A JUDICIOUS

ON THE FACE OF IT, ARBITRATION IS COSTLY, EXPENSIVE, AND CONTRACTORS HAVE ONLY ABOUT A 50-50 CHANCE OF WINNING. BUT A GROUND-BREAKING STUDY BY EUGENE LENEHAN SHOWS THAT CHOOSING ARBITRATORS MORE WISELY COULD IMPROVE THE OUTCOME FOR ALL

EMPICS

IT'S NO SURPRISE THAT USE OF ARBITRATION HAS plummeted since the leaner, meaner method of adjudication was introduced in 1998. My research shows that the average length of an arbitration is just over 14 months, though plenty drag on for years, and the larger the claim the longer they last. Nor are they a sure-fire way of getting your money. In the cases I studied, only 54% of main contractor claimants received the arbitrator's full award, and the amount awarded was most often less than claimed.

But arbitration still has its advantages. Unlike in adjudication, for instance, decisions are final. What's more, my research suggests that if arbitration is the right solution for you, there is a way you can improve the chances that time and costs stay reasonable. In short, choose a good arbitrator.

The Arbitration Act 1996 emphasises speed, economy and fairness, and the selection of an arbitrator who can comply with both the spirit and the letter of the act is vital to success. There are various procedures the arbitrator can follow which can reduce costs and time, but not all will take advantage of them.

AVOIDING EXPENSE

Arbitrators should be flexible. The act tells them to "adopt procedures suitable to the circumstances to the particular case, avoiding unnecessary delay or expense". They don't have to adopt grand but unwieldy "court" proceedings. In fact, a number of optional procedures have a streamlining effect. These procedures include:

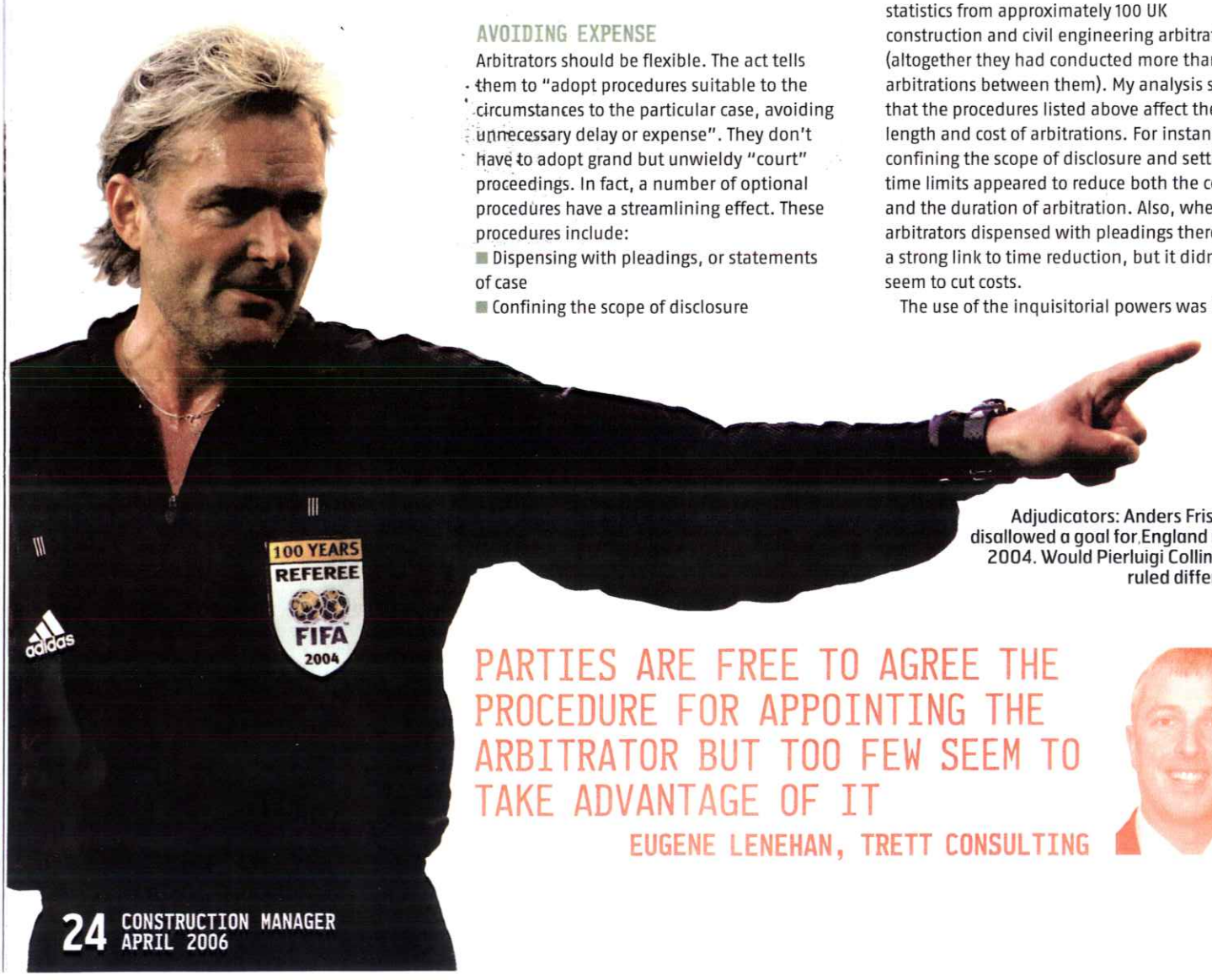
- Dispensing with pleadings, or statements of case
- Confining the scope of disclosure
- Having a fast-track timetable for the arbitration
- Using written submissions instead of havi interlocutory hearings
- Using inquisitorial powers, where the judg searches for facts, examines documents, and makes further investigations.

PROCEDURE MATTERS

These procedures are not mandatory so the parties have to agree to them. But if they ca agree, the arbitrator can decide to use them

In my research, 36 arbitrators provided statistics from approximately 100 UK construction and civil engineering arbitratio (altogether they had conducted more than 2 arbitrations between them). My analysis sho that the procedures listed above affect the length and cost of arbitrations. For instance, confining the scope of disclosure and setting time limits appeared to reduce both the cost and the duration of arbitration. Also, when arbitrators dispensed with pleadings there w a strong link to time reduction, but it didn't seem to cut costs.

The use of the inquisitorial powers was lin



Adjudicators: Anders Frisk (disallowed a goal for England in E 2004. Would Pierluigi Collina h ruled differer

PARTIES ARE FREE TO AGREE THE PROCEDURE FOR APPOINTING THE ARBITRATOR BUT TOO FEW SEEM TO TAKE ADVANTAGE OF IT

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CHOICE

to a reduction in costs but there appeared to be no reduction in the duration. And instructing written submissions instead of holding interlocutory hearings seemed to cut time but, somewhat perplexingly, it doubled costs. Clearly, there is a mixed bag of methods which, when put together, could have a marked effect on the efficiency of an arbitration.

But despite the advantages of these procedures, not all arbitrators use them. Although confining the scope of disclosure was linked to a reduction in costs and duration, it was used in only half of the arbitrations I studied, and a quarter of arbitrators admitted never having used this procedure.

Fast-track timetables and setting time limits have clear benefits, but only 47% of arbitrations involved this procedure, and 8% of arbitrators confessed to never using it. More than a third of arbitrators never dispensed with pleadings and it was seen in only 11% of arbitrations.

I also found that the more experienced arbitrators were the most likely to confine the scope of disclosure but, oddly, they were less likely to set a fast-track timetable.

PROPORTION OF FINAL AWARD COMPARED WITH SUM CLAIMED

CLAIM SIZE	MEAN PROPORTION OF FINAL AWARD TO SIZE OF CLAIM
£0–£50,000	**59.8%**
£50,000–£100,000	**49.1%**
£100,000–£250,000	**57.4%**
£250,000–£500,000	**36.9%**
£500,000–£1m	**56.6%**
£1m+	**56.3%**
All claims	**54.7%**

Source: Eugene Lenehan

ARBITRARY CHOICES

The act says parties are free to agree the procedure for appointing the arbitrator, but too few seem to take advantage of this freedom. For example, you'd think that checking the prospective arbitrator's CV would be a standard exercise, but this sensible safeguard occurred in only a third of the arbitrations I analysed.

In 66% of cases the tribunal is appointed through nomination by an institution, a route many contracts stipulate. But on what do the institutions base their choices? Some institutions, such as the RIBA and the IMechE, base it on which arbitrators are closest, geographically, to the parties. If there is more than one arbitrator in the area, the institutions try to pick someone with relevant qualifications. Is this not the wrong way round? Geographical proximity is an advantage, but surely the expertise of the arbitrator should be given higher priority?

I recommend that parties should only refer to an institution if they fail to agree on who the arbitrator should be. In addition, both the arbitrator and the parties should give careful thought to the type of procedures they may wish to use, and parties should try to discover whether the arbitrator being considered thinks they work, and has used them before. cm

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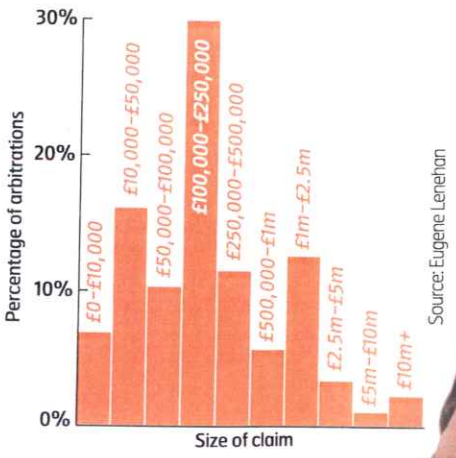
SPREAD OF CLAIM SIZES OVER 100 ADJUDICATIONS STUDIED



Source: Eugene Lenehan