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AN INVESTIGATION INTO THE SUITABILITY OF ARBITRATION AS A DISPUTE SETTLING MECHANISM IN THE CONSTRUCTION INDUSTRY

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1991

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DECLARATION

I declare that this research report is my own, unaided work save insofar as indicated in the acknowledgments and references. It is being submitted in partial fulfillment for the degree of Master of Building (Specializing in Project Management) in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other University.

(Signature of Candidate)

17th day of February 1991

SYNOPSIS

This research report investigates the suitability of arbitration as a dispute settling mechanism in the construction industry. It reports the views of protagonists and antagonists of mediation, arbitration and litigation. In particular, it records the results of questionnaires submitted to building contractors, architects, civil engineering consultants, civil engineering contractors, arbitrators and attorneys. The questionnaire responses were analyzed in order to determine the extent of, and use of, arbitration. The analysis determined whether arbitration is an effective dispute settling mechanism, how it compares to litigation and mediation, and whether there should be any amendments to the rules and procedures given by the Arbitration Association of South Africa. These determinations are based on three hypotheses.

The report concludes that :

i) The contract predominantly being used by those sampled in the construction industry is the building contract (S.A. Institute of Architects).

ii) The most common dispute settling mechanism being used is arbitration.

iii) Delays, Variations, Interpretation of the contract

and contractor negligence are the most common reasons for dispute.

iv) The incidence of the use of arbitration is not dependent on the size and nature of the claim.

v) Mediation is the preferred method of dispute resolution for future disputes, with arbitration being preferred to litigation.

vi) The aspects of no reasons for the award, and arbitration held back until the end of the contract, are seen to be detrimental to the effectiveness of arbitration as a dispute settlement mechanism.

Finally, based on the conclusions, the following major recommendations can be made to improve the suitability of arbitration as a dispute settling mechanism :

i) Mediation should be included as a pre-arbitration dispute settling mechanism in the building contract (S.A. Institute of Architects).

ii) Arbitration should not be held back to the end of the contract, furthermore, awards should be given with reasons and the four month time limit for award should be enforced more strictly.

iii) The following phasing is recommended for effective dispute settlement in the construction industry :

Phase 1 : Architect / Engineers decision.

Phase 2 : Mediation

Phase 3 : Arbitration or Litigation

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CHAPTER 1

INTRODUCTION

The inclusion of an arbitration clause in construction contracts as a dispute settling mechanism has been considered beneficial when compared to litigation. The listed advantages of arbitration given by protagonists thereof are, typically, speed, flexibility, expertise of the arbitrator, legal representation not being obligatory, economy, finality and privacy. These advantages have to some extent been challenged by various persons in the legal fraternity who argue that litigation is still, for certain disputes, more effective as a dispute settling mechanism than litigation.

Furthermore, protagonists of mediation argue that mediation is more effective than arbitration. The matter is further complicated by the fact that no records are kept of mediation or arbitration hearings or awards. This leaves parties to a construction contract, when deciding on which method to use in case of a dispute, in a difficult position. In general, parties to a dispute would prefer the dispute to be settled quickly, with low cost, and with as little disruption to the business entity as possible. Furthermore, the settlement should be deemed equitable by both parties.

The objectives of this report are as follows :

1. To establish which types of contracts and dispute settling mechanisms used and to find whether any correlation exists, furthermore, to correlate these to the size and nature of the claims pertaining to these mechanisms. This will indicate whether the amount of money involved, or type of dispute, will govern the choice of dispute settling mechanism.

2. To explore the perceptions of respondents within the construction industry for mediation, arbitration and litigation, with a view to rating each of the mechanisms in terms of their suitability as effective dispute settlement mechanisms.

3. To investigate whether any aspects pertaining to arbitration procedure and rules need to be changed to increase the suitability of the technique as a means of settling disputes.

4. To recommend, based on the results of the surveys, a suitable dispute settling procedure for use mainly in the the construction industry.

These objectives are embodied in the research hypotheses as shown in Chapter 4 section 1.

The information on which this report is based was gathered by utilizing an initial literature survey which aimed to show the theoretical advantages and disadvantages of each mechanism. This was followed by a structured questionnaire which was sent to selected participants in the construction industry who might have been or could become involved in disputes.

The investigation limited itself to building contractors (Witwatersrand, Master Builders' Association), architects (Transvaal Provincial Institute of Architects), civil engineering contractors (Federation of Civil Engineering Contractors), civil engineering consultants (Association of Consulting Engineers), arbitrators (Panel of Arbitrators) and attorneys (Guide to Attorneys Services). With the exception of arbitration, where only fifty (50) arbitrators were sampled due to the small population size, it was decided to sample one hundred (100) companies/organisations from each category. The investigation was initially limited to companies/persons in the Pretoria - Witwatersrand - Vereeniging (PWV) area. However, for civil engineering contractors and arbitrators this was extended country-wide to make up the number. Of the 550 questionnaires sent out a total of 133 completed questionnaires covering all the categories were analyzed. Besides limitations in sample sizes a further limitation of this research is that it is

not a legal treatise, merely an evaluation of the techniques based on practical considerations. The report opens by briefly explaining dispute settling mechanisms in relation to the construction industry as a whole.

Formal dispute settlement mechanisms available for construction disputes, ie. mediation, arbitration and litigation, were then evaluated and compared. The main problem areas were identified through this evaluation showing the arguments for and against arbitration as a dispute settling mechanism. The report then clarifies and explains the research methodology and analysis of the questionnaires. The results of the questionnaires have been evaluated against the respective hypotheses which were either accepted or rejected on the results of the questionnaire. Conclusions have been based on the findings and hypotheses whereafter recommendations, based on these, were made.

CHAPTER 2

DISPUTE SETTLING MECHANISMS

2.1 The Nature of the construction industry

Coulson (1983:45) states that no construction method is perfect and that the advent of new approaches to construction ie. fast tracking, design-build, and separate construction management bring greater uncertainty into the construction process. He attributes this to fewer specifics being defined at the time that the contract is agreed upon. Coulson further states that traditionally the architect played the role of interpreting the contract requirements if any disagreement arose. If a settlement was not achieved the parties would then resort to some third party for resolution.

Generally under fast tracking, the roles of the parties remain unchanged, however the sequence of work differs from the traditional method as design and construction progress simultaneously. The method was created as a reaction to high interest rates and inflation of material prices as well as labour costs so as to lessen their effect by decreasing the time factor in the project. (COULSON,1983:47).

Coulson states that one of the risks attributed to fast tracking is the fact that there is little time, if any, for a fully-fledged check of the architect's or engineer's documentation. There is therefore a greater possibility that disputes will arise from conflicts, omissions and errors within the documentation. The design and build method occurs when the owner employs a single entity, ie. the separate construction manager, to become responsible for the management of the design and the construction of the project. Problems with the separate construction manager pertain mainly to those of changes in responsibility in terms of changes in the traditional mandate of the architect/engineer. The architect traditionally acts as an independent referee, and by bringing in the construction manager the method of dispute settlement needs to be evaluated to avoid possible problems. (COULSON,1983:48).

The construction manager acts as a professional consultant to the owner, and therefore becomes the owner's representative. (COULSON,1983:49). When the construction manager is used with the traditional method, some conflict may arise in terms of authority and responsibility. However, the construction management system is usually used with fast track projects where the construction manager's expertise in complex materials acquisition and scheduling is required. (COULSON,1983:49).

Construction projects have some inherent risks of conflict of which the following aspects are, in the author's opinion, contributory factors :

i) The construction company can be seen as a factory which frequently changes its geographical position.

ii) The members of the team are not of the same mind in terms of their individual objectives for the project and conflicts are almost inevitable ie. architect objectives vs client organisational objectives vs contractor objectives.

iii) There are therefore numerous dispute opportunities due to the very nature of the construction project, eg. variation orders, claims for time or money.

iv) There is an inherent risk that the architect or Quantity Surveyor may have been negligent in his duties, as a result of which some form of claim could arise.

v) When compared to the management of a manufacturing company, eg. shoes, the various resources involved, eg. finance, labour, etc., are more difficult to control and monitor because of the changing environment at the workplace.

2.2 Conflict and conflict resolution

"Conflict is defined as the behavior of an individual, a group, or an organization which impedes or restricts (at least temporarily) another party from attaining its desired goals. Although conflict may impede the attainment of one's goal, the consequences may be beneficial if they produce new information, which, in turn enhances the decision making process. By contrast, conflict becomes dysfunctional if it results in poor project-decision making, lengthy delays over issues which do not importantly affect the outcome of the project, or a disintegration of the team's efforts."

[KERZNER, H, Project Management, A Systems Approach to Planning, Scheduling and Controlling, 2nd Edition, Pg 351]

Kerzner (1984:346) identifies the following aspects as the most common sources of conflicts in any given project:

- *Manpower Resources*
- *Equipment and Facilities*
- *Capital Expenditures*
- *Costs*
- *Technical Opinions and Trade-offs*
- *Priorities*
- *Administrative Procedures*
- *Scheduling*
- *Responsibilities*
- *Personality Clashes*

From the above-mentioned it is thus possible to categorize a dispute within a construction project into one of these classifications. It is not to say however that conflict on a construction project will only involve one of the above-mentioned aspects.

The role of a third party in settling a dispute can be viewed as the process which is employed when no equitable solution can be reached by the parties directly involved.

The modes of conflict handling have been identified as follows : (KERZNER,1984:353)

1) Withdrawal	*This is retreat or withdrawal by either of the parties from an actual or potential disagreement.*
2) Smoothing	*This can be seen as avoidance of potential disagreements by placing more emphasis on areas of agreement.*
3) Compromising	*This is characterized by a "give-and-take" attitude, ie. there is a search for solutions that bring some degree of satisfaction to both parties.*
4) Forcing	*This is characterised by a competitive win/lose situation, ie. one party loses, one party wins.*
5) Confrontation	*This is characterised by the parties facing the conflict directly. The conflict is jointly resolved.*

For the purpose of this research the author identifies the conflict resolution modes as those aspects which would fall under the negotiation phase of dispute resolution. This implies that at least one of these modes will be implemented before any dispute is declared to be heard by a third party. An example of this is where the contractor is in disagreement with the architect over the technical quality of an item. It is highly likely that there will initially be some form of oral exchange which will fall under at least one of the conflict resolution modes. It is only when this fails, ie. generally when one of the parties feels he has lost or is entitled to more, that some formal method of settling a dispute is normally resorted to.

2.3 Dispute settling by a Third Party

The aspect of dispute settling can be viewed as a third, objective person making a decision or advising the parties in dispute of his opinion. In this way an equitable and generally acceptable agreement should be reached.

Parris (1983:3) describes the development of the dispute settlement process:

"The earliest method, dating back to Cain and Abel, is dignified by legal theorists with the title of "self help". Basically, it consists of beating an opponent over the head with a club. It is popular even among the pious, witness

the great Council of the Church of Adie, whose members tried to resolve the filiosque controversy (as to whether the Holy Ghost proceeded from the Father or from the Father and the Son) by beating each other over the head with stools. But this tends to be counter productive..... It is also lacking in finality especially if the opponent has relatives and friends. Notwithstanding that, it is highly favoured today in international affairs.

The second method is not greatly superior to the first. This consists of submitting the dispute to somebody who has a bigger club than either of the disputants and who is powerful enough to beat both over the head. This is no new experience. As Richard Burton put it over three hundred years ago: "He who goes to law takes a wolf by the ears."

The third and most civilized method of settling disputes is for those concerned to submit their disagreements to a third party and to agree to abide by his decision. "Sometime in the Saxon or Old English, it was called a Love-Day, because of the Quiet and Tranquillity that should follow the ending of the Controversial": Abitrium redivivam (1694)."

One can see that the first method is not acceptable for disputes that may arise in a construction project (although it is possible that it has and may still happen). The one common ground between the second and the third method is the factor of third party intervention.

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Ideally the role of the third party can be seen as follows:

1) Objectivity	*The third party should be unbiased or should have no subjective influences, he should be impartial.*
2) Equality	*There should be basic equality in the positions of the parties before the third party.*
3) Competence	*The third party should be competent enough to make a decision based on fairness, and (usually) based on the law.*
4) Award/Decision	*The award should be binding on both parties, unless otherwise agreed or having been provided for. This is to ensure that the dispute is not prolonged unnecessarily.*
5) Time and Cost	*The settlement process should be reasonably fast and have an inexpensive procedure.*

The above quotation from Hellard, (1988:27), is based on the six tenets set out by Italian Professor M. Minoli in 1972 that make a dispute settling method as being objectively worthy of trust.

Furthermore, the third party's role can be seen to include the clarification of the facts of the dispute. High emotions coupled with personality differences between the disputing parties will often make this difficult.

2.4. Management Objectives When Dealing With Disputes

Before one can consider the objectives of the disputants, the possible consequences of having a dispute declared must be clarified. Factors that must be considered before declaring a dispute are what impact such a dispute will have on the the disputants':

- Resources.
- Business reputation.
- Personal emotions.

2.4.1. Impact on Resources

The main resources affected by a dispute are time and money. This occurs as a result of time and money wasted trying to resolve a dispute when these resources could have been put to a more productive use.(COULSON,1984:20) In this sub section the author attempts to discuss the hidden costs and time involved rather than those associated with (say) formal litigation. ie. employment of counsel etc.

The hidden costs, (ie. those costs which cannot be reflected as payment in the accounts), are those attributed to the involvement of senior personnel, who must spend their time trying to resolve the dispute. Time, although directly linked to money, can become an important issue if the project or the management of the business is time sensitive in terms of a fixed time allocation, eg. penalty for late completion.

The more time allocated to any given dispute, the higher the cost, particularly if junior and senior personnel are involved. One can compare this concept to a strike at a manufacturing plant where every hour lost could mean millions lost in production. It is the author's opinion that when pursuing a dispute, management may decide that it is more feasible to "give in" to demands, or to compromise or smooth the dispute, [illegible] to run the risk of lost production. In the case of a commercial dispute, ie. non-labour related, the risk attributed to loss of production is probably less.

When one considers the added costs of employing outside help to resolve the dispute the feasibility structure may change. Generally the cost of outside help, eg. attorneys, is based on the time spent trying to reach an agreeable settlement. It is however very difficult to predict the time involved before a settlement is reached.

Another factor that should be considered in this context is the timing of the settlement. In some cases, the provision of an award mid-contract could sour relations between the parties. The effect of this is only predictable in the sense that someone will be the loser, also, ultimately both parties will feel the effect of soured relations.

2.4.2. Impact on Business Reputation and Emotions

According to Coulson, (1984:23), the involvement in any dispute can have an effect on the business' reputation and credit rating. This is not to say that by keeping the dispute private this effect will not be felt - even rumour of a pending lawsuit can affect this.

"This business executive seeks to protect the firm's reputation."

[Coulson, R, How to Stay Out of Court, Pg 23]

Besides the serious results that a dispute may have on the value of stock or credit facilities, the business executive must also view the consequences of poor publicity. In the construction industry this may mean the rejection of a tender as a direct result. The decision to accept or reject a tender may be taken with regard to the owner/client's reputation based on the contractor's poor publicity or, may even be based on the client's preference not to work with an alleged "trouble

causer", (claim-prove contractor), or negligent contractor who could be detrimental to the success of the project.

The acceptance or rejection of the tender is also affected where, for example, the architect has a poor reputation and the contractor refuses to work with him - ie. avoidance of an increased potential for conflict.

A good case for avoiding publicity in a construction contract is where, for example, the main contractor has employed several sub-contractors on a project. It may be that one of the sub-contractors decides to dispute credit arrangements with the main contractor. If it is decided that credit arrangements should be changed to benefit the sub-contractor is highly likely that the rest will jump on the "band wagon". This in turn could mean a severe financial loss to the main contractor.

The above-mentioned example must be seen as a specific hypothetical example. There are numerous cases which will show good cause for privacy. However, one must also consider the right of the public to know the misdemeanors of a company as such publicity may offer the public some protection. Thus the concept privacy of dispute can be seen as a double edged sword for the parties to the dispute.

On the emotional side it must be considered that few people enjoy the prospect of bitter confrontation with an adversary. *"For some, it is too harsh a test, for others, too naked an exposure ..... we often encounter an individual who is unable to do anything constructive while a matter is pending."* (COULSON,1981:16).

2.4.3. Management Objectives

The following, in the author's opinion and as a summary of the discussion so far, can be deduced in terms of the basic management objectives when deciding on a policy towards dispute settlement :

The resolution of the dispute should :

a) Not be too costly (in terms of the expected gain).
b) Not be too time consuming, and be correctly timed.
c) Preferably be kept private.
d) Preferably involve as little emotional stress as possible.
e) Preferably be fair, ie, it should not lead to further resentment between the parties.
f) Not become too personal

The above-mentioned are the main aspects addressed in the testing of the suitability of any given dispute settlement mechanism, the author admits however that some difficulty is foreseen in terms of the objective quantification of the above-mentioned aspects.

CHAPTER 3

MEANS OF SETTLING CONSTRUCTION DISPUTES IN SOUTH AFRICA

3.1 Contractual Agreements

The following is a brief explanation of the main contractual agreements currently being used in the South African construction industry in the formal sector, and the dispute settling mechanisms provided for in these agreements:

3.1.1 Private Sector

a) Building industry

i) Agreement and Schedule of Conditions of Building Contract, Contract Incorporating Bills of Quantities, The Institute of S.A. Architects, 1981/1988 Edition.*

Relevant clause : 26

Mechanism : Initial decision by architect then arbitration.

Arbitrator nomination : Parties agree contractually or he is nominated by President-in-Chief of the Institute of South African Architects.

* - As approved and recommended by the Institute of S.A. Architects, the Ass. of S.A. Quantity Surveyors, the Building Industries Federation (S.A) and the S.A. Property Owners' Association.

ii) Agreement of Building Sub-Contract, Domestic Sub-Contract, Building Industries Federation (South Africa), 1988 Edition.

Relevant clause : 36
Mechanism : arbitration.
Arbitrator nomination : Parties agree contractually or nominated by the President of the Master Builder's Association or, if he is not available the President of the Building Industries Federation.

iii) Agreement of Building Sub-Contract, Nominated Sub-Contract, Building Industries Federation (South Africa), 1982 Edition.

Relevant clause : 29
Mechanism : arbitration.
Arbitrator nomination : As per Domestic Sub-Contract.

iv) Agreement of Building Sub-Contract, Non-Nominated Sub-Contract, Building Industries Federation (South Africa), 1986 Edition,

Relevant clause : 37
Mechanism : arbitration.
Arbitrator nomination : As per Domestic Sub-Contract.

b) Civil Engineering Industry

i) General Conditions Contract 1982, For use in Connection with Works of Civil Engineering Construction, South African Institution of Civil Engineers, Fifth Edition (1982).

Relevant clause : 69
Mechanism : Engineer's decision.
mediation.
arbitration

Mediator nomination : Parties agree contractually or nominated by the President of the South African Institute of Civil Engineers.

Arbitrator nomination : Parties agree contractually or nominated by President of the South African Institute of Civil Engineers in consultation with the South African Association of Consulting Engineers and the South African Federation of Civil Engineering Contractors.

ii) General Conditions of Sub-Contract 1978, Sub-Contract works of Civil Engineering Construction, South African Federation of Civil Engineering Contractors, First Edition (July 1978).

Relevant clause : 14
Mechanism : As per Principal Contract
Mediator nomination : As per Principal Contract.
Arbitrator nomination : As per Principal Contract.

3.1.2 Public Sector

i) South African Railways and Harbours Contract, 37/30068 (E.5(1979)).

Relevant clause : 40

Mechanism : Engineer/Chief Civil Engineer's deputy Chief Civil Engineer.
arbitrator.

Arbitrator nomination : Parties agree contractually or nominated by the President of the South African Institution of Civil Engineers.

ii) Electricity Supply Commission, General Conditions of Contract, (Civil Engineering and Building Works).

Relevant clause : 45

Mechanism : arbitration.

Arbitrator nomination : Parties agree contractually, no mention is made of any Institution to nominate if the parties do not agree.

iii) Department of Community Development, Conditions of Contract, GO 203.

Relevant clause : 28

Mechanism : Engineer's decision clauses 2.1, 3.3, 3.5, 14.5
Actions to a court of law specifically excluded clauses 15, 18.1, 18.3(b),

Arbitrator nomination : None.

Thus the analysis of the aforementioned contracts and their dispute settling mechanisms reveals that arbitration features strongly, with mediation being used primarily in the civil engineering contract. One must consider that a contract is, in essence, an agreement and the parties may agree not to use the mechanisms but rather go the route of litigation. Thus the parties can essentially choose between the three main mechanisms for formal dispute settlement or a combination thereof. The three main mechanisms are mediation, arbitration and litigation.

3.2 Mediation, arbitration and litigation

The following section gives a brief explanation of each system, together with an overall comparison, and a listing of their attributes.

3.2.1 Mediation

> Mediation is in essence "*the taking of active steps by a third party making suggestions to both sides to try to find a solution acceptable to both sides*". (HELLARD,1988:xvi).

Mediation does not involve the handing down of an award. In the South African civil engineering industry one should consider the following:

> " *The general philosophy of mediation is that disputes which arise in the execution of civil engineering works by contract can be settled by engineer mediators for other engineers. This should become the common method of settling such disputes and as such the civil engineering fraternity should develop the outlook that mediation does not carry the same characteristics of mortal combat as does arbitration or some other forms of litigation. It is essentially an informal method of resolving the dispute.*" (ROUSE,1988:102).

Mediation is not a formal legal procedure, rather a procedure whereby a third party, ie. the mediator, gives an opinion to achieve a mutually acceptable settlement. (ROUSE,1988:102). In the civil engineering industry mediation is the second phase of dispute settlement following the engineer's decision. The parties are not bound by the mediator's opinion and they may object to the opinion within a specified number of days whereafter it will go to arbitration or litigation. If, however, the parties agree to the mediator's opinion, or there is no objection within the stated period for doing so then the mediator's opinion is final.

Although mediation is not considered a formal legal procedure certain "legal" principles still apply. In terms of the evidence the mediator should follow normal judicial procedures through first hearing the claimant then the defendant. A party must endeavour to convince the mediator that his view is contractually correct and that the other party's view is incorrect. (ROUSE,1988:102).

The South African Institute of Civil Engineers recommends that the mediator should be careful not to make contact with the parties unless they are together, this can be considered an ethical, if not legal, requirement. (SAICE,1989:3).

The mediator's opinion should be in writing stating the outcome in terms of the "winning party" and the proposed settlement. Furthermore, he should give detailed and reasoned arguments to support this opinion. (ROUSE,1988:102). Procedure in mediation should be based on the procedures stated in the "*Guidelines for Mediation*" booklet by The South African Institute of Civil Engineers.(SAICE,1989).

In terms of these guidelines both parties are not allowed more than two representatives at the mediation, both of whom should <u>not</u> be legal advisers. Parties may, however, consult with anyone for assistance in the preparation of arguments, claims, responses and counterclaims. (SAICE,1989:4). Mediators are not restrained by any time

constraint in making their opinion. From the aforementioned issues, mediation can be seen as a clarification process as well as a settling process. The clarification occurs during the mediation as parties will identify the actual points of dispute, should the parties not agree to the opinion, this process will narrow the areas of dispute for arbitration or litigation. Mediation is an alternative to arbitration.

3.2.2 Arbitration

Arbitration is in essence "*the handing down of an award enforceable at law as the settlement of a dispute arising either from a contract in which an arbitration clause was included or as the result of a joint agreement to refer matters in difference to a third party appointed on behalf of the parties ..... . The parties in entering arbitration are bound to accept the arbitration Award as final and binding upon them and the award is enforceable as a judgement of the court.*" (HELLARD,1988:xvi).

Hellard (1988:4) furthermore describes the following concerning the development of arbitration as a method:

> "*As far as the construction industry is concerned, arbitration emerged as a sensible alternative to the courts at the beginning of the century because those involved in it resolved that there were many technical*

causes of dispute that were not understood by lawyers and perhaps because a private forum was the better place to discuss these matters before a judge who understood them and was himself generally involved in them in his day-to-day activities."

In comparison to mediation, arbitration is a legal procedure governed by the Arbitration Act No 42 of 1965. The Arbitration Act is modelled on the English Arbitration Act of 1950. (JACOBS,1972:1). The South African Arbitration Act covers aspects involving the arbitration agreement, the arbitrator's powers, proceedings, the award and general provisions. (Arbitration Act,1965).

The arbitrator is required to hear both sides in a judicial manner ie. he is required to observe the rules of natural justice. The arbitrator is not there to assist the parties in reaching a compromise decision, he is there to determine the dispute and give an award which is final and binding on the parties. The arbitrator relies on the evidence presented before him and is not permitted to make an independent investigation and reach his own conclusion in order to settle the dispute. (FINSEN,1990:2).

The arbitrator's award may be given with reasons, but these are usually, unless requested by the parties, separate from the award. The award may be reviewed and set aside by the Supreme Court only if there has been, for example, misconduct on behalf of the arbitrator. (Arbitration Act,1965:15).

The arbitrator is bound by the requirements of the arbitration rules and is not allowed to see the parties individually without the opposing party's agreement or presence.

Legal representation is allowed at an arbitration and this usually takes the form of legal advisers and/or counsel. Clause 23.a) of the Arbitration Act, (1965), states that, unless the arbitration agreement otherwise provides, the arbitrator will make his award within four months of the reference date or the date on which the arbitrator was called to act by notice from any party. However, the parties can, and may agree to extend this time limitation.

Thus the arbitration process should not be equated with mediation in terms of "weeding out", it is rather a judicial process where, when the parties agree to arbitration, they also agree to the arbitrator's award being final and binding. Arbitration is seen as an alternative to litigation. "Voet" explains the following as the reasons for going to arbitration:

"..... The reason that resort is commonly made to such persons by those who are frightened of too heavy expenses of lawsuits, the din of legal proceedings, their harassing labours and pernicious delays, and finally the burdensome and weary waiting on the uncertainty of law."(JACOBS,1977:4)

3.2.3 Litigation

Litigation is in essence "*the process of contesting a dispute by civil action in a court of law. This can arise either from a contract between the parties or can be an action in tort* (delict), *that is a claim for damages over a private or judicial wrong.*" (HELLARD,1988:xvi)

Litigation procedures and rules are governed in South Africa by the Supreme Court Act No. 59 of 1959, the Magistrates Court Act No. 32 of 1944 and the Small Claims Court Act No. 61 of 1984.

Litigation is plagued by a shortage of available judges.(SCHLOSS.1989:12). This contributes to the lengthy delays in the dispute settling process.

Another contentious issue is that the lower courts, ie. Magistrates and Supreme Courts, are limited in their jurisdiction, not only geographically, but also as to the size of the claim. The Small Claims Court only has jurisdiction in respect of disputes not exceeding R1500-00. The Magistrates Court jurisdiction is limited to R5000-00 in actions for illiquid claims and R10 000-00 for actions arising out of liquid documents. (SCHLOSS,1989:13).

However, if the claim exceeds the relevant jurisdiction of a particular court, the parties can still agree to use the court in question. Thus a case that should be heard by the Supreme Court in terms of jurisdiction can be heard by a Magistrates Court if the parties agree to it. If there is no agreement then the case must be heard by the relevant court. (FINSEN,1990:6).

Another aspect which is of great importance is that of appeals. There can be appeal against a judgement in the Magistrates or Supreme Court but not however in the Small Claims Courts where the judgement is final and binding.

> *"Where the reason for wanting to have the judgement set aside is that the court came to the wrong conclusion on the facts or the law, the appropriate remedy is by way of appeal. Where the grievance is against the <u>method</u> of the trial it is proper to bring the case on review."* (DENDY & LOOTS,1989).

It is with this in mind that one can see why a Judge is required in law to give reasons for his findings - ie. an analysis of the pleading, evidence, arguments and also extensive research of the authorities quoted and other known authorities. (SCHLOSS,1989:13).

The aspect of appeals can be seen from a management point of view, as a possible legal escape to try to delay the settlement of the dispute. However, parties can agree to accept a Magistrate's decision as final and binding.

When comparing the roles of the mediator, arbitrator and Judge the following oath, whereby Judges are sworn in, gives an idea of the extent of the Judges' role:

> *"I ..... do hereby swear/solemnly and sincerely affirm and declare that I will in my capacity as a Judge of the Supreme (Magistrates) Court of South Africa administer justice to all persons alike without fear, favour or prejudice, and, as the circumstances of any case may require, in accordance with the law and customs of the Republic of South Africa or of the territory of South West Africa."* (ERASMUS & BARROW,1989:5).

A Judge is bound by oath, the rules of the relevant court, and the uniform rules and forms for conduct in the Supreme Court of the Republic whereas arbitrators and mediators are not bound by oath.

The Judge is not there to facilitate an agreement between the parties.

From the above-mentioned, together with the facts of lengthiness of procedure, shortages of available judges etc., it shows that litigation is expected to be a time consuming settlement procedure.

Schloss, (1989:12), states that legal representation for litigation is recommended and that the representation usually consists of an attorney with the engagement of senior counsel.

Senior counsel is required for the Supreme Court but in a Magistrates Court attorneys have the right to plead and appear without counsel. (SCHLOSS,1989:12).

In the Small Claims Court however no representation is allowed.

"The engagement of senior counsel, often warranted in complex matters or those involving substantial sums of money, adds considerably to the costs as is the almost obligatory engagement of junior counsel whose fee is calculated at two thirds of senior counsel."
(SCHMOSS,1989:12).

The judge is bound by the rules of the court and may not act as a facilitator, he is there to judge the case based on correct and fair procedure and the evidence placed before him. This concept applies similarly to arbitrators.

3.6 A comparison of mediation, arbitration and litigation.

The following section examines the differences between the three systems in more detail. The comparison is based on a comparison between mediation and arbitration written by *C. Spence* based on a paper originally delivered to the Association of Arbitrators South Africa in 1985. (SHILSTON,1979:188). The additional notes on litigation are inserted by the author.

MEDIATION	ARBITRATION	*(Author's notes)* LITIGATION
1. Mediation is an informal legal procedure with no controlling legislation.	1. Arbitration is a legal procedure in terms of the Arbitration Act No.42 of 1965.	1. Litigation is a legal procedure in terms of the Supreme Court Act No.59 of 1959, Magistrates Court Act No.32 of 1944, Small Claims Court Act No.61 of 1984.
2. The procedure of mediation is determined by the mediator himself after consultation with the parties.	2. In arbitration the procedure is in accordance with accepted (Arbitration Association) rules.*	2. In litigation the procedure is in accordance with legislation which prescribes court procedure.
3. No legal representation of the parties is permitted.	3. The parties are usually represented by legal advisors and counsel. **	3. The parties are usually represented by an attorney. Counsel is obligatory in the Supreme Court. No representation is permitted in the Small Claims Court.
4. The mediator should interpret the contract but need not be confined to the evidence placed placed before him.	4. The arbitrator acts as a judge and should only take cognisance of the evidence placed before him unless he has agreed with the parties that he may use his expertise.	4. The Judge should only take cognisance of the evidence placed before him.
5. The mediator is not bound by the normal rules of evidence but should endeavour to comply with the rules of natural justice.	5. The rules of evidence should be more strictly applied but only the rules of natural justice are mandatory.	5. The rules of evidence are mandatory.

* - Parties to the arbitration may however agree on a mutually acceptable procedure which may not conform with Arbitration Association Rules.(application of arbitration rules optional)

** - Parties are not required to have respresentation.

MEDIATION	ARBITRATION	*(Author's notes)* LITIGATION
6. The mediator's obligation is to attempt to obtain agreement of both parties to a solution of a dispute.	6. The arbitrator has no reason to obtain any agreement to his stated opinion or award.	6. The Judge has no obligations to the parties.
7. The mediator may propose a tentative solution and argue this with either or both parties.	7. The arbitrator remains aloof from the dispute and should only participate in questioning for the purpose of clarification.	7. The Judge similarly remains aloof and only questions for clarification.
8. The mediator's function is to intervene between the parties for the purpose of reconciling them.	8. The arbitrator performs no conciliatory function, he is simply a judge of evidence submitted.	8. The Judge does also not perform a conciliatory function, he judges the evidence.
9. Mediations can take place at any time during or after construction and are not limited to handling financial problems.	9. Arbitrations are usually delayed until after the construction is complete and are normally limited to financial awards.*	9. Litigation can take place during the contract but is usually delayed until after. Courts give financial awards.**
10. Mediations are usually quick and inexpensive. A mediator does not have to accept any unjustified procrastination.	10. Arbitrations can be lengthy, time-consuming and expensive. They can be delayed by legal quibbing.	10. Litigation is a lengthy, time-consuming and expenaive method which is more often than not delayed by legal quibbing.

* - However arbitrators can give a decision on workmanship or whether the contractor has worked to specification.

** - It is unlikely that the courts, or arbitrators, will award specific performance to either of the parties in a construction dispute.

MEDIATION	ARBITRATION	*(Author's notes)* LITIGATION
11. In order to achieve the common agreement of the parties to his decision, the mediator must give balanced reasons for it.	11. The arbitrator's decision is usually not accompanied by reasons, unless he feels that he wishes to do this. *(or it was a term of his appointment)*	11. A Judge is obliged, save in the Small Claims Court, to give reasons. These reasons usually form the basis for appeal.
12. The mediator's decision is only binding unless and until otherwise ordered in subsequent arbitration or litigation. *(can become binding by passing of time specified for rejection)*	12. The arbitrator's decision is final and binding upon the parties and can only be overturned by proving misconduct, gross irregularity, ultra vires or that it was improperly obtained.	12. The Judge's decision is final and binding but it can be reviewed or appealed against (not Small Claims Courts).
13. Mediator's opinion cannot be made an order of the court once it has been rejected.	13. Arbitrator's award can be made an award of court, if any of the parties refuse to accept it.	13. If there is no appeal or review applied for, then the parties cannot reject - as it becomes 'contempt of court'.
14. The costs are borne equally by the parties to the dispute.*	14. The arbitrator must apportion the costs of the arbitration as between the parties otherwise his award is incomplete. **	14. The Judge will award costs.
15. The mediator has no lien on his opinion.	15. The arbitrator has a lien on his award which he may use to ensure his costs.	15. Not applicable as the Judges are state funded.
16. The mediator gives an 'opinion'.	16. The arbitrator gives an 'award'.	16. The Judge gives a 'judgement' with reasons.

* - This does however depend on the agreement between the parties.

** - In terms of the Act the arbitrator must award costs, apportionment thereof depends on the case.

All above-mentioned references to "Judge" include Magistrates and Supreme Court Judges.

3.4 Benefits of Each System

The selection of an appropriate dispute settling method can be seen to be dependant on the amount of time and money expected to be spent, together with the expected outcome of the settlement in terms of fairness of decision*. The comparison in Chapter 3, section 3.3, gives a fair indication of the attributes of the different systems. The following is a summary of the attributes of each system :

a) Benefits of litigation

i) Open court - for precedence in future cases and public interest.

ii) Equal right of representation.

iii) Case law relevance.

iv) Integrity of the Judge and legal system.

v) Certainty of enforcement.

vi) Equality of the parties.

* - Fairness of decision in this context can be seen as the level of fairness of the award as seen by the "reasonable man".

b) Benefits of arbitration

i) Privacy.

ii) Certainty of application of the award.

iii) Equality of parties in the eyes of the arbitrator.

iv) Competence of arbitrator in terms of legal and technical knowledge.

v) Fast and inexpensive.

vi) Legal effectiveness.

vii) Certainty of enforcement, ie. finality

Benefits of litigation and arbitration, E. MINOLI 1972.(HELLARD,1988:31).

The following, in the author's opinion, can be give as the attributes of mediation :

c) Benefits of mediation

i) Privacy.

ii) Equality of Parties.

iii) Fast and inexpensive.

iv) Minimal disruption to business.

v) Competence, technically speaking, of the mediator.

Based on the original comparison of mediation and arbitration by C.Spence (SHILSTON,1979:188)

In terms of the management objectives of time, cost and fairness of decision it is possible, based on the aforementioned comparison and attributes of each system, to categorise the settling methods as follows in Table 1: *(Author's opinion)*

TABLE 1 RATING OF THE SETTLING MECHANISMS.

	Mediation	Arbitration	Litigation
1.Privacy	1	1	3
2.Speed	1	2	3
3.Cost	1	2	3
4.Technical Capacity	1	1	3
5.Legal Complexity	3	2	1
6.Equality of Parties	1	1	1
7.Disruption to Business	1	2	3
8.Finality	3	1	2
9.Legal Effectiveness	3	1	2
10.Certainty of settlement	3	1	2

(1=Appropriate, 2= Fair, 3=Inappropriate)

It would seem thus that on an overall basis arbitration should be the most appropriate mechanism as it is cost effective and time efficient, and has the added advantage of being legally effective in terms of the award being final and binding. If parties to the dispute are willing to settle, and the case is not legally complex, mediation would be preferable as it has the least disruptive effect.

3.5 Arbitration As Seen By The Legal Fraternity**

"Many advantages are claimed for arbitration, these include finality, secrecy of proceedings (in the sense of the absence of publicity), greater speed, lower costs and the possibility of having a dispute adjudicated by a person or persons technically qualified in the field of the subject matter of the dispute. In particular cases, however, one may find these advantages to be overstated, or even downright illusionary, or outweighed by serious disadvantages peculiar to that particular dispute. Thus a party to a dispute may find himself regretting his agreements in advance to submit disputes arising out of a contract to arbitration and the consequent loss of right to bring his opponent before an ordinary court with the residing officer skilled in weighing evidence and deciding questions of law."

[Wille and Millin's, Mercantile Law of South Africa, P. MILLIN and G. WILLE, 18th Edition, Pg 643].

** Legal fraternity is used here to show opinions of specific theorists and attorneys and does not necessarily reflect the opinions of all the legal theorists or all the attorneys.

This quotation shows to some extent the cautious optimism that is felt towards arbitration as a dispute settling mechanism. The following sections give the advantages, as proferred by the protagonists of arbitration together with counter arguments as given by certain persons in the legal fraternity.

3.5.1 Speed

The protagonists of arbitration argue that arbitration is speedier than litigation as the procedure is less time consuming, expert witnesses are usually not required and the waiting period for a hearing is less. It is said that litigation in building disputes is so time consuming and the outcome so unpredictable that attorneys would advise clients not to litigate unless the claim is high enough to justify the expense. (GAWLER,1989:3).

This infers that arbitration would be considered an alternative if the value of the dispute is not high.

The legal fraternity mirrors this inference as it concedes that for simple matters arbitration is quicker than litigation. However, where the matters are complex, or large sums of money are involved and where there are intricate legal points it can be considered beneficial to use counsel. This may not seem pertinent but the problem occurs when trying to set a date that will suit the

parties, counsel and the arbitrator. Since the arbitrator is reluctant to set dates that do not suit all parties it can delay the start of the hearing. In this context Gorley, (1988:331), argues that although there is a waiting period for a Supreme Court hearing at least the parties are obliged to adhere to the date that is set.

In the United Kingdom it is similarly felt that the length of arbitrations are increasing. The reasons for this have been attributed to a loss of control of the proceedings by the arbitrator. The loss of control is attributed to acceding to legal representatives' suggestions on procedure without examination or questioning of its merits for the particular case. (HELLIWELL,1988:78).

3.5.2 Expenses

Those costs that apply equally to arbitration and litigation are:

i) Party and Party Costs - these are the costs which one party to a legal proceeding is ordered to pay the other party.

2) Attorney and Client Costs	*- those costs that are awarded to a successful party where the tribunal wishes to express its displeasure against vexacious, frivolous, reckless or malicious litigation.*
3) Qualifying Expenses or Special Costs	*- the expenses necessarily incurred by a witness in his investigations, experiments or research, payment of which has to be specially authorized.*
4) Wasted Costs	*- the additional costs incurred by a party through the fault of his opponent or costs previously incurred which have become useless by reason of his opponent's fault.*

Source : The Law of Costs In South Africa, L. RUBIN. (PEMBERTON,1937:26).

In this case the protagonists argue that a saving in cost can be attributed to the saving in time and the fact that counsel is not obligatory. Despite the fact that arbitrators are paid, arbitrations are frequently less expensive than litigation. (GANLER,1989:3).

The legal fraternity concedes that if in certain cases the matter is highly technical and there are no legal issues then it is possible to avoid legal representation. It is added however that most lawyers are "*reluctant to leave clients at arbitrators' mercy*". (GORLEY,1988:343).

Furthermore, it must be borne in mind that cost of counsel, arbitrator's fees, recording evidence and having a suitable venue show no saving when compared to Supreme Court proceedings. (GORLEY,1988:343).

The following statement exemplifies an attorney's viewpoint :

"It is true to say that arbitration proceedings are in general more expensive than court proceedings".

[Advantages and Disadvantages of the arbitration Procedure, A.R. GORLEY,1988, Pg 343].

3.5.3 Fairness of Decision

It is the author's opinion that those aspects which contribute to fairness of decision in arbitration are the ability to choose your own judge, the finality of the award, the expertise of the arbitrator and the equity, (see page 46), clause

It is argued that by allowing the parties to choose their own arbitrator a suitable judge will be chosen. Even the legal fraternity agrees with this advantage as some judges are better able to understand complex legal and technical matters than others. (GORLEY,1988:343).

However, the training of arbitrators or their ability to act appropriately is questioned. This brings up the question of whether parties should choose a legal or lay arbitrator. When using a lay arbitrator it may occur that a decision which is unsatisfactory to the parties, due to the fact that it is manifestly incorrect in law, occurs.

It is further argued that it is unlikely that a technical expert will have vague knowledge of the laws of evidence, resulting in the possibility of gross errors. If these errors occur then inordinate delays can arise out of lengthy and complex review proceedings in the Supreme Court.

In terms of finality of the award one must consider that this may or may not be desirable depending on the matter. In the United Kingdom there is some form of recourse for a party who wants to appeal on a point of law (GORLEY,1988:343).

The finality of the matter is another reason for using a legally trained arbitrator. (GORLEY,1988:343).

"Without disparaging the undoubted abilities of men and women learned in their respective fields, it must be accepted that a legally trained person is better able to assimilate and understand technical matters (as, for example, judges hearing complex patent cases have to do) than an expert in a technical subject is able to assimilate and understand the subtleness of the law and in particular often incomprehensible (to a layman) rules of evidence."

[Advantages and Disadvantages of the Arbitration Procedure, A.R. GORLEY,1988, Pg 344].

The equity clause, ie. that clause which contracts may contain, (relating to allowing the arbitrator discretion as to the procedure he may use and permitting him to ignore principles of law and rules of evidence), has also caused some concern as parties effectively deny themselves any form of redress in the event of miscarriage of justice. (GORLEY,1988:344).

3.5.4 Privacy

Protagonists of arbitration argue that *"the lack of privacy of court proceedings often deters potential litigants who have good cases from taking them to court,*

fearing that in the process reputations may be damaged, closely guarded trade secrets may be made public and the issues may be misinterpreted and misreported by the media". (DAVIS,1966:9).

The counter argument given is as follows:

"In so far as secrecy is concerned, there is little doubt that in the vast majority of cases this factor is of no concern whatsoever to the parties. Nowadays, few civil cases are mentioned in the daily press. This so-called advantage of arbitration would only apply in isolated and unusual instances." (GORLEY,1988:344).

From the aforementioned therefore it can be seen that Gorley has grave doubts about the advantages of arbitration.

3.6 Summary of Previous Research

From the previous discussions it is clear that there are two sides with opposing views on arbitration as an effective dispute settling mechanism. Basically all the advantages for arbitration on comparison to litigation are being refuted by Gorley. The main points of concern are those relating to time, money and fairness of decision.

Surveys to date in South Africa have been undertaken by both the Association of Arbitrators, on arbitration, and the South African Institute of Civil Engineers, on mediation.

The survey by the Association of Arbitrators in 1986 (see Annexure A) conducted amongst its members was not aimed at comparing the three methods, merely to find the total value of claims and awards, the percentage of awards, how many arbitrators were nominated and the average length of time for an arbitration.

The pertinent results of the survey are:

1. Value of claims exceeded the value of the award by up to 248 times.
2. A majority of the arbitrations occurred in the building industry.
3. On average 38% of all arbitrators were nominated.
4. Only 59% of the disputes were settled out of court.
5. Average length of time, from date of appointment to date of award, for an arbitration was 6 months.

The survey by the South African Institute of Civil Engineers (1986) was aimed more at assessing the extent of usage of mediation, arbitration and litigation in the construction industry. The questionnaire was sent out to members whose names appear on the Institution's Panel of mediators (see Annexure B).

The pertinent results are:

1. Over the years 1982 to 1986 a total of 155 mediations took place.
2. Out of these only 20% ended up in arbitration.
3. There are only 3 cases of litigation reported for this period.

It is significant that only 20% of all mediations ended in arbitration. This indicates that mediation has credibility as a dispute settling mechanism and several arbitrations could possibly have been avoided if contracts contained mediation clauses. On the arbitration side the most significant result is the average length of time required for an arbitration at 6 months. This would surely present a strong case for arbitration.

The following comprises the basis for this research and highlights the inadequacies of the previous research :

1. No adequate comparison of the three methods of dispute settlement has been undertaken using results from practice (rather than theoretical) in terms of speed, cost and fairness of decision. The comparison cannot be undertaken through a literature survey as no records are kept of mediation and arbitration awards.

2. One must consider that if mediation is as effective as claimed then there may be place for such a clause in the building contract.

3. There has been no survey which has been undertaken to prove or disprove the advantages of arbitration.

4. There has also been no survey which has been undertaken to establish the reasons for claims compared to the respective advantages of the type of dispute settling mechanisms.

5. There are no comparative results to show that disputes of higher value go to litigation, rather than to arbitration or mediation.

6. There have been no surveys dealing with arbitration in terms of:

   a) Holding back the arbitration till end of the contract.
   b) Reasons for delays in arbitration.
   c) Whether an arbitrator should give a reasoned award.
   d) Whether there should be greater scope for appeal.
   e) Whether the arbitrator should be appointed by the President of an Institute.
   f) Whether arbitrators give compromise decisions.
   g) Whether pre-hearing conferences are beneficial.

7. An added problem that must be taken into account is that none of the previous surveys were undertaken outside the membership of the respective Institutes.

Furthermore, the "counter arguments" given for the advantages of arbitration (see section 3.4 pg 37) cannot be seen as the general opinion of the legal fraternity. It may be that the arguments given are isolated from the opinions of the whole legal fraternity as no further opinions on arbitration could be found in any other legal publications .

CHAPTER 4

RESEARCH METHODOLOGY

The purpose of this chapter is to describe the research methodology in terms of the hypothesis, information gathering process, sample sizes and the research limitations.

Any given research has six distinct phases, ie. (LEEDY,1989:9)

1) Unanswered question in the mind of the researcher.
2) Clear statement of problem.
3) Division of the problem into sub problems.
4) Tentative solutions to the problems by appropriate hypotheses.
5) Facts are collected, guided by the hypotheses.
6) Interpretation of the meaning of the facts to answer the initial question.

The previous chapters have defined the problem and divided the problem into sub problems (see Sect 3.6 pg 47) based on the literature survey and information gathering. This chapter aims to give tentative solutions by appropriate hypotheses, show the methodology for the research and identify any problems encountered.

4.1 Hypotheses

Hypotheses are defined by Leedy (1989:60) as "*tentative, intelligent guesses posited for the purpose of directing one's thinking toward the solution of the problem*".

Based on the previously mentioned literature survey and the statement of problems (questions) the following are the significant hypotheses for this research:

Hypothesis 1: *The effective use of arbitration is dependent on the size and nature of the claim.*

Hypothesis 2: *Arbitration is preferred to mediation and litigation as a method of dispute resolution in the construction industry.*

Hypothesis 3: *The aspects of Timing of hearing, Time limitation for award, No reasons given, Privacy, No appeal, President appointed arbitrators (where no agreement), Legal experience and pre-hearing conferences* are acceptable to the construction industry in terms arbitration as a dispute settling mechanism.*

The objective of the research is to collect and correlate data which upon interpretation will allow the acceptance or rejection of these hypotheses.

* - Pre-hearing conferences are held to establish the facts that are being disputed.

4.2 Methodology

4.2.1 The Population Group

The construction industry includes contractors, suppliers, service organizations, eg. the professions, and sub-contractors. This population can be divided into two main areas ie. those involved in building; and those involved in civil engineering works (there are companies that are involved in both disciplines). Before any sampling was undertaken it was decided that only building contractors, architects, civil engineering contractors and civil engineering consultants would be sampled. The reasons for this were that out of the whole population, it is more probable that the above-mentioned will have had experience with arbitration or mediation rather than, for example, suppliers of building materials; and the combination of contractors and design organisations would facilitate ease of comparison. In this way the manufacturing, ie. contractors, and the design/service orientated companies, ie. consultants, are represented for civil engineering and building works. This type of narrowing down can be related to cluster sampling design.

Further groups that were added to the population to be sampled were arbitrators and attorneys. These additional groups were chosen as they are also involved in construction dispute settling. The opinions of the arbitrators would show whether they agreed with the

advantages as given by the theorists. The attorneys would, on the other hand, be tested to find whether they agreed with the opinions expressed by Gorley (1988).

4.2.2 The Sample

The purpose of a sample is to be "*able to see all the characteristics of the total population in the same relationship that they would be seen were the researcher in fact to inspect the total population*". (LEEDY,1989:152).

The basic assumption behind any kind of sampling is that a cross-section of any group would be characteristic of the group as a whole. The most important factor to be considered is the representativeness of the sample in terms of whether the sample can, to a certain degree of confidence, show the characteristics/opinion of the population group.

The samples were chosen on a random basis out of each group. No statistical function or proportion was used to decide the size of each sample to be used. Under guidance the researcher decided to use 100 units of each group, except for arbitrators where a figure of 50 units was used as the population size for this sample was not large enough to allow for a 100 unit sample. This sample size, although small, can still be considered acceptable as according to Leedy (1989:158) a statistically meaningful analysis occurs where, for a normal distribution, the

number of units (replies) exceeds 30.

Thus the method on determining the sample was reversed in that the proportion of the population size is determined by the sample size not vice-versa. This concept must be borne in mind whilst studying the analysis of the research data, as the data does not lend itself to comparison between the individual groups to give an overall statistically proven relationship. The analysis was therefore undertaken by utilizing "*judgmental statistics*".

The samples were chosen from the following groups.

1. Building contractors - Members of the *Master Builders Association*, Witwatersrand or Transvaal South, General Contractors (Membership roll 1989).

2. Architects - Members of the *Transvaal Institute of Architects*; practising in Transvaal; Transvaal Institute of Architects, 1989.

3. Civil engineering contractors - Members of the *South African Federation of Civil Engineering Contractors*, 1989.

4. Civil engineering consultants	- Members of *The South African Association of Consulting Engineers*; Civil Engineering; Johannesburg; Directory of Firms, 1989.
5. Arbitrators	- Members of the *Panel of Arbitrators*. Arbitration Association of South Africa, 1989.
6. Attorneys	- Firms shown under Johannesburg and Pretoria, *Guide to Attorney's Services*, 1988.

It should be noted at this stage that some problems occurred based on the decision to use 100 units from each sample. The main problem samples were civil engineering contractors and arbitrators as there were fewer than the required units in the P.W.V. area. Thus for these two samples it was decided that 100 and 50 units respectively would be chosen from a country wide sample. The following table provides a tabular representation of the samples, the population size, and the proportion that the units hold of the sample.

TABLE 2 SAMPLE SIZES

SAMPLE NAME	POPULATION SIZE	SAMPLE SIZE	PROPORTION%
BUILDING CONTRACTORS	478	100	20.9
ARCHITECTS	276	100	36.2
CIVIL CONTRACTORS	266 *	100	37.5
CIVIL CONSULTANTS	101	100	99.0
ARBITRATORS	109 *	50	45.8
ATTORNEYS	105[1]	100	95.2

* Country Wide

[1] Johannesburg and Pretoria only.

4.2.3 The Units

The units are those bodies/persons/organizations that were chosen to represent the different samples. The choice of units was undertaken to be a random selection from the membership lists.

This was facilitated to some degree by using, for most samples, the first 10 of each alphabetic categorization. However, one must consider that for those samples where the proportions are high, eg. 95%, a degree of randomness is lost.

Furthermore, certain samples had units, eg. companies, specifically included as they were known to have had experience with arbitration. The following shows where and to what extent this occurred:

TABLE 3 SPECIFIED UNITS

SAMPLE NAME	SPECIFIED UNITS
BUILDING CONTRACTORS	5 units from West Rand, 2 units from East Rand.
ARCHITECTS	55 units to be included.
ARBITRATORS	16 units to be included.
ATTORNEYS	4 units to be included.

4.2.4 Data Collection

It was decided to use a questionnaire as a basis for data collection due to the geographic dispersion of the samples as well as financial and time constraints.

The questionnaire was designed to be as comprehensive yet as simple as possible. It was assumed that recipients had some understanding of arbitration, mediation and litigation. The language of the questionnaire was tailored to the expected respondents. The questionnaire was designed using three basic objectives, ie. to gather information based on the experience of the recipients with one or more of the dispute settling techniques, and to gather information based on opinion from those respondents that had had no previous experience with arbitration in order to ascertain credibility of arbitration as a dispute settlement mechanism.

The questionnaire was accompanied by a self addressed envelope and a covering letter to take the place of the opening interview, so as act as an incentive to help increase the response rate (*see Annexure C. Covering Letter and Questionnaire*). A pilot study was not considered necessary as the main issues had already been identified through the literature survey.

The following is an explanation of the rationale for each section of the questionnaire:

a) Section 1

This section was included to gather general information about the samples. The questions are modelled to determine the types of contracts used, the types of dispute settling mechanisms used, the value of the disputes as well as the nature of the dispute. This section relates to Hypothesis 1.(pg 53)

b) Section 2

This section was modelled to find the preferred method of dispute resolution so as to facilitate comparison. This method was decided on so as to utilize Correspondence Analysis. Respondents were asked to rate each of the mechanisms according to their experience therewith. This section relates to Hypothesis 2.(pg 53)

c) Section 3

This section has questions designed to determine whether certain aspects are acceptable or unacceptable to the population. This is facilitated by YES/NO answers. This section relates to Hypothesis 3.(pg 53)

d) Section 4

This section applied to those recipients who had no previous experience with arbitration as a dispute settling mechanism. The question was structured so as to test the awareness in terms of the published advantages and disadvantages of arbitration.

General

The questionnaire also gave respondents an opportunity to express further opinions by allowing comments at the end of Section 3 and 4.

4.3 Bias

Bias is defined as "*any influence, condition or set of conditions that singly or together distort the data from what may have been obtained under the conditions of pure chance; furthermore, bias is any influence that may have disturbed the randomness by which the choice of a sample population has been selected*". (LEEDY,1989:166).The following is the author's acknowledgment of possible

bias in the research and questionnaire:

1. *Award/decision bias* - A previous unfavourable decision or award may lead the questionnaire respondent to be biased in his views on that particular dispute settling mechanism.

2. *Opinion bias* - There is a possibility that the questionnaire respondent has read only one of the side's views which could severely influence his opinion, eg. a newspaper article.

3. *User bias* - There is a high possibility that arbitrators and attorneys will have, based on their experience, some form of bias in their responses. Furthermore, the possibility that some of the civil engineering sample included mediators, and that some of the building sample included arbitrators, is acknowledged. This could sway an opinion even though the questionnaire respondent's personal experience may have been different.

4. *Randomness* - This bias has already been fully expressed in Section 4.2.3.

5. *Personal bias* - It is ethically expected that the author of the research should be objective in the analysis. It is acknowledged that some form of personal bias, may be present due to human error or misinterpretation.

4.4 Assumptions

It is essential for the researcher to clarify his assumptions in order to establish the boundaries of the research. The following represents the assumptions of this research:

1. It is assumed that all the names and addresses of the samples were correct, and that all the persons/organizations exist.

2. It is assumed that respondents completed the questionnaire with honesty and integrity, ie. none of the respondents purposely misrepresented their opinions.

3. It is assumed that those recipients who did not return the questionnaire are of the same mind as those that did. This can be considered a base assumption of research of this nature ie. the sample population is typical of the total population.

4. It is assumed that those recipients who did not respond did so because of time constraints or because they were not willing to fill in the questionnaire. It is for this reason that a follow up questionnaire was decided against.

5. It is assumed that respondents have some knowledge of the different dispute settling methods.

6. It is assumed that a qualified, in terms of experience or knowledge, person in the respective organizations completed the questionnaire.

CHAPTER 5

Analysis and Evaluation of Results

5.1 Responses

Of the 550 questionnaires dispatched there were 139 responses. This represents a response rate of 25.2% for the total sample. However, six of the questionnaire responses were considered unfit for use as they were incorrectly or insufficiently filled in. Four of the six indicated that they had not used the mechanisms and were therefore not able to comment; one respondent indicated that the company was no longer active and one of the respondents sent the covering letter back but not the questionnaire. This provided a usable response of 133 out of the 550, ie. an effective response rate of 24%

The response rate varied considerably from sample to sample. The following table shows the response rate for each sample:

TABLE 4 RESPONSE RATE

SAMPLE NAME	NO. SENT	NO. RESPONDED	%RESPONDED
Building Contractors	100	20	20
Architects	100	30	30
Civil Contractors	100	32	32
Civil Consultants	100	26	26
Arbitrators	50	16	32
Attorneys	100	9	9

The response rates for all samples, save attorneys, were considered acceptable, since 20-25% is considered a good response. An attempt was made after the cut off date to increase the attorney response as their opinions needed to be compared to those expressed by Gorley (1988).

The follow up for this sample was conducted telephonically and a further month was allocated for replies, however no further responses were received.

5.2 Analysis Methodology

Through thorough investigation it was found that even though three of the response rates were above or equal to 30%, the data did not lend itself to comparative statistical analysis. Further analysis showed that the data size was not adequate for complex statistical analysis utilizing Correspondence Analysis.

It was thus decided to limit the statistical analysis to a "*Goodness of Fit*" test for each sample response.

This analysis utilizes the Chi squared test for each question. The test would test the hypothesis (Ho): *The replies are independent of the questions*. If the hypothesis was rejected, ie. probability of < 0.05 then it was accepted that the data was fit for that sample.

In some cases the data proved too small for the Chi squared test and the Fisher test, which is appropriate for small cell frequency, was then used.

The testing was conducted utilizing the S.A.S. (Statistical Analysis Software) package.

Some of the data did not lend itself to any form of statistical analysis. This refers to specific questions where the analysis would have to be on a three dimensional statistical basis. In these cases the analysis was undertaken utilizing proportions in the respondents answers.

The problems encountered with the analysis of each question are highlighted in the following section (5.3). It was decided, even though comparative statistical analysis was possible, that all results would be shown together to allow for the "judgmental" analysis and reasoning.

The analysis should be undertaken sample by sample, but this would have made the comparative analysis, with the view to making overall conclusions, extremely complex.

The limitations of the results are acknowledged, however the results are still meaningful enough to allow for analysis from which findings and conclusions can be drawn.

5.3 Analysis Of The Survey Results

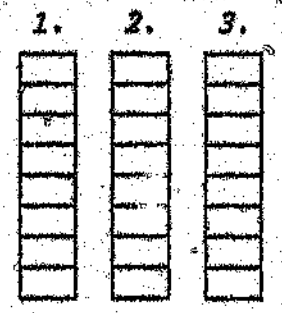
The analysis is carried out on a section by section, question by question basis.

Section 1 General Information

Question 1

1. What type of contract agreements are you involved in?

(Tick the appropriate box, where 1= continuously, 2= less than 50% of the time, 3= more than 50% of the time.)



a) Building contract (Inst. of Arch)
b) Building sub-contract (BIFSA)
- Domestic
- Nominated
- Non-nominated
c) Civil Engineering (GCE 1982)
d) Civil Eng. sub-contract (1978)
e) Other (specify).....

This question was selected to ascertain the degree of involvement with the different types of contract that the respondents had used. It was decided to collapse choices 1 and 3, ie. continuously and more than 50% of the time respectively, to show frequent use. The contract and sample names have been abbreviated to save space. They are hereafter abbreviated as follows :

BC - Building contract (Institute of Architects).

BSubD - Building sub-contract (BIFSA) domestic.

BSubN - Building sub-contract (BIFSA) nominated.

BSubNN - Building sub-contract (BIFSA) non-nominated.

CEC - Civil engineering contract (GCE 1982).

CE Sub - Civil engineering sub-contract (1978).

Other - Specified other contracts.

B & C - Building contract & civil engineering contract.

Further noted abbreviations are :

Build - Building contractors

Arch - Architects.

C.Cont - Civil engineering contractors.

C.Cons - Civil engineering consultants.

Att - Attorneys

Arb - Arbitrators

The following table represents the results obtained.

TABLE 5 FREQUENCY OF THE USE OF THE DIFFERENT CONTRACT
(Shown as percentage YES for each sample)

CONTRACTS	BUILD	ARCH	C.CONT	C.CONS	ATT	ARB
BC	8.33	11.54	3.75	2.88	3.57	6.25
BSubD	5.21	1.92	1.25	1.92	0.00	1.79
BSubN	4.17	2.88	1.25	2.88	1.79	1.79
BSubNN	5.21	1.92	1.87	0.96	0.00	0.89
CEC	2.08	0.00	10.36	8.65	1.79	5.36
CE Sub	0.00	0.96	3.12	0.96	0.00	0.00
Other	2.08	0.96	1.87	0.96	0.00	2.68
B & C	0.00	0.00	3.12	0.96	1.79	0.89
Probability (Chi²)	0.002	0.00	0.00	0.001	0.449	0.006
Accept/Reject	R	R	R	R	A	R

The reader should not view the percentages shown on Table 5 as a percentage of the whole sample. The percentages are a reflection of the "frequency" of response for each sample. Where no box was ticked it was assumed that the contract had been used less than 50% of the time. The figures are not for comparative use, merely to indicate which contracts are most frequently used for each sample.

The following is an analysis pertaining to Table 5:

Building contractors use the building contract, followed by the sub-contract, most frequently. For architects the most frequently used contract was similarly the building contract.

Similarly the civil engineering contractors and consultants most frequently use the civil engineering contract. These results are not surprising as they pertain to the respective fields of expertise.

On the attorneys and arbitrators side a different response is reported. It can be said that arbitrators most frequently arbitrate the building and civil engineering contracts. The attorneys results must be viewed with the fact that the frequency of response is not deemed "fit", ie. no generalizations can be made. However it seems that the highest use of contract is the building

contract, with the civil engineering contract second, and Nominated building sub-contract third.

The results for arbitrators and attorneys could be seen to indicate that disputes arise mainly out of the building contract and the civil engineering contract.

Those respondents who answered "other" included the following contracts through specification :

1. South African Transport Services
2. Negotiated contracts (Private)
3. Transvaal Provincial Administration
4. Iscor/Yskor (Iron and Steel Corporation)
5. Escom/Eskom (Electricity Supply Commission)
6. Mining Houses.

It was found that the "Goodness of fit" test for the different samples gave identical results for each of the questions and was therefore not shown for each question analyzed.

Section 1

Question 2

2. Which of the following have you been involved in arising from a construction dispute?

Mediation	*YES*	*NO*
Arbitration	*YES*	*NO*
Litigation	*YES*	*NO*

This question was selected to ascertain the frequency of use of the three different dispute settling methods ie. mediation, arbitration and litigation.

The following table shows the percentage of YES responses for each mechanism for each sample:

TABLE 6 DISPUTE SETTLING MECHANISMS

SAMPLE NAME	MEDIATION	ARBITRATION	LITIGATION
BUILD	58.3	66.7	58.3
ARCH	46.2	84.6	23.1
C.CONT	95.0	45.0	70.0
C.CONS	46.2	46.2	46.2
ATT	28.6	85.7	85.7
ARB	85.7	100.0	78.6

It was expected that arbitration and mediation would rate highest in the building and civil engineering industries respectively, as these are included in the contracts as disputa

settling mechanisms. However some disparity exists in the civil engineering consultant sample as there was not the expected majority for mediation.

This does not correspond to the mediation survey carried out by the South African Institute of Civil Engineers. Another point of concern is that although arbitration is specified in the building contract there is a high proportion of respondents that have had experience with mediation and litigation. One can only deduce that parties have specifically excluded arbitration and preferred to go the route of litigation or mediation.

The results also show that arbitrators are also involved to some extent in mediations and litigation. The attorney's response cannot be taken as representative, however, it should be noted that, in comparison to litigation and arbitration, a low amount of legal representation/advice is given at mediation.

It should be noted here that if a respondent answered, for example, that he had only used mediation then answers for the rest of the questions which referred to arbitration and litigation, including sections 2 and 3, were not included in the analysis. The author decided this as the sections 1, 2 and 3 are based on experience. Section 4 caters for opinion.

Section 1

Question 3

3. Give the number of times each has occurred in the value categories (Where A = 0-5, B = 6-10, C = 11-15, D = 16-20, E=more than 20 occurrences)

Value of dispute	*Number of times*		
Range	*Med*	*Arb*	*Lit*
R 0 to 50 000	A B C D E	A B C D E	A B C D E
R 50 000 to 100 000	A B C D E	A B C D E	A B C D E
R 100 000 to 200 000	A B C D E	A B C D E	A B C D E
R 200 000 to 300 000	A B C D E	A B C D E	A B C D E
greater than R 300 000	A B C D E	A B C D E	A B C D E

This question aimed to find the value of claims and the number of times the relevant dispute settling procedure was used, with a view to finding out generally where the highest claims are settled. The limitations of this type of analysis are such that the results should only be used for generalization.

The question required the respondent to tick the appropriate box which reflected the number of times, the size of claim, and the mechanism used. [For ease of comparison the lowest number of times was used as a basis, ie. A=1; B=6; C=11; D=16; E=20] (eg. if 4 respondents ticked E for greater than R300 000 then 4 times (20) = 80 occurrences). This gives an adequate base for comparison but does to some extent distort the data. (See the following tables).

TABLE 7 METHOD OF DISPUTE SETTLEMENT COMPARED TO OCCURRE

1. Building Contractors

VALUE (R)	NO. OF TIMES		
	MED	ARB	LIT
0 - 50 000	5	7	4
50 - 100 000	0	1	1
100 - 200 000	1	1	1
200 - 300 000	0	2	0
> 300 000	1	4	1
	7	15	7

2. Architects

VALUE (R)	NO. OF TIMES		
	MED	ARB	LIT
0 - 50 000	8	41	18
50 - 100 000	3	32	17
100 - 200 000	1	13	7
200 - 300 000	0	14	12
> 300 000	1	31	7
	13	131	61

3. Civil Contractors

VALUE (R)	NO. OF TIMES		
	MED	ARB	LIT
0 - 50 000	9	4	6
50 - 100 000	8	11	6
100 - 200 000	5	2	2
200 - 300 000	3	2	4
> 300 000	3	3	5
	28	22	23

4. Civil Consultants

VALUE (R)	NO. OF TIMES		
	MED	ARB	LIT
0 - 50 000	2	0	3
50 - 100 000	2	0	2
100 - 200 000	0	1	0
200 - 300 000	0	0	0
> 300 000	2	1	2
	6	2	7

5. Attorneys

VALUE (R)	NO. OF TIMES		
	MED	ARB	LIT
0 - 50 000	0	13	23
50 - 100 000	0	13	17
100 - 200 000	6	12	13
200 - 300 000	7	18	12
> 300 000	1	15	7
	14	71	72

6. Arbitrators

VALUE (R)	NO. OF TIMES		
	MED	ARB	LIT
0 - 50 000	17	37	2
50 - 100 000	25	16	3
100 - 200 000	19	40	3
200 - 300 000	20	27	7
> 300 000	6	36	11
	87	156	26

The following table is proposed as a summary showing which dispute settling procedures were used the most in the different value categories.

(where M = mediation, A = arbitration, L = litigation)

TABLE 8 DISPUTE SETTLING METHOD COMPARED TO SIZE OF CLA

VALUE (R)	SAMPLE					
	BUILD	ARCH	C.CONT	C.CONS	ATT	ARB
0 - 50 000	A	A	M	B	L	A
50 - 100 000	A/L	A	A	M/L	L	M
100 - 200 000	M/A/L	A	M	A	L	A
200 - 300 000	A	A	L	-	A	A
> 300 000	A	A	L	M/L	A	A

(NOTE:; Only the highest values are reflected here).

This table does not prove that any of the methods are preferred. However it does show for building contractors, architects and arbitrators, that arbitration is a commonly used method through the Value of the dispute categories. The frequent use of mediation is limited somewhat to the civil engineering fraternity. The attorney response, as it is too low, cannot be taken as representative but the table shows that attorneys are more often involved in litigation for disputes less than R200 000, and arbitration for disputes above R200 000.

By utilizing this data and collating it with the rating questions in Section 2 (pg 82) it is possible to consider whether arbitration is affected by the size of the claim.

Section 1

Question 4

4. What was the cause of the dispute in the cases you have been involved in? (tick the appropriate box)

	Med	Arb	Lit
a) Negligence			
- Contractor			
- Architect/Engineer			
b) Variations			
c) Interpretation of contract			
d) Time - delays			
e) Sub-contractors			
f) Certificate			
g) Other (please specify)			
.....			
.....			
.....			

The purpose of this question was to find the primary reasons for claim under each of the dispute settling methods. Respondents were asked to tick the appropriate box. The following tables give a percentage breakdown of the cause of dispute for each sample.

TABLE 9 CAUSE OF DISPUTE COMPARED TO SETTLING METHOD (SAMP

1. Building Contractors

CAUSE	MED	ARB	LIT
CONTR. NEGLIGENCE	20	0	12.5
ARCH/ENG NEGLIGENCE	7	17	12.5
VARIATIONS	13	11	0
INTERPRETATION	27	11	12.5
TIME/DELAYS	13	22	12.5
SUB-CONTRACTORS	13	11	12.5
CERTIFICATE	0	11	0
OTHER	7	17	37.5
TOTAL %	100	100	100

2. Architects

CAUSE	MED	ARB	LIT
CONTR. NEGLIGENCE	23.8	16	16.6
ARCH/ENG NEGLIGENCE	9.5	12	8.3
VARIATIONS	19	16	25
INTERPRETATION	9.5	16	8.3
TIME/DELAYS	19	12	8.3
SUB-CONTRACTORS	9.5	16	8.3
CERTIFICATE	4.7	4	16.6
OTHER	4.7	8	8.3
TOTAL %	100	100	100

3. Civil Contractors

CAUSE	MED	ARB	LIT
CONTR. NEGLIGENCE	0	5	5
ARCH/ENG NEGLIGENCE	15	15	15
VARIATIONS	23	30	20
INTERPRETATION	26	20	25
TIME/DELAYS	20	15	10
SUB-CONTRACTORS	8.8	10	20
CERTIFICATE	0	5	0
OTHER	5.8	0	5
TOTAL %	100	100	100

4. Civil Consultants

CAUSE	MED	ARB	LIT
CONTR. NEGLIGENCE	12.5	15	11
ARCH/ENG NEGLIGENCE	0	20	33
VARIATIONS	18.7	10	22
INTERPRETATION	31.3	25	0
TIME/DELAYS	31.3	15	11
SUB-CONTRACTORS	6.3	15	11
CERTIFICATE	0	0	0
OTHER	0	0	11
TOTAL %	100	100	100

5. Attorneys

CAUSE	MED	ARB	LIT
CONTR. NEGLIGENCE	0	13.3	20
ARCH/ENG NEGLIGENCE	12.5	13.3	15
VARIATIONS	12.5	13.3	20
INTERPRETATION	25	20	10
TIME/DELAYS	25	26.6	20
SUB-CONTRACTORS	12.5	0	5
CERTIFICATE	0	6.6	0
OTHER	12.5	6.6	10
TOTAL %	100	100	100

6. Arbitrators

CAUSE	MED	ARB	LIT
CONTR. NEGLIGENCE	9.3	12.1	14.8
ARCH/ENG NEGLIGENCE	2.3	9.7	18.5
VARIATIONS	16.3	7.3	24.8
INTERPRETATION	23.2	22	26
TIME/DELAYS	23.2	22	7.4
SUB-CONTRACTORS	16.3	7.3	11.1
CERTIFICATE	4.6	9.7	0
OTHER	4.6	9.7	7.4
TOTAL %	100	100	100

The following table represents a summary of the previous table giving the highest cause of dispute for each sample's dispute settling mechanism:

Table 10 SUMMARY CAUSE OF DISPUTE

SAMPLE NAME	MEDIATION	ARBITRATION	LITIGATION
BUILDING CONTR.	Interp	Delays	Other
ARCHITECT	Contr. Neglig	Var/Interp./ Cont.Neg/Sub-Cont	Var
CIV.CONTR.	Interp	Var	Interp
CIV. CONS	Interp/Delays	Interp	A/E Neglig
ATTORNEYS	Interp/Delays	Dela Delay.../erp	Contr.Neglig
ARBITRATIONS	Interp/Delays	Interp/Delays	Interp.

WHERE : Interp = Interpretation of the contract
Contr.Neglig = Negligence on contractor's behalf
A/E Neglig = Negligence on architect/engineer's behalf
Delays = Time lost (delays)
Var = Variations
Other = Other

Those causes listed under "Other", taken from all the respondents include; supplier's defective materials, supplier's cession dispute, dishonored guarantee; changed conditions of contract, flood damage, and sub soil conditions.

From the aforementioned table we are able to deduce that the most frequent cause of disputes in mediation is the interpretation of the contract. For arbitration the causes are shared predominantly by interpretation and delays. Whereas, for litigation, interpretation and negligence play a role.

Section 1 - Summary

From the analysis of the four questions in this section the following can be inferred :

1. The most predominantly used contracts in the construction industry are the Building Contract (BIFSA) and the Civil Engineering Contract (GCE 1982).

2. In terms of dispute settling mechanisms, the building contract is the contract that attorneys and arbitrators are most predominantly involved in.

3. A high proportion of respondents use litigation; thus, based on the fact that specific clauses are included for mediation and arbitration, it could be deduced that litigation is being specifically agreed on as a dispute settling mechanism for settling construction disputes.

4. The size of claim does not necessarily preclude mediation or arbitration, arbitration has been used through the Value range R0 - 300 000 and above. (This does however not imply that it is successful as a dispute settling mechanism in this range).

5. Based on the results the primary causes of disputes can be generally be narrowed down to interpretation of contracts, delays and negligence by the contractor.

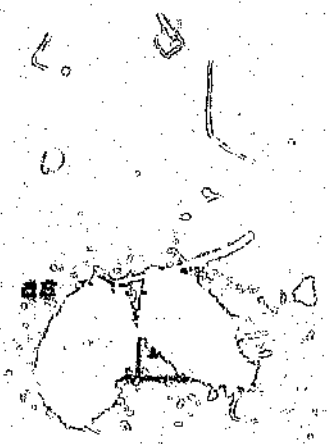
Section 2 MEDIATION vs ARBITRATION vs LITIGATION

This section was divided into three separate sub-sections. The questions are identical for arbitration and mediation. However for litigation certain questions that were considered "*unethical*" in terms of their implications, ie. Qualification of a Judge and Fairness of Decision for litigation, were omitted.

The questions gave the respondents the opportunity, based on their experience to rate the different dispute settling mechanisms in terms of speed and quality of award/decision. Respondents were further asked to express their opinion concerning the economic viability of each mechanism. The main purpose of this section was to compare the three systems with a view to rating each of them in terms of speed, cost and fairness of decision (in the eyes of the respondents).

The two problem questions in this section are those referring to fairness of decision and predictability of result. The aspect of fairness of decision, which refers to whether the respondent found the decision "fair", is a subjective question that could be misinterpreted or the response biased, eg. if the respondent lost the case. Furthermore, "*Predictability of Result*" can also be taken through various interpretations, but, in this case it was assumed that the respondents viewed it as how accurately they were able to predict the result of the award/decision given.

The rating questions are analyzed according to the spread of ratings for each question ie. only those boxes with the highest response were considered. The analysis of this section is undertaken on a question by question basis, ie. the questions for each of the mechanism are linked, to allow for comparison.



Section 2

Question 1(a)

1. Cost

a) Do you see mediation/arbitration/litigation as economic means of resolving a dispute?

The question referred to whether respondents found the mechanisms to be an economic means of dispute settlement. The following tables give the results obtained from each of the sampled respondents.

TABLE 11 COST OF MECHANISMS

SAMPLE NAME	RESULT	MED	ARB	LIT
BUILDERS	YES	50.0	41.7	16.0
	NO	8.3	25.0	41.7
ARCHITECTS	YES	38.5	76.9	23.1
	NO	7.7	7.7	76.9
CIV.CONT	YES	75.0	30.0	20.0
	NO	20.0	15.0	45.0
CIV.CONS	YES	30.8	15.4	15.4
	NO	7.7	30.8	30.8
ARBIT	YES	85.7	92.9	21.4
	NO	14.3	7.1	57.1
ATTOR	YES	14.3	57.1	42.9
	NO	14.3	14.3	14.3

Where cells do not equal 100%, the difference is attributed to "undecided opinion" and has not been included in the analysis.

From the aforementioned tabulation it is possible to deduce the following :

1. Mediation is considered an economic means of solving disputes by all parties in the construction industry except by attorneys. Further inspection shows that civil engineering contractors and arbitrators are largely in favour of mediation as a dispute settling mechanism.

   It would however have been expected that more civil engineering consultants would have agreed on mediation as an economic means of solving disputes. The unexpected result in this question could be attributed to some respondents having had experience in all three processes which possibly led to comparative reasoning instead of objective reasoning.

2. Only the civil engineering consultants are not in favour of arbitration as an economic means of dispute settlement.

That a large majority of arbitrators favour arbitration is to be expected as it is unlikely that they would be objectively critical of their own system. Based on the results it can be seen that architects favour arbitration as an economic means of resolving a dispute. Surprisingly, a majority of attorneys favour arbitration as being economic.

3. Litigation is not, based on these results, considered an economic means of settling disputes, save by attorneys. It should be noted however that the support for litigation given by the attorneys was expected.

The overall analysis, based on a majority favouring each system, shows the following: (judgment 1)

Mediation	: Favoured on economic grounds by 6 samples
Arbitration	: Favoured on economic grounds by 5 samples
Litigation	: Favoured on economic grounds by 1 sample

Thus we can deduce that mediation and arbitration are preferred to litigation as being economic means of dispute resolution.

Section 2

Question 2(a) Speed

a) *Time from when dispute lodged to time of first hearing.*

0-4 wks	*4-10 wks*	*greater than 10 weeks*

This question asked respondents to give, based on their experience, the time that passed from the lodging of the dispute to the first hearing. The respondents were asked to tick the appropriate box ranging from 0 - 4 weeks, 4 - 10 weeks and greater than 10 weeks. Based on these results it is possible to assess which system has the lowest waiting period; ie. as a reflection of the efficiency of procedure and availability of the respective third party.

The following table reflects the responses for each of the samples for the time to first hearing :

TABLE 12 TIME TO FIRST HEARING
(% breakdown of response)

SAMPLE NAME	WEEKS	MECHANISM		
		MED	ARB	LIT
BUILDERS	0 - 4	50.0	33.3	0
	4 - 10	50.0	22.2	0
	>10	0	44.4	100
ARCHITECTS	0 - 4	16.6	0	0
	4 - 10	66.6	28.5	16.6
	>10	16.6	71.4	83.3
CIV.CONT	0 - 4	7.6	0	0
	4 - 10	46.1	75.0	8.3
	>10	46.1	25.0	91.6
CIV.CONS	0 - 4	0	0	20.0
	4 - 10	33.3	40.0	0
	>10	66.6	60.0	80.0

SAMPLE NAME	WEEKS	MECHANISM		
		MED	ARB	LIT
ARBIT	0 - 4	22.2	0	0
	4 - 10	66.6	36.3	0
	>10	11.1	63.6	100
ATTOR	0 - 4	0	0	0
	4 - 10	100	0	0
	>10	0	100	100

From the results it appears that the majority of cases settled by mediation required less than 10 weeks from initiation of the action to the first hearing since the sum of the first two cells is greater than 50% for all except the civil engineering consultants.

The results for arbitration are not as clear cut but it appears that arbitration action generally takes less than 10 weeks. However a high proportion of respondents experienced that at least 10 weeks will elapse before the first hearing. There is a low frequency for litigation commencing under 10 weeks. Generally, based on this data, time to first hearing for litigation will exceed 10 weeks. This corresponds with expectations expressed in the literature survey.

In terms of the above data there is a definite case for using mediation before arbitration, and arbitration before litigation, if the time to first hearing is important. It should be noted that building contractors; arbitrators and attorneys, (although the last is not necessarily a representative response), agreed unanimously that litigation time to first hearing is expected to exceed 10 weeks.

Summary Expected Time To First Hearing

1. Mediation : Range 0 - 10 weeks
2. Arbitration : Range 4 - greater than 10 weeks
3. Litigation : Range - greater than 10 weeks

Section 2

Question 2(b) Speed of Hearing

b) *Speed of actual hearing*



This question asked respondents to rate the speed of hearing for each mechanism between five available choices ranging from Excellent to Very Poor. The analysis is based on the spread of the data for each category. The following table gives the results for each mechanism:

TABLE 13 MECHANISM COMPARED TO SPEED OF HEARING

1. Mediation Speed of Hearing

SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	14.7	71.4	0	14.7	0
ARCHITECTS	20.0	60.0	20.0	0	0
CIV.CONT	31.5	42.1	10.5	5.2	10.5
CIV.CONS	20.0	20.0	20.0	20.0	20.0
ARBIT	25.0	66.6	8.3	0	0
ATTOR	0	100.0	0	0	0
AVERAGE	18.5	60.0	9.8	6.6	5.1

From this table we can see that a majority spread for mediation lies in the "Good" rating.

2. Arbitration Speed of Hearing

SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	0	50.0	25.0	0	25.0
ARCHITECTS	10.0	40.0	40.0	0	10.0
CIV.CONT	22.2	33.3	22.2	22.2	0
CIV.CONS	0	40.0	0	40.0	20.0
ARBIT	14.3	50.0	28.5	7.1	0
ATTOR	0	60.0	40.0	0	0
AVERAGE	7.8	45.5	25.9	11.5	9.2

Thus for arbitration the range for hearing speed is between "Good" and "Fair".

3. Litigation Speed of Hearing

SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	0	0	66.6	16.6	16.6
ARCHITECTS	0	0	66.6	33.3	0
CIV.CONT	0	23.1	15.4	30.7	30.7
CIV.CONS	16.6	16.6	0	16.6	50.0
ARBIT	0	9.1	27.3	54.5	9.1
ATTOR	0	40.0	20.0	40.0	0
AVERAGE	2.7	14.8	32.6	31.9	17.7

For litigation the speed of hearing rating tends to be the "Fair" to "Poor" range.

The data for these and other tables is skewed by the zero responses. This is one of the problems expected when sampling is undertaken using a representative population. The data, for the purposes of this research, is however viewed as being representative.

Section 2

Question 2(c) Speed of Decision



c) *Speed of decision.*

This question aimed to find how the respondents rated the speed of decision by the third party deciding the dispute. The rating system is the same as for the previous question.

TABLE 14 MECHANISM COMPARED TO SPEED OF DECISION

1. Mediation Speed of Decision

SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	16.6	66.6	0	0	16.6
ARCHITECTS	20.0	40.0	40.0	0	0
CIV.CONT	21.1	47.3	21.1	5.2	5.2
CIV.CONS	60.0	0	40.0	0	0
ARBIT	7.6	84.6	7.6	0	0
ATTOR	0	100	0	0	0
AVERAGE	20.8	56.4	18.1	0.8	3.6

For mediation speed of decision tends to be in the "Excellent" to "Good" range.

2. Arbitration Speed of Decision

SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	0	37.5	37.5	0	25.0
ARCHITECTS	11.1	44.4	33.3	0	11.1
CIV.CONT	11.1	44.4	22.2	11.1	11.1
CIV.CONS	25.0	25.0	0	50.0	0
ARBIT	0	57.1	35.7	7.1	0
ATTOR	20.0	80.0	0	0	0
AVERAGE	11.2	48.1	21.4	11.3	7.8

For arbitration the speed of decision tends to be in the "Good" to "Fair" range.

3. Litigation Speed of Decision

SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	16.6	16.6	66.6	0	0
ARCHITECTS	0	0	50.0	0	50.0
CIV.CONT	15.3	7.6	38.4	15.3	23.1
CIV.CONS	20.0	20.0	20.0	0	40.0
ARBIT	0	0	45.4	45.4	9.2
ATTOR	20.0	40.0	40.0	0	0
AVERAGE	11.9	14.0	43.4	10.1	20.3

For litigation speed of decision tends to be in the "Fair" range, however it should be noted that there was a relatively high response of "Very Poor".

Section 2 Award

Question 3(a) Qualification of Third Party



) Qualification of Mediator

This question aimed to find what rating the respondents, who have had experience with the systems, gave the qualification of mediators and arbitrators.

This question was not applied to litigation as, for the purpose of this research, it was considered to be unethical to question a Judge's qualification. The qualification question is aimed at mediators and arbitrators as the level of formal education required is less than what is needed to act as a Judge. The following table shows the respondents opinions :

TABLE 15 QUALIFICATIONS OF THIRD PARTY

1. Mediation Qualification of Mediator

SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	0	80.0	20.0	0	0
ARCHITECTS	25.0	50.0	25.0	0	0
CIV.CONT	31.5	47.3	15.7	5.2	0
CIV.CONS	0	80.0	20.0	0	0
ARBIT	20.0	50.0	30.0	0	0
ATTOR	0	50.0	50.0	0	0
AVERAGE	12.7	59.5	26.7	0.8	0

The qualification of mediators is seen to be in the "Good" to "Fair" range.

2. Arbitration Qualification of Arbitrator

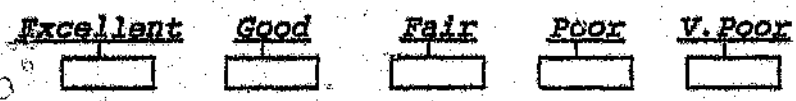
SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	14.2	42.8	28.5	0	14.2
ARCHITECTS	22.2	55.5	22.2	0	0
CIV.CONT	33.3	44.4	22.2	0	0
CIV.CONS	0	75.0	25.0	0	0
ARBIT	9.0	72.7	9.0	9.0	0
ATTOR	20.0	60.0	20.0	0	0
AVERAGE	16.4	58.4	21.1	1.5	2.6

The qualification of arbitrators is seen to be in the "Good" to "Fair" range.

Only building contractors and arbitrators responded in the "Poor" to "Very Poor" range. A point of interest is the 9% representation in the "Poor" range for arbitrators which shows that some arbitrators are of the opinion that arbitrators are poorly qualified.

Section 2 Award

Question 3(b) Fairness of Decision



It must be acknowledged that parties who had decisions in favour of their opponents in a dispute are likely to be biased against that system and hence are expected to rate the fairness of award lower than those who had benefitted from the awards, ie. some form of subjectivity is likely. The "Fairness of Decision" refers more to a third party making an unjustifiable decision or a compromise decision - which could be considered an unfair decision. The question was again not asked for litigation based on ethical grounds. The following table shows the respondents opinions :

TABLE 16 FAIRNESS OF DECISION

1. Mediation Fairness of Decision

SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	14.2	57.1	14.2	14.2	0
ARCHITECTS	20.0	60.0	20.0	0	0
CIV.CONT	16.6	44.4	22.2	16.6	0
CIV.CONS	0	40.0	60.0	0	0
ARBIT	18.1	54.5	27.3	0	0
ATTOR	0	0	50.0	50.0	0
AVERAGE	11.4	42.6	32.3	13.4	0

"Fairness of Decision" for mediation tends to be in the

"Good" to "Fair" range, however there is quite a high response of "Poor" especially for the attorneys.

2. Arbitration Fairness of Decision

SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	16.6	50.0	16.6	0	16.6
ARCHITECTS	11.1	44.4	44.4	0	0
CIV.CONT	33.3	44.4	11.1	11.1	0
CIV.CONS	0	66.6	0	33.3	0
ARBIT	9.1	54.5	27.2	9.1	0
ATTOR	25.0	25.0	50.0	0	0
AVERAGE	15.8	47.4	24.8	8.9	2.7

"Fairness of Decision" for arbitration has a similar rating as for mediation. A point of concern is the high "Very Poor" response for building contractors. These results do to some extent indicate that there may be cases of compromise or unjustifiable decisions by a mediator or arbitrator.

Section 2 Award

Question 3(c) Predictability of Result

c) *Predictability of result* — *Excellent* ☐ *Good* ☐ *Fair* ☐ *Poor* ☐ *V.Poor* ☐

Predictability of result has an important function for the parties. The main source of this predictability in litigation is past cases that set some form of precedence. Unfortunately, no records are kept of mediation or arbitration cases so no form of precedence can be used. The purpose of this question was to establish whether, on a subjective basis, there is still some form of predictability for arbitration and mediation and how this compares to litigation.

The following tables show the response for this question:

TABLE 17 PREDICTABILITY OF RESULT

1. Mediation Predictability of Result

SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	14.2	28.5	28.5	14.2	14.2
ARCHITECTS	0	50.0	50.0	0	0
CIV.CONT	8.3	41.6	25.0	16.6	8.3
CIV.CONS	0	60.0	40.0	0	0
ARBIT	10.0	40.0	30.0	20.0	0
ATTOR	0	0	50.0	0	15.0
AVERAGE	5.4	36.6	37.3	8.4	12.0

The "Predictability of Result" for mediation is considered as "Good" to "Fair" even though no precedence exists. As expected attorneys do not favour mediation in terms of the "Predictability of Result".

2. Arbitration Predictability of Result

SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	0	42.8	28.5	14.2	14.2
ARCHITECTS	0	30.0	40.0	20.0	10.0
CIV.CONT	0	37.5	50.0	12.5	0
CIV.CONS	0	25.0	25.0	50.0	0
ARBIT	9.1	45.4	36.3	0	9.1
ATTOR	0	20.0	60.0	20.0	0
AVERAGE	1.5	33.4	39.4	19.5	5.5

"Predictability of Result" for arbitration is seen to be in the "Good" to "Fair" range, however there is some support for the "Poor" range.

3. Litigation — Predictability of Result

SAMPLE NAME	EXCELL	GOOD	FAIR	POOR	V.POOR
BUILDERS	0	33.3	50.0	16.6	0
ARCHITECTS	0	0	25.0	50.0	25.0
CIV.CONT	0	16.6	25.0	41.6	16.6
CIV.CONS	0	16.6	50.0	16.6	16.6
ARBIT	10.0	30.0	40.0	20.0	0
ATTOR	0	40.0	60.0	0	0
AVERAGE	1.6	22.7	41.6	24.1	9.7

"Predictability of Result" for litigation is considered "Fair" with the range extending into "Poor" and "Good".

Section 2

Summary

The following summary table utilizes "judgmental statistics" to rank the different mechanisms, in terms of which dispute settling mechanism has the highest rating, under each of the aspects concerning cost, time and award.

(Where 1st = highest majority ; 3rd = lowest majority).

TABLE 18 — SUMMARY TABLE OF SECTION 2

MANAGEMENT OBJECTIVES	RANKING ORDER		
	1ST	2ND	3RD
1.COST EFFICIENT	MED	ARB	LIT
2.TIME TO FIRST HEARING	MED	ARB	LIT
3.SPEED OF HEARING	MED	ARB	LIT
4.SPEED OF DECISION	MED	ARB	LIT
5.QUALIFICATION OF THIRD PARTY	MED	ARB	-
6.FAIRNESS OF DECISION	MED	ARB	-
7.PREDICTABILITY OF RESULT	MED	ARB	LIT

From the aforementioned table therefore we can deduce that mediation and arbitration are preferable to litigation in terms of cost and time. The aspects of "Qualification' and "Fairness of decision" must be viewed separately, as the comparison is not simple. The mediator's qualifications can be judged based on how easily or well they can achieve an acceptable settlement.

The arbitrator's qualifications also encompass the legal aspect and therefore fairness of decision will be judged on both management and legal objectives.

The author does not suggest or imply, based on the interpretation of the results, that arbitrators are less qualified than mediators.

SECTION 3 Arbitration

The questions in this section are more specific on arbitration. The objective here was to elicit opinions on certain fundamental issues of arbitration and on general questions of arbitration procedure. The analysis is undertaken on a Yes/No basis with a view to establishing majorities based on the respective opinions.

Section 3

Question 1 Proceedings (YES/NO)

Should arbitration proceedings be held back until the end of the contract?

YES	NO

This question asked respondents whether proceedings should be held back until the end of the contract. By holding the arbitration back disputes will stay unresolved until the end. The following table summarizes the response received to this question :

TABLE 19 ARBITRATION BEING HELD BACK

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	25.0	27.3	11.1	33.3	35.7	0	22.1
NO	75.0	72.7	88.9	50.0	57.1	100	73.9
NO REPLY	0	0	0	16.7	7.1	0	3.9

From this table we can deduce that the respondents are not in favour of arbitration being held back until the end of the contract.

Section 3

Question 2 Delays (YES/NO)

. Based on the arbitration/s you have been involved in, have ou experienced any unnecessary delays?

YES	*NO*

If YES, was it primarily due to the :

- *Arbitrator*
- *Attorneys*
- *Claimant/Respondent*
- *Administrative problems*
- *Other (specify).....*

This question asked respondents whether they had experienced any unnecessary delays during arbitration. It was expected that the interpretation of "unnecessary delays" will differ from sample to sample as attorneys will, for example, spend hours arguing over something important that may seem trivial to the client. The limitations of this question in terms of differing interpretations of "unnecessary delays" have been taken into account in that no definite deductions are made. The following table summarizes the response:

TABLE 20 ARBITRATION DELAYS

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	100	45.5	88.9	100	78.6	60.0	78.8
NO	0	45.5	11.1	0	21.4	40.0	19.6
NO REPLY	0	9.1	0	0	0	0	1.5

The response for this question shows that the samples agree, with the exception of architects, that there were unnecessary delays in the arbitrations.

The question asked the respondents to qualify their answers by indicating which factors they attributed the delays to.

The following table lists the factors and summarizes the data for those that answered "YES" to the question :

TABLE 21 CAUSE OF UNNECESSARY DELAYS

	SAMPLES AS %					
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT
ARBIT	12.5	7.1	8.3	10.0	0	0
ATTOR	37.5	42.8	41.6	50.0	52.6	25.0
CLAIMANT/RESP.	37.5	35.7	33.3	30.0	36.8	75.0
ADMIN	12.5	14.2	8.3	10,0	10.5	0
OTHER	0	0	8.3	0	0	0
TOTAL	100	100	100	100	100	100

This table shows that the majority of respondents, with the exception of attorneys, indicated that attorneys were the main cause of unnecessary delays.

From the attorneys side, a majority claimed that delays were caused by the claimants or respondents, which may be attributed to various factors, eg. delays caused by either of the parties not having adequate information. One could argue that the attorney response is intended to divert criticism from themselves.

Section 3

Question 3 Award Time Limit (YES/NO)

3. An arbitrator usually has to make his award within 4 months, however, an extension of time may be applied for. Do you agree that these extensions of time should be allowed?

YES	NO

i) Should the award time limit be enforced more strictly? YES NO
ii) Should the Act be changed to accommodate this? YES NO

This question explained to the respondents that an arbitrator is bound by statute to make his award within 4 months. This may however be extended. The question was divided into three sub questions. The first part of the question asked whether respondents agree that extensions of time should be allowed. The following table shows the results :

TABLE 22 TIME EXTENSIONS ALLOWED

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	0	18.2	11.1	50.0	71.4	0	25.1
NO	100	63.6	88.9	33.3	28.6	100	69.1
NO REPLY	0	18.2	0	16.7	0	0	5.8

From the aforementioned table it can be deduced that building contractors, architects, civil engineering contractors and attorneys oppose time extensions. Arbitrators and civil engineering contractors do not oppose the time extension. The possible reasons for the difference can be attributed to different experiences pertaining to time extension.

The second part question; (i); asked whether the time limit should be enforced more strictly. This question aimed to find whether arbitrators should be stricter in enforcing the time limit. The following table shows the results :

TABLE 23 STRICTER ENFORCEMENT OF TIME LIMIT

TABLE 22 TIME LIMIT ENFORCING

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	100	72.7	88.9	50.0	28.6	80.0	70.0
NO	0	18.2	11.1	0	71.4	20.0	20.1
NO REPLY	0	9.1	0	50.0	0	0	9.8

A majority of respondents believe that time limits, set in the Arbitration Act, should be enforced more strictly. This may be as a result of arbitrators being hesitant to impose a rule that the parties do not agree to. However, based on the response to this question, arbitrators should be stricter when enforcing this rule.

The third part of the question; (ii); asked respondents whether the Arbitration Act should be changed to accommodate stricter enforcement of the time limit. The results are detailed in the following table :

TABLE 24 ACT CHANGES : TIME EXTENSION

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT.	AVE.
YES	87.5	54.5	66.7	50.0	14.3	60.0	55.5
NO	12.5	18.2	33.3	0	85.7	40.0	31.6
NO REPLY	0	27.3	0	50.0	0	0	12.8

The response for this question shows that a majority of the respondents, besides arbitrators, would like to see the Arbitration Act changed. However, the opinions on the need for new legislation is somewhat divided and a mere majority does not justify such a drastic step.

Section 3

Question 4 Reasoned Award

4. *Should an arbitrator give a reasoned award?*

YES	NO

If YES,

YES	NO
YES	NO

i) Should the award be published?
ii) Should the general public have access to the award?
iii) Should these reasoned awards act as precedence for future cases? (ie. as per court of a law)

YES	NO
YES	NO

iv) Should the reasoned award be a basis for appeal?

One of the differences between arbitration, and that of mediation and litigation is that arbitrators do not have to give a reasoned award, unless required by the parties. The purpose of this question was to find whether respondents would prefer reasons for the award to be stated and, if YES, subsequently how it should be handled. The following table shows the response for the question on the statement of the reasons for award.

TABLE 25 REASONS FOR THE AWARD

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	87.5	81.8	100	83.3	50.0	100	83.7
NO	12.5	18.2	0	16.7	50.0	0	16.2
NO REPLY	0	0	0	0	0	0	0

The results show that respondents are in favour of reasons for award. Interestingly 50% of arbitrators are also in favour of this.

The following questions aimed to find whether respondents sought the statement of the reasons to allow for "appeal" in the arbitration process.

TABLE 26 AWARD TO BE PUBLISHED

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	37.5	54.5	77.8	50.0	28.6	80.0	54.7
NO	50.0	27.3	22.2	33.3	21.4	20.0	29.0
NO REPLY	12.5	18.2	0	16.7	50.0	0	16.2

TABLE 27 PUBLIC ACCESS TO THE AWARD

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	37.5	36.4	44.4	33.3	14.3	60.0	37.6
NO	50.0	45.5	44.4	50.0	35.7	40.0	44.2
NO REPLY	12.5	18.2	11.1	16.7	50.0	0	18.1

TABLE 28 PRECEDENCE FOR FUTURE CASES

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	25.0	63.6	44.4	50.0	14.3	40.0	39.6
NO	62.5	9.1	44.4	33.3	35.7	60.0	28.6
NO REPLY	12.5	27.3	11.1	16.7	50.0	0	19.6

TABLE 29 SHOULD REASONS BE A BASIS FOR APPEAL

	SAMPLES AS						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	37.5	9.1	33.3	33.3	14.3	20.0	24.5
NO	50.0	72.7	55.6	33.3	35.7	80.0	54.5
NO REPLY	12.5	18.2	11.1	33.3	50.0	0	20.8

The results for these questions are characterized by high "No Reply" responses. However, the following can de deduced from the responses:

1. Reasoned Award Published* - The respondents for this question are in favour of the reasoned award being published; this infers that oral reasons would not be acceptable.

2. Public Access - The response varied somewhat from sample t- sample. Overall the response can be seen as inconclusive as there is no absolute majority, although the tendency is that the respondents are not in favour of public access to the award.

* - Published in this context refers to the case being documented in the Law Journals as has been done with Court cases.

3. Precedence - The response here shows that attorneys and building contractors oppose reasoned awards setting precedence for disputes being settled by arbitration. Civil engineering contractors are divided in their opinion. Again the overall response should be taken as inconclusive as there is no absolute majority but a tendency in favour of precedence setting.

4. Basis for Appeal - The response here is not in favour of the reasoned award being a basis for appeal. Civil engineering consultants are evenly divided in their opinion.

Section 3

Question 5

5. *Currently there is very little scope for appeal. Should this scope be widened so that arbitration becomes similar to a court of law?*

YES	*NO*

If YES,

i) Should the appeal be heard by an independent arbitrator?*
ii) Should the appeal be heard by a court of law?

YES	*NO*
YES	*NO*

This question aimed to find whether the review system should be widened to allow appeal which would make arbitration similar to a court of law. Those respondents that agreed were asked whether the appeal should be heard by an Independent arbitrator or a Court of Law. The following table indicates the response for widening the scope of appeal :

* - Independent arbitrator in this context refers to an arbitrator who was not involved in the original hearing of the case.

TABLE 30 SHOULD THERE BE APPEAL

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	37.5	9.1	33.3	33.3	14.3	20.0	24.5
NO	62.5	90.9	66.7	50.0	85.7	80.0	72.6
NO REPLY	0	0	0	16.7	0	0	2.7

From this table we can deduce that respondents are not in favour of the scope for appeal being widened. This does to some extent clash with Question 4 (IV) and leaves the question of to what extent the scope of appeal should be widened.

For those answering "YES" the following tables represent their opinion of who should hear the appeal :

TABLE 31 APPEAL TO AN INDEPENDENT ARBITRATOR

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	25.0	9.1	22.2	16.7	7.1	0	13.3
NO	12.5	0	11.1	16.7	7.1	20.0	11.2
NO REPLY	62.5	90.9	66.7	66.7	85.7	80.0	n/a

TABLE 32 APPEAL TO A COURT OF LAW

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	12.5	0	11.1	16.7	7.1	20.0	11.2
NO	25.0	9.1	22.2	16.7	0	0	21.7
NO REPLY	62.5	90.9	66.7	66.7	92.9	80.0	n/a

The percentile values given above should not be considered representative as the Nil Reply was included. However, we can deduce that the aspect of appeal to an independent arbitrator is inconclusive. A majority of the respondents do not favour appeal to a court of law. The high incidence of "No Reply" is attributed to rejection of the concept of appeal (see table 30).

Section 3

Question 6 President Nominated Arbitrators

6. *Do you believe that an arbitrator should be appointed by the President of an Institute?*

YES	NO

i) Have you ever used a President (SAICE) appointed arbitrator?

YES	NO

ii) Have you ever used an Association of Arbitrators appointed arbitrator?

YES	NO

iii) Have you ever used an arbitrator appointed by the President of the Institute of Architects.?

YES	NO

iv) Have you ever used an arbitrator appointed by a court?

YES	NO

v) Have you ever used an M.B.A/ BIFSA appointed arbitrator?

YES	NO

The purpose of this question was to ascertain whether respondents are in favour of President appointed arbitrators when no arbitrator can be agreed on by the parties. The sub-questions were used to ascertain which President appointed arbitrators were most predominantly used. From these results the it is possible to ascertain how much use is being made of President appointed arbitrators. The following table shows the response on whether arbitrators should be President nominated :

TABLE 33 ARBITRATOR NOMINATED BY THE PRESIDENT OF AN INSTITUTE.

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	50.0	63.6	44.4	16.7	64.3	40.0	46.5
NO	50.0	36.4	55.6	50.0	21.4	60.0	45.6
NO REPLY	0	0	0	33.3	14.3	0	7.9

The above table shows that arbitrators and architects are in favour of an Institute appointed arbitrator. The remaining respondents are either undecided, ie. building contractors, or not in favour of a President appointed arbitrator. The following tables give the results for the use of different Institutional appointments :

TABLE 34 ARBITRATOR NOMINATED BY THE PRESIDENT OF SAICE

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	12.5	36.4	44.4	0	50.0	40.0	30.5
NO	87.5	54.5	55.6	66.7	50.0	60.0	62.4
NO REPLY	0	9.1	0	33.3	0	0	7.1

TABLE 35 ARBITRATOR NOMINATED BY THE PRESIDENT OF THE ASSOCIATION OF ARBITRATORS

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	37.5	72.7	11.1	33.3	57.1	20.0	38.6
NO	62.5	18.2	88.9	66.7	42.9	80.0	59.8
NO REPLY	0	9.1	0	0	0	0	1.5

TABLE 36 ARBITRATOR NOMINATED BY THE PRESIDENT OF INSTITUTE OF ARCHITECTS

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	50.0	72.7	22.2	33.3	71.4	60.0	51.6
NO	50.0	18.2	77.8	66.7	28.6	40.0	46.8
NO REPLY	0	9.1	0	0	0	0	1.5

TABLE 37 ARBITRATOR NOMINATED BY A COURT

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	0	9.1	0	33.3	21.4	20.0	13.9
NO	100	81.8	100	66.7	78.6	80.0	84.5
NO REPLY	0	9.1	0	0	0	0	1.5

TABLE 38 ARBITRATOR NOMINATED BY THE PRESIDENT OF MBA/BIFSA

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	25.0	9.1	11.1	33.3	28.6	20.0	21.1
NO	75.0	81.8	88.9	66.7	71.4	80.0	77.3
NO REPLY	0	9.1	0	0	0	0	1.5

The above tables lead to the following deductions (based on the sample percentages) :

1. South African Institute of Civil Engineers appointed arbitrators are in use in both the building and civil engineering industries, where the highest users are civil engineering contractors. This can be considered interesting as there is no reference to SAICE nominations in the building contract.
2. Association of Arbitrators nominated arbitrators also used in both industries. A high percentage of architects had experienced Association of Arbitrators nominated arbitrators. In comparison however, the respondents from the civil engineering industry experienced them less frequently. The same relationship applies to arbitrators appointed by the Institute of Architects.
3. Court nominated arbitrators have only been experienced by architects and civil engineering consultants. Again this is interesting response as both the building contract and the civil engineering contract refers to nominations by the respective institutions but not to court appointments. Court appointed arbitrators are generally infrequent.
4. BIFSA/MBA nominated arbitrators are, unexpectedly so, most frequently used by civil engineering consultants, as BIFSA/MBA represents the building industry. This result is noted as contrary

to expectations as there is no reference to BIFSA or the MBA in the civil engineering contracts, but could be attributed to contractor versus sub-contractor disputes.

5. On an overall basis the respondents are not in favour of the use of Institute nominated arbitrators. This infers that parties prefer to agree on an arbitrator.

Section 3

Question 7 Compromise Decision

7. *Has it been your experience that arbitrators give a compromise decision?* YES / NO

The arbitrator should not give a compromise decision, his role is to decide the award based on principles of law. This question aimed to find out whether any of the respondents were of the opinion that the arbitrator had given a compromise decision. The following table shows the results :

TABLE 39 COMPROMISE DECISION IN ARBITRATION AWARDS

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	37.5	36.4	22.2	50.0	21.4	80.0	41.2
NO	50.0	54.5	77.8	16.7	64.3	20.0	47.2
NO REPLY	12.5	9.1	0	33.3	14.3	0	11.5

This table shows that a small majority are of the opinion that arbitrators do not give compromise decisions. However, it is disconcerting that a high proportion of respondents, especially

occur. Interestingly even some arbitrators agreed that there are compromise decisions.

Section 3

Question 8 Mediation in Building Contract

8. *Should mediation be included as a pre-arbitration mechanism in the building contract (Inst. of Architects)?*

YES	NO

The question was mainly aimed at respondents within the building industry. The objective was to find whether respondents are in favour of mediation as a pre-arbitration mechanism in the building contract. The following table shows the results :

TABLE 40 MEDIATION IN BUILDING CONTRACT

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	75.0	72.7	33.3	50.0	50.0	0	46.8
NO	25.0	27.3	66.7	16.7	42.9	80.0	43.1
NO REPLY	0	0	0	33.3	7.1	20.0	10.1

This table shows that the respondents, with the exception of civil engineering contractors and attorneys, are in favour of mediation in the building contract. It is important to note here that those most often involved in the building contract are in favour of mediation as a pre-arbitration mechanism. It is not possible to ascertain whether those civil engineering contractors that oppose mediation in the building contract do so because they have had poor experience with the mediation.

Section 3

Question 9 Pre-Hearing Conference

9. *Have you ever attended a pre-hearing conference?* | *YES* | *NO*
i) If YES, did you find this beneficial? | *YES* | *NO*

This question sought to find whether the concept of a pre-hearing conference was being used and whether it was considered beneficial. A pre-hearing conference helps parties to the dispute agree on the facts and narrows the areas of dispute. The following table shows the results :

TABLE 41 PRE-HEARING CONFERENCE FOR ARBITRATION

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	62.5	63.6	22.2	100	78.6	80.0	67.8
NO	37.5	36.4	11.1	0	14.3	20.0	19.8
NO REPLY	0	0	66.7	0	7.1	0	12.3

The use of the pre-hearing conference is in most samples high, as they are required by most rules. The only sample that has not used the facility frequently is the civil engineering contractors where a high percentage nil response was found. The second part of the question aimed to find whether the respondents found the pre-hearing conference beneficial. The following table shows the results :

TABLE 42 FOUND PRE-HEARING CONFERENCE BENEFICIAL

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
YES	62.5	63.6	88.9	83.5	71.4	80.0	70.8
NO	25.0	9.1	11.1	16.7	7.1	20.0	14.8
NO REPLY	12.5	27.3	0	0	21.4	0	10.2

This table shows that respondents are of the opinion that a lot of benefit can be derived from a pre-hearing conference for arbitration.

Section 3

Question 10 Mechanism Prefer to Use in Future

10. *If in the future you were to be involved in a dispute again, which system would you prefer to use as a dispute settling mechanism?*

Mediation
Arbitration
Litigation



The objective if this question was to find which mechanism, based on previous experience, the respondents would prefer to use in the future. The analysis is undertaken on a percentage, for each sample, response basis. The following table reflects the results:

TABLE 43 MECHANISM RESPONDENTS PREFER TO USE IN FUTURE

	SAMPLES AS %						
RESPONSE	BUILD	ARCH	C.CONT	C.CONS.	ARB	ATT	AVE.
MED	62.5	45.4	60.0	100	46.6	0	52.4
ARB	25.0	54.5	30.0	0	46.6	60.0	36.0
LIT	12.5	0	10.0	0	6.6	40.0	11.5

This table shows that all the samples, with the exception of attorneys and architects, would prefer to use mediation in the future. It could be deduced that arbitration is the second most preferred dispute settlement mechanism with litigation the least preferred. It is again interesting to note that a majority of builders would prefer to use mediation even though few of them had any experiance with the system.

Section 3

Question 11 Comments

The comments given under Question 11 proved to be utilized more for qualifying the answers in Question 10 (ie. the preferred system for future disputes) than general comments.

Respondents qualified their preferences stating that the type of dispute settling mechanism chosen depends on the size and nature of the dispute and, relations with the opposition. Further comments were received on mediation which showed concern for the process as it was seen as a sounding board, to ascertain validity of a claim, or as a delaying tactic in the settlement process.

Respondents expressed their opinion that parties may as well go to arbitration or litigation as it is unlikely the mediator's decision will be accepted. These comments on mediation should however be viewed in isolation, as previous research by the South African Institute of Civil Engineers indicates that very few mediations end up in arbitration or litigation. (Refer Annexure B).

5.3.4 Section 4

This section gave those respondents who had no previous experience with the arbitration mechanism an opportunity to express their opinions regarding their perceptions of arbitration. The section further provided opportunity for respondents to state which system they would prefer to use in the future and allowed for any additional comments. Only respondents who had replied 'NO' for arbitration in section 1 question 2 and who filled out this section were considered.*

Section 4

Question 1 Advantages and disadvantages of Arbitration

1. *Do you believe the following to be advantageous/disadvantageous in terms of arbitration as a dispute settling mechanism. (please tick appropriate box)*

	Adv	Disad
a) *Speed*		
b) *Cost*		
c) *Informality*		
d) *Privacy*		
e) *The fact that the arbitrator is better qualified to decide on technical matter*		
f) *Finality of award*		
g) *No appeal*		
h) *Legal experience of arbitrator*		
i) *Procedure management*		
j) *Flexibility of dispute resolution process*		
k) *No reasons for award given*		

The respondents were asked whether, in their opinion, certain aspects inherent to the arbitration system could be considered advantageous or disadvantageous.

* - Some of the arbitrators taken from the Panel of Arbitrators had not arbitrated before.

The following tables show the response as a percentage breakdown for each sample :

Question 1(a)

Table 44 SPEED OF ARBITRATION

RESPONSE	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT	AVGE
DISAD	0	5.3	20.0	10.0	0	0	5.8
ADV	100	89.5	75.0	90.0	100	100	92.4
NO REPLY	0	5.3	5.0	0	0	0	1.7

From the above-mentionedd table we can see that a majority of respondents are of the opinion that speed is one of the advantages of arbitration.

Question 1(b)

Table 45 COST OF ARBITRATION

RESPONSE	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT	AVGE
DISAD	10.0	10.5	20.0	15.0	50.0	0	18.5
ADV	90.0	84.2	75.0	80.0	50.0	100	79.8
NO REPLY	0	5.3	5.0	5.0	0	0	1.7

From this table we can see that a majority of the respondents, with the exception of arbitrators who are divided in their opinion, are of the opinion that cost is one of the advantages of arbitration.

Question 1(c)

Table 46 INFORMALITY OF ARBITRATION

RESPONSE	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT	AVGE
DISAD	10.0	26.3	20.0	20.0	0	0	12.7
ADV	90.0	68.4	75.0	75.0	100	100	84.7
NO REPLY	0	5.3	5.0	5.0	0	0	2.5

The above-mentioned table shows that a majority of respondents are of the opinion that informality is one of the advantages of arbitration.

Question 1(d)

Table 47 PRIVACY OF ARBITRATION

RESPONSE	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT	AVGE
DISAD	0	21.1	15.0	10.0	0	0	7.6
ADV	90.0	68.4	80.0	80.0	100	100	86.4
NO REPLY	10.0	10.5	5.0	10.0	0	0	5.9

This table shows that a majority of the respondents are of the opinion that privacy is one of the advantages of arbitration.

Question 1(e)

Table 48 TECHNICAL EXPERTISE OF THE ARBITRATOR

RESPONSE	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT	AVGE
DISAD	20.0	0	10.0	0	0	0	5.0
ADV	80.0	94.7	85.0	95.0	100	100	92.4
NO REPLY	0	5.3	5.0	5.0	0	0	2.5

This table shows that respondents perceive the fact that arbitrators may be better qualified on technical matters, than for example a judge, to be advantageous.

Question 1(f)

Table 49 FINALITY OF THE ARBITRATION AWARD

RESPONSE	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT	AVGE
DISAD	40.0	26.3	20.0	40.0	0	33.3	26.6
ADV	40.0	57.9	75.0	45.0	100	66.7	64.1
NO REPLY	20.0	15.8	5.0	15.0	0	0	9.3

This table shows that some of the respondents are somewhat divided in their opinion on the issue of finality of award, ie. building contractors, civil engineering contractors and attorneys. However if we take the overall majority into account then the finality of award can be said to be advantageous.

Question 1(g)

Table 50 THE FACTOR OF NO APPEAL

RESPONSE	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT	AVGE
DISAD	50.0	52.6	60.0	60.0	50.0	33.3	50.9
ADV	30.0	31.6	35.0	30.0	50.0	66.6	40.5
NO REPLY	20.0	15.8	5.0	10.0	0	0	8.5

This table shows that respondents are not in favour of the aspect of "no appeal" in arbitration. The results for this table contradict the results for the previous table on finality of award and thus renders both responses invalid and no conclusions are drawn.

Question 1(h)

Table 51 LEGAL EXPERIENCE OF THE ARBITRATOR

RESPONSE	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT	AVGE
DISAD	50.0	31.6	25.0	40.0	0	33.3	29.9
ADV	40.0	57.9	65.0	55.0	50.0	66.7	55.7
NO REPLY	10.0	10.5	10.0	5.0	50.0	0	14.2

This table shows that with the exception of the building contractors the respondents viewed the arbitrator's legal experience as advantageous.

Question 1(i)

Table 52 PROCEDURE MANAGEMENT IN ARBITRATION

RESPONSE	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT	AVGE
DISAD	10.0	10.5	15.0	15.0	0	0	8.4
ADV	70.0	68.4	70.0	65.0	100	100	78.9
NO REPLY	20.0	21.1	15.0	20.0	0	0	12.6

This table shows that respondents unanimously felt that the procedure management system of arbitration could be viewed as advantageous. This question is linked to the cost and speed questions, and does correlate with those responses.

Question 1(i)

Table 53 FLEXIBILITY OF THE RESOLUTION PROCESS

RESPONSE	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT	AVGE
DISAD	10.0	10.5	20.0	10.0	0	0	8.4
ADV	70.0	68.4	75.0	85.0	100	100	83.1
NO REPLY	20.0	21.1	5.0	5.0	0	0	8.6

This table shows that a majority of the respondents see flexibility of the dispute resolution process in arbitration as advantageous.

Question 1(k)

Table 54 NO REASONS STATED FOR THE AWARD

RESPONSE	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT	AVGE
DISAD	100.0	84.2	90.0	75.0	50.0	66.7	77.6
ADV	0	5.3	5.0	5.0	0	33.7	8.1
NO REPLY	0	10.5	5.0	20.0	50.0	0	14.2

From the above-mentioned table we can see that a majority of the respondents feel that the factor of 'no reasons for award' is considered disadvantageous in arbitration.

Section 4

Question 2 Mechanism prefer to use in the future

2. If in the future you were to be involved in a dispute which system would you prefer to use as a dispute settling mechanism?

Mediation
Arbitration
Litigation



The objectives of this question are the same as for section 3 question 10,ie. to determine which mechanism respondents would prefer to use in future. The following table reflects the results :

Table 55 MECHANISM RESPONDENTS (NO EXPERIENCE) PREFER TO USE IN FUTURE

RESPONSE	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT	AVGE
MED.	27.2	57.8	80.9	42.1	50.0	33.3	48.5
ARB.	53.8	36.8	19.0	47.3	50.0	66.7	45.6
LIT.	7.6	5.2	0	10.5	0	0	3.8

This table shows that those respondents who have had no experience with the arbitration process are divided in their opinion as to which system they would prefer to use in the future. Those respondents preferring mediation are architects and civil engineering contractors. Arbitrators were divided in their opinion for future use of the mechanisms between mediation and arbitration. The rest, ie. attorneys, builders and civil engineering consultants, were in favour of arbitration for future dispute resolution. It can be noted here that, even though the civil engineering contract specifies mediation before arbitration, there is a preference for the future use of arbitration by civil engineering consultants.

Section 4

Question 3 Comments

This question allowed respondents to express any further views regarding the dispute resolution processes. The comments mainly centered around the doubts concerning the legal qualification of the arbitrator. Furthermore the comments also included statements by respondents not favouring legal representation at arbitrations as, in their opinion, it would affected the economic viability of arbitration in terms of speed and cost.

Summary Section 4

The following table represents a summary of the respondents opinions regarding aspects of arbitration :

a) Speed - Advantage
b) Cost - Advantage
c) Informality - Advantage
d) Privacy - Advantage
e) The fact that the arbitrator is better qualified to decide on technical matters. - Advantage
f) Finality of award - Advantage
g) No appeal - Disadvantage
h) Legal experience of arbitrator - Advantage
i) Procedure management - Advantage
j) Flexibility of dispute resolution process - Advantage
k) No reasons for award given - Disadvantage

5.4 Testing of hypotheses

The hypotheses, as stated earlier in Chapter 4.1, are restated with the relevant questions to test each hypothesis. The testing procedure is non statistical in nature as the data does not lend itself to complex statistical analysis. Judgmental analysis is used to accept or reject the individual hypotheses.

5.4.1 Hypothesis 1

"The effeective use of arbitration is dependent on the size and nature of the claim."

It should be noted that this analysis is limited in terms of the fact that the type of dispute resolution process is generally agreed on at the start of the contract, ie. before any dispute has arisen. The questions relating to this hypothesis are questions 3 and 4 from Section 1. The findings are summarized as follows:

Table 56 'VALUE OF CLAIMS' SUMMARY

VALUE (R)	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT
0 - 50 000	A	A	M	L	L	A
50 -100 000	A/L	A	A	M/L	L	M
100 -200 000	M/A/L	A	M	A	L	A
200 -300 000	A	A	L	-	A	A
> 300 000	A	A	L	M/L	A	A

(Where A=arbitration; M=mediation; L=litigation)

The following table summarizes the predominant causes of disputes under the different respondent categories for each dispute settling mechanism:

Table 57 'CAUSE OF DISPUTE' SUMMARY

METHOD	BUILD	ARCH	C.CONT	C.CONS	ARB	ATT
MED.	I	CN	I	I;D	I;D	I;D
ARB.	D	SC;V;I;CN	V	I	D	I;D
LIT.	Ot	V	I	AN	CN;D;I	I

(Where: I= Interpretation; D= Delays; V= Variations; AN= Architect Negligence; CN= Contractor Negligence; SC= Sub-Contract; Ot= Other.)

The value of claims table, Table 56, shows arbitration in use through all the specified value ranges. Furthermore it is also the predominant dispute settling mechanism through all the value ranges. The cause of dispute table shows that the use of arbitration is not limited to any one cause of dispute.

Thus the hypothesis is rejected and it can be said that the use of arbitration is not necessarily dependant on the nature or size of dispute.

5.4.2 Hypothesis 2

"Arbitration is preferred to mediation and litigation as a method of dispute resolution in the construction industry."

This test is based on Section 2 and parts of Sections 3 and 4 of the questionnaire. It is again stressed that the test is not statistical in nature. The test utilizes the analyses for cost, speed, award and fairness of decision. The systems are rated based on the majority for each sample population, which facilitates the comparison. The following table shows a summary of the results :

Table 58 RATING OF THE DIFFERENT DISPUTE SETTLING MECHANISMS

ASPECT	1st	2nd	3rd
1a. ECONOMIC MEANS	M	A	L
2a. TIME TO 1ST HEARING	M	A	L
2b. SPEED OF HEARING	M	A	L
2c. SPEED OF DECISION	M	A	L
3a. QUALIFICATIONS	M	A	-
3b. FAIRNESS OF DECISION	M	A	-
3c. PREDICTABILITY OF RESULT	M	A	L

(Where : 1st= highest rating; 3rd= lowest rating)
(Where : M= mediation; A= arbitration; L= litigation)

The results show that mediation received the highest rating for all the aspects with arbitration second and litigation third. In terms of management objectives therefore, it can be found that mediation is considered the most favourable method for dispute resolution.

A further question asked of respondents was which system they would prefer to use for future dispute resolution. The results for those who had had previous experience with arbitration was that they would prefer to use mediation in the future; whereas those with no experience would prefer to use arbitration, although mediation also had a high response.

Another question that contributes to the testing of the hypothesis is question 8 of Section 3 which asked respondents whether mediation should be included in the building contract as a pre-arbitration mechanism. The response was favourable in terms of inclusion of mediation as a dispute settling mechanism in the building contract. This does not necessarily exclude arbitration as a mechanism, it merely shows that respondents prefer to use mediation before arbitration. The data further concludes that arbitration is preferred to litigation.

Thus, based on the aforementioned data, the hypothesis is rejected. This brings some validity to the claims by the protagonists of arbitration.

5.4.3 Hypothesis 3

> *"The aspects of Timing of hearing, Time limitation for award, No reasons given, Privacy, No appeal, President appointed arbitrators (where no agreement), Legal experience and pre-hearing conferences are acceptable to the construction industry in terms of arbitration as a dispute settling mechanism."*

The hypothesis is divided into sub- hypotheses which are individually tested in a non statistical manner. The following states the results for each of these aspects:(Section 3)

1. Respondents are in not favour of arbitration being held back to the end of the contract.(Q1)

2. A majority of respondents do not oppose the time limitation of 4 months for the arbitrators award.(Q3) This is qualified by respondents favouring stricter enforcement of the time limitations (Q3i) which includes possible changes to the Arbitration Act.(Q3ii)

3. A majority of respondents favoured the inclusion of reasons for arbitration awards.(Q4) This is qualified through the favouring of reasons for awards being published (Q4i) but not so as to be used as a basis for appeal.(Q4iv) Respondents were however inconclusive in terms of the aspect of public access to the award (Q4ii), and the aspect of the reasoned award setting precedence for future cases (Q4iii).

4. Based on the response to the question pertaining to public access to the award, it is not possible to conclude on the aspect of privacy during arbitration.

5. Respondents were in favour of there being no appeal against an arbitrator's award. Those that desired the right to appeal were inconclusive as to whether an independent arbitrator should hear the appeal, but were against the appeal being heard in a court of law.

6. The respondents were undecided on the aspect of a President appointed arbitrator where there is disagreem t between the parties regarding the nomination of the arbitrator. The following gives a breakdown of which institute appointed arbitrators were used the most : (as a proportion of each respective sample, not in order of priority).

President of :

a) Building contractors - South African Institute of Civil Engineers.
b) Architects - Institute of S.A. Architects and Arbitration Association of South Africa.
c) Civil Engineering consultants - Building Industries Federation S.A / M.B.A and Court appointed.

The Institute most commonly used was the Institute of S.A. Architects, with the Arbitration Association second most commonly.

7. A majority of respondents agreed that arbitrators do not give compromise decisions. However the high response in disagreement with this causes some concern as there should, theoretically, be little compromise.

8. A majority of respondents had utilized a pre - hearing conference for arbitration. Respondents further qualified that the pre-hearing conference is considered beneficial.

Thus based on the responses for the various aforementioned aspects it is not possible to accept or fully reject this Hypothesis.

5.5 Other findings

This section deals with those questions that were not directly related to the accepting or rejecting of the aforementioned hypotheses.

1. Contracts

The following shows, on a sample by sample basis, which contracts have the highest frequency of use respectively : (Section 1 question 1)

Building contractors	- Building contract
Architects	- Building contract
Civil engineering contractors	- Building contract
Civil engineering consultants	- Civil engineering contract
Arbitrators	- Building contract
Attorneys	- Building contract

2. Disputs Settling Methods

The following table breaks the dispute settling mechanisms

down into those that had been used the most and those used the least for each sample: (Section 1 question 2)

TABLE 59 'MECHANISMS USED' SUMMARY

SAMPLE NAME	MOST	LEAST
BUILD	ARB	MED/LIT
ARCH	ARB	LIT
C.CONTR	MED	ARB
C.CONS	ALL USED	-
ATT	ARB/LIT	MED
ARB	ARB	LIT

3. Delays in Arbitration

Those respondents that had experience with arbitration agreed that there were unnecessary delays during the arbitration process. The major causes of delays were identified as those caused by attorneys and, claimants and respondents. (Section 3 question 2)

4. Advantages of Arbitration

Respondents who had no experience using arbitration believed the following aspects to be advantageous aspects of arbitration : (Section 4 question 1)

- Speed
- Cost
- Informality
- Privacy
- Technical expertise of the arbitrator

- Legal experience of the arbitrator
- Procedure management
- Flexibility of dispute resolution process

The aspects that respondents believed to be disadvantageous were :

- No appeal
- No reasons for award

The only aspect on which the respondents were inconclusive was the aspect of finality of award.

CHAPTER 6

CONCLUSIONS

Arbitration is the most commonly used dispute settlement procedure in the construction industry. This does to some extent correlate with the findings that the most predominantly used contract in the industry is the building contract (Institute of Architects) and the finding that arbitrators arbitrate on the building contract most frequently. There ar however some interesting findings in terms of the use of mediation in contracts where it is not specified.

The findings pertaining to the type of contract and type of dispute settling mechanism show that, even though arbitration and mediation are respectively specified in the different contracts, there is a high incidence of the use of litigation as a dispute settlement mechanism when arbitration is not provided for. Another point of concern is the fact that where contracts specify arbitration as the settling mechanism there is a high incidence of the use of mediation, which may be attributed to parties agreeing to using mediation before arbitration. Thus it can be concluded here that parties do to some extent still use methods that are not specified in the contracts.

The initial objective of finding the extent of the use of arbitration is satisfied in that it was found that it was used through all the specified contracts. It can therefore

be concluded that arbitration is still a widely used dispute settlement mechanism but there may be some shortcomings as some parties still opt for mediation and litigation. One of the expected shortcomings, based on those expressed by the protagonists of litigation, was that the use of arbitration was dependent on the size and nature of the claim. This was tested by the Hypothesis " *The use of arbitration is dependent on the size and nature of the claim*" and was subsequently rejected. This does not however lead to any definite conclusion as the type of dispute settlement procedure is usually decided on before the dispute actually occurs. The finding does however throw some doubt over the claims made by the protagonists of litigation.

The findings relating to which are the most common reasons for dispute for the different mechanisms were inconclusive. It is however possible to conclude that it is likely that if a construction dispute is declared there is a strong possibility that it is as a result of either interpretation of the contract, delays, variations or contractor negligence.

In terms of arguments posed by protagonists of litigation concerning time, cost and fairness of decision the research shows, by rejecting the Hypothesis "*Arbitration is preferred to mediation and litigation as a method of dispute resolution*", that there is some doubt on the validity of their claims. Those respondents that previously had

experience with the mechanisms found that arbitration is less time consuming and more economical than litigation. The fairness of decision was affected by the the rating of aspects pertaining to the qualification of the arbitrator, which was considered high, and the incidence of compromise decision which was considered low. This was supported by the respondents rating fairness of decision in the "Good" to "Fair" range for the rating question.

The only aspects that respondents, with experience in arbitration as a dispute settlement mechanism, did not find beneficial were those concerning the arbitration being held back to the end of the contract and the fact that no reasons are need to be stated with the arbitrator's award. Those respondents that had no previous experience with arbitration further found that the aspect of no appeal is not advantageous.

Besides testing the validity of the claims by the protagonists of litigation the report further viewed arbitration in comparison to mediation on the aspects of cost, time, fairness of decision, qualifications and predictability of result. The findings are conclusive in that respondents rate mediation higher than arbitration for the above-mentioned aspects. Thus some doubt can be shown concerning arguments professing that arbitration is more suitable than mediation as there is no finality of award in mediation which increases the cost and time factor. Furthermore respondents rated arbitration higher than mediation on the predictability of result scale but this

result is limited by the fact that mediators only give an opinion that is not binding.

Thus on an overall basis it can be concluded, based on the rejection of Hypothesis 2 (as aforementioned), that mediation is the most suitable method of dispute settlement with arbitration coming in second and litigation coming third. This conclusion is supported by respondents' favouring the inclusion of mediation as a pre-arbitration mechanism in the building contract.

It is difficult to conclude on Hypothesis 3, which tested various aspects of arbitration procedure and rules, as it was neither rejected or accepted. However based on the results it can be concluded that :

* Arbitration should not be held back to the end of the contract.
* The 4 month time limitation is considered beneficial but stricter enforcement thereof should be made by arbitrators and parties.
* Reasons for the award should be stated by the arbitrator. This is not however for purposes of appeal, but moreso for the parties to evaluate the arbitrators decision.
* No definite conclusion can be made for the aspect of President appointed arbitrators.
* The pre-hearing conference was found to be beneficial and should be used before the arbitration hearing.

It can be concluded on an overall basis that arbitration is still a more suitable dispute settling mechanism than litigation but it is not considered as suitable as mediation. The suitability of arbitration is mainly affected by the fact that arbitrations are usually held back to the end of the contract and the fact the no reasons for the award need be stated.

CHAPTER 7

RECOMMENDATIONS

Based on the findings and conclusions the following are recommended :

1. To increase suitability of arbitration the following changes to arbitration rules and procedure are recommended :

   a) Arbitration should not be held back to the end of the contract.

   The arbitrator and the parties should agree to ensure that:

   b) The awards are given with reasons.

   c) The four month time limit for awards more strictly adhered to in order to ensure the speedy settlement of the dispute.

3. It is recommended that mediation be included as a pre-arbitration mechanism in the building contract (Institute of Architects).

4. Based on the findings and conclusions pertaining to the suitability of arbitration the following process for dispute settlement is recommended for all construction contracts:

Phase

i) Dispute declared and the architect/engineer gives a decision.

ii) If the architect/engineer's decision is rejected by one or both of the parties then the dispute is referred to mediation.

iii) If the mediator's decision is rejected by one or both of the parties then the parties either go to arbitration or litigation for an award.

In this way parties to a dispute will have the choice of arbitration or litigation if the mediator's decision is not accepted.

5. Since the report is inconclusive on the aspects of privacy and president-appointed arbitrators, it is recommended that further study be undertaken in these areas to assess the extent to which privacy is considered important, and possibly to limit the nomination of arbitrators to one Institute, such as The Association of Arbitrators.

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ANNEXURES



ANNEXURE A

SURVEY BY THE NATAL BRANCH OF THE ASSOCIATION OF ARBITRATORS (S.A.)

ASSOCIATION OF ARBITRATORS

SURVEY OF APPOINTMENTS AND AWARDS

The following is a resumé events, and is set down as requested by the Natal Branch Committee on 14th June 1988.

1) MOTIVATION

It was reported in the Minutes of the Executive Committee held on 27th April 1988 Clause 13.1 that the National Chairman of the Association had asked the Natal Branch Committee for comments and suggestions as to the information that future surveys should provide and the use to which such information should be put.

2) HISTORY

a) Following on a suggested form of survey which was circulated by the Association, the Natal Branch Committee discussed "Record of Arbitrations" on 22nd April 1986 as recorded in Clause 17.1 of that meeting.
It was felt that it would be desirable for the Association to have a record of disputes settled by arbitration. The Natal Branch Committee suggested that the Executive Committee should issue an annual questionnaire similar to that issued by the British Institution of Arbitrators.
b) On 29th August 1986 the National Chairman called for a statistical survey of Arbitrations with a questionnaire. This was sent out to all members for them to reply direct to the Association of Arbitrators. There were nine questions to be answered.
c) The Executive Minutes of December 1986 Clause 14 referred to Questionnaire to Arbitrators, in which the National Chairman undertook to prepare a new draft combining the best features of the Association's previous draft and the version used by the Chartered Institute of Arbitrators as suggested by the Natal Branch Committee.

3) REQUIREMENTS

The Chairman's report at the A.G.M. of the Association in December 1986 stated that there was urgent need for information a) on the number of arbitrations conducted, b) the sort of disputes, c) other pertinent information.

During the first half of 1987 a yellow double sheet survey of Arbitration Appointments and Awards was sent to all members, calling for answers to seven questions and stating that replies should be submitted not later than 30th June 1987 (Authorised by Executive Committee at their meeting in March 1987 Clause 15.)

4) SUBSEQUENTLY.

4.1 Executive Committee Meeting 18th November 1987 reported that the results of the questionnaire were being processed and a report would be available shortly.

4.2 The results of the questionnaire which was entitled "Survey of Arbitration Appointments and Awards Jan 1984 to Dec1986", were attached to the Minutes of the Executive Meeting held on 27th Jan 1988 (Clause 16)

The results are summarised as follows:-

1. 18% Response received. Only 5% of membership appear to be active arbitrators.
2. Total value of claims

1984	R	45 154 557
1985		102 227 733
1986		15 555 282

3. Total value of Awards

1984	R	8 671 872
1985		411 197
1986		806 188

4 Percentage of Awards

Building	1984	77%
	1985	69%
	1986	61%
Civils	1984	5%
	1985	17%
	1986	14%
Other	1984	18%
	1985	14%
	1986	25%

5. Over the three years an average of 38% of the appointments were nominated. The remainder were made by the parties.
6. Number of arbitrations in which awards were made:

1984	8
1985	9
1986	22

7. Percentage of disputes settled out of court 59
8. Average length of time from date of appointment to date of award:

1984	6.7 months
1985	7.2 "
1986	4.2 "

4.3 The Executive Committee are working on a draft questionnaire for 1987 but would like the Natal Branch Committee to submit recommendations.

4.4 Possibly, as the survey revealed that only about 5% of its members were involved in arbitrations, the Executive Committee in the Minutes of

the meeting held on 27th January 1988 (Clause 16.2) agreed to invite members who wished to be considered for nomination as arbitrators to submit their names and details. Application forms were circulated in June 1988.

5. RELEVANT QUESTIONS

a) What purpose is served by a survey?

b) Does it only produce certain statistics?

c) Can the results of a survey be used to promote a case for arbitration?

6. RECOMMENDATIONS

a) It is debatable whether an annual questionnaire is warranted.

b) It is suggested that one every three years would be sufficient, covering the preceding three years.

c) Expeditious handling and distribution of the results is advisable for them to be meaningful.

d) The format of the original statistical survey is basically satisfactory.

W. S. WALKER.

June 1988

ANNEXURE B

SURVEY BY THE SOUTH AFRICAN INSTITUTE OF CIVIL ENGINEERS.

THE SOUTH AFRICAN INSTITUTION
OF CIVIL ENGINEERS
DIE SUID-AFRIKAANSE INSTITUUT
VAN SIVIELE INGENIEURS

JHdeVB/cb/GM4

REPORT ON A QUESTIONNAIRE ON ARBITRATION AND MEDIATION CASES

A questionnaire was sent out to all members on the list of Mediators of the Institution to gather information on the extent of usage of mediation, arbitration and litigation to settle disputes arising in the Construction industry. It is unlikely that the Institution would be able to gain a fully comprehensive picture, but it was felt appropriate to write first to those members whose names appear on the Institution's Panel of Mediators to seek some elementary information.

Out of a total of 59 names on the Panel 43 responded (72,9%) to our request.

1. Number of Mediation Cases the members had undertaken during the following years:

1982	-	20
1983	-	24
1984	-	29
1985	-	37
1986	-	45

2. Number of abovementioned cases ended up in Arbitration:

1982	-	1
1983	-	3
1984	-	9
1985	-	11
1986	-	8

3. The number of cases that went to litigation:

1982	-	1
1983		
1984		
1985		
1986	-	2

The following comments were made by the respondents:

* Several arbitrations during the period would probably have been avoided if Contracts had contained Mediation Clauses.

* Mediation normally starts after completion of the Contract. Blue book should be rewritten to place time limit after completion or else it should be referred directly to Arbitration.

* Mediation is an effective procedure, provided:

  (a) The Mediator has authorative status.

  (b) An appropriate procedure is adopted, rather than the quasi-arbitration required by the SAICE "Rules".

* The time within which the Mediator is to state his opinion should be set out in the Contract and in the terms of appointment of the Mediator.

* Mediations and Arbitrations tend to drag out over long periods.

* Mediation should be encouraged because Arbitration is very costly.

J H de V BOTHA
DIRECTOR

2 JUNE 1987



ANNEXURE C

COVERING LETTER AND QUESTIONNAIRE.

BUILDING SCIENCE DEPARTMENT
P.O.BOX 20
WITS
2050

6 OCTOBER 1989

Dear Sir,

SURVEY: SUITABILITY OF ARBITRATION AS A DISPUTE SETTLING MECHANISM

I am currently writing my thesis for a Master's degree in Building Science entitled "An Investigation into the suitability of Arbitration as a dispute settling mechanism."

The investigation covers aspects of cost, time case decisions and procedures during arbitration, mediation and litigation. In order to ensure that my information is factually correct and that the information reflects the opinion of those involved in construction disputes, I herewith enclose a questionnaire for your completion. If you are unable to attend to this personally please pass the questionnaire to another responsible person within your organisation.

Please note the following when completing the survey:

a) All replies will be treated in full confidentiality.

b) Please give answers based on your experience only.If you have had no previous experience the last section (4) caters for your opinions.

The questionnaire should not take you more than 15 minutes to complete.

I would be grateful if the questionnaire is returned to me as soon as possible, please use the self addressed envelope included herewith for your convenience. The return should reach me by no later than the 30 th of November 1989.

If you have any comments or queries, please indicate these at the foot of the survey or phone me at (011) 886-6038.

Yours faithfully

B.W.BARTH

Bsc (Building). UCT

QUESTIONNAIRE

If you have ever participated in Mediation / Arbitration / Litigation please answer all the questions in all the sections, if not please give your opinion for the questions in section 4 only.

SECTION 1

1. What type of contract agreements are you involved in? (Tick the appropriate box, where 1= continuously, 2= less than 50% of the time, 3= more than 50% of the time.)

	1.	2.	3.
a) Building contract (Inst. of Arch)			
b) Building Sub contract (BIFSA)			
- Domestic			
- Nominated			
- Non nominated			
c) Civil Engineering (GCE 1982)			
d) Civil Eng. Sub contract (1978)			
e) Other (specify).....			

2. Which of the following have you been involved in arising from a construction dispute?

Mediation	YES	NO
Arbitration	YES	NO
Litigation	YES	NO

3. Give the number of times each has occurred in the value categories. (Where A = 0-5, B = 6-10, C = 11-15, D = 16-20 , E=more than 20 occurrences)

Value of dispute Range	Number of times Med	Arb	Lit
R 0 to 50 000	A B C D E	A B C D E	A B C D E
R 50 000 to 100 000	A B C D E	A B C D E	A B C D E
R 100 000 to 200 000	A B C D E	A B C D E	A B C D E
R 200 000 to 300 000	A B C D E	A B C D E	A B C D E
greater than R 300 000	A B C D E	A B C D E	A B C D E

4. What was the cause of the dispute in the cases you have been involved in? (tick the appropriate box)

	Med	Arb	Lit
a) Negligence			
- Contractor			
- Architect/Engineer			
b) Variations			
c) Interpretation of contract			
d) Time -delays			
e) Sub contractors			
f) Certificate			
g) Other (please specify)			
.....			
.....			
.....			

SECTION 2

** Please tick the appropriate box which best characterizes your experience with --- MEDIATION.

1. Cost
a) Do you see Mediation as an economic means of resolving a dispute?

YES	NO

2. Speed
a) Time from when dispute lodged to time of first hearing.

0-4 wks	4-10 wks	greater than 10 weeks

	Excellent	Good	Fair	Poor	V.Poor
b) Speed of actual hearing					
c) Speed of decision.					
3. Award					
a) Qualification of Mediator					
b) Fairness of decision.					
c) Predictability of result.					

** Please tick the appropriate box which best characterizes your experience with --- ARBITRATION.

1. Cost
a) Do you see Arbitration as an economic means of resolving a dispute?

YES	NO

2. Speed
a) Time from when dispute lodged to time of first hearing.

0-4 wks	4-10 wks	greater than 10 weeks

	Excellent	Good	Fair	Poor	V.Poor
b) Speed of actual hearing					
c) Speed of decision.					
3. Award					
a) Qualification of Arbitrator					
b) Fairness of decision.					
c) Predictability of result.					

** Please tick the appropriate box which best characterizes your experience with --- LITIGATION.

1. Cost
a) Do you see Litigation as an economic means of resolving a dispute?

YES	NO

2. Speed
a) Time from when dispute lodged to time of first hearing.

0-4 wks	4-10 wks	greater than 10 weeks

	Excellent	Good	Fair	Poor	V.Poor
b) Speed of actual hearing					
c) Speed of decision.					
3. Award					
a) Predictability of result.					

SECTION 3

Arbitration

1. Should arbitration proceedings be held back until the end of the contract? YES / NO
2. Based on the arbitration/s you have been involved in, have you experienced any unnecessary delays? YES / NO

   If YES, was it primarily due to the :

   - Arbitrator
   - Attorneys
   - Claimant/Respondent
   - Administrative problems
   - Other (specify).....

3. An arbitrator usually has to make his award within 4 months, however, an extension of time may be applied for. Do you agree that these extensions of time should be allowed? YES / NO

   i) Should the award time limit be enforced more strictly? YES / NO
   ii) Should the Act be changed to accommodate this? YES / NO

4. Should an arbitrator give a reasoned award? YES / NO

   If YES,

   i) Should the award be published? YES / NO
   ii) Should the general public have access to the award? YES / NO
   iii) Should these reasoned awards act as precedence for future cases? (ie. as per court of a law) YES / NO
   iv) Should the reasoned award be a basis for appeal? YES / NO

5. Currently there is very little scope for appeal. Should this scope be widened so that arbitration becomes similar to a court of law? YES / NO

   If YES,

   i) Should the appeal be heard by an independent arbitrator? YES / NO
   ii) Should the appeal be heard by a court of law? YES / NO

6. Do you believe that an arbitrator should be appointed by the President of an Institute? YES / NO

   i) Have you ever used a President (SAICE) appointed arbitrator? YES / NO
   ii) Have you ever used an Association of Arbitrators appointed arbitrator? YES / NO
   iii) Have you ever used an arbitrator appointed by the President of the Institute of Architects.? YES / NO
   iv) Have you ever used an arbitrator appointed by a court? YES / NO
   v) Have you ever used an M.B.A/ BIFSA appointed arbitrator? YES / NO

7. Has it been your experience that Arbitrators give a compromise decision? YES / NO

8. Should mediation be included as a pre-arbitration mechanism in the Building contract (Inst. of Architects)? YES / NO

9. Have you ever attended a pre-hearing conference?
   i) If YES, did you find this beneficial?

YES	NO
YES	NO

10. If in the future you were to be involved in a dispute again, which system would you prefer to use as a dispute settling mechanism?

Mediation
Arbitration
Litigation

11. Any further comments you would like to make.

.....
.....
.....
.....

SECTION 4

Please fill this section in if you have had no previous experience of resolving dispute by means of arbitration. (Give your opinion)

1. Do you believe the following to be the advantageous / disadvantageous in terms of arbitration as a dispute settling mechanism. (please tick appropriate box)

	Adv	Disad
a) Speed		
b) Cost		
c) Informality		
d) Privacy		
e) The fact that the arbitrator is better qualified to decide on technical matters		
f) Finality of award		
g) No appeal		
h) Legal experience of arbitrator		
i) Procedure management		
j) Flexibility of dispute resolution process		
k) No reasons for award given		

2. If in the future you were to be involved in a dispute which system would you prefer to use as a dispute settling mechanism?

Mediation
Arbitration
Litigation

3. Any further comments you would like to make.

.....
.....
.....
.....

Please return this Questionnaire by using the self addressed envelope included herewith.

THANK YOU FOR YOUR TIME.

PLEASE RETURN THIS QUESTIONNAIRE AS SOON AS POSSIBLE



Author: Barth B.W.
Name of thesis: An investigation into the suitability of arbitration as a dispute settling mechanism in the construction industry.

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