THE SCOTTISH ARBITRATION SURVEY

REPORT NO 1

COVERING THE PERIOD 1 JULY 2013 TO 30 JUNE 2014

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Foreword by The Honourable Lord Glennie

Over many years arbitration in Scotland acquired a reputation for expense and delay. Conducted under inappropriate court-like procedures, and subject to an appeal procedure by stated case or judicial review quite unsuited to the modern age, it had become not fit for purpose and was little used.

The Arbitration (Scotland) Act 2010 attempted to change all that, by providing a modern platform for arbitration in Scotland. It enshrines the founding principles of arbitration, namely the fair and impartial resolution of disputes without unnecessary delay or expense, party autonomy and the restriction of the court's power to intervene; and sets out rules governing arbitration consistent with arbitration norms in the rest of the United Kingdom and throughout the world.

Since the Act came into force very few arbitration applications or appeals have come before the courts. That may show that the Act is working efficiently; or it may show that there is still very little arbitration carried on in Scotland despite the changes. There is a need to find out whether the Act has made a difference and what, if any, changes need to be made. But how? Anecdotal evidence is of limited value. Confidentiality, enshrined in the Act, makes it difficult to get detailed information.

The Scottish Arbitration Survey carried out by Aberdeen University in conjunction with the Law Society of Scotland and Burness Paull LLP is therefore a very welcome addition to the literature on arbitration under the new Act. Compiling data from those potentially involved in arbitration, the authors have been able to assess the number of arbitrations in Scotland during the relevant period, examine procedural trends (including the role played by the court) and reveal attitudes and perceptions relating to arbitration as it is conducted under the Act. It is too early to assess the long term effect of the Act. The number of new arbitrations is still small, but attitudes appear to be positive, recourse to the courts is limited, and there is a perception that the Act is working.

It is proposed to repeat the Survey annually. Over time it should provide a clear indication of whether the 2010 Act has succeeded in its aims. That is important. The results of these annual Surveys will inform future debate and decision making as to the way forward.

The authors are to be congratulated on their initiative in undertaking this work and to be encouraged to take it forward in the future.

Lord Glennie was appointed a Judge of the Supreme Courts in Scotland in 2005.

He is a graduate of Cambridge University (Trinity Hall) (MA Hons). He has been a barrister in England (Lincoln's Inn) since 1974, practising at the commercial bar and in arbitration. He was appointed Queen's Counsel in England in 1991.

He was admitted to the Faculty of Advocates in 1992, and appointed Queen's Counsel in Scotland in 1998.

Lord Glennie is currently one of the designated Intellectual Property Judges, a position he has held with short interruptions since 2005. In 2007 he was appointed a Commercial Judge and was the Principal Commercial Judge from January 2008 until August 2011. He was a designated arbitration judge in the Court of Session between 2010 and 2012.

Use of the Survey

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1 – Introduction to the Survey

1 ARBITRATION IN SCOTLAND SINCE 2010

1.1 The Arbitration (Scotland) Act 2010 ("**the Act**") came into effect on 7 June 2010. The Act provided Scotland with a modern platform for the practice of arbitration. Some of the important ingredients of the Act and its application, which contribute to the efficiency of arbitration as a dispute resolution procedure are:

1.1.1 Its founding principles for: (1) the fair and impartial resolution of disputes without unnecessary delay or expense; (2) freedom for parties to select the appropriate ingredients of their own dispute resolution procedures (subject to safeguards); and (3) the restriction of the court's intervention except where expressly provided by the Act.

1.1.2 The track record of the courts in the first five years in applying the principle of restricted intervention, and in expedition of its involvement where such is necessary to provide a safeguard. We consider this in more detail in section 2 of this Report.

1.1.3 The provision within the Act of a body of rules, known as the Scottish Arbitration Rules, providing for a structural framework for arbitration.

1.2 It is important to remember that the Scottish Arbitration Rules provide flexibility to parties.

1.2.1 Whilst certain core rules are mandatory, many rules are referred to as default rules, and can be disapplied or amended. For instance it is possible to further minimise the circumstances in which the courts may intervene, to adjust the confidentiality clause to reflect parties' particular needs, or otherwise to adapt the default rules.

1.2.2 It is also possible to use the Scottish Arbitration Rules as the foundation of a focused body of rules tailored to its particular needs. For instance the Chartered Institute of Arbitrators (Scottish Branch) have published their Scottish Short Form Arbitration Rules to provide an expedited process intended for disputes valued at under £25,000.

1.3 Whilst mediation provides a consensual route to resolution, and adjudication provides parties to construction disputes with a procedure for the interim resolution of disputes, the primary mechanisms for the *final determination* of disputes are litigation, arbitration and expert determination.

1.3.1 Mediation may result in final resolution of disputes, but such an outcome is reliant upon agreement.

1.3.2 It is important, when entering into contracts, to make a choice of the appropriate method of *final* dispute determination. For instance, in order to select arbitration, it

is necessary to include an arbitration clause within the contract, or to reach an agreement to arbitrate once a dispute arises.

1.3.3 The selection of an appropriate method of final dispute resolution, by weighing up relevant factors, is an exercise which requires care by legal advisers.

1.3.4 Such choices are likely to have a very significant financial impact. Arbitration is one of several tools in the armoury of resolution techniques and all techniques should be considered carefully.

1.3.5 We comment further on arbitration clauses in section 2 of this Report.

1.4 This Report is primarily focused on collecting data on the use of arbitration, and is intended to provide a litmus test on the arbitration process. It recognises that the choice of a particular dispute resolution mechanism to resolve a dispute is dependant on many factors in the particular circumstance of each case. There is some positive data from the Survey about, for instance, attitudes to mediation and it is generally recognised that mediation has a good record in achieving an outcome at mediation or shortly afterwards.

1.5 We consider some of the factors that may be relevant to selection of court, arbitration or expert determination as a means to final dispute resolution in section 2 of this Report.

1.6 Arbitration has been most used in construction and property disputes, for largely historical reasons. For instance the use of adjudication in the construction sector, which has different consequences to arbitration but shares many traits, has encouraged the growth of professional adjudicators and arbitrators in that sector. Arbitration is however a process which enables the resolution of technical disputes more widely by appropriate men or women of skill. It is therefore a technique which provides opportunities to other sectors to take ownership of dispute resolution within their industries. For instance arbitration may be suited to the resolution of finance sector disputes, by accountants and other professionals. We consider this further in section 2.

1.7 Although the Act, and the potential advantages of arbitration, provide a platform, the use of arbitration requires the development of confidence in arbitrators and the process.

1.8 There are ambitions amongst the arbitration community to promote Scotland as a centre for international arbitration.

1.8.1 The Chartered Institute of Arbitrators (Scottish Branch) continues in its mission for the promotion of alternative methods of dispute resolution, including arbitration, adjudication, expert determination and mediation, in Scotland. It is actively involved in the promotion of arbitration under the pillars of education; its panel of arbitrators; its promotion of the Scottish Arbitration Centre; its provision of well supported events; and in its young members group.

1.8.2 The Scottish Arbitration Centre was formed in 2011, with financial support and direct involvement of the Scottish Government, the Law Society of Scotland, the Faculty of Advocates, the Chartered Institute of Arbitrators, and the Royal Institute of Chartered Surveyors. It has been actively promoting Scotland as a centre. It has operated since 2014 from premises at 125 Princes Street, Edinburgh.

1.9 There is a recognition that, for arbitration to develop in Scotland, resource must be committed to more grass roots improvements to arbitration at a domestic level. The Scottish Branch of the Chartered Institute of Arbitrators has been refreshing its selection process to its panel of arbitrators, and making available its own pathway, in Scotland, to Fellowship, for those who wish to become arbitrators, or be recognised for their arbitration expertise.

1.10 Such developments will benefit from feedback from those involved in arbitration, and also from those who have very little or no involvement in arbitration. The community engaged in arbitration need to understand attitudes, to appropriately focus their efforts to meet the objectives of end users of dispute resolution processes.

2 THE SCOTTISH ARBITRATION SURVEY

2.1 Against that background, five years in, it has become increasingly important to provide a tool to measure Scottish arbitration trends. The confidential nature of the arbitral process means that statistics are not readily available regarding the volume of use of arbitration; the ways in which is it is used; and attitudes to it. The number of arbitrations is not simply reflected by the number of appointments made by the Arbitral Appointment Bodies, since representatives confident in the arbitration process increasingly tend to appoint arbitrators by agreement, without involving those bodies.

2.2 The Scottish Arbitration Survey ("**the Survey**") is a combined initiative involving the University of Aberdeen, Burness Paull LLP and the Law Society of Scotland. Its mission is to provide core statistics regarding arbitration in Scotland. The process began with a survey conducted from Autumn 2014 to January 2015 relative to the period between July 2013 and June 2014, asking some core questions about arbitration from a wide community ranging from arbitrators and regular party representatives in arbitration, to businesses and those who have very little or no involvement with arbitration, and whose attitudes are of relevance to the overall analysis.

2.2.1 We also provide some wider comment about initiatives relative to arbitration.

2.2.2 It is intended that the main survey will be repeated at regular intervals. Over time, the survey will thereby provide information on changing trends.

2.3 The Survey has the support and encouragement of the Chartered Institute of Arbitrators (Scottish Branch) and the Scottish Arbitration Centre.

3 FORM OF THE REPORT

3.1 We provide commentary on particular aspects of arbitration in chapter 2.

3.2 Readers can immediately see an overview of the Findings of the Survey by turning to the Executive Summary in Chapter 3.

3.3 We have focused the substantive analysis of the data we have collected under four headings.

3.4 **Chapter 4 - The occurrence of arbitrations in Scotland**

3.4.1 The primary function of the survey is to provide the best analysis of the number of arbitrations which are occurring in Scotland.

3.4.2 We also analyse the types of arbitrations by subject matter, value and other categories.

3.5 **Chapter 5 - Procedural trends in Scottish arbitration**

3.5.1 We report on trends in the arbitration process, and particularly procedural approaches to arbitration.

3.5.2 This chapter should be particularly helpful to arbitrators and practitioners, to understand general trends and preferences in the approach to arbitration.

3.6 **Chapter 6 - Arbitral Appointing Bodies**

3.6.1 We report separately on the Arbitral Appointment Referees (ie those statutory bodies identified as such), together with other bodies who appoint arbitrators (we refer collectively to all appointing bodies, whether statutory or otherwise, as "**Arbitral Appointing Bodies**").

3.6.2 We include here some comments on developments by such organisations actively engaged in the appointment of arbitrators and the promotion of arbitration.

3.7 **Chapter 7 - Attitudes to arbitration**

3.7.1 In chapter 7 we tackle the important issue of attitudes to arbitration. Since our pool for the survey includes those not directly involved in arbitration, we explore wider perceptions of arbitration.

3.7.2 Of course it is the attitudes of businesses and practitioners to the process which will be the main driver to the use of arbitration in future years. By an understanding of attitudes, arbitrators and those bodies involved in the promotion of arbitration, can improve the process, to meet the requirements of end users.

3.8 We draw some conclusions at chapter 8.

3.9 We also provide annexes with some background information, including an explanation of the methodology adopted. At Annex C we provide a table of certain defined terms, which we will use throughout the Report.

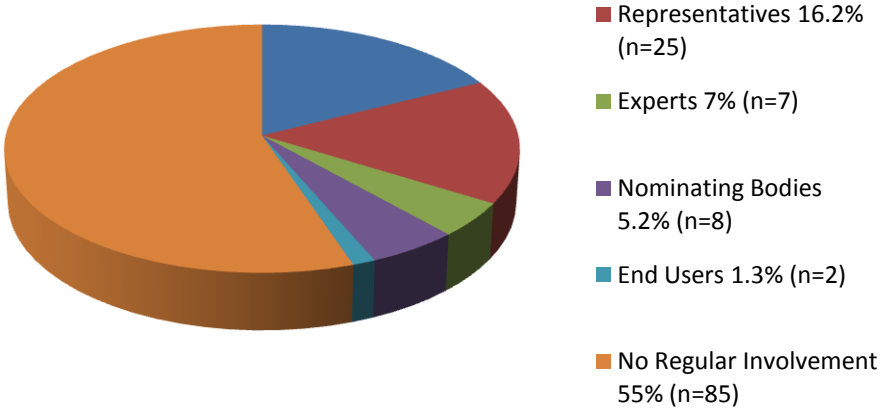
4 PRIMARY ASPECTS OF THE SURVEY

4.1 The Survey has collected data, and now reports upon, the occurrence of arbitration during the one year period between 1 July 2013 and 30 June 2014. We refer to this period throughout this Report as "**the Relevant Period**".

4.2 The Survey has collected data from six categories of respondent, namely (1) arbitrators; (2) Arbitral Appointing Bodies; (3) representatives in arbitration; (4) end users of arbitration; (5) experts; and (6) those who do not fall into any other category. The Survey was set up so that each category answered a body of survey questions relative to the particular category.

4.3 27 Arbitrators; 8 Arbitral Appointment Referees; 25 party representatives; 2 end users; 7 experts; and 85 other respondents, a total of 154 respondents, completed the survey. This provides a solid foundation for the first Survey, upon which relevant and practical deductions can be made in this Report.

Chart 1 - Composition of Respondents (n=154)



4.4 The primary question for the Survey was to provide an assessment of the number of arbitrations occurring in Scotland. We took the view that, to avoid duplication, the best approach was to obtain a full response from those known to be practicing as arbitrators in Scotland. A comprehensive list of such arbitrators was carefully compiled and each were contacted. Most of these arbitrators did respond to the Survey. Some known arbitrators did

not respond as arbitrators but in the 'other' category, which suggests that arbitrators beyond the 27 who provided positive data, were not appointed as arbitrators during the Relevant Period. We will comment further on our findings regarding the number of arbitrations in chapter 4. Whilst we do not claim that the numbers of arbitrations reported can be definitive, we do feel that the exercise undertaken provides the best assessment of the use of arbitration that can be ascertained given the confidential nature of the process.

4.5 Beyond the primary question of the number of arbitrations, we have also explored attitudes and practices in important areas, which we hope will be of value to users, practitioners, and arbitrators alike.

4.6 It is important that the Survey recognises the confidential nature of arbitration. The questions have been framed in such a way that information likely to suggest the identity of the parties would not be provided. Also we were clear that in the event that any party specific information was disclosed (for instance in free text) it is not reported here. The purpose of the Survey is to assess trends. Nor do we seek to provide league tables, for instance between different appointing bodies.

4.7 We hope that the Survey will open up debate about dispute resolution methods, including alternative methods such as arbitration, mediation, and expert determination. We also hope that this will in turn promote a greater understanding of alternative dispute resolution processes, so that there is greater awareness of choice. We feel that the Survey will have served an important purpose if it promotes a wider understanding of the important choice to be made at the contract formation stage, as to the optimum and most efficient form of dispute resolution, whatever that may be. Parties may of course consensually select a different choice in the event of a dispute occurring.

4.8 It is intended to follow up this survey with further surveys at appropriate intervals, to enable an evaluation of trends over time. For reasons of timing, we focused this first survey over the period from 1 July 2013 and 30 June 2014, and some Survey Respondents reported that it would be easier to use a calendar year as the reporting base (see for instance paragraph 1.9.4(b) at Appendix A). For that reason we anticipate launching the second survey to cover the period of the calendar year 2015, in early 2016, and thereafter to follow calendar year reporting periods.

2 – The Evolution of Arbitration in Scotland since the Act

5 WEIGHING UP FACTORS IN THE SELECTION OF THE DISPUTE RESOLUTION MECHANISM

5.1 The primary choices for the final determination of disputes are court, arbitration or expert determination. Mediation is an important alternative dispute resolution process, but depends on consensus for its outcome. Construction Adjudication provides an interim determination (albeit often treated as *de facto* final). That means that when parties enter into a contractual arrangement, they need to make a choice between court, arbitration or expert determination. They could of course provide for a contractual mediation clause, but they will still need to make a choice for a final dispute resolution mechanism if parties have to rely upon a third party determination. If parties do nothing, then the default option of litigation will apply.

5.2 Whilst before 2010, parties might have rejected arbitration outright, it is important that legal advisers provide guidance to their clients on the choices which are available, so that an informed decision can be made.

5.3 It is important that this Survey does not seek to advocate a preference for arbitration over other forms of dispute resolution. It recognises that, post 2010, there is an important choice. Against that backdrop, it is important that parties and practitioners are informed on options and trends in arbitration, and that arbitrators and promoters of arbitration, are provided with relevant underlying statistics.

5.4 Law Society Guidance Rule B1.9 (Dispute Resolution) provides:

"*Solicitors should have a sufficient understanding of commonly available alternative dispute resolution options to allow proper consideration and communication of options to a client in considering the client's interests and objectives.*

A solicitor providing advice on dispute resolution procedures should be able to discuss and explain available options, including the advantages and disadvantages of each, to a client in such a way as to enable the client to make an informed decision as to the course of action and procedure he or she should pursue to best meet their needs and objectives, and to instruct the solicitor accordingly.

A solicitor providing advice on dispute resolution procedures is also expected to be able to identify where alternative methods of dispute resolution may not be in the best interests of the client. ..."

5.5 It is of course the case that consideration of the choice of dispute resolution alternatives is made directly by parties to contracts, or sometimes directed by the advice of non-contentious legal and other practitioners, at a time when parties agree contract terms and do not contemplate the crystallisation of an actual dispute. Indeed the optimum time for agreement

on an efficient dispute resolution mechanism is at the time when parties can objectively agree upon a cost efficient and effective process. Once a dispute exists, each party has its own agenda, and often the agenda of a respondent to a claim will be to adopt a strategy which best suits its resistance to the claim. So non-contentious legal and other advisers have an important role in advising (with appropriate assistance from their contentious practice colleagues) on this important choice.

5.6 Some of the factors which may be relevant to that choice are:

5.6.1 **Finality**. Subject to checks on fairness and jurisdiction, an arbitration decision is final and binding. The restrictions on appeal of the substantive decision (a legal error appeal is a default rule (Rule 69) which could be disapplied, or retained as a more limited check on error) may minimise the scope for onward appeal. Of course this needs to be balanced against the risk of being bound by a decision with no further remedy.

5.6.2 **Specialism**. Many commercial and technical disputes may be efficiently resolved by an arbitrator of particular technical or specialist skill, reflecting the subject matter of the dispute. In litigation, the expertise of the judge is in law. An arbitration clause can allow parties to choose from a pool of various disciplines, a professional arbitrator appropriate for the particular nature of the dispute. Such an arbitrator might be a lawyer or might be another technical expert, depending on the nature of a particular dispute at the time that it arises. On the other hand the resolution of technical matters often have contractual disputes at their heart. Some parties and advisers may consider that an experienced judge, with particular expertise in the assessment of evidence, provides an effective process of dispute resolution.

5.6.3 **User-friendly**. Arbitration provides the arbitrator with opportunities for greater procedural flexibility. Parties are generally able to present their claim in a commercial and user-friendly manner. On the other hand some practitioners may feel that the formality of court procedure helps to safeguard aspects such as fair notice and procedural definition.

5.6.4 **Speed**. The flexibility of the arbitral process may enable arbitrators to adopt efficient timescales. Arbitrations can usually avoid lengthy delays waiting for court time and last minute court hearing postponements. Swifter finality and the restriction on appeal opportunities also serves to curtail the process.

5.6.5 **Cost**. The scope for flexibility and efficiency of process may lead to a more cost effective process. Of course, parties must also bear the costs of the arbitrator(s) as well as ancillary costs such as those related to the venue and administrative costs. On the other hand court fees are no longer nominal, and in general the greater costs for parties are the costs of representation, so that an effectively directed arbitration should promote cost efficiency. In other words savings arising from representation costs on account of reduced timescales might outweigh the inherent additional costs that arbitration attracts.

5.6.6 **Control**. Parties may have more control in arbitration and their views may be taken into account by arbitrators in adopting an efficient process. Parties can agree efficiencies in process between themselves more efficiently than in litigation and identify cost effective ways to narrow and resolve the dispute.

5.6.7 **Multi-party disputes**. Resolving multi-party disputes through arbitration can be problematic, though this may be mitigated by provisions to allow conjoining or consolidation of arbitrations.

5.6.8 **Confidentiality**. Unlike court, arbitration is a confidential process. This can be a very significant factor for commercial parties wishing to protect market-sensitive information and their sector-specific and public reputations. Parties can keep disputes to themselves.

5.6.9 **Enforcement**. Arbitral decisions are widely enforceable internationally under the New York Convention 1958. 145 of the 193 United Nations Member States have adopted the New York Convention, providing wide scope for international enforcement. There may be advantages in enforcement of an arbitration decision in jurisdictions particularly outwith UK and outwith the EU Member States. On the other hand a court decree may sometimes provide a more direct route to enforcement within Scotland.

5.7 It is recognised that another form of final dispute resolution is expert determination, which is generally not subject to any appeal or reference to the court on points of law or procedure. In general expert determination is not intended as an adversarial process, in the same way as arbitration/litigation, and may generally be driven by the expert's own determination of papers submitted to him or her by the parties without consecutive rounds of submission or hearings. It is likely to be most appropriate for disputes which solely rely upon determination of discrete technical matters, such as valuations. It can be less appropriate where there are mixed issues for instance of contract interpretation and technical specialism.

5.8 It is suggested that parties should weigh up the choices for final determination, and that the factors set out above may be relevant to that process.

6 THE COURT'S ROLE AS FRIEND AND POLICEMAN OF ARBITRATION

6.1 Prior to the Act, arbitration had (for good reason) fallen out of favour as a mean of dispute resolution in Scotland. The courts were not seen as its friend, largely due to difficulties with the stated case procedure.[1]

[1] See in particular *ERDC Construction Ltd v HM Love & Co (No 2) 1997 SLT 175* and the various McCrindle arbitration cases. That arbitration commenced in 2002 and ran for some 10 years under various arbitrators. See *McCrindle Group Limited v Maclay Murray & Spens* 2013 CSOH 72 and *Macroberts v McCrindle Group Limited* 2014 CSOH 99.

6.2 **The Act**

6.2.1 The third founding principle of the Act, is that the court should not intervene in arbitration except as provided in the Act: in other words there can be no back door route to court.[2]

6.2.2 Section 13 headed '*Court intervention in arbitrations'* is clear that court intervention is competent, but only (a) in respect of any jurisdictional matter where (i) objecting to an order under Section 12 of the Act re enforcement of a tribunal award; or (ii) under Rules 21, 21 and 67; and (b) in respect of a tribunal awards under Rules 67-72.

6.2.3 One of the most important drivers for arbitration in a domestic context is confidence that the court will enforce tribunal awards. This arises from Section 12. However the court friendship with arbitration is not a blind one, but rather that of a wise and trusted friend, willing where appropriate to speak his mind and give advice to the arbitrator, who is asked to rethink and make amends for any significant failings on his part.

6.2.4 The court must suspend any legal proceedings concerning a dispute in respect of which there exists a valid arbitration agreement, unless the applicant to the court has waived its right to insist on arbitration[3]. It follows that the court also has power to determine the validity of any arbitration agreement.[4]

6.3 **Rules**

6.3.1 Turning to the Rules, generally court intervention is preconditioned and restricted, but the court acts in a policing role, which can be viewed positively, in that without it, real confidence in the private arbitration process might be undermined. The founding principles in section 1 of the Act 'underpin all questions of arbitration in Scotland'.[5] Further, these principles apply to the arbitrator as well as the parties[6]. Importantly, the Court of Session has made it clear that the use of English cases in interpreting similar provisions from the 1996 Act which are also in the 2010 Act is appropriate.[7] In another example of flexibility, it has been held that evidence which is not supported by the arbitral pleadings (or which has been excluded from the pleadings) may still be admitted – the strict approach to pleadings and foreshadowing of evidence does not require to be followed by an arbitrator. [8] On the

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[2] Section 1 (3)
[3] Section 10
[4] Section 10 (1)(a)
[5] *Arbitration Application No. 1 of 2013* [2014] CSOH 83, per Lord Woolman.
[6] See the comments of Lord Malcolm in *G1 Venues Ltd*. [2013] CSOH 202 in the context of delay in issuing a decision [para 18].
[7] See Lord Glennie in *Arbitration Application No 3 of 2011* 2012 SLT 150 [para 8], supported by Lord Woolman in *Arbitration Application No 1 of 2013* [2014] CSOH 83 [para 10].
[8] See comments to this effect by Lord Glennie in *Arbitration Application No 3 of 2011* 2012 SLT 150 [para 29].

award too, the courts have suggested that they will not readily intervene: the award need only deal with the essential issues, not with every point raised, and in the case in question reasons which were 'very brief' were regarded as adequate.[9] In connection with rule 58 on 'Correcting an Award' this has been described as offering 'significant corrective powers' which reflects the philosophy of arbitration as a 'stand-alone process, with its own remedial mechanisms'.[10]

6.3.2 Mandatory Rules 12 to 14 and 16 are supervisory rules, permitting removal of an arbitrator for reasons of performance, in the sense of not acting in accordance with natural justice or acting in manner whereby substantial injustice will arise. The supervisory role is more restrictive than that given the courts in the context of adjudication, where not infrequently minor procedural shortcomings have resulted in decisions being rendered void.[11]

6.3.3 The case of *G1 Venues Ltd*[12] can be seen as evidence of the court's positive approach to arbitration. Here the arbitrator made a Rule 20 ruling that he did not have jurisdiction to decide the matter due to the arbitration notice being served *ex facie* on the wrong party. Under Rule 21 the court considered this a technical or immaterial mistake, and the appeal was successful such that the matter was remitted back to the arbitrator to deal with.

6.3.4 Where adopted, default Rule 22 gives a wide power to the Outer House court to determine jurisdiction, whilst mandatory Rule 23 provides the standard preconditions seen in the Act, that parties must agree, or the tribunal must consent and the court be satisfied there is *inter alia* good reason for its involvement.

6.3.5 The approach of the courts in maintaining anonymity in legal proceedings[13] and the case of *Gray Construction*[14] also show a friendly and supportive attitude to arbitration. The conflict between private arbitral proceedings, and the public interest or a party's right to protect its lawful interests are addressed by Rule 26 (1) (d) and (e).

6.3.6 The opportunity to deepen the role of the court in the arbitration process arises in default Rules 41, 43, 46 and 58, whereby powers can, but need not, be given to the court to determine a point of Scots law; vary time limits set by the parties; give it the same powers as it has in civil proceedings; and correct awards re clerical errors etc.

6.3.7 Rule 45 is beneficial to the arbitral process in giving power to the court to order attendance of witnesses and disclosure of documents. Helpful guidance has been

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[9] See the discussion by Lord Woolman in *Arbitration Application 1 of 2013* [2014] CSOH 83 at paras [23]-[24].
[10] *Arbitration Application 1 of 2013* [2014] CSOH 83, Lord Woolman at para [15].
[11] *Highlands & Islands Authority Ltd v Shetland Islands Council* 2012 CSOH 12 is an example of a case where if substantial injustice had been the legal test the adjudicator's decision would have stood.
[12] *G1 Venues Limited* 2013 CSOH 202
[13] Section 15
[14] *Gray Construction Limited v Harley Haddow* 2012 CSOH 92

given by the court in the case of *SGL Carbon Fibres*[15] as to the operation of Rule 45 (1) (b) which emphasised that the tribunal is best placed to make such decisions per Rule 28(c) as to admissibility and relevance of documents, because of its knowledge of the dispute.

6.3.8 Rule 66 helpfully permits court intervention to deal with fee disputes between parties and the arbitrators with this role being fulfilled by the Auditor of the Court of Session.

6.3.9 Part 8 of the Act contains the obvious policing powers. Rules 67 and 68 deal with challenges to awards, regarding substantive jurisdiction and serious irregularity respectively, (and potential sanction re an arbitrator's entitlement to fees) with the option of Rule 69 regarding legal error appeals. However there are detailed restrictions on timescales and procedure, and legal error appeals require agreement of parties, or leave to appeal.[16] [17] Decisions can only go as far as the Inner House, and may do so only upon leave. Where the court decides that following a serious irregularity or legal error appeal a new award is required, it is the tribunal and not the court which has to make this generally within 3 months.[18]

6.3.10 There have been three reported legal error appeals. The first[19] (concerning a rent review dispute) and the second[20] (concerning a payment dispute under NEC 3) were both unsuccessful, but the third[21] (again on a rent review) matter was successful. The usual test in such cases, that the decision must be 'obviously wrong', is a strict test and Lord Woolman has indicated that the English definition of this phrase should be adopted in Scotland:

"[such a decision] must involve something in the nature of a major intellectual aberration, or "making a false leap in logic or reaching a result for which there was no reasonable explanation": *HMV UK Ltd v Propinvest Friar Partnership* [2012] I Lloyd's Rep 416." [para 32][22]

It seems that the error, in order to qualify as a challengeable one, would have to be one which is of considerable significance.

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[15] *SGL Carbon Fibres Limited* 2013 CSOH 21 paragraphs 6-9
[16] Rules 70 and 71. The latter contains 17 provisions regarding use of Rules 67 and 68.
[17] Arbitration Application number 3 (*SGL Carbon Fibres V RBG Ltd*) 2012 COSH 19
[18] See Rule 72(1) as to when 3 months runs from and the court may also specify another time limit.
[19] Arbitration Application No.2 2011 CSOH 186
[20] SGL Carbon Fibres Limited V RBG Ltd 2012 CSOH 19
[21] Manchester Associated Mills V Mitchells & Butler Retail Limited 2013 CSOH 2
[22] *Arbitration Application No 1 of 2013* [2014] CSOH 83.

6.3.11 There has been one serious irregularity appeal[23], highlighting that success will only arise in extreme cases where the tribunal has gone wrong. Lord Woolman offered the following analysis in that case:

"Three general points can be made about serious irregularity appeals. First, they are designed as "a long stop available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected": Departmental Advisory Committee on Arbitration Report on the Arbitration Bill 1996. ….Second, the court will not intervene on the basis that it might have done things differently, or expressed its conclusions on the essential issues at greater length. Third, such an appeal can only succeed if there has been substantial injustice. If the result of the arbitration would have been likely to be the same or very similar, then there is no basis for overturning the award: Checkpoint Ltd v Strathclyde Pension Fund [2003] EWCA Civ 84. Accordingly a dissatisfied party has to meet a high test." [para 18].

This should offer reassurance to those in the arbitration community worried about the prospect of ill-founded serious irregularity appeals.

6.4 In conclusion, the Act and case law suggests a restricted policing role for the courts in the arbitral process, being more akin to a sensible, honest friendship.

7 A WIDER SCOPE FOR ARBITRATION IN THE FUTURE?

7.1 We remarked in the previous chapter, that for historic reasons, arbitration has tended to become most focused upon construction and property disputes. There is no obvious reason why arbitration should remain so restricted. The new 2010 regime should provide an opportunity for other disciplines to adopt arbitration as a process for the resolution of specialist and technical disputes.

7.2 The Scottish Branch of the Chartered Institute of Arbitrators has, over the past few years, been exploring opportunities for arbitration in other disciplines.

7.2.1 For instance there have been discussions with the Institute of Chartered Accountants in Scotland and with forensic accountants about the potential for accountants with a practice in dispute resolution to provide a pool of accountant arbitrators. Inevitably there is a chicken and egg situation, in that a sufficient demand needs to grow for accountants as arbitrators to encourage accountants to commit to a pathway to an arbitrator role (for instance through the CIArb pathway to Fellowship). There is a potential demand for accountant arbitrators. CIArb Scotland has received enquiries, for instance arising from arbitration clauses in partnership agreements, about accountant arbitrators. Growing areas for arbitration such as family law (see below) may also benefit from the provision of accountant arbitrators.

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[23] Arbitration application No.1 2013 CSOH 2014 83

7.2.2 A new growth area for arbitration has arisen in family law and particularly through the efforts of the Family Law Arbitration Group Scotland ("**FLAGS**"). FLAGS has its own form of the Scottish Arbitration Rules and provides a body of specialist practitioners who have undergone specific training to act as arbitrators. Whilst the initial focus has been in the obvious area of financial aspects, FLAGS see arbitration as having a wider role in the resolution of all kinds of family disputes with the bespoke form of rules and associated practice notes also encompassing child related matters. Rachael Kelsey, who is actively involved in FLAGS, told us:

"Arbitration can be used to resolve almost all disputes of a family law nature in Scotland. In many situations a single contentious element, such as identification of the relevant date in a financial provision on divorce case, can be a matter suitable for referral to arbitration. In other cases, the entire subject matter of the dispute, such as the financial provision on divorce as a whole, or the relocation of a child, can be referred.

With the coming into force of the Arbitration (Scotland) Act 2010 we found an opportunity to create a bespoke set of rules specifically for family law issues, which led to the formation of FLAGS. We were encouraged by the support and enthusiasm of the judiciary, government and other stakeholders in the creation of the scheme, which is now gaining traction, as is that of our sister family law arbitration organisation in England and Wales (IFLA).

The use of arbitration in contentious family situations is clearly relatively new and FLAGS' focus now, in part, is on educating practitioners on this dispute resolution method. The use of arbitration has many advantages notably the ability to choose a family law specialist as the arbitrator; the use of a quick, more flexible and tailored approach to an individual case; a resultant saving in legal costs; greater scope for confidentiality; and, perhaps most importantly in the current climate, the opportunity to have matters dealt with in the locality in which the parties reside."

7.3 Another potential growth area for the use of arbitration is in the resolution of sports related disputes. There is a tendency in sport towards a strong preference against resolution through the courts. For example, Paragraph 68.2 of the Statutes of the Fédération Internationale de Football Association states: "*Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited*." The Scottish Football Association ("**Scottish FA**") provides an alternative dispute resolution mechanism for the resolution of football related disputes between players, clubs, and other associated persons, and with the Scottish FA itself, through the provision of a detailed arbitration clause. Article 99 of the Scottish FA's Articles of Association provides for the resolution of general football related disputes, whilst a separate arbitral dispute resolution mechanism is provided for disputes relative to its registration rules, and intermediary regulations (see the Scottish FA Handbook).

7.4 Arbitration also has a potential role in consumer and lower value disputes, including by the adoption of the Scottish Short Form Arbitration Rules.

8 SCOTLAND AS A CENTRE FOR INTERNATIONAL ARBITRATION?

8.1 The Scottish Arbitration Centre has actively promoted those factors which give Scotland a platform as a seat for international arbitration.

8.2 A further example of the widening scope of arbitration, in the international sphere from a Scottish base, is the International Centre for Energy Arbitration ("**ICEA**"), a joint venture between the Centre for Energy Petroleum Mineral Law and Policy at the University of Dundee and the Scottish Arbitration Centre. Its mission is "*to research attitudes and trends in dispute resolution in the energy sector, to facilitate debate and promote best practice, and to be a centre of excellence and a resource for those involved in energy dispute resolution whether as party, advisor, or tribunal member*". Brandon Malone commented: "*To differentiate Scotland from other emerging seats of arbitration, we have focused on the energy sector. With Scotland's concentration of legal and technical expertise in oil and gas and renewables, the logic of Scotland as a seat for energy disputes is obvious and we have had significant interest from international firms in using Scotland for these types of dispute*." ICEA have recently completed a Survey on dispute resolution in the energy sector.

8.3 The Franco-British Lawyers Society recently held a debate between representatives of France, England, Ireland and Scotland as to the better seat for arbitration. It was generally agreed between the debaters that the differences between those jurisdictions are not seismic. Scotland can however promote a sound legal expertise; with solid support from the courts; a powerful modern platform for arbitration through the Act; and the provision of arbitrators and representatives more cost-efficiently than other jurisdictions.

8.4 It is suspected that the promotion of Scotland as a seat for arbitration internationally will best be founded upon a robust domestic arbitration base, and this was a comment made by many survey respondents. We know that the Scottish Branch of the Chartered Institute of Arbitrators is pursuing a number of initiatives to enhance the domestic arbitration base, including a recent overhaul of its criteria for arbitrator and adjudicator panel membership, and the delivery of courses in Scotland to allow the pathway to Fellowship, so that Scottish Arbitrators develop their expertise founded upon the Scottish jurisdictional rules.

9 ARBITRATION CLAUSES

9.1 The usual[24] mechanism to select a form of dispute resolution other than litigation, is through the provision of a dispute resolution clause within the relevant contract. If selecting arbitration, then parties will need to agree and include an appropriate arbitration clause[25].

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[24] The other method is by negotiating an arbitration agreement once the dispute has arisen. While this route has obvious advantages (such as an understanding of the precise nature of the dispute, leading to a better chance of a suitable resolution method being chosen) the clear downside is that such a method requires agreement at a time when the parties are in dispute, which may well be challenging. Commercial parties tend to prefer prior regulation of a dispute resolution process, based on an assessment as to the most suitable method, given the nature of the obligations and the transaction.

9.2 It is suggested that, in drafting an arbitration clause, the following matters are considered:

9.2.1 It is important to decide on the scope of disputes which are to be referred to arbitration. It may be that it is intended that all disputes arising under the agreement are to be referred to arbitration. Or parties might chose to restrict the scope of disputes referable to arbitration to particular categories of dispute. It is important to define this in the arbitration clause.

9.2.2 We have explained that the Act provides for the application of the Scottish Arbitration Rules to all arbitrations seated in Scotland. Whilst some of those rules are mandatory, some are default rules which can be disapplied. To disapply such rules, it is necessary to expressly disapply the rules in the arbitration agreement (or they may be disapplied if inconsistent with other provisions of the arbitration agreement). For that reason consideration should be given to whether to disapply default rules. Parties may wish to particularly consider:

(a) Whether to disapply Rule 22 (referral of a point of jurisdiction prior to final award), Rule 41 (referral of a point of law prior to award), Rule 43 (variation of time limits set by parties) and Rule 69 (legal error appeal) if they prefer to restrict the intervention of the court and provide for the least challengeable route to final determination. On the other hand parties may feel that these are important safeguards.

(b) Whether to make any adjustment to Rule 26 (confidentiality). The provision is a robust confidentiality provision, which may be an important reason to select arbitration. It makes a breach of the confidentiality obligation actionable. It provides for certain exceptions, for instance to enable disclosure where that is required by law, in the interests of justice, for the proper performance of public functions etc. Parties may wish to review whether any adjustment is required to enable the reporting of the outcome of disputes, in case the exceptions are not sufficiently wide to meet the particular circumstances of an individual or organisation.

(c) Rules 59 to 63 in relation to arbitration expenses.

(d) Rules 83 and 84 in relation to notice provisions and periods of time, to be sure these are consistent with the wider provisions of the contract.

(e) It may well be unnecessary to make any changes, but it is important to remember that there is a choice regarding default rules.

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[25] For some general guidelines on how to draft arbitration clauses, see the *IBA Guidelines for Drafting International Arbitration Clauses*, 2010, available at the IBA's website: http://www.ibanet.org/ENews_Archive/IBA_27October_2010_Arbitration_Clauses_Guidelines.aspx.

(f) Whether to add any rules of their own, but it suggested that caution should be exercised in such regard.

9.2.3 Consideration should be given to whether to adopt a particular set of procedural rules, bespoke or in standard form.

9.2.4 Parties may wish to consider the option of a fast-track arbitration, with the aim of reaching an award within a fixed period of time.

9.2.5 Careful consideration should be given to the appointment process. Whilst dispute practitioners often agree on the appointment of an arbitrator, a referring party needs to be able to secure the appointment of an arbitrator where agreement is not reached. This is achieved by providing for appointment by an Arbitral Appointment Referee or another organisation which appoints arbitrators. There are currently eight statutory Arbitral Appointment Referees[26] (in respect of which the Scottish Arbitration Rules provide for appointments where parties have not specified the appointment procedure), and other bodies who also appoint arbitrators (such as the Scottish Arbitration Centre or the Dean of the Faculty of Advocates). It is suggested that parties ensure they understand who is on the panels of such bodies, to be sure they have the right mix of arbitrators. It is open to parties to provide for a number of Arbitral Appointment Bodies to have power to appoint, and potentially to provide for appointment of named individuals (providing for an alternative in case such individuals are unable to act). It is important to be sure that the bodies selected are able to appoint arbitrators.

9.2.6 It is also important to define the seat, and if appropriate the language of the arbitration.

9.3 A possible formula for an arbitration clause is:

"All disputes arising [out of or in connection with the contract] shall be finally settled by arbitration. [The arbitration shall be governed by [Specify Rules]]. [The Arbitrator(s) shall be appointed in accordance with the said Rules.] [The Arbitrator(s) shall be appointed by the Chair or Vice Chair of the Royal Institution of Chartered Surveyors in Scotland, the Scottish Arbitration Centre, The Chairman or Vice Chairman of the Chartered Institute of Arbitrators (Scottish Branch) or the President or Vice President of the Law Society of Scotland.] [Rules 22, 41, 43, 69 of the Scottish Arbitration Rules shall not apply.][The language of the arbitration shall be English.][The seat of the arbitration shall be Scotland. The arbitration shall take place in [specify city].]"

Separately – "*the Law of the Contract shall be the law of [Scotland]*."

[26] (1) the Agricultural Industries Confederation Limited; (2) the Chartered Institute of Arbitrators; (3) the Dean of the Faculty of Advocates; (4) the Institution of Civil Engineers; (5) the Law Society of Scotland; (6) the Royal Incorporation of Architects in Scotland; (7) the Royal Institution of Chartered Surveyors; and (8) the Scottish Agricultural Arbiters and Valuers Association.`

9.4 Various bodies provide forms of arbitration clause including:

9.4.1 The Scottish Arbitration Centre;

9.4.2 The Faculty Dispute Resolution Service;

9.4.3 The Family Law Arbitration Group Scotland;

9.4.4 The London Court of International Arbitration;

9.4.5 The International Chamber of Commerce;

9.4.6 The International Centre for Dispute Resolution.

3 - Executive Summary

10 **A SUMMARY OF OUR FINDINGS**

10.1 We start with an executive summary of our findings.

10.2 The primary objective of the Survey was to answer one important question – how many arbitrations took place in Scotland during the Relevant Period ("**the Primary Question**"). This is because, five years on from the Act, it is important to take a 'litmus test' on use of arbitration, and to then re-test at regular intervals, to provide some measure of the use of arbitration over time.

10.3 The Survey also undertook a number of secondary objectives, to ask questions to reveal trends in the procedural approach to arbitration, and attitudes. It is hoped that the answers to these secondary questions will assist promotors of arbitration in understanding underlying commercial and practical drivers to efficient dispute resolution, and will also provide wider transparency about the choice of dispute resolution options to those who advise upon and use such processes.

10.4 **The Primary Question**

10.4.1 Whilst in the *Hitchhikers Guide to the Galaxy*, the meaning of life was revealed to be 42, the Survey has concluded that the number of arbitrations with a seat in Scotland during the one year period to the end of June 2014 (known in this Survey as the Relevant Period) is **22** (or thereby).

10.4.2 We explain in paragraph 11.2 how we arrived at that figure. Given the confidential nature of arbitration we acknowledge that the figure could be understated and we explain some of the other data which might support a view that there may well have been more arbitrations. But we have solid evidence to vouch that there were at least 22 arbitrations. The recorded figure of 22 is the best assessment that can be made on available data.

10.4.3 We have also ascertained that there were 36 arbitrations (or thereby) involving Scottish arbitrators in arbitrations with a seat outwith Scotland.

10.5 **The nature of arbitrations**

10.5.1 Not unexpectedly, traditional areas of construction and property still dominate the **subject matter of arbitrations**. Agricultural disputes feature significantly in the data provided by arbitrators. There is evidence of arbitrations being used in new areas, such as family disputes. See especially paragraph 12.3.

10.5.2 There are wide ranging **values of disputes** referred to arbitrations, with significant numbers of disputes valued at over £1M, but also significant numbers of disputes valued at less than £10k. See paragraph 12.4.

10.5.3 The **method of appointment** of arbitrators in the bulk of arbitrations is through Arbitral Appointment Referees. There are also significant numbers of arbitrations where arbitrators are appointed by agreement. See paragraph 0.

10.6 **Procedural trends**

10.6.1 Regarding **tribunal makeup**, it is not surprising to see that Scotland tends to favour single arbitrators rather than tribunals of three arbitrators. Taking the data reported by arbitrators and representatives, generally two thirds or more arbitrations involved single arbitrators. See paragraph 13.2.

10.6.2 The data on the **use of procedural rules**, shows that the bulk of arbitrations used the Scottish Arbitration Rules only, but a large number of arbitrations used their own bespoke rules. See paragraph 13.3.

10.6.3 In terms of **procedural approach**, there is evidence of significant use of the documents only procedure, preliminary hearings, splitting or bifurcation of arbitrations into different parts (typically liability followed by quantum), and of the use of a full hearing. See paragraph 13.3.2.

10.6.4 There is some record of **court involvement in arbitrations** at paragraph 14. It is interesting that the bulk of such references were under Rule 68 (serious irregularity challenges) and Rule 69 (legal error appeal).

10.6.5 In terms of arbitration **timescales**, the bulk of arbitrations fell into the less than 6 months or 6 months to 12 months categories, which is encouraging for users of the process. Representatives reported a fair number never reaching award, which we suspect would generally have arisen where a case has settled. See paragraph 15.1.

10.7 **Attitudes**

10.7.1 It is encouraging that both advisers and those not directly involved in arbitration overwhelmingly feel it is appropriate to recommend or consider the **inclusion of an arbitration clause**. As indicated in the introductory section, we suspect that the optimum advice should be to always consider alternative options to dispute resolution. Arbitration is one such option, amongst the armoury of dispute resolution methods. See paragraph 18.

10.7.2 Regarding perceptions of **preference between different forms of dispute resolution** procedure, there was a general preference for adjudication and mediation receiving strong support particularly from those not directly involved in arbitration. It is important to observe that (1) construction adjudication is a form of dispute

resolution procedure which generally arises from the terms of the contract or statutory incorporation in construction contracts and which gives rise to an interim finding; and (2) mediation is a process which has a high success rate, but relies upon consensus to achieve a resolution. Parties may wish to consider providing for adjudication (including where it is not implied by statutory incorporation) or mediation in a contractual dispute resolution clause. For instance a dispute resolution clause might provide for an attempt to mediate as a precondition to arbitration or litigation. It is important, then, to recognise that, regardless of which form of dispute resolution process is ultimately used, there is also an important choice to be made at contract formation stage between the various forms of *final* dispute determination. In respect of final determination, litigation did not tend to be preferred by Survey Respondents, and expert determination and arbitration were considered favourably. See paragraph 19.1.

10.7.3 The **most important factor considered to be important in an arbitrator** was technical specialist expertise. See paragraph 19.1.2.

10.7.4 The **perception of relative cost** was that court was the most expensive form of dispute resolution, then arbitration, with mediation as the least expensive form. See paragraph 0.

10.7.5 The Survey provides some feedback on **perceptions of potential advantages of arbitration** at paragraph 19.3. Speed was generally favoured. There was a strong feeling that confidentiality, procedural flexibility and technical specialism were important advantages. There was some support for quick finality as an advantage of arbitration. There was less importance put on user friendliness and party control.

10.7.6 The general **perception of the likely outcome of an arbitration** was that arbitrators tend to undertake a detailed and reasoned analysis, rather than to split their finding 'down the middle' or simply to find for one party over the other. See paragraph 19.3.3.

4 - The occurrence of arbitrations in Scotland

11 HOW MANY ARBITRATIONS TOOK PLACE IN SCOTLAND IN THE RELEVANT PERIOD?

11.1 The heart of our survey, is an analysis of the number of arbitrations occurring. Whilst the counting of arbitrations relies on an analysis of information voluntarily provided by Survey Respondents, we have adopted a methodology to provide the best guidance on the occurrence of arbitrations, which is further explained in Annex A. To avoid double counting, we have relied on arbitrators as the primary source for our conclusions on volumes, using other sources (such as party representatives) as a cross check. Whilst we cannot say that the numbers reported are precise numbers (which would not be a realistic objective given the confidential nature of the process), we feel that our methods provide the optimum approach to reporting on this question.

11.2 We have concluded that, during the Relevant Period:

11.2.1 There were **22 arbitrations** (or thereby) which occurred with a seat in Scotland.

(a) Of those who completed the Survey, 4 arbitrators reported that they had been appointed as arbitrators which had commenced during the Relevant Period in 1 arbitration. 6 had been appointed twice. 2 had been appointed 3 times.

(b) We recognise that our survey has focused on obtaining responses from arbitrators known to be practicing in Scotland. It is of course possible that there were some additional arbitrations occurring with a Scottish seat, in which arbitrators outwith Scotland were appointed. Our survey was distributed to many arbitrators outwith Scotland. Of course there may have been appointments of particular arbitrators from other jurisdictions who did not respond to the Survey. All 8 Arbitral Appointment Referees (some of which include panels of arbitrators outwith Scotland), were asked to circulate the survey, and agreed to do so. We recognise that there may be arbitrators who are less well known to the Scottish arbitral community, who were appointed during the Relevant Period in arbitrations with a Scottish seat, which are not included in the figures.

(c) Of those arbitration *representatives* who completed the Survey, 40 arbitrations were reported with a seat in Scotland (12 reported 1, 5 reported 2, and 6 reported 3). This suggests that the assessment of 22 arbitrations may be a conservative reflection of the volume of arbitrations. We have however refrained from founding our assessment of arbitration numbers on representatives because it is recognised that representatives may report for different parties in the same arbitration. On the assumption that there are two parties to every arbitration, a report by representatives of 40 arbitrations is a reasonable cross check to the assessed figure of 22.

(d) The 8 Arbitral Appointment Bodies reported that they had appointed 27 arbitrators or tribunals during the Relevant Period (3 had appointed nil, 1 had appointed 1, 2 had appointed 2, 1 had appointed 7 and 1 had appointed in excess of 15). See also paragraph 17.1.1 below. However again these figures can only be secondary data in considering the numbers of arbitrations which occurred in Scotland for three reasons. Firstly the numbers will overstate the numbers of Scottish seat Arbitrations because several of the organisations appoint across the UK (for instance see comments by one such body at paragraph 17.5.3). Secondly the numbers will understate the volume of Scottish seat arbitrations because arbitrators will have been appointed during the Relevant Period directly by agreement between the parties, without referral to an appointing body. See for instance paragraph 17.5.4. Thirdly there are other appointing bodies who may also have been used. We do not report on the individual statistics for particular bodies, because we are grateful to the relevant bodies for sharing data with us, and it is not intended that this Survey provides a ranking between different bodies, who operate in different circumstances. We can comment that the body which reported in excess of 15 appointments appoints arbitrators across the UK. The body which reported 7 appointments, is a Scottish based body that would be expected to appoint entirely or at least primarily in Scottish arbitrations. The question we asked of Arbitral Appointment Referees was "*How many arbitrators/arbitral tribunals has your organisation appointed during the Relevant Period*?" On reflection, we could have asked a further question to identify arbitrations with a seat other than Scotland, and we intend to follow this course in future Surveys.

(e) Of those experts instructed to give evidence in arbitrations during the Relevant Period who responded, 8 were instructed to give evidence in 2 arbitrations and 2 report being instructed to give evidence in a single case. In other words experts reported a total of 18 arbitrations in which they were involved.

(f) By explaining the wider statistics, we hope that readers will have a better feel for the underlying evidence regarding numbers, and can draw their own deductions as to whether it might be concluded that there were in fact greater than 22 Scottish seat arbitrations.

(g) The Survey feels that the best pragmatic assessment of the underlying data, is that 22 arbitrations (or thereby) occurred during the Relevant Period, with a Scottish seat. It can be reported therefore with some confidence that there were at least 22 arbitrations with a Scottish Seat.

11.2.2 There were **36 arbitrations** (or thereby) which occurred with a seat outwith Scotland, involving respondents who were generally practising primarily in Scotland.

(a) Of those who completed the Survey, 4 arbitrators reported that they had been appointed as arbitrators which had commenced during the Relevant Period in 1

arbitration. 1 had been appointed twice. 2 had been appointed 3 times. 1 was appointed 4 times. 1 was appointed 10 times. 1 was appointed in excess of 10 times. The person who reported appointments in excess of 10 arbitrations with a seat outwith Scotland is a Scottish lawyer. The person who reported 10 arbitrations is an English lawyer, with an interest in Scotland.

(b) Of those arbitration representatives who completed the Survey, 14 arbitrations were reported with a seat outwith Scotland (9 reported 1, 1 reported 2, and 1 reported 3).

(c) We know from comments that responding arbitrators conduct arbitrations for instance in Middle East countries such as Dubai, which are included in these figures.

(d) There is no appropriate comparison to be made between the 36 arbitrations outwith Scotland and the 22 in Scotland simply on account of the pool of respondents being primarily those practising in Scotland. So the 36 represents a snapshot of non Scottish arbitrations in which there was some Scottish link on the part of the arbitrator. By contrast, the 22 arbitrations finding is more likely to be representative of the actual numbers of arbitrations in Scotland.

11.3 Given the primary reliance on the responses of arbitrators for the data on the volume of use of arbitration, readers may find it helpful to know that the arbitrators who responded as arbitrators were spread across disciplines as described in paragraph 12.5 below.

12 WHAT WAS THE NATURE OF ARBITRATIONS WHICH TOOK PLACE IN THE RELEVANT PERIOD?

12.1 We now turn to some more detailed conclusions about the nature of arbitrations occurring with some Scottish interest.

12.2 Where did the parties come from?

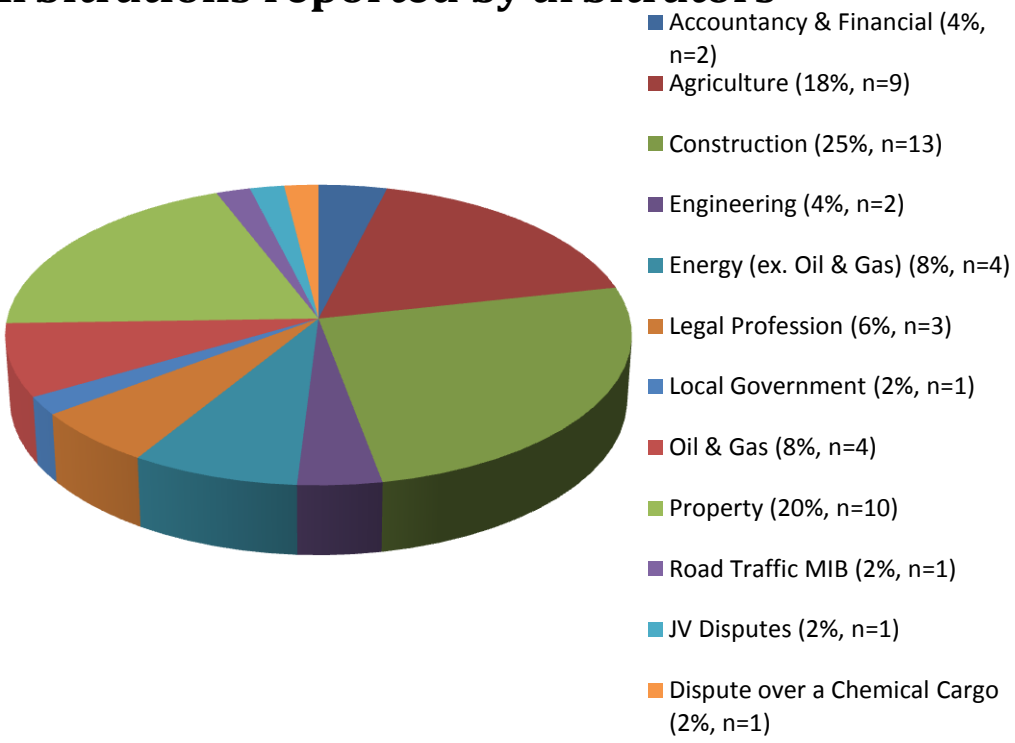
12.2.1 In the data reported by arbitrators in 16 arbitrations all the parties were registered or resident in Scotland. In 1 arbitration some of the parties were registered or resident in Scotland, and in 30 arbitrations there were no parties registered or resident in Scotland.

12.2.2 In the data reported by representatives, 13 of these had all parties registered or resident in Scotland. 11 reported that some but not all parties were registered or resident in Scotland and 5 reported that no parties were resident or registered in Scotland.

12.3 **Subject Matter**

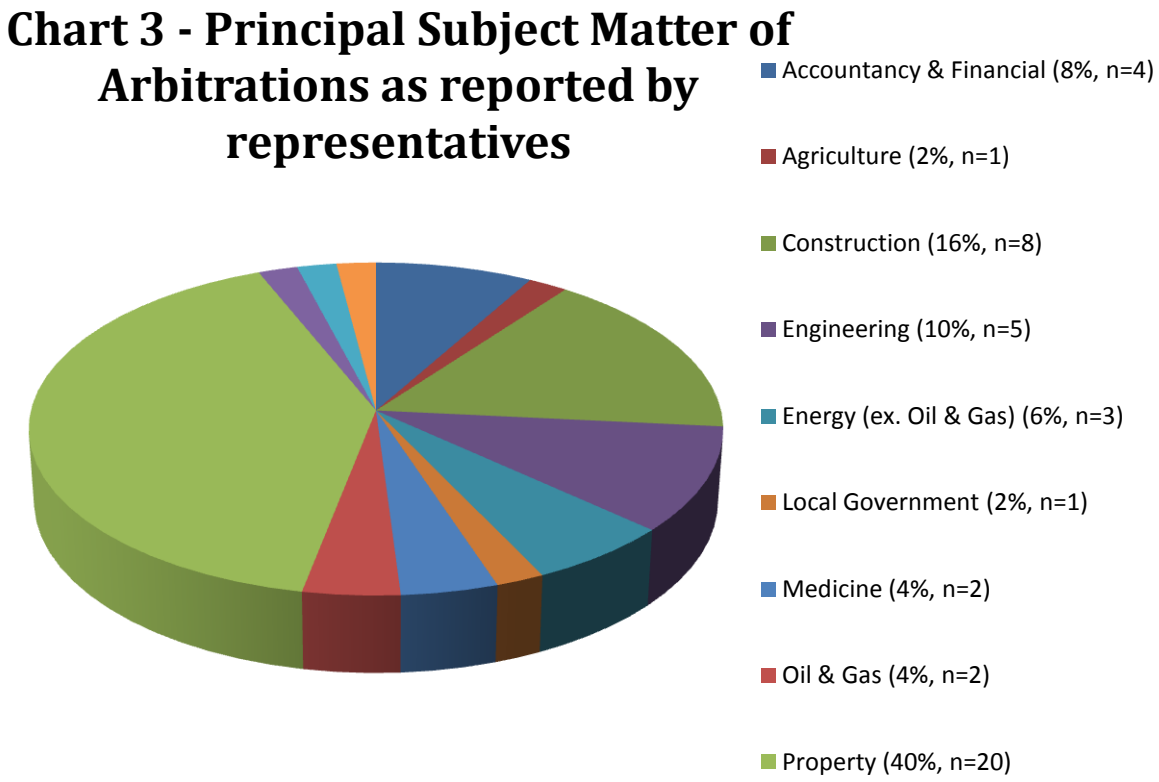
12.3.1 The following pie chart presents the distribution of principal subjects of arbitrations during the Relevant Period as reported by arbitrators. As is evident from the pie chart below, arbitrators reported a range of subjects of arbitration, the majority concerning Construction (25%, n=13), Property (20%, n=10), and Agriculture (18%, n=9).

Chart 2 - Principal Subject Matter of Arbitrations reported by arbitrators



12.3.2 We know from comments that at least one of these arbitrations was a family dispute under the FLAGS rules (this may have been reported in the legal profession category).

12.3.3 The following pie chart presents the subject matter of arbitrations as reported by representatives. The majority of arbitrations concerned Property (40%, n=20), followed by Construction (16%, n=8), and Engineering (10%, n=5).



12.3.4 It is not surprising to see construction and property dominating the figures as the subject matter of arbitration. Arbitrators report a significant use of arbitration to resolve agriculture disputes (perhaps reflecting that two of the statutory Arbitral Appointment Referees are agriculture bodies).

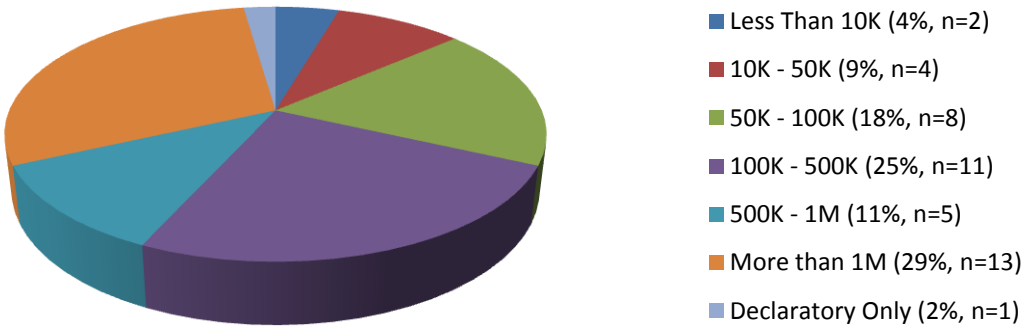
12.3.5 We commented in the introductory section (paragraph 7) on areas which might consider the use of arbitration as providing resolution by appropriate technical experts and we have separately reported on the particular initiative of FLAGS in the use of arbitration in family disputes.

12.4 **Value**

12.4.1 Arbitrators reported 14 arbitrations with a value under £10k, 7 arbitrations in the range £10-50k, 9 arbitrations in the range £50-100k, 9 arbitrations in the range £100-500k, 2 arbitrations in the range £500k-£1M and 19 arbitrations with a value in excess of £1M. This suggests a wide spread of value in disputes being referred to arbitration with significant numbers of arbitrations both at the low and high end of value.

12.4.2 The following pie chart presents the value of arbitral disputes as reported by representatives. Just under a third of disputes were valued at more than 1M (29%, n=13), while a quarter of disputes were valued in the 100K to 500K range (25%, n=11). Eight disputes were valued in the 50K – 100K range (18%, n=8), and a further five in the 500K to 1M range (11%, n=5). The remaining categories made up less than 10% each of arbitral disputes.

Chart 4 - Value of Arbitral Disputes reported by representatives



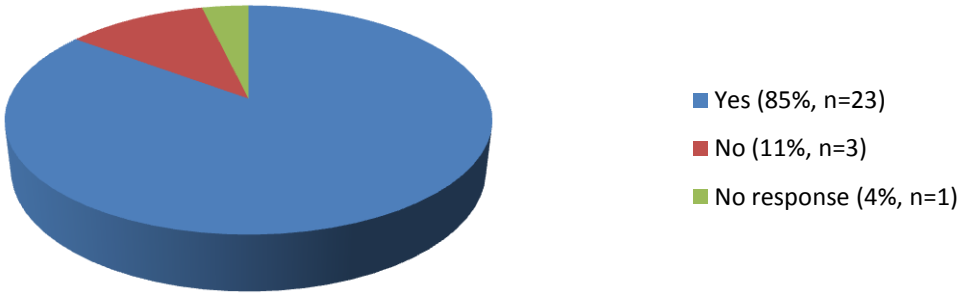
12.4.3 The primary data from arbitrators (which is likely to most compressively reflect the occurrence of arbitrations generally) shows that whilst there was a high distribution of arbitrations at the top end of the scale (greater than £1M), there was also a high distribution at the lower end (less than £10k). The fact that representatives do not report high numbers of arbitrations at the lower end is not surprising, since it may be that such arbitrations proceeded without representation by the body of representatives who were questioned in this Survey.

12.5 **Arbitrators**

12.5.1 Who are the people who make up our pool of arbitrators? Of those arbitrators responding to the Survey, we have the following data.

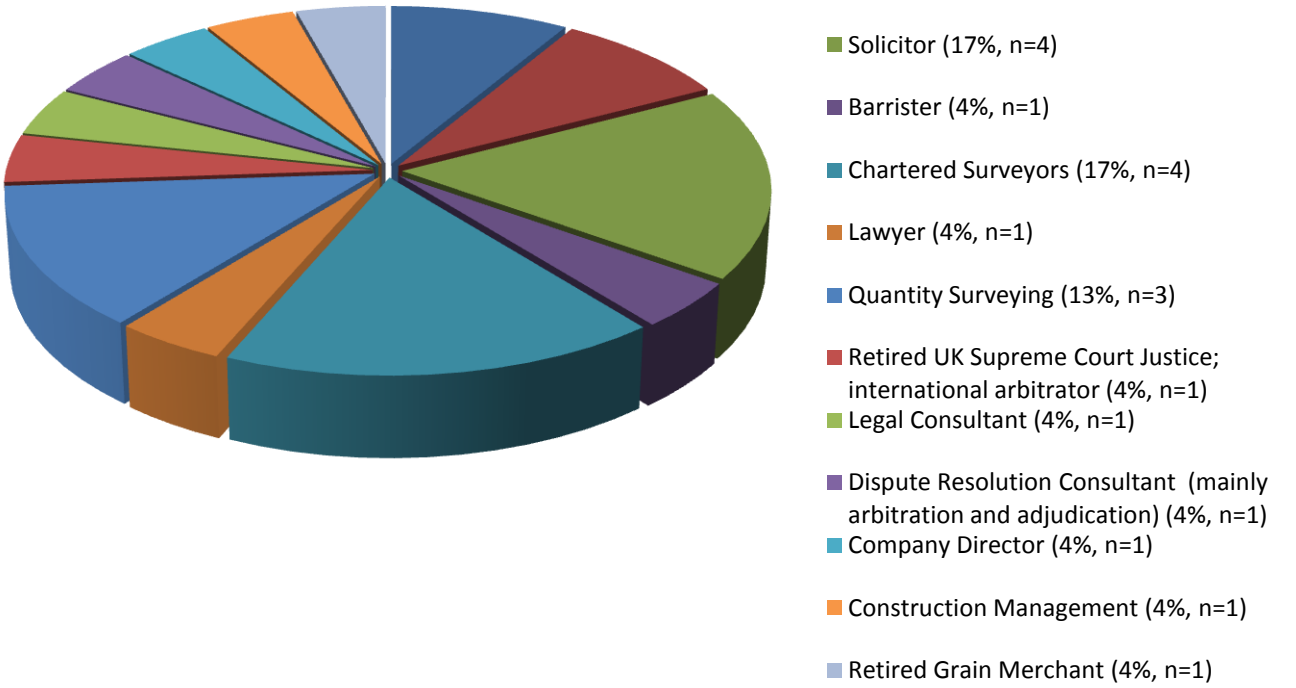
12.5.2 Of those arbitrators responding to the Survey, we have the following data.

Chart 5 - Arbitrators with Scotland as Primary place of Business



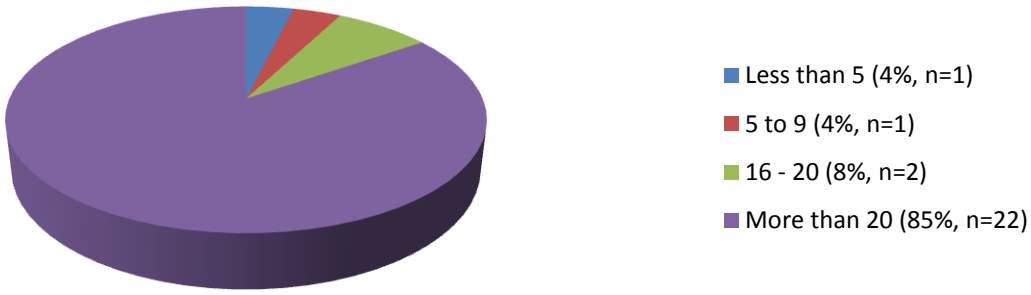
12.5.3 The principal profession of responding arbitrators are shown in the following pie chart. Respondents described themselves as belonging to a range of professions, and as is evident from the figure below, the majority identify themselves as Solicitors (17%, n=4), Chartered Surveyors (17%, n=4), and Quantity Surveyors (13%, n=3)

Chart 6 - Arbitrators' Principal Profession



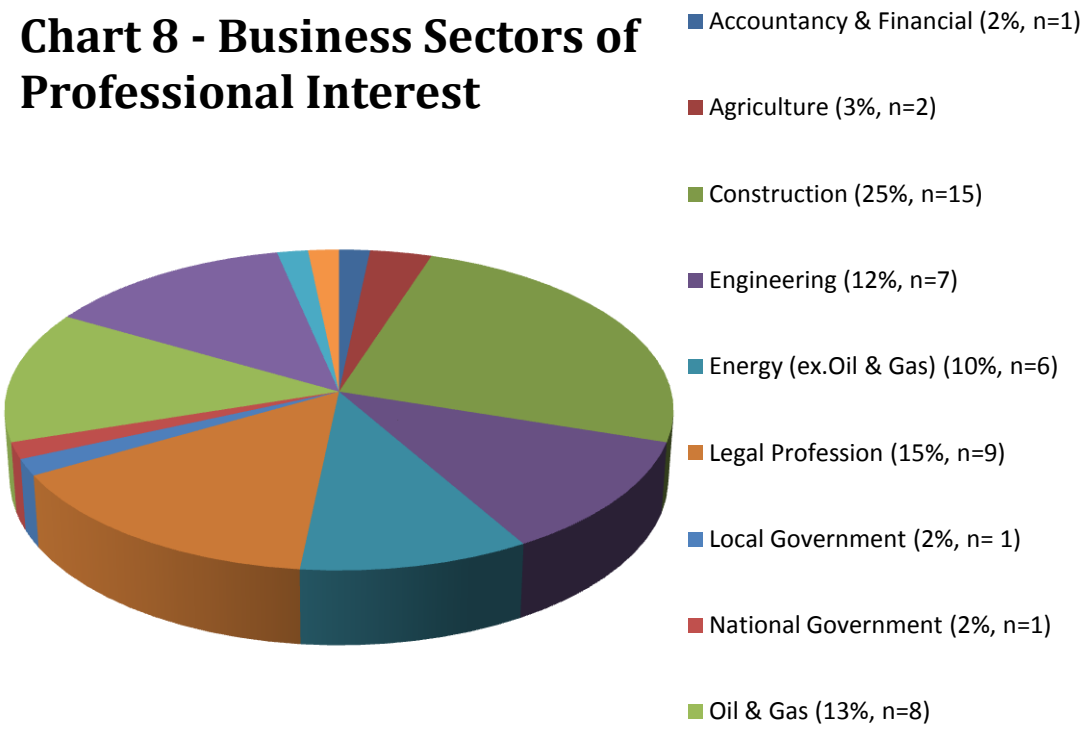
12.5.4 The pie chart below shows number of years qualified in principal profession as reported by responding arbitrators. As is clear from the chart, the majority of respondents (85%, n=22) have been qualified for more than 20 years. That is not surprising. One respondent did not specify number of years qualified.

Chart 7 - Arbitrators: Number of Years Qualified



12.5.5 The pie chart below presents those sectors in which arbitrators' principal interests lay. Arbitrators were free to indicate more than one area of interest. Arbitrators reported a variety of business interests. As is evident from the pie chart, the majority of arbitrators have an interest in the construction sector (25%, n=15), with smaller proportions having an interest in the Legal Profession (15%, n=9), Oil & Gas (13%, n=8), Engineering (12%, n=7), and Energy (10%, n=6).

Chart 8 - Business Sectors of Professional Interest



12.5.6 We also report on the makeup of Arbitral Appointment Referee Panels at paragraph 17.2 below.

12.5.7 Two eminent judges have recently joined the body of arbitrators in Scotland, being Rt. Hon. Lord Hope of Craighead QC, who retired from the Supreme Court, and The Right Honourable Lord Hamilton, who was previously Lord Justice General of Scotland and Lord President of the Court of Session.

12.5.8 Perhaps an optimum pool of arbitrators in practice might be an appropriate mix of various professions, together with a range from venerable practitioners with a wealth of experience to younger practitioners in current commercial practice.

12.5.9 A number of comments were made by arbitrators responding to the Survey and these are of interest in relation to the thinking of arbitrators and to the process more widely.

(a) "*The evidence is growing that the Scottish legal professions have not understood the 2010 Act and are continuing to do things the "old way" e.g. this was evident at the SAC Training Day on 4th September [2014]. In addition, I have heard some horrifying anecdotes in this regard.*"

(b) "*Arbitrators need to take a firm grip of procedure; order concise statements of position limited to a specific number of words. Given free rein parties' advisers, particularly solicitors, submit very lengthy submissions of generally poor quality increasing costs and reducing the prospects of focussing on the real issues and getting to the right answer*."

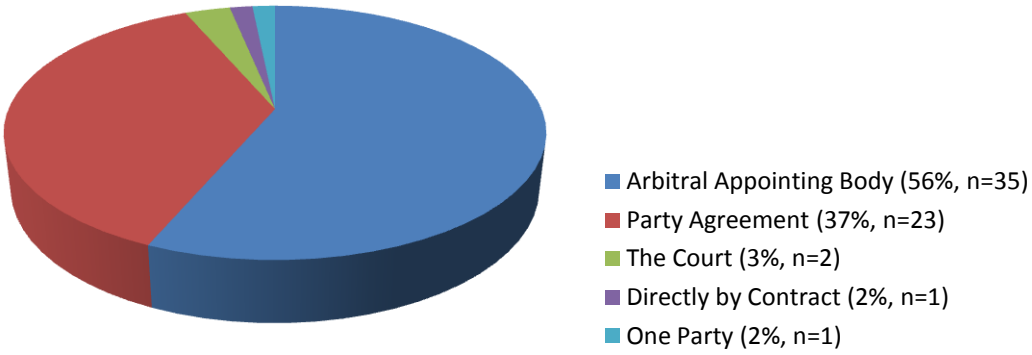
(c) "*I have conducted circa 6 arbitrations since the 2010 Act came into force. I feel that party advisors are more confident about utilising arbitration. I perceive a willingness to provide arbitration as a dispute resolution method in contracts. I am aware that there are some suggestions as to minor amendments to the 2010 Act. None of the issues have affected the arbitrations I have acted in*."

(d) "*We must hold firm to the underlying principles of arbitration. It may seem very critical to say this but there are those who are involved in arbitration work who are treating it more like formal litigation proceedings. Sad but true*."

12.6 **Method of appointment**

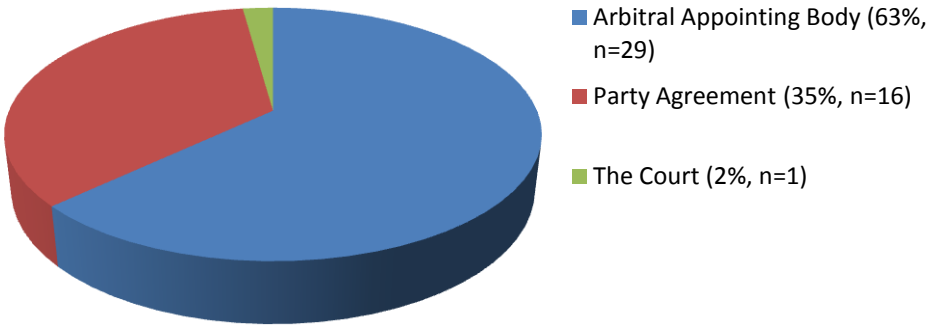
12.6.1 The following graph presents categories of arbitration appointments as reported by arbitrators. As is clear from the chart, the majority of arbitrator appointments were made by an Arbitral Appointing Body (56%, n=35), with party agreement being the next most common method of appointment of arbitrators (37%, n= 23).

Chart 9 - Method of appointment of arbitrators as reported by arbitrators



12.6.2 The following pie chart presents categories of arbitration appointments as reported by representatives. As is clear from the chart, the majority of arbitrator appointments were made by Arbitral Appointing Body (63%, n=29), with party agreement being the next most common method of appointment of arbitrators (35%, n= 16)

Chart 10 - Method of appointment of arbitrators as reported by representatives



5 - Procedural trends in Scottish Arbitration

13 HOW DO ARBITRATIONS TEND TO OPERATE?

13.1 We turn now to our analysis of the procedural approaches commonly taken in arbitrations with a seat in Scotland, and in arbitrations outwith Scotland where there is some Scottish interest.

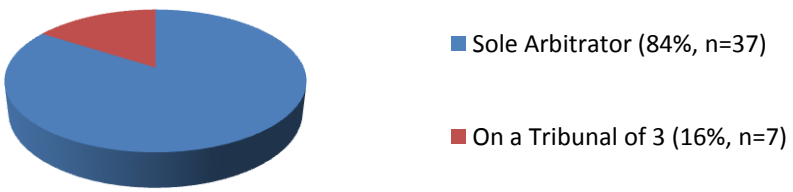
13.2 Arbitrators and Tribunals

13.2.1 The following pie chart represents the proportions of arbitrations where arbitrators were appointed singly or as part of a tribunal, as reported by arbitrators. The data indicates that arbitrators are more often appointed as sole arbitrator (65%, n=41), than as part of a tribunal (35%, n=22).

Chart 11 - Number Arbitrations as Sole Arbitrator or on a Tribunal of Three, reported by arbitrators

13.2.2 The following pie chart represents the proportions of arbitrations where arbitrators were appointed singly or as part of a tribunal of three, reported by representatives. The data clearly indicates that arbitrators were more often appointed as sole arbitrator (84%, n=37), than as part of a tribunal (16%, n=7).

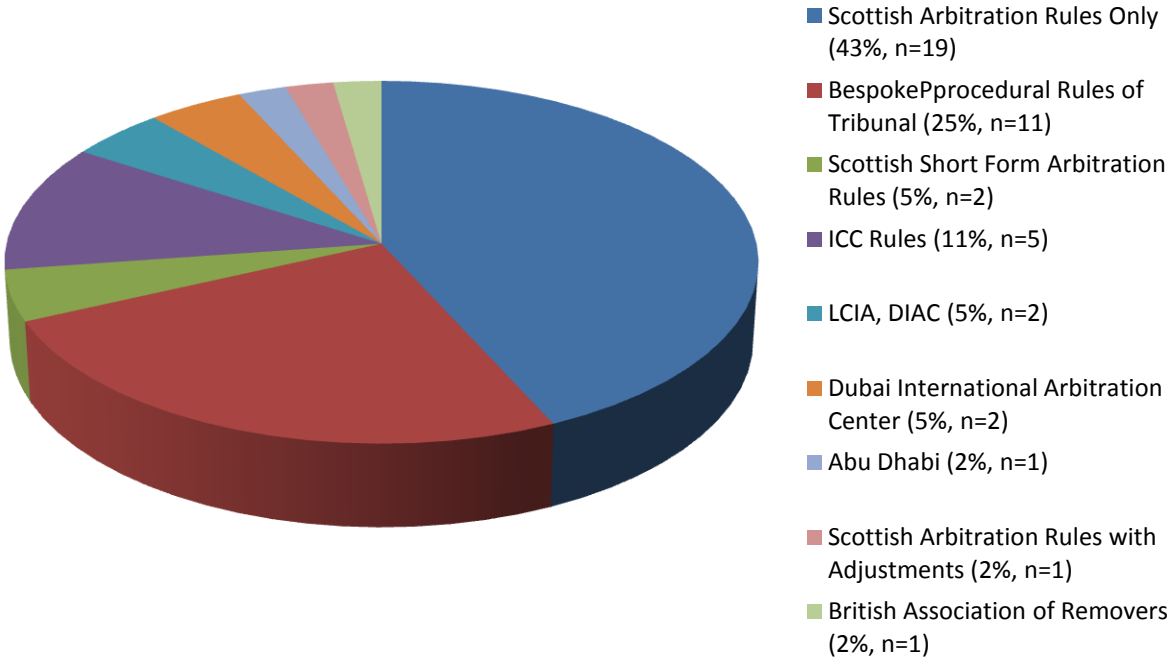
Chart 12 - Number Arbitrations as Sole Arbitrator or on a Tribunal of Three, reported by representatives



13.3 **Procedural Rules**

13.3.1 The following pie chart represents the distribution of rules used in arbitrations commenced during the Relevant Period, as reported by arbitrators. The majority of arbitrations were governed by Scottish Arbitration Rules only (43%, n=19), and Bespoke Procedural Rules of Tribunal (25%, n=11), with the next most frequently used being ICC Rules (11%, n=5).

Chart 13 - Procedural Governance of Arbitrations



13.3.2 The reporting indicates that the Scottish Arbitration Rules are generally not being amended and default rules disapplied.

13.4 **Procedural approach**

13.5 The following results represent the proportion of arbitrations involving different categories of procedure.

	Numbers reported by Arbitrators
Documents Only	28
Preliminary Hearing	22
Splitting of different elements of the dispute (bifurcation)	19
Oral legal submissions, but no factual hearing	9
Full hearing with evidence	22

13.6 The following results represent the proportion of arbitrations involving different categories of procedure as reported by experts.

	Numbers Reported by Experts
Documents Only	1
Preliminary Hearing	7
Hot tubbing	2
Joint Meeting of experts	7
Oral legal submissions, but no factual hearing	1
Full hearing with evidence	7

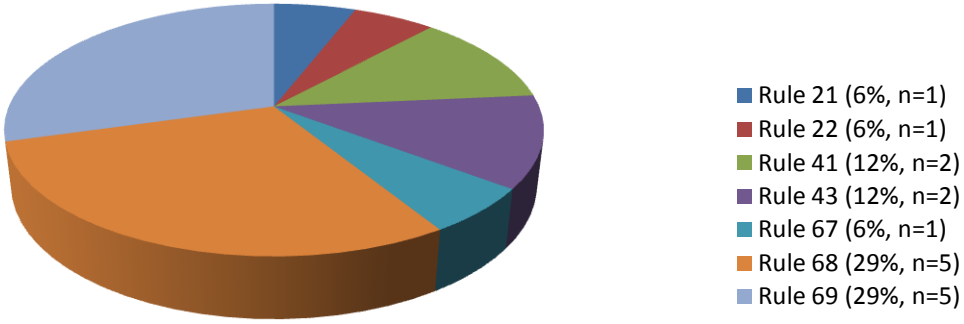
14 TO WHAT EXTENT DO THE SCOTTISH COURTS GET INVOLVED IN ARBITRATION?

14.1 With respect to frequency of court involvements with arbitrations, only one such occasion was noted by arbitrators, and that pertaining to Scottish Arbitration Rules, Rule 21 (pre-award appeal on jurisdiction). It may not be surprising that arbitrators may not report all such occurrences, since they may not be involved in such challenges which may often arise post award.

14.2 Some instances of court intervention were reported by representatives who acted on behalf of a party in a court challenge to arbitration, but were not involved in the underlying arbitration. Of such representatives reporting, 10 representatives reported one such arbitration 1 reported 2 and 1 reported 3.

14.3 The pie chart below presents the nature of court involvement in arbitrations during the Relevant Period, as reported by Survey Respondents. These statistics report 17 occurrences of court interventions, but of course representatives for different parties may have been reporting on the same instances of court intervention, and the figures must be read in that context. Almost a third of all court involvements concerned Rule 68 (challenge post award on serious irregularity, 29%, n=5) and Rule 69 (challenge post award on legal error, 29%, n=5).

Chart 14 - Frequency and Nature of Court Involvement in Arbitrations

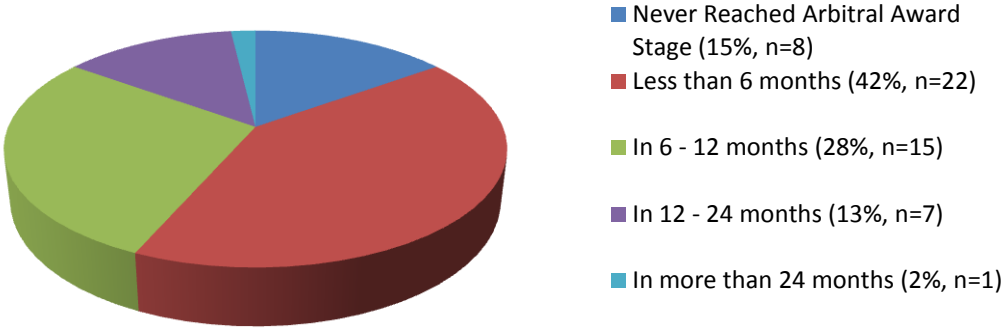


15 ARBITRATION OUTPUT

15.1 Time frames

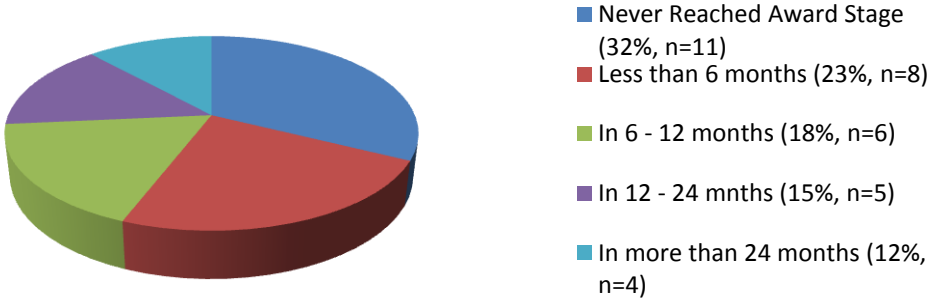
15.1.1 The following pie chart presents the relative time taken for arbitrations to reach the award stage, as reported by arbitrators. As can been seen from the chart, over a third of arbitrations reached the award stage in less than six months (42%, n=22), with the next most frequent duration to award stage being in six to twelve months (28%, n=15). Eight arbitrations (15%) never reached the arbitral award stage, while seven (13%) reached the award stage in twelve to twenty-four months.

Chart 15 - Time Frame of Arbitral Award, as reported by arbitrators



15.1.2 The following graph presents the relative time taken for arbitrations to reach the award stage as reported by representatives. As can been seen from the chart, almost a third of arbitrations never reached the award stage during the relevant period (32%, n=11), with the next most frequent duration to award stage being less than six months (23%, n=8). Six arbitrations (18%) reached the arbitral award stage in six to twelve months, while five (15%) reached the award stage in twelve to twenty-four months.

Chart 16 - Time taken to reach Arbitral Award as reported by representatives



6 - Arbitral Appointing Bodies

16 GENERAL COMMENTS ON ARBITRAL APPOINTING BODIES

16.1 Parties may decide to provide in their contracts for any organisation, or person, to act as the appointing body or person to appoint their arbitrator or tribunal, where parties are unable otherwise to agree on the appointment of an arbitrator. It is of course important to check with the organisation or person that they are able and willing to take on such a function, and at what cost. A well considered arbitration clause should provide for such an appointment mechanism, because there is no guarantee, when a dispute arises, that parties will be able to agree to appoint a particular person. A mechanism is required so that the arbitration does not get stuck before it has even begun.

16.2 That said, help is at hand through the Scottish Arbitration Rules. If an arbitrator is to be appointed, Rule 6 provides that each party may appoint an individual arbitrator, and the two arbitrators appointed may then appoint the remaining (usually the third) arbitrator. Rule 7 provides that if the appointment of an arbitrator otherwise fails, appointment can be made by one of the statutory Arbitral Appointment Referees.

16.3 The Arbitral Appointment Referees are currently (1) the Agricultural Industries Confederation Limited; (2) the Chartered Institute of Arbitrators; (3) the Dean of the Faculty of Advocates; (4) the Institution of Civil Engineers; (5) the Law Society of Scotland; (6) the Royal Incorporation of Architects in Scotland; (7) the Royal Institution of Chartered Surveyors; and (8) the Scottish Agricultural Arbiters and Valuers Association.

16.4 As well as these statutory Referees, other bodies which will appoint arbitrators include (1) the Scottish Arbitration Centre; (2) the Family Law Arbitration Group Scotland; and (3) the Institute of Chartered Accountants of Scotland.

16.5 Certain of these bodies are also directly engaged in the promotion of arbitration, including the Chartered Institute of Arbitrators (which operates in Scotland through its Scottish branch), the Scottish Arbitration Centre, the Law Society of Scotland and the Faculty of Advocates.

16.6 For reasons explained previously in this Report, we do not consider that an appropriate measure of the number of arbitrations occurring, is the number of appointments made by these bodies. Parties often manage to appoint arbitrators by agreement. Practitioners who regularly engage in arbitration know the pool of arbitrators, and tend to prefer to agree to appoint an arbitrator in whom they are content to place reliance, rather than lose control of who the arbitrator appointed by a third party body may be.

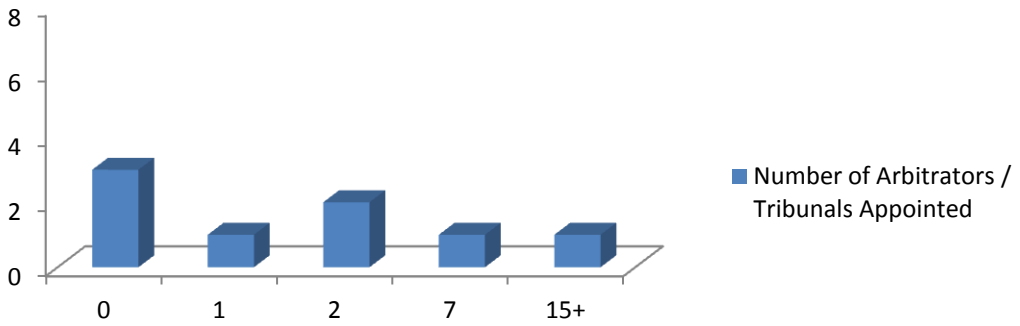
16.7 However the panels of arbitrators provided by these bodies are a source from which parties may choose to select arbitrators, and these bodies are directly involved, to varying extents, in the process of arbitration. In this chapter, we explore some particular issues in the operation of these organisations.

17 THE PRACTICE OF THE ARBITRAL APPOINTING BODIES

17.1 Numbers

17.1.1 The following graph presents the number of arbitrators / tribunals appointed by nominating bodies during the relevant period. As shown below, three nominating bodies report that no appointments were made in the relevant period (37%), one nominating body made only a single appointment (12.5%), two report making two appointments (25%), one nominating body reports making seven appointments (12.5%), while another reports making more than 15 appointments (12.5%).

Graph 17 - Number of Arbitrators / Tribunals Appointed



17.2 Panels

17.2.1 Some of the Arbitral Appointing Bodies retain panels of arbitrators, from which they appoint, adopting an appropriate mechanism, often using a form of cab rank rule. Other bodies appoint on a case by case basis, selecting a particular person to act as arbitrator in a particular case.

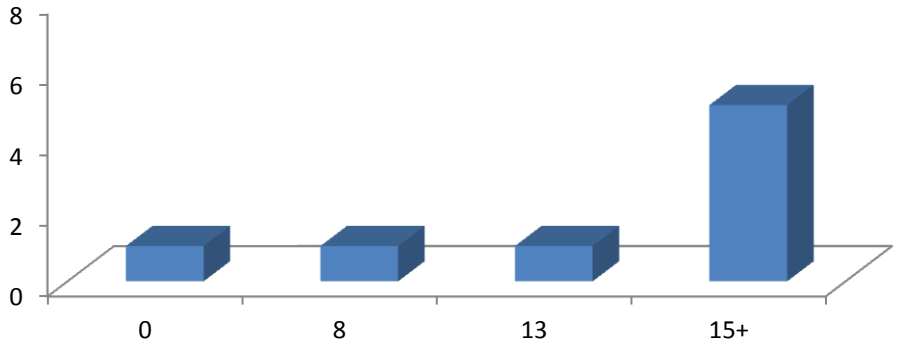
17.2.2 The Scottish Arbitration Centre is an appointing body, but is not one of the eight official Arbitral Appointing Referees. It can make appointments, but it does not have a panel. Its independent committee has a free hand in determining who is an appropriate arbitrator for a dispute. The SAC has formal directions and guidance for its appointment service.

17.2.3 The Scottish Branch of the Chartered Institute of Arbitrators appoints arbitrators from its Panel on the basis of its own guidance notes.

17.2.4 The following graph presents the number of arbitrators on the panel of nominating bodies during the Relevant Period. As shown below, five nominating bodies report having more than fifteen arbitrators (62%), one nominating body reports having thirteen arbitrators (12.5%), one reports having eight arbitrators (12.5%), and one

nominating body reports having no arbitrators (12.5%), on their panel (see comments above that some appointing bodies do not have panels).

Graph 18 - Number of Arbitrators on Panel



17.2.5 In terms of the breakdown of panels by discipline:

(a) Most bodies do not publish lists of arbitrators on their panels. It is felt that appointing bodies *should* consider providing such lists publicly on their websites, as it is important for parties wishing to choose an Arbitral Appointment Referee, to have some insight into who is likely to be appointed by that body. The list does not, of course, need to show who is likely to next be appointed, but should, in our view, show who is on the list.

(b) The Chartered Institute of Arbitrators (Scottish Branch) publishes its arbitrator panel on its website.

(c) By way of overview the disciplines represented on panels are distributed as follows:

(i) One body reported it has in excess of 10 **architects** on its list.

(ii) One body reported it has in excess of 10 **engineers** on its list. Another body has two.

(iii) One body reported it has in excess of 10 **lawyers** on its list, one 6, one 5, one 4 and one 1.

(iv) One body reported it has in excess of 10 **quantity surveyors** on its list, one 8 and one 2.

(v) One body reported it has one **oil and gas professional** on its list.

(vi) One body reported it has in excess of 10 **surveyors** of various categories on its list.

(vii) One body reported it has in excess of 10 **chartered surveyor or agricultural consultants** on its list.

(viii) One body reported it has 8 **farmers or grain trade professionals** on its list.

(ix) One body reported it has one **construction management professional** on its list.

(x) FLAGS has 29 **family law professionals** on its list.

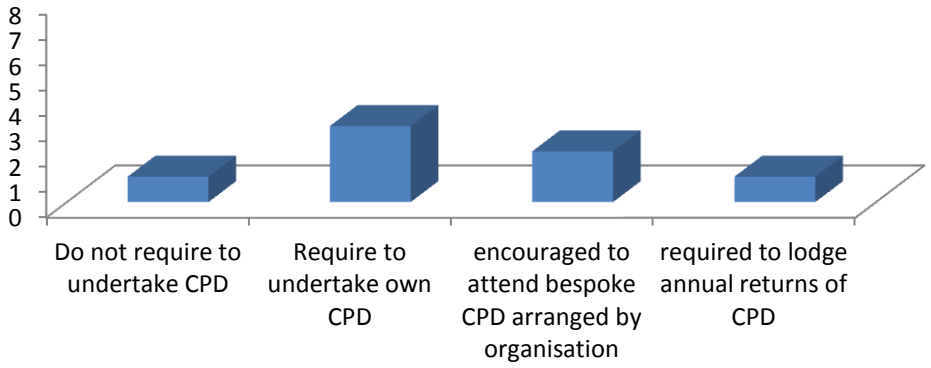
17.3 **Complaints**

17.3.1 No complaints to the Arbitral Appointing Bodies were reported during the Relevant Period.

17.4 **CPD requirements for panels**

17.4.1 The following graphs present the requirements of arbitrators on the panel of Arbitral Appointing Bodies to comply with continuing professional development ("**CPD**") requirements. As shown below, three Arbitral Appointing Bodies require the panel to undertake their own CPD (43%), two encourage the panel to attend bespoke CPD (28.5%), one requires the panel to lodge annual returns of CPD (14.2%), and one does not require the panel to undertake CPD (14.2%).

Graph 19 - Requirements of Abitral Panel



17.5 **General comments by Arbitral Appointment Bodies**

17.5.1 One body commented that they had "*not received any request for a referral since we became an Arbitral Nominating Body*." Whilst we will not attribute data to particular respondents, we would comment that some Arbitral Appointing Bodies are more specialist bodies than others.

17.5.2 One body reported on the particular underlying statutory regime that applies to its area of business, and felt that better alignment between that regime and the Act might increase the use of arbitration.

17.5.3 Consistent with a comment made above, one body which had reported that it had appointed two arbitrators or tribunals confirmed that these were in arbitrations outwith Scotland.

17.5.4 Richard Farndale, who as well as an author of this Survey, administers appointments by CIArb (Scotland), commented "*It is important to recognise that arbitrators are increasingly selected by agreement, so that the numbers of appointments by appointing bodies is not necessarily reflective of volumes of use. Listing on a panel (as the CIArb does on its website) is an important source for users of arbitration looking to appoint arbitrators*."

7 - Attitudes to arbitration

18 **THE USE OF ARBITRATION CLAUSES**

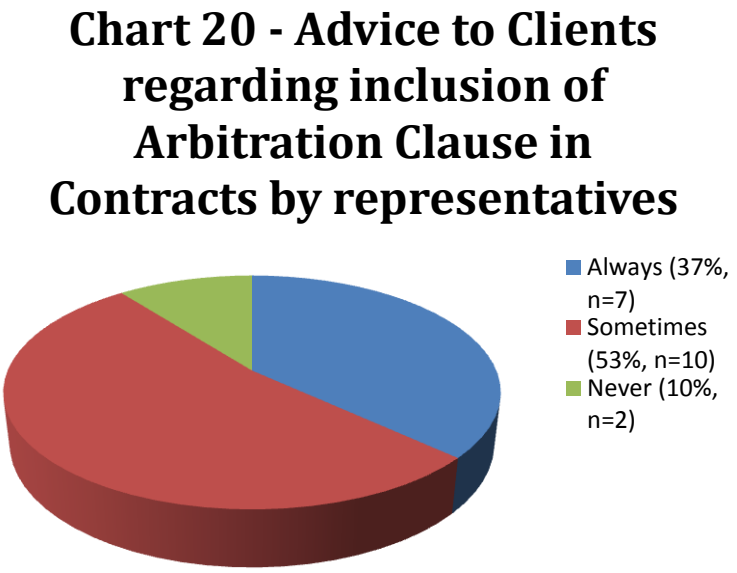
18.1 The main mechanism by which parties select arbitration for resolution of disputes arising (thereby replacing the default role of the courts) is by the inclusion in relevant agreements of an arbitration clause.

18.1.1 We commented at paragraph 9 on the ingredients for an appropriate arbitration clause.

18.1.2 The Scottish Arbitration Centre has procured the agreement of Scottish Government to include arbitration clauses in all Scottish Government contracts. It also procured the use of arbitration clauses in Commonwealth Games contracts. It is also understood that the Scottish Building Contracts Committee intends to include arbitration clauses in its next issue standard form contracts.

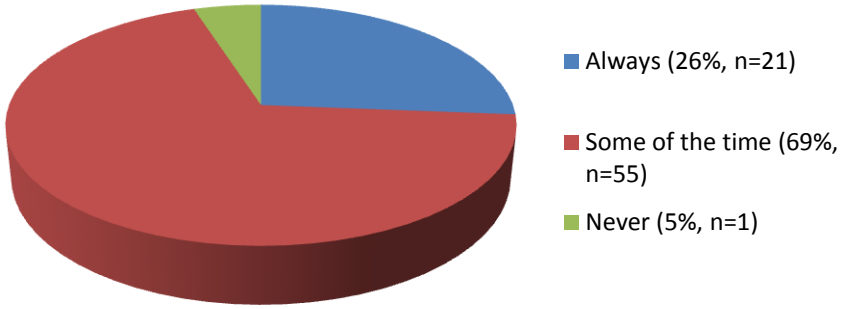
18.1.3 In terms of the use of arbitration, it might be anticipated that there will be a time lag after which any significant increase in the provision of arbitration clauses in contracts will give rise to an increase in the use of arbitration.

18.1.4 The pie chart below records representatives' tendency to advise clients with respect to the inclusion of an arbitration clause in contracts. Just over half of responses indicate that representatives sometimes advise inclusion of such a clause (53%, n=10), over a third of responses indicated that representatives always advise inclusion of such a clause (37%, n=7), whilst only two responded that they never advise inclusion of such a clause (10%).



18.1.5 The following pie chart shows the proportion of respondents in the 'other' category (ie those who did not report in a specific category such as arbitrator) who felt that it was Always, Sometimes, or Never appropriate to include an Arbitration clause in contracts. As can be seen from the chart, the majority of respondents felt it was Sometimes appropriate to include such a clause (69%, n=55), while just over a quarter felt it was Always appropriate to include such a clause (26%, n=21). Only one respondent felt it was Never appropriate (5%).

Chart 21 - Appropriate to Include Arbitration Clause in Contract (others)



18.1.6 It is encouraging that both advisers and those not directly involved in the arbitration process overwhelmingly feel it is appropriate to consider the inclusion of an arbitration clause. As indicated in the introductory section, we suspect that the optimum response should be to always consider alternative options to dispute resolution. Arbitration is one such option, amongst the armoury of dispute resolution methods.

18.1.7 It is important that clients are advised properly on the choice of dispute resolution options.

19 ATTITUDES TO DISPUTE RESOLUTION ALTERNATIVES

19.1 Preferred DRPs

19.1.1 Experts' perception of different forms of dispute resolution procedure were as follows.

(a) Adjudication was most often ranked as experts' 1st preference (50%, n=3). Adjudication was ranked as 2nd, 3rd and 4th preferred method of resolution with equal frequency (17%, n=1).

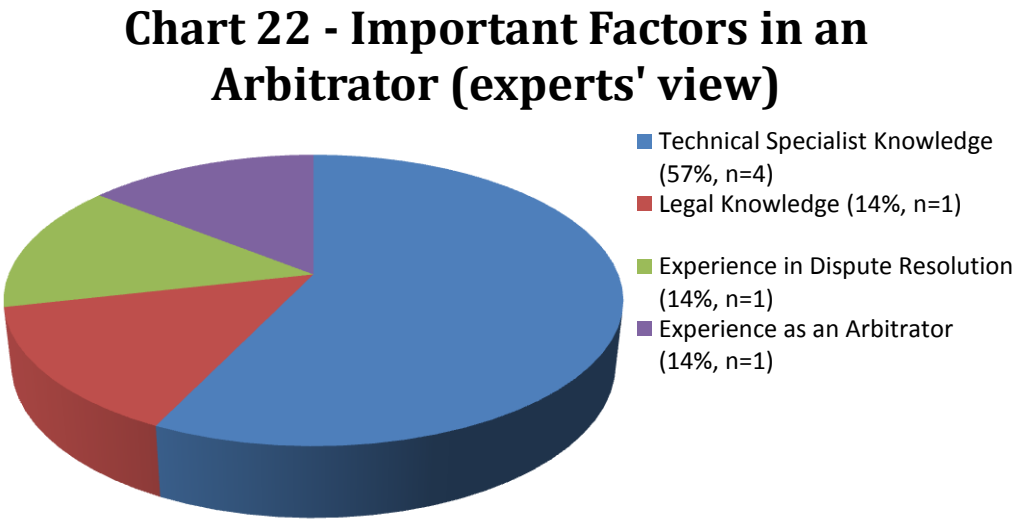
(b) Arbitration was rated as 1st and 3rd preference with equal frequency (28%, n=2), and as 2nd, 4th, and 5th preferred method half as frequently (14%, n=1).

(c) Litigation was never ranked as experts' 1st preference, but was ranked as 3rd and 5th preference with equal frequency (40%, n=2). Litigation was ranked as 4th preferred method only once (20%).

(d) Expert Determination was most often ranked as experts' 2nd and 4th preference (33%, n=2), followed by 1st and 3rd preference (17%, n=1).

(e) Mediation was most often ranked as experts' 2nd preference (43%, n=3), followed by 1st preference (28%, n=2). Mediation was ranked as 2nd, 4th and 5th preferred method of resolution with equal frequency (14%, n=1).

19.1.2 The following pie chart shows the most important factors in an arbitrator from the perspective of Experts. More than half of Experts felt Technical Specialist Knowledge to be the most important factor in an arbitrator (57%, n=4), while only one expert rated each other factor as the most important (14%, n=1).



19.1.3 An important source for perceptions on arbitration was provided by those Survey Respondents who are not directly involved in arbitration. In this category:

(a) Litigation was most frequently ranked as respondents 5th preference (31%, n=21), and was ranked as 1st preference somewhat less frequently (25%, n=17). The next most common rankings of litigation as a resolution method was 4th (19%, n=13), 3rd (15%, n=10) and 2nd (10%, n=7).

(b) Arbitration was most frequently ranked as respondents 3rd preference (40%, n=26). The next most common rankings of Arbitration as a resolution method

was 2nd and 4th (25%, n=16), followed by 5th (9%, n=6). Only one respondent ranked arbitration as their 1st preference (1.5%).

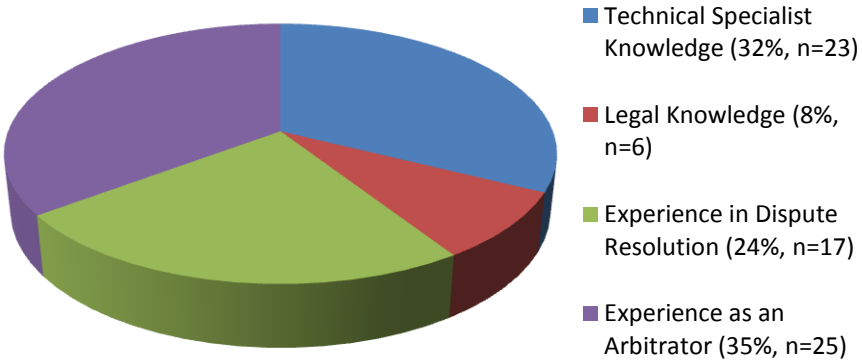
(c) Adjudication was most frequently ranked as respondents 1st preference (29%, n=16). The next most common rankings of Adjudication as a resolution method was 4th (27%, n=15), followed by 3rd (20%, n=11), 5th (13%, n=7), and 2nd (11%, n=6).

(d) Mediation was most frequently ranked as respondents 1st preference (45%, n=31). The next most common rankings of Mediation as a resolution method was 2nd (28%, n=19), followed by 3rd (19%, n=13), 5th (6%, n=4), and 4th (1%, n=1).

(e) Expert Determination was most frequently ranked as respondents 2nd preference (37%, n=22). The next most common rankings of Expert Determination as a resolution method was 3rd and 5th (19%, n=11), followed by 4th (15%, n=9), and 1st (10%, n=6).

19.1.4 The following pie chart shows the most important factors in an arbitrator from the perspective of respondents in the 'other' category. More than a third of respondents felt Experience as an Arbitrator to be the most important factor (32%, n=25), while just under a third rated Specialist Technical Knowledge as most important (32%, n=23). Experience in Dispute Resolution was rated as the most important factor by 24% of respondents (n=17).

Chart 23 - Important Factors in an Arbitrator (others)



19.1.5 The above figures show a perception that favours mediation and tends against litigation as an optimum method of dispute resolution. In terms of a method of final dispute resolution, Survey Respondents tended to favour arbitration and expert determination over court.

19.2 **Perception of cost**

19.2.1 Respondents in the 'other' category were asked to rank methods of formal resolution by order of cost. The following present each method of resolution and its proportionate rankings of cost (least to most expensive).

19.2.2 More than half of respondents ranked litigation as the most expensive resolution method (5th, 55%, n=35).The next most common ranking of litigation cost was as the second most expensive option (4th ,22%, n=14).

19.2.3 Almost half of respondents ranked Arbitration as the second most expensive resolution method (4th, 45%, n=30).The next most common ranking of Arbitration cost was as the third most expensive option (3rd, 24%, n=16).

19.2.4 Almost half of respondents ranked Adjudication as the third most expensive resolution method (3rd, 44%, n=23).The next most common ranking of Adjudication cost was as the second cheapest option (2nd, 29%, n=15).

19.2.5 Almost two-thirds of respondents ranked Mediation as the least expensive resolution method (1st, 63%, n=44).The next most common ranking of Adjudication cost was as the second cheapest option (2nd, 21%, n=15).

19.2.6 More than a third of respondents ranked Expert Determination as the second cheapest resolution method (2nd, 36%, n=23).The next most common ranking of Expert Determination cost was as the cheapest (1st , 26%, n=17) and as the third cheapest option (3rd, 26%, n=17).

19.3 **Factors which are considered to be primary advantages of arbitration**

19.3.1 Respondents in the 'other' category ranked the principal potential advantages of arbitration.

19.3.2 The following Table shows the occurrence of the following categories in the first second and third rankings:

Category	**First**	**Second**	**Third**
Speed	20	16	4
Quick Finality	2	5	13
User Friendly	1	3	6
Confidentiality	15	10	12

Category	First	Second	Third
Procedural Flexibility	4	12	15
Technical specialism of decision maker	18	14	11
Party control	3	8	7

19.3.3 It is apparent that respondents saw particular advantage in speed, confidentiality and technical specialism. Respondents saw advantage in quick finality and procedural flexibility. Respondents appeared to place less weight on user friendliness and part control.

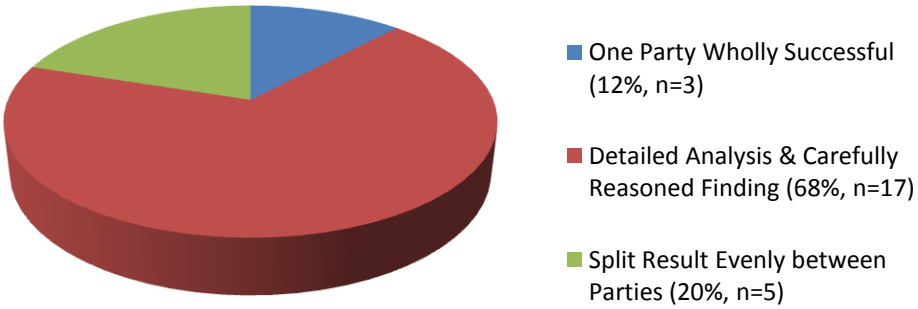
19.4 **Perception of arbitrators**

19.4.1 We have referred above to statistics regarding the perceived important qualities in an arbitrator.

19.4.2 We now turn to perception of the likely outcome of arbitration.

(a) The following pie chart presents representatives' perceptions of the most likely outcome of arbitration. The majority of representatives believed the most likely outcome of arbitration to be a Detailed Analysis and Carefully Reasoned Finding (68%, n=17), with five reporting a Split Result between Parties (20%), and three reporting finding One Party wholly successful (12%).

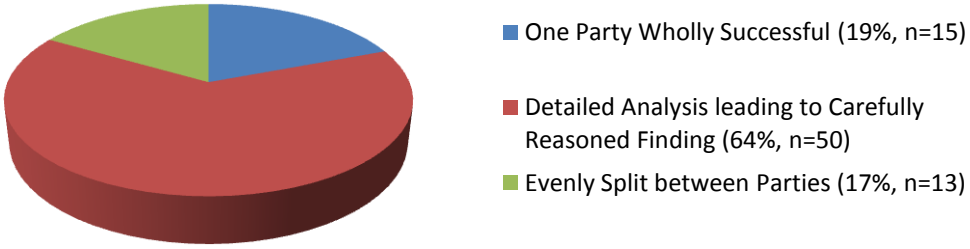
Chart 24 - Perception of Most Likely Outcome of Arbitration as reported by representatives



(b) The majority of respondents in the 'other' category perceived a Detailed Analysis Leading to Carefully Reasoned Finding to be the most likely outcome

of arbitration (64%, n=50), with smaller proportions perceiving One Party being Wholly Successful (19%, n=15) and an Even Split between Parties (17%, n=13) to be the most likely outcomes, respectively

Chart 25 - Perceived Most Likely Outcome as reported by others



(c) The strong view is that arbitration is not a lottery. There was not a strong perception that arbitrators undertake a judgement of Solomon approach and simply divide the result down the middle. The stronger view is that arbitrators undertake a detailed analysis and provide a reasoned award.

19.5 **Particular comments on arbitration**

19.5.1 Survey Respondents were provided with an opportunity to make general comments about arbitration in Scotland, including how it might be improved.

19.5.2 We have reported separately on comments made by arbitrators at paragraph 12.5.9.

19.5.3 Please note that the anonymised comments made by Survey Respondents in the section below are the comments of individuals, and are not of course necessarily the view of the Survey; but perceptions are important to understand.

19.5.4 Comments made by party representatives were:

(a) "*Agricultural arbitrations fall out with the 2010 Act - this is an anomaly that should be corrected*."

(b) "*It will only develop if more solicitors strike out the litigation option in the standard Forms. Pleased with progress of SAC but there is too much hype. Scottish Government support has been good for Arbitration*."

(c) "*It can too often be strung out by one party which can result in excessive delay. Making clear guidelines that arbitrators/parties can refer to which make clear the limits of delay*."

(d) "*Costs need to be brought down. Find that barristers / advocates are champions of arbitration (but, in my experience, so they can charge a massive fee for relying on solicitors to do the leg work).*"

(e) "*Court appointment (a Sheriff Court) was extremely slow - in terms of communications, responses and actual appointment - and there was no clear process*."

(f) "*Increase the training of arbitrators. Too many commercial solicitors consider themselves qualified without any detailed training in arbitration*."

(g) "*I seldom recommend arbitration having been involved in a number of agricultural arbitrations pre the jurisdiction passing to the Land Court and found them all unsatisfactory, expensive and with arbiters who lacked the professionalism to control the arbitration*."

(h) "*A big topic. Education of arbitrators is the most effective way to take forward the cause of arbitration in commerce. It cannot be said too often that if clients are educated, then arbitrations will follow. The cost of litigation is so high, and the outcome so unpredictable, and the delays so prodigious, that arbitration must have a place. The arbitral bodies which form the SAC ought to be delegating the right and the duty to educate to the SAC, which would then attract funding as a serious player in the education world. That means a bigger complement of people including professional educators*."

19.5.5 Comments made by experts were:

(a) "*Improving the specialist knowledge and procedural nous of arbitrators - increasing the numbers of arbitrators with the relevant experience*."

(b) "*It must not copy court procedures, but aim to be quicker and more responsive to particular needs of parties*."

(c) "*I think as more arbitrations take place and are successful, the method's use will increase - increasing knowledge in the industry is paramount*."

19.5.6 Comments by end users were:

(a) "*Costs of Arbitration are not always less than those of litigation*."

19.5.7 Comments by those other survey respondents, not directly involved in the arbitral process were as follows:

(a) "*Support for the Scottish Arbitration Centre will assist it in its attempts to increase the use of both domestic and international arbitration*."

(b) "*Law Society Guides to give to the public or have on their website*."

(c) "*I have never been involved in an arbitration, so when advising clients I do not have accurate information about the speed and cost so that they can compare it to court action. Greater availability of such information would be of assistance*."

(d) "*It lacks international credibility*."

(e) "*I have been directed to this part of the survey on the basis that I am not a user or arbitration, so it is difficult for me to comment. What I can say is that, as an experienced construction solicitor, I see no real upturn in the number of disputes going to arbitration since the new Act came into force. This may be because of the scale of projects I advise on, but I have not been involved in an arbitration for around 12 years. I believe that is the experience of most of those in my team, although I am aware of a few arbitrations which have taken place*."

(f) "*Help from Scottish Government to promote Arbitration instead of just speaking about it, with less time being spent on other 'cost saving measures' that in reality are still costing the taxpayer's money in some shape or form*."

(g) "*Adopting a maximum 6 month agreed time scale*."

(h) "*There is a need for more trained and approved panels of Arbiters in Scotland if arbitration is to regain any of the ground lost to adjudication*."

(i) "*My experience of arbitration relates to disputes within the sphere I practice, agricultural law. Unfortunately, my perception of arbitration is that it is expensive, slow and cumbersome which I believe is not its intention. However, both parties involved in arbitration tend to wish to instruct solicitors, possibly counsel and experts, this slows the process down and means that it is as expensive as pursuing the matter through the courts*."

(j) "*The promoted benefits of the new Arbitration (Scotland) Act (much faster and cheaper dispute resolution using arbitration), if they are being delivered, do not appear to be widely recognised yet. Until they are, I think most decision makers will be hesitant to choose arbitration. My own recent experience of arbitration (which was shortly before the period covered by this survey) was that it was not faster and cheaper. The reason appeared to me to be that the "experienced" arbitrator was not embracing the ethos of the Act leading to costs for all parties that exceeded the value of the dispute*."

(k) "*Isn't the real issue about how you achieve buy-in from the international business community and how you persuade them that Scotland should be the arbitration jurisdiction of choice as opposed to other arbitration centres*?"

(l) "*Have had arbitration experience prior to the relevant period. More recently I have had good recent experience (at least procedurally) with the commercial court in the Court of Session and reasonable experience with the commercial court in the Sheriff Court. I think those are the main competition for arbitration to get further traction in Scotland, outside of specialist fields, such as construction. Also, the courts offer a Pursuer options such as interdict, inhibition, arrestment, which can provide both a real reaction quickly and a sense of security in taking the matter forward. The confidential nature of arbitration is the great attraction; however Scottish arbitration faces the 'English Law' problem, particularly in the offshore oil and gas industry*."

(m) "*Need to find a way of keeping costs down. Need to have a list of reliable arbitrators in relevant fields*."

(n) "*Generally recommend arbitration in international contracts and expert determination on specific technical matters. Otherwise generally do not favour compulsory arbitration*."

(o) "*Preference always is to include an adjudication clause over an arbitration clause*." and "*adjudication preferred over arbitration*".

(p) "*As difficult and as expensive as court but my experience (which is limited) is that there was a greater degree of latitude towards the contractor as opposed to the local authority*."

(q) "*Clear understanding of panel, panel members to be fully trained and qualified*."

(r) "*The arbitration panel in Scotland is now almost totally made up of professionals (Land agents, auctioneers etc.). As such the farming industry has lost faith in its ability to be impartial. The need to understand the law and keep within it has meant that most farmers shy away. Yet without the practical expertise that only commercial farmers can bring the ability to determine a fair rent is often lost. I believe most of those who have sat the exam see it as a way to earn a fee rather than a way to resolve a dispute. Forty years ago the panel would have been almost all practising farmers*."

(s) "*Arbitration is useful in some circumstances and must be supported. Mediation is a more constructive process and expert determination is sometimes cheaper and quicker*."

(t) "*The courts are the best place to resolve disputes where you have naive clients who do not understand arbitration*."

(u) "*There require to be more legally qualified arbitrators with expertise in commercial law*."

(v) "*Make it less expensive and quicker*."

(w) "*There is a question mark over the calibre of arbitrators. Furthermore, I have been in full time dispute resolution for over 20 years. Whilst I have had experience of arbitration overseas, I have only been involved in one arbitration in the UK in that time. It still suffers from the perception from the bad old days as being a costly and lengthy process (with potential for lots of legal challenges).*"

(x) "*Better dissemination of the benefits of arbitration, both domestic and international*."

8 - Conclusions

20 OUR PRIMARY DEDUCTIONS

20.1 Our finding that there were 22 (or thereby) arbitrations with a Scottish Seat occurring during the period 1 July 2013 to 30 June 2014 appears to the Survey to show that arbitration was being used in not unexpected volumes at the time of the Relevant Period, which was 3 to 4 years after the Act. What will now be interesting will be to see how numbers vary over time.

20.2 We have also reflected the continuing dominance of property and construction disputes as the subject matter of arbitrations, but also noted initiatives within the arbitration community to widen the scope of matters that might be referred to arbitration, and recorded particular activity in this regard in relation to agricultural and family disputes.

20.3 Arbitration is used across a wide range of dispute value.

20.4 The evidence of court judgements, and of the data provided by this Survey, is that the courts are generally respecting the stated principle of the Act, that the courts should not intervene other than in the particular circumstances provided by the Act. We have also observed that certain of these rules allowing court intervention are default rules, including the legal error appeal provision.

20.5 There is a general perception that arbitrators are deciding disputes on the basis of detailed analysis and reasoning.

20.6 Single arbitrators continues to prevail over tribunals in Scotland. Of course tribunals of three are more likely in international arbitrations (such as ICC arbitrations), whereas domestic arbitrations tend to favour single arbitrators.

20.7 Arbitrations generally follow the unamended Scottish Arbitration Rules, but there is use of bespoke rules. Arbitrations use documents only processes but also tend to use hearings in many cases. Arbitrations also use preliminary hearings and bifurcation, and also use processes such as hot tubbing and joint meetings of experts.

20.8 Arbitrations generally reach an award in less than 12 months.

20.9 Some of the key features of arbitration which are seen as potential advantages are speed, confidentiality, procedural flexibility and technical specialism.

21 WHAT MIGHT BE TAKEN FROM THE FIRST SURVEY?

21.1 Those promoting arbitration, including Scottish Government, may draw some comfort from this data that arbitration is being used in Scotland at a rate which might be expected at this stage of its evolution, following the transition of ‘old arbitration’ into a new modern statutory regime.

21.2 Those advising on contract formation may find this Report helpful in understanding the importance of advising clients on the choice of dispute resolution methods. The Survey does not record any preference for arbitration over other forms of dispute resolution, and has indeed reported on a positive perception of mediation as an efficient dispute resolution process. The Survey has suggested that parties should understand the need to select a method of *final* dispute resolution, at contract formation stage, to provide a mechanism to resolution in circumstances where parties do not accept an interim binding decision, or where they cannot reach consensual agreement through negotiation or mediation.

21.3 Promoters of arbitration will hopefully find the statistics helpful to understand perceptions and what is important to end users and representatives in the resolution of disputes.

21.4 Arbitrators will find some of the perceptions of approaches to arbitration helpful, together with records of procedural trends in arbitration.

22 SUGGESTIONS AND COMMENTS

22.1 If you have any comments on the Survey, or would like to offer any information which you feel may assist us in future analysis of arbitration, please send an email to Richard Farndale (Richard.Farndale@burnesspaull.com), or to Derek Auchie (d.auchie@abdn.ac.uk).

19 June 2015

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Annex A
Methodology and Acknowledgements

1 METHODOLOGY

1.1 General

1.1.1 The Survey team (see Annex B) held a series of meetings to focus the objectives of the Survey. The team initially identified the following mission statement – "*to collect and report upon statistical data in order to record and draw appropriate deductions regarding (1) attitudes; (2) the volume of use; (3) practice; and (4) outputs of arbitrations (including domestic arbitrations in Scotland, international arbitrations with a Scottish seat and international arbitrations involving Scottish practitioners), in the wider context of options for dispute resolution*".

1.1.2 It was considered that there is currently no available statistical resource relative to the use of arbitration in Scotland. White & Case provides an annual survey on English arbitration and Glasgow Caledonian University provides a Quarterly Report on statistics relative to adjudication.

1.1.3 Chris Mackay and Richard Farndale of Burness Paull and Derek Auchie of Aberdeen University ("**the Directing Team**"), focused the issues for statistical survey and worked on the focus of the research. This was a key exercise in directing the research to the most relevant topics in order to inform the particular questionnaires which would drive the statistical collation. The Directing Team also identified the sources of statistical returns including interested organisations, Arbitral Appointing Bodies, arbitrators, professional party representatives, law firms, counsel, and bodies or businesses reflective of potential users of arbitration.

1.1.4 It was recognised that a key benefit of arbitration is its confidentiality, and the questions asked would not reveal particular parties or particular factual circumstances in individual arbitrations.

1.1.5 Thereafter a technical team set up the statistical resource, which included compilation of questionnaires, setting up of mailing lists, resolution of IT issues, set up of systems for appropriate analysis of data etc. This exercise was largely undertaken by John Lemon (Emeritus Computing Advisor at the University of Aberdeen) with Derek Auchie of Aberdeen University. Richard Farndale provided lists of arbitrators, which would form the basis of the analysis of numbers of arbitrations in particular and contacted each of the Arbitral Appointing Referees and other appointing bodies.

1.1.6 Prior to the commencement of the full survey, a pilot survey was undertaken, by 10 very experienced arbitration professionals, who provided feedback on the questions being asked, allowing a further refinement of the Survey before full launch.

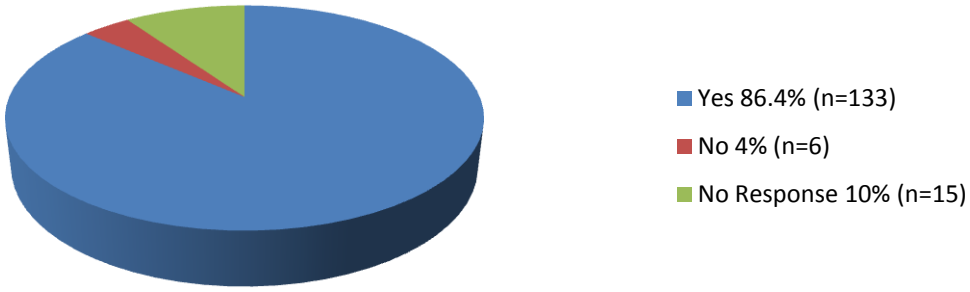
1.1.7 The Survey was widely advertised and directly distributed to many organisations which would ensure the widest distribution to the relevant body of respondents.

1.1.8 After collection of the data, analysis was undertaken initially by John Lemon, and then by Nicola Gibson, the latter a final year PhD student in the Social Sciences School at the University of Aberdeen. The Report was then drafted by Richard Farndale and then the full team of Chris Mackay, Derek Auchie, Coral Riddell and Richard refined the Report.

1.2 Who responded?

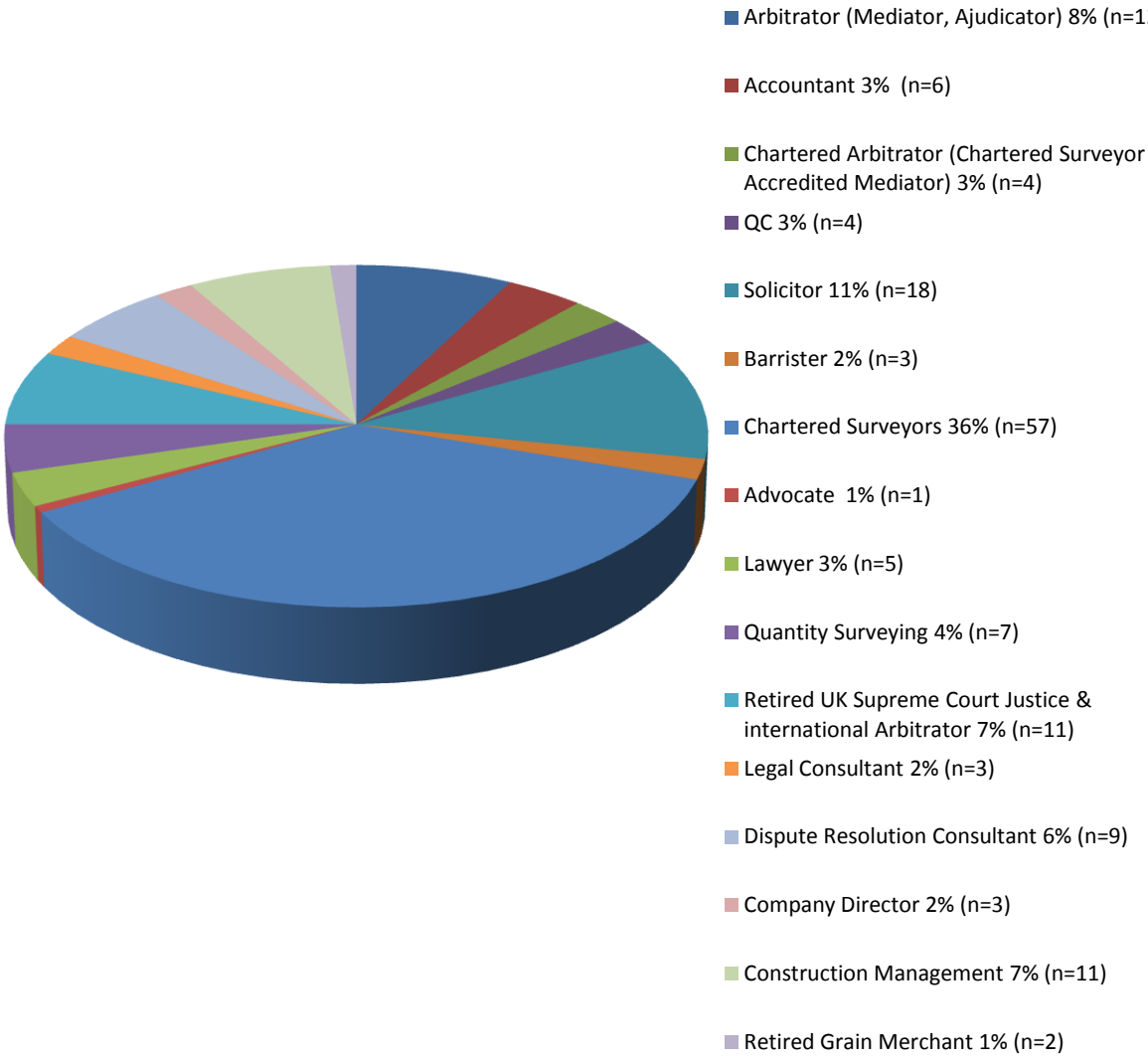
1.2.1 The vast majority of Survey Respondents reported Scotland as their primary place of business. The following pie chart shows the proportion of respondents with Scotland as their Primary place of Business. 15 respondents did not answer this question. However, as can been seen from the pie chart below, the majority of respondents report Scotland to be their Primary place of Business.

Chart 26 - Survey Respondents with Scotland as Primary Place of Business



1.2.2 The distribution of profession of those responding to the Survey was as follows. Respondents described themselves as belonging to a range of professions, and as is evident from the figure below, the majority identify themselves as Chartered Surveyors. Several respondents listed more than one profession. For example, several Arbitrators described themselves as "Arbitrator (Mediator, Adjudicator)". Similarly, three respondents described themselves as "Chartered Arbitrator (Chartered Surveyor & Accredited Mediator)", while eleven respondents described themselves as "Court Justice & International Arbitrator". However, all other respondents listed only one principal profession.

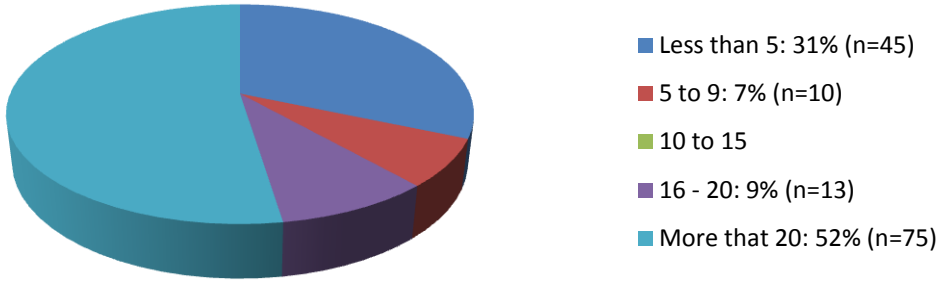
Chart 27 - Survey Respondents' Principal Profession



1.2.3 The pie chart below shows number of years qualified in principal profession as reported by respondents across the whole sample. As is clear from the chart, the

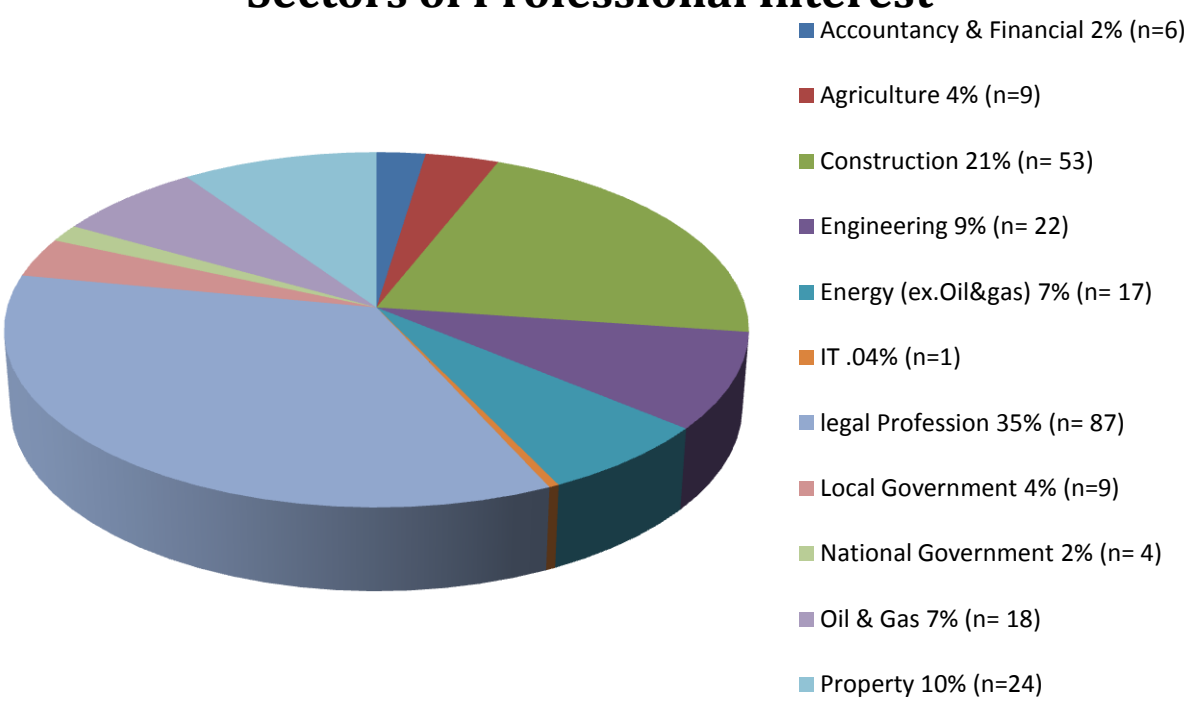
majority of respondents (75 in total, 52%) have been qualified for more than 20 years.

Chart 28 - Survey Respondents - Years Qualified in Principal Profession



1.2.4 The figure below presents those sectors in which respondents principal interests lay for the whole sample. Respondents were free to indicate more than one area of interest. Data for those indicating "other" are not presented here. Respondents reported a variety of business interests. As is evident from the graph, the majority of respondents have an interest in the Legal (35%, n= 87), and Construction (21%, n=53) sectors, with smaller proportions having an interest in Property (10%, n=24), Engineering (9%, n=22), Energy (7%, n=17) and Oil & Gas (7%, n=18).

Chart 29 - Survey Respondents - Business Sectors of Professional Interest

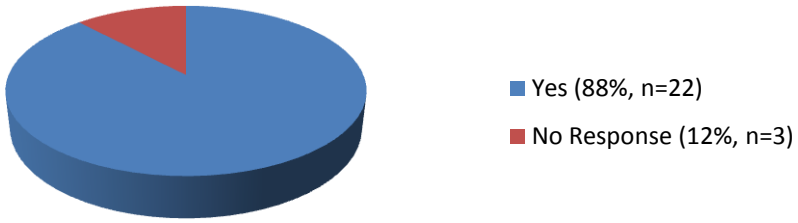


1.3 We reported on the background of arbitrators completing the Survey in the main report at paragraph 12.5.

1.4 The background of those representatives who completed the Survey is as follows:

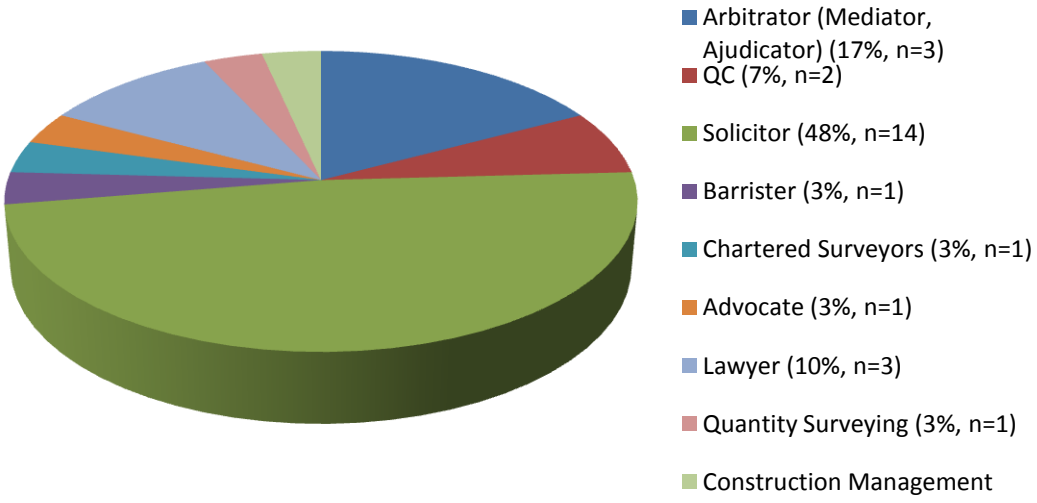
1.4.1 The following pie chart presents the proportion of Representatives with Scotland as their primary place of business. As is clear from the chart, the majority of Representatives have Scotland as their primary place of business. Three respondents (12%) did not give a response to this question.

Chart 30 - Representatives with Scotland Primary Place of Business



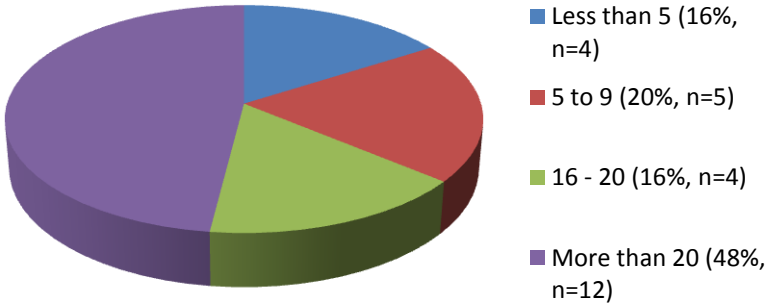
1.4.2 The following pie chart presents the relative proportion of professions of Representatives. The majority of Representatives were solicitors (48%, n=14), with the next most common professions being arbitrator (mediator, adjudicator) (17%, n=3) and lawyer (10%, n=3).

Chart 31 - Representatives' Principal Profession



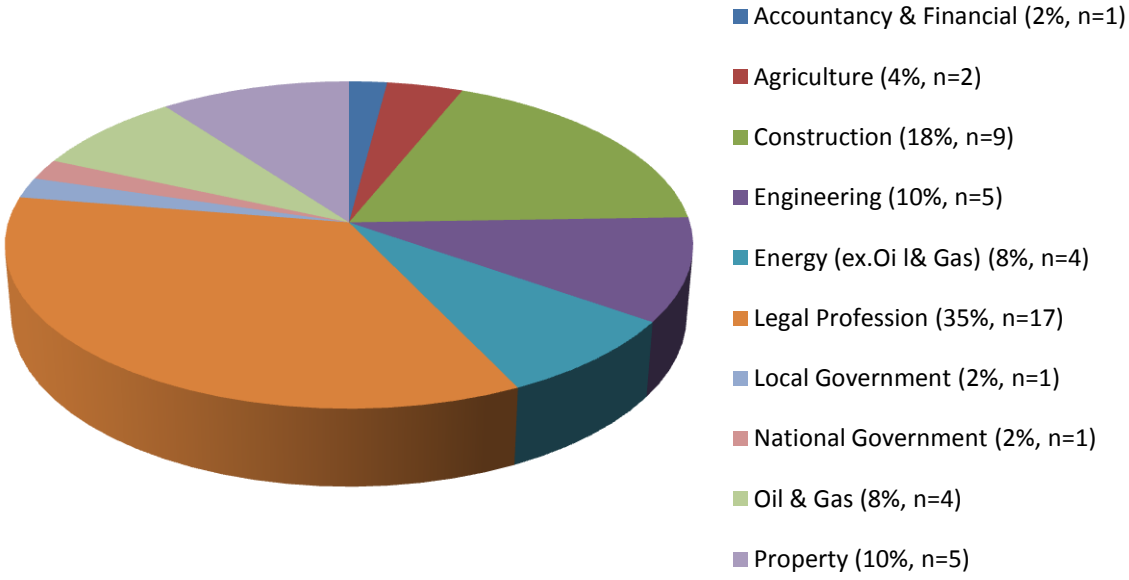
1.4.3 The following pie chart presents the number of years Representatives have been qualified. The majority of Representatives reported being qualified for more than twenty years (48%, n=12), while five (20%, n=5) reported being qualified for between five and nine years.

Chart 32 - Representatives - Number of Years Qualified



1.4.4 The pie chart below presents those business sectors in which representatives' principal interests lay. Representatives were free to indicate more than one area of interest. As is evident from the graph, the majority of Arbitrators have an interest in the Legal Profession (35%, n=17), Construction (18%, n=9), Engineering (10%, n=5), and Property (10%, n=5).

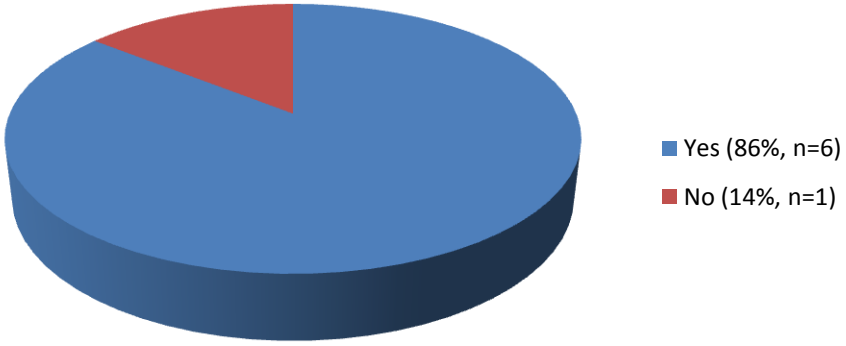
Chart 33 - Representatives' Business Sectors of Professional Interest



1.5 The background of those experts responding to the Survey were:

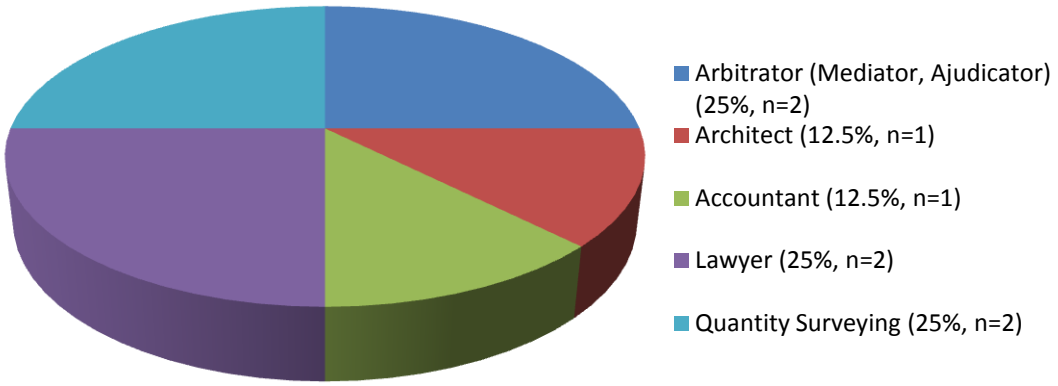
1.5.1 The following graph presents the proportion of Experts with Scotland as their primary place of business. As is clear from the chart, the majority of Representatives have Scotland as their primary place of business (86%, n=6). Only one expert (14%) did not have Scotland as their primary place of business.

Chart 34 - Experts with Scotland Primary Place of Business



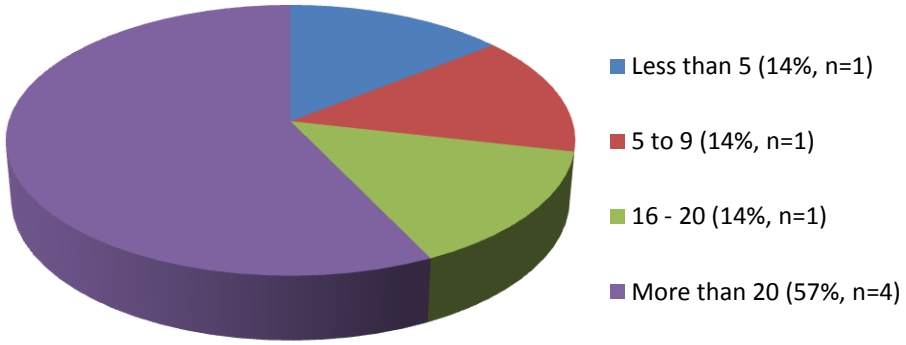
1.5.2 The following graph presents the relative proportion of professions of Representatives. A quarter of Experts were arbitrators (mediator, adjudicator) (25%, n=2), lawyers (25%, n=2), and quantity surveyors (25%, n=2), while an eighth were accountants (12.5%, n=1) and architects (12.5%, n=1).

Chart 35 - Principal Profession of Experts



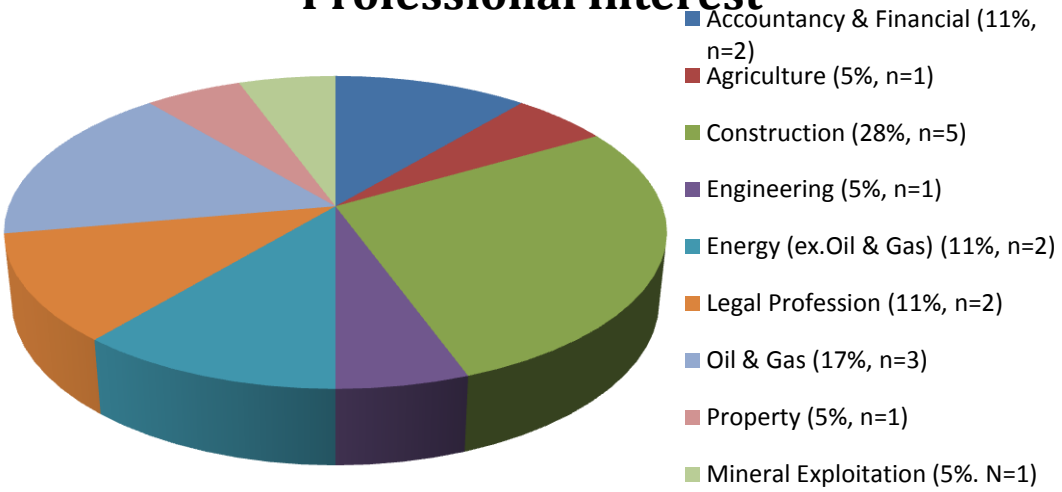
1.5.3 The following graph presents the number of years Experts have been qualified. The majority of Experts reported being qualified for more than twenty years (57%, n=4).

Chart 36 - Experts: Number of years Qualified



1.5.4 The figure below presents those business sectors in which Experts principal interests lay. Experts were free to indicate more than one area of interest. As is evident from the graph, Experts areas of interest fell largely into Construction (28%, n=5), and Oil and Gas (17%, n=3), the remaining being fairly evenly distributed between Accountancy and Financial (11%, n=2), Energy (11%, n=2), Legal Profession (11%, n=2), Agriculture (5%, n=1), Engineering (5%, n=1), Property (5%, n=1), and Mineral Exploitation (5%, n=1).

Chart 37 - Experts' Business Sectors of Professional Interest

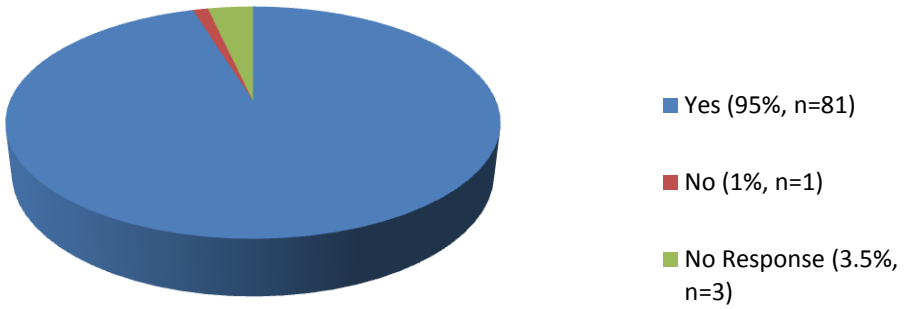


1.6 We were disappointed not to have had more end user responses to the survey. It can be difficult to persuade those who are not involved more frequently in arbitration, to complete such a survey. We hope in future surveys that in-house solicitors may be encouraged to offer their views on this important topic, on behalf of their organisations.

1.7 However, a more balanced view of the perception of arbitration from those not directly involved in the process was provided by the 85 respondents who responded in the 'other category' and whose background was as follows:

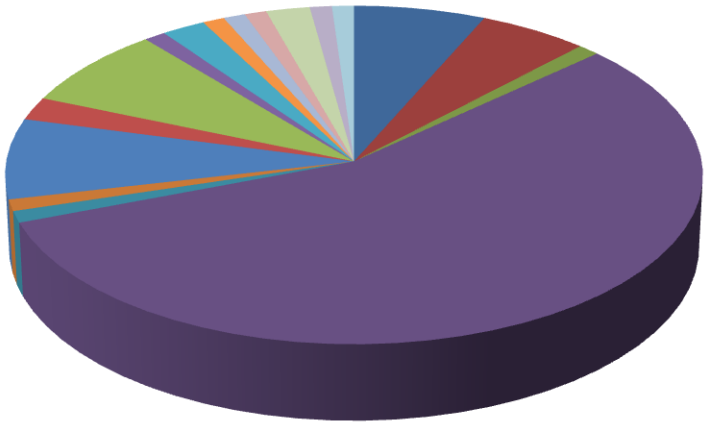
1.7.1 The following pie chart presents the proportion of Respondents with No Regular Involvement with Arbitration who report Scotland as their primary place of business. As is clear from the chart, the majority of Representatives have Scotland as their primary place of business (95%, n=81). Only one respondent (1%, n=1) did not have Scotland as their primary place of business, and three respondents did not answer this question.

Chart 38 - Others with Scotland Primary Place of Business



1.7.2 The following pie chart presents the relative proportion of professions of respondents with No Regular Involvement in Arbitration. More than half of respondents (56%, n=51) were solicitors, with the next most frequently reported professions being lawyer (8%, n=7), and quantity surveyor (8%, n=7), followed by arbitrator (6.5%, n=6) and architect (5%, n=5). Other stated professions represent 2% (n=2) and 1% (n=1) of respondents.

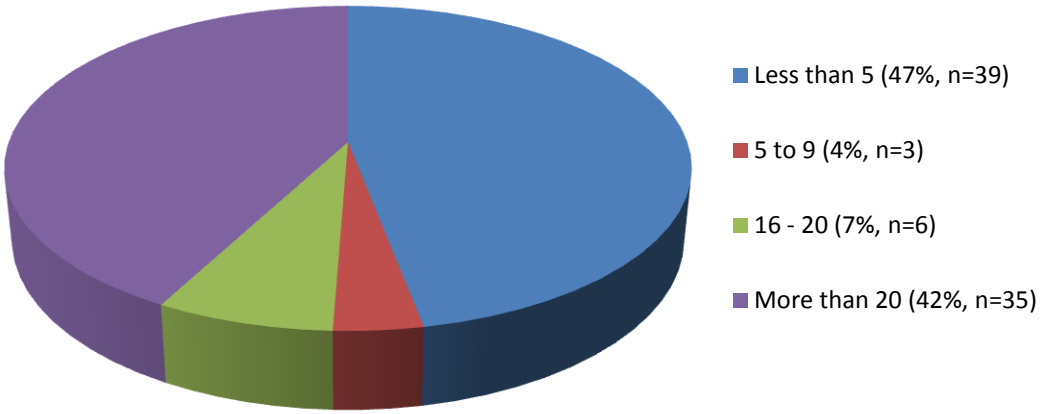
Chart 39 - Others - Principal Profession



- Arbitrator (Mediator, Ajudicator) (6.5%, n=6)
- Architect (5%, n=5)
- Independent Expert (1%, n=1)
- Solicitor (56%, n=51)
- Chartered Surveyors (1%, n=1)
- Advocate (1%, n=1)
- Lawyer (8%, n=7)
- Legal / Paralegal (2%, n=2)
- Quantity Surveying (8%, n=7)
- Secretarial Assistant (company) (1%, n=1)
- Chartered Civil Engineer (25, n=2)
- Quantum Expert and Claims Manager (1%, n=1)
- Legal Services Manager (1%, n=1)
- Project Manager (1%, n=1)
- Land Agent (2%, n=2)
- Farmer (1%, n=1)
- Retired Judge (1%, n=1)

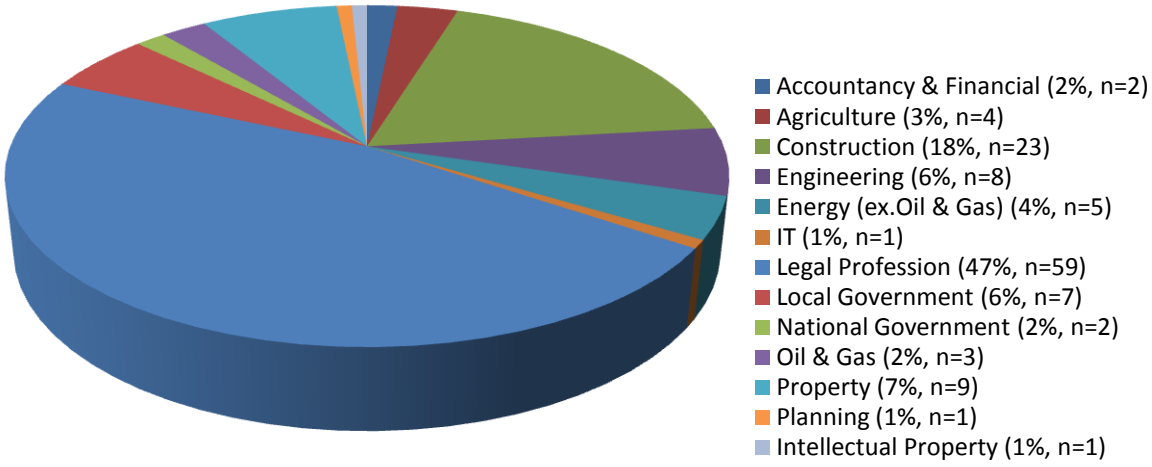
1.7.3 The following pie chart presents the number of years respondents (with no regular involvement in arbitration) have been qualified. The majority of Representatives reported being qualified for less than five years (47%, n=39), with slightly fewer being qualified for more than twenty years (42%, n=35). A relatively small proportion reported being qualified for sixteen to twenty years (7%, n=6) and five to nine years, respectively (4%, n=3).

Chart 40 - Others: Number of Years Qualified



1.7.4 The pie chart below presents those business sectors in which respondents (with no regular involvement in arbitration) principal interests lay. As is evident from the graph, Respondents areas of interest fell largely into the Legal Profession (47%, n=59), and Construction (18%, n=23).

Chart 41 - Others: Business Sectors of Professional Interest



1.8 **Sources**

1.8.1 The Survey was distributed to, amongst others (and as well as wider advertisement through Scottish Legal News and other media), the following groups:

(a) Solicitors and in house lawyers through the Law Society of Scotland;

(b) All arbitrators, adjudicators, members, fellows, associate members and wider contacts of the Chartered Institute of Arbitrators (Scotland);

(c) The Faculty of Advocates;

(d) The Scottish Arbitration Centre contacts;

(e) The Institute of Civil Engineers arbitrators, members and contacts;

(f) Royal Incorporation of Architects in Scotland arbitrators, members and contacts;

(g) Royal Institution of Chartered Surveyors arbitrators, members and contacts;

(h) Scottish Agricultural Arbiters and Valuers Association (SAAVA) arbitrators, members and contacts;

(i) Agricultural Industries Confederation Limited arbitrators, members and contacts;

(j) Institute of Chartered Accountants in Scotland contacts;

(k) Chartered Institute of Building Scotland contacts;

(l) Family Law Arbitration Group (Scotland) arbitrators, members and contacts.

1.8.2 All those who assisted us to distribute the Survey are thanked by the Survey team.

1.9 **Comments received about the Survey**

1.9.1 Respondents were asked to comment upon the usability of the Survey. As this is the first Survey, we are of course keen to ensure that we learn about usability issues and improve on this in future surveys.

1.9.2 We are pleased that the majority of comments were very positive and included "*very easy to use*"; "*Excellent* !"; "*Easy to complete*"; "*Good effort - interested to see the results*"; "*I am sure it will be useful*."; "*Pretty straightforward*"; "*No problems and quite clear.*"; and "*Straightforward*."

1.9.3 One responding arbitrator commented "*I suspect that the number of arbitrations proceeding to some sort of decision are so small in Scotland as to make the value of statistics or trends highly questionable Anecdotal evidence suggests there has been a modest increase in the number of arbitrations in Scotland since the 2010 Act came into force. That means from virtually no arbitrations to a few. The key word is modest. The reason is the folly of the solicitor branch of the profession in using English arbitration clauses in almost every commercial document they draft*." We are keen to report on all views about arbitration, and the statistical analysis of data. Our own feeling is that, five years on from the Act, it is very important to gather what data we can about arbitration use. We appreciate that there are relevant factors in any such survey in relation to the volume of arbitration in the jurisdiction; the confidential nature of the process; and the reliance upon cooperation of survey respondents, but we hope that the data provided gives the best available picture of arbitration during the relevant period in time. Another respondent observed that "*The questions were too high level and too general*." We hope that readers will feel, having now read the deductions that we have drawn from the questions asked, that the Survey was appropriately focused. Of course we understand that there will always be different views about the most relevant questions to ask and report upon, and the Survey will continue to review the particular questions which its asks.

1.9.4 Some further useful feedback was:

(a) "*It would be helpful to re-state what the "Relevant Period" is beside the question referring to it (rather than just on the front page)*"

(b) "*Very easy to use. The relevant period is always difficult given the periods over which arbitrations may extend*."

(c) "*My situation, in which none of my three arbitrations has yet reached the hearing stage, does not appear to be expressly catered for*."

(d) "*The boxes were limiting e.g. I chose one single factor in one of the tick-box questions because that was the only option, but in reality my true answer would have included two of the options combined*."

(e) "*User friendly (although I was unable to delete my tick when placing it in the wrong box - for clarity the seat of the relevant arbitration is in Scotland).*"

(f) "*Survey fairly straight forward but even it only affirms my view. It is set out as if every arbiter is a "professional person*"

(g) "*Some of the choices were restrictive e.g. having to decide between three options for best qualities of an arbitrator one of them being "legal knowledge" and the other "experience". Clearly experience is better but in my view only if there is sufficient legal knowledge*."

1.9.5 We will consider all these helpful comments in advance of the next survey.

2 ACKNOWLEDGEMENTS

2.1 We are very grateful to a number of persons and bodies who have assisted us with this survey.

2.2 The Survey would like to particularly thank two people at the University of Aberdeen, who have provided vital support to the analysis of data.

2.2.1 First, we wish to thank John Lemon, Emeritus Computing Advisor, who first converted our objectives for survey questions into a user friendly and workable survey solution, which drove the collection of data. Then he provided initial analysis and structuring of the data, to enable the reporting process to begin.

2.2.2 Second, we wish to thank Nicola Gibson, who carefully analysed the data into an ordered form to enable the logical reporting upon the data collected. She also created the graphs and pie charts which help us to provide pictorial representation of the data. This was a detailed task and we are very grateful for her hard work and support.

2.3 We would like to thank the Scottish Branch of the Chartered Institute of Arbitrators and the Scottish Arbitration Centre for their encouragement and support.

2.4 We are particularly grateful to our team of practitioners with particular experience of the arbitration process, who agreed to take part in our pilot, to help us cross check the questions and focus the matters which are of most interest in the analysis of arbitration in Scotland. These are:

2.4.1 Gordon Bathgate, Principal, GB Consulting, Arbitrator, Committee member of the Chartered Institute of Arbitrators (Scottish Branch), Director of the Scottish Arbitration Centre;

2.4.2 Jonathan Broome, Advocate, Axiom Stables, Former Chairman of the Chartered Institute of Arbitrators (Scottish Branch);

2.4.3 David Carrick, Vice President and Managing Director, Hill International, Arbitrator;

2.4.4 Hew Dundas, Arbitrator, Vice President of the Scottish Arbitration Centre and former Chairman of the Chartered Institute of Arbitrators;

2.4.5 John Hunter, Hunter Consulting, Arbitrator, Former Chairman of the Chartered Institute of Arbitrators (Scottish Branch);

2.4.6 Neil Kelly, Partner, MacRoberts, Chairman of the Chartered Institute of Arbitrators (Scottish Branch);

2.4.7 Brandon Malone, Brandon Malone & Company, Chairman of the Scottish Arbitration Centre;

2.4.8 Janey Milligan, Construction Dispute Resolution, Arbitrator, Director of the Scottish Arbitration Centre;

2.4.9 David Parratt, Advocate, Terra Firma Stables, Arbitrator, Director of Training at the Faculty of Advocates;

2.4.10 Gordon Reid QC, Senior Counsel, Terra Firma Stables, Director of the Scottish Arbitration Centre.

2.5 We would also like to thank Scottish Legal News and the Law Society Journal, for their advertising of the Survey.

2.6 We would like to thank the Chartered Institute of Arbitrators (Scottish Branch), the Scottish Arbitration Centre, the Royal Incorporation of Architects in Scotland, the Royal Institution of Chartered Surveyors Scotland, Scottish Agricultural Arbiters & Valuers Association (SAAVA), the Institution of Civil Engineers, and the Agricultural Industries Confederation for their assistance in distributing the Survey to members, and in providing the Survey with information.

2.7 We would also like to thank Neil Stevenson at the Law Society who is enthusiastic about the importance of collecting data on arbitration. The idea for the Survey originated in a discussion between Neil and Richard Farndale following a Law Society forum on arbitration use. We wish Neil well in his new role as Chief Executive of the Scottish Legal Complaints Commission.

2.8 Finally and importantly we would like to thank each person who took time to contribute to the Survey. We do hope that you will recognise the value of the exercise and provide your further contribution and assistance to future surveys.

Annex B
Biographies of the authors

Derek P Auchie

Derek is a Senior Teaching Fellow at the University of Aberdeen. He was formerly a practising solicitor before moving into academia in 2002. He spent ten years at Robert Gordon University, Aberdeen before moving to the University of Aberdeen's School of Law in June 2012. Derek works as a part time tribunal chair on the Mental Health Tribunal for Scotland and the Additional Support Needs Tribunal for Scotland. He is an adjudicator with the Centre for Effective Dispute Resolution (CEDR). He is a Faculty Member of the Chartered Institute of Arbitrators (CIArb), with whom he is also a Fellow. Derek is interested in (and has published on) the law of evidence and in dispute resolution processes (court, tribunal, arbitration and mediation). He is also interested in the interpretation of rules and legislation.

Richard Farndale

A former artillery officer and forward artillery observation officer in the First Gulf War, Richard is a director in the construction and projects team at Burness Paull LLP, specialising in dispute resolution including by arbitration and adjudication. He regularly represents clients in all forms of dispute resolution, including domestic and international arbitration. He led the legal team which provided the Scottish Football Association with disciplinary rules, focused on a fair structure with appropriate powers. He is Vice Chairman and Honorary Secretary of the Scottish Branch of the Chartered Institute of Arbitrators and actively involved in the analysis and operation of arbitration and other forms of alternative dispute resolution. He tutors on the CIArb membership course. He regularly provides seminars on arbitration and dispute resolution.

Chris Mackay

Chris is a senior partner within Burness Paull LLP and specialises in the fields of construction/ projects work and is a recognised expert in both. He advises a wide range of clients private and public both on procurement and dispute resolution. He is very experienced in all forms of Alternative Dispute Resolution and work highlights include acting for International clients, a number of Scottish local authorities, harbour trusts, airports and NHS Boards. His experience in arbitration includes domestic ad hoc tribunals and international institutional tribunals such as ICC. He has also acted in many significant litigations, adjudications and mediations. He has worked successfully with a number of Counsel at the Scottish and English bars. He has presented on both the Arbitration Scotland Act 2010 and 2012 ICC rules and procedures and is a tutor for CIArb. He is a Scottish Law Society Accredited Expert in both Construction and Arbitration.

Coral Riddell

Coral Riddell is the Head of the Professional Practice team at the Law Society of Scotland. She contributes to and is responsible for a team of solicitors providing advice in relation to practice and ethics for the Scottish legal profession. Coral holds responsibility for several committee functions within the Professional Practice team and is Secretary to the Professional Committees. Prior to her current role Coral practised with Dundas & Wilson, Maclay Murray & Spens and Pinsent Masons specialising in Construction and Engineering law and dispute resolution. She holds considerable experience in adjudication, arbitration, mediation and litigation and is a Director with the Scottish Arbitration Centre. A non-executive role as Legal Director of the British Association of Snowsports, and a former role as Company Secretary to a national governing body have provided key Board experience out with legal forums. Most recently Coral has been appointed to the Board of Directors for SportScotland.

Annex C

Definitions used in this Report

Defined Term	Definition
Arbitral Appointing Body	Our general term to refer to all bodies who, from time to time, appoint arbitrators from their own panels or otherwise, including but not limited to the Arbitral Appointment Referees.
Arbitral Appointments Referee	One of the bodies authorised with reference to the Arbitration (Scotland) Act 2010 (section 24 and currently the Arbitral Appointments Referee (Scotland) Order 2010), to appoint arbitrators in terms of Rule 7 of the Scottish Arbitration Rules.
Relevant Arbitration	An Arbitration which occurred during the Relevant period, which Survey Respondents were asked to report upon.
Relevant Period	The period from 1 July 2013 to 30 June 2014, which Survey Respondents were asked to report upon.
Scottish Arbitration Survey, and The Survey	The whole process of the survey of information regarding arbitration, including the reporting on the information in this Report.
Survey Respondent	A person who has provided data to the Scottish Arbitration Survey, by responding to questions.