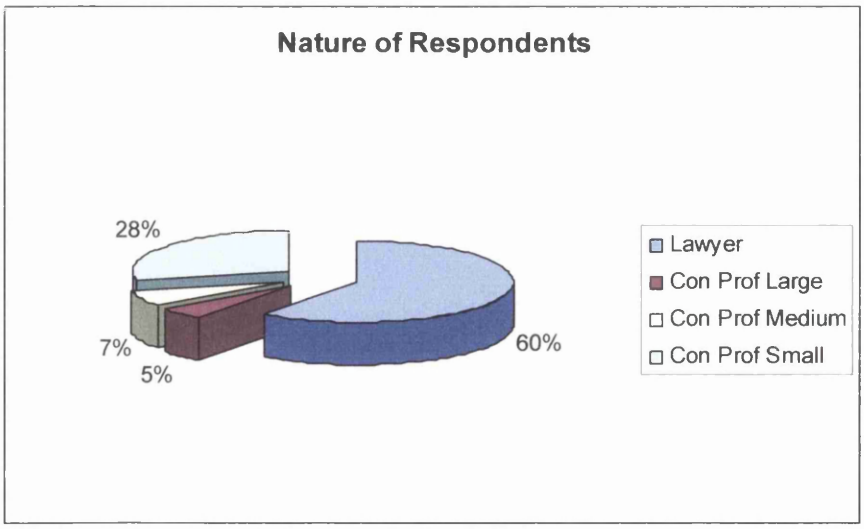
# CHAPTER SIX: EMPIRICAL RESEARCH - LITIGATION

The results of the empirical research into arbitration and adjudication were highlighted in Chapters Four and Five respectively. Below is set out the results of the litigation empirical research, followed by an analysis as to whether the data indicates that litigation is fulfilling Woolf's criteria for access to justice.

## The Nature of Respondents

The identity of questionnaire respondents can be seen in Figure 1. Indeed, 60% of respondents stated that their occupation was that of lawyer, 28% stated that they were construction professionals working for a small business, with 7% representing themselves as construction professionals employed by a medium sized business and 5% as construction professionals employed by a large business.

**Figure 1**

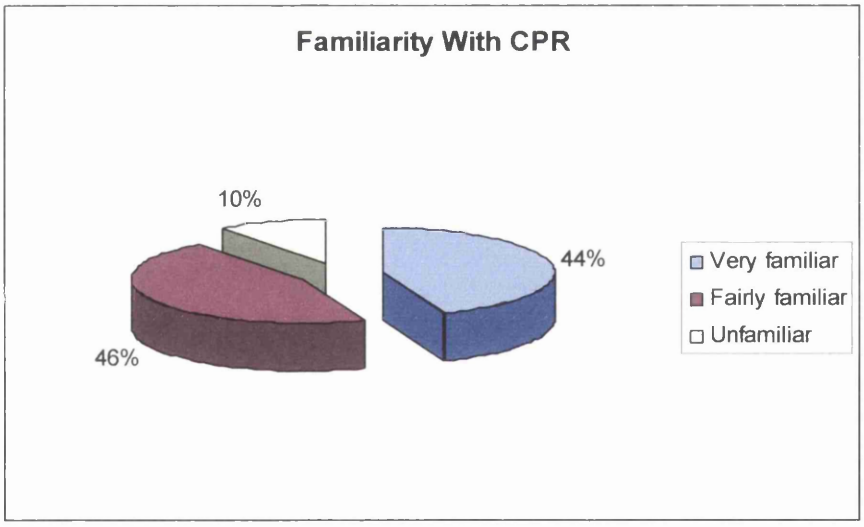


However, it should be noted that one respondent fell into more than one employment category, reporting that they were both a lawyer and a construction professional employed by a small firm.

## Respondents Experience of Litigation

So as to assess familiarity with litigation proceedings, respondents were asked to quantify their familiarity with the Civil Procedure Rules. As can be seen from Figure 2, 46% of questionnaire respondents stated that they were fairly familiar with the provisions of the Civil Procedure Rules 1998.

**Figure 2**



When comparing the familiarity levels of base employment group[1] questionnaire respondents, an interesting result can be found. As exemplified by the crosstabulation contained in Figure 3, whereas 67% of lawyers stated that they were "very familiar" with the provisions of the CPR, only 9% of non-lawyers (construction professionals) professed such a level of familiarity.

**Figure 3**

**lawyer * familiarity with CPR Crosstabulation**

Count

| | | familiarity with CPR | | | |
|---|---|---|---|---|---|
| | | very familiar | fairly familiar | unfamiliar | Total |
| lawyer | yes | 24 | 12 | | 36 |
| | no | 2 | 15 | 6 | 23 |
| Total | | 26 | 27 | 6 | 59 |

Indeed, as demonstrated by the Mann-Whitney U Test contained in Figure 4, such a difference in the level of familiarity can be seen to be relevant at the 0% level of probability. Thus, lawyers are statistically more likely to be "very familiar" with the provisions of the Civil Procedure Rules, than non-lawyers.

[1] That is comparing the answers of lawyers against non-lawyers. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 4**

**Ranks**

| | lawyer | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| familiarity with CPR | yes | 36 | 22.33 | 804.00 |
| | no | 23 | 42.00 | 966.00 |
| | Total | 59 | | |

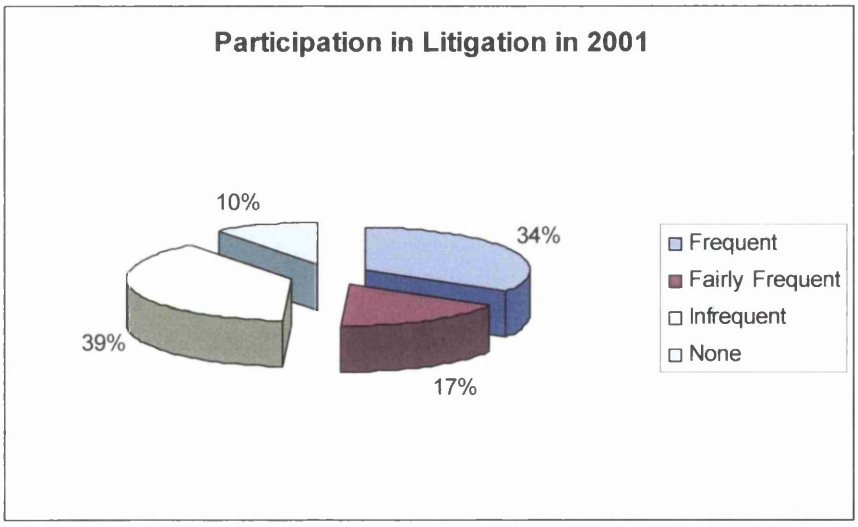
**Test Statistics[a]**

| | familiarity with CPR |
|---|---|
| Mann-Whitney U | 138.000 |
| Wilcoxon W | 804.000 |
| Z | -4.743 |
| Asymp. Sig. (2-tailed) | .000 |

a. Grouping Variable: lawyer

In addition to their familiarity with the provisions of the Civil Procedure Rules, respondents were also asked to describe their level of participation in litigation proceedings for the year 2001. As exemplified by Figure 5, 39% of respondents described their level of participation in litigation proceedings for 2001 as being "infrequent", with 34% describing it as "frequent".

**Figure 5**



When comparing the participation levels of base employment group[2] questionnaire respondents, an interesting result can be found. Indeed, as exemplified in the crosstabulation contained in Figure 6, whereas 61% of lawyers described their involvement as being "frequent" or "fairly frequent" for the period 2001, only 34.4% of non-lawyers proclaimed such.

**Figure 6**

**lawyer * participation in lit 2001 Crosstabulation**

Count

| | | participation in lit 2001 | | | | |
|---|---|---|---|---|---|---|
| | | frequent | fairly frequent | infrequent | none | Total |
| lawyer | yes | 13 | 9 | 14 | | 36 |
| | no | 7 | 1 | 9 | 6 | 23 |
| Total | | 20 | 10 | 23 | 6 | 59 |

As demonstrated by the Mann-Whitney U Test contained in Figure 7, such a difference in the level of participation can be seen to be relevant at the 5% level of probability. Thus, lawyers are statistically more likely to have been engaged "frequently" or "fairly frequently" in litigation proceedings in the year 2001, than non-lawyers.

[2] That is comparing the answers of lawyers against non-lawyers. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 7**

**Ranks**

| | lawyer | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| participation in lit 2001 | yes | 36 | 26.50 | 954.00 |
| | no | 23 | 35.48 | 816.00 |
| | Total | 59 | | |

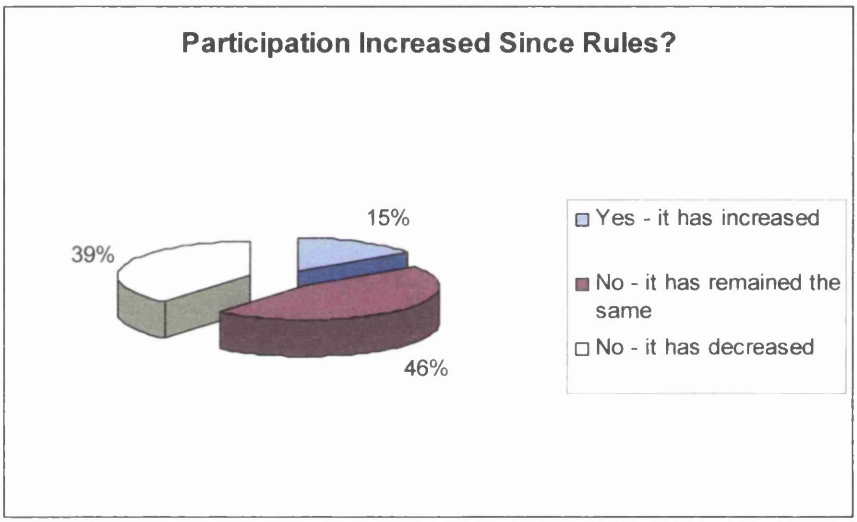
**Test Statistics[a]**

| | participation in lit 2001 |
|---|---|
| Mann-Whitney U | 288.000 |
| Wilcoxon W | 954.000 |
| Z | -2.069 |
| Asymp. Sig. (2-tailed) | .039 |

a. Grouping Variable: lawyer

So as to ascertain the impact of the Civil Procedure Rules 1998 upon the level of litigation proceedings employed by the industry, respondents were then asked whether they had experienced an increase in litigation since the introduction of the Rules. As can be seen by Figure 8, 46% stated that their level of involvement in litigation had remained the same since the introduction of the Rules, with 39% reporting a decrease and 15% an increase in their level of involvement.

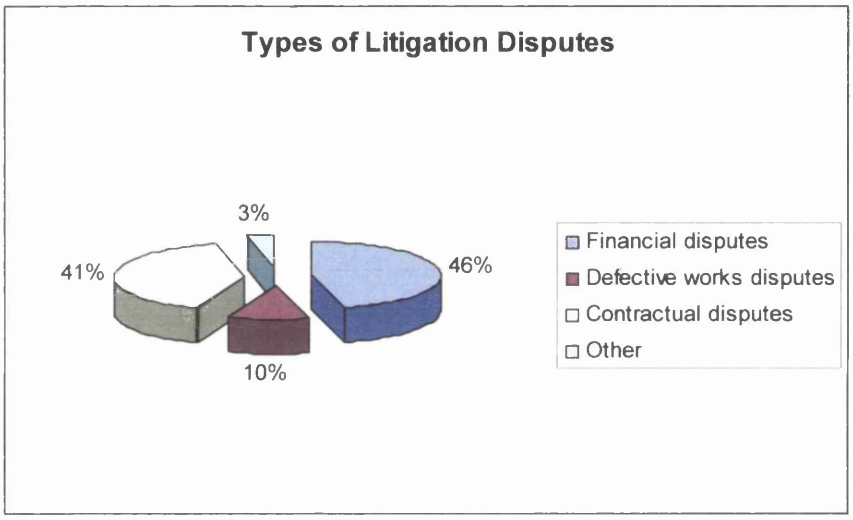
**Figure 8**



## The Nature of Disputes & Disputants

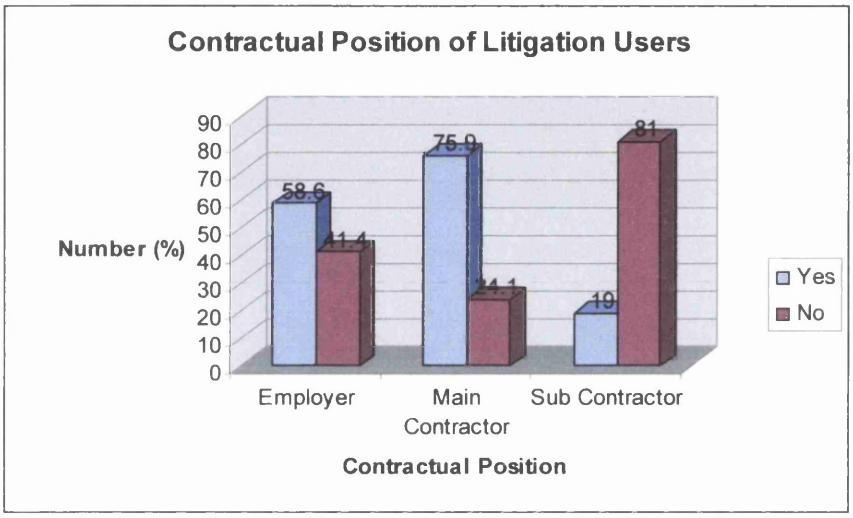
So as to ascertain information as to the type of disputes that proceed to litigation, respondents were asked to quantify the subject matter of their litigation proceedings. As exemplified by Figure 9 below, 46% of litigation proceedings concerned financial disputes, with 41% accounting for contractual disputes.

**Figure 9**



The contractual position of litigation users was also of interest. Thus, respondents were asked whether the contractual position of litigation users was that of employer, main contractor, and / or sub-contractor.[3] As can be seen in Figure 10, 75.9% of respondents stated that litigation users were main contractors, with 58.6% stating that litigation users were employers and only 19% identifying them as being sub-contractors.

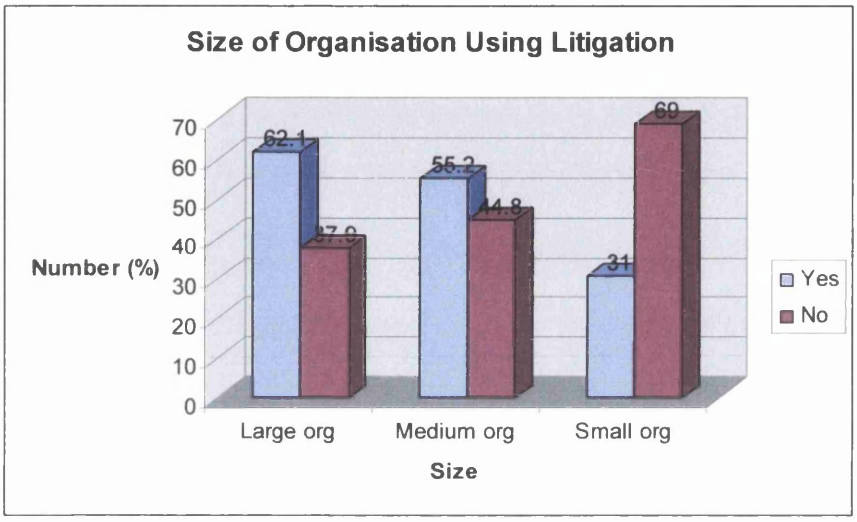
**Figure 10**




[3] More than one answer could be selected - respondents could select one category only, or select two or all three if they so wished. Thus, percentages have been worked on the basis that each contractual position be treated as an independent variable.

Similarly, respondents were asked to describe the size of organizations that in their experience use litigation as a means of resolving disputes.[4] It can be seen in Figure 11 that 62.1% of respondents reported large organizations as utilizing litigation, with 55.2% identifying medium-sized organizations as using the process and only 31% identifying small organizations as being users of litigation.

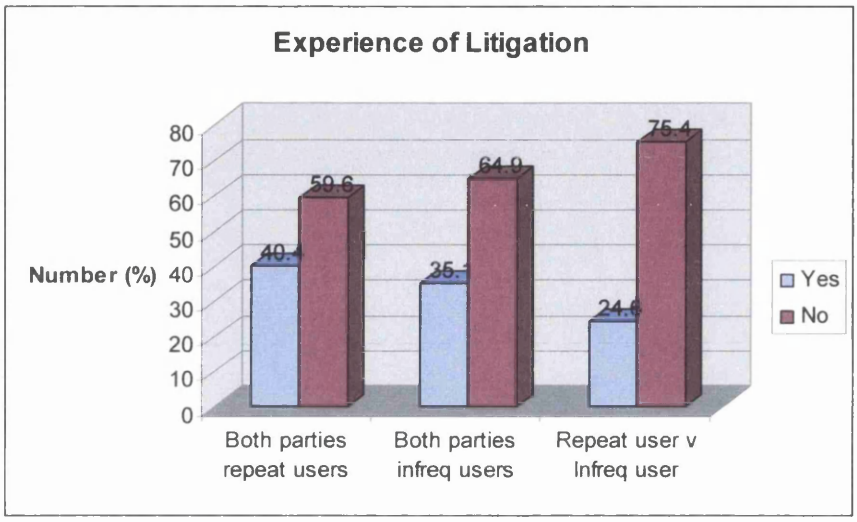
**Figure 11**




[4] More than one answer could be selected - respondents could select one category only, or select two or all three if they so wished. Thus, percentages have been worked on the basis that each organisational size be treated as an independent variable

The level of procedural experience of each litigating party was also of interest.[5] As elucidated by Figure 12, 40.4% of respondents stated that both litigating parties were repeat users of the process, with 35.1% stating that both parties were infrequent users of the procedure and 24.6% identifying a repeat user litigating against an infrequent user of the mechanism.

**Figure 12**




[5] Once more respondents were free to select more than one answer. Thus, percentages have been worked on the basis that each combination of arbitral experience be treated as an independent variable

When comparing the procedural experience of litigation users as described by the base employment group[6] questionnaire respondents, an interesting result can be found. Indeed, as exemplified in the crosstabulation contained in Figure 13, whereas 50% of lawyers had reportedly been engaged in proceedings where both litigating parties were "repeat users" of the process, only 24% of non-lawyers proclaimed such

**Figure 13**

**lawyer * both lit parties repeat users Crosstabulation**

Count

| | | both lit parties repeat users | | |
|---|---|---|---|---|
| | | yes | no | Total |
| lawyer | yes | 18 | 18 | 36 |
| | no | 5 | 16 | 21 |
| Total | | 23 | 34 | 57 |

As demonstrated by the T-Test[7] contained in Figure 14, this difference in perception can be seen to be relevant at the 5% level of probability. Thus, lawyers are statistically more likely to encounter litigating parties who are both repeat users of the process, than non-lawyers.

[6] That is comparing the answers of lawyers against non-lawyers. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

[7] The Independent-Samples T Test procedure compares means for two groups of cases.

**Figure 14**

**Group Statistics**

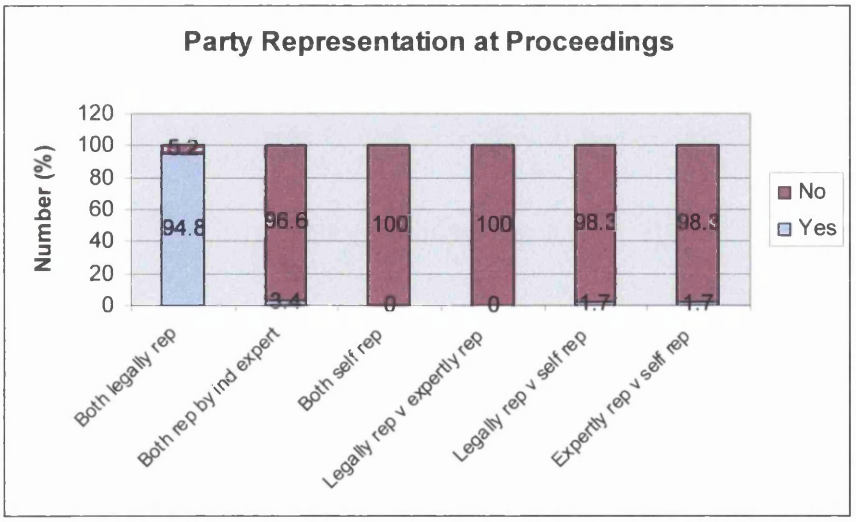
| | lawyer | N | Mean | Std. Deviation | Std. Error Mean |
|---|---|---|---|---|---|
| both lit parties repeat users | yes | 36 | 1.50 | .507 | .085 |
| | no | 21 | 1.76 | .436 | .095 |

**Independent Samples Test**

| | | Levene's Test for Equality of Variances | | t-test for Equality of Means | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 95% Confidence Interval of the Difference | |
| | | F | Sig. | t | df | Sig. (2-tailed) | Mean Difference | Std. Error Difference | Lower | Upper |
| both lit parties repeat users | Equal variances assumed | 13.135 | .001 | -1.976 | 55 | .053 | -.26 | .133 | -.527 | .004 |
| | Equal variances not assumed | | | -2.057 | 47.183 | .045 | -.26 | .127 | -.518 | -.006 |

When asked to recount the representation status of parties to litigation, 94.8% of respondents stated that in their experience, both parties were legally represented (Figure 15).

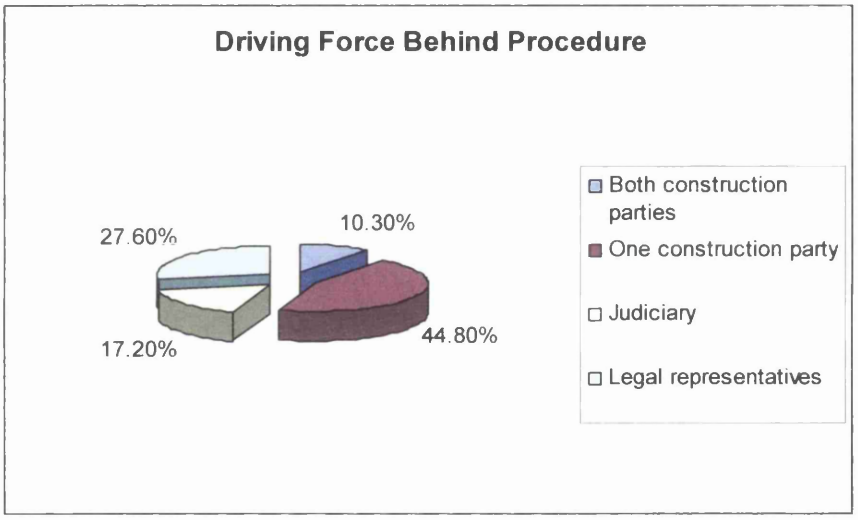
**Figure 15**



## The Nature of Proceedings

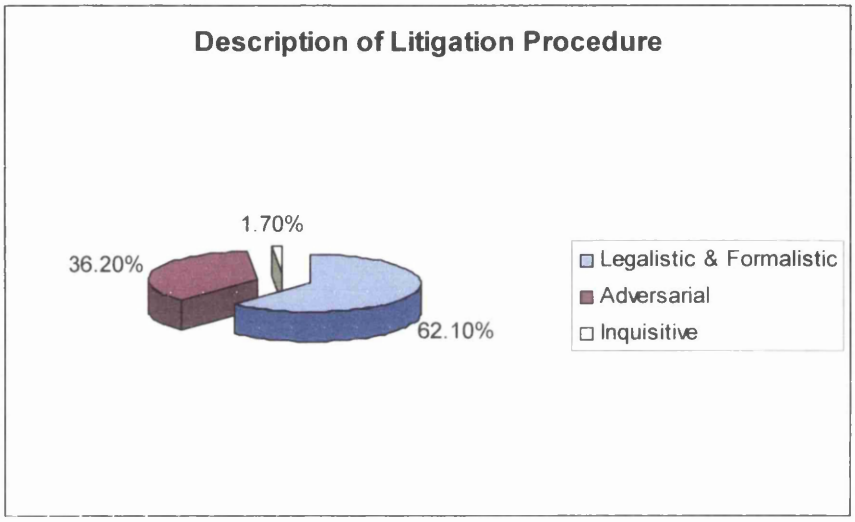
As demonstrated by Figure 16, when asked to identify the driving force behind litigation procedure, 44.8% of respondents stated that one construction party could be seen to be such, with 27.6% identifying the legal representatives, 17.2% identifying the Judiciary and 10.3% stating that both construction parties were the driving force behind matters of procedure.

**Figure 16**



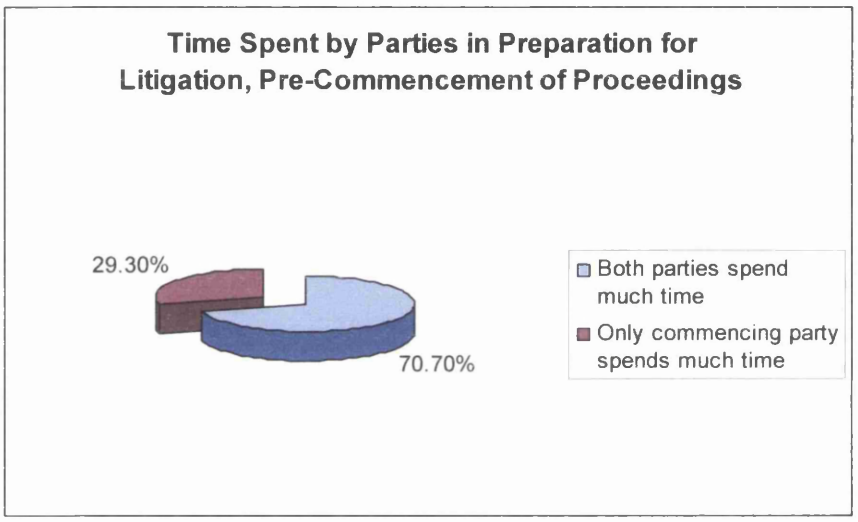
Respondents were also asked to describe litigation proceedings. As demonstrated by Figure 17, 62.1% of respondents stated that they believed litigation proceedings to be "legalistic and formalistic", with 36.2% of respondents describing the procedure as being "adversarial".

**Figure 17**



So as to gain information on the way in which proceedings were initiated, respondents were asked to categorize the time spent by parties in preparation for litigation pre-commencement of proceedings. As elucidated by Figure 18, 70.7% of respondents stated that both parties spent "much time"[8] in preparation for proceedings, with 29.3% of respondents claiming that only the party intending to commence litigation proceedings spent "much time" in preparation.

**Figure 18**

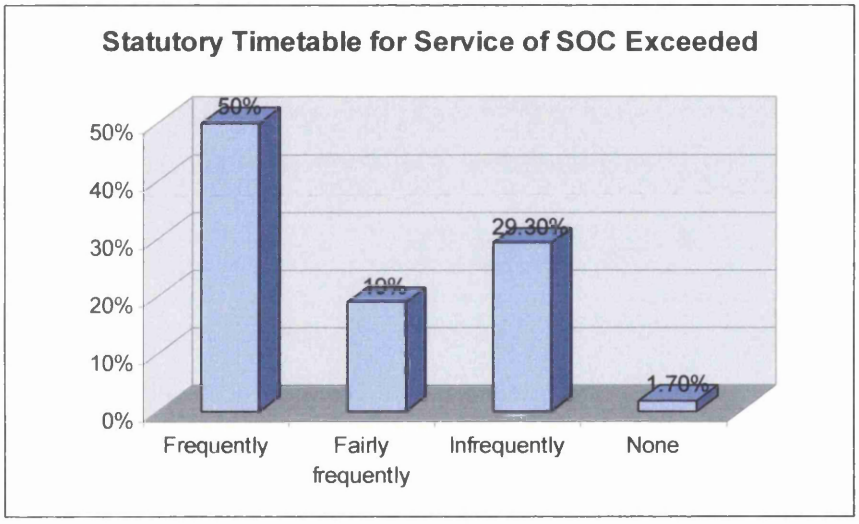



[8] Defined as being 2 weeks or more pre-commencement of proceedings.

## Case Management

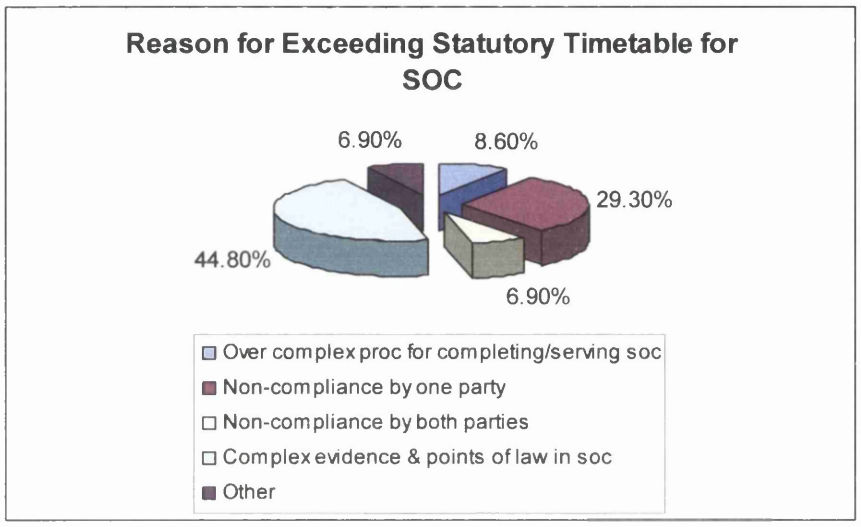
To determine the effectiveness of case management by the Judiciary, respondents were asked how often the statutory timetable for the service of statement of case was exceeded. It can be seen from Figure 19 below, that 50% of respondents reported that the timetable for such was "frequently" exceeded, with 29.3% reporting that it was "infrequently" exceeded.

**Figure 19**



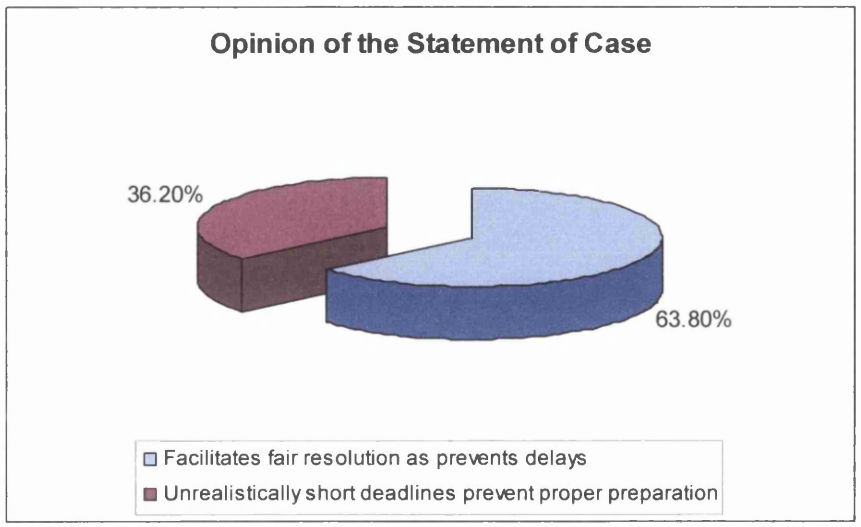
When asked to provide reasoning for such, 44.8% of respondents reported that it was due to the complex evidence and points of law contained in the Statement of Case (Figure 20).

**Figure 20**



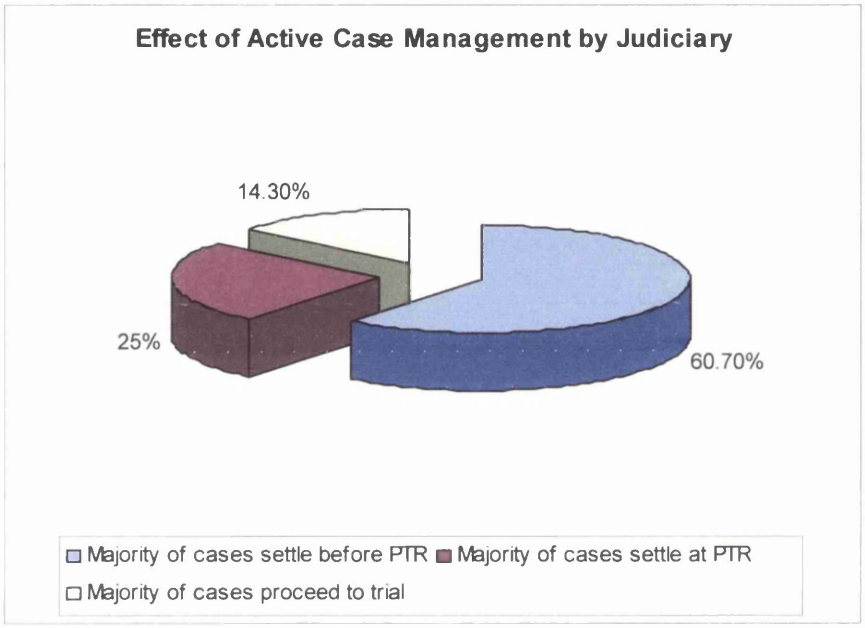

Respondents were also asked their opinion of the operation of the statement of case. It can be seen from Figure 21 below that 63.8% of respondents viewed such as being a mechanism that facilitates a fair resolution to a dispute as it prevents undue delays.

**Figure 21**



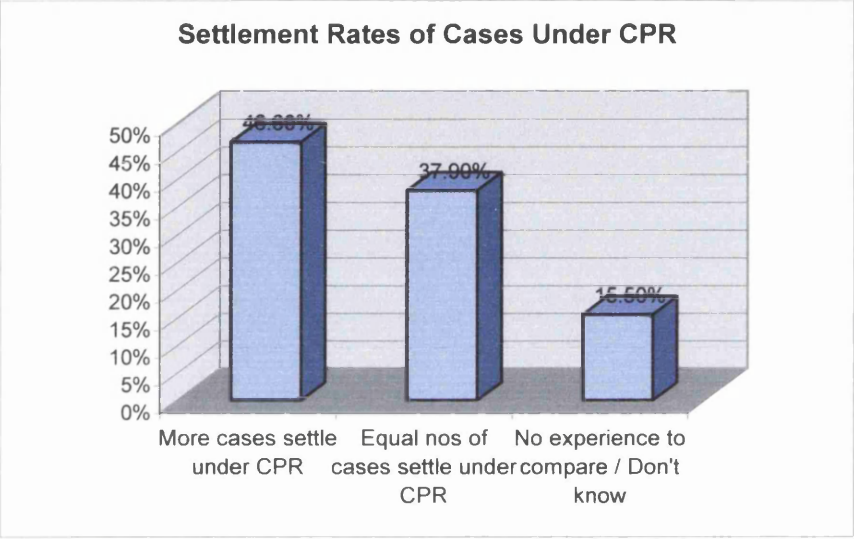
As to the effect of active case management of the judiciary upon the settlement of disputes, 60.7% believed that such management resulted in the majority of cases settling before Pre Trial Review (Figure 22).

**Figure 22**



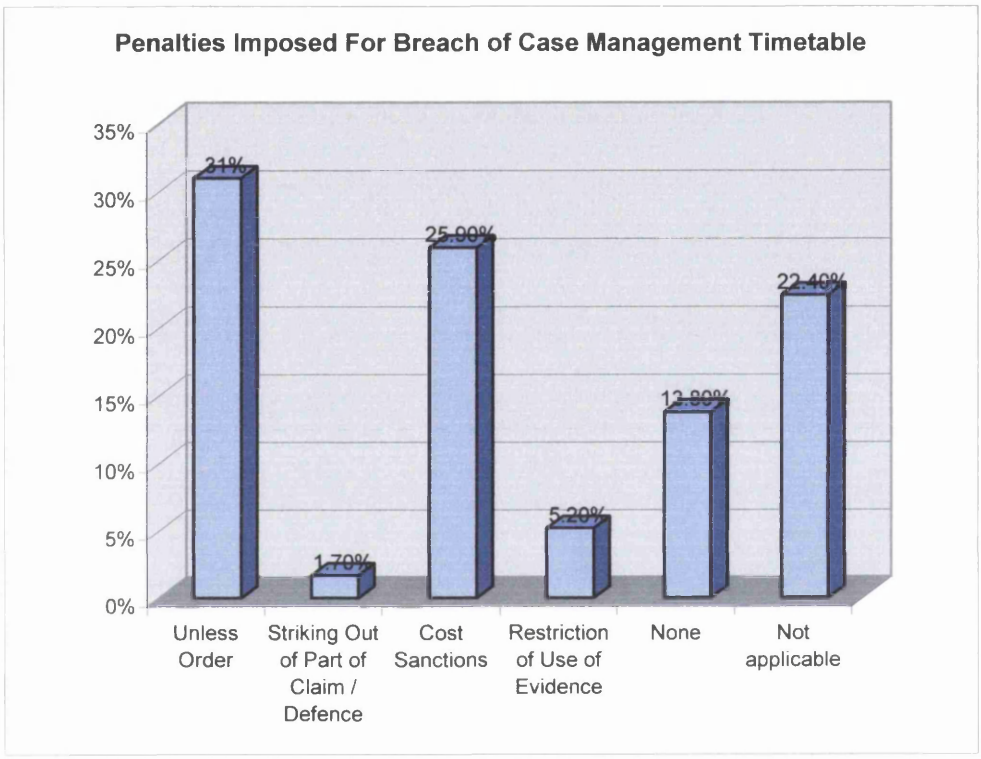
So as to obtain information as to the success with which the Civil Procedure Rules 1998 have encouraged disputing parties to settle their case, respondents were asked to assess the impact of the Civil Procedure Rules upon such. It can be seen from Figure 23 below, that 46.6% of respondents believed there to be an increased rate of settlement under the 1998 Rules.

**Figure 23**



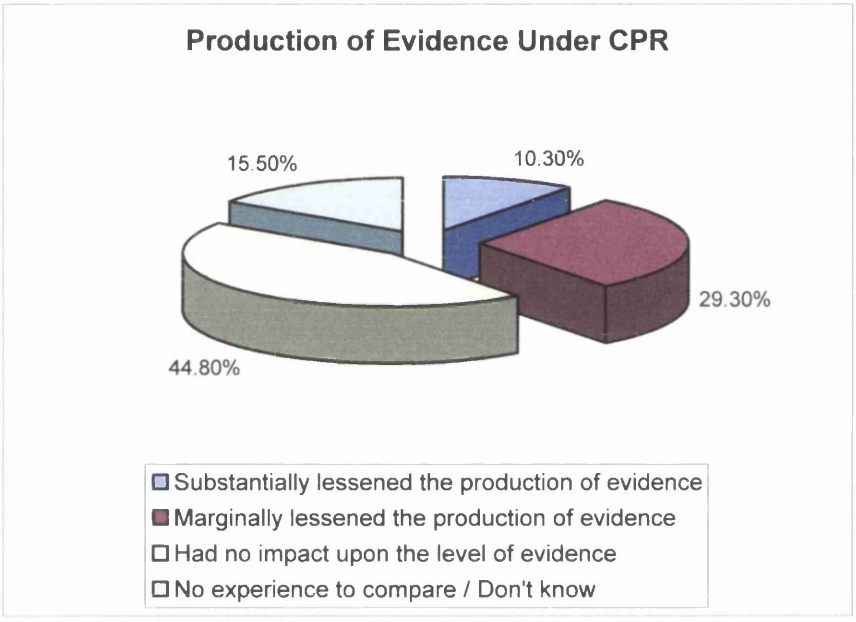
Information was also sought as to the penalties imposed by the judiciary for breaches of the case management timetable. As demonstrated by Figure 24, 31% of respondents reported the use of an Unless Order and 25.9% reported the employment of cost sanctions.

**Figure 24**



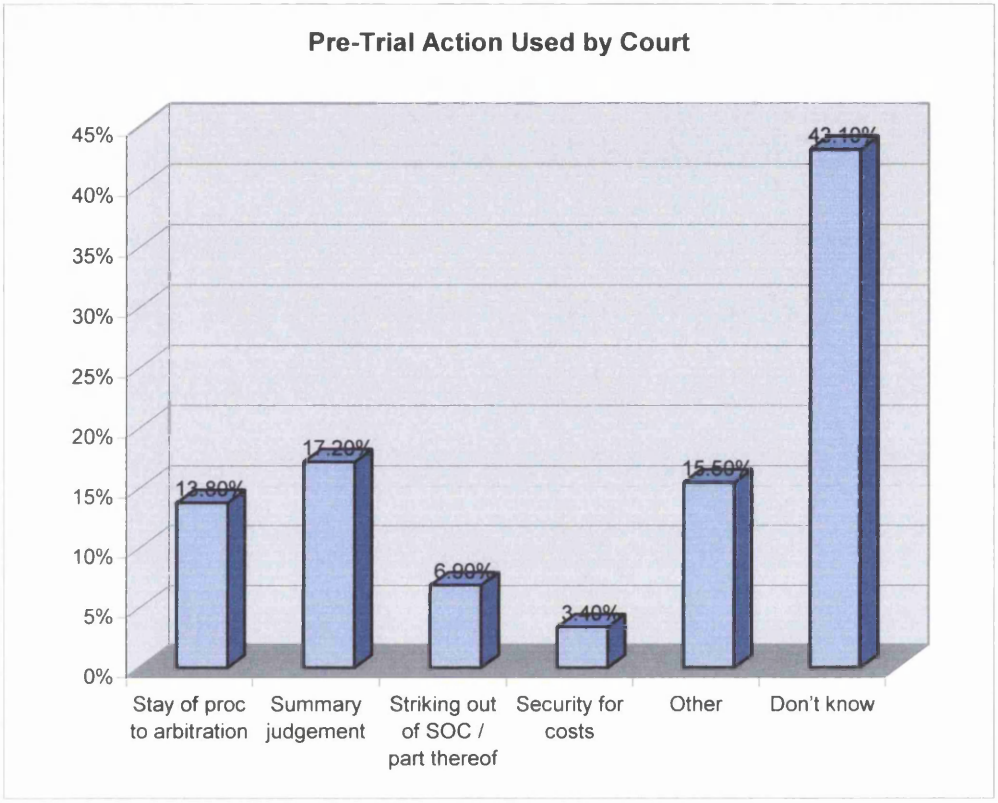
Given the need for expediency in any mechanism of dispute resolution, respondents were asked to assess the effect of the 1998 Rules upon the production of evidence in court proceedings. It can be seen from Figure 25 below, that 44.8% of respondents reported that the Civil Procedure Rules 1998 had no effect upon the production of evidence.

**Figure 25**



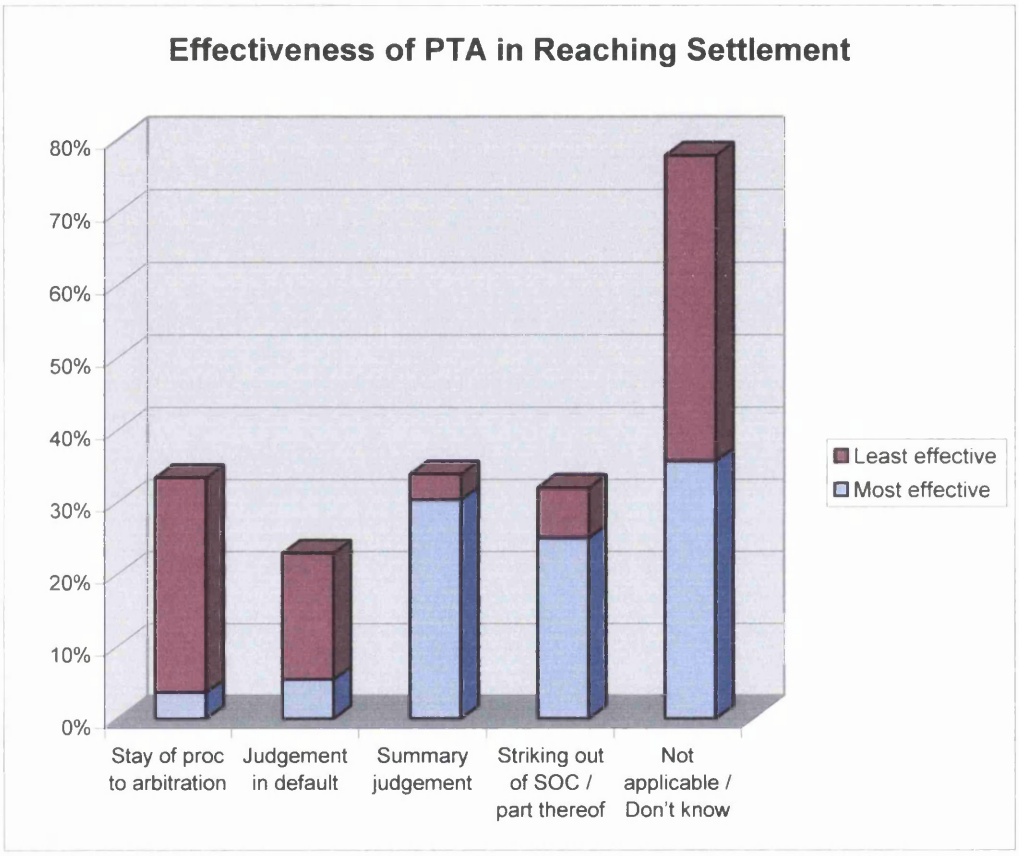
Information was also sought on the pre-trial actions used by the Court in construction cases. 17.2% of respondents reported that in their experience, the most commonly utilised pre-trial action was that of summary judgement (Figure 26).

**Figure 26**



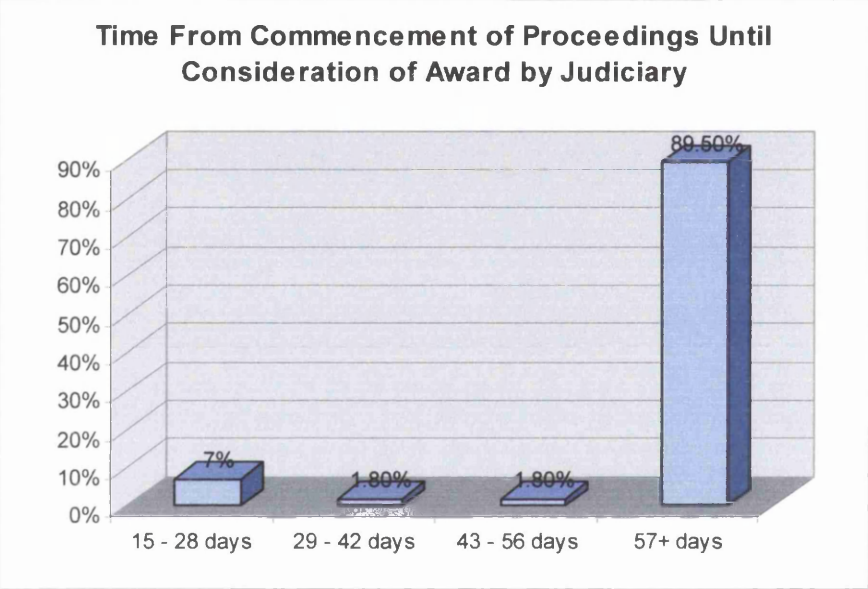
As to the effectiveness of a pre-trial action in reaching a settlement, it can be seen that the summary judgement was deemed to be the most effective, with the stay of proceedings to arbitration being deemed to be the least effective at reaching a settlement (Figure 27).

**Figure 27**



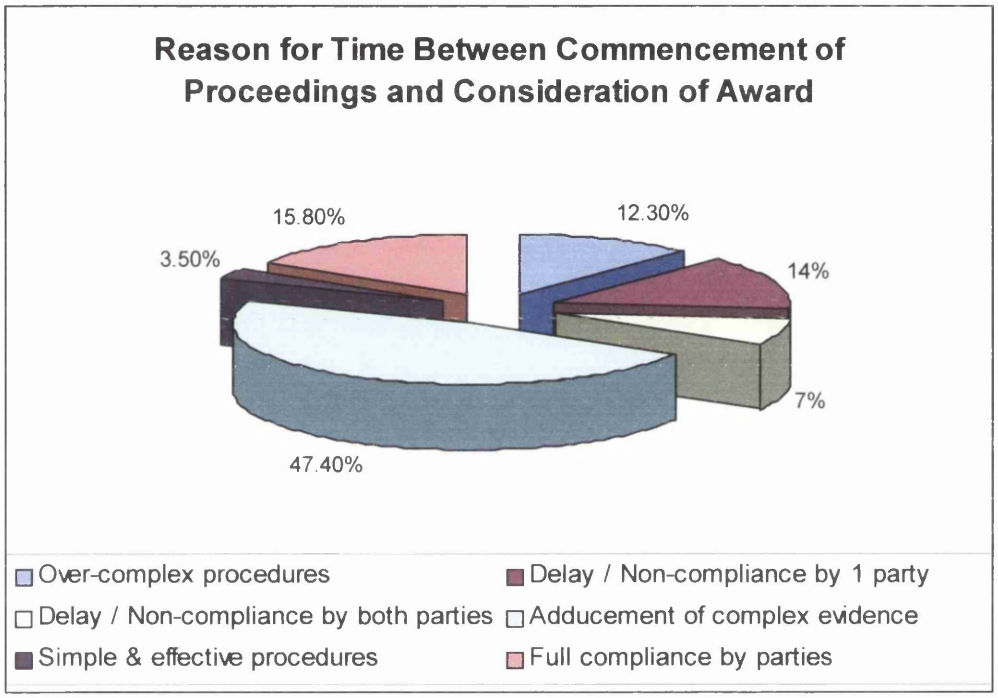
To further enlighten the assessment of procedural efficiency, respondents were asked to define the period of time from the commencement of litigation proceedings, until the consideration of the award by the judiciary. As exemplified by Figure 28, 89.5% of respondents stated that in their experience, it took 57+ days after commencement of proceedings for the judiciary to be in the position to consider the award.

**Figure 28**



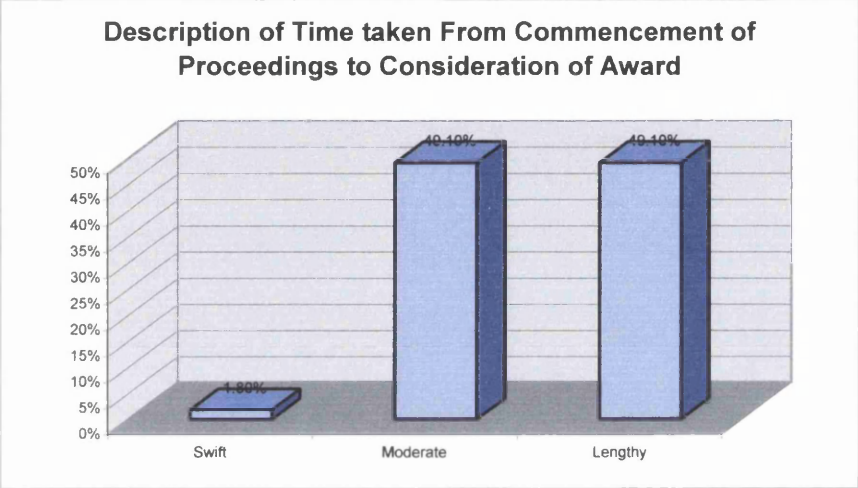
When asked to speculate on the reasoning for such a timescale, 47.4% of respondents suggested that the adducement of complex evidence might provide the answer (Figure 29).

**Figure 29**



So as to place the above information in context, respondents were asked to quantify their opinion of the time taken from the commencement of proceedings until the consideration of the award. As can be seen in Figure 30, 49.1% of respondents stated that in their opinion such a timescale could be described as being "lengthy", with a further 49.1% describing it as being "moderate".

**Figure 30**



When comparing the time taken from commencement of proceedings to the consideration of the award as described by the base employment group[9] questionnaire respondents, an interesting result can be found. For it can be seen that whilst 67% of construction professionals viewed the period of time from commencement of proceedings to the consideration of the award as being "lengthy", only 39% of lawyers reported such a view (Figure 31).

**Figure 31**

**lawyer * time btwn commencement & consid of award is Crosstabulation**

Count

| | | time btwn commencement & consid of award is | | | |
|---|---|---|---|---|---|
| | | swift | moderate | lengthy | Total |
| lawyer | yes | 1 | 21 | 14 | 36 |
| | no | | 7 | 14 | 21 |
| Total | | 1 | 28 | 28 | 57 |

Indeed, as exemplified by the Mann-Whitney U Test contained in Figure 32, such a difference in perception can be seen to be relevant at the 5% level of probability. Thus, construction professionals are statistically more likely than lawyers, to consider the time between the commencement of proceedings until the consideration of the award, as being "lengthy".

[9] That is comparing the answers of lawyers against non-lawyers. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 32**

**Ranks**

| | lawyer | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| time btwn commencement & consid of award is | yes | 36 | 25.99 | 935.50 |
| | no | 21 | 34.17 | 717.50 |
| | Total | 57 | | |

**Test Statistics[a]**

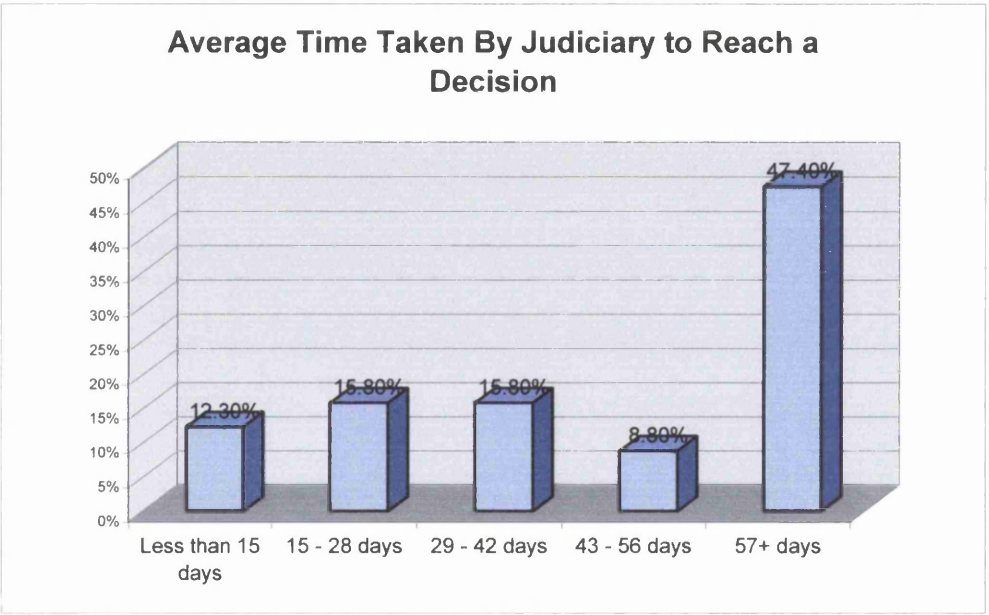
| | time btwn commencement & consid of award is |
|---|---|
| Mann-Whitney U | 269.500 |
| Wilcoxon W | 935.500 |
| Z | -2.055 |
| Asymp. Sig. (2-tailed) | .040 |

a. Grouping Variable: lawyer

## The Judicial Award

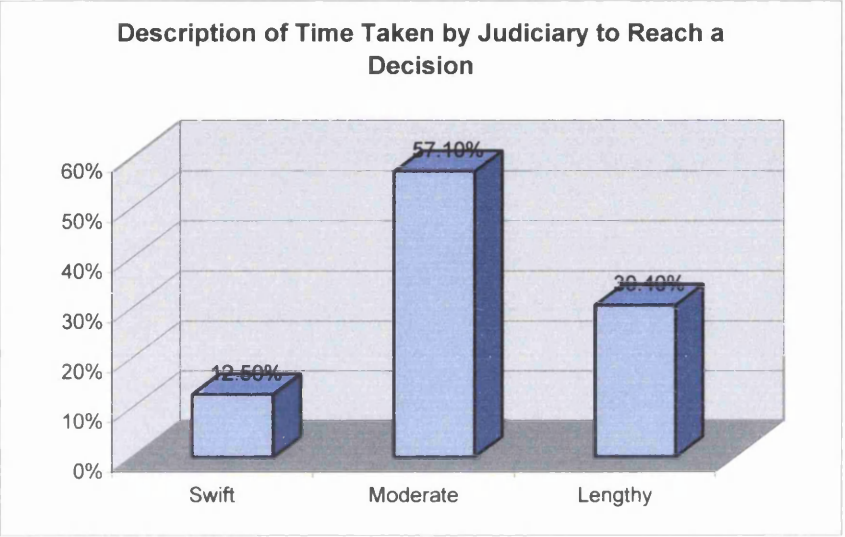
So as to continue the assessment of procedural efficiency, respondents were asked to state the average time taken by the judiciary to reach a decision. It can be seen from Figure 33 that 47.4% of respondents reported a timescale of 57+ days as being required for the judiciary to reach a decision.

**Figure 33**



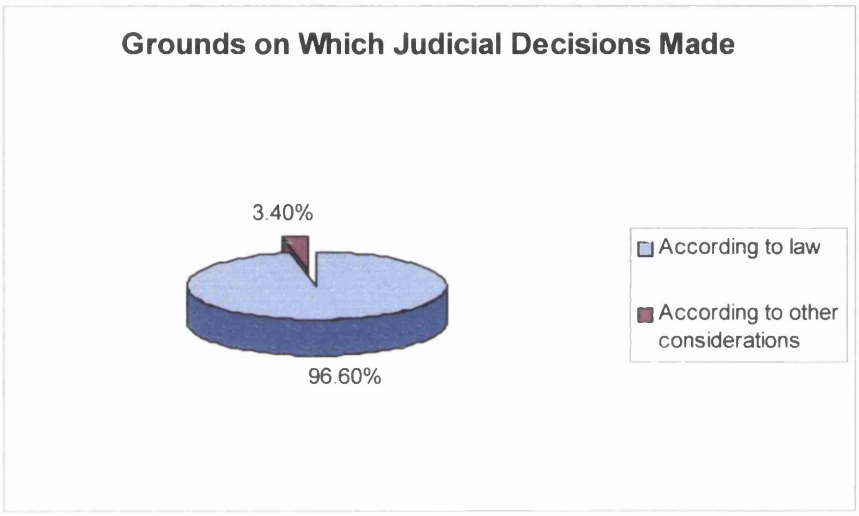
So as to place the timescale into context, respondents were asked to quantify their opinion of the time taken by the judiciary to reach their decision. As demonstrated by Figure 34, 57.1% of respondents viewed such a timescale as "moderate".

**Figure 34**



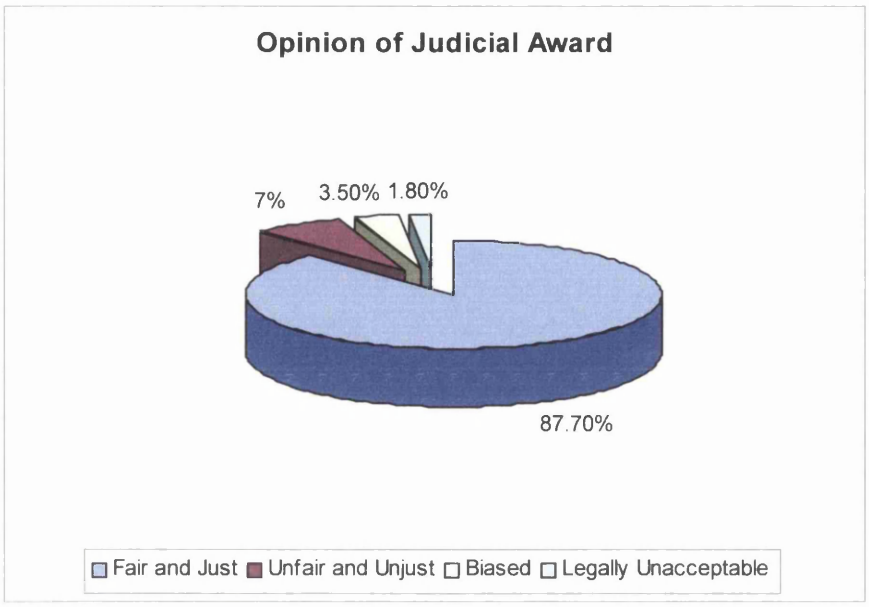
In addition to assessing the procedural efficiency of court proceedings, it was also important to establish the grounds upon which judicial decisions were made. As elucidated by Figure 35, 96.6% of respondents reported that judicial awards were made according to legal principles.

**Figure 35**



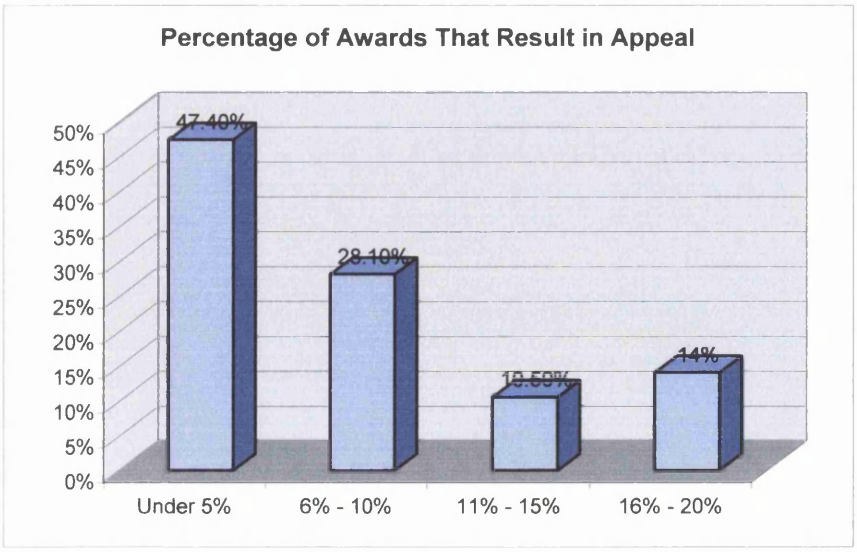

Respondents were also asked to quantify their opinion of the validity of the award. As demonstrated by Figure 36, 87.7% of respondents viewed the judicial award as being "fair and just".

**Figure 36**



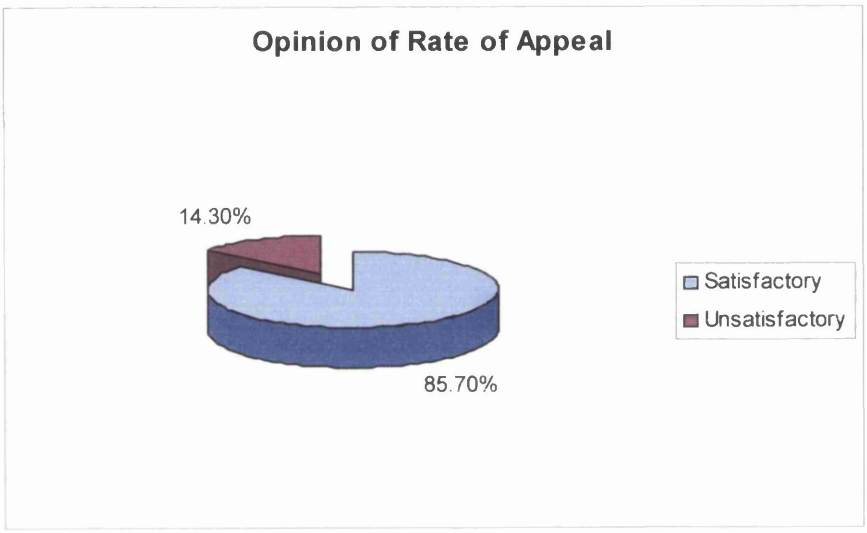

Having provided information on the way in which the Award was reached and the resulting impression it thereby created, respondents were then asked to estimate the percentage of judicial awards that result in appeal. 47.4% of respondents stated that fewer than 5% of judicial awards result in appeal (Figure 37).

**Figure 37**



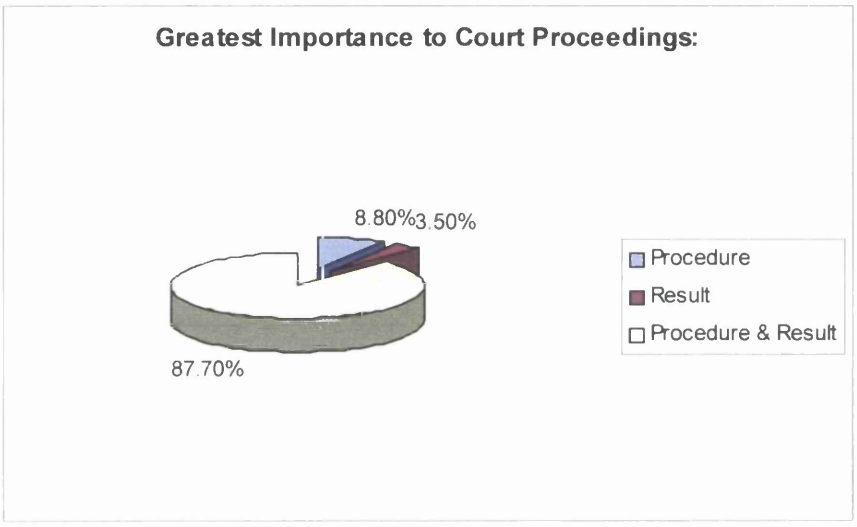
When asked their opinion of the rate of appeal, it can be seen by Figure 38 that 85.7% of respondents viewed such as being satisfactory.

**Figure 38**



So as to assess the importance placed upon issues of procedure and the resulting award by the various parties to litigation, respondents were asked to identify which they believed to be of greatest importance to court proceedings: procedure; result; or procedure and result. It can be seen from Figure 39 that 87.7% of respondents believed both issues of procedure and the resulting award to be of importance in court proceedings.

**Figure 39**

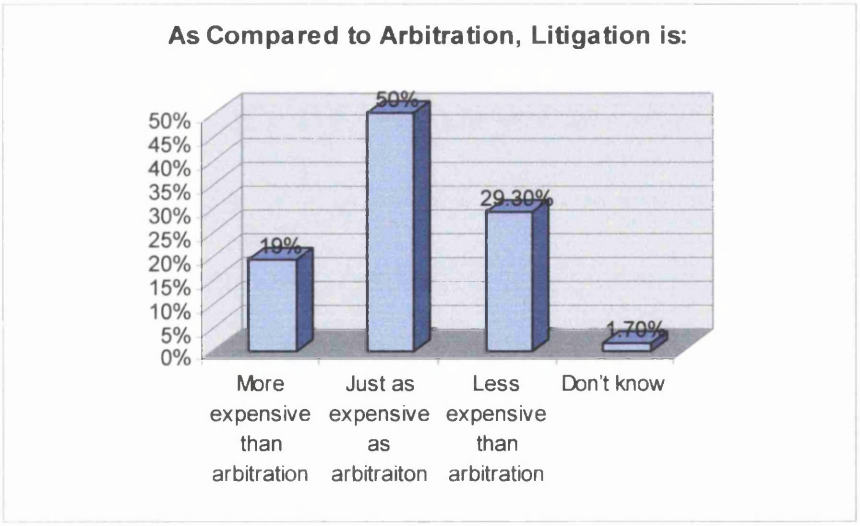


## The Financial Implications of Litigation

So as to assess the financial impact of litigation, respondents were asked to quantify the outlay involved in engaging proceedings. When questioned, 100% of respondents viewed litigation as being "costly".

To put the financial implications of litigation into context, respondents were asked to compare the financial burden of litigation as compared to arbitration. 50% of respondents viewed litigation as being "just as expensive" as arbitration, with 29.3% reporting it as being "less expensive" (Figure 40).

**Figure 40**



When comparing the financial implications of litigation and arbitration as described by the base employment group[10] questionnaire respondents, an interesting result can be found. As can be seen by the crosstabulation contained in Figure 41, whilst 42% of lawyers viewed litigation as being "less expensive" than arbitration, only 9% of non-lawyers viewed litigation in such a light.

**Figure 41**

**lawyer * as compared to arbitration, lit is Crosstabulation**

Count

| | | as compared to arbitration, lit is | | | | |
|---|---|---|---|---|---|---|
| | | more expensive than arbitration | just as expensive as arbitration | less expensive than arbitration | don't know | Total |
| lawyer | yes | 3 | 17 | 15 | 1 | 36 |
| | no | 8 | 12 | 2 | | 22 |
| Total | | 11 | 29 | 17 | 1 | 58 |

As demonstrated by the Mann-Whitney U Test in Figure 42, such a difference in opinion can be seen to be relevant at the 1% level of probability. Thus, lawyers are statistically more likely than non-lawyers, to view litigation as being "less expensive" than arbitration.

[10] That is comparing the answers of lawyers against non-lawyers. Due to the many possible combinations of employment group comparisons, it would not be statistically viable to sub-divide the nature of respondents any further than this base level.

**Figure 42**

**Ranks**

| | lawyer | N | Mean Rank | Sum of Ranks |
|---|---|---|---|---|
| as compared to arbitration, lit is | yes | 36 | 34.81 | 1253.00 |
| | no | 22 | 20.82 | 458.00 |
| | Total | 58 | | |

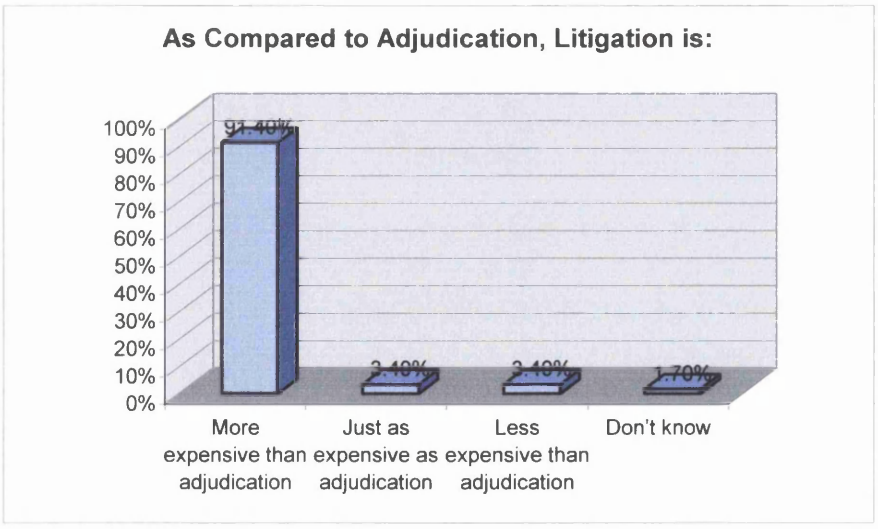
**Test Statistics[a]**

| | as compared to arbitration, lit is |
|---|---|
| Mann-Whitney U | 205.000 |
| Wilcoxon W | 458.000 |
| Z | -3.333 |
| Asymp. Sig. (2-tailed) | .001 |

a. Grouping Variable: lawyer

Respondents were also asked to quantify the financial impact of litigation as compared to adjudication. As exemplified by Figure 43, 91.4% of respondents viewed litigation as being "more expensive" than adjudication.

**Figure 43**

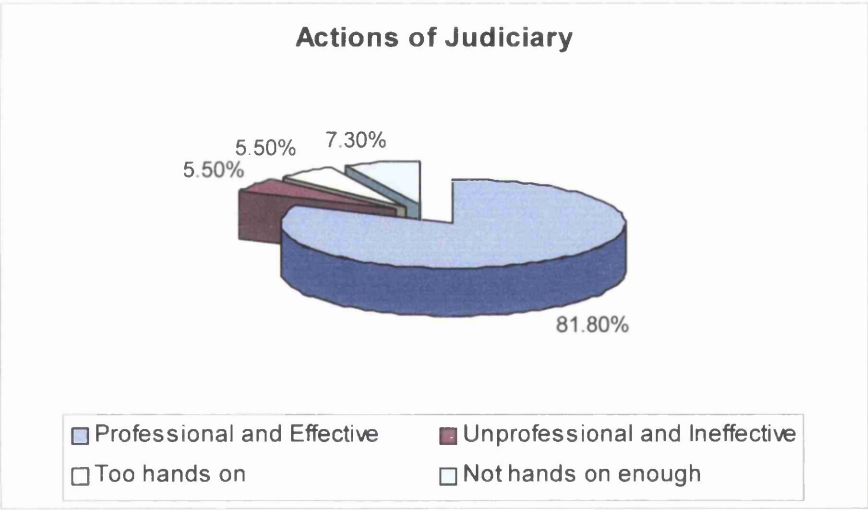


## The Conduct of Litigation Players

Key to understanding procedural efficiency and fairness, are the actions and attitudes of the various parties to court proceedings. To this end, respondents were asked to comment on the actions and attitudes of the judiciary; representatives; and parties to the dispute.

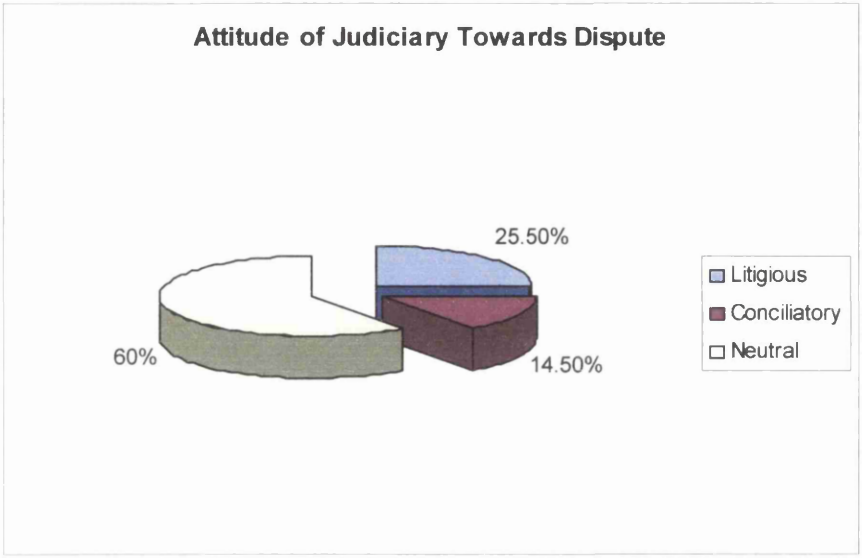
It can be seen from Figure 44 that 81.8% of respondents viewed the actions and conduct of the judiciary as being "professional and effective".

**Figure 44**



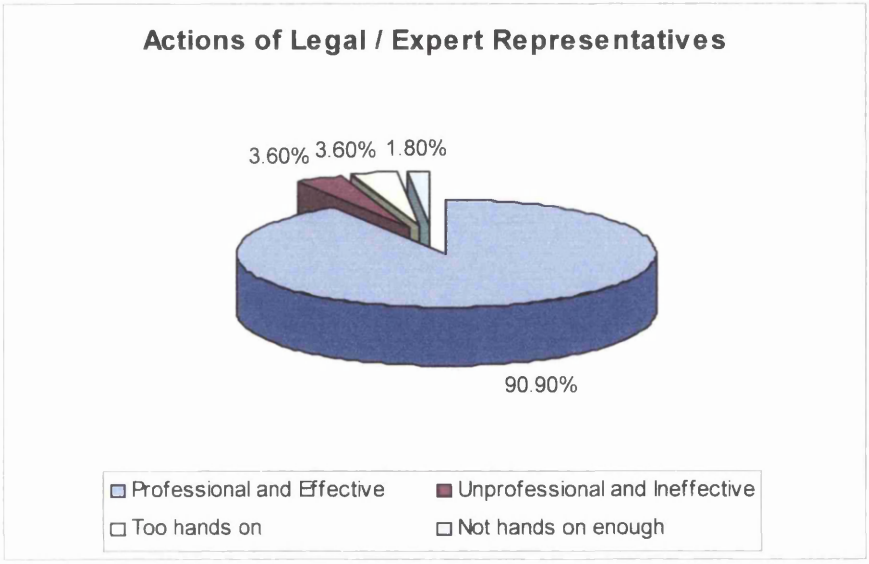
60% of respondents described the attitude of the judiciary towards the dispute as being "neutral" (Figure 45).

**Figure 45**



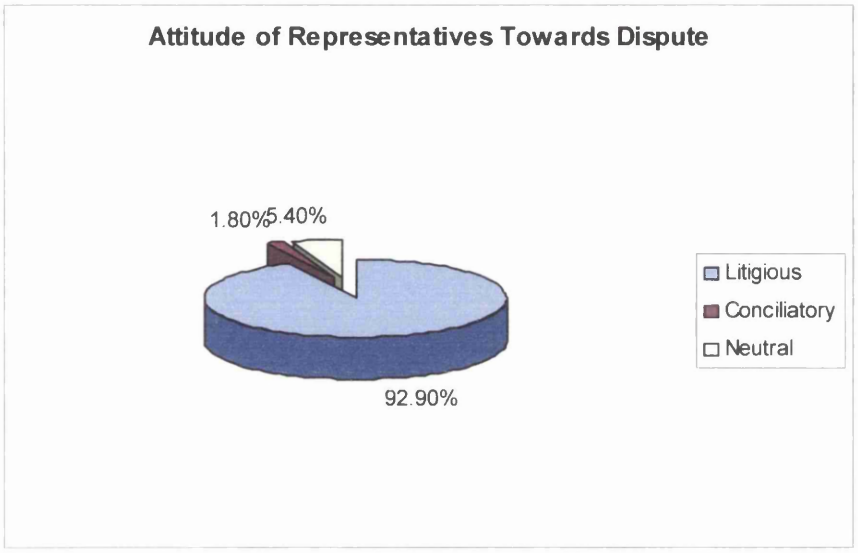

90.9% of respondents viewed the actions of the legal / expert representatives as being "professional and effective" (Figure 46)

**Figure 46**



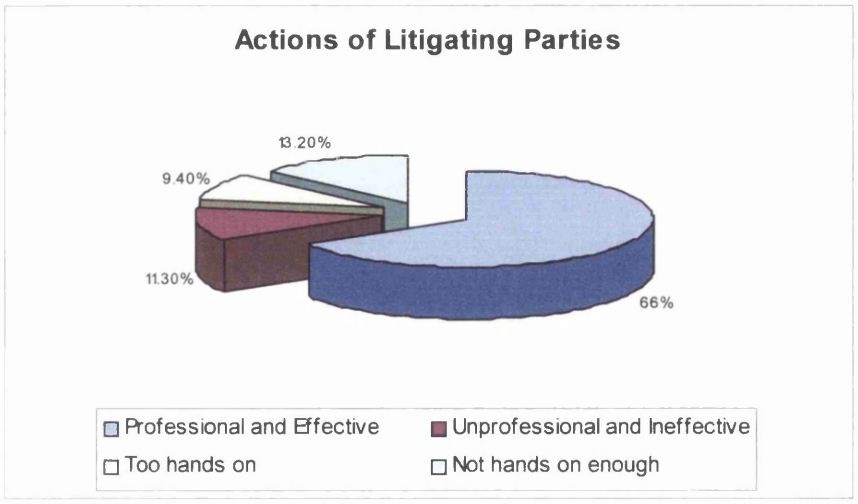
92.9% of respondents viewed the attitude of the legal / expert representatives towards the dispute as being "litigious" (Figure 47).

**Figure 47**



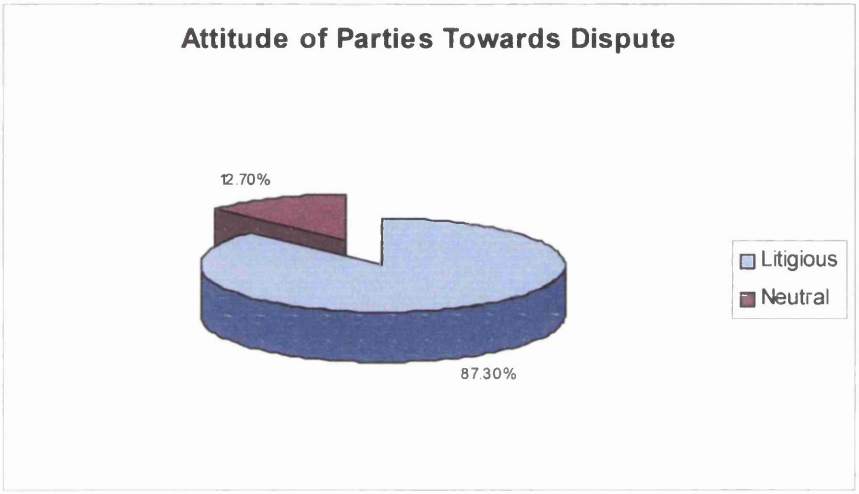

When asked to describe the actions of the litigating parties, 66% of respondents stated that they believed them to be "professional and effective" (Figure 48).

**Figure 48**



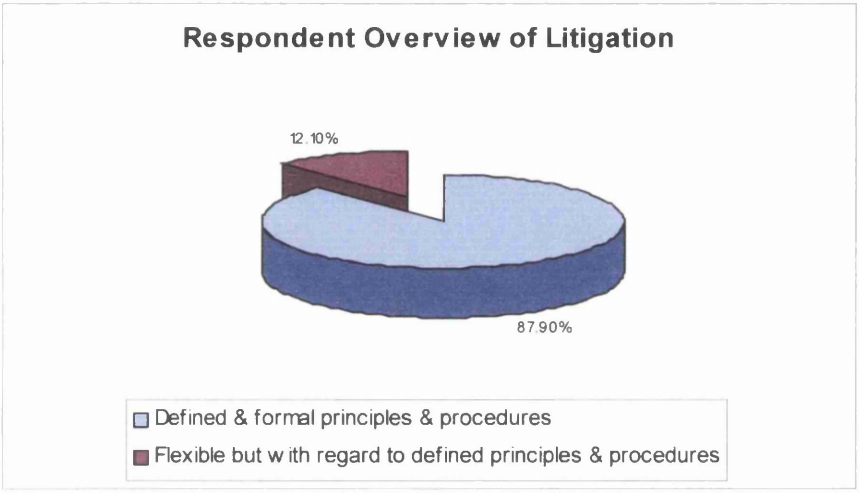
Similar to the attitude attributed to the legal / expert representative, 87.3% of respondents described the attitude of litigating parties towards the dispute as being "litigious" (Figure 49).

**Figure 49**



So as to place the actions and attitude of the parties to litigation into context, respondents were asked to select one of three commonly held views concerning the nature of court proceedings. As can be seen from Figure 50 below, 87.9% of respondents believed litigation to be a mechanism that was based on defined and formal principles and procedures, with 12.1% of respondents believing it to be a flexible mechanism that had regard to defined principles and procedures.

**Figure 50**



## Discussion – Does the Empirical Evidence Suggest that Litigation Complies With Woolf's Eight Criteria for Access to Justice?

From the good level of familiarity reported by questionnaire respondents on the Civil Procedure Rules 1998,[11] one might assume that litigation in the construction industry is operating within the criteria as established by Woolf for effective access to justice. Indeed, given that the majority of construction disputes proceeding to litigation are financial or contractual in nature,[12] it is essential that litigation operates to facilitate such. In applying the research findings to each of Woolf's criteria, an indication as to the ability of litigation to facilitate access to justice shall be achieved.

### The First Two Criteria: Procedural Fairness and a Just Result

Litigation is often utilised by the top end of the contractual chain. The typical contractual position of litigating parties was reported to be that of the main contractor followed by the employer[13] and the size of organisations using the process was reported to be large and subsequently medium organisations.[14] When questioned as to the court experience of parties to proceedings,[15] it was reported that in over 40% of cases, both parties to proceedings are repeat users of the mechanism. However, a significant number of proceedings were recounted in which both parties to the proceedings were infrequent users of the process and further, a frequent user litigating against an infrequent user. Given the possibility for an inequality in bargaining power

[11] See Figures 2 - 4
[12] See Figure 9
[13] See Figure 10
[14] See Figure 11
[15] See Figures 12 - 14

and the ramifications that this may bring, it is essential that court action facilitates a fair procedure so as to achieve a just result.

As with both arbitration and adjudication, a concern with the court process is that it might be abused by a party to a dispute as a means of gaining tactical advantage. Evidence from the research would suggest, however, that this is not necessarily the case. Indeed, as elucidated by Figure 18, when questioned as to the time spent in preparation for proceedings, 70.70% of respondents stated that both parties spent "much time"[16] in preparation for proceedings. However, 29.30% of respondents stated that only the party commencing court action spends much time in preparation. Thus, in approximately a third of proceedings, court action may have been invoked as an ambush tactic designed to confer unilateral advantage. External safe-guard is afforded against an abuse of bargaining position, however, by the fact that both parties to court proceedings are usually legally represented,[17]. Further, as indicated by Figure 36, 87.70% of respondents viewed the Judicial Award as being "fair and just". Thus, from empirical data, it would appear that under this head, litigation is compliant with Woolf's requirements for access to justice in the majority of cases.

[16] Defined as being 2 weeks or more pre-commencement of proceedings.
[17] See Figure 15

**The Third, Fourth and Eighth Criteria: Reasonable Cost and Speed & Effectiveness**

If procedural fairness and a just result are to be obtained, then proceedings must be executed with reasonable speed and cost. They must also be "effective", meaning adequately resourced and organised.

Turning to consider the financial implications of litigation, when questioned, 100% of respondents stated that litigation is "costly". However, when asked to compare the cost of litigation as against that of arbitration,[18] 50% stated that it was "just as expensive" as arbitration, with 29.30% believing it to be "less expensive" than arbitration.[19] Only 10% of respondents perceived litigation to be "more expensive" than arbitration. When compared to adjudication, however, 91.40% of respondents stated that litigation was the "more expensive" process.[20] In short, whilst perceived to be expensive, in terms of cost litigation was viewed in a more positive light than arbitration, but less favourably than that of adjudication.

In so far as the time element of litigation is concerned, empirical data would seem to suggest that litigation is an efficient mechanism in certain spheres, giving to protracted proceedings in other areas. When questioned as to the frequency with which the Statutory Timetable for the Service of Statements of Case was exceeded, 50% of respondents reported that it was "frequently" exceeded, with 29.3% of

[18] See Figure 40
[19] The base employment group of "lawyer" was largely responsible for such a view. See Figures 41 and 42.
[20] See Figure 43

respondents reporting that it was "infrequently" exceeded.[21] Thus, approximately half of all proceedings are delayed at the onset. In 44.8% of cases, however, such a delay was due to the complex nature of the evidence and points of law to be included in the Statement of Case - only in 29.3% of cases was the delay attributed to non-compliance by one party.[22] Indeed, the provision of a Statement of Case was deemed to be a positive requirement by the majority of respondents.[23] 63.8% of respondents reportedly viewed the Statement of Case as both preventing delays in proceedings at a later juncture, together with operating so as to facilitate the fair resolution of a dispute. Further, 60.7% of respondents believed that case management by the judiciary enabled the majority of cases to settle before the Pre-Trial Review.[24] Only 14.3% of respondents reported that despite case management, the majority of cases proceed to a full trial. In support of such, over 46% of respondents reported that more cases now settle under the CPR, with 37% reporting that the CPR has had little effect on settlement rates.[25] Perhaps the widespread use of penalties for a breach of the Case Management Timetable,[26] together with the use of Pre-Trial Action[27] provides an explanation for such. In short, it would appear that as a result of effective case management by the judiciary, litigation proceedings are more expeditious than was previously the case.

It is interesting to note, however, that the CPR is perceived as having little effect upon the production of evidence. For as demonstrated by Figure 25, 44.8% of respondents reported that the Civil Procedure Rules 1998 had no effect upon the production of

[21] See Figure 19
[22] See Figure 20
[23] See Figure 21
[24] See Figure 22
[25] See Figure 23
[26] See Figure 24
[27] See Figures 26 and 27

evidence, with 29.3% believing it to have had little effect. Thus, it is conceivable that litigation proceedings are still being weighted down by the production of unnecessary evidence. Further, when asked to define the period of time from the commencement of court proceedings until the consideration of the award by the judiciary, 89.50% of respondents stated that in their experience, it took 57+ days after commencement of proceedings for the judiciary to be in the position to consider the award.[28] However, adducement of complex evidence was seen to account for such a timescale in the majority of cases,[29] which was deemed by nearly fifty per cent of respondents to be "lengthy".[30] Interestingly, although 47.4% of respondents reported the average time taken by the judiciary to reach a decision as being in excess of 57 days, 28.1% of respondents recorded a timescale of less than 29 days.[31] 57.10% of respondents described such timescales as being "moderate", with 30.4% categorizing it as being "lengthy".[32]

In short, the CPR 1998 have dramatically reduced the numbers of disputes proceeding to trial. For those cases that do proceed to trial, whilst the length of time from the commencement of proceedings until the point of consideration of the award may be seen to be protracted in the majority of cases, the actual time taken by the judiciary to reach their decision is not necessarily so. Thus, in terms of satisfying this head, empirical data would seem to suggest that litigation is successful in encouraging early settlement, but in terms of providing an efficient and cost effective mechanism of dispute resolution for those cases that remain in the system, it is not so effectual. It is doubtful therefore, whether litigation could be seen to be effective in either

[28] See Figure 28
[29] See Figure 29
[30] See Figures 30 - 32
[31] See Figure 33
[32] See Figure 34.

organisational or financial terms. As such, litigation fails to fulfill Woolf's requirements for access to justice under all three heads.

**The Fifth and Sixth Criteria: Understandable and Responsive**

If litigation is to facilitate access to justice, then court procedure must be understandable to those parties engaging in such, and further it must be responsive to their needs.

As with arbitration and adjudication, a key requisite to the success of litigation under this head must be that it facilitates party autonomy with regard to the method by which their dispute is to be resolved. To this end, respondents were asked to identify the driving force behind matters of procedure where a case proceeds towards court. As illustrated in Figure 16, 44.8% of respondents reported that one construction party was the driving force behind matters of procedure, with 27.6% identifying the legal representatives. Whether such a fact is indicative of an abuse of party autonomy to determine matters of procedure, is an issue of construction. If party autonomy is to be defined as meaning that both litigating parties alone must determine matters of procedure, then litigation cannot be compliant with such. If, however, party autonomy is to be defined as either one or all parties to proceedings determining issues of procedure, with the assistance of their legal representatives where necessary, then litigation may be compliant. Given that the CPR fosters a spirit of co-operation between parties in the resolution of the dispute and given that it is the role of both the legal representatives and the judiciary to ensure that where proceedings are unilaterally driven an abuse of position does not result, it is suggested that this latter

interpretation is perhaps the most appropriate. Thus, on interpretation of the empirical data, it may be seen that in nearly 45% of cases, litigating parties are enjoying autonomy over issues of procedure. However, the prominent role of the legal representatives in the determination of procedural issues in over a quarter of cases may pose a complicating factor in terms of the juridification debate and shall be considered later.

The description of court procedure as "legalistic and formalistic" also complicates matters in so far as the ability of litigation to meet the requirements for access to justice under this head is concerned.[33] For if procedures are formalised and regimented, then by definition they cannot be responsive. Furthermore, whilst in possession of the ability to determine the dispute according to legal principle or other considerations, the judiciary are not taking advantage of such. For 96.6% of respondents stated that the judicial award was reached according to legal principle.[34] Thus, in terms of the ability of litigation to satisfy this head, judgement must be withheld until the continuing impact of juridification has been considered.

**The Seventh Criteria: Certainty**

As already exemplified,[35] if a mechanism of dispute resolution is to satisfy the requirement for certainty, then it must be able to facilitate the final resolution of a dispute. Evidence of a binding resolution to a dispute can be found where the rate of settlement is high and where the level of appeal is minimal. It has already been demonstrated that litigation under the CPR 1998 facilitates settlement in many

[33] See Figure 17.
[34] See Figure 35.
[35] See Chapter 2 at p.67 & p.99

cases.[36] Furthermore, in terms of appealing from an award of the court, it would appear from Figure 37 that litigation has satisfied this head. For when questioned, 75.5% of respondents stated that under 10% of Awards result in appeal. When asked their opinion on such an appeal rate, 85.70% responded that it was "satisfactory" in their opinion.[37] Thus, not only may litigation be seen to satisfy the need to provide a final and binding resolution to a dispute, but the rate of satisfaction amongst parties to court proceedings would seem to suggest that only the most deserving of cases are granted leave to appeal. As such, litigation may also be seen to satisfy the public justice aspect of certainty. Where needed, justice is done and is manifestly seen to be done.[38]

**The Barrier to Access to Justice: Juridification**

The historically protracted and costly nature of court action has been well documented through the ages, as has the fact that litigation became the almost exclusive province of those skilled in the law. However, it was the intention of the CPR 1998 to vanquish the over complexity of court proceedings, to create a more dynamic, versatile mechanism of dispute resolution. In essence, the 1998 Rules sought to rid the court process of juridification. However, despite such reforms vestiges of juridification remain still. For as already demonstrated, litigation is still perceived to be "legalistic and formalistic".[39] Analysis of the empirical data uncovers further evidence of juridifcation. Firstly, although the actions of the judiciary, legal representatives and parties to the dispute were considered to be "professional and

[36] See Figures 22 and 23
[37] See Figure 38.
[38] As required by Lord Hewart in *R v Sussex Justice ex p McCarthy* [1924] 1 KB 256 at p.259
[39] See Figure 17

effective",[40] when questioned as to their attitude towards the dispute, the judiciary were described as being "neutral",[41] whereas the legal representatives and litigating parties were largely described as being "litigious".[42] The intention of the CPR 1998 to create a spirit of co-operation would therefore seem to have had little effect to date upon the attitude of disputing parties.

However, unlike arbitration and adjudication, little evidence was found to support Tyler's[43] polarisation theory. When questioned as to the factor of greatest importance to court proceedings, 87.70% of respondents stated that both procedure and result were of significance.[44] When analysed according to base employment group, no significant difference between the views of lawyers and non-lawyers was uncovered. What is significant, however, is the fact that when asked to describe litigation,[45] 87.90% of respondents viewed it as being a defined and formal principle and procedure. Only 12% viewed it as being a flexible mechanism that has regard to defined principles and procedures, as desired by the CPR 1998.

Thus, upon evaluation of empirical data, strong indications of juridification emerge. Not only is the attitude towards the dispute of parties and their respondents indicative of a persisting litigious influence, but the perception of litigation as a mechanism of dispute resolution is clearly coloured by the memory of the pre-1998 court structure.

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[40] See Figures 44, 46 and 48
[41] See Figure 45
[42] See Figures 47 and 49.
[43] See Chapter 2 at p.82
[44] See Figure 39
[45] See Figure 50

# CHAPTER SEVEN: THE FUTURE OF DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY

As we have discussed, the purpose of this empirical research was to ascertain the ability of arbitration and adjudication, as reformed by the respective 1996 legislation, to meet Woolf's requirements for access to justice. The inclusion of litigation in the research was to act as a "control" – that is, a standard against which alternatives to court procedure may be judged. So as to test the ability of each mechanism to facilitate access to justice, we shall now consider the mechanisms in comparison, highlighting where necessary the need for reform.

## The First Two Criteria: Procedural Fairness and a Just Result

### The Typical Users of Arbitration, Adjudication and Litigation

In this work it has been demonstrated that arbitration was being utilised by the same category of "user" as those who proceed to litigation – those located at the top end of the contractual chain. In both instances, the typical contractual position of users was reported to be that of the main contractor followed by the employer.[1] Similarly, the size of organisations using the process was reported to be medium and subsequently large organisations in arbitration and vice versa in litigation.[2] Conversely, adjudication is often utilised by the lower end of the contractual chain - the typical contractual position of adjudication users was reported to be that of the sub contractor

[1] See Figure 15 Chapter 4 and Figure 10 Chapter 6
[2] See Figure 16 Chapter 4 and Figure 11 Chapter 6

followed by the main contractor[3] and the size of organisations using the process was reported to be small and subsequently medium sized organisations.[4] Mapping such findings onto both micro and macro economic data,[5] it would therefore appear that the majority of the construction sector do not utilise arbitration and litigation as a method of dispute resolution. Given that sub-contractors and sub-sub contractors largely comprise the construction industry, the use of arbitration and litigation by the top end of the contractual chain would seem to preclude the majority. Rather, adjudication is the principal method by which the majority of construction parties seek to formally resolve their dispute. Regardless of the identity of parties to proceedings, however, procedural fairness and a just result are imperative if the integrity of dispute resolution proceedings is not to be called into question.

**The Use and Outcomes of Proceedings**

As demonstrated in Chapter 2,[6] a concern with dispute resolution proceedings is whether they facilitate tactical advantage(s) that may be exploited by a party so as to confer a unilateral benefit. For example, concern was raised as to whether methods of dispute resolution may enable a party to commence proceedings in a way akin to an "ambush", thereby prejudicing the other side by denying them an equal opportunity to prepare their case and to comprehensively answer the case of their opponent. In short, by denying a party an equal opportunity to prepare for proceedings, the coherence and

[3] See Figures 15 – 17 Chapter 5
[4] See Figure 18 Chapter 5. It should be noted that Lawyers were more likely to experience medium-sized parties than other groups, with particular reference to construction professionals employed by a small firm (See Figures 19 – 22). Further, Adjudicators were more likely to experience small-sized organisations using the process than other groups, with particular reference to Lawyers (See Figures 23 – 26).
[5] See Chapter 1 at pp. 8 - 11
[6] See Chapter 2 at p.93

effectiveness of their submissions will be impaired thereby adversely affecting the outcome to the dispute. In such cases the decisions and awards passed by the judge / arbitrator / adjudicator may be described as dispensing "rough justice" as whilst the individual passing the decision or award believes it to be a fair and just result, the circumstances surrounding the action reflect a different perspective.

With regard to litigation, this work would suggest that this is not necessarily the case. Indeed, in nearly three quarters of court proceedings, both parties spent "much time" in preparation for proceedings.[7] However, approximately one quarter of respondents stated that only the party commencing court action spends "much time" in preparation, posing the question as to whether such action may have been invoked as an ambush tactic designed to confer unilateral advantage. External safe-guard is afforded against an abuse of bargaining position, however, by the fact that both parties to court proceedings are usually legally represented,[8]. Further, 88% of respondents viewed the Judicial Award as being "fair and just".[9] Thus, from empirical data, it would appear that in the majority of litigation proceedings, the court process is compliant with Woolf's requirements for access to justice under this head.

Similarly, with regard to arbitration, evidence from the research would suggest that the process is not being abused so as to confer unilateral tactical advantage in the majority of cases. For example, the use of arbitration as a means of ambush was largely disproved by the finding that in over three quarters of proceedings, both parties spent similar periods of time in preparation for arbitration.[10] However, as with

[7] See Figure 18 Chapter 6
[8] See Figure 15 Chapter 6
[9] See Figure 36 Chapter 6
[10] See Figure 28 Chapter 4

litigation, in just under a quarter of proceedings, only the party commencing the action was reported to spend "much time" in preparation, indicating that an opportunity for exploitation may exist in a limited number of disputes. Further reflecting litigation practice, the fact that both parties to proceedings were usually legally represented[11] may be seen to afford some external safe-guard against an abuse of bargaining position, a proposition which is supported by the finding that 90% of respondents viewed the arbitral award as being "fair and just".[12] Thus, from empirical data, it would appear that under this head, arbitration is compliant with Woolf's requirements for access to justice.

Conversely, with regard to adjudication, evidence was uncovered that may serve to suggest that the process is being abused as a means of gaining tactical advantage and further that the process has served "rough justice" in some instances. For example, when questioned as to the adjudication experience of parties to proceedings,[13] it was reported that in the majority of cases, both parties to proceedings are infrequent users of the mechanism.[14] However, a significant number of proceedings were recounted in which a frequent user was engaged in adjudication with an infrequent user.[15] When coupled with the findings that in the majority of cases it was the commencing party that spent much time in preparation for adjudication[16] and that in a significant number of disputes, a legally or expertly represented party was engaged in adjudication with a

[11] See Figure 22 Chapter 4
[12] See Figure 44 Chapter 4
[13] See Figure 27 Chapter 5
[14] Adjudicators were more likely to experience proceedings in which both parties to the dispute were infrequent users of the mechanism than other groups, with particular reference to Lawyers (See Figures 30 – 33).
[15] Construction professionals employed by a small firm were less likely to experience such than other groups (See Figures 34 & 35).
[16] See Figure 53 Chapter 5

self-representing party,[17] one must question the potential for an inequality in bargaining power. It should be noted however, that the abuse of adjudication proceedings may be somewhat tempered by the finding that in the majority of proceedings both parties employed some form of representation, legal and expert. Thus one may presume that in such cases, external safeguard is afforded against both an abuse of bargaining position by a party to proceedings and against bias or unfairness on the part of the adjudicator.[18] Indeed, when questioned as to the perceived fairness or otherwise of the adjudication award, 83% of respondents viewed the majority of adjudication awards as being "fair and just".[19] Thus, from empirical data it would appear that whilst there are causes for concern, in the majority of cases adjudication is compliant with Woolf's requirements for access to justice under this head.

In short, therefore, litigation, arbitration and adjudication can be seen to afford a fair procedure and a just result. In terms of user satisfaction with the mechanisms, arbitration conferred the highest rate of perceived fairness and justice, with adjudication commanding the lowest. However, it should be noted that arbitration and adjudication were intended to operate as an alternative to court procedure. Analysis of the empirical evidence above would suggest that the juridification debate[20] has statistical significance. Indeed, as already demonstrated, in the majority of arbitration proceedings and in a significant majority of adjudication proceedings,

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[17] See Figure 36 Chapter 5. It should be noted that Adjudicators were more likely to encounter legally or expertly represented parties adjudicating against self-representing parties than other groups (See Figures 43 – 46).
[18] See Figure 36 and Figures 37 – 42 Chapter 5.
[19] See Figure 68 Chapter 5. It should be noted that Adjudicators were more likely to view the award as being "fair and just" than other groups (See Figure 69). Lawyers were more likely to view the award as being "legally unacceptable" than other groups (See Figure 70).
[20] See Chapter 2 at p.81 & p.105

disputing parties are legally represented. Whilst such representation may be seen to ensure that an abuse of process does not go unchecked, regard must be had to the effect of such representation upon the character of proceedings. That is, does the presence of a legal representative colour arbitration and adjudication so as to create a litigious process? We shall now consider this further.

## The Third, Fourth and Eighth Criteria: Reasonable Cost and Speed & Effectiveness

It was stated in Chapter 2[21] that if procedural fairness and a just result are to be obtained, then proceedings must be executed with reasonable speed and cost. They must also be "effective", meaning adequately resourced and organised.

### Financial Implications of Dispute Resolution

In terms of their financial burden, both litigation and arbitration were seen to be "costly" mechanisms of dispute resolution.[22] It was perhaps a surprising finding, however, that out of the two methodologies, arbitration was perceived to be just as expensive as and even more expensive to pursue than litigation.[23] Conversely, adjudication was largely perceived to be an "inexpensive" method of dispute resolution[24] and was almost universally perceived to be less expensive than arbitration

[21] See Chapter 2 at p.54
[22] See Chapters 4 and 6
[23] See Figure 52 Chapter 4 and Figure 40 Chapter 6
[24] See Figure 83 Chapter 5

and litigation.[25] Thus, the ability of arbitration and to a lesser extent litigation, to provide a cost effective mechanism of dispute resolution must be called into question.

The reasoning for the perception of arbitration as being "just as expensive" or "more expensive" than litigation was considered in Chapter 4.[26] It will be remembered that due to such an opinion largely being attributed to the base employment group of lawyer,[27] the reasons proffered for such were: a prejudice against non-judicial methods of dispute resolution; due to the fact that legal representation in arbitral proceedings excessively escalates the cost associated with the procedure; or due to the fact that legal representation was only sought in instances where the financial implications of the dispute were severe. Given that construction professionals employed by a small enterprise were statistically more likely to view arbitration as being "less expensive" than litigation,[28] the latter two reasons seemed persuasive.

However, it has already been demonstrated that litigating parties habitually employ legal representatives. Thus, the heightened cost of arbitration cannot be attributed to legal representation alone. Furthermore, the perception of adjudication as being a cost effective mechanism would discount any theory based upon prejudice attributable to legal representatives against non-judicial methods of dispute resolution. What does distinguish arbitration, however, is that unlike adjudication, arbitration is not bound to resolve a dispute within four weeks. Thus, whereas particularly complex and financially valuable proceedings may be dissuaded from adopting adjudication, this is not the case with arbitral proceedings. Furthermore, unlike litigation, arbitral parties

[25] See Figure 57 Chapter 4, Figures 84 and 85 Chapter 5 and Figure 43 Chapter 6
[26] See Chapter 4 p.182
[27] Lawyers were statistically more likely to view arbitration as being "more expensive than litigation" than other groups. See Figures 53 and 54 Chapter 4.
[28] See Figure 55 and 56.

must bare the cost of the arbitrator, his expenses and venue hire, together with the usual costs associated with pursuing legal action. In short, it is perhaps a myriad of factors that operate to preclude arbitration from meeting Woolf's objectives at the outset. Such a proposition brings us full-circle to the state funding debate as considered in Chapter 2.[29]

**Temporal Implications of Dispute Resolution**

With regard to litigation, as demonstrated in Chapter 6, the CPR 1998 have dramatically reduced the numbers of disputes proceeding to trial by providing avenues that afford and encourage early settlement. For example, the requirement for full and frank disclosure as required by the Statement of Case was seen to be a method that afforded early resolution to a dispute.[30] The reason for such is clear, as the provision of the facts and legal argument as asserted by the other side enables an objective evaluation of the merits of the case and serves to present a basis upon which a settlement may be reached. Judicial case management of the dispute was also seen to facilitate early settlement.[31] Indeed, it is perceived by a significant number of respondents that more cases now settle under the CPR 1998 than was previously the case.[32] For those cases that do proceed to full trial, however, the length of time from the commencement of proceedings until the point of consideration of the award may be seen to be protracted in the majority of cases, although the actual time taken by the judiciary to reach their decision is not necessarily so.[33] Furthermore, the CPR 1998 have been seen by 74% of respondents to have had little or no effect upon the

[29] See Chapter 2 at p.73 & p.104
[30] See Figure 21 Chapter 6
[31] See Figure 22 Chapter 6
[32] See Figure 23 Chapter 6
[33] See Figures 28, 29 and 33 Chapter 6

production of evidence – the evidence produced by litigating parties remains voluminous.[34] Indeed, the litigation process up to and including the trial was perceived by the majority of respondents to be a "lengthy" process.[35] Thus, empirical data would seem to suggest that litigation is successful in encouraging early settlement, but in terms of providing an efficient and cost effective mechanism of dispute resolution for those cases that remain in the system, it is not so effectual. It is doubtful therefore, whether litigation could be seen to be effective in either organisational or financial terms. As such, litigation must be seen to fail Woolf's requirements for access to justice on all three heads – reasonable cost, reasonable speed and effectiveness.

Similarly, arbitration may be seen to be an efficient mechanism in certain spheres, giving to protracted proceedings in other areas. Whilst the appointment procedure of the arbitrator reportedly operates efficiently,[36] the period of time from the commencement of arbitral proceedings until the consideration of the award was considered to be a "lengthy" process, albeit that the decision making process itself was deemed to be temporally satisfactory.[37] As will become clear, the time-scale associated with arbitration is more akin to litigation than to adjudication. Perhaps this is due to the nature of disputes that seek to utilise the mechanism in comparison to adjudication. Indeed, a reason given for the protracted arbitral procedure was the complex nature of the evidence produced.[38] Nonetheless, in terms of satisfying this head, empirical data would seem to suggest that based upon user opinion of the process, arbitration is unsuccessful in providing an efficient mechanism that is

[34] See Figure 25 Chapter 6
[35] See Figures 30 – 32 and 34 Chapter 6
[36] See Figure 29 Chapter 4
[37] See Figures 34, 35 and 36, 39, 40 - 42 Chapter 4
[38] See Figure 35 Chapter 4

effective in organisational and financial terms. As such, arbitration fails to fulfill Woolf's requirements for access to justice under all three heads: cost; speed; and effectiveness.

Conversely, adjudication was seen to be more successful in creating an efficient mechanism of dispute resolution. As with arbitration, the appointment procedure was seen to be efficient and complied with the time-restraints as required by s108(2) in the majority of cases.[39] Contrary to arbitration, however, the majority of cases were concluded within the 28-day timescale, although there were a significant number of cases in which this time-scale was exceeded.[40] Adducement of complex evidence accounted for the delays, whilst simple and effective procedures and full compliance by the parties to the dispute were seen to account for the time-scale compliance.[41] Also unlike arbitration and litigation, over half of all respondents to the adjudication questionnaire reportedly perceived the procedure to be "swift".[42] Interestingly, the construction professional employed by a small organisation was statistically more likely to view this timescale as being "moderate" or "lengthy" than other groups.[43] In short, the perception of adjudication users as to the expediency of the mechanism, did not directly accord with that held by party representatives or adjudicators. Thus, in terms of satisfying this head, empirical data would seem to suggest that adjudication is successful in providing a cost effective mechanism of dispute resolution. With regard to the ability of the mechanism to resolve a dispute with reasonable speed, analysis indicates that whilst some disputes suffer from protracted proceedings, the

[39] See Figures 54 and 57 Chapter 5. It should be noted that s108(2) requires the appointment of an adjudicator and the referral of the dispute to him within 7 days of the issuing of notice of an intention to proceed to adjudication.
[40] See Figures 58, 63 and 64 Chapter 5
[41] See Figure 59 Chapter 5
[42] See Figures 60 and 64 Chapter 5
[43] See Figures 61 and 62 Chapter 5

majority of adjudication proceedings are conducted expediently and largely to the satisfaction of those engaged in the process. As such, adjudication can be seen to effective, that is, adequately resourced and organised.

## The Fifth and Sixth Criteria: Understandable and Responsive

It has already been seen in Chapter 2[44] that if a method of dispute resolution is to facilitate access to justice, then its procedure must be understandable to those parties engaging in such, and further it must be responsive to their needs. Clearly, a key requisite to such is that the dispute resolution mechanism must facilitate party autonomy with regard to the method by which their dispute is to be resolved.

As demonstrated in Chapter 6, under the CPR 1998 litigating parties and their legal representatives play an active role in the determination of procedural issues where a case proceeds to trial.[45] Thus, it would appear that litigation facilitates party autonomy in the resolution of a dispute. However, the description of court procedure as "legalistic and formalistic" complicates matters in so far as the ability of litigation to provide an effective and dynamic mechanism is concerned.[46] For if procedures are formalised and regimented, then by definition they cannot be responsive. It is also questionable as to whether legalistic and formalistic procedures are easily understandable to the lay-client utilising the process. Furthermore, whilst in possession of the ability to determine the dispute according to legal principle or other considerations, the judiciary are not taking advantage of such, preferring to resolve a

[44] See Chapter 2 at p.63 & p.98
[45] See Figure 16 Chapter 6
[46] See Figure 17 Chapter 6.

dispute on the basis of legal principle alone.[47] Thus, whether litigation can truly be described as being responsive when it is bound by the principle of case precedent is questionable. The ability of litigation to fulfil the criteria under this head must therefore be a matter of construction.

Similarly to litigation, arbitration and adjudication may be seen to fulfil the criteria for party autonomy, in that the majority of respondents reported that contractually provided principals determined arbitral and adjudication procedure.[48] Thus, it is suggested that arbitral and adjudication parties are exercising their ability to choose the source of procedure for the resolution of their dispute and as such, the procedures selected by the parties must be deemed to be understandable and responsive to their perceived future need. However, evidence of juridification may serve to undermine the full benefit that may have been conferred by true independence from litigious proceedings. For the description of both arbitral and adjudication procedure as "adversarial" and "legalistic and formalistic" [49] serves to undermine any robust contention that arbitration and adjudication are understandable and responsive mechanisms. Whilst the commercial background of the majority of arbitrators and adjudicators[50] may serve to temper the formulism with which proceedings are conducted, as with the judiciary, arbitrators and adjudicators are not taking advantage of their ability to determine the dispute according to legal principle or other considerations. Rather, disputes are being resolved according to legal principle.[51]

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[47] See Figure 35 Chapter 6.
[48] See Figure 23 Chapter 4 and Figure 47 Chapter 5 respectively
[49] See Figure 27 Chapter 4 and Figures 50 and 52 Chapter 5 respectively .
[50] See Figures 30 – 32 Chapter 4 for arbitration. It is interesting to note that lawyers were statistically more likely to experience an arbitrator of a legal background than non-lawyers. See Figure 55 Chapter 5 for adjudication. It is interesting to note that adjudicators were statistically more likely to describe adjudicators as being of a construction background than other groups. See Figure 56.
[51] See Figure 43 Chapter 4 and Figures 65- 67 Chapter 5.

Given the striking similarities between litigation, arbitration and adjudication under this head, it is doubtful whether arbitration and adjudication can be said to be free from litigious influence and thus they cannot be said to be truly responsive and understandable methodologies.

## The Seventh Criteria: Certainty

As already exemplified,[52] if a mechanism of dispute resolution is to satisfy the requirement for certainty, then it must be able to facilitate the final resolution of a dispute. Evidence of a binding resolution to a dispute can be found where the rate of settlement is high and where the level of appeal is minimal.

Litigation and arbitration can be seen to satisfy the criteria for certainty. It has already been demonstrated that litigation under the CPR 1998 facilitates settlement in many cases.[53] Furthermore, the level of appeal is relatively low in that 76% of respondents reported that under 10% of Judicial Awards result in appeal.[54] Arbitration fared better, with 63% reporting that less than 5% of Arbitral Awards result in appeal.[55] Satisfaction with the appeal rates was also high, with over 80% of litigation and adjudication respondents recording the rate of appeal as being "satisfactory".[56] Thus, not only may litigation and arbitration be seen to satisfy the need to provide a final and binding resolution to a dispute, but the rate of satisfaction amongst parties to court and arbitral proceedings would seem to suggest that only the

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[52] See Chapter 2 at p.67 & p.99
[53] See Figures 22 and 23 Chapter 6
[54] See Figure 37 Chapter 6
[55] See Figure 45 Chapter 4
[56] See Figure 38 Chapter 6 and Figure 46 Chapter 4. Interestingly, arbitrators are statistically more likely to be satisfied with the rate of appeal than other groups. See Figures 47 - 48.

most deserving of cases are granted leave to appeal. As such, litigation and arbitration may also be seen to satisfy the public justice aspect of certainty. Where needed, justice is done and is manifestly seen to be done.[57]

The situation with regard to adjudication is a little more complex, however. Whilst over 74% of respondents stated that under 5% of adjudication Decisions are referred for a final resolution,[58] when analysed in accordance with base employment group status, it was discovered that whilst adjudicators reported such a view, lawyers were statistically more likely to perceive the referral rate as being higher.[59] In short, from analysing the responses by base employment group, it would appear that where a lawyer is engaged in the adjudication process, the referral of an adjudicators Decision is more likely and as such, adjudication is less likely to achieve a final resolution to the dispute.

Furthermore, when questioned as to the destination of a disputed decision, although the majority of respondents reported that an adjudicator's decision was referred to Court, over one quarter of respondents reported that a dispute was referred to arbitration for a final resolution.[60] As illustrated above, arbitral Awards may be appealed. Thus, the spectre of a single dispute being referred to three separate forums for resolution is a reality in some instances. [61] Such a prospect must be tempered however, by the fact that satisfaction with the rate of appeal from a Decision was

[57] As required by Lord Hewart in *R v Sussex Justice ex p McCarthy* [1924] 1 KB 256 at p.259
[58] See Figure 71 Chapter 5
[59] See Figures 72 and 73 Chapter 5.
[60] See Figure 77 Chapter 5. It should be noted that adjudicators were more likely to report their decisions as being referred to Court than other groups. See Figures 78 and 79.
[61] Such a phenomenon was illustrated as a concern in Chapter 2 at p.100

high.[62] Whilst 20% of respondents returned a view that it was "unsatisfactory", it can be seen from Figures 75[63] and 76[64] that the base employment group of lawyer was statistically more likely to return such a view than other groups. Thus, there would appear to be a divergence between the views of the users of the adjudication process and the opinions of their legal representatives. Notwithstanding such, from a broad perspective it can be seen that adjudication, as with litigation and arbitration, can be seen to satisfy the need to provide a final and binding resolution to a dispute in the majority of cases.

## The Future of Dispute Resolution in the Construction Industry

From the analysis above, it is patently clear that litigation, arbitration nor adjudication can be seen to comply with each of Woolf's eight criteria for access to justice. Given Woolf's intention that each of the eight criteria must be fulfilled for access to justice to be facilitated, reform is needed if the construction industry is to be adequately served.

### Litigation, Arbitration & Adjudication – The Limitations in Focus

Turning to consider litigation, whilst it may prima facie satisfy the need for a fair procedure and just result and whilst it may facilitate certainty in the resolution of a dispute, litigation was only able to partially fulfil the criteria for an expedient resolution to the dispute by virtue of the fact that it facilitates settlement in the

[62] See Figure 74 Chapter 5
[63] At Chapter 5
[64] Ibid

majority of cases. Indeed, when examining the duration of a case that proceeds to full trial and the impact of such duration upon disputing parties, it is clear that litigation lacks expediency. When coupled with the financial impact of proceedings, litigation cannot be said to be effective in terms of organisation and resourcing. Whether litigation can be seen to be understandable and responsive is also a matter of construction in that whether "adversarial" and "legalistic and formalistic" methods of dispute resolution are comprehensible to the layperson is disputable.

With regard to arbitration, as with litigation the arbitral process was prima facie seen to facilitate a fair procedure and a just result, together with facilitating certainty in the resolution of a dispute. However, as with litigation, arbitration also failed to facilitate a cost effective and expedient mechanism of dispute resolution and cannot therefore be said to afford efficiency. Empirical evidence would seem to suggest that the reason for such protracted proceedings and hence escalating costs, is the complex nature of disputes that proceed to arbitration, together with the fact that arbitral parties must bare the full financial burden of proceedings. Furthermore, by definition, the permeation of juridification throughout the arbitral mechanism will necessarily impact upon the duration and cost of proceedings, serving to undermine the clarity and responsiveness of the procedure to those engaged in the process.

In relation to adjudication, the only criterion that the mechanism substantially failed to achieve was to provide an understandable and responsive procedure. This was largely due to the impact of juridification upon the process, which created a legalistic and formalistic procedure that was composed of litigious-minded parties and their representatives.

Thus, it can be seen that although litigation, arbitration and adjudication are by definition different methods of dispute resolution, they each succumb to similar difficulties. Set out below are the writer's thoughts on how such difficulties may be overcome.

**Education, Training & Funding - Solutions to the Difficulties?**

Since the conclusion of the primary empirical research detailed above, the writer has been fortunate enough to experience litigation, arbitration and adjudication from a "lawyers perspective". Indeed, the writer has spent some eight months working in private legal practice, during which various observations about dispute resolution in the construction industry have been made.

Over Documentation & Juridification

As demonstrated by the empirical research, the CPR 1998 failed to adequately reduce the amount of documentation that is produced in litigation proceedings. However, personal experience has shown that this "over production" is not solely limited to litigation – arbitration and adjudication also suffer from protracted proceedings caused by the over-production of "evidence".

The reasoning behind the apparent need to produce and serve such documentation is twofold. Firstly, lawyers are predisposed to seeking "tactical advantage". That is, there is a belief amongst certain sections of the legal community that to inundate the opposition with evidence, will serve to ensure that potentially damaging

documentation is missed by the other side due to the sheer volume of papers through which they must read. Furthermore, there is the widespread belief that inundating the other side with evidence will take their "eye off the ball" and will adversely affect the coherency and competency of their legal argument. Secondly, there is also the belief that when a dispute first emerges, the relevancy of particular documentation cannot be known and thus so as to ensure that all relevant documents can later be replied upon, legal representatives will disclose the majority, if not all of the documentation to hand in the opening stages of court, arbitral or adjudication proceedings.

Clearly such conduct is against the spirit of the legislative reforms affecting litigation, arbitration and adjudication and serves only to lengthen proceedings and increase the cost to the parties. The solution to such a difficulty is clear – as part of the Continuing Professional Development that solicitors are required to undertake, there should be a compulsory element focusing upon the production of evidence in proceedings. So as to ensure uniformity in approach, the Law Society should set a mandatory course content, which should include not only analytical skills in the identifying of relevant evidence to be disclosed, but should also focus upon the benefits of "considered disclosure", namely a saving to the parties in terms of time and money. Emphasis should also be placed on the fact that by streamlining disclosure and thereby dispute resolution mechanisms as a whole, solicitors will not suffer from a reduced income stream as some may fear. Rather, those individuals that were previously dissuaded from seeking the services of a solicitor due to issues of cost, will be more open to employing legal services once comfort is provided as to the expediency of dispute resolution mechanisms. This freeing up of fee earners to pursue the disputes of new clients will heighten the firm's opportunity to increase

their annual turnover – particularly when one has regard to the ability of the client to challenge their legal bill should they feel that an unjust amount of time and money has been expended on the resolution of their case.[65]

Furthermore, whilst CPD courses provided under the auspices of the Law Society presently include courses tailored to "alternative dispute resolution" and the requirements of the various "pre action protocols" it is submitted that greater emphasis should be placed upon the need to be "conciliatory" in all spheres of dispute resolution. Indeed, the evidence of juridification uncovered by the empirical research, together with observations made over the preceding eight months, has demonstrated that whilst willing to adopt arbitration and adjudication as an alternative to litigation and whilst willing to acknowledge the existence of the pre action protocols of litigation, many legal practitioners are unable to break free from their litigious and formulistic heritage. The writer has on numerous occasions heard experienced practitioners refer to arbitration and adjudication as "short form of litigation" and has further observed practitioners' advise their clients that litigation needs to be approached as if one is a "tiger" seeking to find the loopholes in the pre action protocol requirements so as to seize tactical advantage in a show of strength. These adversarial attitudes have a propensity to spill over to the lay client who then becomes a diluted version of their adversarial legal adviser.

Such aggressive attitudes towards dispute resolution can only hinder the reaching of a settlement to a dispute and cannot be in the best interests of the client. Overcoming these entrenched attitudes towards dispute resolution will not, however, be an easy

[65] See Law Society's Guide to Professional Conduct Chapter 14

task and may require strong arm tactics on the part of the Law Society to ensure that as a matter of professional conduct, pre action protocols and the rules governing ADR are followed to the letter both in terms of action and in terms of attitude. Perhaps a more successful long-term approach would be to ensure that all "student solicitors" on the Legal Practice Course understand the intricacies of the pre action protocols and appreciate the spirit of arbitration and adjudication. If the Law Society and law schools together place the need for a conciliatory approach to dispute resolution high on the agenda, then future generations of legal practitioners will positively influence the way in which disputes are managed and there will be a meaningful shift away from the juridification of disputes.

This process of de-juridification can be further enhanced by the development of an independent organisation that ranks legal practices, on a voluntary basis, according to performance in terms of fees, the time taken to resolve the dispute and the success rate. Both large and small legal firms alike could be awarded varying levels of accreditation which would inspire customer confidence, whilst simultaneously providing the law firm with an enhanced client base and marketing tool. Such a scheme would undoubtedly encourage legal practices to adopt a more client friendly approach and would focus the mind on dispute settlement, rather than dispute over-management. It would further remove any preconception that a small firm provides an inadequate or inferior service and as such would level the playing field and increase competition between service providers, further driving down the cost of legal services. This advantage alone would encourage the uptake of such a scheme amongst smaller legal practices, which account for the majority of law firms in the UK.

It would be wrong, however, to lay the blame for juridification and the over production of documentation solely at the feet of the legal adviser. As already indicated by Bingham,[66] adjudicators are beginning to conduct proceedings as if they are taking place in a court of law. Domestic arbitration is also well known to be legalistic in approach and the judiciary in some instances are failing to utilise their powers to "scale down" the formality with which court proceedings are conducted. Indeed, the writer has observed on many occasions in open court, the failure of the judiciary to reprimand parties who produce voluminous evidence, the majority of which is never called. Thus, in addition to the re-education of solicitors, arbitrators, adjudicators and the judiciary must also turn their minds to the need for reform. The nominating bodies for arbitrators and adjudicators have recently placed education high on their agenda and time will tell if their over-haul of the training regime has impacted upon the legality, formality and litigiousness with which dispute resolution mechanisms are frequently conducted.

Funding of Dispute Resolution Mechanisms – A Hurdle to be Overcome

A frequent complaint of those respondents to the empirical research was the cost incurred in pursuing arbitration, litigation and to a lesser extent, adjudication.

Significantly, financial implications go to the heart of access to justice as the distribution of legal resources can affect the outcomes of legal disputes, because the greater the legal resources available to a party, the more likely they will obtain an

[66] See Chapter 2 at page 106

award / decision in their favour.[67] It is self-evident that the quality and quantity of legal and expert assistance can greatly impact upon the persuasiveness of a case. The greater the financial resources available, the more investigative work can be undertaken and greater specialisation of legal and expert talent can be purchased. Where resources are limited, a party may be forced into accepting an inadequate out-of-court settlement or succumb to a claim which is devoid of any valid legal defence. In this context, even the "prospect" of unequal resources may affect the resolution (or non-resolution) of a dispute before proceedings have been commenced. The reason for this is that where a party to a dispute is unable to afford legal assistance, they may choose not to pursue a valid matter or raise a valid defence to a claim.

Whilst state funding of the arbitral and adjudication processes has been dismissed,[68] there are three potential alternatives which may alleviate the financial burden placed upon the parties, namely: legal expense insurance; an industry specific "dispute management" pool; and a capping system.

Turning to consider legal expense insurance, such insurance is often considered to be a tool by which access to justice is promoted, as insurance can equalise the resources between the disputing parties. Any tactical advantage that may be gained by one party wielding its financial might over a less wealthy competitor is thereby reduced, consequently putting all parties to a dispute on a "level playing field".

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[67] See Wertheimer "The Equalisation of Legal Resources" (1988) 17 *Philisophy and Public Affairs* 4 p.303

[68] See Chapter 2 at pages 74 -75 and 104 - 105

There are two types of legal expense insurance that may be enjoyed by businesses in the UK: before the event insurance; and after the event insurance. Before the event insurance is as its name suggests purchased by a business before a dispute has arisen. Such insurance can be purchased direct from an insurer either as part of a specific legal expense insurance package, or as part of a more generalised insurance package for example "contents insurance". Alternatively, before the event legal insurance can be purchased as part of a "legal scheme" operated by a firm of solicitors for example. In this scenario, in return for an annual fee the law firm typically offers the client a helpline facility which is underwritten by insurance should the client need to pursue arbitration, litigation or adjudication to resolve their dispute.

Whilst such schemes initially sound attractive, there are limitations to their usefulness. The first limitation is the cost of the insurance premium. Economic theory supports the proposition that those businesses seeking insurance are most often those businesses that will need to take advantage of it. Furthermore, once in receipt of insurance cover, businesses often adopt a more hostile manner to dispute resolution than they otherwise would if funding the proceedings themselves. This dual process of "adverse selection"[69] and "moral hazard"[70] means that insurance companies recognise that the incentives of policyholders change once insurance is purchased, leading to an increase in insurance premiums.[71] In short, due to cost, before the event legal expense insurance is often beyond the reach of the small enterprise – and in

[69] See Beynon, Davies and Moore "Intellectual Property and Legal Expense Insurance" (2003) IP Wales
[70] See Lanjouw and Lerner "Tilting the Table? The Use of Preliminary Injunctions" (2001) 44 *Journal of Law and Economics* 573; Wachman "LEI Market Sees a New Dawn" (1996) 10 *Lawyer* 39
[71] See Mayers and Smith "Contractual Provisions, Organisational Structure and Conflict Control in Insurance Markets" (1981) 54 *The Journal of Business* 3 at p407

terms of the construction industry in particular, is often beyond the reach of the majority of construction firms.

Even those firms that are fortunate enough to be able to afford the insurance premium have another hurdle to overcome before they can be assured that their legal expenses will be met – the "reasonable chance of success" clause. The reasonable chance of success clause is a term of most legal expense insurance policies and it does serve a legitimate purpose in that it ensures that insurers do not have to meet the cost of pursuing frivolous or outlandish claims. However, as it is often the legal adviser to the insurance company that assesses the merits of a case, it is not unreasonable to suspect that insurers "find a way to evade their responsibilities".[72] Indeed, it is important to note that the reasonable chance of success clause does not only apply to when a claim is first made, but it applies to any time during dispute resolution proceedings. This means that having commenced litigation proceedings for example, should the insurer consider that the chances of success have reduced, then the party to the dispute can be left without insurance cover and will have to meet the cost of continuing the litigation themselves. Conversely, should the same party wish to settle the dispute outside of court, unless otherwise agreed by the insurer, the party may be left without compensation. However, perhaps the biggest challenge to specific before the event legal expense insurance is that it is presently an unproven product. As with all new products, a period of gestation will be needed before any measurable effect can be seen. As such, judgement must temporarily be reserved as to the benefit it may offer to construction professionals in the financing of their dispute management programmes.

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[72] See Serjeant "Intellectual Property Patinova '99" (1999) 28 Chartered Institute of Patent Agents Journal Issue 11 p989

The second type of insurance available to construction professionals is "after the event" insurance, which as its name suggests, is purchased once a dispute has already arisen. Whilst this type of insurance is also subject to the above influencing factors, it does have the advantage in that under s29 of the Access to Justice Act 1999, the insurance premiums incurred in after the event insurance policies can be recovered from the other side at court. Thus, the small sub contractor facing a dispute, who has a reasonable chance of succeeding in his case, may well be better served by seeking after the event insurance, as opposed to before the event cover.

Of course, adopting such a strategy is risky in that the business may well find that it is faced with a dispute that for whatever reason, is in the opinion of the insurance company condemned to failure. For example, despite the chances of a successful action, where the benefit to the insurance company in pursuing the case is limited, cover is unlikely to be provided. In such a scenario, whether or not the sub contractor could in fact successfully defend / pursue his case, he will be left without a policy that will meet his legal expenses and as such must fund the proceedings himself. It is not inconceivable that when faced with such, the party to the dispute may forgo a valid legal defence or a legitimate legal claim. Thus, whilst there is a place for legal expense insurance in the construction industry, it is by no means a panacea to the issue of funding.

A potentially more successful solution to the funding problem is that of the "dispute management pool". This is a scheme whereby a national organisation such as the Construction Industry Council,[73] takes an annual fee from its members in return for "dispute resolution services". In other words, all members of the scheme are bound to resolve their disputes by way of adjudication. In return for following the code of conduct of the scheme, the scheme would provide free venue hire and would provide the services of the scheme's retained adjudicator without cost to the parties. This would greatly lessen the cost associated with pursuing adjudication and would increase access to justice for the majority, as opposed to a smaller proportion of the construction industry as is presently the case.

Where a dispute arises between a member and a non-member and where the member has a reasonable chance of success, then the Scheme would also fund the reasonable costs incurred in litigating the dispute. This would remove any incentive for companies to opt-out of the scheme and it would reduce the aggressiveness of those parties who believe that financial strength is a tactical advantage.

Of course, the success of such a scheme does depend upon the annual fee being set at such a rate that the small sub-contractor, who accounts for the majority of British construction firms, can afford. One possible solution would be to graduate the annual fee so that larger firms, who have a greater profit or some other such suitable criteria, pay slightly more than those firms who have a lower profit. This graduated fee structure is justifiable on the basis that due to an increased rate of business activity, one would expect larger firms to be more likely to incur disputes than those firms who

[73] The CIC has a collective membership of 500,000 individuals and 25,000 firms of construction consultants

are engaged in less business activity. This is particularly true of businesses that are engaged in numerous sub-contracts.

An alternative to either of the above notions would be to put a cap on legal resources expended in the resolution of a dispute. Under this proposal, where expenses are likely to exceed £10,000 for example, a capping system would take effect whereby each side's expenses must remain within a fixed percentage of the other.

As is presently required by Law Society rules,[74] at the outset of the proceedings and after a prima facie examination of the case, the legal adviser for each party would be required to provide a realistic estimate (time and materials) as to how much the legal costs are likely to be. The capping system comes into effect, in that where the expected costs exceed £10,000, provided both parties concur, then the higher estimate becomes the cap value which neither side may exceed beyond an acceptable tolerance, without express permission of the court. Where there is no agreement to accept the higher estimation as the cap value, then the lower of the estimations becomes the cap and again an acceptable tolerance is applied. The purpose of the tolerance is to provide law firms with an acceptable margin of error when providing an estimation of cost, as opposed to being carte blanche to exceed the agreed cap.

A variation of this would be to say that whilst the initial estimate is to be the "target" within which the costs should be confined, provided regular financial disclosure has been made between the parties and their final costs do not significantly diverge, then the exceeding of the cap is permissible without prior reference to the court.

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[74] See Law Society's Guide to Professional Conduct Chapter 13

One might imagine that under such a system, lawyers will artificially inflate their costs so as to increase revenue and provide a comfort margin. However, the laws of supply and demand will apply and when supplying an estimate for the purposes of the capping system, the risk of losing the potential client to an equally effective competitor will force the cost of the service to its true market value.

Whilst such a scheme would not prevent legal fees from escalating, it would prevent the situation whereby one party's expenditure is significantly greater than the other. This would ensure that all parties to the dispute are able to purchase a similar quality of legal provision and given that the British construction industry predominantly consists of sub-contractors, such a level playing field is necessary if access to justice is to be facilitated. Such a scheme would also encourage legal service providers to ensure that they deliver what they are contractually obliged to – an expedient and cost effective dispute resolution service. Indeed, the actual cost of dispute resolution would be reflective of the initial estimated cost and the client would have greater confidence in the economic value of the proceedings. Client confidence in the legal profession would be further enhanced if such a system were to be operated in conjunction with the ranking system described above – those lawyers who deliver within their stated costs would be immediately recognisable.

The disadvantage to such a scheme is that larger construction firms usually have "in-house" legal services and thus the quantification of their legal expenditure in a dispute scenario would be more difficult to calculate due to "hidden costs". Thus, if a capping system were to be employed, specific rules would have to be drafted with

reference to how time and money is to be calculated where parties employ in-house legal resources, as opposed to purchasing external legal services.

## Further Research

So it can be seen that whilst arbitration, adjudication and litigation presently suffer from issues of both juridification and cost, these difficulties are not insurmountable due to the raft of potential reforms open to the construction industry. Whether the above proposals for reform would provide the answer, is a question that can only be determined by specific and extensive legal and economic research.

Given the focus of this work on access to justice, a further question arising out of the empirical research is whether the cost expended on the resolution of a dispute does indeed equate to success. It is indisputable that the ability to fund a dispute impacts upon the *ability* of a party to either bring or defend proceedings. However, it is less certain as to whether employing expensive legal services affect the chances of *succeeding* in bringing or defending a claim. If there is a link between expenditure and success, then the idea of a capping system gains further credence in that one party to a dispute will be prevented from "buying victory." If there is not such a link, then the issue becomes one of "enabling" parties to purchase expert representation, as opposed to ensuring that the representation purchased is of equal financial value.

In light of the Iraq war and the subsequent greater involvement of smaller British construction businesses in international redevelopment, a further issue for research is the comparison of domestic dispute resolution to international methodology. In

particular, one might question whether those businesses engaged in international contracts have a predisposition towards a particular method of dispute resolution and whether their preference is affected by whether the dispute is an international or domestic dispute.

Whilst it is beyond the scope of this work to consider such points in detail, their examination is a necessary building block that will further facilitate the understanding of dispute resolution and its influencing factors in the United Kingdom.

## Methodological Evaluation

The empirical research conducted by this work has focused upon primary quantitative analysis, with qualitative research methodology being employed at the design stage of the research and also following completion of the final research tranche so as to clarify with respondents any ambiguous or interesting points arising out of their replies to the questionnaires.

The reasoning behind such an approach is that whilst recognising the need for qualitative research to give direction and focus to the initial design of the questionnaires, in the final research tranche the writer was keen to obtain information that would facilitate a robust statistical analysis of dispute resolution in the construction industry. Hence qualitative data was of secondary importance to quantitative research findings.

Although not initially intended, fortuitous circumstances have also enabled the writer to conduct covert-observation methodology. That is, since the conclusion of the empirical research, the writer has been in the position to observe the conduct of legal practitioners in the resolution of disputes without impacting upon their behaviour. These observations have been used to inform the various proposals put forward for reform.

Whilst such methodology is robust and has delivered the results sought, upon reflection there are two potential modifications to the methodology that could have been made: the use of semi-structured interviews; and the conducting of a longitudinal study.

It is accepted that in addition to quantitative research, semi-structured interviews may also have contributed to the fabric of the research. This is because semi-structured interviews can be used to elicit more detailed and occasionally more sensitive information than may otherwise be collated by way of electronic or postal questionnaire. There are however, limitations to semi-structured interviews, namely that of "interviewer bias". This is where the interviewer inadvertently or deliberately influences the responses to the questions posed, either by tonal inflections in the way questions are phrased, or by body language. For this reason, semi-structured interviews were not incorporated into the research, although their potential contribution is recognised and accepted.

Further, with time-permitting, the conducting of a longitudinal study would also have been of interest. As rather than supplying a snap shot of dispute resolution, one could have documented any temporal changes witnessed in the various methods of dispute resolution and sought to establish a link between such changes and external factors. To be of recognisable value, however, an interlude of approximately five years between each research tranche would have been necessary – a practical impossibility to the work in hand. Further, one would have to implement safeguards to prevent the situation whereby respondents to the study are depleted over time, thereby affecting the validity of the findings.

Thus, whilst the research methodology employed may have been modified and enhanced in a number of ways, the methodology used was by no means "deficient" and therefore the results generated may be relied upon as being of genuine statistical significance.

## Concluding Remarks

It is clear from the theoretical evaluation and empirical research into arbitration, adjudication and litigation that reform is needed if dispute resolution in the United Kingdom is to facilitate access to justice.

In the inaugural Barlow Lyde & Gilbert Litigation Lecture, Lord Woolf[75] warned that:

> "slowly but surely, step by step, we are introducing the complexity that the civil procedure rules [were] meant to get rid of"

[75] See "Woolf Get Tough Plea" (2006) *Gazette* p.6

Lord Woolf went on to comment that although litigation is becoming the mechanism of last choice, the court system remains too expensive and the scale of litigation being conducted is now a process of injustice.

Such a high profile call for change may initiate a further round of reform, although as Lord Woolf himself acknowledged, it is the attitude of those engaged in dispute resolution proceedings that needs to change, as opposed to procedural reform being passed.

Should this call for difference mark an attitudinal change on the part of the judiciary, arbitral tribunals, adjudicators, legal practitioners and their lay clients, then the British construction industry will have witnessed the biggest reform yet. As to whether such an attitudinal change will be achieved – only time will tell.

# ANNEXE 1: RESULTS OF THE RESEARCH UNDERTAKEN BY THE CONSTRUCTION INDUSTRY COUNCIL

## The Mechanics of Adjudication

As exemplified by Figure 1, the median level of fee being charged by adjudicators at the end of 2001 was the category £81 to £100 an hour.

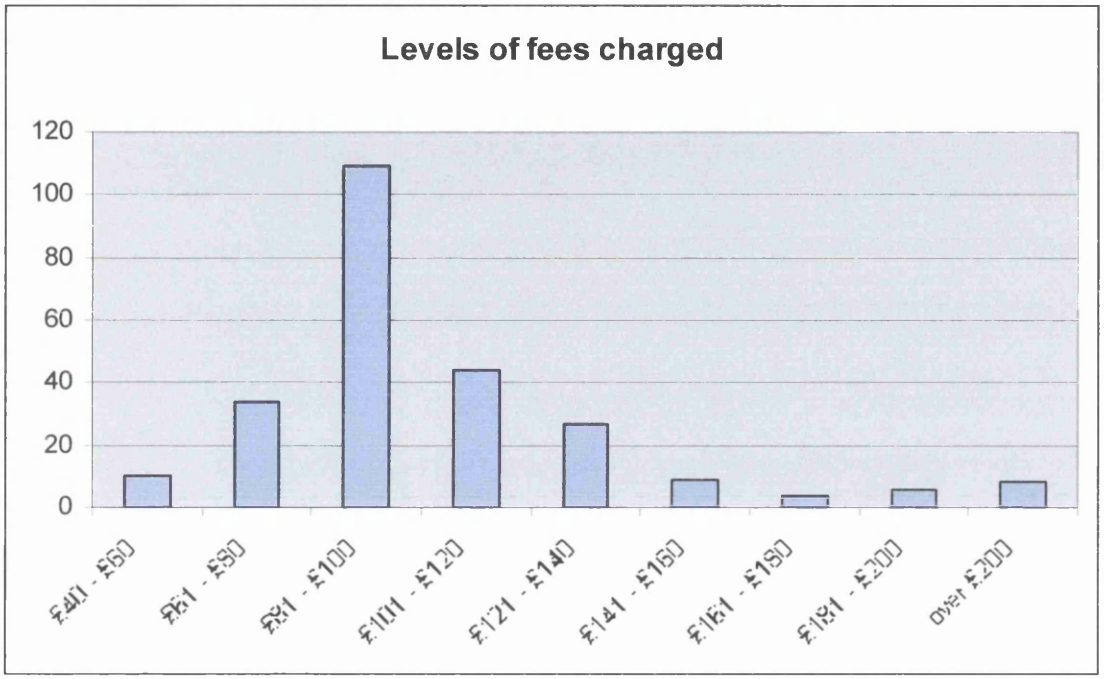


*Figure 1*

Evidence as to the possible circumvention of the spirit of adjudication can be seen in Figure 2. For when questioned, adjudicators reported 66 occasions in which they encountered "oppressive terms" in the adjudication contract.[1] Thus, 3% of all adjudication decisions were made on the basis of an oppressive agreement.

[1] For example, the referring party pays both parties costs whatever the outcome.

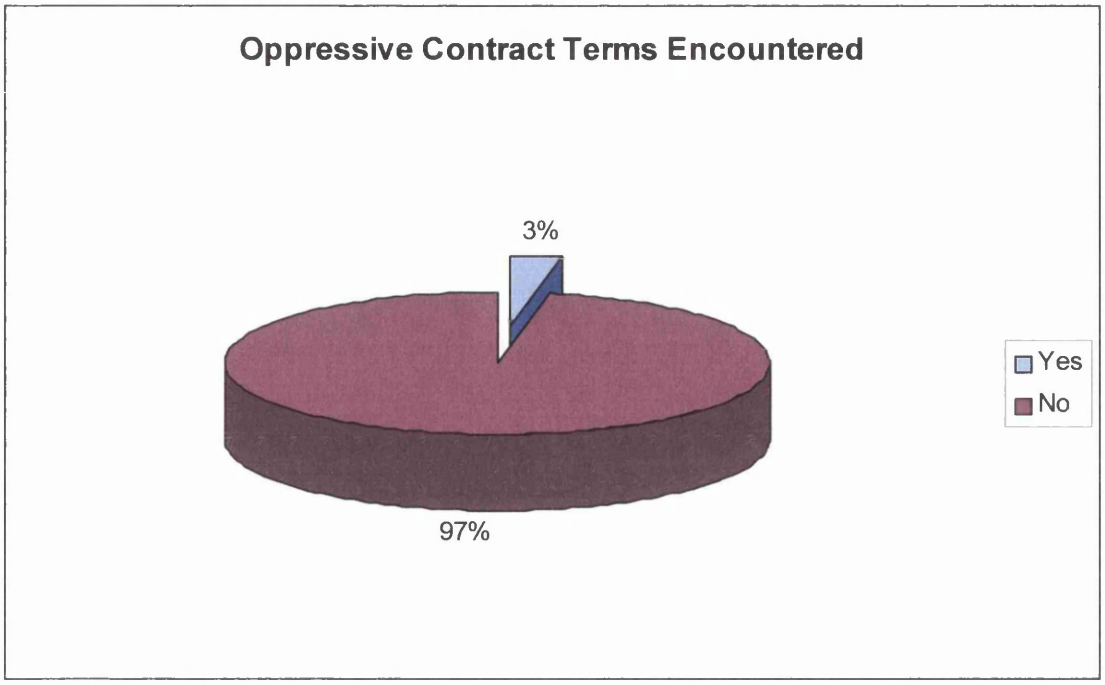


*Figure 2*

As exemplified in Figure 3, adjudicators reported seeking legal or technical advice or using a legal or technical assessor in 193 adjudication proceedings. Thus, 9% of decisions were formulated on the basis of third-party expert opinion.

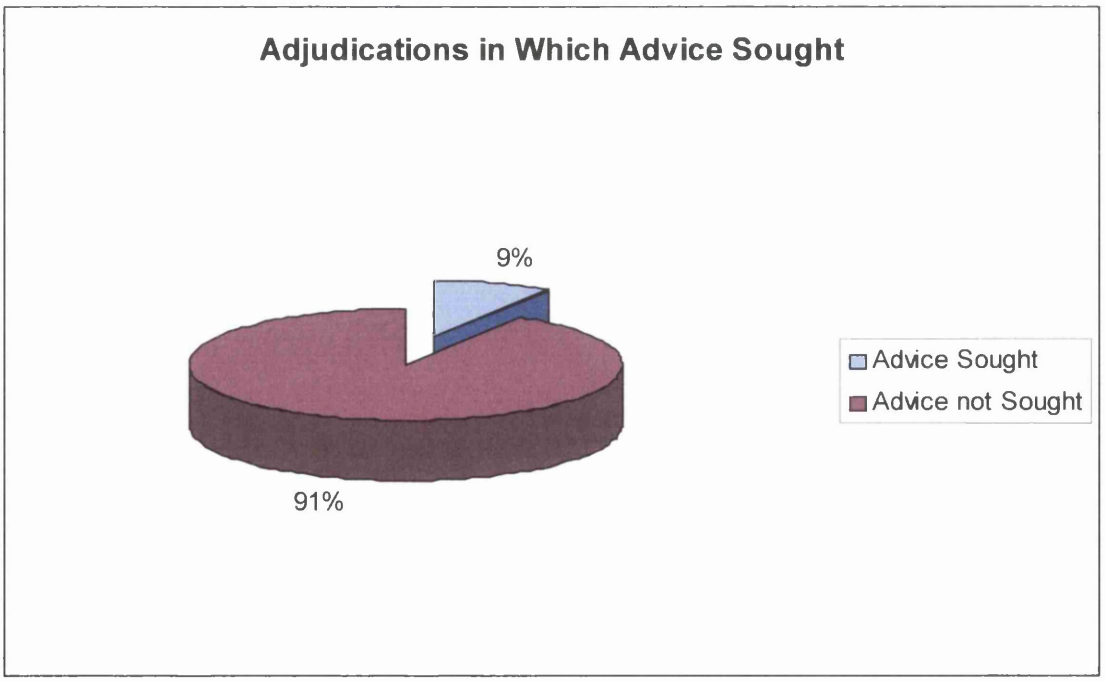


*Figure 3*

Figure 4 provides evidence to suggest that the majority of adjudications proceed on a document only basis. For only in 41% of cases were meetings convened.

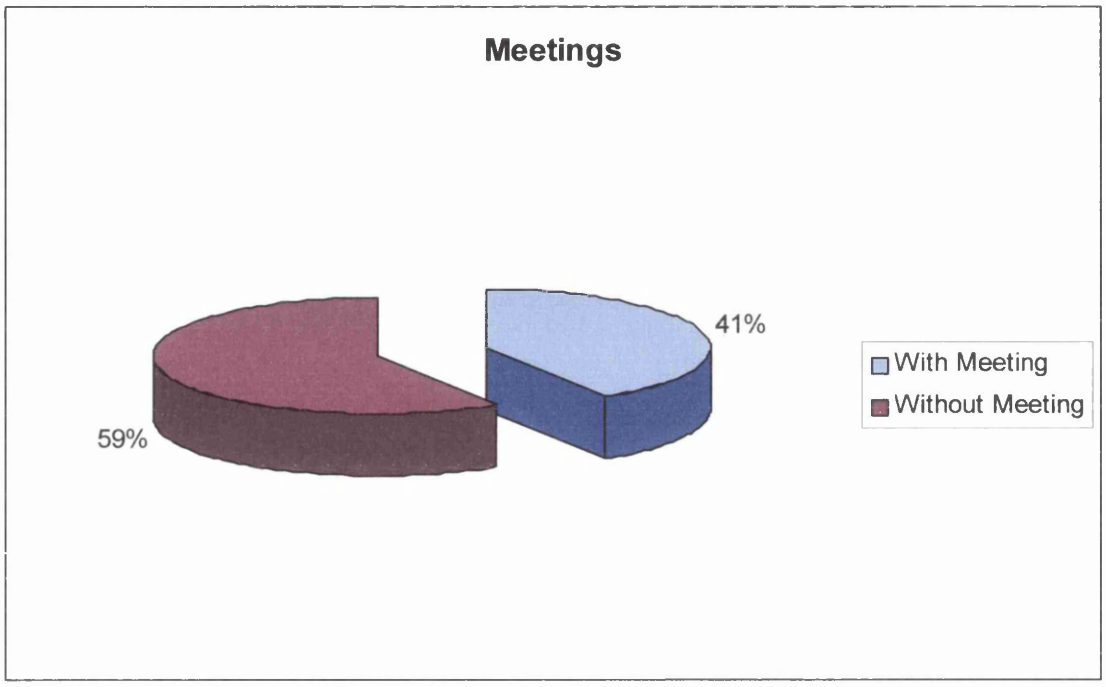


*Figure 4*

## The Nature of Disputes

It can be seen from Figure 5 that in 78% of adjudications, the amount in dispute was £200,000 or less.

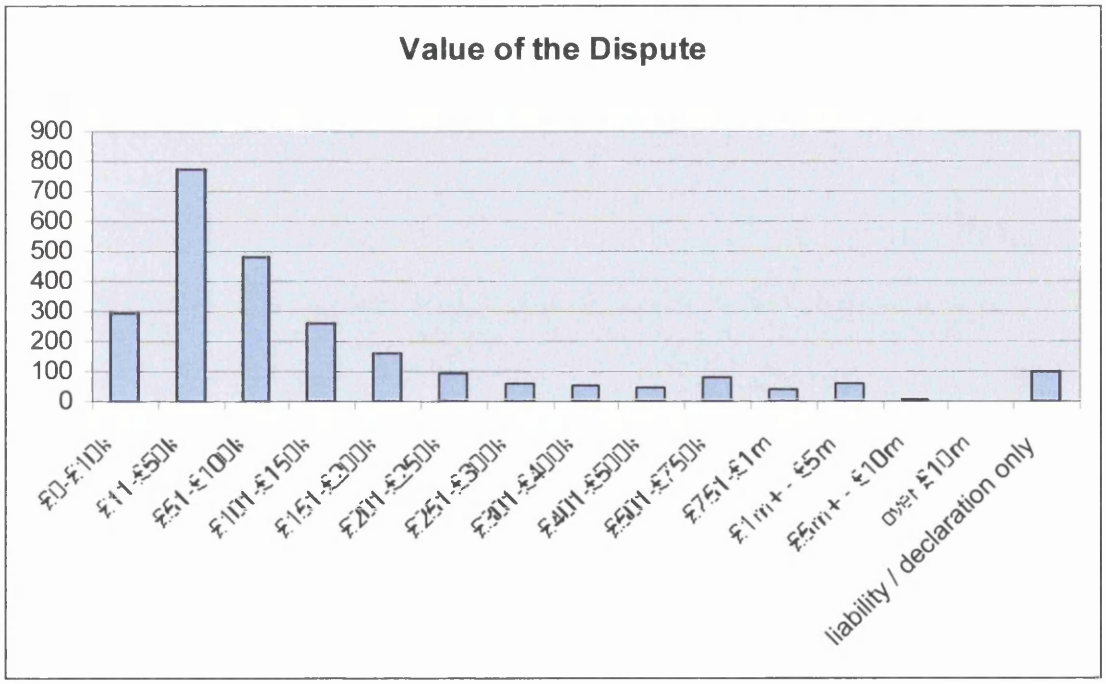


*Figure 5*

As exemplified by Figure 6, disputes proceeding to adjudication are varied in their context. Aside from payment disputes, the matters most frequently in contention are variations; loss and expense; extension of time; and points of law.

However, it was reported by respondent adjudicators that 73% of their workload involved allegations of non-payment under Sections 109-113 of the Act.

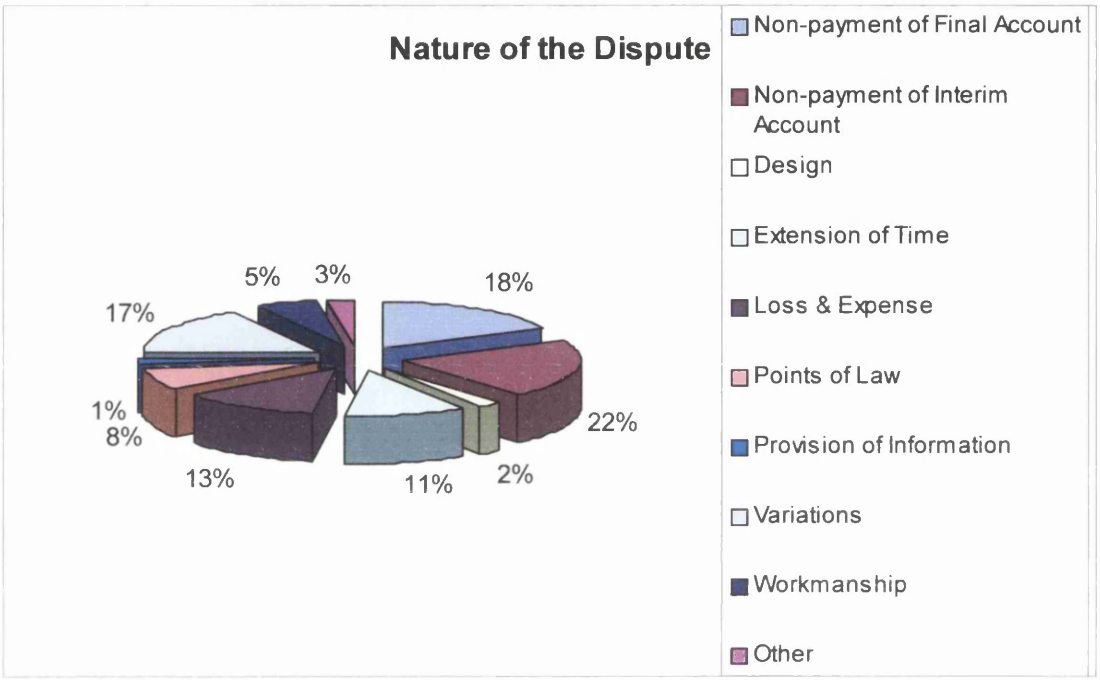


*Figure 6*

Figure 7 exemplifies that in 81% of adjudications, the referring party was lower in the contractual chain than the party against whom the reference was made. Indeed, the largest number of references has been made by the sub-contractor against the contractor, followed by the contractor against the employer.

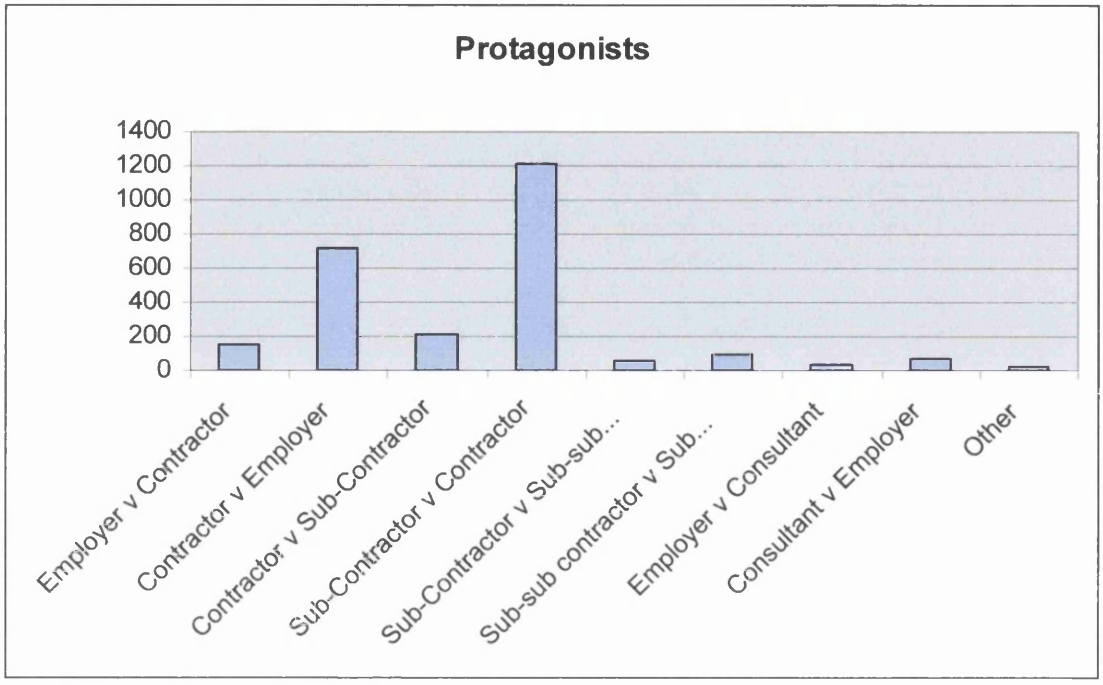


*Figure 7*

## The Decision of the Adjudicator

Figure 8 provides information on the ways in which adjudication proceedings are brought to an end. It can be seen that whilst in the embryonic stages there was little difference between the numbers of proceedings that concluded due to a decision[2], abandonment[3] or non-adjudication[4], by the end of 1999 a vast difference had emerged.

Indeed, by September 2001 79% of adjudications proceeded to decision, with just over 11% of proceedings being abandoned and little more than 9% resulting in non-adjudication.

[2] Decision means a decision written by the Adjudicator
[3] Abandoned means abandoned or settled at a late stage before writing the decision
[4] Non-adjudication means abandoned or settled at an early stage before proceedings really commenced

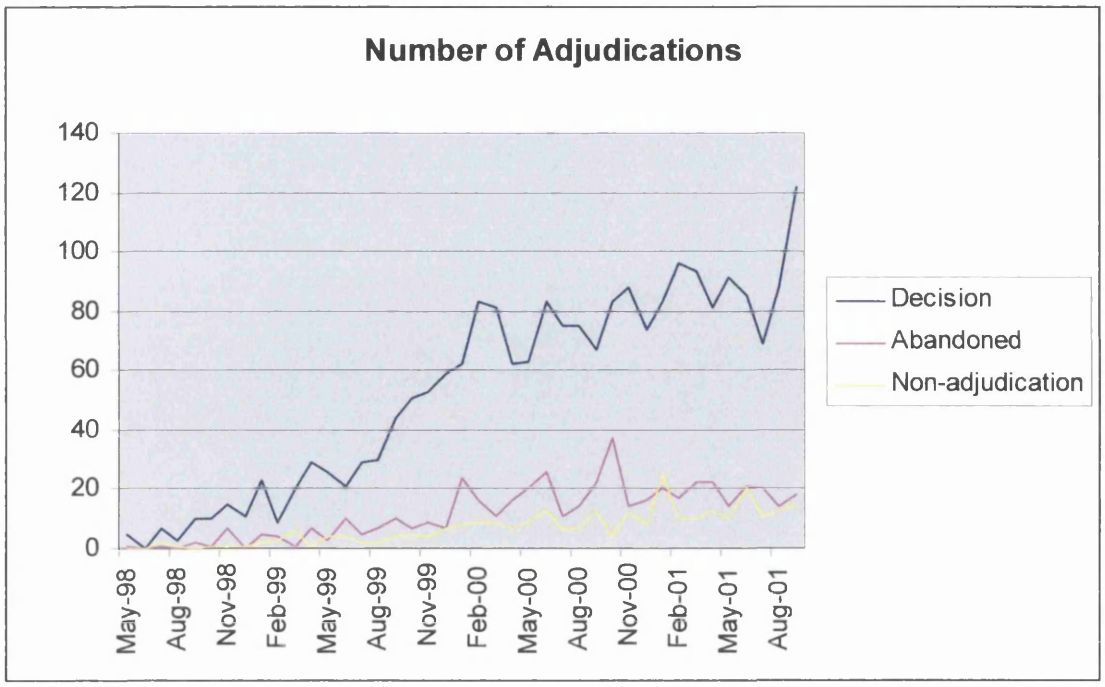


**Figure 8**

As exemplified by Figure 9, most adjudication proceedings are completed within the statutory 28-day timescale. For in 76% of proceedings, the adjudicator completed his task in forty hours or less.

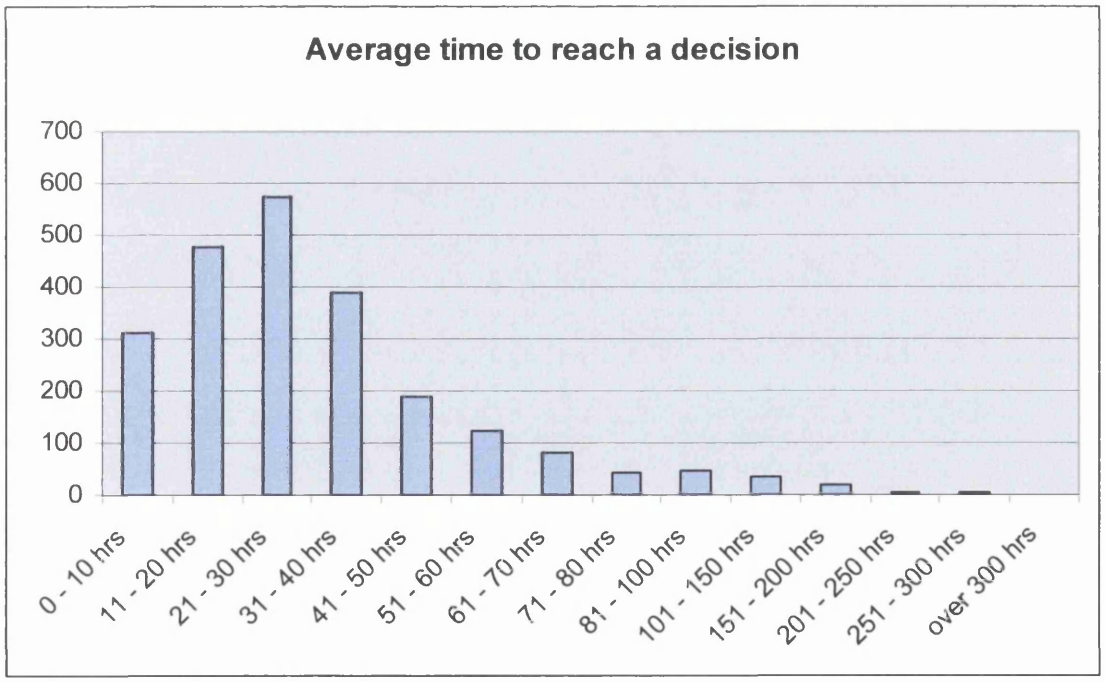


**Figure 9**

Adjudicators were asked to recount the number of occasions in which their decision broadly favoured the referring party, the responding party, or both parties to the proceedings. As exemplified by Figure 10, there were 1470 instances[5] in which decisions were granted in favour of the referring party. Only in 295 cases did the adjudicator reach a split decision.

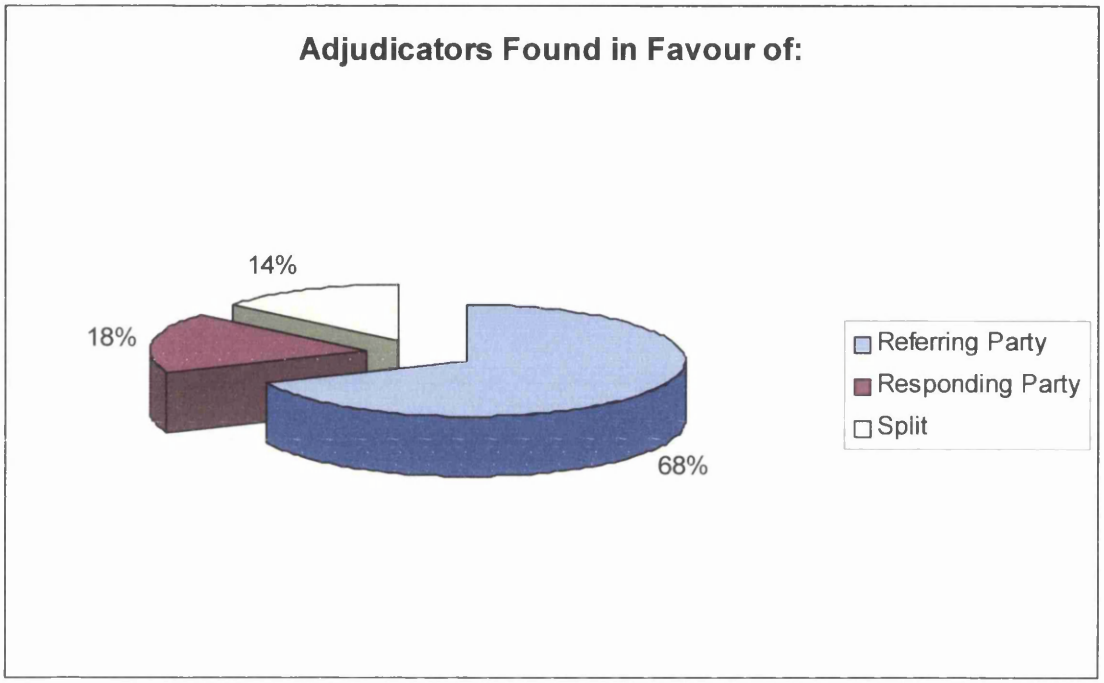


*Figure 10*

As can be seen in Figure 11, in 73% of proceedings the adjudicator provided the parties with the reasoning behind their decision.

[5] 68% of decisions

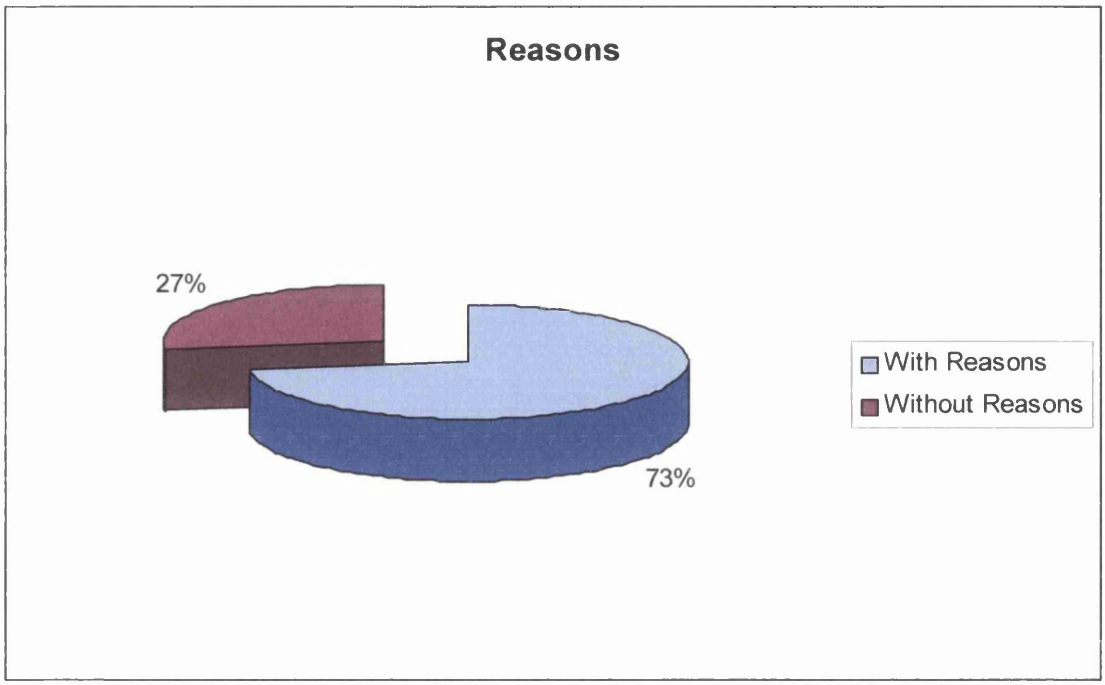


*Figure 11*

## Finality of the Adjudication Award

Upon the introduction of the Construction Act, concern was expressed as to the finality of adjudication proceedings. However, as illustrated by Figure 12, that concern has yet to come to fruition. For in only 18% of nominations were jurisdictional challenges launched.

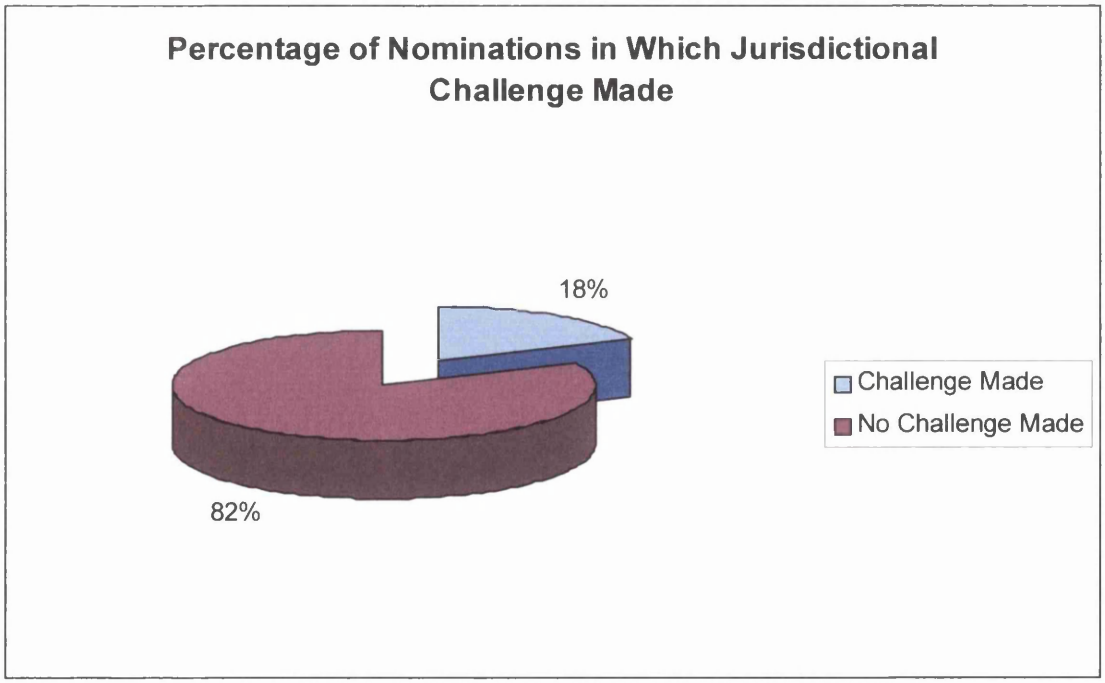


*Figure 12*

Such a contention is further supported by Figure 13, which demonstrates that there was only 90 reported incidences of complaint concerning the conduct of the process or the decision made. Thus, only 4% of decisions were considered by the parties to be objectionable.

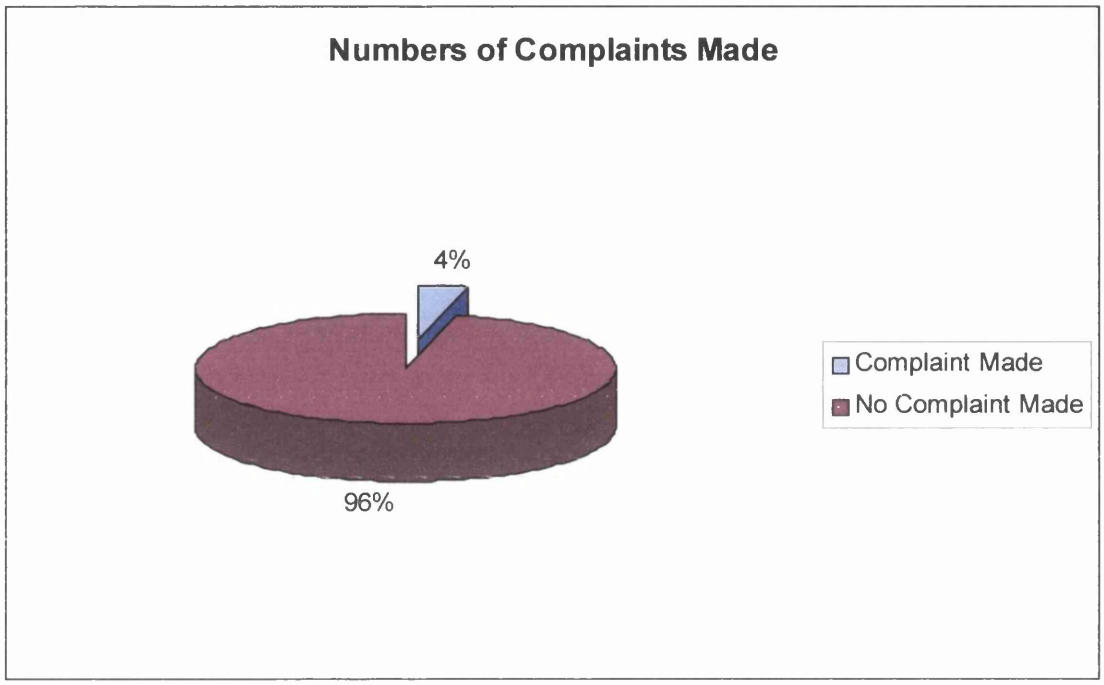


*Figure 13*

# ANNEXE 2: RESULTS OF THE RESEARCH UNDERTAKEN BY CALEDONIAN UNIVERSITY

## Feedback from the Adjudicator Nominating Bodies

As exemplified by Table 1, since the introduction of the Construction Act in 1998, the Association of Independent Construction Adjudicators (formerly the Academy of Construction Adjudicators) has been the most frequently utilised Adjudicator Nominating Body, with the Chartered Institute of Arbitrators following in second place.

Moreover, whilst the number of adjudicators registered with Adjudicator Nominating Bodies stabilised around mid-2000, the latter half of 2001 to early 2002 witnessed a slight increase of just below 3% in the number of registered adjudicators.

| Adjudicator Nominating Body | May 1999 | August 1999 | February 2000 | August 2000 | February 2001 | April 2001 | May 2002 |
|---|---|---|---|---|---|---|---|
| *Association of Independent Construction Adjudicators** | 200 | 219 | 202 | 209 | 182 | 182 | 194 |
| *Chartered Institute of Arbitrators* | 105 | 105 | 120 | 130 | 147 | 147 | 147 |
| *Confederation of Construction Specialists* | 25 | 30 | 25 | 30 | 30 | 32 | 25 |
| *Construction Industry Council* | 95 | 95 | 83* | 138 | 142 | 146 | 170 |
| *Institution of Chemical Engineers* | 5 | 5 | 5 | 5 | NR | NR | NR |
| *Institution of Civil Engineers* | 79 | 79 | 84 | 84 | 84 | 81 | 80 |
| *Royal Institute of British Architects* | 59 | 61 | 75 | 73 | 71 | 69 | 70 |
| *Royal Institution of Chartered Surveyors* | 72 | 72 | 72 | 94 | 104 | 112 | 107 |
| *3A's Polycon AIMS Ltd* | 36 | 36 | 36 | 36 | 36 | 36 | 33 |
| *Institution of Mechanical Engineers* | 8 | 8 | 8 | 2 | 2 | 2 | NR |
| *Chartered Institute of Building* | 10 | 20 | 46 | 49 | 46 | 46 | 53 |
| *Construction Confederation* | 60 | 60 | 65 | 47 | 40 | 56 | 43 |
| *Scottish Building* | 8 | 8 | 11 | 11 | 11 | 11 | 12 |
| *Royal Incorporation of Architects in Scotland* | 19 | 19 | 21 | 22 | 22 | 22 | 14 |
| *Royal Institution Chartered Surveyors in Scotland* | 0 | 26 | 27 | 30 | 35 | 35 | 47 |
| *Centre for Dispute Resolution* | NR | NR | 40 | 40 | 48 | 48 | 48 |
| *Institution of Electrical Engineers* | NR | NR | 20 | NR | NR | NR | NR |
| *Technology & Construction Solicitors Association* | NR | NR | 60 | 114 | 117 | 117 | 128 |
| *Chartered Institute of Arbiters (Scotland)* | NR | NR | 6 | 12 | 22 | 22 | 22 |
| *The Law Society of Scotland* | NR | NR | 6 | 6 | 5 | 6 | 10 |
| *Technology and Construction Bar Association* | NR | NR | NR | NR | NR | NR | NR |
| Total | **781** | **843** | **1012** | **1132** | **1144** | **1170** | **1203** |

***Table 1 – Number of Adjudicators***

* ***Formerly the Academy of construction Adjudicators***

Moreover, as can be seen by virtue of Table 2, the primary discipline of those adjudicators nominated since August 2000, is that of Quantity Surveying. Indeed, since that date, the ranking of the top five disciplines has remained unchanged in the nomination stakes.

| Discipline | No. as at Aug 2000 | No. as at Feb 2001 | No. as at Apr 2001 | % as at May 2002 |
|---|---|---|---|---|
| *Quantity Surveying* | 458 | 467 | 481 | 30.9 |
| *Lawyers* | 227 | 212 | 234 | 24.0 |
| *Civil Engineers* | 155 | 213 | 234 | 15.6 |
| *Architects* | 125 | 119 | 132 | 8.3 |
| *CIOB/Builders* | 38 | 47 | 45 | 3.6 |
| *Project Engineers* | 19 | 1 | 1 | 0.7 |
| *Construction Consultants* | 13 | 9 | 6 | 2.7 |
| *Structural Engineers* | 12 | 18 | 17 | 2.3 |
| *Mechanical Engineers* | 11 | 7 | 13 | 2.8 |
| *Specialist Constructors* | 9 | 0 | 0 | 0 |
| *Building Surveyors* | 9 | 10 | 19 | 2.3 |
| *Electrical Engineers* | 7 | 3 | 4 | 2.7 |
| *Chemical Engineers* | 6 | 1 | 1 | 0.1 |
| *Planners* | 3 | 4 | 4 | 0.8 |
| *Project Managers* | 3 | 2 | 4 | 1.4 |
| *Materials Testing / Quality Inspectorss* | 3 | 3 | 3 | 0.7 |
| *Contracts Consultants* | 2 | 0 | 23 | 0.6 |
| *RTPI* | 2 | 1 | 1 | 0 |
| *Geo Technical Engineers* | 1 | 5 | 7 | 0.4 |
| *Independent Mediator* | 0 | 1 | 1 | 0 |

***Table 2 - Primary Discipline of Adjudicators (as stated by ANBs)***

## Trends in Adjudication

As exemplified by Table 3, the period 1998 to 2001 witnessed a dramatic increase in the number of adjudications implemented by the construction industry. However, whilst there can be seen to be an initial explosion in the use of adjudication, the number of adjudications since mid-2001 can be seen to have stabilised.

| Time Periods | 14 ANBs Consistently Reporting | % Growth |
|---|---|---|
| *YEAR 1- **May 98 – Apr 99*** | 187 | - |
| *YEAR 2- **May 99 – Apr 00*** | 1156 | 518% |
| *YEAR 3- **May00 - Apr 01*** | 1869 | 62% |
| *YEAR 4– **May01 – Apr 02*** | 1924 | 3% |

***Table 3 – Adjudications by Consistently Reporting ANBs***

**Geographical Distribution**

It can be seen in Table 4 that the overwhelming majority of adjudication proceedings are located in the South of England. However, this is unsurprising given that demographically, the South of England plays host to the bulk of construction activity.

It is important to note that the Midlands region was included in the statistics as a late addition. The Adjudication Reporting Centre has stated that the Midlands figures have been mostly taken from what was previously categorised by the ANBs as North England. Thus, very little has been taken from South England figures.

It should also be noted that due to the inconsistent reporting of some ANBs as compared to the consistent reporting of the Scottish ANBs, the results of the study might be somewhat unbalanced and therefore not representative of fact.

In support of the statistics contained in Table 3, Table 4 can be seen to exemplify a significant decline in the use of adjudication nationally.

| Area | May 98- Apr 99 | May 99- Feb 00 | Mar 00 – Aug 00* | Sept 00 – Feb 01 | Mar 01 – Apr 02 |
|---|---|---|---|---|---|
| *South England* | 54 | 58 | 53.6% | 43% | 51% |
| *North England* | 33 | 28 | 23.1% | 21% | 11% |
| *Midlands*** | | | | 15% | 10% |
| *Wales* | 6 | 6 | 3.1% | 1% | 3% |
| *Scotland* | 4 | 9 | 19.7% | 18% | 24% |
| *Northern Ireland* | | | 0.5% | 2% | 1% |

* **Decimal places used to include figure from Northern Ireland**

** **Midlands added as category from September 2000**

*Table 4 – Geographical Distribution of Adjudications*

It can be seen in Table 5 that the total number of complaints made against adjudicators in the period May 2001 to April 2002, was 40. When compared to the total number of adjudications undertaken in this period, this represents a dissatisfaction rate of 2% - a rate consistent with the proceeding period.

Of the total number of complaints made, however, only 15.6% were upheld. It is contended that given the small numbers involved, such a statistic appears worse than the reality.

| Complaints Against Adjudicators | Sept 00 – Feb 01 | Mar 00 – Apr 01 | May 01 – Oct 01 | Nov 01 – Apr 02 |
|---|---|---|---|---|
| ***Complaints Made*** | 15 | 9 | 16 | 24 |
| ***Complaints Upheld*** | 2 | 1 | 4 | 3 |

***Table 5 – Number of Complaints Against Adjudicators***

The Adjudication Reporting Centre also asked Adjudicator Nominating Bodies if there was any subject or trend that they had noticed in relation to the adjudication procedures which had not been addressed in the questionnaire. Their responses to Report Numbers 4 and 5 have been summarised below:

- It was noted that there was an increase in the number of representatives being used in adjudication proceedings, for example solicitors and contract consultants.
- ICE reported examples of ambushes in December 2001
- There has been an increase in the number of challenges to the jurisdiction of the adjudicator at the appointing stage
- More disputes seem to be settled prior to notice of adjudication or appointment of an adjudicator.
- Academy of Construction Adjudicators reported that they had noted a tendency for main contractors to find ways of circumventing adjudications
- The nature of disputes being referred to adjudication are becoming more varied and in some instances, more complex
- Chartered Institute of Building reported that jurisdiction and costs remain the usual bone of contention
- Parties often are not satisfied with the 'cost' side of things. There have not been complaints of adjudicators decisions, just comments concerning the fact of why costs are not provided for in the Act

## Feedback from Adjudicators

### The Disputing Parties

As can be seen in Figure 6, main contractors and their domestic subcontractors are the main protagonists of adjudication, followed by main contractors and their clients.

Interestingly, whilst disputes between main contractors and their domestic subcontractors can be seen to be reducing in frequency, disputes between all other important contracting pairs are increasing. Moreover, whilst the number of disputes between main contractors and their domestic sub-contractors used to be more than twice the amount of disputes than that between the client and main contractor, this gap has now been significantly reduced.

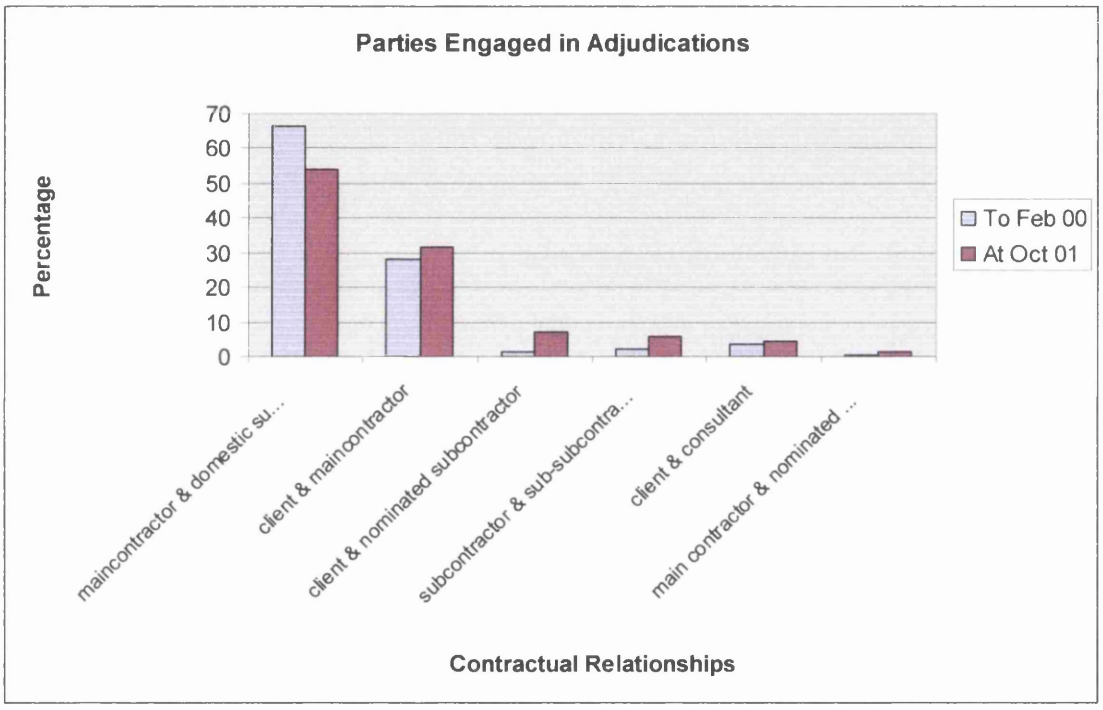


*Figure 6 – Parties Engaged in Adjudications*

As exemplified in Figure 7, it is the domestic sub-contractor who can be seen to be the main referring party to adjudication. However, in line with Figure 6, the number of disputes referred to adjudication by the domestic sub-contractor has significantly reduced. Conversely, disputes referred to adjudication by the main contractor can be seen to be on the increase, as is those referred by the client and sub sub-contractor.

Given that it was the intention of Latham to redress the imbalance of power suffered by domestic subcontractors, the declining referral rate of the domestic subcontractor should give cause for concern.

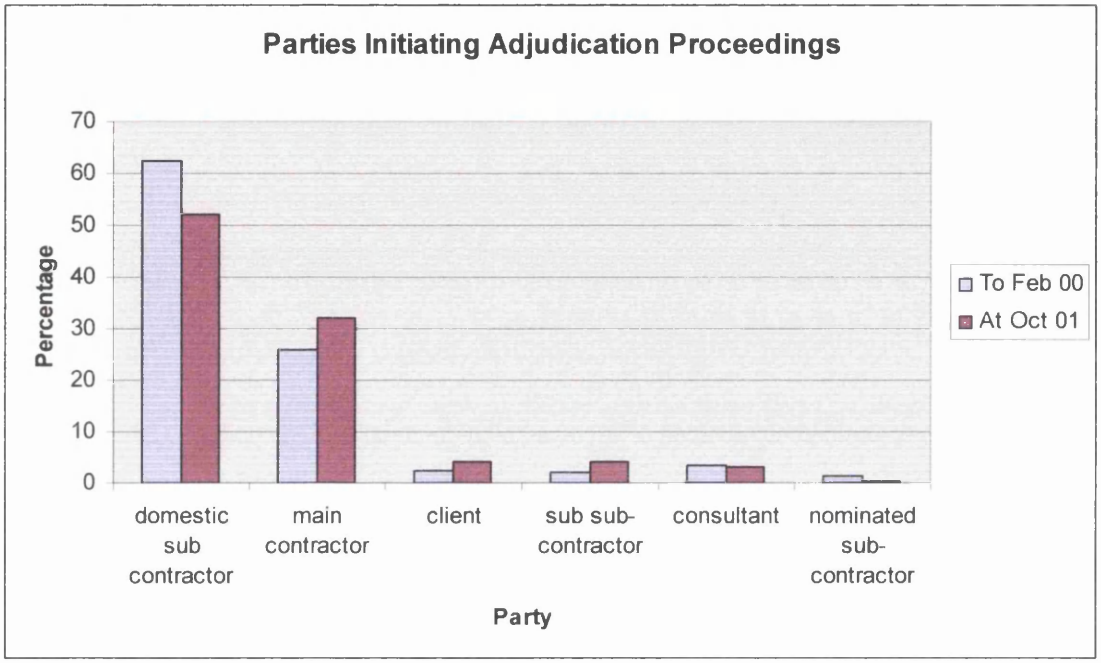


*Figure 7 – Parties Initiating Adjudication Proceedings*

**When is Adjudication Initiated?**

It was the intention of Latham that disputes be resolved as soon as they arise, so as to prevent festering problems from damaging the commercial relationship.

However, as can be seen in Figure 8, the intended initiation point for adjudication has not taken place. For only 33% of adjudications are invoked during construction works, with 67% commencing after practical completion of the project.

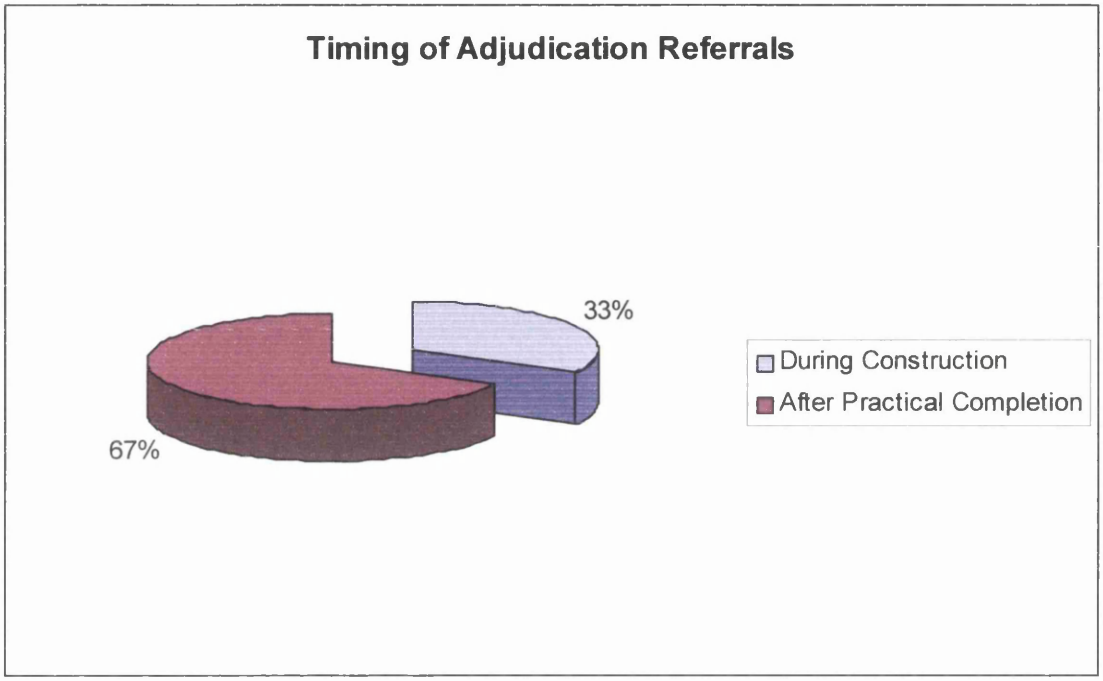


*Figure 8 – Timing of Adjudication Referrals as at Report 4*

**Were the Parties Represented?**

As exemplified by Figure 9, it was the contention of adjudicators that 63% of construction parties were represented at adjudication proceedings, with 37% being self-representing.

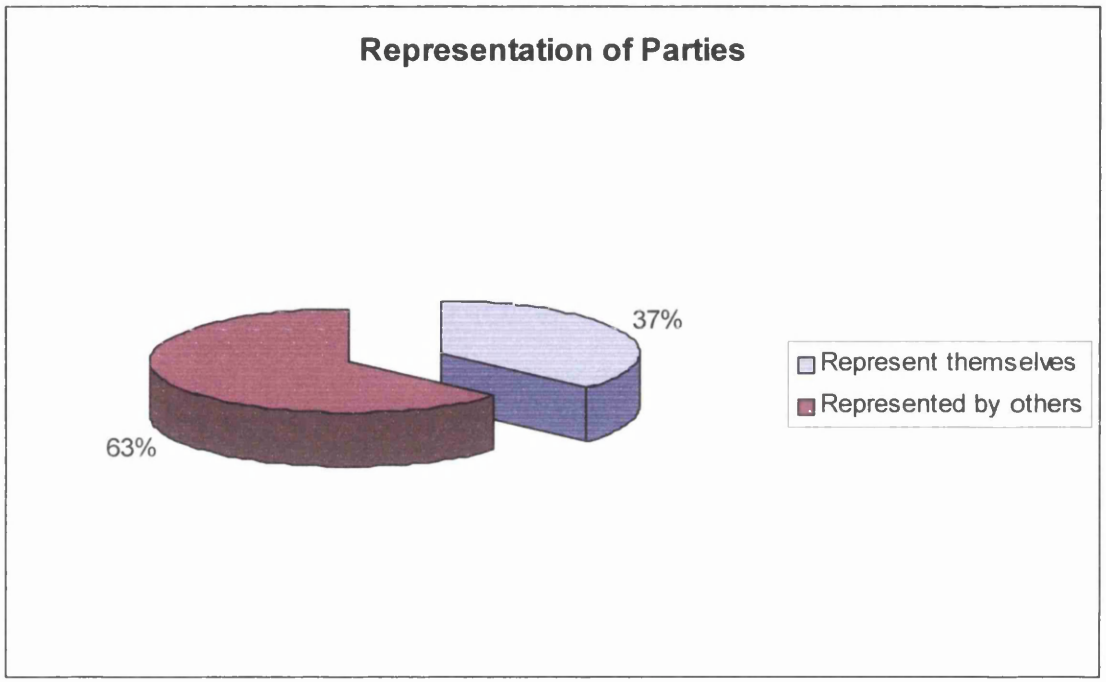


*Figure 9 – Representation of Parties as at Report 4*

**Who are the Winners and Who are the Losers?**

As exemplified by Figure 10, when asked for whom they found in their adjudications, the adjudicators indicated that in 69% of cases they found for the claimant, in 22% for the respondent and in 9% of cases their decision was split.

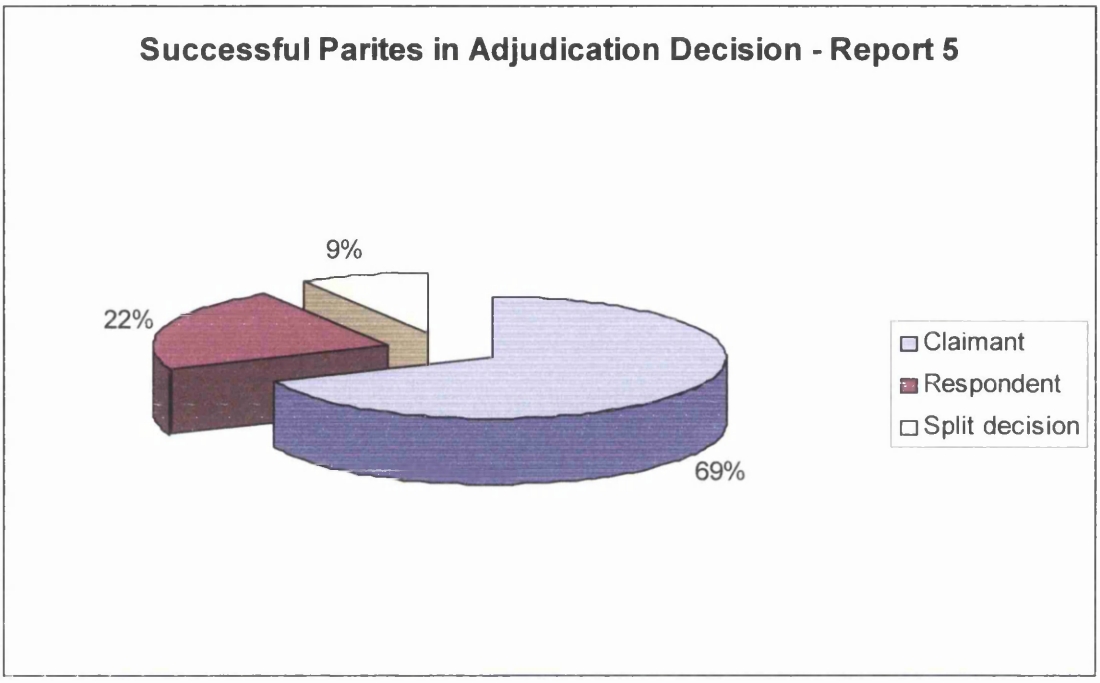


*Figure 10 – Successful Parties in Adjudication Decision*

As can be seen in Figure 11, since the production of the fourth report, the number of decisions found in favour of the claimant have fallen, whilst there has been an increase in the success rate of the respondent.

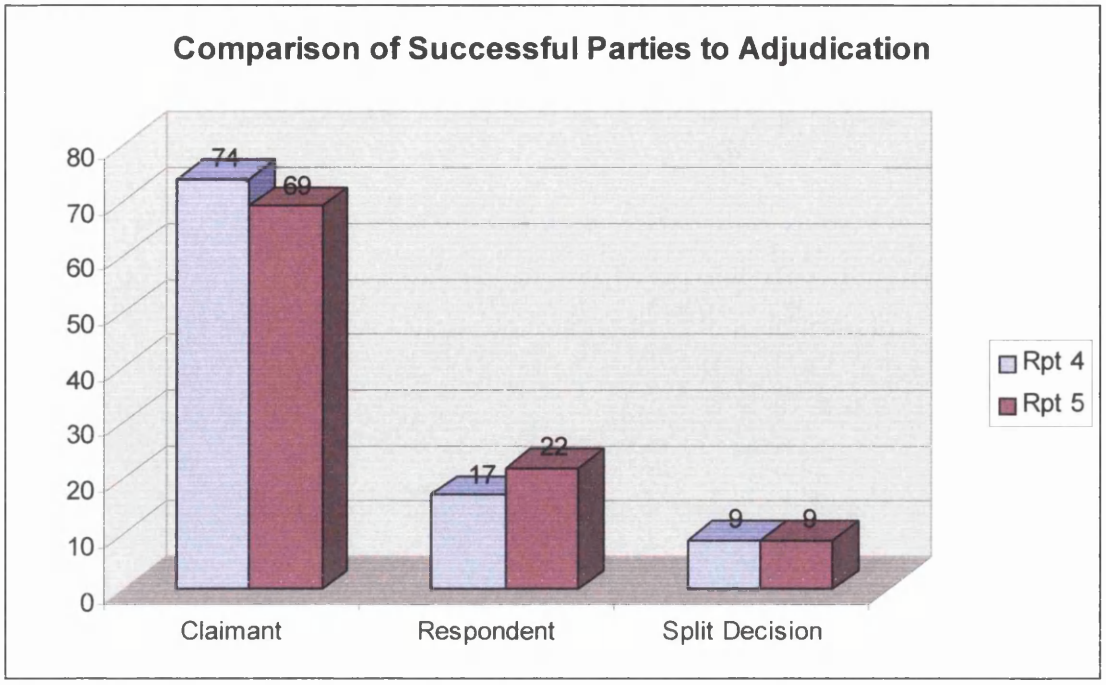


*Figure 11 – Comparison of Successful Parties to Adjudication*

However, it is important to note that not all the reported adjudications resulted in a win, lose or split decision. For Report 5 noted an adjudication settlement rate of 21% with 7% of cases being abandoned.

**Subjects of the Disputes**

It can be seen in Table 12 that the main subject of dispute has shifted from being that of failure to comply with payment provisions, to the valuation of variations. Conversely the valuation of the final account has risen in significance to account for 27% of disputes as opposed to the previous figure of 17%. Indeed, it would appear that post-contract activity now accounts for more adjudication proceedings than events occurring during the life of the project.

| Main Subjects of the Disputes | % at Rpt 4 | % at Rpt 5 |
|---|---|---|
| ***Failure to comply with Payment Provisions*** | 26% | 24% |
| ***Valuation of Variations*** | 23% | 36% |
| ***Valuation of Final Account*** | 17% | 27% |
| ***Extension of Time & Loss and Expense Combined*** | 10% | 3% |
| ***Loss & Expense*** | 10% | 7% |
| ***Defective Work*** | 4% | 2% |
| ***Valuation of Works*** | 4% | - |
| ***Determination*** | 3% | - |
| ***Withholding Monies*** | 2% | - |
| ***Non Payment of Fees*** | 1% | - |
| ***Services & Values*** | 1% | - |
| ***Entitlement to Interest*** | - | 1% |
| ***L & A Damages*** | - | 1% |

*Table 12 – Main Subjects of Disputes Between Parties*

**Lack of Compliance with the 1996 Act**

During the study by the Adjudication Reporting Centre, adjudicators were asked whether the adjudications that they had dealt with had shown areas where the provisions of the 1996 Act and the Scheme for Construction Contracts were not being fully implemented.

Their responses are contained in Table 13, which exemplifies that the adjudication provisions of the Scheme are being relied upon largely by default. However, it is important to note that during the last year, the number of adjudications conducted in accordance with complaint provisions has increased. As contended by the authors of the Report, this is perhaps due to the numbers of standard form contracts now being utilised and coming into effect.

| Compliance with the Act (& Scheme) | % in Rpt 4 | % in Rpt 5 |
|---|---|---|
| ***How many adjudication decisions have been made using compliant contract Adjudication provisions? (ie not the Scheme)*** | 43% | 51% |
| ***How many adjudication decisions have been made by defaulting to the procedures of the Scheme for Construction Contracts?*** | 57% | 49% |

***Table 13 – Common Instances of Non-Compliance with the 1996 Act & Scheme***

**Matters of Procedure**

As can be seen in Table14, adjudicators are persistently adopting a documents only procedure. Of interest, however, is the fact that in Report 5, 11% of adjudication procedures included a site visit – a phenomenon not witnessed in earlier periods. Could such a fact indicate an increasingly inquisitorial approach on behalf of the adjudicator?

| Procedure Adopted by Adjudicators | % Rpt 4 | % Rpt 5 |
|---|---|---|
| ***Adjudicator employed a documents only procedure*** | 56% | 52% |
| ***Adjudicator employed an interview procedure with only one party present**** | 3% | 0.3% |
| ***Adjudicator employed an interview procedure with both parties present*** | 35% | 21% |
| ***Adjudicator carried out a full hearings procedure*** | 6% | 6% |
| ***Adjudicator carried out a site visit*** | - | 11% |
| ***Adjudicator employed other type of procedure*** | - | 1% |

***Table 14 – Procedures Adopted by Adjudicators***

Compliance with the statutory timetable for adjudication proceedings is a fundamental aspect of the Construction Act. In Report Number 4, the Adjudication Reporting Centre asked adjudicators to report their experiences of compliance with the time limits.

| Compliance with Time Limits | % |
|---|---|
| ***Decisions given within 28 days*** | 69% |
| ***14 day extension of time applied for*** | 27% |
| ***Extension of time beyond 42 days applied for*** | 4% |

***Table 15 – Compliance with Time Limits***

As exemplified by Table 15, 69% of adjudications were completed within the 28-day timescale, with 27% requiring an extension of 14 days. The success rate in applying for extensions of time in the case of a 14-day extension was 72% and in the case of applications for extensions beyond 42 days, the success rate was 91%

As can be seen by Figure 16, however, October 2002 witnessed an increased length in adjudication proceedings. As submitted by the authors of the Report, such a phenomenon may indicate a shift from relatively simple adjudications to those that are more demanding and require more time to complete.

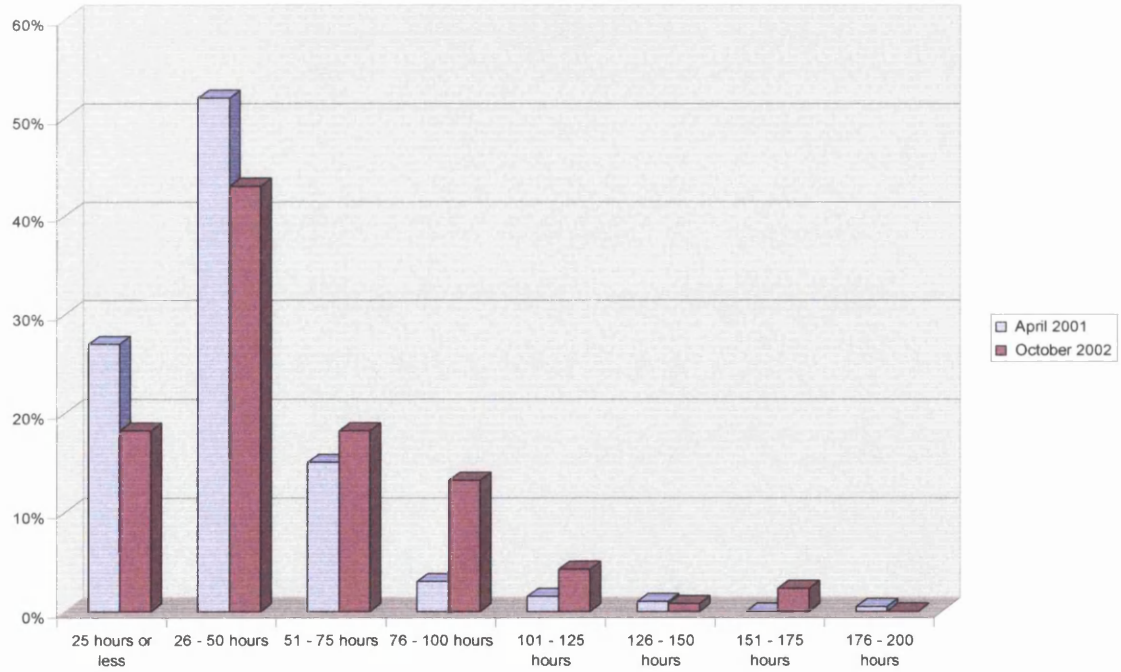


***Figure 16- Hours Spent by Adjudicators on Each Adjudication***

The numbers of experts appointed by adjudicators taking part in the study are shown in Table 17. The most frequently utilised adviser was the lawyer.

| Use of Experts | Report No. 4 | Report No. 5 |
|---|---|---|
| *Solicitors* | 26 | 13 |
| *Quantity Surveyor* | 2 | - |
| *Programming & Technical Adviser* | 2 | 3 |
| *Delay Analyst* | 1 | - |
| *Building Surveyor* | - | 2 |
| *Structural Engineer* | - | 2 |
| *Architect* | - | 1 |
| *Drilling Engineer* | - | 1 |
| *Fire Protection Engineer* | - | 1 |
| *M&E Engineer* | - | 1 |

*Table 17 – Number of Expert Advisers Employed*

Figure 18 shows some variation in the fees charged by adjudicators – the most common grouping being £76 to £100 per hour followed by £101 to £125 per hour. It will be noted that the past year has witnessed an increase in adjudicator's fees at the higher end of the spectrum, correlated with a decrease in fees at the lower end of the scale. As submitted by the authors of the Report, perhaps the increasing number of larger adjudications demand a higher skill level and hence an ability to command a higher price through proven experience.

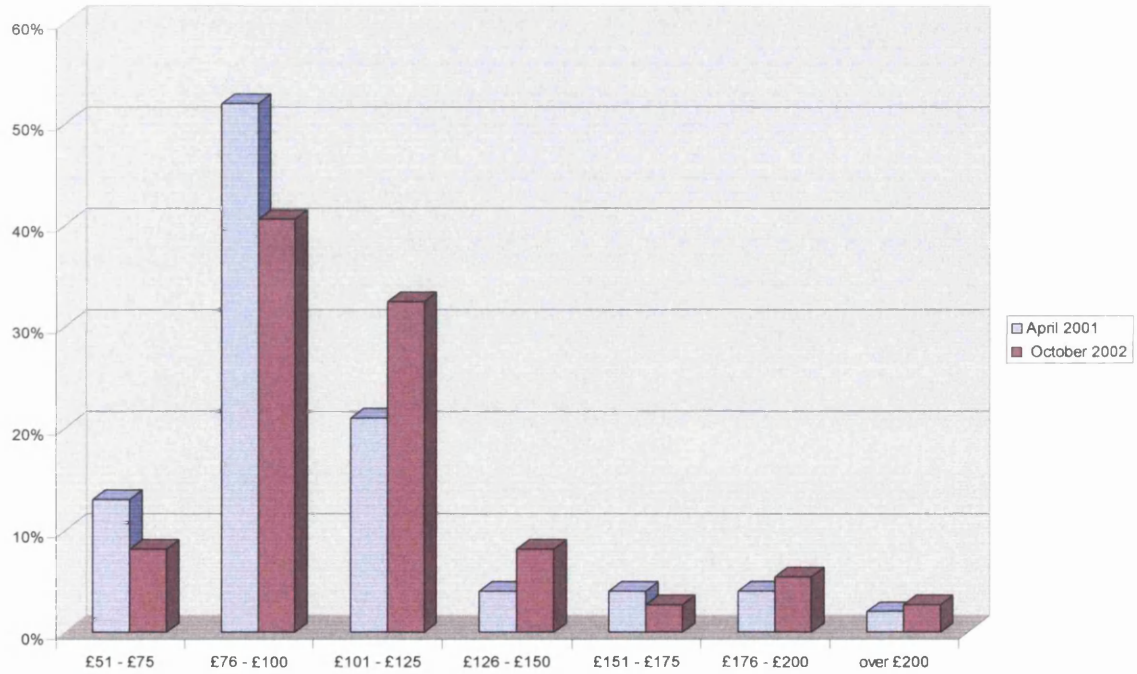


*Figure 18 – Hourly Fees Charged by Adjudicators*

# ANNEXE 3: EXAMPLE OF PILOT STUDY QUESTIONNAIRE – ADJUDICATION QUESTIONNAIRE SENT TO CONSTRUCTION PARTIES

# ADJUDICATION QUESTIONNAIRE (PARTIES)

## *ABOUT YOUR ORGANISATION*

### Q1

**Would you describe your organisation as being:**

***Please answer parts I, II and III***

### I

- ❒ Employer
- ❒ Main Contractor
- ❒ Sub Contractor
- ❒ Other.....

### II

- ❒ Large international organisations
  (annual sales figures in excess of 300,000,000)
- ❒ Large domestic organisations
  (annual sales figures in excess of 300,000,000)
- ❒ Medium international organisations
  (annual sales figures of approx. 201,000,000)
- ❒ Medium domestic organisations
  (annual sales figures of approx. 193,000,000)
- ❒ Small international organisations
  (annual sales figures of less than 53,000,000)
- ❒ Small domestic organisations
  (annual sales figures of less than 49,000,000)

### III

- ❒ Located nationally
- ❒ Located mainly in Southern England
- ❒ Located mainly in Northern England
- ❒ Located mainly in Wales

**Q2**

**In so far as the adjudication provisions of the Housing Grants Construction and Regeneration Act 1996 are concerned, are you:**

- ❒ Very familiar
- ❒ Fairly familiar
- ❒ Unfamiliar

## *YOUR ADJUDICATION EXPERIENCE*

**Q3**

**Has your organisation ever been a party to adjudication proceedings:**

- ❒ Yes
- ❒ No - proceed no further with this questionnaire

**Q4**

**How often were you engaged in construction adjudications in the year 1999:**

- ❒ None
- ❒ 1 time
- ❒ 2 to 3 times
- ❒ 4 to 6 times
- ❒ 7 to 9 times
- ❒ 10 + times

## Q5

**Would you say that your participation rate for construction adjudication in the year 1999, was representative of the annual level of participation in construction adjudication for the period 1990 - 1996 inclusive:**

- ❒ Yes, the participation rate for the year of 1999 was representative of the participation rate for the period 1990-1996
- ❒ No, the participation rate for the year 1999 was not representative of the participation rate for the period 1990 - 1996 - it was higher
- ❒ No, the participation rate for the year 1999 was not representative of the participation rate for the period 1990 - 1996 - it was lower

## Q6

**Would you say that your participation rate for construction adjudication in the year 1999, was representative of the level of participation in construction adjudication for the years 1997 - 1998 inclusive:**

- ❒ Yes, the participation rate for the year of 1999 was representative of the participation rate for the period 1997-1998
- ❒ No, the participation rate for the year 1999 was not representative of the participation rate for the period 1997 - 1998- it was higher
- ❒ No, the participation rate for the year 1999 was not representative of the participation rate for the period 1997 - 1998 - it was lower

## Q7

**How would you describe your level of participation in construction adjudication proceedings for the year 1999:**

- ❒ Frequent
- ❒ Fairly often
- ❒ Infrequent
- ❒ None

## Q8

**Would you describe your organisation as being:**

- ❒ A frequent user of adjudication
- ❒ An infrequent user of adjudication

## Q9

**How would you describe the majority of construction adjudication disputes in which your organisation has been involved:**

- ❒ Financial disputes
- ❒ Defective works disputes
- ❒ Contractual disputes
- ❒ Other.....

## *ABOUT YOUR ADJUDICATION OPPONENT(S)*

**Q10 - Please answer either question 10a OR question 10b**

**Q10a**

**If you have described your participation in adjudication as being infrequent, from your experience would you describe your opponent(s) as being:**

***Please answer parts I, II, III and IV***

**I**

- ❒ Employer
- ❒ Main Contractor
- ❒ Sub Contractor

**II**

- ❒ Large international organisations (annual sales figures in excess of 300,000,000)
- ❒ Large domestic organisations (annual sales figures in excess of 300,000,000)
- ❒ Medium international organisations (annual sales figures of approx. 201,000,000)
- ❒ Medium domestic organisations (annual sales figures of approx. 193,000,000)
- ❒ Small international organisations (annual sales figures of less than 53,000,000)
- ❒ Small domestic organisations (annual sales figures of less than 49,000,000)

**III**

- ❒ Located nationally
- ❒ Located mainly in Southern England
- ❒ Located mainly in Northern England
- ❒ Located mainly in Wales

**IV**

***From your experience, would you suggest that your "opponent" was a:***

- ❒ Repeat user(s) of adjudication
- ❒ Infrequent user(s) of adjudication

**Q10b**

**If you have described your participation in adjudication as being fairly often or frequent, from your experience would you describe your opponents as generally being:**

***Please answer parts I, II, III and IV***

**I**

***You may select more than one of the following;***

- ❒ Employers
- ❒ Main Contractors
- ❒ Sub Contractors

**II**

***You may select more than one of the following;***

- ❒ Large international organisations (annual sales figures in excess of 300,000,000)
- ❒ Large domestic organisations (annual sales figures in excess of 300,000,000)
- ❒ Medium international organisations (annual sales figures of approx. 201,000,000)
- ❒ Medium domestic organisations (annual sales figures of approx. 193,000,000)
- ❒ Small international organisations (annual sales figures of less than 53,000,000)
- ❒ Small domestic organisations (annual sales figures of less than 49,000,000)

**III**

❒ Located nationally
❒ Located mainly in Southern England
❒ Located mainly in Northern England
❒ Located mainly in Wales

**IV**

***From your experiences, would you suggest that your opponents are generally:***

❒ Repeat user(s) of adjudication
❒ Infrequent user(s) of adjudication

**Q11**

**When engaged in adjudication, have:**

**YOU** (you may tick more than one)

❒ Been legally represented
❒ Been represented by a commercial / industrial expert
❒ Unrepresented / self-representing

**YOUR OPPONENT** (you may tick more than one)

❒ Been legally represented
❒ Been represented by a commercial / industrial expert
❒ Unrepresented / self-representing

**Q12**

**From your experience, how would you describe the attitude of the majority of your adjudication "opponents" towards the dispute in hand:**

❒ Litigious in approach
❒ Conciliatory in approach
❒ Neutral

## *ABOUT THE ADJUDICATION PROCESS ITSELF*

### Q13

**When engaged in adjudication, were the procedures followed:**

- ❒ Those provided by the construction contract itself
- ❒ Those contained in a standard form contract
- ❒ Those provided by The Scheme for Construction Contracts
- ❒ Other.....

### Q14

**In your opinion, who is generally the driving force behind matters of procedure:**

- ❒ Both parties
- ❒ One party
- ❒ Legal representatives
- ❒ Expert representatives
- ❒ Adjudicator

### Q15

**If your answer to Q14 was that on average, it tends to be only one party who is the driving force behind matters of procedure, are these parties generally:**

***Please answer parts I, II, III and IV***

**I**

- ❒ Employer(s)
- ❒ Main Contractor(s)
- ❒ Sub Contractors(s)

**II**

- ❒ Large international organisations
  (annual sales figures in excess of 300,000,000)
- ❒ Large domestic organisations
  (annual sales figures in excess of 300,000,000)
- ❒ Medium international organisations
  (annual sales figures of approx. 201,000,000)
- ❒ Medium domestic organisations
  (annual sales figures of approx. 193,000,000)
- ❒ Small international organisations
  (annual sales figures of less than 53,000,000)
- ❒ Small domestic organisations
  (annual sales figures of less than 49,000,000)

**III**

***From your experience, would you describe these parties as being;***

- ❒ Repeat-user(s) of adjudication
- ❒ Infrequent user(s) of adjudication

**IV**

***From your experience, were these parties generally;***

- ❒ Legally represented
- ❒ Represented by an expert
- ❒ Self-representing

## Q16

**Whether engaged in adjudication frequently, fairly often or infrequently, would you describe the adjudication procedure followed as:**

- ❒ Formalistic
- ❒ Legalistic
- ❒ Rigid
- ❒ Adversarial (legal reps. presented facts and the law to the adjudicator)
- ❒ Informal
- ❒ Commercially orientated
- ❒ Flexible
- ❒ Inquisitive (adj'cator attempted to ascertain facts and law for himself)
- ❒ Other.....

## Q17

**With which of these commonly held statements do you most agree:**

- ❒ Adjudication is a means of settling disputes according to defined and formal principles and procedures
- ❒ Adjudication is a means of settling disputes in a flexible manner
- ❒ Adjudication is a means of settling disputes in a flexible fashion, but with regard to certain defined principles and procedures

## Q18

**With which of these commonly held views do you most agree:**

- ❒ Adjudication is very similar to litigation, in that there are two "sides" who battle it out, each seeking to win
- ❒ Adjudication is a process whereby each party has the opportunity to express their grievances and whoever has the more reasoned argument, shall be granted an adjudication award in their favour
- ❒ Adjudication is a form of alternative dispute resolution and should be approached with a conciliatory attitude

**Q19 - Please answer either question 19a OR question 19b:**

**Q19a**

**If engaged infrequently in adjudication, how much time was spent pre-commencement of proceedings, in preparation for adjudication?**

- ❒ 1 - 7 days
- ❒ 2 - 3 weeks
- ❒ 1 month +
- ❒ Other

**Q19b**

**If engaged fairly often or frequently in adjudication, how much time in general is spent on the preparation of proceedings pre-commencement of adjudication?**

- ❒ 1 - 7 days
- ❒ 2 - 3 weeks
- ❒ 1 month +
- ❒ Other

**Q 20**

**As regards the appointing of an adjudicator:**

- ❒ Was the identity of the adjudicator specified in the construction contract
- ❒ Was an appointing body specified in the contract to select an adjudicator
- ❒ Was the identity of an adjudicator agreed upon by the parties once a dispute had emerged

**Q21**

**From your experience, are the majority of adjudicators of a:**

- ❒ Legal background
- ❒ Construction background
- ❒ Other.....

**Q22**

**From your experience, how long is the average period of time from the giving of notice of intention to refer a dispute to adjudication, until the appointment of an adjudicator:**

- ☐ 1 day
- ☐ 2 - 3 days
- ☐ 4 - 5 days
- ☐ 6 -7 days
- ☐ 7 + days

**Q23**

**From your experience, what is the average period of time from the appointment of an adjudicator, until the referral of the dispute to the adjudicator:**

- ☐ 1 day
- ☐ 2 - 3 days
- ☐ 4 - 5 days
- ☐ 6 - 7 days
- ☐ 7+ days

## *THE ADJUDICATION AWARD*

**Q24**

**On average, how long is the period of time from the commencement of adjudication proceedings, to the consideration of the award by the adjudicator:**

- ☐ 1 day
- ☐ 2 - 7 days
- ☐ 7 - 14 days
- ☐ 14 - 21 days
- ☐ 21 - 28 days
- ☐ 28+ days (please specify.....)

## Q25

**What would you anticipate as being the reason for such a timescale (you may select more than one of the following)**

- ❒ Over complex procedures
- ❒ Delay or non-compliance by one party
- ❒ Delay or non-compliance by both parties
- ❒ The adducement of complex evidence
- ❒ Other.....

- ❒ Simple and effective procedures
- ❒ Full compliance by the parties
- ❒ The adducement of simple forms of evidence
- ❒ Other.....

## Q26

**If your answer to Q25 was "delay or non-compliance by one party", would you describe these parties as being;**

***Please answer parts I, II, III and IV***

**I**

- ❒ Employer(s)
- ❒ Main Contractor(s)
- ❒ Sub Contractor(s)

**II**

- ❒ Large international organisations
  (annual sales figures in excess of 300,000,000)
- ❒ Large domestic organisations
  (annual sales figures in excess of 300,000,000)
- ❒ Medium international organisations
  (annual sales figures of approx. 201,000,000)
- ❒ Medium domestic organisations
  (annual sales figures of approx. 193,000,000)
- ❒ Small international organisations
  (annual sales figures of less than 53,000,000)
- ❒ Small domestic organisations
  (annual sales figures of less than 49,000,000)

**III**

***From your experience, would you suggest that these parties are;***

- ❒ Repeat-user(s) of adjudication
- ❒ Infrequent-user(s) of adjudication

**IV**

***From your experience, are these parties;***

- ❒ Legally represented
- ❒ Represented by an expert
- ❒ Self-representing

**Q27**

**How would you describe this time taken from commencement of proceedings to the consideration of the award by the adjudicator:**

- ❒ Too lengthy
- ❒ Fairly lengthy
- ❒ Adequately swift
- ❒ Very short

**Q28**

**What is the average time taken by adjudicators to reach a decision:**

- ❒ 1 day
- ❒ 2 - 7 days
- ❒ 7 - 14 days
- ❒ 14 - 21 days
- ❒ 21 - 28 days
- ❒ 28+ days (please specify.....)

**Q29**

**How would you describe the time taken by adjudicators to reach a decision:**

- ❒ Too lengthy
- ❒ Fairly lengthy
- ❒ Adequately swift
- ❒ Very short

**Q30 - Please answer either question 30a OR question 30b**

**Q30a**

**Where engaged in adjudication infrequently, on what grounds was the adjudication award made:**

- ❒ According to law
- ❒ According to other considerations

**Q30b**

**Where engaged fairly often or frequently in adjudication, in general, on what grounds are adjudication awards made:**

- ❒ Mainly according to the law
- ❒ Mainly according to other considerations

## Q31

**If your answer to Q30 was "other considerations", what were these considerations:**

.....

.....

.....

.....

## Q32

**What is your view of the grounds upon which adjudication decisions are being made:**

- ❒ Satisfactory
- ❒ Fairly satisfactory
- ❒ Unsatisfactory

Reason.....

.....

.....

.....

## Q33

**In your opinion, was the adjudication award:**

- ❒ Fair
- ❒ Just
- ❒ Unfair
- ❒ Biased (towards whom.....)
- ❒ Unjust
- ❒ Legally Unacceptable
- ❒ Other.....

**Q34 - Please answer either question 34a OR question 34b**

**Q34a**

**If engaged infrequently in adjudication, was an appeal launched from the award?**

- ❒ Yes
- ❒ No

**Q34b**

**If engaged fairly often or frequently in adjudication, what was the approximate percentage of awards that resulted in appeal:**

- ❒ Less than 5%
- ❒ Between 5% and 10%
- ❒ Between 20% and 30%
- ❒ Approximately 50%
- ❒ Between 60% and 70%
- ❒ Above 80%

**Q35**

**From your experience, would you describe the incidence of appeals under the Housing Grants Construction and Regeneration Act 1996 as:**

- ❒ Too frequent
- ❒ Fairly frequent
- ❒ Infrequent
- ❒ Non-existent

**Q36**

**From your experience, to whom are appeals launched:**

- ❒ Appeals against an adjudicators decision are made to court
- ❒ Appeals against an adjudicators decision are made to an arbitral tribunal

## Q37

**What is your view of the incidence of appeals:**

- ❒ This is a satisfactory situation
- ❒ This is an unsatisfactory situation

Reason.....

.....

.....

.....

## Q38

**As regards adjudicators themselves, would you describe their conduct and case management as:**

- ❒ Professional
- ❒ Effective
- ❒ Unprofessional
- ❒ Ineffective
- ❒ Too "hands-on"
- ❒ Not "hands-on" enough

**Q39**

**As regards any legal / expert representatives employed during the adjudication proceedings:**

***Please answer parts I and II***

**I**

**How would you describe the conduct of YOUR representatives**

***You may select more than one of the following;***

- ❒ Professional
- ❒ Effective
- ❒ Unprofessional
- ❒ Ineffective
- ❒ Too "hands-on"
- ❒ Not "hands-on" enough
- ❒ Litigious in approach
- ❒ Conciliatory in approach
- ❒ Neutral in approach

**II**

**How would you describe the conduct of your "OPPONENTS" representatives**

***You may select more than one of the following;***

- ❒ Professional
- ❒ Effective
- ❒ Unprofessional
- ❒ Ineffective
- ❒ Too "hands-on"
- ❒ Not "hands-on" enough
- ❒ Litigious in approach
- ❒ Conciliatory in approach
- ❒ Neutral in approach

**Q40**

**From your experience(s), how would you describe the overall financial demands placed upon adjudication parties by adjudication:**

- ❒ Costly
- ❒ Inexpensive

**Q41**

**From your experience, would you suggest that adjudication is:**

***Please answer parts I and II***

**I**

- ❒ More expensive than litigation
- ❒ Just as expensive as litigation
- ❒ Less expensive than litigation
- ❒ Have never been a party to litigation / have no knowledge of litigation expense

**II**

- ❒ More expensive than arbitration
- ❒ Just as expensive as arbitration
- ❒ Less expensive than arbitration
- ❒ Have never been a party to arbitration / have no knowledge of arbitration expense

## Q42

**Which commonly held statement most accords with your view of adjudication (you may select more than one):**

- ☐ Adjudication offers a valid alternative to litigation, which is expedient and inexpensive
- ☐ Adjudication is little different from litigation in terms of cost and procedure
- ☐ Adjudication is successful due to the fact that it is the parties themselves who determine matters of procedure, making it simple and easy to understand
- ☐ Adjudication is in reality governed by legal representatives and / or the adjudicator, giving the process a formal character
- ☐ Other.....

## Q43

**From your experience, which of the below would you suggest is of greatest importance:**

- ☐ **Procedure** - the greatest concern is to ensure that the procedure is fair & equitable
- ☐ **Result** - the greatest concern is to ensure that the result is fair & equitable
- ☐ **Procedure & Result** - both the procedure & the result must be seen to be fair & equitable
- ☐ **Other**.....

## Q44

**Did you experience a change in attitude towards adjudication post adjudication proceedings, as compared to your pre-commencement of proceedings stance:**

- ☐ Yes, I was more in favour of adjudication as a method of dispute resolution post award than pre-commencement of proceedings
- ☐ Yes, I was less in favour of adjudication post-award than pre-commencement of proceedings
- ☐ No, my views on adjudication remained the same throughout the proceedings

## Q45

**What improvements, if any, would you suggest to the present system of adjudication:**

.....

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# ANNEXE 4: RESULTS OF THE PILOT STUDY RESEARCH

The current study was conducted in order to test the validity of the experimenter-compiled questionnaire, as well as a preliminary investigation into the adjudication, arbitration and litigation processes.

Various methods of analysis were employed in an endeavour to observe relevant statistical associations, relationships and differences between groups and the answers provided in response to the experimenter-compiled questionnaire. Therefore, chi-square tests of associations, Pearson's Product Moment Correlation Co-efficient and Independent Sample T-Tests were used.

It must be remembered, however, that the current investigation was a pilot study which targeted adjudication, arbitration and litigation questionnaires at a small, yet representative cross-section of the construction industry and those concerned with the dispute resolution process. Due to limited sample size, when analysis was calculated for association, relationship or difference, the majority of significant findings were unreliable. Therefore, the results section has been restricted to an exposition of those calculations where a pattern can be found.

Initially, Chi-square tests of associations were calculated for potential associations between the questionnaire answers and the groups belonged to, be that arbitrators, lawyers or parties. Initial investigations found significant differences between certain variables. However, when one observed the expected count was less than 5, it became apparent that the calculations were insignificant. Nonetheless, when cross-tabulation tables were examined, certain potential associations between the group belonged to and the answers provided became evident.

### Cross-Tabulation Calculations

Cross-tabulation calculations found a number of potential associations between the group belonged to and some questions posed in the experimenter-compiled questionnaire.

An interesting result was found between group and whether the arbitrator was the driving force behind arbitral procedure (see Table 1 below).

Table 1

**group * arbitrator driving force behind procedure**
**Crosstabulation**

*Count*

| | | arbitrator driving force behind procedure | | |
|---|---|---|---|---|
| | | yes | no | Total |
| group | arbitrator | 4 | | 4 |
| | lawyer | 1 | 4 | 5 |
| | party | 4 | 1 | 5 |
| Total | | 9 | 5 | 14 |

For the category of arbitrator it was found that this group in its totality responded positively towards this question, with the majority of arbitral parties following suite. Lawyers on the other hand, tended towards a negative response.

An interesting result was also found between group and whether arbitral proceedings consisted of a legally represented party against an expertly represented party (see Table 2 below).

Table 2

**group * legally rep arb party v expertly rep arb party Crosstabulation**

*Count*

| | | legally rep arb party v expertly rep arb party | | |
|---|---|---|---|---|
| | | yes | no | Total |
| group | arbitrator | 1 | 3 | 4 |
| | lawyer | | 5 | 5 |
| | party | 4 | 1 | 5 |
| Total | | 5 | 9 | 14 |

Whilst lawyers in their entirety and the majority of arbitrators responded negatively towards this question, it can be seen that the category of party tended towards a positive response.

**Pearson's Product Moment Correlation Co-efficient**

A significant correlation was found at the 5% level of probability for a two-tailed test ($0.021<0.05$) between the group belonged to and whether the arbitration procedure was seen to be legalistic (see Table 3). In view of the fact that the group contains 3 categories and the answers provided in the questionnaire allowed for 2 options, it is not possible explain where this significant relationship lies.

Table 3

**Correlations**

| | | group | arbitration procedure is legalistic |
|---|---|---|---|
| group | Pearson Correlation | 1.000 | -.607 * |
| | Sig. (2-tailed) | . | .021 |
| | N | 14 | 14 |
| arbitration procedure is legalistic | Pearson Correlation | -.607 * | 1.000 |
| | Sig. (2-tailed) | .021 | . |
| | N | 14 | 14 |

*. Correlation is significant at the 0.05 level (2-tailed).

In an endeavour to understand the correlation in Table 3 above, it is necessary to observe the answers provided in a cross-tabulation calculation. Table 4 below highlights associations between the group belonged to and whether the arbitration procedure is seen to be legalistic. That is, arbitrators and lawyers in their totality answered the question in the negative. However, the response of the category of

parties can be seen to be split, with the majority of respondents opting for a positive response to the question.

Table 4

**group * arbitration procedure is legalistic Crosstabulation**

*Count*

| | | arbitration procedure is legalistic | | |
|---|---|---|---|---|
| | | yes | no | Total |
| group | arbitrator | | 4 | 4 |
| | lawyer | | 5 | 5 |
| | party | 3 | 2 | 5 |
| Total | | 3 | 11 | 14 |

A significant correlation was found at the 5% level of probability for a two-tailed test ($0.021<0.05$) between the group belonged to and whether the arbitration procedure was seen to be rigid (see Table 5). In view of the fact that the group contains 3 categories and the answers provided in the questionnaire allowed for 2 options, it is not possible explain where this significant relationship lies.

Table 5

| | | group | arbitration procedure is rigid |
|---|---|---|---|
| group | Pearson Correlation | 1.000 | -.607 * |
| | Sig. (2-tailed) | . | .021 |
| | N | 14 | 14 |
| arbitration procedure is rigid | Pearson Correlation | -.607 * | 1.000 |
| | Sig. (2-tailed) | .021 | . |
| | N | 14 | 14 |

*. Correlation is significant at the 0.05 level (2-tailed).

In an endeavour to understand the correlation in Table 5 above, it is necessary to observe the answers provided in a cross-tabulation calculation. Table 6 below highlights associations between the group belonged to and whether the arbitration procedure was seen to be rigid. That is, arbitrators and lawyers in their totality answered the question in the negative. However, the response of the category of parties can be seen to be split, with the majority of respondents opting for a positive response to the question.

Table 6

**group * arbitration procedure is rigid Crosstabulation**

*Count*

| | | arbitration procedure is rigid | | |
|---|---|---|---|---|
| | | yes | no | Total |
| group | arbitrator | | 4 | 4 |
| | lawyer | | 5 | 5 |
| | party | 3 | 2 | 5 |
| Total | | 3 | 11 | 14 |

A significant correlation was found at the 1% level of probability for a two-tailed test ($0.008<0.01$) between the group belonged to and the statements of the respondents as regards the settlement of disputes (see Table 7). In view of the fact that the group contains 3 categories and the answers provided in the questionnaire allowed for 3 options, it is not possible explain where this significant relationship lies.

Table 7

| | | group | respondents statements re: settlement of disputes |
|---|---|---|---|
| group | Pearson Correlation | 1.000 | -.676 ** |
| | Sig. (2-tailed) | . | .008 |
| respondents statements re: settlement of disputes | Pearson Correlation | -.676 ** | 1.000 |
| | Sig. (2-tailed) | .008 | . |

**. Correlation is significant at the 0.01 level (2-tailed).

In an endeavour to understand the correlation in Table 7 above, it is necessary to observe the answers provided in a cross-tabulation calculation. Table 8 below highlights associations between the group belonged to and the statements of the respondents as regards the settlement of disputes. That is, the category of arbitrators in their totality responded that arbitration is a means of settling disputes in a flexible yet defined fashion. Conversely, the category of parties tended towards the response that arbitration was a means of settling disputes according to defined and formal principles and procedures. Lawyers on the other hand, provided a range of responses across the board.

Table 8

**group * respondents statements re: settlement of disputes Crosstabulation**

*Count*

| | | respondents statements re: settlement of disputes | | | |
|---|---|---|---|---|---|
| | | defined and formal | flexible | flexible yet defined | Total |
| group | arbitrator | | | 4 | 4 |
| | lawyer | 2 | 2 | 1 | 5 |
| | party | 4 | | 1 | 5 |
| Total | | 6 | 2 | 6 | 14 |

A significant correlation was found at the 5% level of probability for a two-tailed test ($0.017<0.05$) between the group belonged to and the percentage of awards that result in appeal (see Table 9). In view of the fact that the group contains 3 categories and the answers provided in the questionnaire allowed for 5 options, it is not possible explain where this significant relationship lies.

Table 9

| | | group | percentage of awards that result in appeal |
|---|---|---|---|
| group | Pearson Correlation | 1.000 | -.645 * |
| | Sig. (2-tailed) | . | .017 |
| | N | 14 | 13 |
| percentage of awards that result in appeal | Pearson Correlation | -.645 * | 1.000 |
| | Sig. (2-tailed) | .017 | . |
| | N | 13 | 13 |

*. Correlation is significant at the 0.05 level (2-tailed).

In an endeavour to understand the correlation in Table 9 above, it is necessary to observe the answers provided in a cross-tabulation calculation. Table 10 below highlights associations between the group belonged to and the percentage of awards that result in appeal. That is, whilst the category of parties in their entirety responded that the percentage of awards that result in appeal was less than 5%, arbitrators and lawyers tended towards the response of 6%-20%.

Table 10

**group * percentage of awards that result in appeal Crosstabulation**

*Count*

| | | percentage of awards that result in appeal | | |
|---|---|---|---|---|
| | | less than 5 | 6 - 20 | Total |
| group | arbitrator | 1 | 3 | 4 |
| | lawyer | 1 | 3 | 4 |
| | party | 5 | | 5 |
| Total | | 7 | 6 | 13 |

## Pearson's Product Moment Correlation Co-efficient – Lawyers & Parties

A significant correlation was found at the 5% level of probability for a two-tailed test ($0.031<0.05$) between the group belonged to and the opinion of the arbitral decision reached (see Table 11). In view of the fact that the group contains 2 categories and the answers provided in the questionnaire allowed for 5 options, it is not possible explain where this significant relationship lies.

Table 11

| | | group | opinion of decisions reached - lawyers & parties |
|---|---|---|---|
| group | Pearson Correlation | 1.000 | -.597 * |
| | Sig. (2-tailed) | . | .031 |
| opinion of decisions reached - lawyers & parties | Pearson Correlation | -.597 * | 1.000 |
| | Sig. (2-tailed) | .031 | . |

*. Correlation is significant at the 0.05 level (2-tailed).

In an endeavour to understand the correlation in Table 11 above, it is necessary to observe the answers provided in a cross-tabulation calculation. Table 12 below highlights associations between the group belonged to and the opinion of the arbitral decision reached. That is, whilst the category of parties tended towards the response that the arbitral decision reached was fair and just, the response of the category lawyers was divided.

Table 12

**group2 * opinion of decisions reached - lawyers & parties Crosstabulation**

*Count*

| | | opinion of decisions reached - lawyers & parties | | | |
|---|---|---|---|---|---|
| | | fair & just | legally unacceptable | other | Total |
| group2 | lawyer | 1 | 1 | 1 | 3 |
| | party | 4 | 1 | | 5 |
| Total | | 5 | 2 | 1 | 8 |

## Frequencies – Lawyers & Parties

Where a response to a multiple-choice question is wholly singular in its return, it is not possible to calculate a cross-tabulation. For a cross-tabulation requires a minimum of two values to be equated. Hence in such circumstances, the only possible means of evaluation is that of the frequency table.

As can be seen from Table 13 and Table 14 below, when questioned as to their views on the conduct of the arbitrators, lawyers and parties in their totality (except for 1 missing value) responded that in their experience, arbitrators were professional and effective.

Table 13

**conduct of arbitrators - lawyers & parties**

| | | Frequency | Percent | Valid Percent | Cumulative Percent |
|---|---|---|---|---|---|
| Valid | professional & effective | 10 | 71.4 | 71.4 | 71.4 |
| | not applicable | 4 | 28.6 | 28.6 | 100.0 |
| | Total | 14 | 100.0 | 100.0 | |

Table 14

**group2**

| | | Frequency | Percent | Valid Percent | Cumulative Percent |
|---|---|---|---|---|---|
| Valid | lawyer | 4 | 28.6 | 44.4 | 44.4 |
| | party | 5 | 35.7 | 55.6 | 100.0 |
| | Total | 9 | 64.3 | 100.0 | |
| Missing | System | 5 | 35.7 | | |
| Total | | 14 | 100.0 | | |

### Independent Sample T-Tests

Although t-tests were calculated between group belonged to and all the questions posed in the experimenter-compiled questionnaire, no significant differences were found. As explained above, the small sample size is the most likely explanation for the lack of significant difference found. However, it is anticipated that the full study will produce a larger sample size and therefore, significant difference will be found.

### Cross-Tabulation Calculations Based Upon the Size of the Disputing Party

Cross-tabulations were calculated using the size of the disputing company as the controlling variable, although due to the low party response rate, no differences could be found. It is anticipated, however, that upon receipt of a larger response rate, cross-tabulations will be successfully computed.

## The Adjudication Process

Initially, Chi-square tests of associations were calculated for potential associations between the questionnaire answers and the groups belonged to, be that adjudicators, lawyers or parties. Initial investigations found significant differences between certain variables. However, when one observed the expected count was less than 5, it became apparent that the calculations were insignificant. Nonetheless, when cross-tabulation tables were examined, certain potential associations between the group belonged to and the answers provided became evident.

As discussed above, a small, yet representative sample size was employed in the preliminary investigation. However, of the 50 adjudication questionnaires piloted, only 12 participants responded. That is, 6 adjudicator respondents, 4 lawyer and 2 party respondents. In view of the low party response rate, discussion has been restricted to adjudicators and lawyers alone. This was so as to ensure that analysis was representative and to minimise the skewed nature of the data.

### Cross-Tabulation Calculations

Cross-tabulation calculations found a number of potential associations between the group belonged to and some questions posed in the experimenter-compiled questionnaire.

An interesting result was found between group and whether adjudication users were sub-contractors (see Table 1 below).

Table 1

**group * adjudication users are sub contractors Crosstabulation**

*Count*

| | | adjudication users are sub contractors | | |
|---|---|---|---|---|
| | | yes | no | Total |
| group | adjudicator | 6 | | 6 |
| | lawyer | 2 | 2 | 4 |
| | party | 2 | | 2 |
| Total | | 10 | 2 | 12 |

As can be seen, whilst adjudicators in their entirety answered the question positively, lawyers were equally split in their response.

Table 2 elucidates an interesting result between group and whether adjudication users were medium international organisations.

Table 2

**group * adjudication users are medium international orgs Crosstabulation**

*Count*

| | | adjudication users are medium international orgs | | |
|---|---|---|---|---|
| | | yes | no | Total |
| group | adjudicator | | 6 | 6 |
| | lawyer | 2 | 2 | 4 |
| | party | | 2 | 2 |
| Total | | 2 | 10 | 12 |

It can be seen that whilst adjudicators in their totality answered the question in the negative, lawyers were equally split in their response.

Table 3 can be seen to provide information between group and whether the adjudication process was composed of repeat adjudication users against infrequent adjudication users.

Table 3

**group * repeat users v infrequent users Crosstabulation**

*Count*

| | | repeat users v infrequent users | | |
|---|---|---|---|---|
| | | yes | no | Total |
| group | adjudicator | | 6 | 6 |
| | lawyer | 3 | 1 | 4 |
| | party | 1 | 1 | 2 |
| Total | | 4 | 8 | 12 |

Whilst adjudicators in their entirety responded negatively towards this question, lawyers can be seen to tend towards answering the question in a positive fashion.

An interesting result was also found between group and whether both parties were legally represented in the adjudication process (see table 4 below).

Table 4

**group * both adj parties legally represented Crosstabulation**

*Count*

| | | both adj parties legally represented | | |
|---|---|---|---|---|
| | | yes | no | Total |
| group | adjudicator | 1 | 5 | 6 |
| | lawyer | 4 | | 4 |
| | party | 1 | 1 | 2 |
| Total | | 6 | 6 | 12 |

For the category of lawyer it was found that this group in its totality responded positively towards this question, however, adjudicators tended towards a negative response.

Table 5 below provides information as to group and whether provided the result is in their favour, adjudication parties are unconcerned with the justice of the procedure.

Table 5

**group * parties unconcerned with justice of procedure, only if result favourable Crosstabulation**

*Count*

| | | parties unconcerned with justice of procedure, only if result favourable | | | |
|---|---|---|---|---|---|
| | | yes | no | not applicable | Total |
| group | adjudicator | 3 | 3 | | 6 |
| | lawyer | | 3 | | 3 |
| | party | | | 2 | 2 |
| Total | | 3 | 6 | 2 | 11 |

As can be seen, whilst adjudicators were equally split in their response to this question, the category of lawyers in their entirety answered the question in the negative.

An interesting result was also found between group and whether adjudication was considered to be an expedient and inexpensive alternative to litigation (see Table 6 below)

Table 6

**group * adjudication alternative to litigation, expedient & inexpensive Crosstabulation**

*Count*

| | | adjudication alternative to litigation, expedient & inexpensive | | |
|---|---|---|---|---|
| | | yes | no | Total |
| group | adjudicator | 6 | | 6 |
| | lawyer | | 3 | 3 |
| | party | 1 | | 1 |
| Total | | 7 | 3 | 10 |

For the category of adjudicator it was found that this group in its totality responded positively towards this question, however, lawyers in their totality provided a negative response.

**Pearson's Product Moment Correlation Co-efficient**

A significant correlation was found at the 5% level of probability for a two-tailed test ($0.014<0.05$) between the group belonged to and time spent in preparation pre-commencement of proceedings (see Table 7). In view of the fact that the group contains 3 categories and the answers provided in the questionnaire allowed for 4 options, it is not possible explain where this significant relationship lies.

Table 7

| | | group | time spent in prep pre-commencement of proceedings |
|---|---|---|---|
| group | Pearson Correlation | 1.000 | -.683 * |
| | Sig. (2-tailed) | . | .014 |
| time spent in prep pre-commencement of proceedings | Pearson Correlation | -.683 * | 1.000 |
| | Sig. (2-tailed) | .014 | . |

*. Correlation is significant at the 0.05 level (2-tailed).

In an endeavour to understand the correlation in Table 7 above, it is necessary to observe the answers provided in a cross-tabulation calculation. Table 8 below highlights associations between the group belonged to and time spent in preparation for adjudication, pre-commencement of proceedings. That is, adjudicators were more likely to believe that only the party commencing the action spends more time in preparation for proceedings. However, it was the over-riding belief of lawyers that both parties spend some time in preparation for proceedings.

Table 8

**group * time spent in prep pre-commencement of proceedings Crosstabulation**

*Count*

| | | time spent in prep pre-commencement of proceedings | | | | |
|---|---|---|---|---|---|---|
| | | both parties - not much time | both parties - some time | both parties - much time | only party commencing action spends much time | Total |
| group | adjudicator | | | 1 | 5 | 6 |
| | lawyer | 1 | 3 | | | 4 |
| | party | | 1 | 1 | | 2 |
| Total | | 1 | 4 | 2 | 5 | 12 |

A significant correlation was found at the 5% level of probability for a two-tailed test ($0.017<0.05$) between the group belonged to and whether the adjudicator was the driving force behind adjudication procedure (see Table 9). In view of the fact that the group contains 3 categories and the answers provided in the questionnaire allowed for 2 options, it is not possible explain where this significant relationship lies.

Table 9

| | | group | adjudicator driving force behind procedure |
|---|---|---|---|
| group | Pearson Correlation | 1.000 | .671 * |
| | Sig. (2-tailed) | . | .017 |
| adjudicator driving force behind procedure | Pearson Correlation | .671 * | 1.000 |
| | Sig. (2-tailed) | .017 | . |

*. Correlation is significant at the 0.05 level (2-tailed).

In an endeavour to understand the correlation in Table 9 above, it is necessary to observe the answers provided in a cross-tabulation calculation. Table 10 below highlights associations between the group belonged to and whether the adjudicator was the driving force behind adjudication procedure. That is, adjudicators were more likely to believe that they were the driving force behind adjudication procedure. However, it was the over-riding belief of lawyers that it was they (the lawyers) who were the driving force behind adjudication procedure.

Table 10

**group * adjudicator driving force behind procedure Crosstabulation**

*Count*

| | | adjudicator driving force behind procedure | | |
|---|---|---|---|---|
| | | yes | no | Total |
| group | adjudicator | 5 | 1 | 6 |
| | lawyer | 1 | 3 | 4 |
| | party | | 2 | 2 |
| Total | | 6 | 6 | 12 |

A significant correlation was found at the 5% level of probability for a two-tailed test ($0.037<0.05$) between the group belonged to and whether the adjudication procedure was seen to be adversarial (see Table 11). In view of the fact that the group contains 3 categories and the answers provided in the questionnaire allowed for 2 options, it is not possible explain where this significant relationship lie.

Table 11

| | | group | adjudication procedure is adversarial |
|---|---|---|---|
| group | Pearson Correlation | 1.000 | -.605 * |
| | Sig. (2-tailed) | . | .037 |
| adjudication procedure is adversarial | Pearson Correlation | -.605 * | 1.000 |
| | Sig. (2-tailed) | .037 | . |

*. Correlation is significant at the 0.05 level (2-tailed).

In an endeavour to understand the correlation in Table 11 above, it is necessary to observe the answers provided in a cross-tabulation calculation. Table 12 below highlights associations between the group belonged to and whether the adjudication procedure was seen to be adversarial. That is, adjudicators were more likely to believe that the adjudication procedure was not adversarial in nature. However, lawyers were equally split in their opinion as to the adversarial nature of the adjudication procedure.

Table 12

**group * adjudication procedure is adversarial Crosstabulation**

*Count*

| | | adjudication procedure is adversarial | | Total |
|---|---|---|---|---|
| | | yes | no | |
| group | adjudicator | 1 | 5 | 6 |
| | lawyer | 2 | 2 | 4 |
| | party | 2 | | 2 |
| Total | | 5 | 7 | 12 |

A significant correlation was found at the 5% level of probability for a two-tailed test ($0.044<0.05$) between the group belonged to and whether provided the procedure was seen to be equitable and just, the disputing parties would accept the adjudication result even if it went against them (see Table 13). In view of the fact that the group contains 3 categories and the answers provided in the questionnaire allowed for 2 options, it is not possible explain where this significant relationship lie.

Table 13

| | | group | parties accept adj decision provided its equitable & just |
|---|---|---|---|
| group | Pearson Correlation | 1.000 | .615 * |
| | Sig. (2-tailed) | . | .044 |
| parties accept adj decision provided its equitable & just | Pearson Correlation | .615 * | 1.000 |
| | Sig. (2-tailed) | .044 | . |

*. Correlation is significant at the 0.05 level (2-tailed).

In an endeavour to understand the correlation in Table 13 above, it is necessary to observe the answers provided in a cross-tabulation calculation. Table 14 below highlights associations between the group belonged to and whether provided the procedure was seen to be equitable and just, disputing parties would accept the result even of it went against them. That is, lawyers were more likely to believe that disputing parties would accept the result provided the procedure was seen to be equitable and just. However, adjudicators were equally split in their opinion as to whether disputing parties would accept the result, even were the procedure to be equitable and just.

Table 14

**group * parties accept adj decision provided its equitable & just Crosstabulation**

*Count*

| | | parties accept adj decision provided its equitable & just | | | |
|---|---|---|---|---|---|
| | | yes | no | not applicable | Total |
| group | adjudicator | 3 | 3 | | 6 |
| | lawyer | 2 | 1 | | 3 |
| | party | | | 2 | 2 |
| Total | | 5 | 4 | 2 | 11 |

A correlation was found at the 1% level of probability for a two-tailed test ($0.000<0.01$) between the cost of adjudication as compared to arbitration and the cost of adjudication as compared to litigation (see Table 15). In view of the fact that the questionnaire allowed for 4 options, it is not possible explain where this significant relationship lie.

Table 15

| | | compared to litigation, adjudication is | compared to arbitration, adjudication is |
|---|---|---|---|
| compared to litigation, adjudication is | Pearson Correlation | 1.000 | 1.000** |
| | Sig. (2-tailed) | . | .000 |
| compared to arbitration, adjudication is | Pearson Correlation | 1.000** | 1.000 |
| | Sig. (2-tailed) | .000 | . |

**. Correlation is significant at the 0.01 level (2-tailed).

In an endeavour to understand the correlation in Table 15 above, it is necessary to observe the answers provided in a cross-tabulation calculation. Table 16 below highlights associations between the cost of adjudication as compared to arbitration and the cost of adjudication as compared to litigation respectively. It can be seen that in both instances, nine respondents described adjudication as being less expensive, with only one respondent contending that adjudication is just as expensive.

Table 16

**compared to litigation, adjudication is * compared to arbitration, adjudication is Crosstabulation**

*Count*

| | | compared to arbitration, adjudication is | | |
|---|---|---|---|---|
| | | just as expensive | less expensive | Total |
| compared to litigation, adjudication is | just as expensive | 1 | | 1 |
| | less expensive | | 9 | 9 |
| Total | | 1 | 9 | 10 |

A significant correlation was found at the 5% level of probability for a two-tailed test ($0.047<0.05$) between the group belonged to and the respondents views of adjudication (see Table 17). In view of the fact that the group contains 3 categories and the answers provided in the questionnaire allowed for 3 options, it is not possible explain where this significant relationship lie.

Table 17

| | | group | respondents views of adjudication |
|---|---|---|---|
| group | Pearson Correlation | 1.000 | -.582 * |
| | Sig. (2-tailed) | . | .047 |
| respondents views of adjudication | Pearson Correlation | -.582 * | 1.000 |
| | Sig. (2-tailed) | .047 | . |

*. Correlation is significant at the 0.05 level (2-tailed).

In an endeavour to understand the correlation in Table 17 above, it is necessary to observe the answers provided in a cross-tabulation calculation. Table 18 below highlights associations between the group belonged to and the respondents views of adjudication. That is, lawyers were more likely to view adjudication as being similar to litigation, in that there are two "sides" who battle it out, each seeking to win. However, adjudicators were more diverse in their view of adjudication.

Table 18

**group * respondents views of adjudication Crosstabulation**

*Count*

| | | respondents views of adjudication | | | |
|---|---|---|---|---|---|
| | | similar to litigation | equal opp & reasoned arg | adr | Total |
| group | adjudicator | 2 | 3 | 1 | 6 |
| | lawyer | 4 | | | 4 |
| | party | 2 | | | 2 |
| Total | | 8 | 3 | 1 | 12 |

## Independent Sample T-Tests

Although t-tests were calculated between group belonged to and all the questions posed in the experimenter-compiled questionnaire, no significant differences were found. As explained above, the small sample size is the most likely explanation for the lack of significant difference found. However, it is anticipated that the full study will produce a larger sample size and therefore, significant difference will be found.

## Cross-Tabulation Calculations Based Upon the Size of the Disputing Party

It was intended that cross-tabulations using the size of the disputing company as the controlling variable, could be computed. Due to the low party response rate, this test was unable to be undertaken. It is anticipated, however, that a fuller response rate will be attained by the full study and upon receipt of an increased number of respondents, such cross-tabulations will be successfully computed.

## The Litigation Process

Initially, Chi-square tests of associations were calculated for potential associations between the questionnaire answers and the groups belonged to, be that lawyers or parties. Initial investigations found significant differences between certain variables. However, when one observed the expected count was less than 5, it became apparent that the calculations were insignificant. Nonetheless, when cross-tabulation tables were examined, certain potential associations between the group belonged to and the answers provided became evident.

As discussed above, a small, yet representative sample size was employed in the preliminary investigation. However, of the 50 litigation questionnaires piloted, only 9 participants responded. That is, 6 lawyer respondents, and 3 party respondents. Thus, by necessity discussion has been restricted to lawyers and parties alone.

### Cross-Tabulation Calculations

Cross-tabulation calculations found a number of potential associations between the group belonged to and some questions posed in the experimenter-compiled questionnaire.

An interesting result was found between group and the subjects familiarity with the Civil Procedure Rules (see Table 1 below).

Table 1

**party * Familiarity with Civil Procedure Rules Crosstabulation**

*Count*

| | | Familiarity with Civil Procedure Rules | | |
|---|---|---|---|---|
| | | very familiar | fairly familiar | Total |
| party | lawyer | 5 | 1 | 6 |
| | party | 3 | | 3 |
| Total | | 8 | 1 | 9 |

It can be seen that the majority of lawyers and parties in their entirety, deemed themselves to be very familiar with the Civil Procedure Rules.

Table 2 provides information as to the nature of disputes brought to litigation proceedings.

Table 2

**party * describe the majority of disputes Crosstabulation**

*Count*

| | | describe the majority of disputes | | | |
|---|---|---|---|---|---|
| | | financial | contractual | all of the above | Total |
| party | lawyer | 4 | 1 | 1 | 6 |
| | party | | | 3 | 3 |
| Total | | 4 | 1 | 4 | 9 |

Interestingly, whilst the majority of lawyers found litigious disputes to concern financial matters, litigation parties in their entirety did not view litigious disputes as being so neatly defined. Rather litigation proceedings were seen to encompass a variety of subject matter.

Information as to the identity of users of the litigation process can be found in Table 3.

Table 3

**party * litigation user is employer Crosstabulation**

*Count*

| | | litigation user is employer | | |
|---|---|---|---|---|
| | | yes | no | Total |
| party | lawyer | 5 | 1 | 6 |
| | party | 2 | 1 | 3 |
| Total | | 7 | 2 | 9 |

It can be seen from Table 3 that the overwhelming majority of the category of lawyer and the category of party viewed the users of litigation as holding the contractual position of "employer".

Further information as to the contractual position of litigation users can be found in Table 4 below.

Table 4

**party * litigation user is main contractor Crosstabulation**

*Count*

| | | litigation user is main contractor | |
|---|---|---|---|
| | | yes | Total |
| party | lawyer | 6 | 6 |
| | party | 3 | 3 |
| Total | | 9 | 9 |

It can be seen that both the category of lawyers and parties in their entirety viewed the users of litigation as holding the contractual position of main contractor.

Information as to the size of litigating organisations can be found in Table 5 below.

Table 5

**party * litigation user is large international org Crosstabulation**

*Count*

| | | litigation user is large international org | | |
|---|---|---|---|---|
| | | yes | no | Total |
| party | lawyer | 4 | 2 | 6 |
| | party | 3 | | 3 |
| Total | | 7 | 2 | 9 |

It can be seen that whilst the category of party in their entirety viewed litigation users as being large international organisations, only two thirds of the category lawyer held such a notion as to the identity of litigating parties. Nevertheless, the net result of such answers is that on balance, questionnaire respondents viewed users of the litigation process as being large international organisations.

Further information as to the size of litigation parties can be found in Table 6.

Table 6

**party * litigation user is small domestic org Crosstabulation**

*Count*

| | | litigation user is small domestic org | | |
|---|---|---|---|---|
| | | yes | no | Total |
| party | lawyer | 5 | 1 | 6 |
| | party | 2 | 1 | 3 |
| Total | | 7 | 2 | 9 |

It can be seen from Table 6 above that the majority of lawyers and parties viewed litigating parties as being small domestic organisations.

An interesting result was found between group and the experience of litigation parties in court proceedings (see Table 7 below).

Table 7

**party * both parties repeat users Crosstabulation**

*Count*

| | | both parties repeat users | | |
|---|---|---|---|---|
| | | yes | no | Total |
| party | lawyer | 4 | 2 | 6 |
| | party | 1 | 2 | 3 |
| Total | | 5 | 4 | 9 |

Whilst 2 out of the 3 party respondents answered that they did not believe litigating parties to be repeat users of the process, two thirds of the category lawyer answered the question in the positive. The net effect of such was that the majority of respondents viewed the users of litigation as being "repeat users" of the process.

Further information appertaining to the litigious experience of litigation users can be seen in Table 8 below.

Table 8

**party * frequent user v infrequent user Crosstabulation**

*Count*

| | | frequent user v infrequent user | | |
|---|---|---|---|---|
| | | yes | no | Total |
| party | lawyer | 2 | 4 | 6 |
| | party | 2 | 1 | 3 |
| Total | | 4 | 5 | 9 |

Whilst 2 out of the 3 party respondents stated that they believed frequent users to be opposing infrequent users in court, three quarters of the category lawyer disagreed with such a contention. The net result of which was that a marginal majority of respondents did not view court proceedings as consisting of a frequent user against an infrequent user.

An interesting result as to the locus of litigating parties can be found in Table 9.

Table 9

**party * litigation user located nationally Crosstabulation**

*Count*

| | | litigation user located nationally | |
|---|---|---|---|
| | | yes | Total |
| party | lawyer | 6 | 6 |
| | party | 3 | 3 |
| Total | | 9 | 9 |

It can be seen that both the category of lawyer and the category of party in their entirety viewed litigating organisations as being located on a national basis.

An interesting result was found between group and the time spent in preparation for litigation proceedings (see Table 10 below).

Table 10

**party * time spent pre-commencement in preparation for lit Crosstabulation**

*Count*

| | | time spent pre-commencement in preparation for lit | | | | |
|---|---|---|---|---|---|---|
| | | 1-7 days | 15-21 days | 22-28 days | 1 month + | Total |
| party | lawyer | 1 | 1 | | 4 | 6 |
| | party | | | 1 | 2 | 3 |
| Total | | 1 | 1 | 1 | 6 | 9 |

It can be seen that for both the category of lawyer and the category of party, the majority of respondents answered that time spent in preparation for litigation proceedings exceeded one month.

Table 11 can be seen to provide information on the effect that active case management by the judiciary has upon the settlement rate of disputes.

Table 11

**party * active case management by judiciary has meant Crosstabulation**

*Count*

| | | active case management by judiciary has meant | | | | |
|---|---|---|---|---|---|---|
| | | maj of cases settle out of ct before PTR | maj of cases settle at PTR | maj of cases proceed to trial | other | Total |
| party | lawyer | 3 | 1 | 1 | 1 | 6 |
| | party | 2 | 1 | | | 3 |
| Total | | 5 | 2 | 1 | 1 | 9 |

It can be seen that whilst the category of lawyer were equally divided in their opinion as to the effect of active case management by the judiciary, the net effect of the responses to the questionnaire was that a significant proportion of respondents viewed case management as leading to an out of court settlement of the dispute before the Pre Trial Review.

Table 12 provides information on the effectiveness of out of court settlements in settling the dispute in hand.

Table 12

**party * effectiveness of out of ct settlements in settling dispute Crosstabulation**

*Count*

| | | effectiveness of out of ct settlements in settling dispute | | | |
|---|---|---|---|---|---|
| | | very successful | fairly successful | unsuccessful | Total |
| party | lawyer | 5 | | 1 | 6 |
| | party | 2 | 1 | | 3 |
| Total | | 7 | 1 | 1 | 9 |

It can be seen from Table 12 that a significant majority of respondents answered that out of court settlements were "very successful" in terminating the dispute.

An interesting result was found between group and the view of the respondent towards the litigation procedure itself.

Table 13

**party * describe litigation procedure Crosstabulation**

*Count*

| | | describe litigation procedure | | |
|---|---|---|---|---|
| | | formalistic | adversarial | Total |
| party | lawyer | | 6 | 6 |
| | party | 3 | | 3 |
| Total | | 3 | 6 | 9 |

It can be seen from Table 13 that whilst the category lawyer in their entirety viewed the litigation procedure to be "adversarial", the category of party in their entirety viewed the procedure to be "formalistic".

Interesting information was found between group and the views held by questionnaire respondents of judicial case management (see Table 14).

Table 14

**party * experience of case management Crosstabulation**

*Count*

| | | experience of case management | | |
|---|---|---|---|---|
| | | substantially reduces time and expense | had little effect upon time and expense | Total |
| party | lawyer | 3 | 3 | 6 |
| | party | | 3 | 3 |
| Total | | 3 | 6 | 9 |

It can be seen that whilst the opinion of the category lawyer was equally divided as to whether or not judicial case management substantially reduced the time and expense of litigation proceedings, the category of party in their entirety contended that case management had little effect upon such factors.

Table 15 can be seen to provide information appertaining to the penalties imposed for breach of the case management timetable.

Table 15

**party * penalty for breach of case management timetable- unless order Crosstabulation**

*Count*

| | | penalty for breach of case management timetable- unless order | | |
|---|---|---|---|---|
| | | yes | no | Total |
| party | lawyer | 3 | 3 | 6 |
| | party | 3 | | 3 |
| Total | | 6 | 3 | 9 |

It can be seen that whilst only 50% of the category of lawyers stated the penalty imposed for a breach of timetable to be an unless order, the category of party in their entirety answered that this was indeed the case. The net result is therefore that two thirds of respondents believed an unless order to be the penalty imposed for a breach of the case management timetable.

An interesting result was found between group and the period of time from commencement of litigation proceedings to the consideration of the award by the judiciary (see Table 16).

Table 16

**party * period of time from commencement to consideration of award Crosstabulation**

*Count*

| | | period of time from commencement to consideration of award | | | |
|---|---|---|---|---|---|
| | | 1-6 months | 7-12 months | 2 years+ | Total |
| party | lawyer | 1 | 4 | 1 | 6 |
| | party | | 2 | 1 | 3 |
| Total | | 1 | 6 | 2 | 9 |

It can be seen from Table 16 that two thirds of the category of lawyer and the majority of the category of party, stated the period of time from commencement to consideration as being 7 – 12 months.

Table 17 can also be seen to highlight an interesting result between group and the approximate percentage of litigation awards that result in appeal.

Table 17

**party * approximate percentage of awards that result in appeal Crosstabulation**

*Count*

| | | approximate percentage of awards that result in appeal | | | |
|---|---|---|---|---|---|
| | | less than 5 | 6 - 20 | 21 - 50 | Total |
| party | lawyer | | 4 | 2 | 6 |
| | party | 3 | | | 3 |
| Total | | 3 | 4 | 2 | 9 |

It can be seen that whilst the category of lawyer were diverse in their answer, stating that between 6-20 % and 21-50 % of awards result in appeal, the category of party in their entirety stated that less than 5% of awards result in appeal.

Table 18 can be seen to provide information as to the respondents views of judicial conduct.

Table 18

**party * conduct of judiciary - professional & effective Crosstabulation**

*Count*

| | | conduct of judiciary - professional & effective | |
|---|---|---|---|
| | | yes | Total |
| party | lawyer | 6 | 6 |
| | party | 3 | 3 |
| Total | | 9 | 9 |

Interestingly, it can be seen that both the category of lawyer and the category of party in their entirety viewed the conduct of the judiciary as being professional and effective.

An interesting result was found between group and the perceived cost of litigation proceedings (see Table 19).

Table 19

**party * cost of litigation Crosstabulation**

*Count*

| | | cost of litigation | |
|---|---|---|---|
| | | costly | Total |
| party | lawyer | 6 | 6 |
| | party | 3 | 3 |
| Total | | 9 | 9 |

It can be seen that both the category of lawyer and the category of party in their entirety viewed the cost of litigation proceedings as being "costly".

**Pearson's Product Moment Correlation Co-efficient**

Correlation calculations were undertaken between the group belonged to and the questions posed in the experimenter-compiled questionnaire. However, whilst a number of 2-tailed calculations prima facie appeared to be of statistical significance, upon examination of the Pearson Correlation test it became apparent that this was not the case. For none of the calculations achieved the .6 significance level that is required if such a small sample size is to be deemed statistically significant.

### Independent Sample T-Tests

Although t-tests were calculated between group belonged to and all the questions posed in the experimenter-compiled questionnaire, no significant differences were found. As explained above, the small sample size is the most likely explanation for the lack of significant difference found. However, it is anticipated that the full study will produce a larger sample size and therefore, significant difference will be found.

### Cross-Tabulation Calculations Based Upon the Size of the Disputing Party

It was intended that cross-tabulations using the size of the disputing company as the controlling variable, could be computed. Due to the low party response rate, this test was unable to be undertaken. It is anticipated, however, that a fuller response rate will be attained by the full study and upon receipt of an increased number of respondents, such cross-tabulations will be successfully computed.

## Discussion

As will be recalled, the overriding objective of the research undertaken was to establish whether legislative reform had effected a meaningful increase in procedural expediency and efficiency. Moreover, it was also anticipated that any potential unilateral advantage enjoyed by a particular category of "user", would also be uncovered. These objectives have been achieved.

### Arbitration

As regards the process of arbitration, it can be seen prima facie that the ambition of the Arbitration Act 1996 and hence Woolf's definition of access to justice, has reached fruition.

That is, if one examines the contents of Table 1, it can be seen that despite the dissent of the category of lawyer, the categories of arbitrator and party both viewed the arbitrator as being the driving force behind procedure. When it is considered that in Tables 3, 4, 5 and 6 both the category of arbitrator and lawyer in their totality stated that the arbitral procedure was neither legalistic nor rigid in its approach, it is possible to assert that the Legislature's ambition to increase the fluidity of arbitral procedure has been achieved. This in turn could be seen to have an effect on procedural expediency and efficiency. It should be noted, however, that the attitude of the arbitral parties towards the legalistic and rigid nature of arbitration was somewhat divided and thus caution must be exercised in the stating of such findings as statistical fact.

Furthermore, as elucidated by Tables 7 and 8, although arbitrators in their totality viewed arbitration as being a means of settling disputes in a flexible fashion with regard to certain defined principles and procedures, construction parties in their majority stated that arbitration is a means of settling disputes according to defined and formal principles and procedures. In contrast to the findings in Tables 3, 4, 5 and 6, the responses of the category of lawyer were somewhat dispersed, ranging from defined and formal to flexible in approach. Thus, although prima facie the Arbitration

Act 1996 can be seen to have achieved its ambition in permitting a more effective and flexible approach to dispute resolution, preliminary findings do not wholly support such a theory.

The Arbitration Act 1996, however, can prima facie be seen to have attained its ambition in limiting the number of appeals resulting from arbitral proceedings. For as elucidated by Table 9 and Table 10, the category of parties in their totality responded that less than 5% of awards result in appeal, with the majority of arbitrators and lawyers responding that between 6%-20% of awards result in appeal. In short, it may be contended that this finality of arbitral awards will have an impact upon the efficiency and expediency of arbitral procedure. For costly delays and increased procedural expense will be of limited incidence.

Some concern has been expressed, particularly amongst the academic sector, that in limiting the number of appeals launched, affronts to justice may go undetected. However, the results as detailed in Tables 11, 12, 13 and 14 would appear to allay such fears. For when questioned as to their opinion of the decisions reached, the majority of arbitral parties responded that they believed the award to be fair and just. The category of lawyer, however, was not so forthcoming in their response, providing a diverse range of answers to the question raised. Thus, caution must be exercised in the stating of such a finding as statistical fact.

However, Table 13 and Table 14 can be seen to provide further supporting evidence for such a theory. For when questioned as to their perception of the conduct of the arbitral tribunal, arbitral parties and lawyers (except for one missing value) in their totality responded that the arbitral tribunal was professional and effective in its approach.

A further concern expressed within academic circles was that of the juridification debate. Interestingly, as exemplified by Table 2, the category of party tended towards a response that in their experience of arbitral representation, one arbitral party would be legally represented, whilst the other party would be expertly represented. Thus, prima facie it would appear that there is little support for the juridification debate. However, it must be noted that the category of lawyers in their totality and the majority of arbitrators responded to this question in the negative. Thus, caution must be exercised in any assertion that there has not been a juridification of arbitral procedure.

**Adjudication**

It will be remembered that a small, yet representative sample size was employed in the preliminary investigation into adjudication. However, of the 50 adjudication questionnaires piloted, only 12 participants responded. That is, 6 adjudicator respondents, 4 lawyer and 2 party respondents. In view of the low party response rate, discussion has been restricted to adjudicators and lawyers alone. This was so as to ensure that analysis was representative and to minimise the skewed nature of the data.

As regards the process of adjudication itself, it may be asserted that prima facie, the adjudication provisions of the Housing Grants Construction and Regeneration Act 1996 have failed to achieve their ambition.

For upon analysis of Table 3, it would appear that there is cause for concern as to the presence of unilateral advantage. That is, whilst the category of adjudicators in their totality declined the suggestion that it is usual for repeat users of adjudication to be engaged in proceedings against infrequent users, the majority of lawyers tended towards a positive response.

Moreover, as detailed in Table 7 and Table 8, the majority of adjudicators tended towards the opinion that it is only the party commencing adjudication who spends much time in preparation for proceedings. Thus, it would prima facie appear that the adjudication process is falling victim to those wishing to gain tactical advantage. However, it is important to note that such a view was not universally held. For the majority of those falling within the category of lawyer deemed it likely that both parties spend some time in preparation for adjudication, with one legal respondent advocating that both parties spend little or not much time in preparation.

In so far as the juridification debate is concerned, it can be seen from Table 9 and Table 10 that the majority of adjudicators consider themselves to be the driving force behind adjudication procedure, to the disagreement of the category of lawyers. Whilst it may be contended that this lack of consensus may be due to factors of personality and ego, it may also be taken to be an indication that the stranglehold of the legal profession is not such that it has taken a hold of the adjudication process in its entirety.

Moreover, as elucidated by Table 4, it was the experience of adjudicator respondents that it is uncommon for both adjudication parties to be legally represented at proceedings. However, as contended by the category of lawyers in their entirety, historically both disputing parties have been legally represented at adjudication.

When this is considered in line with the diversity of views as expressed by the legal profession in Tables 11 and 12, it becomes clear that the waters are somewhat muddied as to the juridification debate. For despite the contention of adjudicators that the adjudication procedure was not adversarial in nature, the legal profession can be seen to be in disagreement in that only half of those questioned denied the adversarial existence of adjudication.

Illustratively, when questioned as to their views of adjudication (see Tables 17 and 18), the category of lawyers in their totality stated that the nature of adjudication was such that there were two "sides" that battled it out, each seeking to win. Even the category of adjudicators found support for such an approach, albeit in their minority.

Respite from such a theory can be found, however, in Table 5 and Tables 13 and 14. For both adjudicators and lawyers were divided in their opinion as to whether provided the procedure was seen to be equitable and just, disputing parties would accept a result even if it went against them. Moreover, lawyers in their totality and half the number of adjudicator respondents disagreed with the contention that parties

were unconcerned with the justice of procedure, only keeping interest and seeking satisfaction in a favourable result. Thus, it cannot be asserted with any degree of accuracy that disputing parties themselves harbour beliefs that are incompatible with the spirit of alternative dispute resolution.

Some doubt may be cast, however, upon the success of the adjudication reforms in achieving an effective and efficient system of dispute resolution. For as exemplified in Table 6, whilst adjudicators in their entirety agreed that adjudication is a valid alternative to litigation, which is expedient and inexpensive, the category of lawyers in their totality disagreed with such a submission.

When considered in the light of Table 15 and Table 16, however, it becomes clear that the failing of adjudication may be in the realms of expediency rather than lessened expense. For when compared to both arbitration and litigation, respondents over-whelmingly contended that adjudication was the less expensive.

Indeed, upon examination of Tables 15 and 16, it can be seen that respondents viewed the litigation and arbitration mechanisms as being identical in terms of cost. For a correlation was found at the 1% level of probability for a two-tailed test ($0.000<0.01$) between the cost of adjudication as compared to arbitration and the cost of adjudication as compared to litigation. Such significant findings are a clear indication that the adjudication provisions of the Housing Grants Construction and Regeneration Act 1996 have achieved financial efficiency.

Given that the majority of users of the adjudication process hold the contractual position of sub-contractor (see Table 1) and that they may / may not hold the position of a medium international organization (see Table 2) such financial efficiency is vital. For due to the nature of the construction industry, a free flow of finance is vital for the survival and growth of business. Without such, the sea of financial constraint and eventual bankruptcy may drown the small contractor.

Thus, there would prima facie seem to be some hope of success for the adjudication process. However, due to the conflicting nature of the early indications, whether the procedure can be seen to attain Woolf's definition of access to justice remains to be established. It is contended that for such an in-depth analysis of its success or otherwise to be undertaken, further and more in-depth information is required.

**Litigation**

So as to afford an effective analysis of arbitration and adjudication, it is imperative that some form of "control" be established against which a standard may be formulated. Given that such procedures were intended to offer an alternative to court procedure, the nature of litigation must by necessity be that control.[1]

The pilot study has indicated a number of characteristics associated with the nature of disputes that result in litigation. It can be seen by virtue of Table 2 that whilst it was

[1] However, due to the pilot nature of this study, such a comparison shall not be undertaken here. It shall be reserved for the final and more detailed empirical work.

the view of the legal professionals that litigious disputes were financial in nature, construction parties believed the subject matter of disputes to be more varied.

A profile of litigating parties can also be seen. For as exemplified by Tables 3 and 4, litigation users are typically employers and main contractors and as demonstrated by Tables 5 and 6, organisations utilising the process are typically large international and small domestic organisations. Table 7 can be seen to suggest that litigating parties are repeat users of the process who are located nationally (Table 9).

Evidence as to the nature of litigation proceedings also emerged. As exemplified in Table 10, time spent in preparation for litigation was typically in excess of one month. However, due to the case management timetable, the majority of cases were believed to settle out of court before pre-trial review (Table 11) and such settlements were understood to be "very successful" in terminating the dispute (Table 12).

However, it is interesting to note that despite the settlement rate under the case management timetable, the majority of respondents stated that such a judicial tool had little effect upon the time and expense incurred by parties engaging in litigation (Table 14). Indeed, as exemplified by Table 16, the period of time from the commencement of proceedings to consideration of the award by the judiciary was stated as being between seven to twelve months. Furthermore, respondents described the proceedings as being "costly" (Table 19).

There are perhaps two reasons that may account for the lack of judicial impact upon the efficiency and expediency of proceedings. Firstly, if the nature of the dispute referred to litigation is particularly contentious or complex, the dispute will need to run its natural course, despite how protracted this may seem. For the artificial compression of such a dispute cannot lead to an equitable and just resolution.

Secondly, the penalty imposed for the breach of the case management timetable by the judiciary was stated to be that of the "unless order" (Table 15). Had cost sanctions been utilised or some other such sanction, then it is arguable that expediency would take on a renewed importance to the litigating parties. In either event, it would prima facie appear that the new Civil Procedure Rules have had little impact upon the time and expense traditionally associated with litigation proceedings.

However, such a fact must not be mistaken for indicating that disputing parties are dissatisfied with the revised procedure. For whilst there was some disparity as to how litigation proceedings were viewed by various parties to the action (Table 13)[2] the majority of respondents reported an appeal rate of less than 20% (Table 17). Furthermore, the conduct of the judiciary was described as being professional and effective (Table 18).

Given early indications as to the time, expense and complexity associated with litigation procedure, it remains to be seen whether the process can be said to attain Woolf's definition of civil justice. Perhaps the answer lies in assessing of the proportionality of costs as compared to the nature of the dispute in hand.

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[2] For it was the belief of the legal profession that litigation proceedings were adversarial, whilst construction parties categorised them as being formalistic

## Methodological Evaluation

Upon examination of the methodology employed in the pilot study, several areas for improvement have been highlighted.

Firstly, upon the undertaking of statistical tests in SPSS, several questions included in the pilot study have been exemplified as being subject to requirements. That is, for example, a number of questions showed little or no statistical significance. It may be said that such findings were due to the limited sample size. However, upon discussion and review of the questionnaire with construction professionals, it was decided that these questions ought be removed from the full study as they were deemed to be of little practical importance to dispute resolution proceedings. In removing such null questions, it is submitted that the length of the questionnaire will be reduced, thereby facilitating an increased response rate.

Moreover, it was found that the multiple-choice answers to questions were on occasion too numerous. The over-provision of responses often meant that certain response variables were unselected by respondents and therefore of little value. Furthermore, the spread of answers over a large number of response variables limited the likelihood of establishing any statistical significance to the question. Hence it is contended that in the full study, the number of response variables be limited to no greater than four to a question, except where dictated by necessity.

For ease of analysis, it has also been decided that singular questionnaires be prepared for adjudication, arbitration and litigation. For upon the inputting of data into SPSS, it was found that the slight variation in questionnaires for arbitrators, lawyers and parties for example, caused experimenter difficulty in creating the SPSS data set. In producing a generic questionnaire for each of the dispute resolution mechanisms, such experimenter difficulties will be overcome.

Initial concerns as to the validity of a singular questionnaire for each process (ie the ability of lawyers as opposed to parties, to read into questions should a generic and comprehensive questionnaire be compiled), may be overcome by the analyzing of the data set in its entirety and the subsequent analysis of the data set with each group removed in turn. The comparison of the results of each will thereby highlight any adverse effect of invalid responses upon the data set as a whole.

## Pilot Study Final Comment

It can be seen prima facie that whilst arbitration may be deemed to have achieved its ambition and hence meet with Woolf's requirements for access to justice, the adjudication reforms may not have been so fortunate. As will be appreciated, however, whilst clear trends can be viewed within the data set, due to the small sample size caution must be exercised in the pronouncement of any such findings as lore. Moreover, before any such assertion can be made, a comparison of the two mechanisms would need to be undertaken against the control "litigation". It is anticipated that with a greater sample size, such restrictions will be overcome and statistical findings will be not only of interest, but of statistical significance also.

# ANNEXE 5: ADJUDICATION, ARBITRATION AND LITIGATION FINAL STUDY QUESTIONNAIRES

# ADJUDICATION QUESTIONNAIRE

## ABOUT YOU

*Please answer each question by clicking on one selection from each drop down box*

Q1. Would you describe yourself as being *(please tick all that apply)*

- ☐ Adjudicator
- ☐ Lawyer
- ☐ Construction Professional - Large Company - Annual Sales > £300m
- ☐ Construction Professional - Medium Company
- ☐ Construction Professional - Small Company - Annual Sales < £51m

Q2. In so far as the adjudication provisions of the Construction Act 1996 are concerned, are you: Please select

Q3a. How would you describe your level of participation in construction adjudication proceedings for the year 2001: Please select

Q3b. Would you say that your level of participation in adjudication proceedings has increased since the introduction of the Construction Act 1996:
Please select

Q4. How would you describe the majority of construction adjudication disputes:
Please select

*Please continue on to Q5 below*

## ABOUT PARTIES TO THE ADJUDICATION PROCEDURE

*Please answer each question by ticking all boxes that you believe apply:*

Q5. Would you describe the majority of "users" of adjudication services as being:

a) Contractual position
- ☐ Employer
- ☐ Main contractor
- ☐ Sub Contractor

b) Size of organisation
- ☐ Large Organisation – Annual sales > £300m
- ☐ Medium Organisation
- ☐ Small Organisation – Annual sales <£51m

c) Experience of adjudication
- ☐ Both parties are repeat users of adjudication
- ☐ Both parties are infrequent users of adj
- ☐ Repeat users of adj –v- infrequent users of adj

d) Representation at proceedings
- ☐ Both parties are legally represented
- ☐ Both parties are represented by industrial expert
- ☐ Both parties self-representing
- ☐ 1 party legally represented & other expertly rep
- ☐ 1 party legally represented & other self-rep
- ☐ 1 party expertly represented & other self-rep

## ABOUT THE ADJUDICATION PROCESS

*Please answer each question by clicking on one selection from each drop down box*

Q6. When engaged in adjudication, were the majority of procedures followed:
Please select

Q7. Who in your opinion is the driving force behind matters of procedure in the majority of cases:
Please select

Q8. Would you describe the majority of adjudication procedures followed as being
Please select

Q9. How long would you say that parties spend in preparation for adjudication, PRIOR to the commencement of proceedings:
Please select

Q10. As regards the appointing of an adjudicator, is it usual for their identity to be specified:
Please select

Q11. From your experience, are the majority of adjudicators of a:
Please select

Q12. from your experience, how much is the average period of time from the giving of notice of intention to refer a dispute to adjudication, until the appointment of an adjudicator: Please select

## ABOUT THE ADJUDICATION AWARD

*Please answer each question by clicking on one selection from each drop down box*

Q13. On average, how long is the period of time from the commencement of adjudication proceedings, to the consideration of the award by the adjudicator:
Please select

Q14. What would you anticipate to be the reason for such a timescale as specified in Q13:
Please select

Q15. How would you describe this time taken from commencement of procedures to consideration of the award by the adjudicator:
Please select

Q16. What is the average time taken by the adjudicator to reach a decision:
Please select

Q17. How would you describe the time taken by adjudicators to reach a decision:
Please select

Q18. From your experience, on what grounds are the majority of adjudication decisions made:
Please select

Q19. In your opinion, are the majority of adjudication awards:
Please select

Q20. From your experience, what is the approximate percentage of awards that result in appeal:
Please select

Q21. Would you describe the rate of appeal as being:
Please select

Q22. From your experience, to whom are appeals launched:
Please select

Q23. Which do you believe to be of greatest importance with regard to adjudication proceedings: Please select

Q24. From your experience, how would you describe the overall financial demands placed upon adjudication parties: Please select

Q25. From your experience, would you suggest that as compared to litigation and arbitration, adjudication is:

Litigation Please select
Arbitration Please select

Q26. From your experience, how would you describe the conduct of those involved in the adjudication process:

Actions of adjudicators are: Please select
Attitude of adjudicators towards dispute are: Please select

Actions of expert - legal representatives are: Please select
Attitude of representatives towards dispute are: Please select

Actions of adjudication parties are: Please select
Attitude of adjudication parties towards dispute are: Please select

Q27. With which of these commonly held statements do you most agree:

- ☐ Adjudication is a means of settling disputes according to defined & formal principles & procedures
- ☐ Adjudication is a means of settling disputes in a generally flexible manner
- ☐ Adjudication is a means of settling disputes in a flexible fashion but with regards to certain defined principles & procedures

**Thank you for taking the time to complete this questionnaire.**

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- **Click "Send"**

# ARBITRATION QUESTIONNAIRE

## ABOUT YOU

*Please answer each question by clicking on one selection from each drop down box*

Q1. Would you describe yourself as being *(please tick all that apply)*

- ☐ Arbitrator
- ☐ Lawyer
- ☐ Construction Professional - Large Company - Annual Sales > £300m
- ☐ Construction Professional - Medium Company
- ☐ Construction Professional - Small Company - Annual Sales < £51m

Q2. In so far as the arbitration provisions of the Arbitration Act 1996 are concerned, are you: Please select

Q3a. How would you describe your level of participation in construction arbitration proceedings for the year 2001: Please select

Q3b. Would you say that your level of participation in arbitration proceedings has increased since the introduction of the Arbitration Act 1996: Please select

Q4. How would you describe the majority of construction arbitration disputes: Please select

*Please continue on to Q5 below*

## ABOUT PARTIES TO THE ARBITRATION PROCEDURE

*Please answer each question by ticking all boxes that you believe apply:*

Q5. Would you describe the majority of "users" of arbitration services as being:

a) Contractual position
- ☐ Employer
- ☐ Main contractor
- ☐ Sub Contractor

b) Size of organisation
- ☐ Large Organisation – Annual sales > £300m
- ☐ Medium Organisation
- ☐ Small Organisation – Annual sales <£51m

c) Experience of arbitration
- ☐ Both parties are repeat users of arbitration
- ☐ Both parties are infrequent users of arb
- ☐ Repeat users of arb –v- infrequent users of arb

d) Representation at proceedings
- ☐ Both parties are legally represented
- ☐ Both parties are represented by industrial expert
- ☐ Both parties self-representing
- ☐ 1 party legally represented & other expertly rep
- ☐ 1 party legally represented & other self-rep
- ☐ 1 party expertly represented & other self-rep

## ABOUT THE ARBITRATION PROCESS

*Please answer each question by clicking on one selection from each drop down box*

Q6. When engaged in arbitration, were the majority of procedures followed:
Please select

Q7. Who in your opinion is the driving force behind matters of procedure in the majority of cases:
Please select

Q8. Would you describe the majority of arbitration procedures followed as being
Please select

Q9. How long would you say that parties spend in preparation for arbitration, PRIOR to the commencement of proceedings:
Please select

Q10. As regards the appointing of an arbitrator, is it usual for their identity to be specified:
Please select

Q11. From your experience, are the majority of arbitrators of a:
Please select

Q12. From your experience, how much is the average period of time from the giving of notice of intention to refer a dispute to arbitration, until the appointment of an arbitrator: Please select

## ABOUT THE ARBITRATION AWARD

*Please answer each question by clicking on one selection from each drop down box*

Q13. On average, how long is the period of time from the commencement of arbitration proceedings, to the consideration of the award by the arbitrator:
Please select

Q14. What would you anticipate to be the reason for such a timescale as specified in Q13:
Please select

Q15. How would you describe this time taken from commencement of procedures to consideration of the award by the arbitrator:
Please select

Q16. What is the average time taken by the arbitrator to reach a decision:
Please select

Q17. How would you describe the time taken by arbitrators to reach a decision:
Please select

Q18. From your experience, on what grounds are the majority of arbitral decisions made:
Please select

Q19. In your opinion, are the majority of arbitral awards:
Please select

Q20. From your experience, what is the approximate percentage of awards that result in appeal:
Please select

Q21. Would you describe the rate of appeal as being:
Please select

Q22. Which do you believe to be of greatest importance with regard to arbitral proceedings: Please select

Q23. From your experience, how would you describe the overall financial demands placed upon arbitral parties: Please select

Q24. From your experience, would you suggest that as compared to litigation and adjudication, arbitration is:

Litigation Please select
Adjudication Please select

Q25. From your experience, how would you describe the conduct of those involved in the arbitration process:

Actions of arbitrators are: Please select
Attitude of arbitrators towards dispute are: Please select

Actions of expert / legal representatives are: Please select
Attitude of representatives towards dispute are: Please select

Actions of arbitral parties are: Please select
Attitude of arbitral parties towards dispute are: Please select

Q27. With which of these commonly held statements do you most agree:

- ☐ Arbitration is a means of settling disputes according to defined & formal principles & procedures
- ☐ Arbitration is a means of settling disputes in a generally flexible manner
- ☐ Arbitration is a means of settling disputes in a flexible fashion but with regards to certain defined principles & procedures

**Thank you for taking the time to complete this questionnaire.**

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- **Click "Send"**

# LITIGATION QUESTIONNAIRE

## ABOUT YOU

*Please answer each question by clicking on one selection from each drop down box*

Q1. Would you describe yourself as being *(please tick all that apply)*

- ☐ Judiciary
- ☐ Lawyer
- ☐ Construction Professional - Large Company - Annual Sales > £300m
- ☐ Construction Professional - Medium Company
- ☐ Construction Professional - Small Company - Annual Sales < £51m

Q2. In so far as the provisions of the Civil Procedure Rules 1998 are concerned, are you: Please select

Q3a. How would you describe your level of participation in construction litigation proceedings for the year 2001: Please select

Q3b. Would you say that your level of participation in litigation proceedings has increased since the introduction of the Civil Procedure Rules 1998: Please select

Q4. How would you describe the majority of construction litigation disputes: Please select

*Please continue on to Q5 below*

## ABOUT PARTIES TO THE LITIGATION PROCEDURE

*Please answer each question by ticking all boxes that you believe apply:*

Q5. Would you describe the majority of "users" of litigation services as being:

a) Contractual position
- ☐ Employer
- ☐ Main contractor
- ☐ Sub Contractor

b) Size of organisation
- ☐ Large Organisation – Annual sales > £300m
- ☐ Medium Organisation
- ☐ Small Organisation – Annual sales <£51m

c) Experience of litigation
- ☐ Both parties are repeat users of litigation
- ☐ Both parties are infrequent users of lit
- ☐ Repeat users of lit –v- infrequent users of lit

d) Representation at proceedings
- ☐ Both parties are legally represented
- ☐ Both parties are represented by industrial expert
- ☐ Both parties self-representing
- ☐ 1 party legally represented & other expertly rep
- ☐ 1 party legally represented & other self-rep
- ☐ 1 party expertly represented & other self-rep

## ABOUT THE LITIGATION PROCESS

*Please answer each question by clicking on one selection from each drop down box*

Q6. Who in your opinion is the driving force behind the litigation process in the majority of cases:
Please select

Q7. Would you describe the majority of litigation procedures followed as being
Please select

Q8. How long would you say that parties spend in preparation for litigation, PRIOR to the commencement of proceedings:
Please select

Q9. In your experience, how often is the Statutory Timetable for the service of Statements of Case (particulars of claim and defence) exceeded:
Please select

Q10. Where the Statutory Timetable for the service of Statements of Case (SoC) has been exceeded, to what would you attribute this non-compliance in the majority of cases:
Please select

Q11. With regard to the Statements of Case (particulars of claim and defence) with which of the following commonly held views do you most agree:

- ☐ It facilitates the fair resolution of disputes as it prevents undue delays
- ☐ Unrealistically short deadlines prevent proper case preparation

Q12. From your experience, would you suggest that as a result of "active case management" by the judiciary:
Please select

Q13. How would you describe the settlement rate of cases under the Civil Procedure Rules 1998:
Please select

Q14. Where there has been a breach of the Case Management Timetable, which of the following penalties were imposed by the judiciary:
Please select

Q15. With regard to the production of evidence in construction cases, from your experience, would you suggest that the Civil Procedure Rules 1998 have:
Please select

Q16. Which of the following pre-trial actions are most commonly utilised by the Court in construction proceedings:
Please select

Q17. From your experience, which of the following pre-trial actions are the MOST effective in disposing of a case or facilitating settlement:
Please select

Q18. From your experience, which of the following pre-trial actions are the LEAST effective in disposing of a case or facilitating settlement:
Please select

## ABOUT THE LITIGATION AWARD

*Please answer each question by clicking on one selection from each drop down box*

Q19. On average, how long is the period of time from the commencement of litigation proceedings, to the consideration of the award by the judiciary:
Please select

Q20. What would you anticipate to be the reason for such a timescale as specified in Q19:
Please select

Q21. How would you describe this time taken from commencement of procedures to consideration of the award by the judiciary:
Please select

Q22. What is the average time taken by the judiciary to reach a decision:
Please select

Q23. How would you describe the time taken by the judiciary to reach a decision:
Please select

Q24. From your experience, on what grounds are the majority of litigation decisions made:
Please select

Q25. In your opinion, are the majority of litigation awards:
Please select

Q26. From your experience, what is the approximate percentage of awards that result in appeal:
Please select

Q27. Would you describe the rate of appeal as being:
Please select

Q28. Which do you believe to be of greatest importance with regard to litigation proceedings: Please select

Q29. From your experience, how would you describe the overall financial demands placed upon litigating parties: Please select

Q30. From your experience, would you suggest that as compared to arbitration and adjudication, litigation is:

Arbitration Please select
Adjudication Please select

Q31. From your experience, how would you describe the conduct of those involved in the litigation process:

| | |
|---|---|
| Actions of judiciary are: | Please select |
| Attitude of judiciary towards dispute is: | Please select |
| Actions of expert / legal representatives are: | Please select |
| Attitude of representatives towards dispute are: | Please select |
| Actions of litigating parties are: | Please select |
| Attitude of litigating parties towards dispute are: | Please select |

Q32. With which of these commonly held statements do you most agree:

- ☐ Litigation is a means of settling disputes according to defined & formal principles & procedures
- ☐ Litigation is a means of settling disputes in a generally flexible manner
- ☐ Litigation is a means of settling disputes in a flexible fashion but with regards to certain defined principles & procedures

**Thank you for taking the time to complete this questionnaire.**

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