Lawyers and Arbitration: The Juridification of Construction Disputes

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Introduction: Problems and Theory

Arbitration has for many years been the main form of dispute resolution in certain fields of business activity, including construction, commodities and shipping. Why has arbitration been the dispute resolution system of choice?[1] This question concerns the dominance of the legal profession over fields of work including *lex mercatoria*.[2] The issues of fields of work speak to the question of how legal specialists attempt to monopolise fields through the process of juridification.[3] The issue of *lex mercatoria* raises questions that transcend the conventionally accepted relationship of law and state and the cultural specificity of law.[4] The three fields of business activity mentioned above — construction, commodities and shipping — are key instances of the routines of *lex mercatoria*. Their jurisprudence, although solemnised from time to time in the courts, is mainly developed through the medium of 'lawyers' law', the routine, everyday processes worked out in negotiations, contracts and non-judicial forums.[5] These take place both within domestic and international transactions. We have, then, a situation that is best described as one of *normative pluralism*.

Arbitration is not a practice uniform across all fields. In this article we concentrate on one field of juridical activity, namely, construction. We chose this field because of the volume and value of disputes; they are significant both nationally and internationally. And virtually all construction contracts contain arbitration clauses.[6] Our

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1 A further question we can put here is: Are we observing a struggle between the spheres of private and public governance, with arbitration leading in the private camp and the courts leading in the public? See S. Macaulay, 'Private Government' (1983) Working Paper DPRP 1983–86, Institute for Legal Studies.

2 See M. Mustill, 'The New *Lex Mercatoria*: The First Twenty-Five Years' (1988) 4 Arbitration International 86; A. Lowenfeld, '*Lex Mercatoria*: An Arbitrator's View' (1990) 6 Arbitration International 133; and W. Craig, W. Park and J. Paulsson, *International Chamber of Commerce Arbitration* (2nd ed, 1990). See also Lando, 'the binding force of the *lex mercatoria* does not depend on the fact that it is made and promulgated by State authorities but that it is recognised as an autonomous norm system by the business community and by State authorities': O. Lando, 'The *Lex Mercatoria* in International Commercial Arbitration' (1985) 34 International and Comparative Law Quarterly 747.

3 P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 Hastings LJ 814.

4 See G. Teubner, 'Global Bukowina: The Politics of *Lex Mercatoria*,' unpublished paper. See also J. Flood, 'Conquering the World: Multinational Legal Practice and the Production of Law' in E. Skordaki (ed), *Social Change and the Solicitors' Profession* (1993); and J. Flood, 'The Cultures of Globalization: Professional Restructuring for the International Market' in D. Sugarman and Y. Dezalay (eds), *Professional Competition and the Social Construction of Markets* (1993).

5 cf S. Macaulay, 'An Empirical View of Contract' (1985) Wisconsin L Rev 465. See also J. Flood, 'Doing Business: The Management of Uncertainty in Lawyers' Work' (1991) 25 Law & Society Rev 41.

6 For example, the Channel tunnel construction project is governed by a contract that provides in the

research is focussed upon the *perceptions* of the actors in the system. As much as possible we let their voices speak for them.[7] the research was conducted primarily through interviewing practitioners in the field, ie, lawyers, civil engineers, quantity surveyors, arbitrators, architects, and advisers and presidents of institutions involved, and through them we attempted to map the world of construction arbitration.[8] We wanted to know how they made sense of the division of labour within their field; and how they made sense of each others' approaches to their work and its structure.

The literature of the industry suggested that a struggle was in process between lawyers and non-lawyers over who should control the arbitral procedure. We know from other studies that occupations and professions are most insecure at their margins and this is the location of turf wars.[9] Moreover, there is a second struggle taking place, that between lawyers in construction and those in more mainstream fields of law. As we show below, construction lawyers are trying to raise their symbolic capital in the face of action that diminishes their status. Yet they operate as legal luminaries in fields that have actively distanced themselves from the centre: their career trajectories diverge from the normal. The two struggles intersect and reinforce each other. No other field of legal activity is so infused with non-lawyer adjudication as is the construction field. The non-lawyer members are reasonably secure in their practice: their central claim to signficance is by virtue of being primarily architects, quantity surveyors or engineers, while the role of arbitrator fundamentally derives from the first. For lawyers, the legal process is their whole concern. The non-lawyers are actively engaged as business people in the field, whereas lawyers are at best ancillary to that activity.[10] Therefore, to be pushed to the edge undercuts the basis of their authority, so in fields engaging both lawyers and non-lawyers and where control does not necessarily reside solely in the lawyers' hands, the lawyers will seek to juridify the field and dominate it.

The juridification thesis has been addressed by, among others, Pierre Bourdieu who argues that any social field is organised in deeply patterned ways. Within these orientations towards practice and practices is a struggle among actors, which can clearly be seen in the field of construction law. Bourdieu states, 'The juridical field is the site of a competition for monopoly of the right to determine the law. Within this field there occurs a confrontation among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognised capacity to interpret a corpus of texts sanctifying a correct or legitimised vision of the social world.'[11]

The actors in this field are broadly lawyers and non-lawyers, with the latter routinely being the arbitrators. For UK domestic arbitrations we have the construction industry's institutional appointments of arbitrators, which for 1991 were as follows

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first instance that disputes be heard by a specially convened Disputes Panel of five experts chaired by a law professor. If either the contractors, TML, or the employers, Eurotunnel, are dissatisfied with the results, then the party can take the dispute to arbitration in Brussels under the rules of the International Chamber of Commerce: *Eurotunnel Annual Report 1991*, p 4.

7 cf J. Clifford and G. Marcus (eds), *Writing Culture: The Poetics and Politics of Ethnography* (1986). See also C. Klockars, *The Professional Fence* (1974).

8 The institutions were the Chartered Institute of Arbitrators, the Royal Institution of Chartered Surveyors, the Royal Institute of British Architects and the International Chamber of Commerce. Where there are unattributed quotations in the text, these are drawn from our interview material.

9 A. Abbott, *The System of Professions* (1988).

10 cf R. Gilson, 'Value Creation by Business Lawyers: Legal Skills and Asset Pricing' (1984) 94 Yale LJ 239.

11 Bourdieu, *op cit* n 3, p 817.

in Table 1. This provides a means for determining the relative use of lawyers and non-lawyers as arbitrators. For, although the Chartered Institute has lawyers on its panels, the majority of arbitral appointments by the institutions are of non-lawyer arbitrators.

There are, in the construction field, two types of technical expertise: that of the legal expert and that of scientific expert, and both like to think that construction disputes are focused on their particular realm of expertise. And since neither realm of expertise can be co-terminous with the other, confrontation results. *Prima facie*, the arbitral process in construction is most often about three types of dispute: delays in the construction process because of unforeseen obstacles; delays in payments; and problems over the technical aspects of construction. Ultimately, they all concern money and which party will be responsible. To the construction expert they are largely self-evident sets of problems, because they are already constructed within a discourse that these experts can practise within. For the lawyers this is insufficient.

Table 1 Construction Industry Arbitral Appointments by Institution for 1991

Institution	*Total Number of Appointments*	*Lawyer Appointments (%)*
1. Royal Institution of Chartered Surveyors	467	<10
2. Royal Institute of British Architects	150	< 1
3. National House Building Council	89	0
4. Chartered Institute of Arbitrators	52–60	40
5. Institute of Civil Engineers	41	7
6. Architects and Surveyors Institute	12	8

Sources: M. Cato, Altin Projects Ltd and R. Morgan, Chartered Institute of Arbitrators.

As Maureen Cain has demonstrated, 'Lawyers are translators — that is their day-to-day chore. They are also the *creators* of the language into which they translate.'[12] Thus, the step the lawyers are able to take is to translate the technical discourse into a legal one and thereby attempt to capture it — the *appropriation effect*, in Bourdieu's terms.[13] We say 'attempt' because the jurisdictional lines are anything but clear. If the lawyers alone controlled the disputing process, the war would be over. But in the field of construction law, although the lawyers can claim the monopoly of counselling and advocacy, they have deficient symbolic resources to claim a monopoly of adjudication. Coombe argues that Bourdieu's guidelines are, 'that we empirically examine the specific power struggles over interpretive competence that structure the field of legal practitioners (differential professional prestige and power attaching to places of practice, legal subspecialties, types of clientele, etc) and endeavour to determine their impact on the production of authoritative representations of the social world.'[14] Who then has the right to determine the discourses of construction disputing?

In discussing the division of juridical labour, Bourdieu proposes a kind of *faux*-resolution to the question:

12 M. Cain, 'The General Practice Lawyer and the Client: Towards a Radical Conception' in R. Dingwall and P. Lewis (eds), *The Sociology of the Professions: Lawyers, Doctors and Others* (1983).

13 Bourdieu, *op cit* n3, p 819.

14 R. Coombe, 'Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies' (1989) 14 Law & Social Enquiry 69, 107.

> Competition for control of access to the legal resources inherited from the past contributes to establishing a social division between lay people and professionals by fostering a continual process of rationalization. Such a process is ideal for constantly increasing the separation between judgments based upon the law and naive intuitions of fairness. The result of this separation is that the system of juridical norms seems (both to those who impose them and even to those upon whom they are imposed) *totally independent* of the power relations which such a system sustains and legitimizes.[15]

In the construction field, the system is put under its greatest strain at the intersection of domestic and international business and disputing. Whereas within domestic business and disputing the system of juridical norms might appear independent of the power relations, that is, their status resides within the system, in the international arena it is this very appearance of independence that causes concern to states and practitioners, because the norms are not located within a particular system.

Commercial markets have become increasingly globalised and the institutional frameworks that cope with negotiations and disputes among businesses have to incorporate more than mere economic values; they also embrace values of politics and professionalism. Business without borders resembles business within national boundaries, but it is more complicated, exaggerating many problems and highlighting some special features. Structuring modern business transactions involves longer, more detailed negotiations — frequently including representatives of state organs whose agendas might diverge from those of the contracting parties — during which the parties have to arrive at a common understanding of what their business is to be. If the parties, for example, a French construction company and a Moroccan company, are engaging in a venture to build a turnkey complex, then the relationship is one that will endure over a number of years.[16] And as both internal and external conditions change, the parties will probably want to alter some aspects of their agreement or possibly dissolve it, and that will entail a degree of conflict.

Informal methods of dispute resolution, those that challenge the hegemony of the courts, occupy an ambiguous position in the domain of disputing.[17] Arbitration is neither fully informal as, say, mediation, nor as fully formal as court litigation. From this point of view, arbitration is both antagonistic to and supportive of central modes of dispute resolution. Nor is it as straightforward as it appears: the world of arbitration varies according to the context in which it takes place. The main dichotomies are between subject fields, ie, whether the dispute is in shipping or construction, and between domestic and international arbitration. To make sense of these issues the topic must be studied within a particular context.

We selected our interviewees through a variety of methods. We first examined the arbitration and construction literature — both academic and trade — and identified those who appeared to be key players in the field. We were fortunate that virtually all lawyers and arbitrators we contacted agreed to be interviewed.[18] Since at this stage we were somewhat uncertain of the contours of the field, we asked our

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15 Bourdieu, *op cit* n 3, p 817.

16 In this case the contract was for more than FFr 211m. A French bank issued a performance bond for 20 per cent of the contract price. A dispute arose between the French construction company and the Moroccan company, which entered ICC arbitration. The Moroccan company sought payment of the guarantee from the French bank (14 ICCA Yearbook Commercial Arb 174 (1989)). Cf S. Goldenberg, *Hands Across the Ocean: Managing Joint Ventures with a Spotlight on China and Japan* (1988).

17 Y. Dezalay, '"The Forum Should Fit the Fuss" — The Economics and Politics of Negotiated Justice: A Comparative and Historical Approach,' unpublished paper.

18 All were generous with their time. No interview took less than an hour and some interviewees gave us up to three hours of their time.

informants to suggest others to whom we should speak. This too was a successful tactic, especially as it led us to those who were regarded as the key players by the players. This form of triangulation helped us confirm or otherwise the correctness of original choices.[19] Our interviews were unstructured in that we used no formal questionnaire, but rather we employed a list of topics we explored with our informants. We did not use a tape recorder; instead, we preferred to take extensive notes during and after the interviews. With two interviewers we were able to cross-check the other's perceptions. Often our interviewees would give us materials to read, and several sent us various materials after the interviews.

In Section Two we examine the role and rise of arbitration. Section Three analyses the history of disputing in the construction industry. In Section Four we examine the practitioners in the field and the international domain. And in Section Five we discuss the relative power of lawyers and non-lawyers in construction disputing.

The Field of Commercial Arbitration

Arbitration is a form of dispute resolution which involves third parties and differs from court adjudication by its dependence on the parties' agreement to be bound by the decision of an arbitral panel.[20] It is a creature of contract. Unless there is that initial contractual commitment by the parties, arbitration cannot be forced on the unwilling. Once the initial agreement exists, the courts will generally stay any court proceedings until the arbitral process has run its course. Although it shares some features with court adjudication, there are distinct differences. It is a creature of choice: the parties are able to select their arbitrators, place of arbitration, procedures, substantive law and time of arbitration. Park *et al* describe international arbitration as having the characteristics of universality, geographic adaptability, openness, institutional supervision and procedural flexibility.[21] And it has privacy and confidentiality. Because it derives from contract between the parties, no one has the right to invade the sanctum of arbitration. Even nations can be bound to arbitration as if they were merely private trading partners. Reasons of state give way to norms of commerce. A nation that wants to play in the global economy can in this way be forced to live up to the international norms of contract.[22] Arbitration business has searched out the places where freedom of contract is given maximum respect.[23] Labaton suggests American lawyers promote arbitration to obtain business that they could not otherwise handle:

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19 cf M. McCall, 'Who and Where are the Artists?' in W. Shaffir, R. Stebbins and A. Turowetz (eds), *Fieldwork Experience: Qualitative Approaches to Social Research* (1980).

20 J. Allison, 'The Context, Properties and Constitutionality of Non-Consensual Arbitration: A Study of Four Systems' (1990) Journal of Dispute Resolution 1; S. Roberts, *Order and Dispute* (1979). The major practitioner definition is provided by M. Mustill and S. Boyd, *Commercial Arbitration* (2nd ed, 1989). Note also that, like construction law, arbitration is a marginal activity in academia. There exists a diploma in international arbitration at Queen Mary and Westfield College, London, and the City Polytechnic of Hong Kong runs an MA in arbitration.

21 Park *et al*, *op cit* n 2, pp 3–4.

22 It has been suggested that, of the arbitrations filed with the ICC in 1986, one-sixth involved governmental or parastatal entities. S. Bond, 'ICC Arbitration in Theory and Practice' (1986) 26 Rassegna dell'Arbitrato 141.

23 cf T. Carbonneau, *Alternative Dispute Resolution* (1989), and W. Park, 'National Legal Systems and Private Dispute Resolution' (1988) 82 American Journal of English Law 616. But cf Mustill, who states:

> To my mind, the whole purpose of a contract being regarded as enforceable in law is that the

> International arbitration has grown sharply as a way to resolve disputes between companies of different nationalities. Arbitration has displaced litigation in many instances [and] . . . enabled American lawyers to take a role in cases in which they would normally be excluded.[24]

Western business people and lawyers mistrust legal systems other than their own, preferring instead what they perceive to be a neutral or at least a familiar forum. The following example of an international construction company's approach illustrates this point:

> Weiser [General Counsel, Bechtel Corporation] pointed to the system of justice in Saudi Arabia, where disputes are decided according to the Koran. That system, Weiser believes, is 'efficient, predictable, and well handled' for domestic disputes. Nevertheless, Weiser continued, Bechtel generally opts out of local systems in favour of arbitration or some other process conducted in a neutral forum.[25]

As third world countries enter international markets, their local legal systems are perceived by Western lawyers as inefficient or lacking in bona fides. One lawyer's characterisation of Latin America provides an example of this attitude: 'Given its colonial origins, Latin America today has an abundance of codes, regulations and bureaucracy. There is also a lack of respect for the law. In Latin America, one tends to go to one's patron, friend or representative to resolve disputes, rather than the courts.'[26] Dezalay emphasises this point in a study of business arbitration in France by quoting an arbitrator: 'Arbitration first began between people sharing the same social background; one practises the same profession, one belongs to the same union; this prospered and still exists within narrow circles shut off from the outside like shipping or big international business.'[27] The intervention, then, of a 'stranger' into the club is often a cause for concern and anxiety.[28] We see arbitration as a means for a favoured, or at least familiar, club to govern commercial disputes.

Arbitration now has many devotees, as can be illustrated by, for example, the numbers of arbitral appointments made.[29] And, according to one senior quantity surveyor and arbitrator, 30 per cent of all construction arbitral appointments are privately arranged, so fail to enter the statistics. On the international front, the International Chamber of Commerce (ICC) receives approximately 300 requests a year for arbitration each year.[30] Construction cases are one of the largest segments of its docket, as Table 2 shows.

> parties can ascertain their rights and duties by reference to some external objective standard, before any dispute has arisen, and can be confident that if a dispute does arise those rights duties will be enforced as they stand. There cannot be a contract which is governed by no law at all. M. Mustill, 'Contemporary Problems in International Commercial Arbitration: A Response' (1989) 17 International Business Law 161, 162.

24 S. Labaton, 'US Law Firms Expand to Reach Global Clientele,' *New York Times*, 12 May 1988, p 1.

25 Center for Public Resources, 'International ADR,' unpublished paper.

26 *ibid.*

27 Y. Dezalay, 'Negotiation and Legal Rationality: Business Arbitration as an Illustration of the Stakes of Mediation within the Legal Field,' unpublished paper.

28 G. Simmel, 'The Stranger' in D. Levine (ed), *On Individuality and Social Forms: Selected Writings* (1971).

29 See Table 1 above. We should also add that it is difficult to calculate the number of disputes because of the different ways of counting them, eg, case filings, dispositions, arbitral appointments. Just because a case is started does not mean it will follow a kind of natural life-course to final disposition; indeed, it will most likely settle or simply fade away. All provide disparate answers. But, more importantly for arbitration, there has not been a history of systematic statistical compilation, so what figures we possess are fragmentary.

30 Park *et al*, *op cit* n 2, p 5.

No other international arbitral forum hears as many cases as the ICC. The London Court of International Arbitration, the American Arbitration Association and the Stockholm Chamber of Commerce deal with relatively few cases.[31]

The state formal system would like to maintain control over disputing, but it is unable to handle all of it. It actively seeks to slough off parts of it while trying to keep a supervisory role which often becomes, not unnaturally, authoritarian. Courts are overloaded and, ideally, the judiciary would like to keep important cases to itself and remove the routine and technical elsewhere. Lord Justice Donaldson has argued:

> Arbitration is a vitally important alternative to resorting to the Courts for the settlement of disputes. If it did not exist, it would have to be invented, because the Courts could not possibly handle the sheer volume of disputes which arise in a complex modern society. But, as is now generally recognised, it should be a real alternative, operating to the same standards as do the Courts, although not necessarily employing the same approach and procedures. Any contrast between the alternatives offered should not be between amateurism and professionalism, but between two brands of professionalism.[32]

Table 2 Categories of International Chamber of Commerce Cases

Category	Percentage Years 1987–*90*			
	1987	1988	1989	1990
1. Foreign trade	31.8	26	26	27.1
2. Licensing	13.3	17	18	16.4
3. Joint venture and industrial cooperation	4.7	2.4	5.4	6.5
4. Construction	18.5	26.4	21	18.9
5. Agency	14.1	10.7	13	17.1
6. Finance	6	5.2	6	5.8
7. Other (maritime transport, consultancy, employment, etc)	11.6	12.3	10.6	8.2

Source: International Chamber of Commerce Annual Report 1990, p 26.

Similarly in the United States, there have been calls for relieving the courts of their 'excessive case load.'[33]

Within the field of construction law, arbitration is well entrenched but it is not truly secure, as it is challenged by a court that exists primarily to hear construction disputes: the Official Referees' Court.[34] Construction lawyers work in both arenas

31 Park *et al*, *op cit* n 2, pp 5–6. Note that within the USA the American Arbitration Association hears a large number of cases; its international docket is small. See also R. Graving, 'The International Arbitration Institutions: How Good a Job are they Doing?' (1989) 4 American U Journal of International Law and Policy 319; and R. Clow and P. Stewart, 'International Arbitration: Storming the Citadels' (1990) International Financial L Rev, March, pp 10–13.

32 Lord Justice Donaldson, 'Foreword' in D. Stephenson *Arbitration for Contractors* (1987). It is interesting to note that since he retired as Master of the Rolls, Lord Donaldson has joined Essex Court chambers as an arbitrator.

33 'As I See It — Slow Justice Is Inadequate Justice: An Interview with Chief Justice Warren E. Burger' (1971) 108 *Forbes*, 1 July, p 21.

34 For 1990 the Official Referees' Court had 2,202 cases pending, of which 136 were tried and another 986 were disposed of by way of transfer or withdrawal. Lord Chancellor's Department, *Judicial Statistics: Annual Report 1990*, Cm 1573.

which are compelled to co-exist in a delicate harmony.[35] The London Official Referees' Court suffers from the disadvantages of most courts — delay.[36] According to the Senior Judge of the Court, the lead time to obtain a fixed date for a hearing is fifteen to eighteen months, during which time 'even quite large companies can experience liquidity problems.'[37]

Table 3 Peak Profits and 1992 Forecast Profits of UK Top 10 Construction Companies

Company	*Profits (£ millions)*		
		Peak year	1992 (forecast)
1. Tarmac	393.1	(1988)	24
2. G. Wimpey	144.5	(1988)	25
3. Taylor Woodrow	116.9	(1989)	0
4. Costain	91.9	(1988)	15
5. AMEC	91.3	(1989)	40
6. Barratt Developments	77.5	(1989)	8
7. J. Mowlem	59.5	(1988)	0
8. Wilson Connolly	54.0	(1989)	26
9. Bryant Group	51.4	(1989)	20
10. Hewden-Stuart	36.2	(1990)	12

Source: Olins, *op cit* n 38.

The History and Context of Construction Disputes

Construction is a business that is basic to the quality of our lives. It is also one that is essential to the British economy. But construction is a highly contingent, fragile business, even more so in the depths of a recession.[38] Table 3 reports the

35 The ambivalence has increased since the Offical Referees can now act as arbitrators with the powers given to them under the Courts and Legal Services Act 1990.

36 cf the situation in the Commercial Court where three judges have been promoted to the Court of Appeal, leaving a severe shortage of judgepower to handle the outstanding cases. The Court's clients — corporate and overseas users — are already looking elsewhere for potential dispute resolution forums because the Court's central advantage was speed, which has now disappeared: F. Gibb, 'Business No Longer As Usual,' *The Times*, 8 December 1992, p 29.

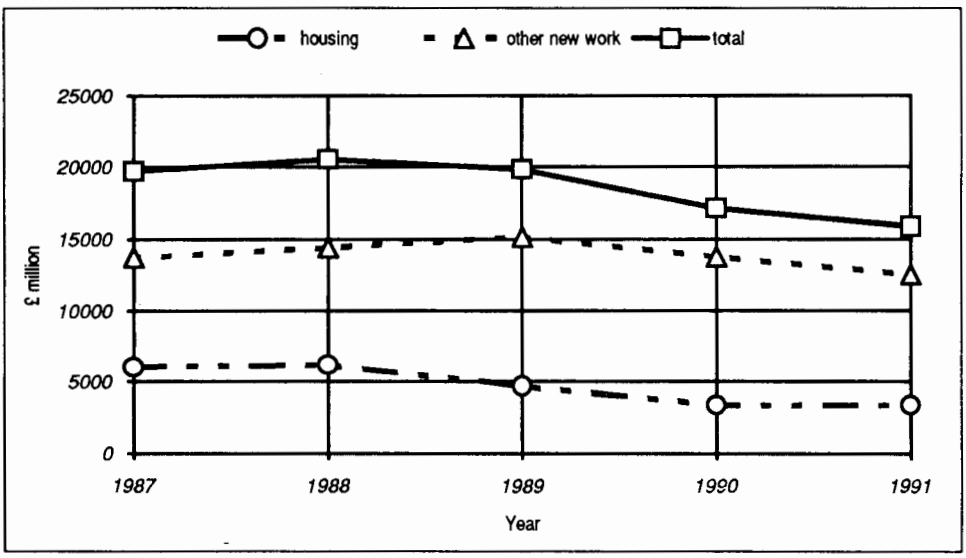
37 A. Stewart, 'Judgement Ways: Expert Witness: Judge John Newey QC' (1992) *Building*, 13 November, p 36.

38 R. Olins, 'Building Industry Against the Wall as Profits Vanish,' *Sunday Times*, 6 September 1992, s 3, p 4. Note also that the construction industry is divided into essentially two parts, *viz*, building and civil engineering. Whereas the former refers to buildings proper, the latter refers to projects such as bridges and the Jubilee Tube Line extension. It is anticipated that the Jubilee Line extension will account for four per cent of all civil engineering work in 1993 (A. Barrick, 'Jubilee Line extension: golden jubilee' (1992) *Building*, 20 November, p 63). But cf Simon Jenkins' optimistic outlook that London is going through a normal phase in slump and boom and will soon prosper. S. Jenkins, 'London's forthcoming boom,' LWT London Lecture, London Weekend Television, 13 December 1992. See also F. Kane and P. Springett, 'Banks Suffer Property Chiller,' *The Guardian*, 5 December 1992, p 36. It is estimated that the total UK commercial property sector is valued at between £200 billion and £300 billion. Because of the recession the property business is suffering high-profile insolvencies such as Olympia & York (Canary Wharf) and Rosehaugh (Broadgate). See R. Kynoch, 'House of Cards' (1990) *Chartered Surveyor Weekly*, 20 December, p 23; and J. Flood and E. Skordaki, 'Corporate Failure and the Work of Insolvency Practitioners: Professional Jurisdiction and Big Corporate Insolvencies' (1993) ACCA Research Report. Also, the JCT80 now contains an insolvency clause to protect jobs when a contractor ceases trading. Building, 'In Brief' (1992) *Building*, 6 November, p 8.

decline in the top ten construction companies' profits.[39]

Table 3 shows dramatic descents from the peak profits of the late 1980s, with some companies forecasting zero profits for 1992.[40] In addition, it is estimated that there are 170,000 building companies in the UK, of which 7,000 have collapsed in the year from late 1991 to late 1992.[41] A survey by the Building Employers Confederation (BEC) predicted, 'building output in 1992 could fall to its lowest level for six years with major contractors hardest hit . . . total output this year was likely to fall to £30,250m, down £1,630m.'[42] Another way of capturing these movements is to look at values of new orders obtained by contractors, as shown in Figure 1.[43]

Figure 1 Value of new orders obtained by contractors by type of work



Note: Other new work consists of commercial/industrial, public/infrastructure construction work

Source: Department of Environment, Business Briefing 15 (February 1993)

39 There is a problem with the concept of profits as an objective measure of value. Lukka writes:

> any concept of profit must inevitably be based on some notion of value, which itself is a socially constructed concept. Thus the concept of profit cannot refer to an entity existing objectively somewhere 'out there.' On the contrary, it is essentially a concept created by human consciousness and explicit or implicit collective agreements in society. K. Lukka, 'Ontology and Accounting: The Concept of Profit' (1990) 1 Critical Perspectives on Accounting 239.

40 So desperate are some companies that they seek business where they can. For example:

> Last month Bovis won a £3m contract to renovate apartment buildings in Bosnia for 20,000 people displaced by civil war. But is convoy of 25 lorries full of generators, heaters and portable lavatories was overtaken by events when Vitez, Travnik and Zenice were themselves engulfed by war and began producing refugees of their own.
>
> Nothing daunted, Bovis has hurriedly despatched a man to Zagreb, on a mission to the UN to find other apartment blocks in need of renovation. Column Eight, 'Builders Without Frontiers,' *The Independent*, 13 November 1992, p 33.

41 Kane and Springett, *op cit* n 38, p 36.

42 New Builder, 'Output Fall Forecast' (1992) *New Builder* 6.

43 We have transformed the numbers from their original tabular form into a graph which shows the yearly movement of the orders more clearly.

Figure 1 shows that values have declined progressively for housing and industrial and commercial work, though not at uniform rates. Industrial and commercial orders begin to decline a year later than housing orders. This, at least, suggests that industrial and commercial orders have less flexibility in their curtailment than housing orders.

These difficulties have been exacerbated by downgrading of the top ten construction companies' credit ratings.[44] One such agency cut Tarmac's rating from *A+* to *A*, Costain from *A−* to *BBB*, and Barratt from *BBB* to *BB+*.[45] Some companies — Costain, Tarmac, Taylor Woodrow, Wimpey — which are members of the Trans-Marche Link consortium are also embroiled in disputes with Eurotunnel over cost overruns of £1.2 billion.[46] 'Subbie-bashing,' too, is rife, where the main contractor delays payment until the subcontractor is forced into bankruptcy.[47] Moreover, the Office of Fair Trading is to investigate the phenomenon of 'Dutch auctioning.'[48] Under this process, 'major builders tendering for projects frequently cut 10–15% off the lowest subcontract tenders to cut the price of their own bids. If the main contractor wins it goes back to the subcontractors and pressurises them to lower their bids.'[49]

There are two faces to the successful achievement of construction projects: the construction itself and project financing. As one construction solicitor put it:

> With project financing there is a problem because whereas the construction contract is about allocating risk between the players, banks are only interested in security. And here is the paradox: banks are trying to make *secure* something which at bottom is *insecure*. Even if banks [or rather their lawyers] draft a set of watertight documents, and it isn't difficult, they are still dependent on the building work being done properly, which goes back to the allocation of risk situation.

Some lawyers see project financing as dealing with risk. For example, the Norton Rose project finance group identified five types of such risk, namely, political risk, construction risk, operational risk, currency risk and market risk, which should be amenable to precautionary documentary drafting.[50] Nevertheless, the combination of project financing and construction complicates the construction process and can lead to diverse sets of problems depending in which area the difficulties arise.

Perhaps the principal point about the construction industry is that disputing is *endemic* to it.[51] In times of plenty and as well as in recessionary periods, disputing is a normal part of the industry's life. Modern developments have exacerbated the industry's predilection towards 'naming, blaming and claiming' behaviour.[52] The

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44 Two American agencies issue credit ratings on companies: Moody's and Standard & Poor. McCullough writes: 'The top four grades are *AAA*, *AA*, *A* and *BBB*, any one of which means that the company which issued the bonds is unlikely to default on the payment of interest or principal or, in the case of stocks, means that the company is in fine financial shape. Anything rated *BB* or below is a dodgy investment.' V. McCullough, *The Economist Pocket Guide to the New City* (1988).

45 A. Duffy, 'Credit Blow to Builders' (1992) *New Builder* 13.

46 T. Wilkinson, 'Wimpey Attacks Government,' *The Independent*, 9 September 1992, p 20.

47 See Simcock, 'Contracting: How Little Guys Pay for Big Companies' Troubles: Victims of the Ripple Effect,' *Independent on Sunday*, 5 July 1992, p 21.

48 A. Stewart, 'OFT to Investigate Tender Price Dispute' (1992) *Building*, 20 November, p 14.

49 *ibid.*

50 Norton Rose, 'Project Finance' (nd). They provide examples of some projects: construction of a combined cycle gas turbine power station in the UK — £400,000,000; construction of paper mill in UK — £300,000,000; construction of LNG complex in Nigeria — US$3,000,000,000.

51 cf B. Yngvesson, 'Disputing Alternatives: Settlement as Science and as Politics' (1988) 13 Law & Social Inquiry 113.

52 W. Felstiner, R. Abel and A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...' (1980–81) 15 Law & Society Rev 631.

Banwell Report of 1963 on the placing and management of contracts for building and civil engineering work described the core problem as the adversarial nature of the industry: 'The industry has come to regard itself as a series of different parts, roughly consisting of professional advisors, contractors, specialist contractors and suppliers and operatives of various crafts and skills. These attitudes must change.'[53] On the whole, contract cases excite less societal condemnation than, say, tort cases, as Engel has demonstrated in Sander County, Illinois.[54] We hear of some of the big cases; the channel tunnel's vicissitudes are reported daily in the press, but most disputes fail to register on society's consciousness.

Before World War II the large construction firms used their own labour and only contracted out specialist work such as lifts. Now there are no large builders. In the 1950s the construction industry became specialised, partly through the need for highly specialised services like air-conditioning. With the rise in the numbers of specialists — eg, flooring and foundations — it became uneconomic for large building firms to retain teams of specialists. Instead they became firms of large contractors specialising in management. The entire project is subcontracted from excavation to roofing.[55] As subcontractors have become more important, so has the potential for problems between them and the managers.

Royce argues that as a result of the change by construction companies from direct involvement in building to management, the construction companies' understanding of the daily interaction on building sites has deteriorated.[56] This is exacerbated by architects, who are frequently the comptrollers of the site, taking a more academic line in their work and becoming detached from the practicalities of work. But the architect is in an unenviable situation. A senior architect and arbitrator put it this way:

> Although the architect is appointed by the client to look after his interests, he has a very real responsibility towards the building contractor and must act quite impartially and fairly between the building owner and the contractor. This is of the utmost importance and should be made quite clear to the client in the event of any dispute between the two parties to the contract. To maintain this impartiality will require tact and strength of character and will provide the greatest test of the architect's integrity. It is only by such integrity that he can do his duty to both client and builder, and at the same time retain the respect of both.
>
> With the speeding up of contracts and regrettably the lack of enthusiasm by architects to take the initiative in assuming a leadership in management of contracts, a climate was created for management services to proliferate and for the advent of the project manager.

The result is that the 'natural' chain of command from architect to building contractor to subcontractor has broken down. In its place the architect relies on a series of subcontractors and labour-only gangs.[57] As the system of governance goes awry, the possibilities for disputing rise dramatically. We can see the differences more clearly when cross-border comparisons are made, eg, UK and France. In France far fewer professionals are involved — eg, there is no quantity surveyor — there is less reliance on precise contract wording and there is a lower tendency to litigate disputes.[58] Construction projects, then, are complex and complicated endeavours. A typical international project is Belgium's largest private building project, Zaventem

53 B. Grant, 'Analysis: Starting Over' (1992) *New Builder* 16.
54 D. Engel, 'The Oven Bird's Song: Insiders, Outsiders and Personal Injuries in an American Community' (1984) 18 Law & Society Rev 101.
55 N. Royce, 'How Fair are we in Dispute Resolution in the Construction Industry?' (1991) *Arbitration* 103.
56 *ibid* 104.
57 *ibid* 104.
58 A. Duffy, 'EC: Road to Europe' (1991) *New Builder*, 25 June, p 26.

Airport, which illustrates the diversity involved.[59] Figure 2 summarises the project.

The scale of the project is so vast that where normally roles would be taken by individual companies — eg, project manager, contractor, architect — in this instance they can only be carried out as joint ventures of two to six companies.[60]

With the demise of the traditional system of construction governance, new ones have arisen. Chief among them are management contracting and package deal contracts. In management contracting, an idea originating in the United States, the main contractor is chosen early in the process to manage the construction process from start to finish, for which a percentage fee — which used to be ten per cent but is now nearer four per cent — is decided between the employer and main contractor who then employs whoever necessary. For example, the most vigorous global management contractor is Bovis, with global sales of £5,000 million.[61]

Figure 2 Breakdown of complex construction project: Zaventem Airport, Brussels

Client:	Brussels Airport Terminal Company
Architect:	Group 2000, joint venture of Botinck, Jaspers, Montois, Van Campenhout and Willcox
Structural Engineer:	Joint venture of Verbeeck, Fraiture and Dumont/BTC
Services Engineer:	Tractebel
Programme Consultant:	Tractebel
Quantity Surveyor:	MDA (Benelux)
Works Inspector:	Seco
Project Manager:	Joint venture of Bernheim and Outremer Sobemap
Contractor:	International Airport Contractors, joint venture of Besix, Vanhout, Wust, Maurice Delens, ABV, and Van Reil & Van den Bergh
Type of Contract:	Management contract
Contract Period:	November 1990 to May 1994 (terminal building and one pier). Second pier opens one year later.
Contract Cost:	BFr17 billion (approx £380 million)

Source: Ridout, *op cit* n 59.

Package deal contracts are where the contractor provides all the services to design and build a project, so that the employer does not take on an independent architect. Gowan and Bolton argue that these arrangements often increase friction between employers and contractors:

> The common feature of [management contracting and design and build contracting] is that they place the contractor and the employer on opposite sides of the fence. Logic would seem to dictate that, to achieve an attitude of common purpose, the employer and the contractor need to be on the same side of the fence. One way of achieving this . . . is through construction management.[62]

59 G. Ridout, 'Zaventem Airport: Flight Stimulator' (1992) *Building*, 6 November, p 49.

60 In part, joint ventures are used in Belgium because Belgian defect liability law imposes the responsibility for structural defects for a period of ten years. Therefore, the contractors and architects spread their risk through a number of participating parties.

61 P. Cooper, 'The Top 500: Wind in their Sales' (1992) *Building*, 20 November, p 49.

62 D. Gowan and J. Bolton, 'Co-opting the Contractor' (1991) DAC Reports 20.

But, conversely, Topping notes:

> The adversarial nature of the UK building industry is a subject of constant comment. But little is said about the vast number where problems are overcome as work proceeds. Many employers appear to be adopting the [design and build] route because it provides a single point of contact and eliminates much of the potential for conflict. It is interesting that [construction management], which was promoted as a system for avoiding conflict, has led to some well-publicised litigation.[63]

The Rise of the Standard Form Contract

Many situations created by contract have at their hearts a series of standard forms or 'boilerplate.' These are the stuff of normal business routine and, although they contain default clauses, Macaulay has shown that actual defaults do not always lead to legal action. Indeed, the norm is non-contractual dispute handling: business people are likely to continue in business with each other despite the ruptures that have occurred.[64] Galanter and Rogers, however, argue that business people have become more instrumental in their disputing decision-making.[65] Long-standing relationships are more likely to be broken if the benefits of so doing outweigh the short-term costs. Rather oddly, Duncan Wallace claims, 'A construction contract is not a contract between "businessmen" ... [it] is in essence a consumer or end-user or retail contract.'[66] With the intensification of competition, business relationships are underscored by a greater insecurity.

The construction industry has its own specific histories of standard forms, of which there are essentially three types. The Standard Form of Building Contract published by the Joint Contracts Tribunal (JCT) became known as the RIBA contract and, although the Royal Institute of British Architects is now only one among several institutions that comprise the JCT, it is colloquially referred to by its early name.[67]

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63 N. Topping, 'Procurement: Times of Change' (1992) *New Builder*, 23 July, p 23. These new systems of governance have also increased fee competition among the players in the construction field. And this competition increases the potential for conflict. One architect said that for an hotel in Cyprus the all-in fee for the contract would have typically been ten to twelve per cent of the project's value. The fee includes the services of the architect, quantity surveyor, civil engineer and others. The project was finally concluded for a fee of two and a quarter per cent. He said, 'I put in my lowest possible bid at three and a half per cent. I don't know how they could do it for their price. Now you even hear of fees of one and a half per cent! It doesn't make sense; they can't do it for that.' The final result of competition and specialisation is the move towards multidisciplinary practice (MDP) in the construction industry where MDPs offer all services on a one-stop basis, eg, legal, architectural, surveying, engineering and project management. One industry specialist offered this view, 'The architect's role remains, but the accountant has now the vital role.' That is, the former role of coordinator and regulator has given way to control by cash flow. Cf the situation of railway engineers versus accountants in railway mechanical engineering in D. Lawrenson, 'Britain's Railways: The Predominance of Engineering over Accountancy during the Inter-war Period' (1992) 3 Critical Perspectives on Accounting 45.

64 This idea was originally mooted in S. Macaulay, 'Non-contractual Relations in Business: A Preliminary Study' (1963) 28 American Sociological Rev 59. Since then there have been other studies which in part confirm Macaulay's thesis. See S. Macaulay, 'Lawyers and Consumer Protection Laws' (1979) 14 Law & Society Rev 115; and Beale and Dugdale, 'Contracts Between Businessmen: Planning and the Use of Contractual Remedies' (1975) British J of Law & Society 18. See also R. Lewis, 'Contracts Between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry' (1982) 9 J of Law & Society 153.

65 M. Galanter and J. Rogers, 'The Transformation of American Business Disputing? Some Preliminary Observations' (1991) Working Paper DPRP 10-3, Institute of Legal Studies; M. Galanter, 'Law Abounding: Legalisation Around the North Atlantic' (1992) 55 MLR 1.

66 I. Duncan Wallace, 'Control by the Courts: A Plea for More, Not Less' (1990) 6 Arbitration International 253.

67 J. Parris, *Arbitration: Principles and Practice* (1983); D. Stephenson, *op cit* n 32.

The second standard form is the Institution of Civil Engineers Conditions of Contract (ICE). The final type of standard form is the Fédération Internationale des Ingénieurs-Conseils and the Fédération Internationale Européenne de la Construction (FIDIC).[68] Its main use is in international civil engineering construction and building work, eg, dams and bridges, and building work. Much of the construction work carried out under the aegis of the World Bank in Third World countries uses the FIDIC contract.[69] All the forms contain dispute resolution clauses.[70]

Royce states that the standard forms of contract are a good thing in that they relieve the parties to construction contracts from having to create a new contract each time.[71] One problem with this view is that the contracts are open to modification by the parties and they are often drafted parallel to the financing documents. And as Yuille points out:

> The recession is influencing the nature of legal work, say lawyers. 'Whereas in the past people had jobs on standard forms, now they have heavily amended standard forms — all very much one-offs which need scrutiny. It comes about by people trying to shift risk,' says Gibson [head of legal services, John Laing].[72]

Lawyers, Non-Lawyers, Courts and Arbitration, Domestic and International

In the field of construction the numbers of lawyers are few. Arbitrators too are few, at least those in demand. Their interaction is fraught: they are aware of their own areas of expertise but find it difficult to accept the authority of the other. Their roles vary according to the context in which they function. In UK construction arbitration work, lawyers adopt fundamentally a representative role with non-lawyers as arbitrators. In international work the distinctions are blurred, with lawyers taking both representative and arbitral roles but non-lawyers appearing either as experts or arbitrators.

Lawyers

The growth of lawyers' involvement in construction arbitration appears to be linked to the development of the standard forms of contract. However, in the period before the Second World War, as one arbitrator described it, 'There was little awareness of substantial involvement of lawyers in construction arbitration. The arbitration process was less legalistic and arbitrators operated by the seat of their pants.' Judicial policy towards arbitration in the 1920s was permissive, especially with regard to

68 Stephenson, *op cit* n 32.

69 *ibid* p 48.

70 These contracts are used according to the type of project. In the construction of an airport, for example, the runways would be built under an ICE form because the nature of the work is fundamentally engineering; but the hangars would be built under a JCT form because the work is primarily building. FIDIC is used in construction projects within the UK where the major contracting party is a foreign entity. Each standard form uses arbitration as its mode of dispute resolution. The first two standard forms, JCT and ICE, are within the ambit of the Arbitration Acts 1950, 1975, 1979, and generally focus on 'Arbitration London.' FIDIC incorporates the provisions of the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC), and arbitral proceedings are protected from the 'special case' procedure by the 1979 Act. See D. Stephenson, *op cit* n 32; and also M. Kerr, 'Forum London' (1989) Counsel, July/August, p 16.

71 N. Royce, *op cit* n 55.

72 M. Yuille, 'Construction Hit by Even Harder Times' (1993) *The Lawyer*, 19 January, p 13.

procedure. Despite this licence, the courts sharpened their control over errors of law because non-lawyer arbitrators were deciding cases without reference to legal principles. The courts wished to protect the use of English law in arbitration against the developing pollution of quasi-law.[73]

Most of the lawyers we interviewed emphasised the small number of solicitors' firms that specialised in construction work. One said, 'There are no more than half a dozen serious players' [referring to firms]. Another referred to a 'penumbra group' of up to 25 firms that undertook some work in the field. The smallest concentration is found in the bar with two sets of chambers specialising in construction work, with another 20 or so barristers scattered around.[74] This aspect of concentration can be illustrated by looking at the legal advisers of the top ten construction companies.

Table 4 Top 10 Construction Companies and their Legal Advisers

Company	*Legal Adviser*
1. Tarmac	Mr R. Tupper
2. G. Wimpey	McKenna & Co/Slaughter & May
3. Taylor Woodrow	Norton Rose/Mr D. Patterson
4. Costain	Slaughter & May
5. AMEC	Laytons/Linklates & Paines
6. Barratt Developments	Slaughter & May
7. J. Mowlem	Mcfarlanes/McKenna & Co
8. Wilson Connolly	Not available
9. Bryant Group	Eversheds
10. Hewden-Stuart	Maclay Murray & Spens

Source: Crawford's Directory of City Connections 1991.

Even though the same firms repeat in Table 4, a distinction must be drawn between the types of legal work construction companies require. We can broadly characterise the work as 'front-end' and 'back-end.' The former is concerned with putting the deal together, including project financing. For example, the *Legal 500* notes: 'a recent report suggested that *Slaughter and May* was the third-most-used firm by construction companies; that rating was, of course, a tribute to its undoubted strength in general corporate law, as opposed to construction law.'[75] The latter is involved in managing disputes when they arise. And the same firm may not necessarily be hired to do both tasks. The relational mode of lawyer-client relations waned during the 1980s as companies became more selective in their searches for expertise.[76] The result of this dramatic change in the nature of the lawyer-client relationship

73 Mustill and Boyd, *op cit* n 20, pp 450–51. See also R. Merkin, *Arbitration Law* (1991).

74 To a large extent, although barristers are independent practitioners, their chambers are reaching such proportions that they are closely akin to law firms, and for purposes of this article they are treated as such. This tendency was highlighted by the Law Society president's speech to the 1992 Bar conference, where he warned his audience 'not to attempt to become full-service legal providers like solicitors.' The implication was clear.

75 *The Legal 500, 1992* A-262 (1992).

76 cf J. Fitzpatrick, 'Legal Future Shock: The Role of Large Law Firms by the End of the Century' (1989) 64 Indiana LJ 461. See also Flood, 'Conquering the World: Multinational Legal Practice and the Production of Law,' *op cit* n 4.

has been a move towards transactional relationships where law firms are taken on for a specific set of tasks. The complexity of the lawyer-client relationship can be illustrated by the example of Mowlem's claim against the Carlton Gate Development Company (CGDC) which became insolvent during arbitration.[77] Mowlem had been dismissed as management contractor over a dispute about certificates. Not only was Mowlem locked into an expensive arbitration, but it was compelled to start court action against the Eagle Star insurance group when it increased its holdings in CGDC from 25 to 50 per cent. CGDC's solicitors were McKenna & Co, who were normally advisers to Mowlem (see Table 4). Mowlem was using the city firm of Clifford Chance. These kinds of developments militate against the generalist and foster the growth of boutique or niche law firms. One beneficiary here has been the law firms and chambers that have grown to handle construction disputes, a number of which have been spin-offs from the established firms. The construction law firms are mostly located in the second tier of corporate law firms below the top ten firms, as Table 5 shows.

Table 5 The Key 20 Construction Law Firms

Law Firm	*Number of Specialists*
1. Masons	43
2. McKenna & Co	40
3. Rowe & Mawe	16
4. Berwin Leighton	8
5. Bristows Cooke & Carpmael	12
6. Fenwick Elliott & Burns	10
7. Lovell White Durrant	32
8. Nabarro Nathanson	22
9. Winward Fearon and Co	8
10. Baker and McKenzie	10
11. Beale and Company	13
12. Berrymans Solicitors	15
13. Denton Hall Burgin & Warrens	6
14. Herbert Smith	9
15. Barlow Lyde & Gilbert	10
16. Clifford Chance	13
17. D.J. Freeman	11
18. Davies Arnold Cooper	5
19. Freedman & Co	13
20. Glovers & Co	4

Sources: The Legal 500, 1992 A-260 (1992), and *Chambers and Partners Directory* 90-1 (1992).

When we asked lawyers why they were working in the construction field, most said that it was hard work but lucrative. One senior lawyer remarked: 'I charge £350 an hour and that's at the top. Mind you, there is [XXXX] in Paris; he charges about £400.' All said it was uneconomic to take on a case worth less than £50,000. The standard mode of charging for all work was by the hour for solicitors. Barristers quote a brief fee and refreshers for domestic work, but for international work they too charge by the hour. The subtleties of how to charge were summarised by a lawyer

77 A. Duffy, 'Mowlem to Pursue Claim' (1991) *New Builder*, December, p 5.

who said, 'Once I did a fourteen-day hearing compressed into seven days, so I was glad I quoted on an hourly rate and not daily!'

Lawyers in the construction field have established an extensive corpus of knowledge and institutions within which this knowledge is created. The lack of core academic institutional support — construction law is not found in the curriculum of conventional UK law degrees — reinforces the field's peripheral nature, yet in the fields of arbitration and alternative dispute resolution (ADR), it is the construction lawyers who lead the way. One key academic institution supporting construction law is the Centre of Construction Law and Management at Kings College London. But here the distance between core and periphery is emphasised by the director being a practising barrister at one of the two construction barristers' set of chambers rather than a full-time academic. Not untypically, the centre has strong links with practitioners.

The production of knowledge in the construction law field relies almost entirely on practitioners. They produce the textbooks, seminars and the *samizdat* literature on the topic that circulates through the construction community.[78] Many of the court decisions are not reported, especially those in the Official Referees' Court, so individuals will create unofficial law reports that are then passed around by hand.[79] At least these refer to specific public events, court hearings, but as most of construction disputing occurs before an arbitral panel, there is usually no record. At this level, arbitral decisions, which effectively have no precedential value, circulate by word of mouth and become part of the mythology of the field.[80] This is an integral part of the struggle to determine the discourses of construction disputing between the lawyers and non-lawyers.

Not only is the construction field marginal, but its main court, the Official Referees' Court, has low status.[81] Two sets of courts have construction cases within their jurisdiction, namely, the Official Referees' Court and the Commercial Court. The latter is an elite institution within the High Court, with 50 per cent of its docket involving international disputes with international parties, but it never hears construction cases. Its judges are selected for their skills in commercial matters, and over time they have developed procedures for avoiding delay. And to ensure they respond to client demand, the court established a users' committee which consists of lawyers and others who make extensive use of the court. The Official Referees' Court, by contrast, although part of the High Court, is staffed by judges who are of comparable status and pay to circuit judges.[82] This deters successful construc-

78 The trade journals, both legal and construction, always contain flyers advertising courses and seminars on various topics: construction, property and arbitration are frequently seen. These courses tend to be expensive, with tuition fees ranging from the hundreds to the thousands of pounds.

79 We were given at least two such reports during the fieldwork. And, of course, cases are reported in the construction trade press.

80 International arbitral decisions are sometimes reported in a denatured way where the parties identities have been stripped out.

81 In 1984 the Attorney General, Sir Michael Havers, commented on the Official Referees' Court as, 'an important part of the administration of justice, although clearly one about which not much is known.' Havers here attempted the impossible: to place an institution at the periphery and centre at the same time. See E. Fay, *Official Referees' Business* (2nd ed, 1988).

82 For example, a High Court judge is called 'Mr Justice Smith' and is usually given a knighthood on being promoted to the bench, whereas an Official Referee is called 'Judge John Smith QC' and does not receive a knighthood. The Beeching Commission report caused much resentment at the time because it recommended that Official Referees should become circuit judges, not members of the High Court (Fay, *op cit* n 81).

tion barristers from becoming judges in this court, with the result that the Official Referees are not directly skilled in construction work. As Fay puts it:

> A practitioner at the specialist patent bar, or Admiralty bar, or commercial bar may be attracted to become a judge of the court wherein he is skilled; the attraction for members of the construction bar is far less, or some might say non-existent in view of the fact that the leaders in this field are among the top earners at the bar today.[83]

The court has since established a users' group, modelled after the Commercial Court. One lawyer who was a member of the group told how he had unsuccessfully recommended to the Lord Chancellor's Department that there should be two types of Official Referee: one, the OR (technical) who would handle the technical issues; the other, the OR (judicial) who would deal with the legal matters.

There are other types of institution mainly concerned with modes of dispute resolution rather than the production of construction law knowledge. Two of these institutions are the Chartered Institute of Arbitrators (CIA) and the Centre for Dispute Resolution (CEDR), and both are dominated by construction lawyers.[84] The CIA maintains lists of arbitrators and will act as an appointing authority; it also trains members in arbitration. CEDR has a similar remit but concentrates on ADR.[85]

The law firms working in the area have begun to develop differentiated expertises within the field of construction law. There are firms which generally act for employers, or for contractors, or for engineers. For example, the brochure of Beale and Company says:

> It was Beale and Company's historical association with the railways that prompted relocation of the firm to offices just off Victoria Street, which is still the traditional home of the engineering profession. That move could be said to have foreshadowed the concentration of experience in building and construction matters which exists within the firm. But the development of this side of our practice has occurred principally during the last twenty years, with a succession of major international and domestic projects on which the firm has been asked to advise.
>
> Our service to the building and civil engineering industry advising on contractual, partnership and company matters and questions of liability is comprehensive.[86]

Other firms market themselves as generalists in the construction field. Freshfields describes itself this way:

> Modern construction and engineering projects are becoming increasingly complex — technically, financially and legally ... Freshfields has a long-established practice and wide experience in advising on all types of domestic and international construction and engineering projects; and in the resolution of construction claims and disputes, pursuing them through arbitration or proceedings in Court if this should ultimately become necessary.[87]

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83 Fay, *op cit* n 81, p 137.

84 The CIA's journal *Arbitration* usually has a preponderance of articles by construction practitioners — lawyers and others. Note that there are other organisations such as the Society of Construction Law and the Official Referees' Solicitors' Association.

85 CEDR was started by a small group of construction lawyers who believed in the efficacy of ADR. Their original aim had been to situate it at the construction law centre of Kings College, to give it academic respectability and independence, but the college was unable to fund it. One of the lawyers who was involved in the founding of CEDR said, 'There was much distrust about setting up CEDR because many lawyers thought it would be another trick in lawyers' armoury.' CEDR promotes dispute resolution through mediation, conciliation or minitrial.

86 Beale and Company, Beale and Company 10 (nd).

87 Freshfield, Construction & Engineering Group 2 (nd).

The development of expertise recognises competition as a necessary element of the field. These firms and lawyers compete intensely with each other as well as with other firms that attempt to break into the market. Moreover, the competition is not bound by national borders. One senior Queen's Counsel said, 'The Americans are much better at marketing advocacy than the British, even though they're not as good as us.' He added, 'We charge less than the Hong Kong or Australian lawyers. It's much cheaper for a client to hire a UK silk, fly him out first class to Hong Kong, and put him up in the Mandarin hotel than hire one of theirs.'

Out of the competition there has developed a rank ordering of work. At the apex is the big international construction arbitration where the claims can run into billions of dollars or pounds. At the base is the everyday disputing between contractor and subcontractor in the UK. And all the lawyers we talked to said claims under £50,000 were not worth the costs involved and thought there ought to be a 'small claims' system for these cases. International work is uncoupled from state norms yet enjoys high status, but domestic work is closely linked to state norms yet is peripheral. Table 1 indicated that the UK engages in disputing with some zeal. Given that this field of juridical activity is largely marginal to the work of the courts (and academia) and takes place in an arbitral forum, lawyers have been engaged in a struggle to shift the procedures and style of arbitration from the informal to the formal end of the spectrum. That is, their aim is to reproduce the court within the arbitral forum. A debate, 'Are Lawyers Killing Arbitration?' at the Chartered Institute of Arbitrators in 1991 demonstrated some of the dimensions of the struggle. The speaker for the motion said:

> There was no doubt that lawyers were killing arbitration, the question was why. The answer — because they were not trained for it. They took shelter under the safety of court procedure because they did not understand the quicker techniques of arbitration. They were afraid of short cuts in case they were sued for negligence. And they were encouraged in this by some arbitrators who liked being treated as judges.[88]

The speaker opposing put forward his view thus:

> Lawyers had made an enormous contribution to arbitration laws and working practices. They developed the 1979 Arbitration Act which had made British arbitration popular overseas by protecting foreign parties from UK courts. A client was better represented by a lawyer than by a lay advocate or appearing in person. Lawyers helped the efficiency of the tribunal by accurate information on the law.[89]

Many of the lawyers we interviewed disliked arbitration and preferred the procedures of the courts. The courts were predictable, reliable and public. A construction lawyer at a large firm said:

> I prefer the courts to arbitration because the judges are good, it's cheaper and there is some right of appeal. But unfortunately the ORs' court has only very limited rights of appeal. The six or so firms that work regularly with the ORs get on well with them. This makes for an informality which allows the judges to take a more proactive line in cases.
>
> It's a gamble whether you get a good arbitrator or not. If it's a money case you want a good QS [quantity surveyor]; if it's a substance case you want a good contracting engineer. But often in arbitration cases change and what started out as one kind of dispute could change into another.
>
> Ten or fifteen years ago ORs weren't so good and cases were taking a long time. Most

88 Arbitration, 'Are Lawyers Killing Arbitration?' (1991) 58 Arbitration 128.
89 *ibid.*

> ORs don't have construction law backgrounds. There were moves to speed things up, which has happened. And now it's ludicrous that ORs are paid less than high court judges.

A Queen's Counsel based his preference on the perceived lack of legal knowledge of arbitrators:

> I'm not keen on lay arbitrators because they get bullied by the lawyers and have no incentive to pull the case to a close. Nor do they understand legal points. If two QCs are arguing legal points before an arbitrator, how on earth is he to decide which is correct? He can't possibly know.

Another barrister expostulated about an arbitration, before a non-lawyer arbitrator, he currently had in his chambers: 'I've got a case that's been going for sixty-three days over £43,000: it's bloody ridiculous!' This he believed would not have occurred in court under a judge's direction. Norman Royce, an architect and senior arbitrator, quoted John Uff QC on the necessary judicialisation of arbitration:

> Only in the 20th century have construction disputes grown to appreciable numbers. These disputes differ from other commercial disputes in that issues of law tend to be intermixed and not readily severable from the facts.
>
> It is one of the great weaknesses in arbitration in the construction industry that so much time is wasted by calling expert witnesses to explain elementary aspects of building to an engineer or architect arbitrator.
>
> The whole process of arbitration has become far too legal and complicated, with the formal High Court procedure involving one side calling witnesses to be cross-examined by the other, and then the other party following suit. The arbitrator, like a judge, is required merely to sit and listen to the case advanced by each party and then decide which of the rival versions of facts, opinion and law, he accepts.
>
> Thus, the role of the arbitrator is immediately reduced to one of an adjudicator, a task for which lawyers are better trained than engineers and architects.[90]

A senior construction solicitor believed there was almost equal competition between the courts and arbitration because the courts had improved their waiting times and had therefore become more accessible to disputants. Therefore, the reputation of arbitration had to improve. One means whereby this could be accomplished, he thought, was in procedural matters: 'Lawyers tend to overjudicialise the arbitration process. A certain amount of procedure is necessary, but on the whole the procedure should be simple and efficient.' Another way in which this tension was expressed was by the feeling among lawyers that arbitrators tended to 'split the difference' between claimants and respondents, relying on false notions of equity rather than logical determination.[91]

The tension over construction arbitration and litigation is a twofold one concerning differential expertises, those of technical and procedural matters. As one solicitor put it:

> I'm cynical about litigation. Look at the McDermott and McAlpine case where each side spent three-quarters of a million pounds on costs!
>
> Lawyers and judges don't understand what most construction cases are about, so they look

90 N. Royce, 'Conciliation in Business Disputes: Has it a Future?' (1989) 5 Construction LJ 35–36.

91 Despite this frequently mentioned criticism of lay arbitrators, their arbitral awards are extensive documents. The title page of a tunnel construction arbitration conducted by a civil engineer illustrates this. Part one contained the analysis and decision in 22 sections over 88 pages. Part two containing the award ran from pages 89 to 95. A. Shilston, 'The Framework of an Arbitral Award' (1991) Arbitration 167.

> for legal issues to base the case on. And these aren't usually the central issues. In a classic case technical issues are — lots of variations in design and squabbles over payments. Lawyers and judges get bored by all the numbers and technical points and, because they don't understand them, the cases drag on and on.[92]

A barrister said, 'My practice is concerned with construction *law* and technical expertise isn't important.'

The consequence of this apparently irreconcilable tension is that, as one engineer put it, 'the lawyers have hijacked arbitration; it's no different from going to court.'

Figure 3 Breakdown of a typical five-day arbitration

Action	*Amount (in £s)*
Preparation	
Solicitor	20,000
Counsel's brief and other pre-hearing counsel fees	9,000
Expert witnesses	4,000
Stationery and administration	1,000
Total	34,000
Hearing	
Counsel's refresher fees at £800 per day (first day covered by brief fee)	3,200
Solicitor	5,000
Expert witnesses	1,000
Arbitrator's fee	2,500
Room hire	500
Miscellaneous	800
Total	13,000
Preparation plus Hearing	**47,000**

Source: F. Elliott, 'The Price of Justice' (1992) *Building*, 20 November, p 41.

Cases, in arbitration, can run for months with large costs. One lawyer told us about a statement of claim he prepared which resulted in twenty feet of box files of documents. He even had a photograph of them. He said that whereas he had had six months to prepare his case, the other side would only have twenty-eight days to respond. It was part of the case tactics. He combined this with his knowledge that he could compel the arbitrator to let him have virtually unlimited discovery, which would considerably extend the proceedings. To illustrate the price of arbitrations, Elliot created a hypothetical breakdown of a straightforward, five-day arbitration in Figure 3.

However, we compared the arbitration costs with the cost of a typical five-day court case. It shows that arbitration is a more expensive process than straightforward litigation. Even though many of the costs are the same, the parties receive the services of the judges and their rooms free, thus reducing the costs by at least £4,000.

92 A senior barrister lamented about one arbitration that lasted 242 sitting days.

Figure 4 Breakdown of a typical five-day court case

Action	*Amount (in £s)*
Preparation	
Solicitor	20,000
Counsel's brief and other pre-hearing counsel fees	9,000
Expert witnesses	4,000
Total	33,000
Hearing	
Counsel's refresher fees at £800 per day (first day covered by brief fee)	3,200
Solicitor	5,000
Expert witnesses	1,000
Miscellaneous	800
Total	10,000
Preparation plus Hearing	**43,000**

Source: S. Loveday, Vizards.

In response to the criticisms of over-legalisation of arbitration, the Chartered Institute of Arbitrators set up a working party on complaints about arbitration. One of its members said:

> The potential of the domestic market for arbitration has never been so good yet never, in my experience, have the criticisms been so strident. The ADR lobby has seized on some of the criticism in order to promote their own services. This, together with the fact that one never hears of the satisfactory performance of the vast majority of arbitrations because of the privacy of the process, means that criticisms have to be given more attention than they would perhaps otherwise merit if viewed against the backdrop of the successes.

The chairman wrote, 'On procedure, evidence before the working party has ranged from that of a leading lawyer whose complaint was that arbitrators were insufficiently aware of the details of the Rules of the Supreme Court to that of another who considered excessive adherence to those same Rules to be at the heart of his complaint.' Another member, a lawyer and arbitrator, said:

> The main recurring complaint I receive is about the cost of arbitrations, but it's a complaint particularly associated with the extension of time. Arbitrations take much longer and therefore cost more because of discovery of documents . . . It's responsible for clients to instruct laywers to have the arbitration anywhere other than in the UK . . . English law is welcome, as long as the *place* of arbitration isn't here. And the reason is the dreadful habit of asking for discovery of hundreds of documents . . . 'Very few arbitrators are strong' is a comment I've heard on several occasions recently, by which is meant they are intimidated by counsel who demand more and more documents. Two 'very strong' arbitrators, who are able to deal with such applications . . . These were thought by two solicitors to whom I was listening, to be very good indeed, 'but there were few like them.'

A senior barrister summed it up this way:

> British procedures are too conservative because arbitrators are always looking over their shoulders at the courts. If arbitration wants to break away from high court procedures the lawyers and arbitrators must be sure of the support of the judges, to whom the losing party may go. They would get such support in the commercial court not in the official referees'

court. The ORs have old-fashioned attitudes to arbitrators whereas the commercial court will support them.

It is clear that lawyers wish to colonise arbitration and convert it to a court-like procedure. What holds them back, besides the parties' wish to resolve conflict by contract and business-based methods, is their apparent unfamiliarity with the details of construction work. They are not able to create a smooth translation process that turns hard detail into legal argumentation.

Construction lawyers are aware of the contingencies of selecting the 'correct' arbitrator. Most would like to arrange a satisfactory choice between the parties, but here the tactical advantage is to be chased if possible. One lawyer said, 'We always put our preferred arbitrator third on the list [out of five], because they'll never give you your first choice.' Another lawyer said, 'Sometimes the clients don't like the lawyers haggling over the choice of arbitrator because they mistrust lawyers generally and don't like the other side coming up with choices.' An international lawyer said he spent far more time on the selection of arbitrators than fifteen years before. When it came to analysing arbitrators, one lawyer said his firm had developed a computerised database in which they stored the details of all their cases, including a description of the matter, types of client, types of expert witnesses, amounts claimed and so forth. This allowed them to choose 'the right horse for the right course.' If the parties cannot agree they will take a presidential appointment from one of the appropriate bodies, which could be the RICS, RIBA, CIA, ICE and so forth.[93] Most lawyers preferred to avoid this type of selection process if they could. One lawyer said, 'You can say what types of qualities you want in an arbitrator — quantity surveyor with engineering experience, for example — but the final choice is theirs.' We asked what happened if the appointee was not an effective one. The instinctive reply was, 'You settle, quickly.' As a solicitor put it, 'There are good and bad arbitrators and counsel, and bad arbitrators and counsel may cause the parties to settle more readily.'

A senior lawyer said there were no 'cross-influences' between domestic and international arbitrations, but that may be an illusion as some of the lawyers that

Table 6 The Key 12 International Arbitration Law Firms in London

Law Firm
1. Freshfields
2. Wilmer Cutler & Pickering (US firm)
3. S.J. Berwin
4. Allen & Overy
5. Clifford Chance
6. Herbert Smith
7. Masons
8. Bryan Cave (US firm)
9. Linklaters & Paines
10. Norton Rose
11. Slaughter & May
12. Whitman and Ransom

Source: The Legal 500, 1992 A-259 (1992).

93 The CIA and RIBA now have an agreement that RIBA appointees should also be fellows of the CIA.

started their practices in UK domestic arbitration work as well in the international arena. Certainly, the club of lawyers and arbitrators was more exclusive. There are no more than twelve law firms of whom three are key players, as Table 6 illustrates.[94]

The table shows that two key construction firms are players in the international arbitration field, namely, Masons and Whitman & Ransom. And as befits the international nature of the field, two American firms are listed. In Paris the American firms are present in even greater numbers because of the location of the ICC. Some law firms market themselves directly to the international market, as Freshfields has done:

> Freshfields' reputation in the field of international commercial arbitration has been growing steadily since the 1960s, when partners Alan Redfern and Martin Hunter first became involved in a series of arbitrations for various governments, oil companies and international corporations. Thirty years later, Freshfields' prominence in the field is acknowledged worldwide, and its practice and expertise now extend to all forms of consensual procedures for dispute resolution.[95]

The field is more highly dominated by lawyers, as advocates and arbitrators, with market pressures apparent: 'If it wasn't for international arbitration, there wouldn't be much work around,' commented one lawyer. However, another long-established international arbitration lawyer said, 'I've done six or seven arbitrations this year and I could easily do more. It's not growing fast.' Even a non-lawyer arbitrator admitted this field was more lawyer-driven than UK arbitration.

The competition in the international sphere is of a different order compared to that of the domestic. It is not competition between arbitration and courts but rather that between the arbitral centres of the world. One lawyer argued thus, 'I look for permanence in an arbitral centre because if it ceases to exist what do the parties do when they get into dispute? If it were, say, the Nigerian government and an American construction company, then they could end up in court in Nigeria, which of course you don't want.'[96] The competitive element perhaps receives its starkest relief through the battle for arbitration laws.[97] Before the 1979 Arbitration Act, appeals from arbitrations to the courts were not difficult to achieve.[98] The result was that business people began to seek more business-friendly environments. Then, in the dying days of the Labour government, a group of American lawyers persuaded the government to pass a new arbitration statute that would cure this defect. Various lawyers we interviewed felt the 1979 statute was at best a partial cure and a thorough revision was needed. This is currently being undertaken, financed by a 'large group of law firms, chambers and institutions including the Chartered Institute of Arbitrators.'[99] But as one lawyer commented, 'The British are very slow when it comes

94 The table might have changed. S.J. Berwin could be replaced by Coudert Brothers' English arm, since three of the main international partners moved from Berwins to Coudert. K. Dillon, 'That Difficult Age' (1992) Legal Business, October, p 26.

95 Freshfields, International Arbitration Group (1992). Two out of the three partners who form the international arbitration group are also members of the firm's construction and engineering group, which shows how dominant construction law can be.

96 See M. Rowe, 'Arbitration — Getting the Best Deal' (1988) International Financial L Rev 26.

97 See A. Hermann, 'Lawyer-dominated Arbitration' in *Law v Business: Business Law Articles from the Financial Times, 1983–1988* (1989); and A. Samuel, 'Arbitration in Western Europe — A Generation of Reform' (1991) 7 Arbitration International 319. Cf J. Steyn, 'Towards a New English Arbitration Act' (1991) Arbitration International 17; and R. Goode, 'The Adaptation of English Law to International Commercial Arbitration' (1992) 8 Arbitration International 1.

98 M. Kerr, *op cit* n 70, p 17.

99 J. Steyn, *op cit* n 97, p 17.

to this kind of thing. It will be years yet before we see the new act.'

The work in this field is largely focused on one arbitral institution, the International Chamber of Commerce. Those who conducted arbitrations under its auspices responded to it according to whether they were acting as advocates or arbitrators. The advocates, especially those from the UK or the US, felt handicapped because of the reliance on civil law procedures, especially where those procedures were perceived as a choke on lawyers' desire for extended orality. For example, one advocate told of one arbitration:

> It was an arbitration between an African country and a European country [concerning a hospital]. We had 23 witness statements, but the arbitrators gave us only four days to present the case, two days for each side. So I had to select my best witnesses and ended up examining seven witnesses in one day!

Another barrister spoke of the mixing of legal traditions in big complex construction arbitrations:

> I'm sitting as an arbitrator in a case involving a man-made river that went wrong. It's worth billions of dollars. In this case the two selected arbitrators are English QCs and our umpire is French. The lawyers are American and English. And we have decided to use French procedure.

Another UK barrister/arbitrator said:

> Although it's fun being an arbitrator in international arbitrations, as you are paid according to the amount in dispute and not by time, it isn't so good being an advocate. English barristers are renowned for being flexible and adaptable, but we have to put much more of our case in writing than we're used to.

For some lawyers, the only requirement was that the language of the construction contract be English, the substantive and adjectival law could be anything. If the first requirement was met then all subsequent proceedings would be in English.

Arbitrators

In domestic arbitration the vast majority of arbitrators are non-lawyers — engineers, quantity surveyors, architects — though some are lawyers. The ones we interviewed were aware of what was being said about them and arbitration in general, but their common view was that arbitration existed for the benefit of the construction industry not the lawyers. One leading arbitrator put it forcefully when he said, 'It takes a lifetime to learn the construction industry.' The lawyer's lifetime is spent in law not construction. Another arbitrator wrote:

> English law, tucked away in the crevices of its precedents, has several cases where the arbitration clause of a party included the words 'the arbitrators shall be commercial men' or words of like effect. Donaldson J[100] considered that the words 'commercial men' were apt to exclude those whose experience was as practising members of the legal profession. Indeed, he went on to say that, while a 'commercial lawyer' served the commercial world, he was not of it.[101]

Becoming an arbitrator is not a straightforward career path. It is usually ancillary to another career, such as that of architect or engineer. As a result, potential arbitrators grow slowly into arbitration. A senior arbitrator explained how his career began

100 *Pando Compania Naviera SA* v *Filmo SAS* [1975] QB 742.
101 G. Beresford Hartwell, 'Who Shall be the Arbitrators?' (1990) 57 Arbitration 235.

and developed:

> I began my career as an architect in the 1930s. I had been to the Architectural Association because you couldn't qualify by going to university in those days. I worked on a building site, bricklaying and labouring. It was all good experience, you see, because the architect has to understand the way a building site works in order to make good decisions. Before the war I was lucky enough to sit at the feet of [XXXX] and begin my apprenticeship in arbitration with him. He insisted every architect should be an arbitrator. I did a couple of small arbitrations on my own; disputes over fees. Then, of course, the war intervened.
>
> After the war I returned to being an architect and arbitrator. Of course, the industry had changed enormously by then. An arbitrator must know the trade otherwise he can't decide what's right or wrong. He must know some law: some evidence and contract, not too much. And he must have the ability to weigh evidence. This can be learned. What can't be learned is how to conduct proceedings. You've got to have a bit of personality. These lawyers can be tough eggs, you know. I had one who was bullying witnesses and then he tried it on with me. I almost laughed at him.

A young arbitrator described his way into arbitration thus:

> I'm qualified as a barrister and a quantity survey and I work in a multidisciplinary practice which manages complex projects for the building industry. I've appeared as an expert witness a number of times and recently I've been nominated in several cases to be arbitrator. These have all been in this country; I haven't done any international ones yet, though I'd like to ... My legal qualification helps me when I have to handle the lawyers.

All arbitrators started as part-timers: it is their expertise in their original fields of knowledge that makes them valuable in the field of arbitration. And all started with relatively small cases building up to the big cases. Most of the small construction cases are arbitrated by appointees of the construction industry institutions. With the larger, more complex cases, institutional appointments play a diminishing role. Here there is an exclusive club of senior arbitrators. One, in construction, said, 'There are only about half a dozen of us at the top.' Another senior arbitrator said, 'I never accept institutional appointments; all of mine are made privately.' The clear view was that one had to be known to have established a reputation as 'a sound man.' One arbitrator said, 'I was chairman of the [appointing institution] panel for years and made thousands of appointments. That plus my own arbitration work made me well-known. To the extent that now I don't take institutional appointments, but I do advise on them for people who want them.' Another arbitrator said, 'The successful arbitrators are in heavy demand. You see, the parties like to choose busy people.' And another arbitrator commented, 'It helps to have a bit of snow in your hair.'

One essential requirement of achieving such a reputation was to have served an 'apprenticeship' with an experienced and renowned arbitrator. Another, especially in the international field, was to have been a successful lawyer or expert witness in arbitrations. One arbitrator said, 'Some parties do request expert witnesses who are also arbitrators so that their reports can be couched with the right tilt to them.' But as we alluded to above, even this career pattern is changing as judges retiring from the High Court bench seek new careers as arbitrators.[102]

In international arbitration, arbitrators are both non-lawyers and lawyers. There

102 See R. Stevens, 'Judicial Salaries: Financial Independence in the Age of Equality' (1992) 13 J Legal History 155.

is a career progression from domestic construction arbitration to international construction arbitration. The international sphere is far more rewarding in status than UK arbitration work. Arbitrators are not bound by state norms in the same manner as they are within their own countries. Their roles are more flexible: they can use *lex mercatoria*; they can be *amiables compositeurs*. Their arbitral awards are sanctioned by the New York Convention on Arbitral Awards. And the work is lucrative. The ICC, for example, remunerates arbitrators according to the amount in dispute. However, one English lawyer/arbitrator remarked:

> I was in an ICC arbitration between English and Indian parties with myself, an Indian and a Swede as the panel. We had the first payment for our fees from the parties, but the Indian respondents didn't pay the second payment, so the arbitrators weren't paid their full fee. And there was nothing we could do about it.

Virtually all the international construction cases are large, complex disputes such as bridges, hospitals, creating artificial rivers, and dams. This means they can take long periods of time to bring to resolution. One arbitrator joked, 'Arbitrations can be held in exotic places, but you do want to make sure they've got *good* restaurants.'

In addition, unlike UK domestic construction arbitrations, most international arbitrations, and especially ICC arbitrations, are heard by three arbitrators. One arbitrator described one of his cases in the following way:

> One of the difficulties is getting people together. I had a case in Kuwait, a turnkey contract case, with Dutch, French and English arbitrators (I was the English one) which went on for five years. One year's delay was admittedly because of the Gulf war.

Other arbitrators talked of the language and cultural barriers in international arbitral work. Language can create problems for the arbitrators. Each side tends to nominate an arbitrator of its own nationality with the umpire being of a different nationality. But when this happens, as one lawyer said:

> There are problems with the arbitrators' levels of comprehension of English, if they're foreign. How do you pitch your argument so that one doesn't fall asleep because he's bored because you're going too slow, and you don't want to go too fast because the other one doesn't understand?

Goodman-Everard captures the cultural dilemma of international arbitration when she writes:

> all international lawyers and arbitrators are firmly rooted, sometimes unwittingly so, in a national framework of law, culture, economic and social circumstances, political and/or religious values and convictions, providing them with a cultural baggage which largely colours their way of thinking and reasoning. This rootedness may cause misunderstandings or false understandings, as much between extremes as between neighbours: similarity and dissimilarity of cultures may in equal measure be enemies of a proper understanding of the parties' viewpoints.[103]

An English senior engineer/arbitrator gave this example of a cultural hurdle in international construction work:

> I was chairing an ICC panel with a French lawyer and a French engineer. The case was about a standard form of contract concerning subcontractors. The French didn't understand sub-contracting. I had to explain it as we went along. It makes conducting cases quite difficult.

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103 R. Goodman-Everard, 'Cultural Diversity in International Arbitration — A Challenge for Decision-Makers and Decision-Making' (1991) 7 Arbitration International 155.

As for the international lawyer arbitrators, the non-lawyer arbitrators found no difficulty handling foreign systems of law. One non-lawyer arbitrator said:

> I was appointed as sole arbitrator under Pakistani law to arbitrate a dispute over fees between an architect and the owners of a hotel in Pakistan. The technical issues were the same whether they were in Pakistan or England, so the law didn't matter too much.

Across their work and their roles, arbitrators and lawyers hold divergent views that are unlikely ever to converge.

Conclusion: Who Runs the Show?

Some arbitrators did feel that lawyers run the cases. More than one remarked that sometimes the lawyers had 'sewn up the case beforehand' by deciding what procedures, evidence and witnesses would be used, and that there was little the arbitrator could do to affect this. An experienced non-lawyer arbitrator expressed a similar view:

> Lay arbitrators, when confronted by QCs and solicitors, won't push points. The result: arbitrations are run by lawyers. In one case I was arbitrator in I was told by a QC, 'I told the president of the nominating body there was a difficult point of law involved and therefore we wanted a *proper* arbitrator, one who was a lawyer.' In the end there was no point of law.

The more experienced the arbitrator, the less he or she feared the lawyers. One said:

> There's a tendency for laymen to be fearful of the legal process. It's most unfortunate because judges are saying they won't interfere unless arbitrators are demanding money from the parties!
>
> I was talking with Michael Mustill [now a Law Lord] recently and he said he wouldn't interfere with an award unless there was manifest injustice.

Another made his feelings clear:

> I never have any problems with lawyers. I call them over early on and say 'Now, this is how I'd like to do it. Let's not have any bother,' and usually there isn't. But sometimes you get barristers like Lord [XXXX] when he was at the bar: he was an absolute shit and would make your life a misery.

One arbitrator said the problem was that lawyers in the UK believed they had a unique system of thought which acted to exclude others as valid actors in an arbitration. He said, 'The lawyer can be like a magician in a cloak and say, "It may be read that way, but it doesn't mean that".' He compared his feelings about English lawyers with continental lawyers with the following example:

> I was an expert in an arbitration in Geneva. I was called over to assist the Swiss lawyers in their final submissions, which is usually done by the lawyers alone in England. I was an integral part of the team. In England there's a barrier rather like that in the legal profession itself.

Hartwell, an engineer and arbitrator, wrote of the difference from his point of view in these terms:

> If there is a difference between the scientific and the legal approach it is that the scientific approach relies on relatively simple rules that are more or less axiomatic and weighs all evidence in the light of those rules, while the legal approach relies on a more complex system of rules by which only a restricted class of evidence requires to be considered at all. The problem with such complex sets of rules is that they are continually in a state of change according to current perceptions of what is necessary in the practical context.
>
> It may be that the scientist's natural approach is a little closer to that of the civil lawyer

> than to that of the common lawyer. His instincts are, after all, investigative. Nevertheless, no one familiar with the spectacle of scientists or engineers in discussion would suggest that there is no adversarial element in their methods of testing the truth of new propositions.[104]

The idea that merchants are the best judges of their own affairs has existed since at least the middle ages. That tradition has created its own forums for dispute resolution taking account of industry norms and culture. In recent times a struggle has emerged, as lawyers seeking new areas of work have sought to capture some of these areas from business people, the architects, engineers and others who have a deep involvement in the construction industry. It results from an amalgam of causes — responses to economic cycles, demand creation, supply control, and the culture of legalism. And lawyers are in a strong position to effect colonisation because of their power over the discourse of legalism. They have the power of appropriation.

Construction arbitration is locked into an ineluctable struggle through its practitioners as they try to dominate and monopolise the field. Construction, however, is a strongly patterned field with long traditions, which not all players are yet willing to give up. Nevertheless, lawyers are succeeding in juridifying construction arbitration to an extent that was never envisaged by its initial promoters. With the globalisation of business and professional services, the practices of the international field are beginning to influence the domestic arbitration market as its practitioners move between the two. It is at the peripheries of the domestic and transnational where the juridification thesis is put to its strongest test, for it is here that practitioners may create their discourses uncoupled from firmly anchored juridical norms and monopoly is not easily achieved.

104 G. Beresford Hartwell, *op cit* n 101, p 239.