CENTRE FOR SOCIO-LEGAL STUDIES

AN OVERVIEW OF THE USE OF ARBITRATION IN ENGLAND

DECEMBER 2014

DR MICHAEL REYNOLDS

MANOR ROAD, OXFORD OX1 3UQ

TEL: +44 (0)1865 284220

FAX: +44 (0)1865 284221

MICHAEL.REYNOLDS@CSLS.OX.AC.UK

AN OVERVIEW OF ARBITRATION IN ENGLAND

CONTENTS

Executive summary

This study attempts to answer the question: what is the state of arbitration today? Here we review the apparent decline in institutional arbitration appointments, the types of case referred by leading institutions, and consider quantitative findings from a statistical analysis provided for the first time by those institutions. We also consider, from a phenomenological point of view, our impressions of the trends in arbitration gathered from discussions and interviews with lawyers, judges and arbitrators who have particular experience in this field. When all this information and data is evaluated, we conclude that whilst arbitration may not enjoy the appeal it once had because of certain innovative ADR processes (such as mediation, and in the construction sector, statutory adjudication), it nevertheless shows some signs of holding its own, particularly in the commercial property sector, and we understand it is enjoying a period of exponential growth in the international sector.[3]

1. Introduction

[3] This we gather from the three international arbitration surveys carried out by Queen Mary University of London in 2006, 2008 and 2010.

In attempting to answer the question: what is the state of domestic arbitration in England today, we look at the types of competing processes akin to arbitration and then review the statistics provided by the leading arbitration appointing institutions. We then examine the results of a questionnaire survey of arbitrators practising in a diverse range of disputes and consider the results of a number of interviews with leading players. We conclude with a summary of our findings and conclusions and make some suggestions as to how the arbitration system may be enhanced.

In England today there four key areas of dispute processes: litigation, arbitration, statutory adjudication and mediation.

Litigation

With the implementation of new procedural rules in 1998 and the objective of reducing cost and delay by means of decreasing the number of cases in court through earlier settlement, there has been a resultant decline in the number of claims in the courts. This is illustrated by the statistics published by the Ministry of Justice demonstrated in Table 1.

Table 1 Civil Claims and Trials 2000-2013

Year	Total claims	Total proceedings started	Total number of hearings and trial
2000	1,943,513	1,968,589	71,233
2001	1,805,637	1,832,107	71,763
2002	1,743,339	1,772,895	68,901
2003	1,718,883	1,749,614	65,026
2004	1,723,371	1,761,650	62,201
2005	1,968,894	2,020,765	63,367
2006	2,115,491	2,182,454	62,968
2007	1,944,812	2,011,751	69,248
2008	1,993,828	2,064,100	63,981
2009	1,803,221	1,879,430	64,078
2010	1,550,626	1,616,545	60,303
2011	1,504,243	1,553,728	52,660
2012	1,394,230	1,432,299	46,993
2013	1,445,344	1,475,852	43,087

Source: Court Statistics Quarterly January to March 2014. Ministry of Justice.

From Table 1 we can conclude that as between 2002 and 2013, the total number of civil claims decreased from 1,943,513 to 1,445,344, i.e., by 26%; the number of hearings and trials decreased from 71,233 to 43,087 i.e., by nearly 40%. In percentage terms, the number of judgments given in cases in 2013 was 60% of the 2000 figure. This may generally point to more effective and efficient case management procedures and a more activist judiciary. If we compare this to the

findings of our arbitration survey below, the difference between the number of proceedings commenced and the number of arbitration referrals is considerable. If it is right that there are between 2000 and 3000 arbitrations per year, this would amount to only 5% of the total number of hearings in the courts. If we posited that there were 12,000 arbitration appointments per year, then this, on the basis of the MoJs 2013 figures, would amount to a mere 0.8% of claims actually commenced in the courts.

Generally, these figures illustrate a success in terms of reduction of the numbers of cases. On the other hand, one might be concerned as to whether *Access to Justice* has achieved its real purpose, insofar as disputants may be dissuaded from taking action in court without alternative remedy. This is an unknown factor incapable of precise measurement, but one where the ADR movement has an important role. Thus, it is not possible to estimate how many potential claims are frustrated for one reason or another. On the positive side, it may be the case that most disputes are negotiated and compromised without the need for third party resolution. It can be seen from Table 1 that the number of claims peaked in 2006 at 2,115,491, and that the high point in terms of hearings and trials peaked in 2001 at 71,763. Be that as it may, whilst recent judicial statistics indicated a fall in the number of claims from 1,943,513 in 2000 to 1,445,344 in 2013 (Table 1), by contrast, in the first quarter of 2013 and the corresponding quarter in 2014 the number of claims showed a rise of 19% on the figures as demonstrated in Table 2.[4]

Table 2 Quarterly Q 1 Figures Comparison 2013-2014

Quarter	Total Claims	Proceeding started	Total number of judgments
Q 1 2013	357,447	365,883	161,635
Q 2 2014	424,527	431,726	206,875
Rate of increase	19%	18%	28%

Source: Courts Statistics Quarterly. January to March 2014. Ministry of Justice Statistics Bulletins. Published 19 June 2014

The overriding fact is that, on any showing, the number of hearings of both small claims and fast and multi-track actions is far greater (practically 47,000 cases in 2012), far exceeding the number of arbitration appointments made in England, which at the highest estimate is 12,000 appointments per year both institutional and private.[5] This might suggest that matters referred to arbitration may represent a quarter of those that are tried, but of that quarter we may hypothesise that, of those

[4] Courts Statistics Quarterly. January to March 2014. Ministry of Justice Statistics Bulletins. Published 19 June 2014

[5] Estimate provided by London Chamber of Commerce see para. 4.2.

12,000 domestic arbitrations, a large proportion are settled before the hearing, so we may be left with 2,000-3,000 cases that are fully resolved through arbitration, but such estimate is speculative. What is clear is that the amount of arbitration that appears to be undertaken is a fraction of those claims that are started in the courts as illustrated in Tables 1 and 10 post.[6]

Arbitration

Arbitration is a disputes process whereby two or more parties agree to a third party referee resolving the dispute which is independent of the state's legal system save for recognition and enforcement. Arbitration must be conducted fairly in accordance with statute and common law by an impartial tribunal "without" (in the words of Section 1 Arbitration Act 1996) "unnecessary delay or expense." The public interest provides that the parties are free to agree how their dispute will be decided and by whom. The courts play no part in the process, save where they are required to do so. Their jurisdiction is supportive, e.g. by enforcing the arbitrator's award. This is essential to secure the effectiveness of the process. Arbitration by its nature is private and confidential, which is why it attracts many business disputants. Where standard form contracts are used, there is usually a provision for the appointment of an arbitrator from the discipline or business involved, e.g. construction, where there will be appointment by RICS or RIBA of an architect or surveyor. In many cases, however, the parties will agree the appointment of an arbitrator without recourse or reference to an institution. Arbitration enjoys the advantage over litigation in terms of international matters, where parties from different states prefer arbitration by a neutral tribunal instead of the other side's state court.

Given that arbitration is, by its very nature, a private judicial disputes process, there are no corresponding indicators published nationally to compare the popularity of arbitration to litigation. The institutions do not publish statistics on arbitral appointments, nor do we know the numbers of private appointments that may well outrank the institutional appointments. Thus, this study is compiled from a limited range of sources, by the kind permission of the leading institutions concerned with arbitration in England, from questionnaires and a series of interviews and discussions both formal and informal.

Adjudication

Statutory adjudication is a shorter and more concentrated disputes process than traditional arbitration. It is primarily used in the construction industry, but also of wider application. Whilst it has become more established as a result of the Housing Grants (Construction and Regeneration) Act 1996 (HGRA), the process was in existence long before this enactment in the form of construction sub-contracts. Whilst some concerns were voiced initially about this fast track process and

[6] para 3.5 p.19

concerns as to the rules of natural justice,[7] it has proved effective in reducing the time for decision on building contracts, which might otherwise be subject to delay in lengthy arbitral or court proceedings. A key element of the process is the 28-day timescale during which the claim and any defence/counterclaim must be presented and proved in evidence. Oral representations may be made where the adjudicator permits, but the essential framework is governed by Section 108(2) HGRA, which enables notice to be given at any time, following which an adjudicator must be appointed within 7 days and the decision given 28 days thereafter.

In their paper, Kennedy, Milligan, Cattanach and McCluskey[8] show that the number of adjudicators has fallen since May 2002 when there were 1203 adjudicators to 921 in April 2010. Of these 120 were members of the RICS, 164 members of the CIArb and 128 members of TeCSA. The primary disciplines concerned in this study were quantity surveyors 33.5%, 15.6% lawyers, 14.1% engineers and 8.1% architects. In 1998-99 there were 187 adjudicators, and that rose to 1,528 by 2009-10, which is some evidence of its increasing attraction.

Mediation

A mediator, unlike an arbitrator or judge, does not act judicially. He or she is a facilitator who helps the parties achieve a mutually acceptable settlement satisfying their interests. This process is not so much concerned with legal rights as with the parties' interests personal or commercial. The mediator should not have any interest in the outcome of the dispute or be related to the parties. He is simply an intermediary facilitating negotiations or helping the parties eliminate differences. As Roberts and Palmer pointed out; "whereas the arbitrator assumes power to make decisions for the parties to a dispute, no such power is surrendered to the mediator; ultimate control over the outcome remains with the parties themselves."[9]

There are two broad categories of mediation. The first type is evaluative, where the mediator directs the parties to the relevant law or practice governing the dispute by virtue of the mediators training and experience. The second is facilitative, where the mediator takes a supportive role in acknowledging the expertise of the parties who may have a better idea of the solution than either the mediator or the lawyers. In this category, the mediator does not initiate or intervene, as that may suggest bias or a lack of knowledge. His role is primarily to facilitate and assist the parties in compromising differences as fairly as possible.

Thus, the underlying nature of mediation is consensual, enabling parties to reach agreement through a third party intermediary. The mediator has no executive power or autonomy — he is an instrument of the parties. Mediation may have a wider application than arbitration, in that it is not only applied to civil claims, but to matters

[7] John Uff. Contemporary Issues in Construction Law. Vol. 2. Construction Contract Reform *A Plea for Sanity.* (Construction Law Press,1997)
[8] 'The Development of Statutory Adjudication in the UK and its Relationship with Construction Workload.' . http://www.gcu.ac.uk/media/gcalwebv2/ebe/content/COBRA%20Conference%20Paper%202010.pdf. Accessed 17 July 2014. Glasgow Caledonian University.
[9] Roberts.S and Palmer M. *Disputes Processes*. 2nd ed. (Cambridge. 2005) p. 185.

of social conflict, in academia, and in other areas where arbitration is not utilised such as family disputes.[10]

2. Methodology

A phenomenological approach has been adopted for this study to ascertain the experiences of a variety of arbitrator practitioners, whether they were lawyers or other specialist disciplines. By this means, information was collected as to their perspective on arbitration, its use and application. In interviews, an empirical approach was adopted with open ended and closed questions. This explored a qualitative approach to the current state of arbitration and was complemented by a quantitative analysis of leading institutions appointment statistics, albeit in some cases incomplete. It has enabled some conclusions and findings to be made.

In addition, questionnaires were submitted to more than 50 fellows of the Chartered Institute of Arbitrators as well as a number of members of the Arbitration Club. Group discussions were also held with members of the Law Courts and Oil and Gas Branches of the Arbitration Club. The club also circulated a number of questionnaires to its members, with a 10% rate of return.

Those interviewed were selected for their longstanding involvement in arbitration as lawyers, arbitrators and other professionals. They included City lawyers, international arbitrators, counsel, former and current members of the judiciary, including some members of the senior judiciary. Officials of various leading arbitral appointing bodies and institutions were interviewed, as well as representatives from industry. Of those interviewed, most arbitrators favoured international work, but many construction specialists preferred adjudication. More complex cases tended to be arbitrated and thus the arbitrators as a whole were more engaged in international cases with few domestic referrals.

A number of studies were reviewed by meta-analysis: the King's College and the Glasgow Caledonian studies particularly with regard to the use of adjudication.

The qualitative data was extracted from questionnaires, statements taken at interviews, and statistics supplied by the institutions. The Chartered Institute Arbitrators, The Royal Institution of Chartered Surveyors, The Royal Institute of British Architects, and The Institution of Civil Engineers kindly supplied these statistics. They are published and collated here for the first time with the kind permission of those institutions.

Other phenomenological data was obtained via Internet searches of those organisations providing particular arbitration and ADR services.

The key aim here has been to reflect the trend in arbitration in England as distinct from other forms of ADR or CDR.

[10] Brown. H and Marriott. A *ADR Principles and Practice* (Sweet and Maxwell. 1999) p.131-134.

What this paper discloses may not be surprising to those who practice in the construction industry or the commercial sector and who have always promoted and advocated a more progressive approach to arbitration.[11]

3. The State of Arbitration in England

This section reports on the data obtained from the main professional institutions that have traditionally been associated with arbitration in England.

3.1 The Charted institute of Arbitrators (C.I.Arb)

The Chartered Institute of Arbitrators has been the leading arbitration institution in the UK since the end of the First World War. It is the recognised professional training and qualifying body for members of the Chartered Institute. Its strength, reflected by its membership, has been the construction industry and some other commercial areas. This is because many construction professionals joined the Chartered Institute in order to become dispute resolvers in one form or another, either as members or fellows. The majority of such members are claims quantity surveyors, who not only act as arbitrators, but also as client representatives in arbitration and adjudication. In more recent years, the Institute has broadened its base from arbitration to other forms of dispute resolution, particularly construction adjudication, and has demonstrated through its conferences and worldwide membership an interest in international arbitration. It runs dispute resolution training courses for its members and aspiring members.

Following the downturn in the British economy and the trend towards globalisation, the Institute has tried to widen its base by marketing itself as a global institution. Hence, its recent conference on international arbitration in November 2013 and the rebranding of the Institute and its journal, now called *The International Journal of Arbitration and Mediation and Dispute Management.* Dispute management entails disputes review boards, which are in the domain of the RICS as described above, indicating an overlap between the services being provided by the Chartered Institute and other organisations. Most CIArb appointments are of Arbitrators or Adjudicators, with a few mediation and expert determination matters. The majority of the adjudications relate to quantum disputes. The Associate Director of ADR Operations/Head of Dispute Appointment Services confirms that most arbitral appointments relate to the following types of dispute:

- Partnership, financial, banking
- Contracts including sale of goods, and supply of services
- Construction
- Intellectual property.

[11] M.P.Reynolds 'Quo Vadis Arbitrium' *Arbitration.* (May 1987)

Regrettably, the Chartered Institute does not keep records as to the types of referrals or subject matter or values of matters.

The Institute is launching a new Property Dispute Service, which will cover a wide range of disputes, namely:

- Landlord and tenant;
- Claims for breach of Covenant under Leases, including damages and injunctions;
- Applications for permission for alterations and change of use;
- Applications for consent to assignment and underletting of the demised premises;
- Rent reviews;
- Lease renewals;
- Disputes over commercial and residential service charges;
- Disputes of standards and costs of services;
- Disputes about repairing Covenants and standards of repair;
- Easements and Rights of Light;
- Extent of rights of way;
- Obstruction of rights of way;
- Repair of rights of way;
- Damages for loss of light;
- Interference with light;
- General issues regarding extent and use of easement, including drainage and water rights;
- Property ownership and Interfaces;
- Boundary dispute;
- Nuisance by noise, encroachment, smell etc.,
- Breach of restrictive Covenant;
- Enforcement of restrictive Covenant;
- Discharge and variation of restrictive Covenant;
- Professional Disputes;
- Claims by Solicitors, Architects and other professionals for outstanding fees in property related matters;
- Claims for professional negligence against solicitors, architects and other professionals for damages and other relief in property related matters;
- Utilities;
- Claims for damage caused by utilities to adjacent property under statutory powers e.g. escapes from water mains;
- Claims by utilities for damage caused by third parties, including other utilities.

The Chartered Institute has provided statistics for the years 2012 and 2013, and some incomplete figures for 2011. It has also provided statistics for the first half of 2014. In relation to these figures in Table 3, the only viable figures for 2012 and 2013 indicate an average of 135 appointments per year for both adjudication and arbitration. There is no apportionment of these figures provided, so the real measure

of arbitral appointments is uncertain. However, there is a *clear upward trend*, and the new panel set up by the Institute may lead to an increase in numbers. On the figures available, it is not possible to make a conclusive finding, but on these figures there appears to be a 16% annual rate of increase in appointments overall.

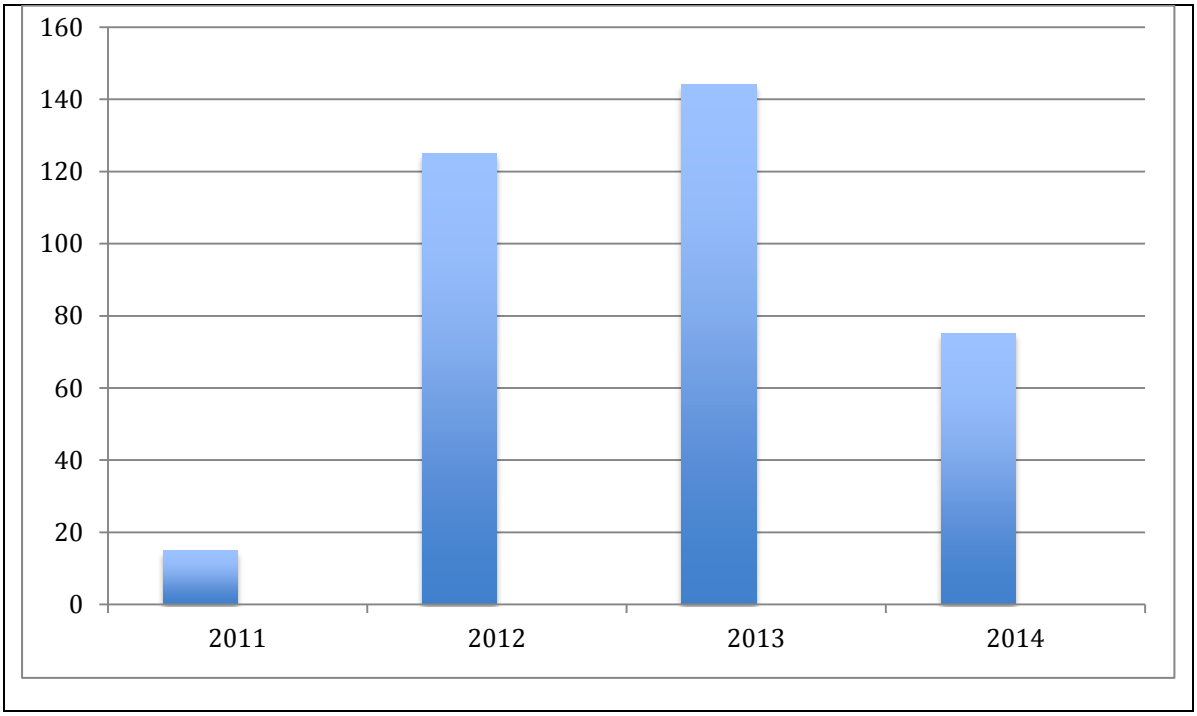
Table 3 Chartered institute of Arbitrators

Presidential Panel Appointments[12]

Year	Number of appointments
2011	**15**
2012	**125**
2013	**145**
2014	**80**

Source: The Chartered Institute of Arbitrators.

Chart 1 Chartered Institute of Arbitrators Appointments



Source: Compiled from statistic supplied by Chartered Institute of Arbitrators * figures up to July 2014.

[12] These figures were supplied by kind permission of the President of the Chartered Institute of Arbitrators and by Mr. Waj Khan Associate Director of ADR Operations/Head of Dispute Appointment Services, Chartered Institute of Arbitrators.

3.2 The Royal Institute of British Architects (RIBA)

There is a stark contrast between the Chartered Institute's appointments and those of the RIBA, as will be seen in viewing Tables 3 and 4. Whereas the Chartered Institute's figures indicate an increase in appointments, the RIBA's indicate that even in the best year, 2009, the number of appointments was only about a quarter of those of the Chartered Institute in 2012. More significant is the *dramatic fall* in appointments by the RIBA, from 33 appointments in 2009 to only 9 in August 2013, and remarkably low figures in the successive years. This represents a 72% decline in the number of appointments, practically a three-quarters reduction in the number of appointments. Such a collapse requires explanation and is an area for further inquiry. The annual average number of appointments over this five-year period for which figures have been provided by the RIBA is 14 per year.

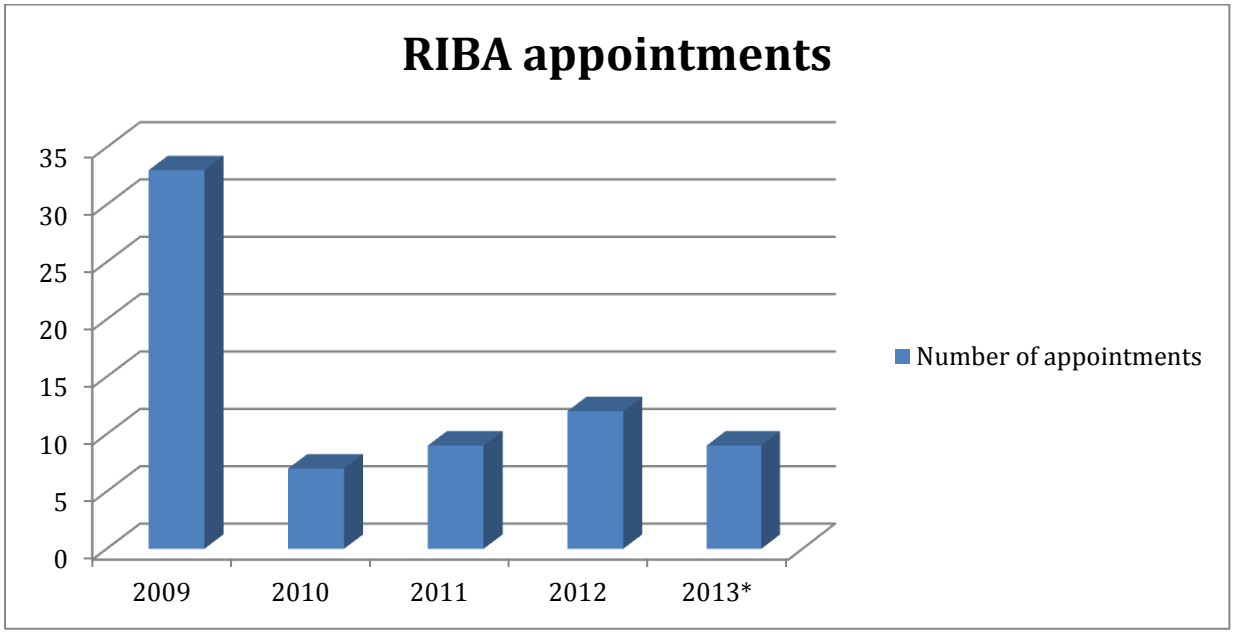
The information obtained from the RIBA, whilst more certain than the CIArb, is not positive or encouraging. It indicates only a very slight upward trend in appointments from a low base. It is regrettable that no information was available as to the type of case, its duration, and value of the claim, or how much they cost. But it is likely that the time and cost of an arbitration compared to the speed and lower cost of adjudication, as well as the recent economic crisis, may have played a part in the decline of arbitrations in this discipline. It may also be that in 2009 architects were less involved in disputes arbitrated than in other non-contentious work.

Table 4 The Royal Institute of British Architects

RIBA Appointments	**2009-2013**	
	Year appointed	**Number of appointments**
	2009	**33**
	2010	**7**
	2011	**9**
	2012	**12**
	2013*	**9**

Source: Compiled from statistic supplied by the Royal Institute of British Architects * figures up to August 2013

Chart 2 RIBA Appointments



Source: Compiled from statistic supplied by the Royal Institute of British Architects * figures up to August 2013

3.3 The Royal Institution of Chartered Surveyors (RICS)

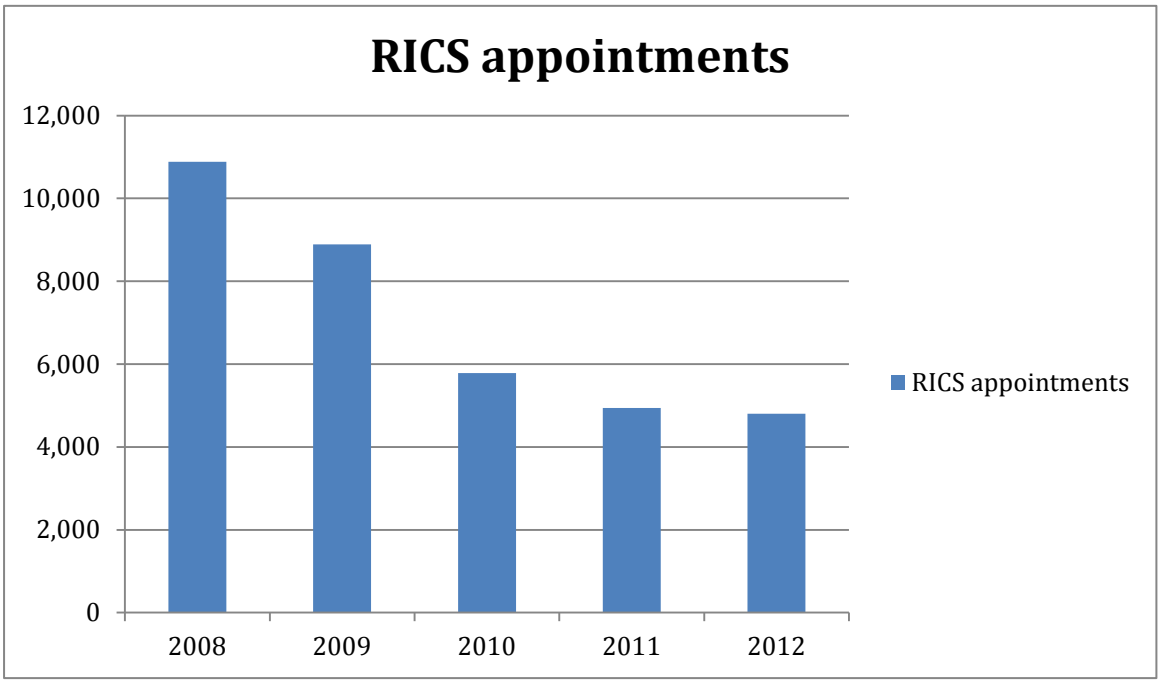
The number of arbitration referrals where the RICS is the appointing body indicates that the RICS is by far the most popular arbitral appointing authority. From what appears below, we can see that this professional body is highly organised and motivated and has become a global institution. In terms of marketing and professional organisation, it would appear to have outstripped the Chartered Institute of Arbitrators in the field of dispute resolution, and possibly presents a good business model for other professional organisations engaged in dispute resolution processes.

Table 5 RICS Appointments

Type of dispute	2008	2009	2010	2011	2012
Commercial Rent	8535	6604	4442	3513	2921
Commercial non-rent	241	240	190	165	151
Agricultural Act 1986	784	708	285	433	773
Agricultural Act 1995	147	155	54	89	68
Adjudication	990	1018	674	641	780
Pact	20	25	29	29	26
Expert Witness	33	48	26	16	21
Small Business Scheme	1	0	0	1	0
Mediation	17	11	8	10	21
Homeowner Adjudication	14	12	24	14	18
Totals	**10,880**	**8893**	**5786**	**4941**	**4800**

Source: Compiled from statistic supplied by the Royal Institution of Chartered Surveyors

Chart 3 RICS Appointment



Source: Compiled from statistic supplied by the Royal Institution of Chartered Surveyors

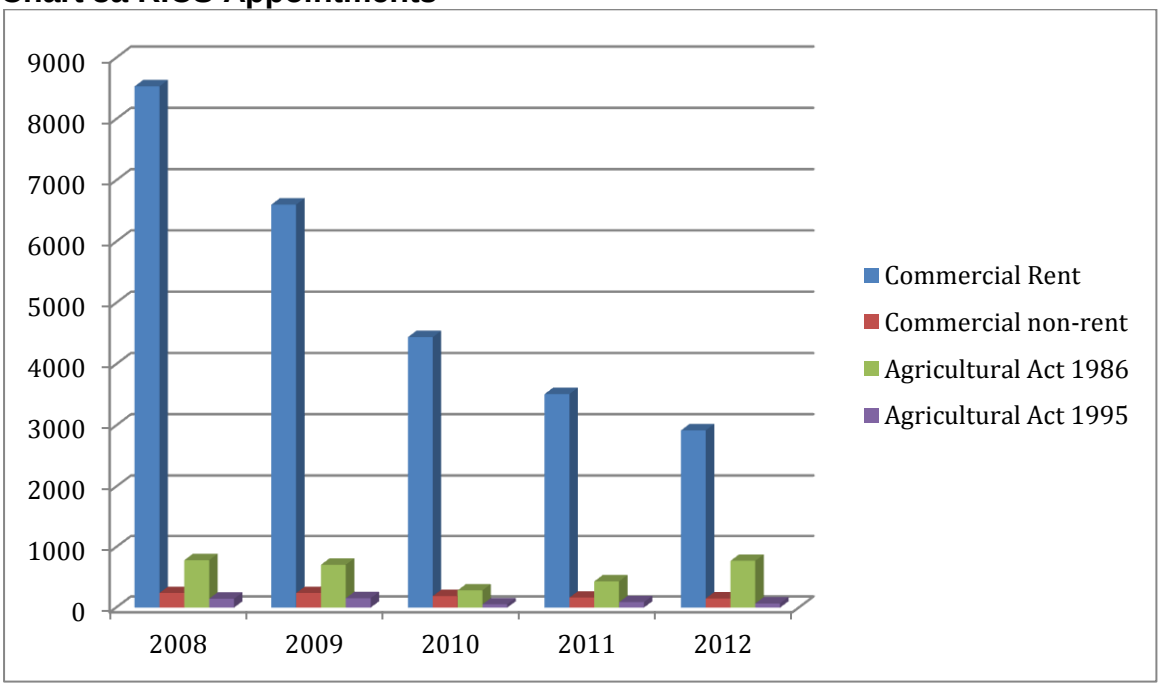
Chart 3 above illustrates how the RICS, whilst having relatively far more arbitration appointments, follows a *downward trend*, although the latest figures provided show a levelling out from the decline following the recession. In terms of arbitration appointments, Table 6 gives the number of arbitration appointments in the recession years 2008-2012, by reference to type, illustrating the potency of the commercial property sector:

Table 6 RICS Arbitral Appointments.

Type of Dispute	**2008**	**2009**	**2010**	**2011**	**2012**	**Annual Average referrals**
Commercial Rent	8535	6604	4442	3513	2921	5,203
Commercial non-rent	241	240	190	165	151	197
Agricultural Holdings Act 1986	784	708	285	433	773	597
Agricultural Tenancies Act 1995	147	155	54	89	68	103
Totals	9,707	7,707	4,971	4,200	3.931	6,103

Source: Compiled from statistic supplied by the Royal Institution of Chartered Surveyors

Chart 3a RICS Appointments



Source: Compiled from statistic supplied by Royal Institution of Chartered Surveyors

Table 6 and Chart 3a above illustrate that commercial property disputes dominate the sector and that whilst, again, there is a decrease in commercial rent arbitration, the number of appointments being down from 8,535 in 2008 to 2,921 in 2012 (the 2012 figure representing only 34% of the 2008 high point), this may well be accounted for by the recent recession. A GLA report[13] confirms that the property market in London peaked at the end of 2007. However, developers made quick adjustments, suspending many new schemes in favour of consolidation through mergers and acquisition. The current buoyancy in the property market in the southeast of England and London may well reverse this trend. Unlike other forms of arbitration, the arbitrations carried out by the RICS in these cases tend to be quicker and less costly than other forms of arbitration. The annual average number of appointments made by the RICS in the years 2008 to 2012 was 6,103. A further analysis reveals that the greater number of references concerned commercial rent, with an annual average number of 5,203 cases, followed by referrals under the Agricultural Holdings Act 1986 at 597, followed by commercial rent at 197, and followed in turn by referrals under the Agricultural Tenancies Act 1995 at 103. If anything, these figures demonstrate that most domestic arbitrations are related to property issues, which exceed the figures for both construction and commercial cases.

3.4 Institution of Civil Engineers (ICE)

The ICE makes very few domestic arbitral appointments, despite having highly skilled and experienced panels of dual qualified arbitrators. The annual average number of appointments over the period 2006-2012 was five, the lowest for any of the institutes that provided statistics.

[13] GLA Economics. p.3 November 2010 www.london.gov.uk/sites/default/files/cn27.pdf

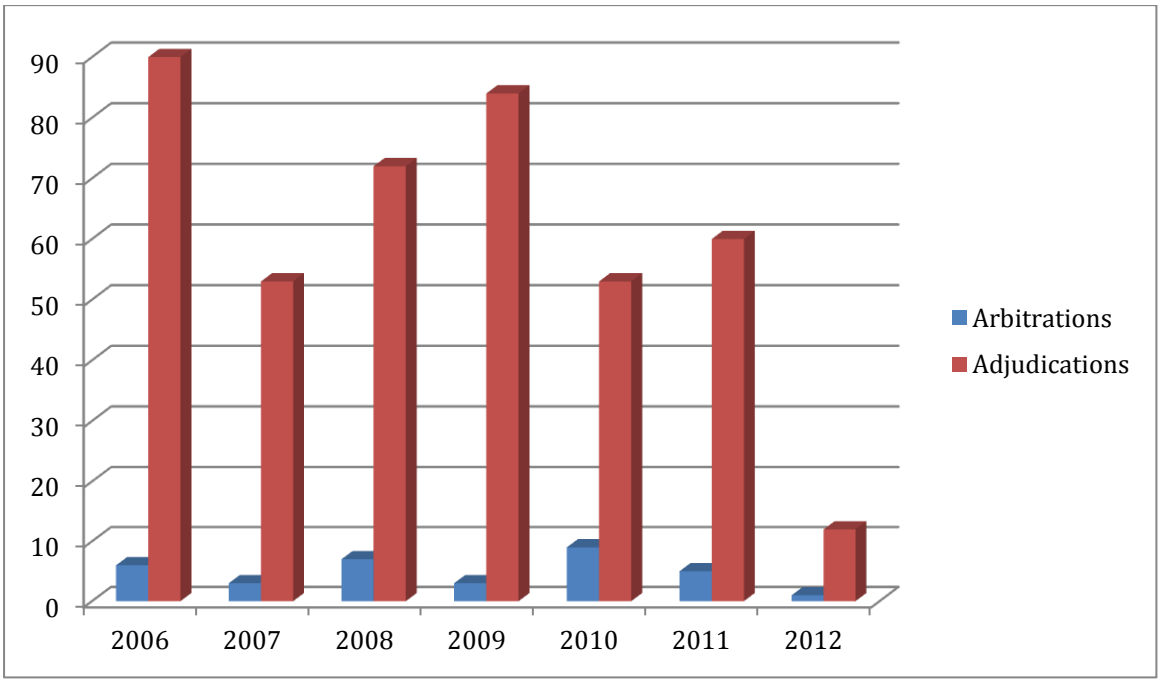
The discrepancy between arbitral and adjudication appointments is somewhat incongruous, as vividly demonstrated by Table 7 and Chart 4. In 2006, for example, there were 15 times as many adjudications as arbitrations: 90 adjudications compared to only 6 arbitration appointments. In 2012, there were 12 times as many—albeit very low figures, being one arbitration appointment and 12 adjudications. Overall, if we take an average over the given seven year period, we conclude that there were on average 12 times as many adjudications as arbitrations.

Table 7 Institution of Civil Engineers

Year	Arbitrations	Adjudications
2006	**6**	**90**
2007	**3**	**53**
2008	**7**	**72**
2009	**3**	**84**
2010	**9**	**53**
2011	**5**	**60**
2012	**1**	**12**

Source: Compiled from statistic supplied by the Institution of Civil Engineers

Chart 4 Institution of Civil Engineers



Source: Compiled from statistic supplied by Institution of Civil Engineers

Conclusions

Considering the importance of civil engineering and its invaluable role in the country's infrastructure, these figures are surprising. One obvious explanation for this is that the low numbers of arbitrations may reflect those not resolved by an adjudicator's decision and the fact that most civil engineering arbitrations are technically very complex matters and frequently involve quite intricate matters of law. Usually, these are arbitrated by dual qualified engineers i.e., in law and engineering. Another reason for relatively low numbers may be the fact that in major projects, such as Crossrail and the Olympics, Disputes Review Boards were designated, similar to that of the Channel Tunnel Disputes Review process, which dealt with disputes and differences as they arose on site.[14] The main purpose of such boards was and is to resolve disputes as they arise, and avoid the delay and higher costs of any disruptive dispute which may delay the project.

Having compiled Tables 3 to 7, we can consider an analysis by comparison in Tables 8 and 9 as follows:

Average Number of Institutional Arbitration referrals per year

Whilst none of the statistics given by the institutions cover the same periods, the following table, Table 8, gives at least some indication of a possible yearly average number of appointments from those institutions. The table is compiled from the two years for which statistics have been provided by the institutions.

Table 8 Average arbitral appointments

Institution	**2011-2012**
Chartered Institute of Arbitrators	65
RIBA	11
RICS	4871
ICE	3
Average number of yearly appointments	4950

Sources: Tables 3,4,5 and 7.

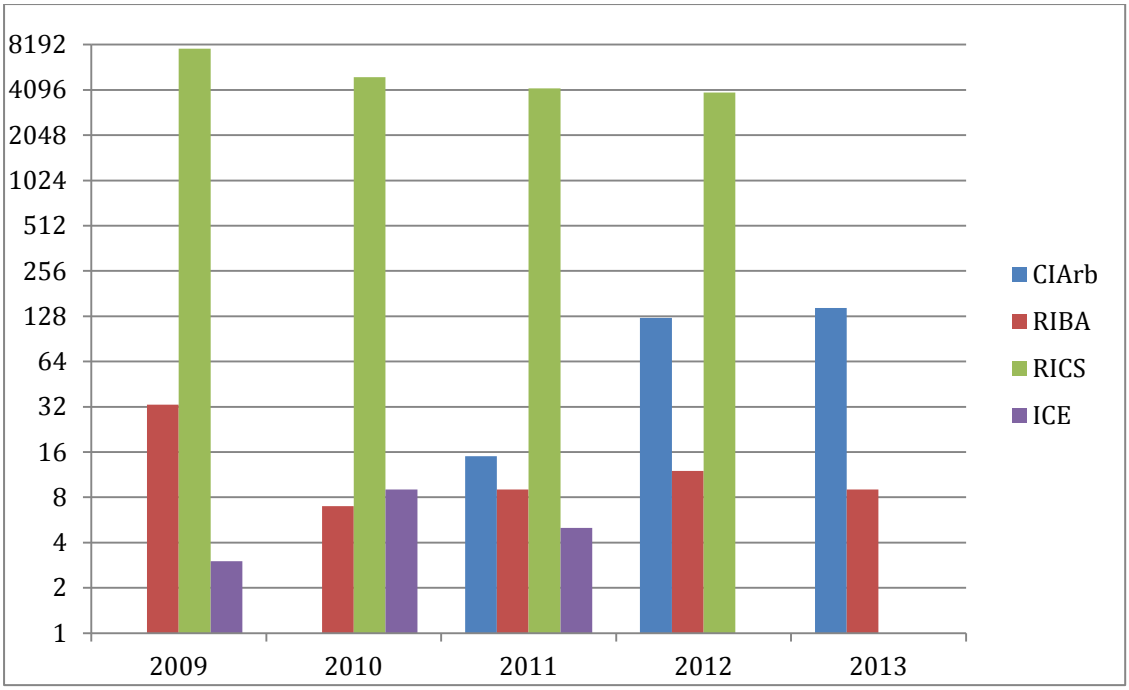
[14] In the case of the Olympics the project was undertaken under the NEC 3 Standard Form. There were two disputes panels. The first dealt with avoiding disputes through discussions with experienced professionals, and the second was an adjudication panel from whom adjudicators could be chosen to deal with particular types of dispute arising.

Table 9 Comparison of Appointments confirmed by institutions

Year	CIArb	RIBA	RICS	ICE
2009	No figures available	33	7,707	3
2010	No figures available	7	4,971	9
2011	15	9	4,200	5
2012	125	12	3,931	1
2013	145	9		

Sources: The Chartered Institute of Arbitrators, the Royal Institute of British Architects, The Royal institution of Chartered Surveyors, and the Institution of Civil Engineers.

Chart 5 Comparison of Appointments confirmed by institutions



Sources: The Chartered Institute of Arbitrators, the Royal Institute of British Architects, The Royal Institution of Chartered Surveyors, and the Institution of Civil Engineers. (Note: logarithmic scale has been applied to Chart 5 for clarity)

From the previous analyses of Tables 4-7, as summarised in Table 9 and as graphically illustrated in logarithmic scale in Chart 5, we can readily conclude that the Royal Institution of Chartered Surveyors is the leading appointing organisation, followed by the Chartered Institute, which has a modest number of referrals with the Royal Institute of British Architects and then the Institution of Civil Engineers. These figures tend to support the following findings;

1. The RIBA and the ICE have experienced a heavy decline in appointments;
2. All institutions experienced a general fall in appointments;
3. Adjudication is preferred as a disputes process in the construction industry;
4. In complex construction disputes involving matters of law there is a preference for the matter to be resolved in the Technology and Construction Court.
5. Notwithstanding this, there is some evidence of an increase in the number of commercial and property arbitration in terms of the CIArb.

Whilst most of these findings are understandable in the context of the recent economic crises, the amount of alternative disputes processes practised in England hardly compares to the amount of litigation, as illustrated in Table 10 below.

3.5 Comparison arbitration and litigation

Table 10 General Comparison of Possible Appointments and Number of Claims issued in civil courts other than Family

Year	Arbitration referrals from selected institutions*	Proceedings started in civil courts
2012	4,069	1,432,299

*Sources: *The Chartered Institute of Arbitrators, the Royal Institute of British Architects, The Royal institution of Chartered Surveyors, and the Institution of Civil Engineers Court. Court proceedings from Statistics Quarterly January to March 2014 2013. Q.1.Ministry of Justice.*

In the civil courts there were 1,968,589 cases proceeding in 2000 (Table 1). The number rose to a high point and peaked in 2006 at 2,182,454, and then fell to 1,432,299 claims proceeding in 2012. The highest number of claims tried in court peaked in 2007 at 69,248.

If we contrast the numbers of proceedings with the numbers of arbitral appointments from those institutions who have returned data (Table 9), we immediately find a stark disparity between the 1,432,299 cases proceeding in 2012, and the 4,069 arbitration appointments confirmed by the arbitration appointing bodies. In percentage terms, arbitration appointments are 0.28% of the number of cases for that year proceeding in the civil courts—a minute percentage. The figure is a minimum figure, which must be viewed with caution, as no account is taken of the numbers of private party appointments, which we estimate for certain arbitrators to be up to ten times that number. Even then, if that were the case for all those arbitrators who are appointed by institutions, that would merely amount to 2.80% of the amount that is litigated. In our view, the figure is much nearer 0.28% than 2.80%.

In the course of our enquiries we were informed by the London Chamber of Commerce that in their estimation there were in the order of 12,000 arbitrations in England annually. That might well be the case if we also take into account the

impression of many arbitrators that there are far more private appointments than institutional appointments.

Table 11 Comparison of Appointments confirmed by institutions and the Ministry of Justice

Year	CIArb	RIBA	RICS	ICE	Ministry of Justice Small claims hearings	Ministry of Justice Trials
2009	No figures available	33	7,707	3	46,963	17,115
2010	No figures available	7	4,971	9	42,786	17,517
2011	15	9	4,200	5	36,719	15,941
2012	125	12	3,931	1	32,457	14,536
2013	145	9				

Sources: The Chartered Institute of Arbitrators, the Royal Institute of British Architects, The Royal institution of Chartered Surveyors, the Institution of Civil Engineers and the Ministry of Justice.

Having considered these figures, if we then focus on the period 2009 to 2012 we find that, although there was a decline in the number of civil hearings and trials, there was also a corresponding decline in the number of institutional arbitral appointments. Whilst there are tens of thousands of civil claims, arbitral appointments are measured in thousands, but not many thousands. Thus we find in Table 9:

Table 12 Comparison of Arbitration appointments to hearings and trials in civil courts.

Year	Arbitration appointments	Hearings/trials	Percentage of arbitration appointments to court hearings
2009	7,743	64,078	12%
2010	4,987	60,303	8%
2011	4,214	52,660	8%
2012	3,944	46,993	8%

Sources: The Chartered Institute of Arbitrators, the Royal Institute of British Architects, The Royal institution of Chartered Surveyors, the Institution of Civil Engineers and the Ministry of Justice.

It would appear that the matters referred to arbitration represent approximately 8% to 9% of those cases that were tried or heard in court. Again, this is not determinative, because we do not know how many of those referrals to arbitration were heard or resolved on documents only. It is merely some indication as to the use of arbitration. It would be interesting to know how long it took cases to be resolved by arbitration as

compared to the courts. In construction matters, the advent of the statutory adjudication process in 1998 has led to arbitrators who act as adjudicators dealing with arbitration more quickly—in months rather than years. However, the Technology and Construction Court has increased its efficiency in recent years to the extent that it processes Part 8 proceedings in just over four weeks.[15]

3.6 Conclusions from statistics provided

The total statistics from the various sources noted above are featured in Tables 1-12 and Charts 1-4. The evidence is not comprehensive but indicative, and may allow us to consider an evaluation as follows.

Looking at the statistics provided by the two construction institutions and the CIArb, we find that the general trend in the latter organisation is improving, in contrast to the RIBA new statistics showing a dramatic decline. By contrast again, whilst there has been some overall decline in RICS appointments, the RICS maintains by far the highest number of appointments. In the case of the ICE, it is very difficult to say what the trend is, but what is clear is that adjudications are practically twelve times the number of arbitrations. This does not necessarily mean that there are many fewer engineering arbitrations than property or construction referrals, because most arbitrators tell us that the majority of their appointments are private and not institutional. Some caution is therefore required in our consideration and analysis of the statistics. They can only be regarded as indicative.

We may observe, however, on the statistics obtained, that the disciplinary prominence of the CIArb membership (to which all arbitrators in England essentially belong) is construction and property. Property disputes appear to outweigh construction disputes in terms of the quantitative evidence of arbitration appointments. The diversification of construction disputes processes is demonstrated by the trend towards adjudication, as evident from figures provided by the ICE. But it is important to stress that this is not the whole picture, and many more appointments are made privately. Our interviews and discussions corroborate the findings of a relatively recent King's College London survey carried out in 2010, which concluded that adjudication was quicker, cheaper and had overtaken arbitration in the construction sector.

So far as the RIBA is concerned, we may conclude that most design disputes or architects fees disputes are either litigated or adjudicated, or that many disputes being money disputes require a discipline other than an architect, although the RIBA list includes arbitrators who are not architects.

The RICS figures suggest that property related claims are possibly more suited to arbitration than construction money claims. Statutory construction adjudication certainly has taken much work away from arbitration in this respect.

[15] Address by Sir Robert Akenhead to the Dispute Resolution Conference, London.14 November 2014. This court will be the subject of a subsequent report in this series.

It is a little surprising that the ICE has the lowest number of appointments. However, in none of these cases do we know how many of the respective institutes' members have private appointments: anecdotal evidence suggests that private appointments far exceed institutional ones. The central finding, that there were on average 12 times as many adjudications as arbitrations, is interesting bearing in mind that engineering disputes are usually far more complex than building disputes, with greater sums at risk. We also suggested above that many potential claims are sensibly resolved through the intervention of a disputes review panel scheme, such as on the Olympics and Crossrail projects.

The RICS statistics disclose by far the highest number of arbitral institutional appointments. This may well account for the predominance of that profession within the corpus of arbitrators and representation within the CIArb. This in turn would tend to enhance the position of adjudication within the Chartered Institute and benefit a more streamlined disputes process. On the other hand, the establishment of a new Property panel at the CIArb may attract quite a range of property related claims as described[16] The analysis provided above in Tables 8 and 10 indicates that arbitration could provide more relief to the civil justice system, bearing in mind the suggestion here that arbitration referrals amount possibly to a tiny proportion of claims issued in the civil courts excluding family matters. The figures in Table 12 indicate that this would amount to only 8%-9% of the total number of hearings in the courts. If we posited that there were a maximum of 12,000 arbitration appointments per year, then, on the basis of court statistics, this would amount to a mere 0.8% of claims *actually commenced* in the courts. However, this is speculative and we are left with a minimum figure of 0.28% of claims as assessed in Table 10.

The overriding conclusions otherwise obtained from the statistical analysis suggest as we have said that:

1. The RIBA and the ICE have experienced a heavy decline in appointments;
2. All institutions experienced a general fall in appointments;
3. Adjudication is preferred as a disputes process in the construction industry;
4. In complex construction disputes involving matters of law there is a preference for the matter to be resolved in the Technology and Construction Court.

[16] p. 9.

4. Questionnaire analysis 2012-2014.

The following Table 13 below has been compiled from the results of questionnaires sent to arbitrators with the facilitation of the Arbitration Club and the Chartered Institute. More than 50 questionnaires were submitted, but only 11 were returned completed. Others preferred to have confidential discussions with the author and those discussions are reflected in the interview section.[17]

If we extrapolate the figures provided by the arbitrators' confidential questionnaires in Table 13 (below) we find that, on average, leading arbitrators may have up to eight appointments per year. These are arbitrators who deal with major arbitrations, some of which are of an international nature. It is difficult to say how many arbitrators are undertaking this amount of work, certainly not all the members of the Chartered Institute.

Table 13 Questionnaire analyses 2012-2014.

Discipline and Qualifications	**Type of reference(s)**	**Issues**	**Procedural law**	**Number of referrals (last 5 years)**	**Number of Awards**	**Time taken to award**
Chartered Surveyor, Dip Arb.	Contract	Loss and expense 6 Defects 1 Delay 11 Instructions and Variations 6 Non-payment 11 Late payment 6 Repudiation 3 Determination 3	English UAE	11	6	Not given
Adjudicator C.Arb, FCIArb, FRICS	Engineering disputes	Formation of contract 33% Contract Terms 100%	English	Not disclosed	3 Interim Awards	6 months

[17] see p. 23 below

		Loss and expense 66% Defects 66% Delay 66% Instructions and Variations 66% Non-payment 100% Late payment 100% Design and professional duty 100% Breach of statutory duty 33% Building Regulations 33% Repudiation 100%			2 Final awards	
Civil Engineer FCIArb, Barrister	Civil Engineering, Disputes involving the automobile industry and Waste Management	Construction and interpretation of contract 100% Formation-contract Contract terms Mistake Assignment and novation Repudiation termination Agency	English, Scottish, Irish, New York, California, Sudan, Bahrain, West Indies, Tanzania.	20	5 interim awards 20 Final awards	Between 3 months and 2 years
Commodity Trader FCIArb,	Commodities	Formation of contract 10% Contract Terms	English	20	Not given	6 to 12 months

FRICS LMAA, LCIA		100% Waiver and estoppel 10% Performance of obligation 80% Misdescription 20% Repudiation 25% Sale of goods 100% Carriage of goods 10% Interpretation of contract 25% International sale of goods 100% Letters of credit 100% Reservation of title 100% Bills of lading 100%				
Quantity Surveyor BSc, M.A, MSc FRICS, FCIArb	Construction Contract	Contract Terms 1 case 90% waiver and estoppel 1 case Misrepresentation 1 case Mistake 1 case Performance obligation 1 case Loss and expense 90% Defects 90% Delay 90%	English	6	1 Interim Award 2 Final Awards	More than one year

		Valuation 75% Instructions and Variations 75% Non-payment Late payment 90% Design and professional duty 50% Repudiation 1 case 25%				
Quantity Surveyor MSc,FRICS, FCIArb,	Construction contract	Loss and expense Defects Valuation	English	3	Not given	Not disclosed
Human Resources Manager BA,MSc,PhD, MCIPD,ACA S	Contract	Construction and interpretation of contract Contract Terms	English	4	Not disclos ed	3 months
Barrister, Member of the British Computer Society. MA,FCIArb,F BCS.	Contract Electronic Commerce	Not disclosed	English	Not disclosed	5 Final Award s	6 months
International Trading. BSc. BSc	International trade	Contract performance Marine insurance cargo International Carriage of Goods by Sea	English	1	None	Not disclosed

4.1 Analysis of Questionnaires

From the above questionnaire results we may conjecture that:

1. The most common references to arbitration are for breach of contract. Most cases concern formation contract, the existence of the contract, and interpretation of the terms of the contract.
2. In terms of construction cases, most appear to concern payment and money claims, which is a little surprising in view of the more expedient statutory 28 day adjudication process. However, in these cases money claims are coupled with more complex issues such as instructions and variation issues, late payment and non-payment claims, breach of professional duty, delay, defects and loss and expense claims. In commercial cases, the most frequent claims involve sale of goods, letters of credit, reservation of title, and bills of lading. What this tends to demonstrate is that the more complex cases are still likely to go to arbitration, following possibly an unacceptable temporary binding adjudication decision or failed mediation.
3. In the International arbitration field, it is noted from this study that the references follow a similar pattern of more complex issues being arbitrated.
4. A number of cases are not referred to adjudication in construction or mediation in other fields where a period of 28 days would provide insufficient time to do justice to the case, or where the parties cannot agree to mediate and do not want the publicity of litigation.
5. Arbitration appointments are still being made to those who are experienced and distinguished in their field and known to the lawyers or parties as having a reputation in a particular specialist field.

4.2 Interviews

Criteria for selection

A number of interviews were undertaken with a selection of arbitrators selected for their particular experience in arbitration. Leading academics, judges, lawyers, surveyors, architects, quantity surveyors, and many others were kind enough to discuss their general experience and current trends they have observed in arbitration practice over the last decade but in particular over the last five years. In many respects the interviewees were chosen for their high standing and experience as well as reputation in their respective professions.

The author carried out meetings in counsel’s chambers, and other offices. Some interviews were carried out over the telephone and background information was obtained online via the respective institutions websites. No recordings or verbatim notes were taken, but general points and impressions of trends were noted.

In particular, the author is grateful to his colleagues at the Arbitration Club for many discussions and to many other colleagues and former colleagues who have had informal discussions with the author.

General Impression

Many experienced arbitrators do not find it cost effective to deal with consumer or lower value range disputes. One international arbitrator opined that arbitration was not, in his view, very effective, because the process was too protracted and costly for domestic cases. It was somewhat cumbersome and bureaucratic in some cases, so that mediation was preferred. Despite that reservation, London is a leading centre for international and commercial arbitration and maintains an excellent reputation. For the lower range claims, most interviewees considered that mediation or adjudication were preferable to arbitration. There was some concern raised about the qualifications and expertise in some domestic cases. These views were supported by a number of specialists and Queen's Counsel as well as many commercial and construction arbitrators.

Other leading arbitrators considered that, in many cases, arbitration might better serve the needs of the "commercial man" rather than relying on the courts, especially in cases where quality and fitness for purpose of goods are in issue. On the other hand, Commercial Directors expressed strong views about cost and time spent in construction referrals and favour litigation in the TCC. A different impression was obtained in the City, where many considered commercial arbitration effective and preferred it to the courts. A similar impression was obtained in relation to international arbitration.

Arbitration and the courts

In the course of discussions on the effectiveness and efficiency of the civil justice system, both practitioners and users were primarily concerned about costs. The new court rules on costs and the efforts of Lord Justice Jackson and Sir Vivian Ramsey have given more confidence to some users, whilst the rules themselves demonstrate the advantage of capped costs, which is not available in arbitration unless the parties consent.[18] Be that as it may, the feeling amongst national and international users is that the English courts' supportive jurisdiction and the instrumentality of the Arbitration Act process enhance the efficacy of arbitration and its reputation.

One of the practical advantages enjoyed by the courts was that of judicial substitution. This arises because many arbitrators are very busy. One of those interviewed, for example, had currently four adjudications and five arbitrations, some with an international element. Where a trial runs over time, the judge's list can be transferred to another judge, so that the courts enjoy more macro management flexibility than a busy arbitrator. An arbitrator cannot delegate or transfer cases. On the other hand, it was pointed out that the courts, cannot deal with certain sensitive matters of considerable complexity that by their nature must be private e.g. defence procurement and some NHS matters.

Construction arbitration

[18] The author of this report as an arbitrator always includes such a capping provision in his directions, as do some other arbitrators.

Construction Arbitrators confirmed that most arbitrations are bespoke, party appointed arbitrations. Parties to construction/engineering disputes tend to appoint those with a proven track record in the field. Having said that, the industry is somewhat reluctant to choose arbitration in preference to litigation. Primarily, this is because, at the time of writing, the Technology and Construction Court is composed of very experienced specialist judges, there being three High Court and three senior circuit court judges.

In construction it appears that the most popular form of dispute resolution process remains statutory adjudication. This provides an efficient and effective 28-day process, which is cheaper and quicker than litigation or arbitration. In certain cases, adjudicators confirmed that a short extension is sometimes agreed where the 28-day period is impractical.

Thus, it would appear that arbitration is not the most popular disputes process in the construction industry. This is despite the opt-in provision of the JCT contract regime for arbitration.

TeBAR[19] consider that that whilst a small percentage of construction matters are successfully mediated that percentage is unlikely to be increased.

It would appear that most construction arbitrators are more engaged in adjudication than arbitration, and those that accept arbitration appointments have one or two a year.

According to the London Chamber of Commerce, there were approximately 12,000 arbitrations conducted in London and southeast of England in the year 2012-13.

The impression in the City seemed to be that the Chartered Institute of Arbitrators was predominantly geared to construction and some other areas. Such an impression is countered perhaps by the Chartered Institute's proposed panel enlargement in the property sector.

It is clear from a recent King's College survey[20] that TCC practitioners are selective in their approach to mediation and do not endow appointing bodies preferring to appoint specific mediators.[21] It also appears that they do not subscribe to the court's own settlement process (TCC Court Settlement Process), again preferring members of the practicing profession to judges.[22] What also may be inferred from the King's study is that, whilst the courts may successfully encourage mediation, they ought not to impose, it since it appears that voluntary mediation is better and more effective in settlement than mandatory mediation. Whilst the King's study endorsed the success of construction mediators, and concludes against the reservations voiced by Dame

[19] Technology and Construction Courts Bar Association.
[20] N.Gould, C.King and P.Britton. *Mediating Construction Disputes: An Evaluation of Existing Practice.* King's College, Centre of Construction Law and Dispute Resolution. January 2010.

[21] n.10 Gould et al. p.63
[22] n.10 Gould et al. p.63

Hazel Genn regarding the Central London County Court schemes and the likelihood of disparity between the parties, King's state that:

> ...disparity or vulnerability is much less likely between the well represented corporate or other entities who are the usual parties to TCC litigation and their mediators.

That may well be the case between parties of equal arms, but not for others. The more fundamental question outside the studies terms of reference involve Professor Genn's larger question of fundamental importance as to whether there is pressure for less law and a diminution in the role of the courts in favour of ADR.[23] That must essentially involve a discussion of what is just in a particular case, which from many a practitioner's point of view does not necessarily equate to *justice on the merits*, but to a realistic commercial resolution in a reasonable time. Ideally, a combination of judicial and informal strategies exemplified by arbitration should assure that end, so in that sense arbitration could provide a suitable compromise in the debate.

Perceived difficulties

One leading expert took the view that construction arbitration has now run its full course and that most disputes in this sector were resolved through adjudication. This contrasts starkly with international arbitration, in which London remains a leading centre. It was suggested that the perceived decline in domestic arbitration was due to a lack of quality and skill. It was also suggested that lawyers have contributed to this decline in making arbitration too much like litigation and burdening the process with excessive fees. On the other hand, it is the view of one legal institution, at least, that their arbitrators fees are not excessive and that they undertake a cost effective role. That institution deals with a wide variety of commercial and professional arbitration matters.

What many interviewees' suggested was that practitioners and their clients, as well as the judiciary, have a high regard for the professionalism of specialist commercial arbitrators. Their acuity differed from those in construction who thought that arbitration was unsuited to construction because the building works must progress and cannot await some arbitral determination in the distant future; they, especially commercial directors, wanted quick decisions, hence the support for adjudication. The problem with that, which is acknowledged by construction specialists, is that there are some very complex cases that are simply incapable of speedy resolution and where there is little choice, but to arbitrate or litigate in the TCC, the latter course being the preferred option in many cases.

One leading construction and engineering arbitrator opined that in some major cases lawyers quite often placed what he regarded as an undue burden on experts. This may shift the burden of liability from the lawyers PI insurers to the expert's PI insurers. This is not a problem of arbitration, but a matter of who does what: the

[23] Hazel Genn *Judging Civil Justice*, The Hamlyn Lecture Series. (Cambridge University Press, 2010) p. 103.

lawyer or expert. These roles are often blurred in practice by the exigencies of the case.

A common view expressed by many suggested that arbitration is in need of further reform. It is not perceived as meeting the 21st century demands of industry or the economy, and must modernise itself to conform with the advances of the ADR movement as a whole imbibing new technology and innovating new methods of practice. There is clearly room for improvement in the education and training of lawyers and arbitrators, to imbibe some of the lessons of adjudication and other forms of ADR, whilst preserving the essential judicial function. ADR in itself is a subject both for practical professional education and postgraduate academic study, as recognised by Professors Roberts and Palmer more than two decades ago.

In discussions with consumers and users it was apparent that they found it difficult to keep track of the constantly changing ADR landscape. There have been many changes over the last decade as between IDRS, CIArb and CEDR. Whilst organisations, and especially commercial ones, have to follow the market, nevertheless some conformity and consistent organisational modelling is necessary to avoid overlap and confusion to the user. Whilst very much a private sector free market problem, ADR, and hence arbitration, become a matter of the public interest insofar as the courts are concerned since they rely on an effective informal disputes process.

Most would agree that given the most effective means of resolving the dispute is by negotiation, or by the intervention of a mediator, or by judicial sanction (be that by the court or by the arbitrator) only in arbitration do the parties have the benefit of a judicial process and privacy with a process designed to suit their particular case.

Most users seem to agree that arbitration is the half way house between the court and mediation: it is judicial, but is given the freedom under the Arbitration Act 1996 of expediting cases in more convenient ways as the parties may agree. Thus, in theory at least, arbitrators should be able to use the powers under the Act to employ the best means available to resolve the dispute. Some of our analysis may suggest that such powers are not fully understood or utilised and that Lord Saville's brave new world has not quite materialised because lawyers and arbitrators have not been inventive enough. The true test here in our view is to tie down the timetable as tightly as is practically and reasonably possible, but we would not underestimate the personal inherent qualities of the arbitrator in achieving this in a fair and just manner.

4.3 Conclusion

Several arbitrators suggested that whilst Arbitration has a place in the disputes process, to better promote itself it requires stricter rules and timescales. Arbitrators must be better qualified and more proactive. [24]

Earlier we suggested that the disciplinary prominence of the CIArb membership, to which all arbitrators in England essentially belong, is construction and property. Property appeared to outweigh construction disputes in terms of the quantitative evidence, and we suggested that this was not the whole picture because many more appointments are made privately. This is certainly the impression we gained from our discussions with the LCC and a number of arbitrators.

The statistical evidence obtained from the CIArb and other appointing bodies tends to suggest a recent upward trend. Evidence from interviews and discussions with groups such as the Arbitration Club and construction arbitrators suggests that arbitration has become unpopular with that industry, in particular, because of the time, cost and litigation-like tendencies of the process. There is some criticism of lawyers' approach to arbitration, especially those who have no specialist training in arbitration. At the same time, some arbitrators have called into question the methods and conduct of those who are acting as party representatives, but are not members of the legal profession. Whilst such opinions are expressed by arbitrators, especially in the construction sector, it may well be that the complexity of the modern forms of the standard building contract which now run into 86 different standard forms (one of which has hundreds of potential optional clauses and variations) are a contributory factor to the approaches by the legal and other disciplines involved.

[24] ICC requires arbitrations as a comparison require completion in six months.

5. SUMMARY OF FINDINGS

In our analyses in section 4, we found a range of figures on the average of annual appointments figures provided by the construction professions and CIArb: from 12,000 cases for 2012-2013 from the London Chamber of Commerce to an annual average of 4,950 for the year 2011-2012 (Table 8).

More precisely, we found disparity between the 1,432,299 cases proceeding in 2012, and the 4,069 arbitration appointments confirmed by the arbitration appointing bodies for that year. In percentage terms, arbitration appointments were 0.28% of the number of cases for that year proceeding in the civil courts-a minute percentage.

The amount of arbitration actually being carried out in England cannot be quantified with any high degree of certainty, but on the basis of this survey it is certainly more than 5,000 cases per year. If we take the average yearly number of referrals at 4,950, as in Table 8, we may add to that figure the results of our questionnaire and pilot study of 50 arbitrators surveyed. Of those, 25% provided the number of appointments they had received in a five-year period to 2013. On average they had two appointments each per year.

We would surmise from this information, and the number of arbitrator members of the CIArb and others, that there may be as many as 8,000 to 12,000 arbitration appointments each year in the domestic sector, including cases with an international element. It may be reasonable also to conclude that in construction by way of example it is estimated by one leading commentator and practitioner that construction arbitrations are running at 10% of the number of adjudications.[25] That popularity exists because of the tight statutory time limit that focuses the parties on proceeding with expedition. For leading arbitrators, we suggest that they probably receive up to five to 10 times the number of institutional appointments which we suggest in some, but very few cases, may reach 20 references a year. In construction this would include a number of adjudications.

According to Table 5, the RICS had 4,800 appointments in 2012. 3,913 were commercial and agricultural matters. A further 780 were adjudications, so that roughly 16% of all cases were adjudicated, whereas with engineering matters the Institution of Civil Engineers suggests that arbitrations were 10% of the number of adjudications, albeit the figures are extremely low but indicative. Property would seem to be holding its own in arbitration. The key conclusion here is that adjudication dominates the dispute resolution process in the construction industry (self-evident from Table 5) and that the RICS is the leading appointing body for arbitration and adjudication. The range of technical disputes handled by members of the RICS somewhat contradicts the suggestion that lawyers dominate arbitration: the fact that many RICS members appointed are non-practising barristers may be a reason for this impression.

[25] Telephone interview with Mr Anthony Bingham Arbitrator and Adjudicator, 3 Paper Buildings, Middle Temple. August 2014. Mr Bingham is also a leading commentator on the construction industry.

From our discussions with CEDR, it appears that it has made a strong contribution to dispute resolution, and its success is measured by its 2012 report, which confirms that more than 100 individuals are involved in 85% of all non-scheme commercial cases.

In construction referrals we found that most were party appointments, with few wishing to risk institutional appointments. Many preferred to issue proceedings in the TCC. Critics suggested that arbitration had "run its course" in construction and was too much like litigation.

We found that there are quite a number of organisations in ADR generally, as appear in the Appendix to this study, and this can confuse users. Consideration may be given, therefore, to an umbrella organisation to co-ordinate and stream disputes to the appropriate forum. On the continent several digital platforms have been developed, for example in Belgium, where disputants can make application for a dispute resolution to a digital platform and be directed to the appropriate body for referral.

Apart from the reforms of arbitration law carried through by Lord Saville, and the work of the Departmental Advisory Committee at that time, it has been left to institutions and individual arbitrators to innovate and experiment in a more effective and efficient way. Since it depends on the parties and a consensus, this is not easy, and hence the need to review the position to see how domestic arbitration may be enhanced. As in other fields, for example in litigation, the construction sector has led the way with a highly reputable Technology and Construction Court and an efficient statutory 28 day adjudication process.[26] Thus, many construction arbitrators with experience of adjudication expedite their arbitrations in a much shorter time span of 100 days or less rather than six months or a year.

Whilst our statistical evidence demonstrates a general falling trend in the number of referrals, the most recent figures suggest that it may be the end of a long decline, and that a professional arbitration process has a market. If it is, then something of a renaissance is required, imbibing the guidance given to arbitrators and adjudicators by the TCC and Commercial Court from time to time. Given the exponential expansion of international trade and the importance of London as a leading financial centre of global finance, English arbitration should be capable of infinite applications in the commercial world.

[26] Housing Grants (Construction and Regeneration) Act 1996.

6. Conclusions

6.1 Our statistical analysis indicates that, whilst the number of referrals has diminished with institutions such as RIBA, RICS and ICE, the figures for CIArb, although much lower than RICS, indicate an encouraging increase in appointments. As between 2013 and 2014, the figures indicate a 16% rate of increase. If we hypothesise that there were 145 appointments in 2013, and possibly 10 times that figure of *ad hoc* or private appointments i.e. 1,450 cases, we might expect 1,600 or so such appointments in 2014, and possibly 4,000 by 2020, at an annual rate of increase of 16%. With the CIArb plans for an expanded property base this figure could be higher. We would also expect the leading appointing body, the RICS, to extend its number of appointments in line with a growing economy.

6.2 Costs and fees are a major issue, with most users preferring shorter timescales and simpler procedures. Here arbitration can be cost effective provided there is adherence to a strict timetable.

6.3 Organisation. This is fragmented, with institutions being unintended competitors for a relatively small domestic market. It might well benefit from having an umbrella organisation or a central digital platform sponsored by the institutions concerned.

6.4. Arbitration has vast potential largely unexploited, with referrals amounting to between 0.28% and 2.8% of the total number of civil claims issued as demonstrated in paragraph 3.5.

Acknowledgements

We would like to thank the following institutions, organisations, arbitrators, judges and members of the various interested professions for their assistance in this survey and study.

The Chartered Institute of Arbitrators

The Arbitration Club

CEDR

The Institution of Civil Engineers

The Royal Institute Of British Architects

The Royal Institution of Chartered Surveyors

The Chartered Institute of Building

ADR Net

The London Chamber of Commerce

Queen Mary College University of London

Centre for Construction Law, King's College London

Lord Woolf, House of Lords.

Lady Justice Hale, Deputy President of the Supreme Court

Sir Philip Otton, 20 Essex Street Chambers.

Mr Justice Akenhead, Head of the Technology and Construction Court.

Mr Justice Ramsey, Technology and Construction Court.

The late Professor Emeritus Simon Roberts, Law Department, London School of Economics

Professor Emeritus John Uff Q.C., Keating Chambers and King's College London.

Professor Julian Lew Q.C., 20 Essex Street Chambers and Queen Mary College London.

Mr Alan Redfern, Arbitrator, 20 Essex Street Chambers.

Mr Alexander Nissen Q.C. TECBAR Chairman, Keating Chambers.

Mr John Tackerberry Q.C., Arbitrator, 39 Essex Street.

Sir Tony Baldry M.P., House of Commons.

Mr Peter Chapman, Arbitrator and Barrister

Dr Mark Hoyle, S.J Berwin.

Mr Hugh Dundas, Arbitrator.

Mr Christopher Dancaster, Arbitrator and Adjudicator.

Mr Anthony Bingham Arbitrator, and Adjudicator

Mr Peter Barnes, Arbitrator and Adjudicator.

Mr Richard Barter, Civil Engineer, Arbitrator and Adjudicator. Secretary, City Branch Arbitration Club.

Mr John Riches, Arbitrator and Adjudicator

Mr Peter Ashford, Solicitor Fox Williams

Carillion Construction

Whilst officers of the above institutions, organisations and individuals facilitated this research, the opinions, views, analyses and conclusions are entirely the authors and cannot be attributable to any individual named or consulted in connection with the study or subsequent enquiries or discussions. We should also like to acknowledge those arbitrators, members and Fellows of the Chartered Institute and also of the Arbitration Club who were good enough to respond to our questionnaire and the many others apart from those named who have been good enough to give their views on arbitration.

Bearing in mind the private and confidential nature of this process many of our enquiries and information obtained cannot be published, but we trust that the impression gained from our study conforms to the majority of opinions and evidence submitted to us.

APPENDIX

CEDR[27]

CEDR Solve currently administer [28]a wide range of arbitration schemes for users including:

ABTA, The Travel Association

Association of Certified Chartered Accountants

Football League

Health & Safety Executive

National House Building Council (NHBC)

Renewable Energy Consumer Code (RECC)

Royal Institution of Chartered Surveyors (RICS)

CEDR SOLVE SCHEMES

ABTA, The Travel Association [29]

Association of Certified Chartered Accountants

The ACCA Arbitration Scheme

Football League

Health & Safety Executive-Vertebrate Animal Data disputes[30]

My deposits tenancy deposit scheme *(managed by CEDR Solve)*

Association of Professional Political Consultants Adjudication (managed by CEDR Solve)
Independent Complaints Adjudication Scheme for Ofsted (managed by CEDR Solve)

Independent Complaints Review for The Homes & Communities Agency (managed by CEDR Solve)

[27] http://www.cedr.com/
[28] Whilst this is the current list there have been and will be further fluctuations in these schemes which may be administered by other providers.
[29] http://abta.com/go-travel/travel-clinic/arbitration-and-mediation
[30] http://www.pesticides.gov.uk/guidance/industries/pesticides/News/Collected-Updates/Regulatory-Updates-2012/September/Updated-Arbitration-Scheme

Independent Complaints Review for Money Advice Service (managed by CEDR Solve

London Chamber of Commerce

Any appointments for the London Chamber of Commerce to act as the appointing body are referred to the LCIA.

National House Building Council (NHBC)

NHBC Homeowner Arbitration Scheme: NHBC Resolution Service and Arbitration

Royal Institution of Chartered Surveyors (RICS) Dispute Resolution Service (DRS)

Independent Dispute Resolution Services (IDRS)

Their focus is on:

a. Consumer redress markets in the UK
b. Disputes between commercial businesses of any kind

Renewable Energy Association Conciliation & Arbitration Scheme

CONSUMER ADR SERVICES ADMINISTERED BY THE IDRS

Communications and Internet Services Adjudication Scheme (CISAS) [31]

Arbitration Scheme for the Travel Industry (ASTI)

The Postal Redress Service (POSTRS)

British Association of Removers (BAR)

BSI Kitemark Conciliation & Arbitration Scheme for Automotive Services

BSI Kitemark Scheme for Replacement of windows, roof lights, roof windows or doors in Dwellings Arbitration Scheme

Estate Planning Arbitration Scheme

Funeral Planning Authority Conciliation & Arbitration Scheme

Glass & Glazing Federation Arbitration Scheme

Mediation for the Insurance Industry: Cost Controlled Mediation[32]

Arbitration and Neutral Evaluation Procedures for Surveying Disputes

Tenancy Deposit Protection

[31] http://www.cisas.org.uk/
[32] http://www.idrs.ltd.uk/?p=44&lang=cy

SCHEMES ADMINISTERED BY THE CHARTERED INSTITUTE OF ARBITRATORS

In addition to the specialist panels administered by the Chartered institute it administers the following schemes:

Heating & Ventilation Contractors Association Arbitration Scheme

Manx Telecom

Mosaic Holidays

TrustMark Arbitration Scheme

Motor Industry Code of Practice and Repair Arbitration Service

Northumbrian Water Arbitration Scheme

Safebuy Consumer Arbitration Service

Independent Complaints Review

The Postal Redress Service -POSTRS

The City Disputes Panel[33]

Mayor's & City of London Court Mediation Scheme.[34]

[33] http://www.citydisputespanel.org/index4719.html?article=15&lang=english

[34] *The Mayor's and City of London Court Mediation Scheme: A review of the Scheme's third year A report prepared at the request of the Mayor's and City of London Court Mediation Steering Committee by:* Professor Simon Roberts, Law Department, London School of Economics and Political Science 2009. see:at http://www.citydisputespanel.org/index4719.html?article=15&lang=english.

ICE Dispute Resolution

RICS Dispute Resolution Service

Royal Institute of British Architects.

The Law Society

Michael Reynolds PhD (LSE).,LL.M.(Lond).,,M.Sc.(Lond),, C.Arb., F.C.I.Arb.
Solicitor and Chartered Arbitrator
Programme Associate,
Centre for Socio-Legal Studies
University of Oxford.
michael.reynolds@csls.oxo.ac.uk