The Relationship between the Arbitration Act 1996 and the Party Wall etc Act 1996.

A talk given to the Surrey Branch of the Pyramus & Thisbe Club by David Bowden BSc ARICS ACIArb on May 7, 1999.

Introduction

There will be one of two relationships dependent on whether the procedure laid down in the Party Wall etc Act is arbitration.

If it is arbitration, then the Party Wall etc Act will be an arbitration agreement for the purposes of the Arbitration Act, and the procedure will be a statutory arbitration subject to the Arbitration Act except where there is any contradiction, in which case the Party Wall etc Act procedure will prevail.

If it is not arbitration, then the rules and procedures laid down in the Arbitration Act will only be persuasive at best in attempting to understand the Party Wall etc Act procedure.

Whether it is arbitration or not is not at all clear. The Arbitration Act in section 94(1) states "The provisions of Part I apply to every arbitration under an enactment (a "statutory arbitration"), whether the enactment was passed or made before or after the commencement of this Act, subject to the adaptations and exclusions specified in sections 95 to 98" but there is no statutory definition of arbitration.

The Party Wall etc Act procedure is certainly similar to arbitration. A dispute arises and is determined by a tribunal appointed by the parties and that tribunal makes an award which is enforceable in Court with a limited right of appeal.

We therefore need to consider what arbitration is, and whether the Party Wall etc Act process fits the definition. I shall start by considering the Party Wall etc Act process.

What is the Party Wall etc Act Procedure?

Under the Party Wall etc Act, owners of adjacent land are given certain rights over each other's land. The exercise of these rights is subject to prior service of notice and generally, either receipt of written assent or an award made by surveyors appointed by each party, with various provisions for proceeding where a party refuses or declines.

In the case of Woodhouse v Consolidated Property Corporation Ltd [1993] 1 EGLR 174 it was held that surveyors only had the right to determine the right of the building owner to do works. Their jurisdiction did not extend to any other matter such as damage, an apparently nonsensical conclusion which due to the changed wording in the 1996 act should now be easily distinguished. Although here, it should be noted that it was not the award that was being appealed against. The question was whether in the plaintiff's amended pleadings he could admit an award as evidence, with the determination in the award as to damage thereby being held as fact. So it is perhaps not surprising that the Court found the way it did.

The Party Wall etc Act came into force on July 1, 1997 and Part VI of the London Building Acts (Amendment) Act, 1939 and Sections xxvii to xxxii of the Bristol Improvement Act 1847

were repealed on the same date, although they continue to apply where any work has been started, notice given or other action taken under them.

Outside Inner London the effective date of commencement was September 1 except for any work carried out under or by virtue of any right granted by the Act.

The Act applies to England and Wales except to land in Inner London in which there is an interest belonging to the Honourable Societies of the Inner Temple, the Middle Temple, Lincoln's Inn, or of Gray's Inn. It also applies to Crown land except that vested in and occupied by Her Majesty in right of the Duchy of Lancaster or vested in and occupied by the possessor for the time being of the Duchy of Cornwall.

Essentially, with respect to the London Building Acts (Amendment) Act 1939 and preceding legislation, the ethos of party wall legislation has changed in that more matters lead automatically to a dispute, foundation notices not responded to, security and costs of works, for example. The effect of this is that more matters now fall within the jurisdiction of the appointed surveyors instead of the courts. The slant of this is similar to the Arbitration Act where the position of the courts has been changed to one of a supporting rather than intervening role.

The terminology has also changed. Differences used to be presumed to arise, not disputes. These are both terms used in arbitration, although the difference between them is either slight or non-existent.

The procedure for dispute determination set down in the 1996 Act is found in Section 10:

S10 (10) The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by award any matter-

(a) which is connected with any work to which this Act relates, and

(b) which is in dispute between the building owner and the adjoining owner.

(11) Either of the parties or either of the surveyors appointed by the parties may call upon the third surveyor selected in pursuance of this section to determine the disputed matters and he shall make the necessary award.

(12) An award may determine-

(a) the right to execute any work;

(b) the time and manner of executing any work; and

(c) any other matter arising out of or incidental to the dispute including the costs of making the award;

(16) The award shall be conclusive and shall not except as provided by this section be questioned in any court.

(17) Either of the parties to the dispute may, within the period of fourteen days beginning with

the day on which an award made under this section is served on him, appeal to the county court against the award and the county court may-

(a) rescind the award or modify it in such manner as the court thinks fit; and

(b) make such order as to costs as the court thinks fit.

Essentially, therefore, we have a defined dispute over property rights which is to be settled by a tribunal chosen by the parties. The determination is called an award, and there are only limited rights of appeal.

What is arbitration

Arbitration is a very old concept, predating our legal system as we now know it. There is no legal definition so we have to approach the concept by considering what others have written, what characteristics it is generally agreed to have, and what it does not.

John Parris in his book, The Law and Practice of Arbitrations, starts by quoting Angliæ Notitia by Edward Chamberlayne, 12th ed, 1684

"The English have always been more given to peacableness and industry than other people and rather than go so far as London and be at so great charges with Attorneys and Lawyers, they will refer their differences to the Arbitration of their Parish Priests … or to the Arbitration of honest neighbours."

He then continues in the first chapter of his book to explain:

Conflict is inevitable, and probably necessary, in every human society. How conflicts are resolved is a criterion of civilisation, and there are basically three ways in which men who differ can settle their disputes. The earliest method, dignified by legal philosophers under the title 'self help', consists of beating an opponent over the head with a club. It tends to be counter-productive and lacking in finality – especially if the opponent has relatives and friends. It is still highly popular, however, in international affairs.

The second method is not greatly superior to the first. It consists of submitting the argument to be settled by somebody who has a bigger club than either of the disputants and who is powerful enough to belt both over the head. That is the principle of the English legal system which owes its origins, and many of its characteristics today, to the sale of a small portion of the absolute power of an absolute monarch by his servants for their personal profit. It may be effective, but all too often the disputants end up feeling that both have in fact been belted over the head. As Richard Burton put it, two hundred years ago: 'He who goes to law takes a wolf by the ears.'

The third, and most civilised method of settling a dispute is for those concerned to agree to submit it to a third person in whom both have confidence, and to undertake to abide by his decision. That, in essence, is arbitration. In more formal language, an arbitration is the submission of a dispute between two parties for decision to a third party of their own choice.

Not only is arbitration more ethical than any other method – involving as it does consent rather

than coercion – it is historically older, ante-dating both legal systems and courts. In fact, in classical Roman times all litigation was no more than private arbitration with the approval and assistance of a magistrate, the Prætor, elected annually for that purpose. ‘None would our ancestors permit to be a judex’, wrote Cicero, ‘even in the most trifling money matter, not to speak of affairs concerning the dignity of a man, unless the opposing parties were agreed upon him.’ In England, merchants resorted to arbitration to settle trading disputes in the early middle ages, long before the King’s Courts had found any way to enforce contractual obligations. Shakespeare was familiar with it, for he wrote:

The end crowns all,
And that old common arbitrator, Time,
Will one day end it.
Troilus and Cressida

But it was not until a century later that the first legislation was passed about arbitration. Then the intention was to limit and discourage it, for it has never been popular with those who make their fortunes out of the misfortunes of others.

In modern times, arbitration was regulated by an Act of 1889 and by an Act of 1934. These, with other statutes, were consolidated into the Arbitration Act 1950.

He wrote that in 1974 and since then we have had three further Arbitration Acts, of which the only one of any relevance is the Act of 1996.

Mustill and Boyd in The Law and Practice of Commercial Arbitration, Second edn, 1989, do not attempt to define arbitration but after pointing out that there is no statutory definition nor any cases in which the matter has been tried as a primary issue, say that there are many concepts which can be recognised as arbitration in the light of experience or intuition but that there is no complete list of the necessary characteristics. After saying that a procedure may be arbitration even if it lacks some of the features consistent with arbitration, they go on to give a suggested list of attributes which must, although not all, be present, and I paraphrase:

the tribunal’s decision must be expected to be binding on the parties
the process will be carried on between those persons whose substantive rights are determined by the tribunal
the jurisdiction of the tribunal must stem from agreement of the parties or a statute which makes it clear that the process is to be an arbitration
the tribunal must be chosen by the parties or by a method to which they have consented
the tribunal should be impartial owing an equal duty of fairness to both parties
the agreement must be enforceable at law
the tribunal should determine a dispute already in existence at the time of its appointment

and factors which are relevant:

whether the tribunal will receive evidence from the parties or at least give them the opportunity of putting it forward
whether the wording of the agreement is consistent with the view that the process was intended to be arbitration
whether the identity (or the method by which it is chosen) of the tribunal shows that the process

was intended to be arbitration
whether the agreement requires the tribunal to determine the dispute according to law

Of these, there are only two questionable points

the jurisdiction of the tribunal must stem from agreement of the parties or a statute which makes it clear that the process is to be an arbitration, and
whether the wording of the agreement is consistent with the view that the process was intended to be arbitration

The Party Wall etc Act does not make it clear in as many words that the process is to be an arbitration but its wording is certainly consistent with the view that it was intended to be arbitration.

The Chartered Institute of Arbitrators describes arbitration as:

… a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties. It is governed by both statute law and the common law. The principal legislation in England and Wales are the Arbitration Acts 1950 - 1996 as amended. Different provisions apply in Scotland and Northern Ireland, but see the Arbitration Act 1996 for further details.

adding that:

As a dispute resolution procedure arbitration is the only means of dispute resolution which is an alternative to litigation because an arbitrator's award is final, binding and enforceable summarily in the courts

The Party Wall etc Act process certainly fits in with that.

The RICS in its advice on boundary dispute resolution gives the following explanations

There are various types of dispute resolution:

Arbitration
A procedure whereby two parties in a dispute agree to be bound by the decision of a third party acting as Arbitrator.

Mediation
A confidential process whereby parties to a dispute invite a neutral individual to facilitate negotiations between them with a view to achieving a resolution of their dispute.

Independent expert determinations
A process whereby the parties to a dispute agree to be bound by the decision of a third party who has expert knowledge of the subject matter in dispute.

Adjudication
A process whereby an adjudicator uses his or her own knowledge and investigations, whilst also weighing the evidence presented by the parties, in order to reach an enforceable decision.

This method of dispute resolution is most commonly used in connection with construction related disputes.

If one allows for the degrees of oversimplification in the RICS description, and proselytising in the CIArb definition, it remains clear that the procedure may well be arbitration.

Arbitration Law

The Arbitration Act 1996 came into force on January 31, 1997, and as with previous arbitration legislation, has retrospective effect. It was designed to consolidate and restate the existing law, whilst reducing the power of the Court to intervene. It was thus hoped that London would regain its status as an arbitration centre, which had begun to become lost as parties fought shy of the lack of finality, essential to arbitration, that the rights of appeal etc allowed in this country and not others.

It is the first piece of legislation to set out its founding principles as a section of the statute. In section 1 under the note ‘General principles’ it states:

The provisions of this Part are founded on the following principles, and shall be construed accordingly-

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in matters governed by this Part the court should not intervene except as provided by this Part.

Section 94(1) of the Arbitration Act 1996 states that “The provisions of Part I apply to every arbitration under an enactment (a "statutory arbitration"), whether the enactment was passed or made before or after the commencement of this Act, subject to the adaptations and exclusions specified in sections 95 to 98.

The provisions of the Arbitration Act 1996 which would apply to the Party Wall etc Act 1996

if it were to be a statutory arbitration are.

That surveyors,

are not liable for anything done in the course of their functions unless it is shown to have been in bad faith and this also applies to their employees and agents,

may rule on their own jurisdiction as to whether the Act applies to the matters in dispute, whether they are properly appointed, and what matters are to be determined,

continue to make awards whilst an objection to the court is pending,

may order an owner to provide security for their fees,

may dismiss any claims made by an owner if there is any delay on his part and may proceed to award on a matter without his evidence if he has failed on notice to produce,

may make more than one award in any dispute,

may award payment of compound interest on any sums,

must proceed to make an award even if the owners reach agreement between themselves recording the agreement in the form of an agreed award,

must include reasons in the award and state the seat of the arbitration and the date on which the award was made,

must make all awards in writing and sign them, (it does not appear that the practice of having the signatures witnessed is necessary),

may correct an award,

should generally award costs on the basis that they follow the event.

Parties, and hence owners, have the right to be represented by a lawyer and liability for the payment of these costs would fall to be determined by the surveyors.

The court has its powers restricted in that it must support, not intervene:

it can only consider questions of the jurisdiction of the appointed surveyors if the application is made either with the written agreement of the other party to the dispute or with the permission of the surveyors and the determination is likely to lead to substantial savings in costs, that the application was made without delay, and that there is good reason why the matter should be determined by the court,

it can only set aside an award or declare it to be of no effect if it considers that it would be inappropriate to remit the award to the surveyors for reconsideration, and then only if substantial injustice would otherwise be caused

no appeal can be heard against a determination of the appointed surveyors unless it is made as soon as possible and the owner has not continued to take part in the proceedings without objection,

as under the 1950 Act, no appeal lies against an award on the ground of errors of fact or law

The European Convention

Rights affected

It is important to note that the Party Wall etc Act only gives rights over other people's land. The

restrictions it imposes on work on one's own land are effectively rights granted to other people to limit the potential effect on them of a building owner carrying out certain work on his own land or exercising rights given by the Act. As such, we are here dealing with civil rights, and hence the European Convention is involved.Article 6 of the.1950 European Convention for Protection of Human Rights and Fundamental Freedoms states that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Whether the Party Wall etc Act is a statutory arbitration with its procedure governed by that legislation or not, the convention will still apply, meaning that at least the surveyors should be independent and impartial.

Natural Justice

There are two rules of natural justice: (i) audi alteram partem meaning every person has a right to a hearing and (ii) nemo debet esse index in propria causa meaning no man shall be a judge in his own cause.

Natural justice was originally a concept applied to justice meted out by bodies other than the Courts. As such, it must apply to arbitration and any procedure such as that under the Act even if it is not arbitration, simply because it is not a state administered court.

The rules of natural justice, together with the European Convention and whether section 24 of the Arbitration Act 1996 applies or not (it gives as a ground for removal of an arbitrator “that circumstances exist that give rise to justifiable doubts as to his impartiality”) must mean in my view that loss adjusters acting for the insurers of one of the parties, as well as employees, cannot be appointed as surveyors.

There is also the difficulty that the Party Wall etc Act procedure may be arbitration, but not a statutory arbitration within the meaning of the Arbitration Act. As such, it would be covered by common law and some case law but not by statute. Isn’t law just wonderful?

Case Law

Then we have case law. There are two cases which are particularly relevant, one from the turn of the century when most cases seem to have been made, presumably following the 1894 Act. At that time there seemed to be little dispute as to whether appointed surveyors were arbitrators.

Selby v Whitbread & Co, [1917], 1 KB 736 was one of the more important in which it was held that appointed surveyors were arbitrators. Following from that Leach in Party Structure Rights in London concluded that their appointment could only be rescinded with the leave of the Court under the Arbitration Act.

However, Humphrey Lloyd J in his judgment in the more recent case of The Chartered Society of Physiotherapy v Simmonds Church Smiles [1995] 1 EGLR 155 said that, again when the main question was a different one, if asked, he would say they were not.

".....the Act envisages that if three surveyors are to be appointed, a party-appointed surveyor while no doubt retaining his professional independence is not obliged to act without regard to the interests of the party who appointed him."

and also:

"In the absence of authority I would not conclude from section 55(a) to (l).....that an award under the Act was an arbitration award.....The Act does not require the award to be a 'speaking' award and there is no apparent obligation for the award to contain findings of fact or conclusions of law and, of course, awards are customarily and commendably direct and to the point. Furthermore section 55(m) plainly excludes the Arbitration Acts."

I see no difficulty with the first point in that a surveyor could act as an arbitrator-advocate. This is particularly common in shipping arbitrations where each party to the dispute appoints an assessor to act for him and put his case but with the final determination being an award. Thus, we have perhaps the best of both types of procedure. Adversarial, but only to an extent, leading through inquisitorial, to a determination by arbitration.

This is remarkably similar to the procedure generally adopted by appointed surveyors. In the initial stages each surveyor puts to the tribunal his party's point of view and effectively represents his interests much as a barrister would at court, except here the surveyors constitute the tribunal.

The fact that lawyers are generally not taught arbitration, in addition to Parris's assertion about people who make money out of others' misfortune, will undoubtedly lead to a general misunderstanding of the concept of arbitration and anything inquisitorial, and hence 'foreign', and not completely under the control of lawyers. Whether they are as ignorant of arbitration as of baking I have no idea, but they are certainly likely to be more suspicious of it. Had Humphrey Lloyd J considered the wording of the Arbitration Act he would not have been able to conclude that there was no requirement for the award to be a speaking award as this would have been a requirement imposed by the Arbitration Act, the terms of which prevail except where there is any contradiction in the statute which sets up the statutory arbitration.

In his second point I do not think he is making a judgment. he is making a passing comment. He does not refer to the Arbitration Act 1950 which would have brought the 39 Act in as a statutory arbitration. Similarly he infers that s55 does not make it a statutory arbitration by reference to various aspects of s55 which do not appear relevant nor contradict the Arbitration Act 1950 and I think he missed the point. I do not know whether it was argued before him. I fail to understand the reasoning behind his interpretation of s55(m). It states "The award shall be conclusive and shall not except as provided by this section be questioned in any court." It seems to me that if that excludes anything it is the jurisdiction of the Court, not the Arbitration Act.

If one accepts Humphrey Lloyd's view, then on what basis are appointed surveyors to make their determinations? Do they simply negotiate with each other until the building owner gives in

because his money is at risk, both so far as fees are concerned and also so far as the viability of his project is concerned? Or are they effectively determining the civil rights of the parties as granted or modified by the Party Wall etc Act?

Conclusion

If the appointed surveyors, the two or three, or sometimes just one, of them, do not constitute such a tribunal, then the Party Wall etc Act, and its preceding legislation, must be bad. If they do constitute such a tribunal, then what governs it? It must, in my opinion, be arbitration law. If the Party Wall etc Act is to be regarded as standing on its own and having some form of unique procedure for determination of disputes, how can the requirements of the Act be enforced without resorting to civil proceedings for injunctive relief or whatever at proportionately high cost. There is no longer any offence for failure to comply with the Act or an award made under it, there are only offences for hindering a building owner in exercising his rights against another, which would not on its own be fair.

I have had awards enforced as if they were County Court judgments under the 1950 Arbitration Act simply by sending them to the local County Court under the Arbitration Act and on an ex parte application asking that they be adopted as judgments of that court. There has never been any question raised against this. I have also had the Land Registry postpone the registration of a charge against a property on the basis that it had no power to do so until the award had been concluded under the 1939 Act.

Legal Reform

It is also clear that legal reform is moving in favour of any dispute resolution procedure that takes some of the pressure off the Courts. Having spent the last few centuries trying to gain control of everything, they now find themselves overwhelmed and unable to dispense justice through the inevitable delays and costs.

In June 1995 Lord Justice Woolf presented his interim report on Access to Justice. He had been appointed by the Lord Chancellor on 28 March 1994 to review the current rules and procedures of the civil courts in England and Wales.

The aims of the review were:

> to improve access to justice and reduce the cost of litigation;
> to reduce the complexity of the rules and modernise terminology;
> to remove unnecessary distinctions of practice and procedure.

In his interim report he stressed the need to reduce cost, delay (note the similarity with section 1 of the Arbitration Act) and also suggested that greater use be made of systems of Alternative Dispute Resolution, with the Courts taking into account the behaviour of the parties in any subsequent litigation.

He suggested extending the Small Claims procedure, itself a form of arbitration.

It is of course after this that both the Arbitration Act 1996 and the Party Wall etc Act 1996,

came into force.

In a press release welcoming the Woolf report, Access to Justice, the Royal Institution of Chartered Surveyors (RICS). RICS spokesman, Anthony Salata said:

"Disputes between landlords and tenants, contractors and clients, and others in the property industry, can be incredibly expensive and time-consuming to settle in the courts."

"Alternative dispute resolution has had a long adolescence in the UK; now it is coming of age. Mediation - the least formal and potentially quickest and cheapest method - has an impressive track record in the USA. It has massive potential here, especially in commercial landlord and tenant disputes, boundary disputes and joint venture development schemes. But ADR can be applied generally to an infinitely wider range of disputes."

The RICS has a panel of trained mediators and adjudicators who can be appointed at short notice at the request of the disputing parties. Where there is a prior agreement to use ADR, either one of the parties can call for its introduction.

The Woolf report comes hard on the heels of several pieces of legislation promoting alternatives to expensive court action. The Party Wall Act enables neighbours throughout England and Wales to settle disputes over work on shared walls by a procedure which by-passes the court. The Housing Grants, Construction and Regeneration Act, which received Royal Assent yesterday, provides for construction industry disputes to be settled by expert adjudication so that building work is not held up for long periods while the parties battle it out in court or at formal arbitration.

Again, perhaps fighting its own corner,and apparently not having read the Woolf report, or at least not the parts disparaging about the type of mediation employed in the USA, the RICS seems to put arbitration in the same box as expensive court action. In its press release welcoming the introduction of the Party Wall etc Act, it said

Good news for homeowners: Party wall bill to become law

The Royal Institution of Chartered Surveyors (RICS) welcomes the news that the Party Wall Bill has been approved by Parliament today (12 July). John Anstey, RICS spokesman and treasurer of the Pyramus and Thisbe Club, said:

"This is great news for homeowners throughout the country. Millions of property owners, both residential and commercial, share a common or "party" wall with a neighbouring owner. Problems arise when neighbours cannot agree on building work involving party walls. "Until now the only redress outside London has been to take the matter to court with all the expense, delay and stress of litigation. Thanks to this Bill the rest of England and Wales can enjoy the benefits afforded by the London Building Act, a straightforward procedure which avoids the need for court action."

The Bill sets out a simple procedure:

- Where a person wants to carry out work on a party wall he must inform his neighbour. - After 14 days if there is no reply the neighbour is deemed to dissent and must appoint a "surveyor",

who could be a chartered surveyor, architect, engineer or solicitor. - Two surveyors, one representing each party, then draw up an "award" - an agreement which describes the work and specifies that any damage caused will be rectified and the neighbour's costs paid. - A "third surveyor" is named in the award and will intervene if the two original surveyors disagree.

Again a simplistic approach, and not entirely relevant to this question. Aside from the fact that millions of homeowners were to wake up one day and find that for the vast majority of small building works that would have been carried out without any difficulty before the Act, they now would be led towards paying for two surveyors to decide when and how they could carry out works, which at perhaps £1000 would not really justify the benefits of avoiding expensive court action in the largely preventable event of things going wrong, there is again no indication as to whether the Party Wall etc Act procedure is arbitration or not. Possibly this is because John at about that time had failed to convince a judge that it was and lost the case as he had always used to in earlier years.

In conclusion, I consider that the dispute resolution procedure laid down in the Party Wall etc Act is arbitration and that the Act is a statutory arbitration within the meaning of the Arbitration Act 1996. It is not clear that this would be accepted by the Courts, which is perhaps more important when advising clients. However, whether the Party Wall etc Act procedure is a statutory arbitration or not, there are so many similarities that surveyors should take appointments and make determinations within the rules set down in the Arbitration Act, and could be held to be at fault if they failed to do so.

David A Bowden

May 7, 1999

There follows a short set of appendices
Party Wall etc Act 1996 section 2

2. - (1) This section applies where lands of different owners adjoin and at the line of junction the lands are built on or a boundary wall, being a party fence wall or the external wall of a building, has been erected.

2. - (2) A building owner shall have the following rights-

(a) to underpin, thicken or raise a party structure, a party fence wall, or an external wall which belongs to the building owner and is built against a party structure or party fence wall;

(b) to make good, repair, or demolish and rebuild, a party structure or party fence wall in a case where such work is necessary on account of defect or want of repair of the structure or wall;

(c) to demolish a partition which separates buildings belonging to different owners but does not conform with statutory requirements and to build instead a party wall which does so conform;

(d) in the case of buildings connected by arches or structures over public ways or over passages belonging to other persons, to demolish the whole or part of such buildings, arches or structures which do not conform with statutory requirements and to rebuild them so that they do so conform;

(e) to demolish a party structure which is of insufficient strength or height for the purposes of any intended building of the building owner and to rebuild it of sufficient strength or height for the said purposes (including rebuilding to a lesser height or thickness where the rebuilt structure is of sufficient strength and height for the purposes of any adjoining owner);

(f) to cut into a party structure for any purpose (which may be or include the purpose of inserting a damp proof course);

(g) to cut away from a party wall, party fence wall, external wall or boundary wall any footing or any projecting chimney breast, jamb or flue, or other projection on or over the land of the building owner in order to erect, raise or underpin any such wall or for any other purpose;

(h) to cut away or demolish parts of any wall or building of an adjoining owner overhanging the land of the building owner or overhanging a party wall, to the extent that it is necessary to cut away or demolish the parts to enable a vertical wall to be erected or raised against the wall or building of the adjoining owner;

(j) to cut into the wall of an adjoining owner's building in order to insert a flashing or other weather-proofing of a wall erected against that wall;

(k) to execute any other necessary works incidental to the connection of a party structure with the premises adjoining it;

(l) to raise a party fence wall, or to raise such a wall for use as a party wall, and to demolish a party fence wall and rebuild it as a party fence wall or as a party wall;

(m) subject to the provisions of section 11(7), to reduce, or to demolish and rebuild, a party wall
or party fence wall to-

(i) a height of not less than two metres where the wall is not used by an adjoining owner to any greater extent than a boundary wall; or

(ii) a height currently enclosed upon by the building of an adjoining owner;

(n) to expose a party wall or party structure hitherto enclosed subject to providing adequate weathering.

The Arbitration Act 1996 (CIArb critique)

A matter that has been the source of the most study, investigation and debate this year has been the progress of the new Arbitration Act 1996.

The proposal for a new and improved Act pertaining to the law and practice of Arbitration had been discussed since 1978-1979, at the time when the Arbitration Act 1979 was considered in the two houses and was subsequently promulgated. At that time, it was agreed that there was need for a new and improved legislative instrument detailing the law and practice of Arbitration.

The first concrete evidence of this proposal was in the June 1989 Departmental Advisory Committee Report on Arbitration Law (the DAC), under the chairmanship of Lord Justice Mustill (now Lord Mustill). The Report recommended against England, Wales and Northern Ireland adopting the UNCITRAL Model Law on International Commercial Arbitration. Instead, the DAC recommended that there should be a new and improved Arbitration Act for England, Wales and Northern Ireland, with the following features (Paragraph 108):

"(1) It should comprise a statement in statutory form of the more important principles in English law of arbitration, statutory and (to the extent practicable) common law.

(2) It should be limited to those principles whose existence and effect are uncontroversial.

(3) It should be set out in a logical order, and expressed in language which is sufficiently clear and free from technicalities to be readily comprehensible to the layman.

(4) It should in general apply to domestic and international arbitration's alike, although there may have to be exceptions to take account of treaty obligations.

(5) It should not be limited to the subject-matter of the Model Law.

(6) It should embody such of our proposals for legislation as have by then been enacted.

(7) Consideration should be given to ensuring that any such new statute should, so far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law."

In an Interim Report in April 1995, the DAC stated as follows:

"The original interpretation of [paragraph 108 of the 1989 Report] led to the draft Bill which was circulated in February 1994. Although undoubtedly a highly skilful piece of work, it now appears that this draft Bill did not carry into effect what most users in fact wanted. In the light of the responses, the view of the DAC is that a new Bill should still be grounded on the objectives set out [in paragraph 108 the 1989 Report] , but that, reinterpreted, what is called for is much more along the lines of a reinstatement of the law, in clear and 'user friendly' language, following, as far as possible, the structure and spirit of the Model Law, rather than simply a classic exercise in consolidation."

The DAC's proposals in the Interim Report led to a new draft Bill which was circulated for public consultation in July 1995. This draft was very much the product of a fresh start. Indeed, it will be noted that whereas the February 1994 draft had the following long title:

"To consolidate, with amendments, the Arbitration Act 1950, the Arbitration Act 1975, the Arbitration Act 1979 and related enactment's"

This was altered for the July 1995 draft, and now begins

"An act to restate and improve the law relating to arbitration pursuant to an arbitration agreement . . . "

The DAC remained of the view, for the reasons given in the Mustill Report, that the solution was not the wholesale adoption of the Model Law. However, at every stage in preparing the new draft Bill, very close regard was paid to the Model Law, and both the structure and the content of the July draft Bill, and the final draft, owe much to this model.

The task of the Committee was made much easier by the quantity and quality of responses received both to the draft Bill published in February 1994, and to the draft Bill which was published in July 1995. The consultation proved to be invaluable. The former consultation showed that a new approach was required, while the latter showed that the April 1995 proposals seemed to be on the right track. Both sets of responses contained carefully considered suggestions, many of which were subsequently incorporated into the Bill.

Indeed, the Chartered Institute created a special working party, chaired by Julian Lew, in order to formulate a valuable response to this Bill. The DAC recognised the value of the responses received from the various arbitral institutions and commodity associations, and there are many references to such institutions in the Bill.

Finally, on 17 June 1996, the Arbitration Bill received Royal Assent, and became known as the Arbitration Act 1996. It is anticipated that it will come into effect in January/February 1997. It will have retrospective effect, in that the provisions of the Act will apply to all arbitrations commenced after the Act comes into force, although the contractual agreement itself might have pre-dated the Act.

There is respectable precedent for this since the Arbitration Acts 1889 and 1934 contained like provisions. The 1950 Act, of course, was not a precedent, since this was a consolidating measure. This is considered to be the wisest approach since some arbitration agreements have a very long life and it would be most unsatisfactory if the existing law and the new Act were to run in parallel indefinitely into the future.

New Provisions Introduced by the Act
I do not intend to cover every new provision of the Act, but I will attempt to highlight some of the important provisions.

- Part 1 of the Act attempts to restate the basic principles of our law of arbitration, as it relates to arbitration arising from an agreement to adopt this form of dispute resolution.

Section 1 of the Act is unique in that it is an introductory clause setting out basic principles. As such, it sets out the principles upon which that part of the Act is founded. It clearly indicates that there are three principles that permeate through the Act, these are: arbitration is to be a fair resolution of disputes without undue expense or delay (the object of arbitration), party autonomy (reflecting the basis of the Model Law) and that the courts will play a supportive role, rather than interventionist, in arbitration matters. This latter principle reflects Article 5 of the Model Law, which provides that:

"In matters governed by this Law, no court shall intervene except where so provided in this Law."

This latter principle is viewed as a most important inclusion in the Act since in the past, the courts were quick to intervene in the arbitral process, thereby tending to frustrate the choice the parties made to use arbitration rather than litigation. The result was that internationally, and certainly amongst the American legal profession, the view taken was that arbitration in London was to be avoided.

Since the advent of the 1979 Act, coupled with changing attitudes generally, the courts now tend only to intervene in order to support rather than displace the arbitral process. This provision, which is echoed throughout the Act, therefore seeks to reinforce this approach.

- Section 3 of the Act sets forth a definition of the 'seat of arbitration', and also appears in respect of the definition of 'domestic arbitration' in Section 85. The concept of 'seat ' as the juridical seat of the arbitration is known to English law but may be unfamiliar to some users of arbitration. The purpose of including this section was to make the Act more user friendly to foreign users.

- Section 5 indicates that the Act applies to arbitration agreements that are in writing. This has always been a requirement, but the new Act now seeks to give a far wider definition to the meaning 'in writing' then was previously the case. Indeed, the meaning is far wider than that found in Article 7 of the Model Law, but is consonant with Article II.2 of the English text of the New York Convention. In addition, this section takes cognisance of the fact that technology is developing very rapidly.

- Section 6 defines what is meant by an 'arbitration agreement'. The first sub-section reflects Article 7(1) of the Model Law, and it provides a more informative definition than presently exists in Section 32 of the 1950 Act.

In English law there is at present some conflicting authority on the question as to what is required for the effective incorporation of an arbitration clause by reference. In Aughton v M F Kent Services [1991] 57 BLR 1 Sir John Megaw found that where parties had agreed a contract and merely provided that the terms and conditions of a separate contract were to apply to their relationship, unless an express reference to the arbitration clause in that separate contract was made, the arbitration clause could not be incorporated by reference into their original contract. This case was heavily criticised and many have suggested that the DAC should take the opportunity of making clear that the law was as stated in the charter party cases and as summarised by Ralph Gibson LJ in the Aughton case. A body of precedent has grown from the Aughton Case, and most recently the case of Ben Barrett v Henry Boot Management Ltd [1995] Constr. Ind. Law Letter 1026 has reaffirmed the approach taken in Aughton.

The DAC, whilst taking the view that the aforementioned case law was not correct, declined to expressly change existing case law. Instead it took the view that this was a matter for the court to decide. However, the wording of Section 6 certainly leaves room for the adoption of a contrary approach since it refers to references to a document containing an arbitration clause as well as a reference to the arbitration clause itself.

It is of interest to note that most recently in the joint case of Roche Products Limited and another v Freeman Process Systems Limited and another and Black Country Development Corporation v Kier Construction Limited the Official Referees Court distinguished Augton's

case and declined to follow the traditional reasoning in the previous cases. Likewise in Extrudakerb (Maltby Engineering) Ltd v White Mountain Quarries Ltd, a matter that was heard in the Queen's Bench Division in Northern Ireland, the High Court also succeeded in distinguishing the previous line of authority. (A copy of a report on the Roche Products case is attached hereto for further perusal. It is to be noted that this extract is taken from Arbitration & Dispute Resolution Law Newsletter of October 1996, which is published by Lloyd's of London Press and edited by Andrew Burr).

It is believed therefore that in the light of Section 6, and the emergence of the above types of cases, the DAC's views will eventually supersede the previous cases and a far wider effect will be given to the meaning of an 'arbitration agreement'.

- Section 7 of the Act now includes an express provision to the effect that an arbitration clause is separable from the main contract in which it exists. This merely sets out a pre-existing principle that was originally set out in Harbour Assurance v Kansa [1993] QB 701 and which is also to be found in Article 16(1) of the Model Law.

- Section 9 now provides that a stay to legal proceedings can be sought in respect of a counterclaim as well as a claim. The existing legislation could be said not to cover counterclaims, since it required the party seeking a stay first to enter an 'appearance', which a defendant to counterclaim could not do.

In addition, the new Act provides that an application may be made for a stay even where the matter cannot be referred to arbitration immediately, because the parties have agreed first to use other dispute resolution procedures. This reflects dicta made by Lord Mustill in Channel Tunnel v Balfour Beatty [1993] AC 334.

In addition, a stay is mandatory unless the arbitration clause is null and void, inoperative, or incapable of being performed. This is the language of the Model Law and of course the New York Convention. However, Part II of the Act provides that "domestic arbitrations" are to be treated differently.

Furthermore, this section does away with Scott v Avery clauses since in some instances it was perceived as denying a party access to justice.

- Section 12 amends the Court's powers in respect of granting extensions of time for commencing arbitration proceedings. In accordance with the spirit of the Act, party autonomy is given superiority and as a result it means that any power given to the Court to override the bargain that the parties have made must be fully justified. The idea that the Court has some general supervisory jurisdiction over arbitration has therefore been abandoned.

There are therefore three cases in which the Court can intervene and grant an extension of time:

a. where the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question;
b. where the conduct of one of the parties has made it unjust to hold the other to the time limit; and
c. where the respective bargaining position of the parties was such that it would again be unfair to hold one of the parties to the time limit.

a. and b. above are set out in this Section,c. above is mentioned in Part II of the Act which deals with "Consumer Protection". In addition there is a growing body of European Law that deals with this.

This section is mandatory.

- Section 24 deals with the power of the Court to remove an arbitrator. The old wording of Section 23 of the 1950 Act and the reference to "misconduct" has been replaced with wording that is largely compliant with Article 12 of the Model Law, which specifies that a Court can remove an arbitrator where there are justifiable doubts as to his/her independence and impartiality.

The Drafting Committee however, chose to exclude the reference to an arbitrator's independence and merely retained the reference to impartiality, as being a ground for removal. This was because the Committee were of the opinion that lack of independence, unless it gave rise to justifiable doubts about the impartiality of an arbitrator, was of no significance.Furthermore, the Committee were of the view that if there was a specific requirement of "independence", this would give rise to endless arguments, as are presently experienced in Sweden and the United States, where almost any connection, however remote, has been put forward to challenge the "independence" of an arbitrator. This is of significance where an arbitrator is appointed in respect of a dispute in a very limited and specialised field. Invariably, it is the case that the arbitrator will know the expert witnesses that are appointed, and indeed may even have some tenuous connection with one of the parties.

- Section 25 sets out the consequences arising from an arbitrator's resignation. Generally an arbitrator cannot unilaterally resign if this conflicts with the express or implied terms of his engagement. However, in certain circumstances, an arbitrator may make application to Court to be granted relief from incurring liability from his resignation. Usually the Court will have the power to grant the arbitrator relief if, in all circumstances, the resignation was reasonable. To this end, Section 33 of the Act is to be borne in mind. This section will be discussed below.

- Section 29 finally clarifies the law relating to the immunity of arbitrators. This section therefore provides that arbitrators will be immune from suite unless the act or omission by that arbitrator is shown to be in bad faith.

- Section 30 makes provision for the competence of the tribunal to rule on its own jurisdiction. This is traditionally called the doctrine of "Kompetenz-Kompetenz", which is an internationally recognised doctrine and is set out in Article 16 of the Model Law. The value of this doctrine is that it avoids delays and difficulties when a question is raised as to the jurisdiction of the tribunal. Clearly the tribunal cannot be the final arbiter of a question of jurisdiction, but failure to include this power would result in a recalcitrant party completely disrupting the arbitral proceedings.

- Section 31 therefore sets out how a challenge to the jurisdiction of the Tribunal can be made, and the circumstances in which it must be made. This section reflects most of Article 16 of the Model Law, with some small exceptions. This Section allows the tribunal to make an award as to its own jurisdiction, either as an interim award or as part of its award on the merits.

Section 67 provides the mechanism for challenging the jurisdiction rulings in such awards.

- Section 33 sets out the general duties of the Tribunal, which is one of the central proposals of the Act and based upon Article 18 of the Model Law. This is a mandatory provision. This section sets out in the simplest of terms the manner in which the Tribunal should approach and deal with its task, which is to do full justice to the parties.

An interesting point to note is that section 33 not only instructs the arbitrators to "act fairly and impartially as between the parties", but it also compels them to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to prove a fair means for the resolution of the matters falling to be determined."

In the light of the above, an arbitrator who is faced with parties who insist on dragging the proceedings out and generally conducting the arbitration like litigation, may legitimately resign on the grounds that he cannot fulfil his mandatory functions as set out in this section. In these circumstances, the Court may legitimately grant the arbitrator relief from liability on the grounds that the resignation was reasonable.

- Section 35 provides that the parties may agree to consolidate their arbitration with other arbitral proceedings or to hold concurrent hearings. As such this section protects the parties autonomy.

- Section 38 significantly redefines the relationship between arbitration and the Court. Wherever a power could be properly exercised by a tribunal rather than the Court, provision has been made to this effect, thereby reducing the need to incur the expense and inconvenience of making application to Court during arbitral proceedings.

The first of the powers in this section is one which enables the tribunal to order security for costs. The power presently given to the Court to order security for costs in arbitrations is removed in its entirety. Indeed, this is a major change from the present position where only the Court can order security for costs. The theory which the Drafting Committee have taken as being the basis for this amendment is that when parties agree to arbitrate, they are agreeing that their dispute will be resolved by this means. Thus, in the absence of express stipulation to the contrary, this does not mean that the dispute is necessarily to be decided on its substantive merits. It is an agreement that it will be resolved by the application of the agreed arbitral process. If one party then fails to comply with the process, then it is entirely within the parties' agreement that the tribunal can resolve the dispute.

Apart from this, the Drafting Committee were of the opinion that the proposition that the Court should involve itself in such matters deciding whether a claimant in an arbitration should provide security for costs has received universal condemnation in the context of international arbitrations. The Drafting Committee noted that: "It is no exaggeration to say that the recent decision in the House of Lords in S. A. Coppee Lavalin NV v Ken-Ren Chemicals and Fertilisers [1994] 2 WLR 631 was greeted with dismay by those in the international arbitral community who have at heart the desire to promote our country as a world centre for arbitration. We share those concerns."

Some however, suggested that a party, in requesting the tribunal to make an order for security for costs, might have to disclose whether an offer of settlement had been made or

was about to be made, which might in turn influence the tribunal in some way. This would not be the case if the disclosure is made to a Court who will not have to try the merits of the case. In the opinion of the Drafting Committee, this should not be of concern since the tribunal, in properly performing its duty under Section 33, could not and should not be influenced by such matters, if the case proceeds to a hearing on the merits.

Section 41 (6) of the Act provides a sanction for failure to comply with the tribunal's order for security for costs, whereby the tribunal can follow the practice of the English Commercial Court. As a consequence, the tribunal is now empowered to make an award dismissing the claim, should one of the parties fail to provide the security the tribunal orders. This ensures that the matter is finally disposed with, not left dormant, which would be the natural result should the proceedings be stayed.

- Section 39 gives the tribunal, upon agreement by the parties, the power to make temporary or provisional orders regulating financial arrangements between the parties, but which will be subject to reversal when the underlying merits are finally decided by the tribunal. In the absence of agreement, the tribunal is not so empowered. It is important to note that the tribunal does not have extended powers to issue Mareva or Anton Piller relief. This is the sole jurisdiction of the Courts.

- Section 40 provides that the parties have a general duty to do all things necessary for the proper and expeditious conduct of the arbitral proceedings. This is a mandatory provision.

- Section 41 sets out the tribunals powers in case of a party's default. There are elements of the present law that are maintained in this section (such as the power of the tribunal to strike out for want of prosecution) however there is an expansion of the present law, since this section does give the tribunal increases powers. So, for example, the tribunal now has the power to proceed ex parte in the face of continued recalcitrance as stipulated.

In addition, should a party, without showing sufficient cause, fail to comply with any order or direction made by the tribunal, the tribunal is charged with the power of making a peremptory order "to the same effect" and may stipulate a limited time within which the party concerned must comply. Should the party still fail to comply with the order, the tribunal has a variety of remedies which are set out Section 41(7) of the Act.

- Section 42 sets out that the Court has the power to order compliance with the tribunal's peremptory orders as set out in Section 41. This section is subject to the parties agreeing otherwise.

- Section 44 redefines the relationship between the Courts and arbitration by virtue of the fact that it sets out the powers that can be exercised by the Court in support of the arbitral proceedings. This provision corresponds with Article 9 of the Model Law. The powers given to the Court are only those necessary when the tribunal cannot act effectively.

- Section 46 provides that the parties have the freedom to decide that the tribunal will make a decision not in accordance with a recognised system of law but under "ex aequo et bono", that is to say, generally recognised principles of fairness and justice.However the Act does not use this Latin term. In agreeing to this term, the parties also exclude any right to appeal

to the Court.

This section also goes on to provide that where the parties have not indicated their choice of law, then the tribunal will have to make a decision based on usual conflict of law principles.

- Section 47 provides that the arbitral tribunal may make awards on different issues. This takes cognisance of the recent development in the Commercial Court and the Official Referees Court. Indeed the old idea that a party is entitled to a full trail of everything at once has now largely disappeared. This was seen in the House of Lords decision in Ashmore v Corporation of Lloyd's [1992] 2 Lloyd's Rep 1. Furthermore, this view is reflected in Lord Woolf's proposals as to how to improve the civil justice system.

This Section complements Section 33(1)(a) since it enables the tribunal to proceed in a manner that is suitable to the circumstances of the particular case. This approach therefore may be able to save the parties both time and money. This clause does not seek to give the tribunal greater or different powers from that which they already hold, but it merely indicates how their powers, in suitable cases, should be exercised.

- Section 49 provides that the arbitral tribunal has the power to award compound interest. The Drafting Committee noted that the absence of such a power merely adds to the delays and expense of arbitration and causes injustice.

- Section 52 re-enacts Article 31 of the Model Law, which provides what form the award is to take. This section therefore provides that awards must be reasoned unless both parties have indicated otherwise. The remainder of the section is self explanatory.

- Section 53 provides that any award made in the proceedings of an arbitration whose seat is in England, Wales and Northern Ireland will be treated as having been made at that seat, regardless of where it was signed, dispatched or delivered. This section is designed to expressly overrule the anomalous situation that arose in the House of Lord's case Hiscox v Outhwaite [1992] 1 AC 562.

- Section 57 provides that the tribunal has the power to correct an award. This takes the old Section 17 'slip rule' further, since this section provides that the tribunal may on its own initiative, or on the application of a party, not only correct an award to remove any clerical error etc. but also clarify or remove any ambiguity in the award. Furthermore, the tribunal is empowered to make an additional award in respect of any claim which was presented to the tribunal but was not dealt with in the award.

Finally, the tribunal will not amend, clarify, remove or make an additional award unless the other party to the proceedings has had an opportunity to comment.

- Section 59 to 65 provides a code dealing with how the costs of an arbitration should be attributed between the parties. The question of the right of the arbitrators to fees and expenses is dealt with earlier in Section 28.

Section 59 starts off by defining costs.

Section 62 provides that unless the parties agree otherwise the right to claim costs extends only to the recoverable costs.

Section 63 provides that the tribunal may determine the recoverable costs of the arbitration on a basis it thinks fit. However, if the tribunal does not determine the recoverable costs of the arbitration,a party may make application to the Court for it to decide upon the recoverable costs of the tribunal.

Section 64 provides that only reasonable costs and expenses as are appropriate in the circumstances are recoverable.

Section 65 gives the tribunal a new power to limit in advance the amount of recoverable costs. This could be used to reduce unnecessary expenditure. This also represents a facet of the duty of the tribunal in Section 33. This will also discourage a financial giant from intimidating a lesser opponent.

- Section 66 sets out the powers of the Court in relation to arbitration awards.

- Section 67 provides in what instances a party may seek to challenge an award based upon the jurisdiction of the tribunal. This is a mandatory section. This section also provides a mechanism for challenges to the jurisdiction by someone who has taken no part in the arbitral proceedings. Finally, in order to avoid unnecessary delays, the tribunal is empowered to continue with the arbitral proceedings in the face of a Court challenge to its jurisdiction.

- Section 68 provides in what instances a party may seek to challenge an award based upon a serious irregularity affecting the tribunal, the proceedings or the award. This section has therefore replaced the old challenge on the grounds of misconduct.

The Drafting Committee considered it useful to separate challenges to substantive jurisdiction from challenges based on the conduct of the tribunal since, with respect to the former, there can be no question of applying a test of "substantial injustice". Irregularities however must stand on a different footing, namely that these have to pass the test of causing "substantial injustice" before the Court can act. The Court can therefore only act in very limited circumstances and only as a support for the arbitral process and not as an interference. The test therefore must be that the Court will intervene in instances where the events simply cannot on any view be defended as an acceptable consequence of that choice.

- Section 69 sets out the instances upon which an appeal on a point of law is allowed. The existing law is maintained, however there is further curtailment in that there may only be an appeal on a point of law which was originally raised before the tribunal. In general the Drafting Committee have attempted to set out the limits to appeal that were enunciated in Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724.

The test the Drafting Committee have proposed is whether, in the ordinary case, the Court is satisfied that the decision of the tribunal is obviously wrong. The right of appeal is only available in these circumstances. However, there is a further test in that the Court will only allow an appeal, despite the agreement of the parties to resolve the matter by arbitration, if it is just and proper in all the circumstances for the Court to determine the question.

- Section 70 sets out the provisions that are to apply to an application or appeal under Section 67, 68 or 69. The time limit for lodging an application or appeal is 28 days of the date of the award, or when the applicant was notified of the result of the process.

- Section 72 sets out the savings for rights of persons who take no part in the proceedings. In the view of the Drafting committee, this provision was vital since a person who disputes that an arbitral tribunal has jurisdiction cannot be required to take part in the arbitration proceedings or to take positive steps to defend his position, for any such requirement would beg the question whether or not his objection has any substance and thus be likely to lead to gross injustice. Such a person therefore, must be entitled, if he wishes, simply to ignore the arbitral process, though of course he runs the risk of an enforceable award being made against him if his objection is not well founded.

- Section 73 is also vital since it provides that recalcitrant parties or those who have had an award made against them cannot seek to avoid honouring the award or delay proceedings by raising points on jurisdiction etc. which they could and should have discovered and raised at an earlier stage of the proceedings. Failure to raise the necessary objection at the time it becomes apparent results in waiver of the right to object at a later stage. In this way, a recalcitrant party cannot avoid the effects of a final and binding award that goes against them. This reflects Article 4 of the Model Law. However the Drafting Committee have gone further, and require a party to arbitration proceedings who has taken part, or continued to take part, without raising the objection in due time, to show that at that stage he neither knew nor could with reasonable diligence have discovered the grounds for his objection.

- Section 74 is novel in that it provides that arbitral institutions are immune from suit in respect of anything done or omitted in the discharge of their function unless the act or omission is shown to have been in bad faith. The reason for this provision is that the Drafting Committee felt that there would be a real risk that attempts would be made to hold institutions or individuals responsible for the consequences of their exercise of power. This would also provide a means of reopening the substantive elements of the arbitration itself and would be a way around the immunity granted to the arbitrator.

Some members of the Institute have viewed this provision with scepticism since it is seen as a means of making the Institute unaccountable, which is not considered to be morally sound.

Part II of the Act sets out the difference between domestic arbitration agreements and international arbitration agreements. A differentiation is maintained because the rules for obtaining a stay of legal proceedings differ. The New York Convention applies to international arbitral awards, and domestic enforcement provisions relate to domestic awards.

However, the Drafting Committee has called for further consultation, prior to the Act coming into effect, as to whether the provisions setting out this differentiation should be repealed in terms of the powers granted to the Secretary of State under Section 88. There are a number of reasons for this proposal, but the strongest reason is that this distinction in fact violates European Community (Union) law since it discriminates between nationals of other European member countries, who are not English.

The Institute has taken the view that this distinction should be abolished since

beside those criticisms that are noted above, and indeed in the DAC Report of February 1996, the distinction results in anomalies.

This part of the Act(Sections 89 to 91) also sets out the law relating to Consumer Arbitration Agreements. To this end, the Consumer Arbitration Agreements Act of 1988 has been repealed. This is one section which has effect not only in England, Wales and Northern Ireland as well, but also in Scotland, thereby ensuring homogeneity of consumer protection law. This has been long required since there was a dearth of consumer protection law, which had been exacerbated by a number of European Community Directives on the subject, none of which seemed to correlate. As a consequence, these provisions are welcomed.

Part III of the Act re-enact the substance of the 1975 Arbitration Act which gave effect to the New York Convention. As a consequence, the 1975 Act has been repealed.

Part IV of the Act merely sets out the administrative elements to its enactment and application.

Conclusion

On the whole, the new Act has been well received, and most are of the view that it is an excellent and unique piece of legislation, which will hopefully draw international arbitration back to London. The Institute has expressed its support and praise for the Act and those that drafted it.

Introduction to Arbitration (ex www.ciarb.org)

Definition

Arbitration is a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties. It is governed by both statute law and the common law. The principal legislation in England and Wales are the Arbitration Acts 1950 - 1996 as amended. Different provisions apply in Scotland and Northern Ireland, but see the Arbitration Act 1996 for further details

As a dispute resolution procedure arbitration is the only means of dispute resolution which is an alternative to litigation because an arbitrator's award is final, binding and enforceable summarily in the courts.

Arbitrator

An arbitrator is independent and impartial and is selected by the parties or on their behalf (by the Institute or by another appointing authority) on the basis of their arbitral/technical expertise, reputation and experience in the field of activity from which the dispute stems.

Disputes

Almost any dispute which can be resolved by litigation in the courts can be settled by arbitration, the exceptions being matters where injunctions are required (owing to the powers needed for enforcement) and other matters which may result in the imposition of a fine or term of imprisonment and matrimonial matters such as divorce, custody and so on. Furthermore an

arbitrator's award is a private matter and cannot therefore, be effective against anyone who is not party to the dispute. This means that arbitration cannot be used in a dispute which necessarily involves parties outside the arbitration agreement, thus an arbitration agreement cannot bind third parties.

Areas where arbitration has proved especially effective include: building and civil engineering contracts, shipping, rent review clauses in commercial leases, partnership disputes, insurance, manufacturing generally, computer applications, imports and exports, process industry, general trading, commodities and the engineering industry.

Features of Arbitration

Privacy

In some cases the whole arbitration process will be considered private and confidential, but there are differences of opinion in this respect.

Flexibility

The parties may control the manner of the proceedings having regard to the nature of the dispute and to their precise needs. The parties indicate the degree of formality or informality of the procedure, unless there are pre-ordained rules or the parties are uncertain as to the procedure to adopt in which case the arbitrator will direct an appropriate procedure. There is no need for arbitration procedures to follow those of the courts; the parties may choose documents-only and expedited hearing procedures. However, it should be borne in mind that in some instances the mandatory provisions of the 1996 Act will preclude any agreement of the parties to the contrary.

Expertise

The parties or a 'nominating body' may appoint an arbitrator who is an expert in the matter under dispute.

Costs

Arbitration may be less costly than litigation as the use of the expert as arbitrator can save time on explanations of a technical nature. In addition, an arbitrator will normally be able to attend the hearing at a location to suit the convenience of the parties.

The costs of an arbitration are primarily time-related and will depend upon the matters in dispute, the procedure chosen by the parties and their choice of representative.

Finality

The award of the arbitrator is final and binding upon the parties. It may only be challenged in the High Court on limited grounds:

1 Lack of substantive legislation;

2 Serious irregularity;
3 Error of law arising out of an award made in the proceedings (in this respect see the Arbitration Act 1996 - sections 66 to 71.

Enforceability

The arbitrator's award is enforceable summarily in the courts. A court will treat the award as if it were one of its own judgments.
RICS Press Archive Press Releases

Good news for homeowners: Party wall bill to become law

The Royal Institution of Chartered Surveyors (RICS) welcomes the news that the Party Wall Bill has been approved by Parliament today (12 July). John Anstey, RICS spokesman and treasurer of the Pyramus and Thisbe Club, said:

"This is great news for homeowners throughout the country. Millions of property owners, both residential and commercial, share a common or "party" wall with a neighbouring owner. Problems arise when neighbours cannot agree on building work involving party walls. "Until now the only redress outside London has been to take the matter to court with all the expense, delay and stress of litigation. Thanks to this Bill the rest of England and Wales can enjoy the benefits afforded by the London Building Act, a straightforward procedure which avoids the need for court action."

The Bill sets out a simple procedure:

- Where a person wants to carry out work on a party wall he must inform his neighbour. - After 14 days if there is no reply the neighbour is deemed to dissent and must appoint a "surveyor", who could be a chartered surveyor, architect, engineer or solicitor. - Two surveyors, one representing each party, then draw up an "award" - an agreement which describes the work and specifies that any damage caused will be rectified and the neighbour's costs paid. - A "third surveyor" is named in the award and will intervene if the two original surveyors disagree.
RICS Press Archive Press Releases

Woolf proposals will boost alternative dispute resolution in property and construction, says RICS

Property industry disputes are much more likely to be settled quickly and informally following the backing for alternative dispute resolution (ADR) in Lord Woolf's review of the civil justice system to be published tomorrow (26 July), says

The Royal Institution of Chartered Surveyors (RICS). RICS spokesman, Anthony Salata said:

"Disputes between landlords and tenants, contractors and clients, and others in the property industry, can be incredibly expensive and time-consuming to settle in the courts."

"Alternative dispute resolution has had a long adolescence in the UK; now it is coming of age. Mediation - the least formal and potentially quickest and cheapest method - has an impressive

track record in the USA. It has massive potential here, especially in commercial landlord and tenant disputes, boundary disputes and joint venture development schemes. But ADR can be applied generally to an infinitely wider range of disputes."

The RICS has a panel of trained mediators and adjudicators who can be appointed at short notice at the request of the disputing parties. Where there is a prior agreement to use ADR, either one of the parties can call for its introduction.

The Woolf report comes hard on the heels of several pieces of legislation promoting alternatives to expensive court action. The Party Wall Act enables neighbours throughout England and Wales to settle disputes over work on shared walls by a procedure which by-passes the court. The Housing Grants, Construction and Regeneration Act, which received Royal Assent yesterday, provides for construction industry disputes to be settled by expert adjudication so that building work is not held up for long periods while the parties battle it out in court or at formal arbitration.
RICS
Surveying Services
Surveyors

Resolving property disputes

In the complicated world of property and construction, disputes are bound to arise. Professionals are looking at how differences can be resolved and questioning whether traditional processes, such as litigation through the courts, are always the best route. Chartered Surveyors are highly trained professionals who understand land, property and construction and are skilled in working with people.

There are various types of dispute resolution:

Arbitration A procedure whereby two parties in a dispute agree to be bound by the decision of a third party acting as Arbitrator.

Mediation A confidential process whereby parties to a dispute invite a neutral individual to facilitate negotiations between them with a view to achieving a resolution of their dispute.

Independent expert determinations A process whereby the parties to a dispute agree to be bound by the decision of a third party who has expert knowledge of the subject matter in dispute. Adjudication A process whereby an adjudicator uses his or her own knowledge and investigations, whilst also weighing the evidence presented by the parties, in order to reach an enforceable decision. This method of dispute resolution is most commonly used in connection with construction related disputes.
Access to Justice (the Woolf Report) extract

Section I

Overview

The Principles

1. In my interim report I identified a number of principles which the civil justice system should meet in order to ensure access to justice. The system should:

(a) be just in the results it delivers;

(b) be fair in the way it treats litigants;

(c) offer appropriate procedures at a reasonable cost;

(d) deal with cases with reasonable speed;

(e) be understandable to those who use it;

(f) be responsive to the needs of those who use it;

(g) provide as much certainty as the nature of particular cases allows; and

(h) be effective: adequately resourced and organised.

The problems

2. The defects I identified in our present system were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.

The basic reforms

3. The interim report set out a blueprint for reform based on a system where the courts with the assistance of litigants would be responsible for the management of cases. I recommended that the courts should have the final responsibility for determining what procedures were suitable for each case; setting realistic timetables; and ensuring that the procedures and timetables were complied with. Defended cases would be allocated to one of three tracks:

(a) an expanded small claims jurisdiction with a financial limit of £3,000;

(b) a new fast track for straightforward cases up to £10,000, with strictly limited procedures, fixed timetables (20 30 weeks to trial) and fixed costs; and

(c) a new multi track for cases above £10,000, providing individual hands on management by judicial teams for the heaviest cases, and standard or tailor made directions where these are appropriate.

The second stage of the Inquiry

4. My general analysis of the problems in the present system, and the broad agenda for reform which I proposed in the interim report, have provided the foundation for the more detailed work I have carried out in the second stage of the Inquiry. This has concentrated on particular areas of litigation where, in my view, the civil justice system is failing most conspicuously to meet needs of litigants. These areas are medical negligence, housing and multi party litigation. I have also developed more detailed proposals on procedure and costs for the new fast track. Another focus of special attention was the Crown Office List, which has a particularly important function in enabling individual citizens to challenge decisions of public bodies including central and local government.

5. In all these areas a particular concern has been to improve access to justice for individuals and small businesses. I am also concerned about the level of public expenditure on litigation, particularly in medical negligence and housing. In both of these areas substantial amounts of public money are absorbed in legal costs which could be better spent, in the one case on improving medical care and in the other on improving standards of social housing. An efficient and cost effective justice system is also of vital importance to the commercial, financial and industrial life of this country and I was anxious to improve this, especially because of the evidence I received that there was a substantial risk of the existing system changing our competitive position in relation to other jurisdictions. Finally I was anxious to ensure that the judiciary and the resources of the Court Service were deployed to the best effect.

6. All the work I have carried out in the second stage of the Inquiry has confirmed the conclusions I reached in the interim report about the defects in the present system. This report therefore builds on the contents and recommendations of the interim report by:

(a) providing greater detail as to the principal recommendations in the interim report;

(b) identifying the problems in those areas which have received special attention during the second stage of the Inquiry and the solutions I am recommending to meet those problems;

(c) describing the new rules; and

(d) making clear any change in my approach since the interim report.

Rules of court

7. An important part of my task in the Inquiry was to produce a single, simpler procedural code to apply to civil litigation in the High Court and county courts. This report is accompanied by a draft of the general rules which will form the core of the new code. In the second part of the Inquiry I have looked in detail at the specialist jurisdictions of the High Court with a view to accommodating them so far as possible within the general procedural framework embodied in the core rules. As a result of the work done by the Inquiry, it is apparent that a great many of the existing specialist rules are no longer required. Work is continuing on the more limited body of special rules which are still considered essential. Here I await with interest the views of those engaged in the specialist jurisdictions who could not express a formal opinion as to what extra rules are still needed until they had seen the general rules which have been prepared by the Inquiry.

The new landscape

8. If my recommendations are implemented the landscape of civil litigation will be fundamentally different from what it is now. It will be underpinned by Rule I of the new procedural code, which imposes an obligation on the courts and the parties to further the overriding objective of the rules so as to deal with cases justly. The rule provides a definition of 'dealing with a case justly', embodying the principles of equality, economy, proportionality and expedition which are fundamental to an effective contemporary system of justice. These requirements of procedural justice, operating in the traditional adversarial context, will give effect to a system which is substantively just in the results it delivers as well as in the way in which it does so.

9. The new landscape will have the following features.

Litigation will be avoided wherever possible.

(a) People will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available.

(b) Information on sources of alternative dispute resolution (ADR) will be provided at all civil courts.

(c) Legal aid funding will be available for pre litigation resolution and ADR.

(d) Protocols in relation to medical negligence, housing and personal injury, and additional powers for the court in relation to pre litigation disclosure, will enable parties to obtain information earlier and promote settlement.

(e) Before commencing litigation both parties will be able to make offers to settle the whole or part of a dispute supported by a special regime as to costs and higher rates of interest if not accepted.

Litigation will be less adversarial and more co operative.

(a) There will be an expectation of openness and co operation between parties from the outset, supported by pre litigation protocols on disclosure and experts. The courts will be able to give effect to their disapproval of a lack of co operation prior to litigation.

(b) The court will encourage the use of ADR at case management conferences and pre trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR.

(c) The duty of experts to the court will be emphasised. Single experts, instructed by the parties, will be used when practicable. Opposing experts will be encouraged to meet or communicate as early as possible to narrow the issues between them. The court will have a power to appoint an expert.

Litigation will be less complex.

(a) There will be a single set of rules applying to the High Court and the county courts. The rules will be simpler, and special rules for specific types of litigation will be reduced to a minimum.

(b) All proceedings will be commenced in the same way by a claim.

(c) The claim and defence will not be technical documents. The claim will set out the facts alleged by the claimant, the remedy the claimant seeks, the grounds on which the remedy is sought and any relevant points of law. The defence will set out the defendant's detailed response to the claim and make clear the real issues between the parties. Both 'statements of case' will have to include certificates by the parties verifying their contents so tactical allegations will no longer be possible.

(d) During the course of proceedings the court on its own initiative, or on the application of either party, will be able to dispose of individual issues or the litigation as a whole where there is no real prospect of success.

(e) Claimants will be able to start proceedings in any court. It will be the court's responsibility to direct parties or to transfer the case, if necessary, to the appropriate part of the system.

(f) Discovery will be controlled; in a minority of cases the present scale of discovery will be possible but in the majority of cases there will be a new standard test for more restricted disclosure.

(g) There will be special procedures, involving active judicial case management, to deal with multi party actions expeditiously and fairly.

(h) Instead of an irrational kaleidoscope of different ways of appealing or applying to the High Court against the decisions of other bodies, there will be a unified code.

The time scale of litigation will be shorter and more certain.

(a) All cases will progress to trial in accordance with a timetable set and monitored by the court.

(b) For fast track cases there will be fixed timetables of no more than 30 weeks.

(c) The court will apply strict sanctions to parties who do not comply with the procedures or timetables.

(d) Appeals from case management decisions will be kept to the minimum, and will be dealt with expeditiously.

(e) The court will determine the length of the trial and what is to happen at the trial.

The cost of litigation will be more affordable, more predictable, and more proportionate to the value and complexity of individual cases.

(a) There will be fixed costs for cases on the fast track.

(b) Estimates of costs for multi track cases will be published by the court or agreed by the parties and approved by the court.

(c) There will be a special 'streamlined' track for lower value or less complex multi track cases, where the procedure will be as simple as possible with appropriate budgets for costs.

(d) For classes of litigation where the procedure is uncomplicated and predictable the court will issue guideline costs with the assistance of users.

(e) There will be a new test for the taxation of costs to further the overriding objective. It will be that there should be allowed "such sum as is reasonable taking account of the interests of both parties to the taxation."

Parties of limited financial means will be able to conduct litigation on a more equal footing.

(a) Litigants who are not legally represented will be able to get more help from advice services and from the courts.

(b) Procedural judges will take account of the parties' financial circumstances in allocating cases to the fast track or to the small claims jurisdiction.

(c) Limited procedures and tight timetables on the fast track, and judicial case management on the multi track, will make it more difficult for wealthier parties to gain a tactical advantage over their opponents by additional expenditure.

(d) When deciding upon the procedure which is to be adopted the court will, if the parties' means are unequal, be entitled to make an order for a more elaborate procedure, conditional upon the other side agreeing to meet, in any event, the difference in the cost of the two possible procedures.

(e) The new approach will be supported by more effective sanctions, including orders for costs in a fixed sum which are to be paid forthwith.

There will be clear lines of judicial and administrative responsibility for the civil justice system.

(a) The Head of Civil Justice will have overall responsibility for the civil justice system in England and Wales.

(b) The Presiding Judges on each Circuit will exercise their responsibility for civil work in conjunction with the two Chancery judges who will also oversee the business and mercantile lists.

(c) A nominated Circuit judge will be responsible for the effective organisation of each civil trial centre and its satellite courts.

(d) The new administrative structure will establish a partnership between the judiciary and the Court Service.

The structure of the courts and the deployment of judges will be designed to meet the needs of litigants.

(a) Heavier and more complex civil cases will be concentrated at trial centres which have the resources needed, including specialist judges, to ensure that the work is dealt with effectively.

(b) Smaller local courts will continue to play a vital role in providing easy access to the civil justice system. Housing claims, small claims, debt cases and cases allocated to the fast track will be dealt with there, as well as case management of the less complex multi track cases.

(c) Better ways of providing access to justice in rural areas will be maintained and developed.

(d) There will be a more straightforward system of appeals. Appeals with no real prospect of success will
be eliminated at an early stage.

(e) The courts will have access to the technology needed to monitor the progress of litigation.

(f) Litigants will be able to communicate with the courts electronically and through video and telephone conferencing facilities.

(g) Trials will take place on the date assigned.

Judges will be deployed effectively so that they can manage litigation in accordance with the new rules and protocols.

(a) Judges will be given the training they need to manage cases.

(b) Judges will be encouraged to specialise in such areas as housing and medical negligence, and will be given the appropriate training to ensure that they understand the legal and technical issues fully.

(c) Cases will be dealt with by the part of the system which is most appropriate. The distinctions between the county courts and High Court and between the divisions of the High Court will be of reduce significance.

(d) Judges will have the administrative and technological support which is required for the effective management of cases.

The civil justice system will be responsive to the needs of litigants.

(a) Courts will provide advice and assistance to litigants through court based or duty advice and assistance schemes, especially in courts with substantial levels of debt and housing work.

(b) Courts will provide more information to litigants through leaflets, videos, telephone help lines and information technology.

(c) Court staff will provide information and help to litigants on how to progress their case.

(d) There will be ongoing monitoring and research on litigants' needs.

The funding of civil litigation

10. My Inquiry is concerned with the procedure of the civil courts. I have not dealt directly with the funding of litigation, but there are other developments in this area which will affect the new landscape I have just described. The most significant recent development in the funding of civil litigation is the current review of legal aid, on which there has been close co operation between my Inquiry Team and the Legal Aid Reform Team.

11. It is essential that the reforms of legal aid should take into account and support the recommendations I am making. The reforms of civil procedure which I am proposing will be more effective if:

(a) legal aid funding is available for pre litigation resolution and ADR (including the costs of an expert conducting expert adjudication of small claims and cases on the fast track);

(b) public funding is available for in court advice services, especially on housing issues;

(c) legal aid is available for solicitors and barristers providing 'unbundled' legal services to parties conducting their own cases on the fast track;

(d) the Legal Aid Board's decisions take into account the court's allocation of a case to the appropriate track, and any directions of the court as to the future management of the case; in all cases but especially in multi party actions;

(e) the legal aid reforms recognise the importance of ensuring the survival of efficient small firms of solicitors, particularly in remote areas.

12. In addition there is the availability of conditional fee agreements and the growth in legal expenses insurance. Both of these can help to make litigation more affordable, but they cannot in themselves deal with the underlying problems of excessive and unpredictable costs. Both conditional fees and insurance are, at present, available only in limited classes of cases. They will only become more generally available if costs are firmly controlled in the ways that I am proposing.

Implementation of my reforms

13. The Lord Chancellor welcomed my interim report and has made plain his commitment to reform. Having accepted the thrust of my recommendations, he has established an implementation team and embarked on a programme of phased implementation.

14. In January 1996 the Lord Chancellor appointed the Vice Chancellor, Sir Richard Scott, to take on the duties envisaged for a Head of Civil Justice. This appointment is in itself a very important step. Sir Richard will be able to take charge of implementing many of the other recommendations He will be able to provide the hands on leadership for civil litigation which it has lacked in the past. He will be able to have an input into the selection of judges to be responsible for the handling of civil work at trial centres. He will be in a position to oversee the

implementation of the other recommendations.

15. The Court Service, in consultation with the judiciary, has started to put into place the supporting structure which will be needed to introduce the new system of case management by the courts. This includes identifying the appropriate number and location of trial centres on each Circuit, and setting up a new arrangement for a partnership between the judiciary and administrative staff. The Judicial Studies Board is preparing for an intensive programme of training for judges involved in case management, based on a survey which the Board wishes to conduct to identify the special interests and needs of judges.

16. Some of my other recommendations which did not need to await this final report have already been implemented. The small claims jurisdiction has been increased to £3,000, except for personal injury claims, as from 8 January l996. At the same time the test applied by district judges in considering transfer out of the small claims jurisdiction was modified, so that cases qualify for transfer if they are considered 'complex' rather then 'exceptionally complex'. The Judicial Studies Board is making arrangements to provide additional training for district judges in connection with their small claims work and has developed a protocol or best practice guide to promote the consistency of approach which I recommended. The option of paper adjudication, which I recommended, as of benefit in particular to small businesses and the self employed, is being considered by the Lord Chancellor's Department.

17. The effects of the increased jurisdiction are being monitored and research is being considered. I hope that the results of any monitoring or research will be published so that the effects of the increase in jurisdiction can be considered by all those involved, before any further increase is contemplated

18. I outlined my proposals for an enhanced role for ADR in the interim report and the past year has seen further developments, including a pilot mediation scheme at Central London County Court and plans for pilot mediation and arbitration schemes at the Patents County Court. I also understand that the Lord Chancellor is considering providing assistance with the ADR pilot scheme being conducted by Bristol Law Society and researching the effects of this. I welcome the recent publication by the Lord Chancellor’s Department of a plain English guide on ADR entitled Resolving Disputes Without Going To Court, designed to make members of the public more aware of methods of resolving disputes which do not involve litigation. The new procedures I propose will emphasise the importance of ADR through the court's ability to take into account whether parties have unreasonably rejected the possibility of ADR or have behaved unreasonably in the course of ADR.

19. The interim report emphasised the importance of providing effective information, advice and assistance to all litigants and recommended that all the Civil Justice Review's recommendations in this respect should be implemented. Provision of such assistance until now has been very much a matter of local initiative and it says much for such local action that about one third of all county courts now host advice schemes. The creation of the Court Service as an agency, with its emphasis on customer service, and in particular the new management structure, now provides an opportunity to take a more strategic approach. The provision of information and advice directs people to appropriate means of resolving disputes, enables them to understand how to progress their eases and contributes to the effective disposal of court business. Just as ease management involves spending time to save time, so the provision of appropriate help to litigants will result in a better use of court and legal aid resources. It will

also ensure that access to justice is a reality rather than a slogan.

Conclusion

20. In the course of the Inquiry there has been unprecedented consultation with all involved in the civil justice system. Over the last year, judges, practitioners and consumers have worked together to hammer out new ways of tackling problems and to contribute to what is proposed in this final report. I see a continuing need for such involvement in the process of implementation. Much has been done. But much more remains to be done. The continuing involvement of all those who use the civil justice system will be given coherence and leadership by the Civil Justice Council which I recommended in the interim report. Local user committees, a specialist IT sub committee and working groups developing further detail for the new fast track would all come under its aegis. The Council would continue and develop the process of co operation and creativity that the Inquiry has benefited from.

21.`The civil justice system in this country urgently needs reform. The time is right for change. The public and businesses want change, and the majority of the legal profession agree. The judiciary has strongly supported my Inquiry. I have been given a unique opportunity to help achieve the change which is needed.

22. My recommendations, together with the new code of rules, form a comprehensive and coherent package for the reform of civil justice. Each contributes to and underpins the others. Their overall effectiveness could be seriously undermined by piecemeal implementation. Their implementation as a whole will ensure that all the supporting elements of the civil justice system are directed towards the fundamental reform that is required.

23. Nevertheless, there should be a degree of flexibility in the approach to implementation. All the recommendations I have made, both in the interim report and in this report, are designed to meet the objectives for the civil justice system which I set out at the beginning of this overview. My detailed recommendations are based on a thorough review of the present system, including the wide consultation I have mentioned, but the objectives are of primary importance. The individual proposals should not be too rigidly applied if it is found that there are better ways of achieving the objectives. My overriding concern is to ensure that we have a civil justice system which will meet the needs of the public in the twenty first century.

The Party Wall etc Act 1996: a summary and comparison with Part VI of the London Building Acts (Amendment Act) 1939

Under the Party Wall etc Act a building owner must give every adjoining owner one month’s notice for:

construction of a party wall or party fence wall,

construction of a boundary wall on the building owner’s own land,

excavation within three metres of an adjoining owner’s building or structure and below the level of its foundations,

excavation within six metres of an adjoining owner’s building or structure, meeting a plane drawn downwards in the direction of the excavation at an angle of forty-five degrees from the line formed by the intersection of the plane of the level of the bottom of the foundations of the building or structure of the adjoining owner with the plane of the external face of the external wall of the building or structure of the adjoining owner.

A building owner must give every adjoining owner two month’s notice for:

work to a party structure or the external wall of an adjoining owner’s building (as listed below where an extract of section 2 of the Act is reproduced).

Except for the construction of an independent wall wholly on the building owner's land, if an adjoining owner does not within fourteen days serve a notice consenting to the works, a dispute is deemed to have arisen and both owners must either appoint one agreed surveyor, or appoint one each who then select a third. The surveyor or surveyors then make an award before work can start.

Aside from affecting the entire jurisdiction as opposed to just Inner London, the Act differs from Part VI of the ’39 Act in that there are new rights (or clarification of rights), subject to conditions, for a building owner to:

demolish and rebuild a party structure to a lesser thickness or height,

insert a damp proof course in a party structure,

cut away or demolish parts of any wall or building overhanging a party wall,

cut into the wall of an adjoining owner’s building to insert weather-proofing of a wall erected against that wall,

reduce the height of a party wall or party fence wall,

There are new conditions including that:

foundation notices now have to be served on owners of contiguous as well as independent structures,

foundation notices will now lead to a dispute if not consented to by notice within fourteen days,

a dispute arising from a foundation notice relates to the proposed construction, not just the question of underpinning or other safeguarding of the adjoining owner’s foundations,

foundation and party structure notices both expire after twelve months,

exposed party structures must be weather-proofed

compensation is payable to any adjoining owner and any adjoining occupier for any loss or damage which may result from the carrying out of any work under the Act,

party walls and party fence walls can only be reduced to a height of two metres or the height currently used by the adjoining owner for enclosure and constructing a parapet if necessary,

expenses are presumed to be the building owner's responsibility but the responsibility for any defect or want of repair is now to be taken into account,

the adjoining owner has the right to require that the building owner pays for damage rather than repairing it.

There are new provisions affecting appointed surveyors including that:

they now have a right of entry to adjoining land after service of notice,

they can deem themselves incapable of acting,

the surveyors have to determine matters previously left to the court including security,

awards have to be served on the owners by their surveyors whether paid for or not,

an owner cannot appoint himself as a surveyor,

it is an offence to hinder a surveyor or building owner in exercising his right of access.