HFW LITIGATION

HFW LITIGATION'S ENGLISH CIVIL PROCEDURE SURVEY
THE CIVIL PROCEDURE RULES, 20 YEARS ON.

"THE STANDOUT FIRM FOR COMMERCIAL LITIGATION."

THE LAWYER

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HFW LITIGATION

As one of the world's largest and most active disputes practices, litigation is in our DNA. We have more than 350 specialist disputes lawyers in offices across the Americas, Europe, the Middle East and Asia-Pacific, and frequently litigate on behalf of clients in courts around the world.

Clients turn to our litigators for help on the most complex, high-value, multi-party and multi-jurisdictional litigation. They say that our lawyers display "*a compelling mix of technical expertise and an uncompromising approach…interlaced with ego-free pragmatism and a relentless client focus*"[1]. When the stakes are high, either financially or in terms of reputational risk, clients need a trusted, first-class firm to navigate them to a successful outcome.

Further details on our HFW LITIGATION practice can be found in our brochure[2].

We hope that you find our survey findings of interest, we look forward to receiving any comments on the content, and we look forward to hearing what you think in our next Survey to be published in the Autumn.

NOEL CAMPBELL
Global Head of HFW LITIGATION

1 Source: Chambers and Partners

2 https://www.hfw.com/downloads/HFW-LITIGATION-Brochure.pdf

In this first HFW LITIGATION survey we focus on English Civil Procedural Rules (CPRs), which came into being as a result of the Woolf Reforms in April 1999, 20 years ago.

With thanks to everyone who responded, including in-house counsel, private practice lawyers, and barristers. We hope you find the feedback received of interest.

EXECUTIVE SUMMARY

In this survey we focus on the CPR Reforms, which have now been with us for 20 years, and look ahead to what might still be needed in order for the English High Court to retain its reputation for excellence and efficiency.

For the most part our respondents consider the CPRs to have been a success, however most responses indicate that there is more to be done, and that not all of the reforms have been as successful as hoped.

Alternative Dispute Resolution (ADR), was one of the central themes of the Reforms, and as expected, it is clear that the majority of respondents see this as successful in assisting in early settlement, whether on the day or shortly afterwards. Interestingly, this topic produced the largest divide between in-house and private practice lawyers. Conversely, the Costs Management Reforms aimed at reducing court and party time on interim applications, are viewed by the majority (and across both in-house and private practice lawyers) as not having been at all successful.

BACKGROUND

By way of a reminder, the CPRs were introduced in April 1999 following the then Master of the Rolls, Lord Woolf being tasked by Lord Mackay, the then Lord Chancellor, to carry out a review of English Civil Justice and the Rules of the Supreme Court, which governed the English litigation process at that time.

The review resulted in the *Access to Justice Report*[3] being published in 1997. The Report looked at how best the English court system might best reduce the costs and time incurred in litigation, modernise, and ultimately make litigation more user-friendly, and therefore London more attractive as a disputes jurisdiction.

The Report led to the Civil Procedure Act 1997, which introduced the Civil Procedure Rules 1998 (CPRs), which came into force in April 1999.

A key feature of the CPRs is the "*overriding objective*", which has at its heart the principle that litigation will be dealt with "*justly and at proportionate cost*". To support this principle, the CPRs focussed on the introduction of a few key component parts, including:

- The introduction of *pre-action protocols*, to facilitate co-operation between the parties, and allow for early case assessment and encourage settlement.
- Better *case management* to promote efficiency and reduce skirmishes.
- Encouraging better use of ADR.
- Better *costs management*, including the introduction of summary assessments of costs at the end of the hearing, with a short payment period in breach of which parties face a stay or dismissal.

We discuss feedback on these, and also developments that followed, including:

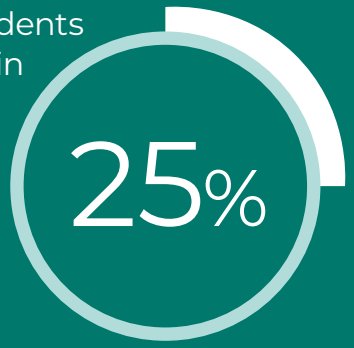
- The introduction of the Disclosure Pilot in the Business and Property Courts, which is now half way through the two year trial period;
- Expert and witness evidence reforms; and
- Judicial assignment (docketing).

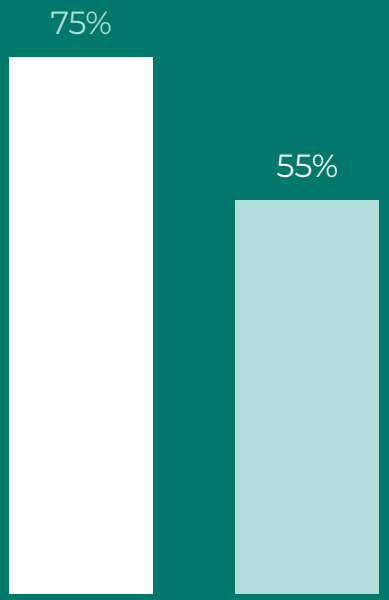
3 https://tinyurl.com/wjkak9w

"A key feature of the CPRs is the *'overriding objective'*, which has at its heart the principle that litigation will be dealt with *'justly and at proportionate cost'*."

THE HIGHLIGHTS

Only **25%** of respondents have seen a change in behaviour following the introduction of the Disclosure Pilot





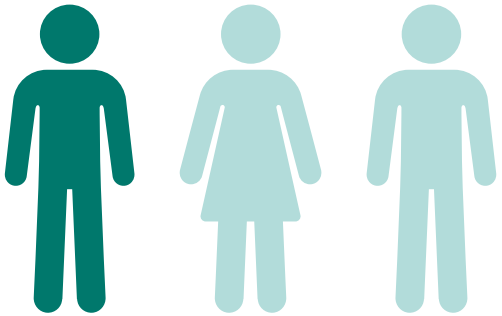
80%
of respondents want to retain written witness statements

75% of private practice lawyers compared with **55%** of in-house lawyers think pre-action protocols work

Costs Management is not working: private practice and in-house lawyers both agree costs management is not working, in total **70%** think it has not reduced the number of interim applications

80% of respondents think the court management of experts has reduced time and cost

1/3 more private practice than in-house lawyers are in favour of judicial assignment/docketing

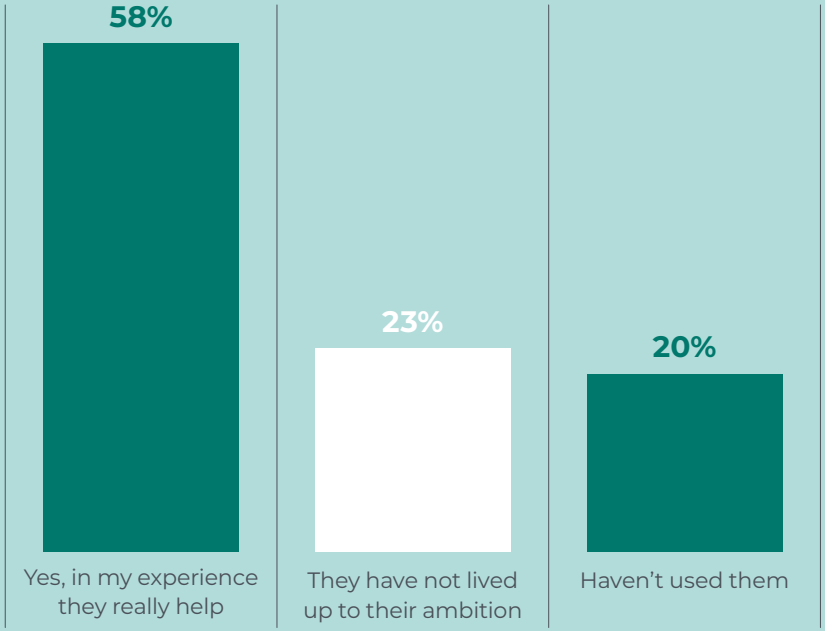


THE RESULTS IN DETAIL

Pre-action Protocols

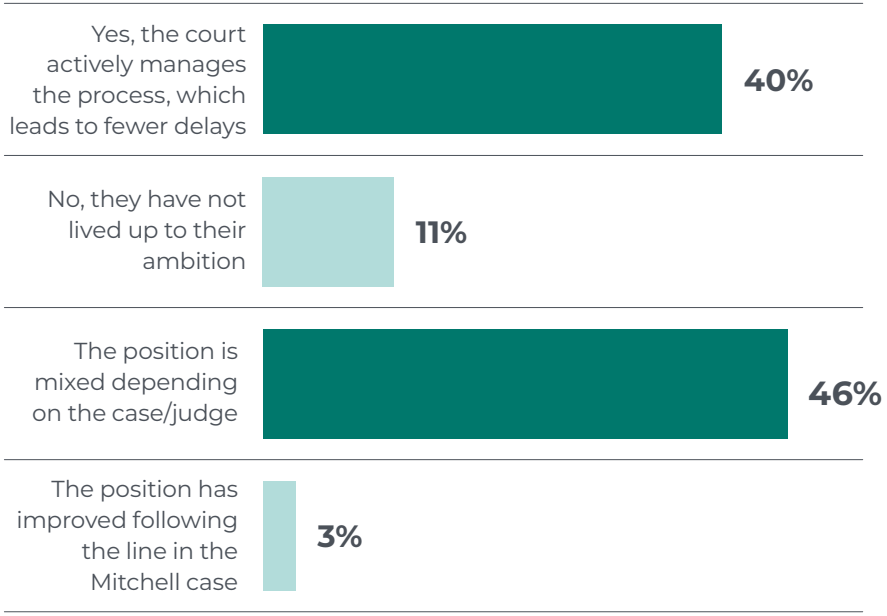
In response to the question of whether respondents thought the pre-action protocols had succeeded in encouraging greater early stage co-operation between the parties, including the sharing of more information at an early stage to facilitate informed case strategy, over half of respondents thought they were successful, with the largest advocates being in-house counsel.

Interestingly, 20 percent of respondents had not engaged with the protocols. This is despite there being a general Practice Direction on Pre-action Conduct and Protocols, which applies to all types of claims, including those where there is no specific protocol, in breach of which the court may order sanctions.



Case Management

Our research shows that almost an equal number of respondents (40 percent) think the courts' case management powers have assisted with better case efficiency, as think that the position depends upon the type of case and the assigned judge (45 percent). This perceived lack of consistency will not be beneficial to the user experience. It would therefore seem that the case management reforms have only been partially successful and there is some work to be done.

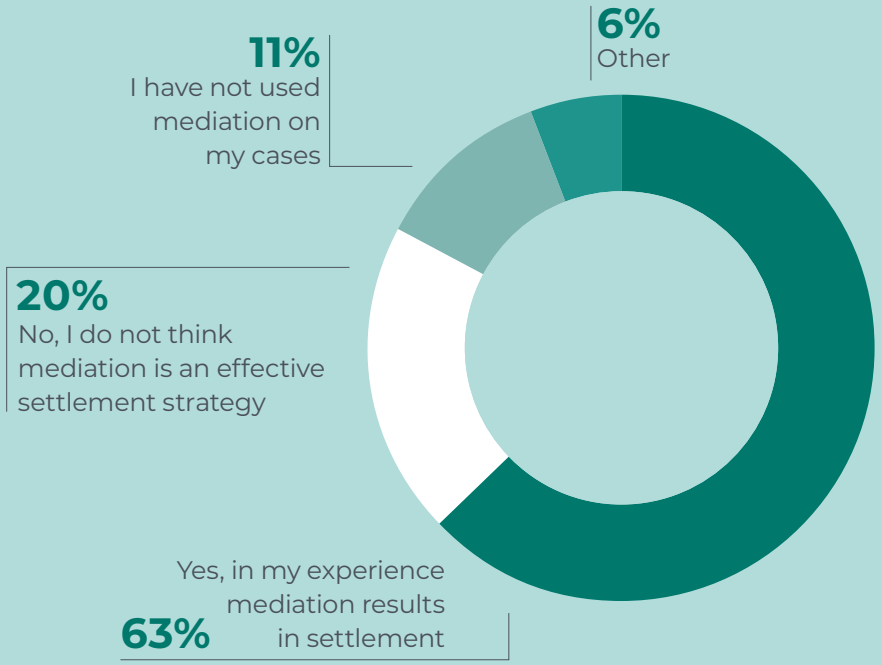


Increased use of ADR

At the heart of the Woolf reforms was a desire to increase the use of alternative dispute resolution (ADR) to encourage early settlement and free up the courts. According to our research this is one of the key areas in which the reforms have proved successful, with over 60 percent of the survey respondents agreeing that the use of ADR results in early settlement.

The feedback notes that mediation can be most effective once initial costs have been incurred, so for example after the close of pleadings, when parties have a more accurate view of the costs likely to be involved, and acknowledging that mediation settlement agreements rarely need separate enforcement proceedings.

Our research shows only around a quarter of in-house counsel think ADR results in settlement, contrasted with just under two-thirds of private practice lawyers, which is surprising.

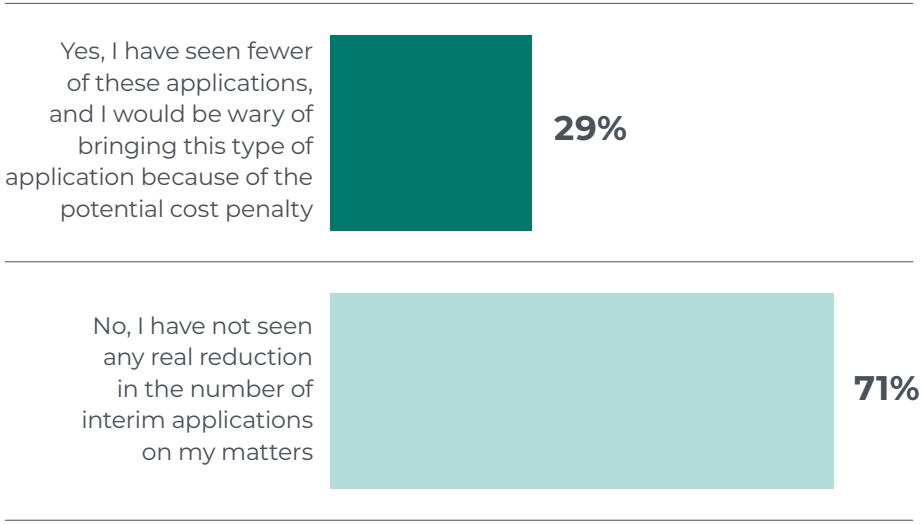


Costs management

The reforms introduced the concept of summary assessment of costs whereby the parties are required to provide costs estimates for interim applications, and judges will make a costs order based on those immediately following the hearing, with payment required within a short time.

The aim of the summary assessment approach was to dissuade parties from pursing tactical interim applications, however according to our research they have not been successful.

Just over 70 percent of respondents report that they have not seen a change or any real reduction in the number of interim applications on their matters, and this is a view held by both in-house counsel and private practice lawyers.



Disclosure: The Disclosure Pilot

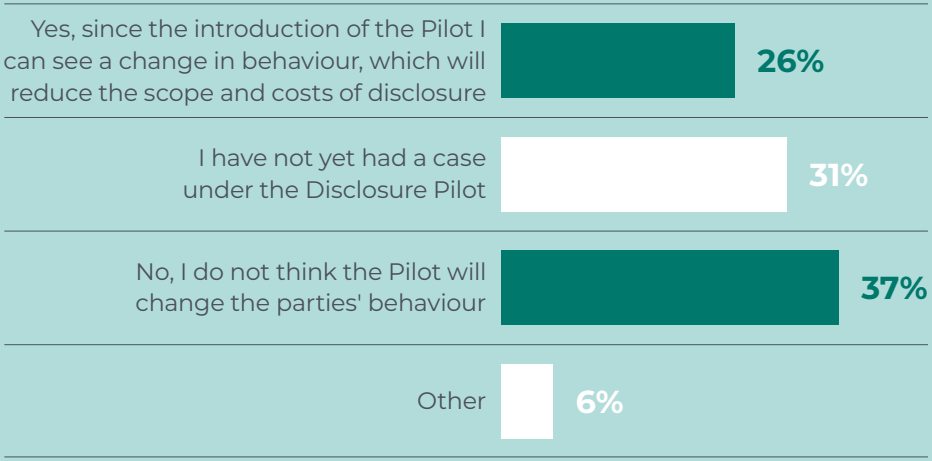
Our survey then looked beyond the Woolf Reforms and considered more recent developments.

The most significant development of recent times is the introduction of the Disclosure Pilot in the Business and Property Courts, which followed feedback from the GC100 on the cost of litigation, but particularly disclosure, being too high.

The mandatory two year Pilot seeks to replace standard disclosure with a list of options aimed at reducing the scope of data to be reviewed, and makes the use of technology via eDisclosure the default position, with parties encouraged to use analytics to further drive efficiency.

The Pilot came into force at the beginning of January 2019 and so is only at the half-way stage, but already it is proving controversial - feedback mainly concerns the front loading of costs (caused by the need to use eDisclosure, but which will ultimately reduce the cost), which will impact upon settlement strategy, and in relation to evidence collection, the express requirement to seek the co-operation of those who have since left the organisation.

Whilst just over 30 percent of those surveyed had not had a case within the Pilot, over 35 percent of those who had did not think it had changed the parties' behaviour. Both in-house counsel and private practice lawyers were of a similar view, with only around 30 percent of each thinking that the Pilot would change behaviour and result in greater cooperation between the parties, and therefore reduced cost.

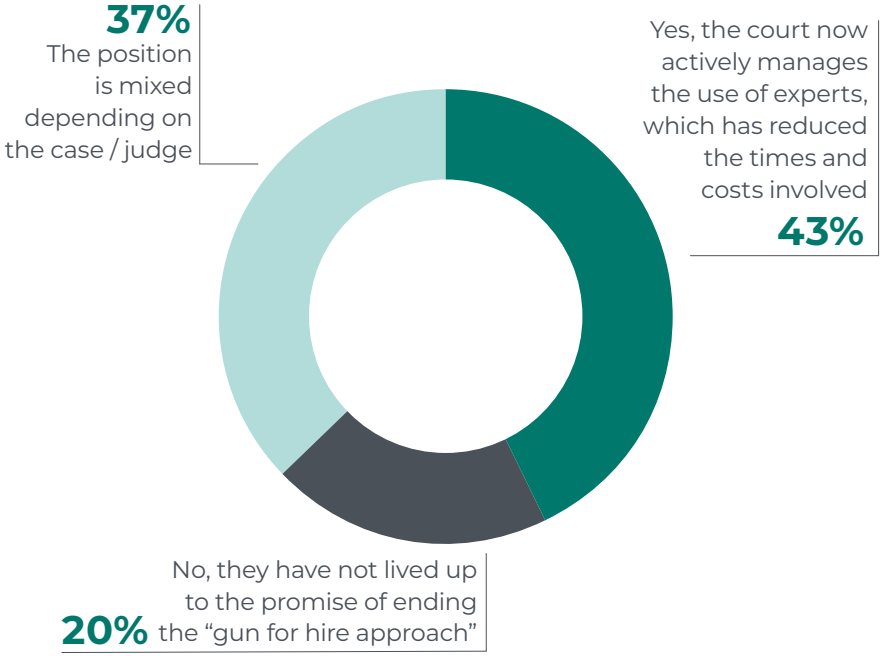


Expert evidence

Expert evidence is often viewed as a 'gun for hire' approach. Consequently, the courts have been keen to ensure that experts are only permitted where the issues on which their evidence is to be used are made out, and so require leave to be granted before expert evidence can be used.

Our research shows that there is a level of inconsistency amongst the judiciary when approaching the use of experts. Just under 40 percent of respondents identified a lack of consistency as symptomatic of the judiciary being able to manage expert evidence.

When looked at more closely the research shows 57 percent of in-house counsel compared to 38 percent of private practice lawyers think that the court successfully manage expert evidence.



Witness evidence

Reform of the English witness evidence process is currently under review, with possible options varying from better enforcement of the rules regarding maximum length, and abiding by the requirement for statements to be in the witnesses' own words in terms of style and language i.e. not overly lawyered, as is currently often the case.

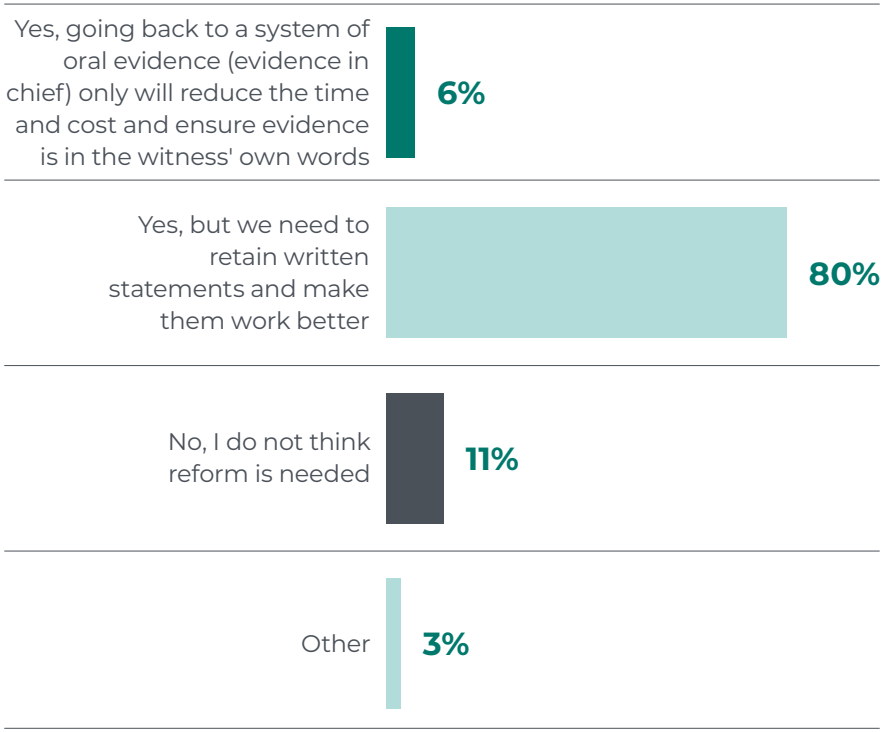
Our research shows that an overwhelming majority of respondents (80 percent) agree that reform is needed, but that retaining written witness statements is preferred to a greater reliance on oral evidence. Responses on this were fairly well balanced between private practice and in-house lawyers. A theme from the comments received is that greater adherence to and enforcement of the current rules dealing with the principles applying to the formation of witness statements is needed, rather than the mass re-writing of the process and the rules.

Following its survey into witness evidence and the use of witness statements across the Business and Property Courts, the Witness Evidence Working Group's Report[5] was published in December 2019. The Report's recommendations echo similar findings to those that emerged from our survey - namely that:

- witness statements should be retained, but that examination in chief will be available in appropriate cases;
- there should be clearer guidance and consistency across the various Business and Property Courts on the best practice approach to preparing the statements;
- there should be greater adherence to the current rules - including confirmation by the legal representatives that they have complied with the rules, and from the witness in the form of a more detailed statement of truth; and
- where non-compliance with the rules is found, judicial criticism should be made and costs sanctions should be applied.

The Report's recommendations have been approved and will be implemented over the coming months.

5 https://www.judiciary.uk/wp-content/uploads/2019/12/Witness-statement-working-group-Final-Report-.pdf

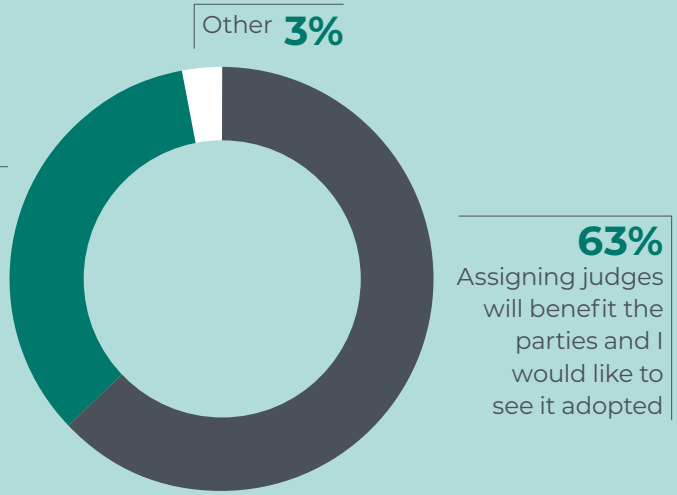


Judicial Assigning (docketing)

Our last question sought opinion on whether a system of assigned judges might better serve the English litigation process.

Those in favour of docketing largely believe that the continuity and consistency generated by cases having one judge managing the matter from inception to conclusion will outweigh any resourcing issues (including delays) that might arise. At 63 percent, the majority of respondents were in favour of judicial assignment, although a third of respondents disagreed and felt docketing wasn't needed and that it would hamper efficiency. More private practice lawyers compared to in-house lawyers preferred a docketing system.

The comments noted that assigning one judge to a case would also have the benefit of reducing the amount of reading time needed, but that it might encourage parties to use interim applications to influence the assigned judge, and it might also lead to claims of bias based on the assigned judge's published ruling history, now more easily accessible via judgment analytics platforms such as Solomonic[6] (with whom HFW partners).



6 https://www.solomonic.co.uk/

We hope that you found our Report helpful, for more information on the Report please contact your usual HFW advisor, or its authors:

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HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our litigation capabilities, please visit hfw.com/Dispute-Resolution.

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