

The mediation of property and valuation disputes

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ABSTRACT

Over the years alternative dispute resolution (ADR) systems have progressed, the pre-action protocols often require parties to consider ADR before using adjudicative procedures. As a result trends and rises in mediation in recent years are unfounded. Notably there has been an increase in the use of mediation in the construction and property sector. The combination of new technologies and COVID-19 has led to an increase in online mediation. This paper investigates research findings that shows the benefits of mediation in construction and property related disputes, namely its cost benefits and maintenance of working relationships and assesses the findings from Centre for Effective Dispute Resolution's Ninth Mediation Audit. The process of mediation is an important one and choosing the right mediator should not be overlooked.

Keywords: mediation, alternative dispute resolution, construction disputes, property disputes, conciliation

INTRODUCTION

Under the Civil Procedure Rules, the Pre-Action Conduct and Protocol requires parties to consider the use of alternative dispute resolution (ADR) processes;¹ these rules apply to all construction and engineering disputes.² There is also applicable pre-action protocol in relation to dilapidations following the end



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of a tenancy agreement and possession claims from social landlords which requires parties to consider a form of ADR.³ Mediation is an ADR process, in which a neutral third party assists the parties to negotiate a settlement of dispute. The parties retain control of the decision whether or not to settle and on what terms. The process of mediation is an important one. While the courts cannot compel parties to mediate,⁴ they have held that a party to a dispute who has unreasonably refused to mediate could be liable to pay cost penalties.⁵

This paper will analyse the mediation process in property and valuation disputes and is divided into six sections. ‘Scope of property disputes’ is an introduction to property disputes. ‘Mediation in context’ situates mediation within the wide range of dispute resolution systems used in construction and property-related disputes; this section will trace mediation’s growth in importance. ‘The use of mediation in construction disputes’ will show the impact of mediation in construction disputes and summarise the findings of the research project carried out in 2006–8 by the Technology and Construction Court of England & Wales to support this notion. ‘Finding your mediator’ concerns the mediation process and outlines things parties should consider when choosing a mediator. The final section will summarise the usefulness of mediation in these disputes.

SCOPE OF PROPERTY DISPUTES

With a turbulent two years property disputes have increased; the typical property dispute is outlined in more detail below:

- *Valuation disputes*: Examples of this occurring is when two estranged spouses are trying to establish how much their property is worth, for the purpose of one party buying out the other’s share;
- *Lease disputes*: Can arise through lease agreements regarding rental property,

tenant rights, responsibility for repairs to the property, rent, eviction and more;

- *Dilapidations*: Generally refers to items of disrepair that are covered by repairing covenants contained in a commercial lease. The term covers breaches of the tenant’s covenants relating to the physical state of the premises when the lease ends;
- *Building defects*: Can cover a whole range of work that is deemed defective; i) design deficiencies; ii) material deficiencies; iii) specification problems; and iv) workmanship deficiencies;⁶
- *Rent and service charge disputes*: These can include arrears and or sharp increases in service charge or ground rent;
- *Possession of property disputes*: Can range from adverse possession to property inherited through probate;
- *Possession of site*: Often on termination of a construction contract the possession of site and or the goods situated upon the land can cause reasons for dispute;
- *Obligations and liabilities*: Under leases the landlords and tenants often have several covenants in which they must comply with. Non-compliance or breach of these obligations these can often cause grounds for dispute between either parties and result in landlord’s relying on self-help clauses to complete the works at the tenant’s cost;
- *Transfer of title and title disputes*: Concerns at which point title transfers, or who owns the title to registered or unregistered land can result in disagreements;
- *Termination and eviction*: In the lease there are several rules and procedures that govern termination of the lease by the landlord and the tenant’s eviction from the property;
- *Enforcement of security*: Security that a lender takes from a borrower will vary depending on the borrowing entity and the transaction structure. Typically, a borrower will grant to a lender a debenture incorporating fixed and floating charges

over all of the borrower's property. Failure to pay back any money borrowed can result in the lender enacting forfeiture proceedings.

MEDIATION IN CONTEXT

In *mediation and conciliation*, a private, informal process, disputants are assisted in their efforts towards settlement by one or more neutral third parties.⁷ The mediator or conciliator reopens or facilitates communications between the parties, with a view to resolving the dispute, but the involvement of this independent third party does not change the position that settlement lies ultimately with the parties themselves.

The process can be *facilitative*, where the third party merely tries to aid the settlement process; or *evaluative*, where the third party comments on the subject matter or makes recommendations as to the outcome (either as an integral part of their role, or if called on to do so by the parties) (see Table 1).

The terminology is not the same everywhere: in some parts of the world, mediation refers to a more interventionist evaluative approach. In the UK, the facilitative style of third-party intervention is most frequently referred to as mediation; the term conciliation is reserved for the evaluative process.

In practice, a mediation that starts off in a purely facilitative way may become evaluative in order to try and reach a settlement. This may occur intentionally, at the request of the parties or with forethought on the part of the mediator, or unintentionally by the words or actions of the mediator. The

boundary is clear in theory, but not necessarily in practice.

The rise in mediation

The origins of mediation and conciliation can be traced to China some 3,000 years ago. China apparently used these techniques as a primary dispute resolution process — in contrast to other parts of the world, which instead developed forms of adjudicative process.⁸ The origins of the formalised version of modern mediation are found principally in the US.⁹ Stipanowich has documented the rise of mediation during the 1980s and early 1990s; it appears to have first been taken seriously in the US construction industry.¹⁰ The Army Corps of Engineers apparently pioneered the process in order to avoid the high costs of litigation.

This rise has continued throughout the UK in recent years. This is due to the notable benefits it offers and the positive impact it can have. Aside from being a far quicker, informal, less costly procedure than the court process, mediation is also private. All documentation and information received by the mediator is confidential and privileged while serving in their capacity as a mediator. This is often favourable to parties as they can also maintain this confidentiality if settlement is not reached. In any arbitration, adjudication, court or other proceedings the parties are not able to rely on anything said or done at the mediation.

In May 2021 the Centre for Effective Dispute Resolution (CEDR) published their 'Ninth Mediation Audit' (see Table 2), following its latest survey of civil and

Table 1: Facilitative and evaluative process

<i>Mediation or Conciliation</i>	
Facilitative	Evaluative
The mediator/conciliator aids the negotiation process, but does not make recommendations	The mediator/conciliator makes a recommendation as to the outcome

commercial mediators in the UK. The Audit report provides growths and trends in mediation.

CEDR reported for the year to 31st March, 2020 (immediately before the COVID-19 pandemic) £17.5bn cases were mediated.¹¹ It was reported that £4.6bn¹² will be saved in 2022 from commercial mediation. While the pandemic resulted in a 35 per cent¹³ activity drop between March and September 2020, there was an increase in online mediation which avoided a rapid decline in mediation during this period.

Despite this decline, there was still a 38 per cent increase in the annual number of cases mediated since the CEDR’s 2018 Audit, highlighting the growth of and trend of mediation. The success of mediation has also increased to a rate of 93 per cent, with 72 per cent settling on the day and 21 per cent shortly after.¹⁴ It was also acknowledged that a future growth for mediation would arise in commercial disputes with the online mediation process providing avenues to do so.

The CEDR notes the lack of diversity in mediation, particularly in relation to non-White representation and those aged under 50.

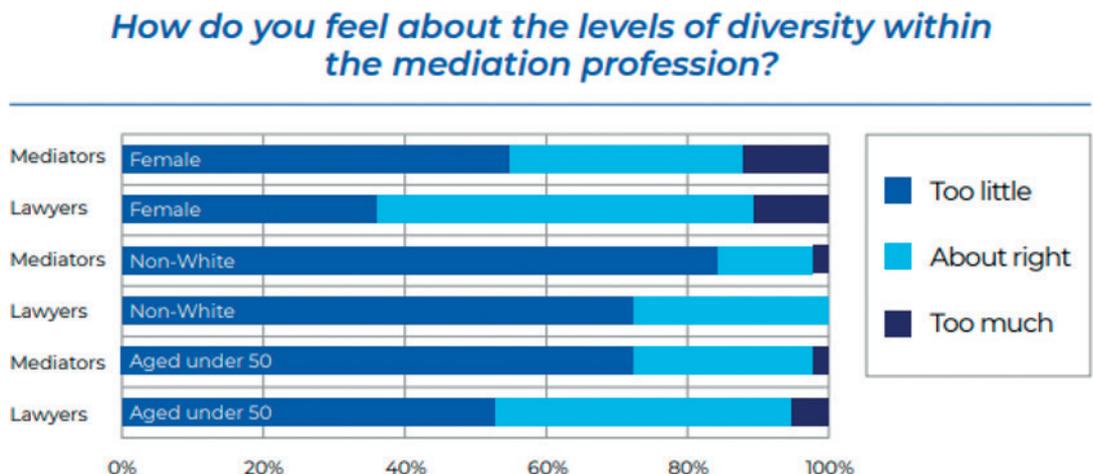
The CEDR’s 2019 Foundation research report¹⁶ identified a series of stages on the

path to becoming a successful commercial mediator and suggested barriers which may be adversely affecting diversity at each stage. Six barriers were identified and simply ranked; the overall conclusion was that the most significant barrier to greater diversity related to the challenge of career progression, for example getting selected for cases and getting early experience. Identification of these barriers and addressing diversity is a step in right direction towards greater diversity in commercial mediation.

The rise in statistics coincide with the industries recognition and support of collaborative dispute resolution. The UK Government’s Construction Playbook published in December 2020 emphasises the benefits of ‘long-term strategic, collaborative contractual relationships’¹⁷ and endorses the Royal Institution of Chartered Surveyors (RICS) Conflict Avoidance Pledge, which supports ‘commitment to conflict avoidance and the use of amicable resolution procedures to deal with emerging disputes at an early stage’.¹⁸

There is now also an increase in standard form contracts towards escalating dispute resolution procedures. For example, section 9 of the JCT Design and Build Contract states that if a dispute cannot be resolved by

Table 2: CEDR Ninth Audit Report — Level of Diversity Within the Mediation Field¹⁵



direct negotiations the parties should give 'serious consideration' to mediating. The Design and Build Contract Guide explicitly states that the JCT supports the use of mediation and ADR but leaves the decision on appropriate techniques and bodies to appoint to the parties.

This trend is also apparent within property disputes. The Law Society, the Association of Retirement Housing Managers (ARHM),¹⁹ the Association of Residential Managing Agents (ARMA) and the Federation of Private Residents Associations (FPRA), a long-established organisation representing long leaseholders in England and Wales, all recommend the use of ADR to resolve disputes.

Property disputes and ADR

Over the years case law,²⁰ all building on the seminal decision in *Halsey v Milton Keynes General NHS Trust*,²¹ point to the increasing importance of mediation in property disputes and cases in general. For example *PGF II SA v OMFS CO 1 Ltd*²² concerned proceedings brought by the freeholder, the claimant, for the breach of a repairing covenant. The claimant sent the defendants two invitations to mediate; however, the defendants failed to respond. A Part 36 offer which had been provided by the defendant eight months prior to the trial was accepted; however, the Court of Appeal agreed with the initial judge who did not allow the defendant costs in which they were entitled to under the Part 36 offer due to their failure to respond to the invitation to mediate.

In contrast, in *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd* the defendant had not ignored the claimant's proposal to mediate but rejected the invitations to mediate. Mr Justice Ramsey acknowledged that requirements of contractual interpretation to determine the dispute did not make it unsuitable for mediation. The judge thought that a mediator might have brought the parties together and found a middle ground or acceptable commercial

solution even if the parties' respective positions indicated that there would not be a settlement. Concluding that while there were factors justifying the refusal to mediate the majority of factors suggested that the defendant was unreasonable to reject NGM's invitation to mediate.

Mediation in property disputes may not always be appropriate, however. In *Gore v (1) Naheed (2) Ahmed*²³ the Court of Appeal supported the trial judge in concluding that a claim concerning historical conveyances, rights of access and difficult disputes as to fact was not an unreasonable reason for a party to refuse mediation.

The cases above suggest the scope to mediate in disputes is not just limited to simple facts and as per The Jackson ADR Handbook²⁴ parties must engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal; however, those of a far complex nature may not be appropriate for the mediation process.

CONSTRUCTION AND PROPERTY MEDIATION: A MANDATORY STEP?

On 3rd August, 2021, the UK Ministry of Justice issued a call for evidence on dispute resolution from all interested parties, the judiciary, legal professionals, mediators and other dispute resolvers, academics, the advice sector and court users on how mediation can be more fully integrated into the court system. The consultation follows the Civil Justice Council (CJC) report on compulsory mediation,²⁵ which found that mandatory mediation would be compatible with UK law and would also be desirable in suitable areas of the justice system. The CJC report concluded that mandatory ADR is lawful as it is compatible with Article 6 of the European Convention on Human Rights. This conclusion is a significant deviation from the current legal position taken in England and Wales in which parties

cannot be compelled to pursue their matters through mediation.²⁶ The CJC report suggests that mandatory mediation is desirable in the correct circumstances. Justice Minister Lord Wolfson has said:

‘Too often the courts aren’t the best means for reaching such outcomes. That is why we want to improve the range of options available to people to resolve their issues, ensuring less adversarial routes are considered the norm rather than the alternative.’

The consultation and CJC report suggests a movement towards mediation across the board and the importance of ADR in modern day disputes.

THE USE OF MEDIATION IN CONSTRUCTION DISPUTES

While unresolved conflicts or disputes over large complex construction projects generally result in complex construction litigation,²⁷ due to the construction project often containing numerous parties, several documents, facts and a multitude of legal issues,²⁸ the statistics and trends above suggest there is a rise towards the importance of mediation in construction disputes.²⁹

The Pre-Action Protocol for the Construction and Engineering Disputes (PAP) applies to all disputes in that category, including professional negligence claims against architects, engineers and quantity surveyors. A claimant must comply with this PAP before commencing proceedings in the court, subject to some exceptions. Paragraph 1.4 relates to compliance:

‘The court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions.’

This PAP provides, uniquely at present among all such protocols, for a pre-action

meeting, and expects that the parties will at that meeting consider whether some form of ADR is more suitable than litigation.³⁰ This accords with the Court of Appeal’s recognition in *Burchell v Bullard* that mediation should act as a track to a just result running parallel with the court system.³¹ One impact of the Technology Construction Court (TCC) PAP is to force parties to incur substantial costs at an early stage (‘front-loading’).

Within the TCC a case typically takes 12 to 18 months to come to trial (see Table 3), and the costs involved with this are significant due to the third-party experts often required. In contrast mediation is a quicker and cheaper collaborative solution. Furthermore many now have questioned whether arbitration has become in recent times ‘litigation without the wigs’³² due to its increasingly adversarial approach and its similarity to traditional litigation with its attendant cost implications.³³

The construction industry has been particularly innovative in designing a wide range of dispute resolution methods, used both domestically and internationally. This leaves parties with a choice how they would prefer their cases to be resolved and managed and the possibility of retaining an optimum degree of control on the management of the process.

Dispute resolution adviser

The basic concept of a dispute resolution adviser (DRA) (see Figure 1) also involves the use of a neutral third person who advises the parties to a disagreement or dispute and suggests possible settlement options. The DRA does not make interim binding decisions but advises on the means by which settlement could be achieved. The power to settle ultimately rests with the parties. A variety of benefits flow from such an approach. For example, disagreements at site level can be addressed before a full-blown dispute develops, enabling parties to maintain working relationships.³⁴

Table 3: The TCC Annual Table 2020³⁵

<i>Technology and Construction Court</i>			
<i>Summary caseload statistics, 2003–20</i>			
<i>Year</i>	<i>Total claims received</i>	<i>Total claims disposed of at trial</i>	<i>Number of interlocutory applications heard</i>
2003	381	363	1,403
2004	341	115	668
2005	340	51	496
2006	390	192	454
2007	409	216	397
2008	366	198	374
2009	528	244	483
2010	493	270	566
2011	528	244	483
2012	452	240	485
2013	475	302	487
2014	478	307	493
2015	437	288	471
2016	359	227	583
2017	404	278	560
2018	396	249	341
2019	481	127	408
2020	495	132	483

**Figure 1: Outline of the DRA system³⁶**

Project mediation

‘Contracted mediation’, or ‘project mediation’, attempts to fuse team building, dispute avoidance and dispute resolution into one procedure. A project mediation panel is appointed at the outset of the project. This impartial panel consists of one lawyer and one commercial expert, who are both trained mediators. The panel assists in organising and attends an initial meeting at the start of the project; and may conduct one or more workshops at the same point, or during the course of the project, as necessary. The CEDR published the second edition of ‘Model Project Mediation Protocol and Agreement’ in September 2015. It embodies the principles of project mediation and makes it simple for the parties to adopt project mediation.³⁷

The aim of CEDR’s project mediation package is to help support the successful delivery of the project by identifying and addressing problems before they turn into disputes about payment and delay. Its three main components comprise:

- (1) Access to two mediators for the duration of the project. Ideally one should be legally qualified and the other have a relevant commercial background; they should visit the project site regularly to discuss progress and to identify with the parties any actual or potential communication problems as early as possible. Project mediators are (unlike members of dispute adjudication boards [DABs]) able to request private advice and opinions from project participants; the cost basis for this is a monthly retainer and hourly rate for each project mediator;
- (2) A half-day project mediation workshop, prior to commencement, attended by all the project decision-makers, including the project managers and leaders, consultants and designers, as well as key subcontractors and suppliers, one of whom should ideally be joined to the project mediation agreement to ensure

their participation in the process and in mediations at any time throughout the project. The aim of the workshop is to explain the role of mediators and to familiarise the parties and the mediators with the aims of the project, the project parties and any key suppliers;

- (3) Formal mediation, using the CEDR solve rules, if informal communications between the Mediators and the parties fail. The advantage of this over any decision reached by a DAB is that it is not disclosable in later proceedings.

It has been argued that project mediation is a cheaper alternative to DAB dispute resolution methods (on which see below) under the International Federation of Consulting Engineers (FIDIC) forms of contract.³⁸ This is because detailed statements of case, evidence and experts may not be necessary; instead, the parties can simply exchange summary position statements and supporting documents, followed by a one-day mediation. CEDR makes the point that project mediation may be suitable for small to medium projects, where the cost of a DAB panel would be disproportionate to the contract value.

Usefulness of mediation in the construction industry

There is some useful data in respect of the use and effectiveness of mediation in the construction industry, and court-annexed mediation services. Between 1st June, 2006 and 31st May, 2008³⁹ an evidence-based survey was developed between King’s College London and the TCC. Working together, it was possible to survey representatives of parties to litigation in that court. Three TCC courts participated: London, Birmingham and Bristol. All respondents were issued questionnaire survey forms. Form 1 was issued where a case had settled (see Figure 2) and Form 2 was issued where judgment had been given (see Figure 3).

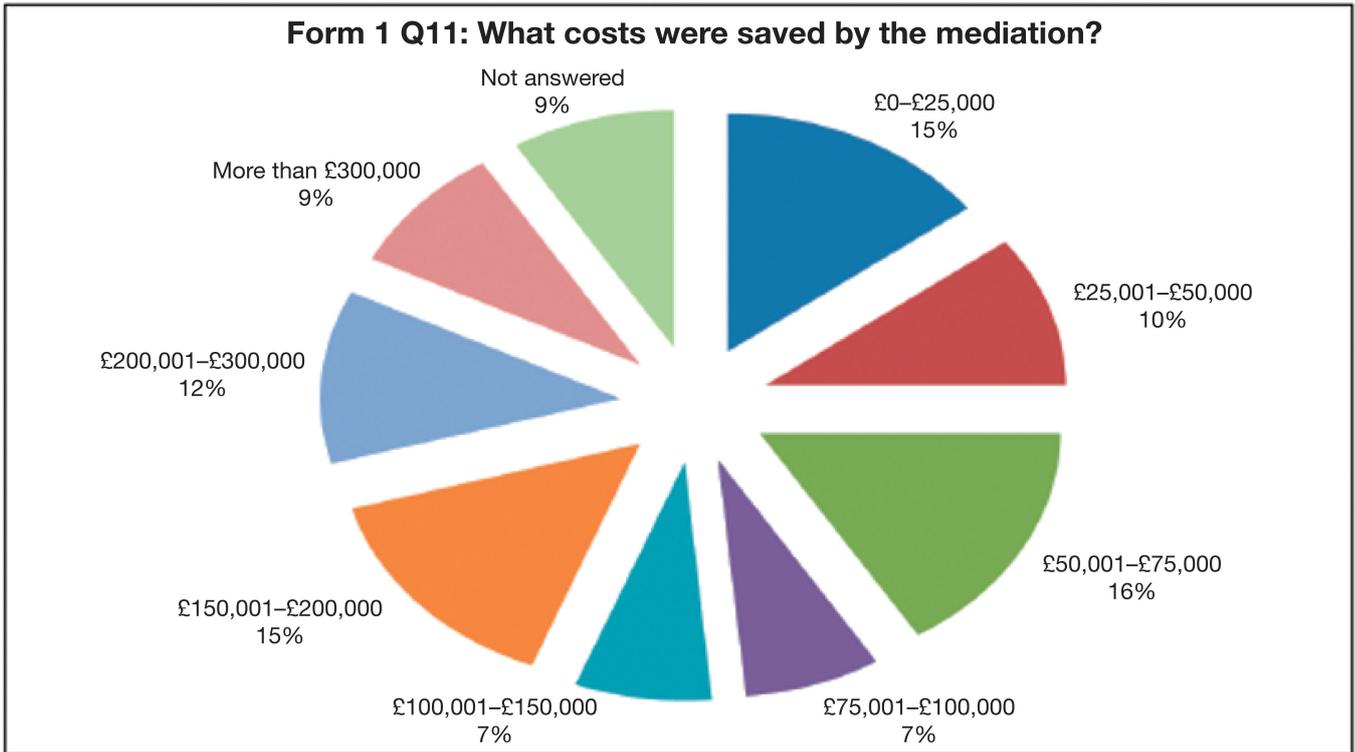


Figure 2: Costs saved by mediation⁴⁰

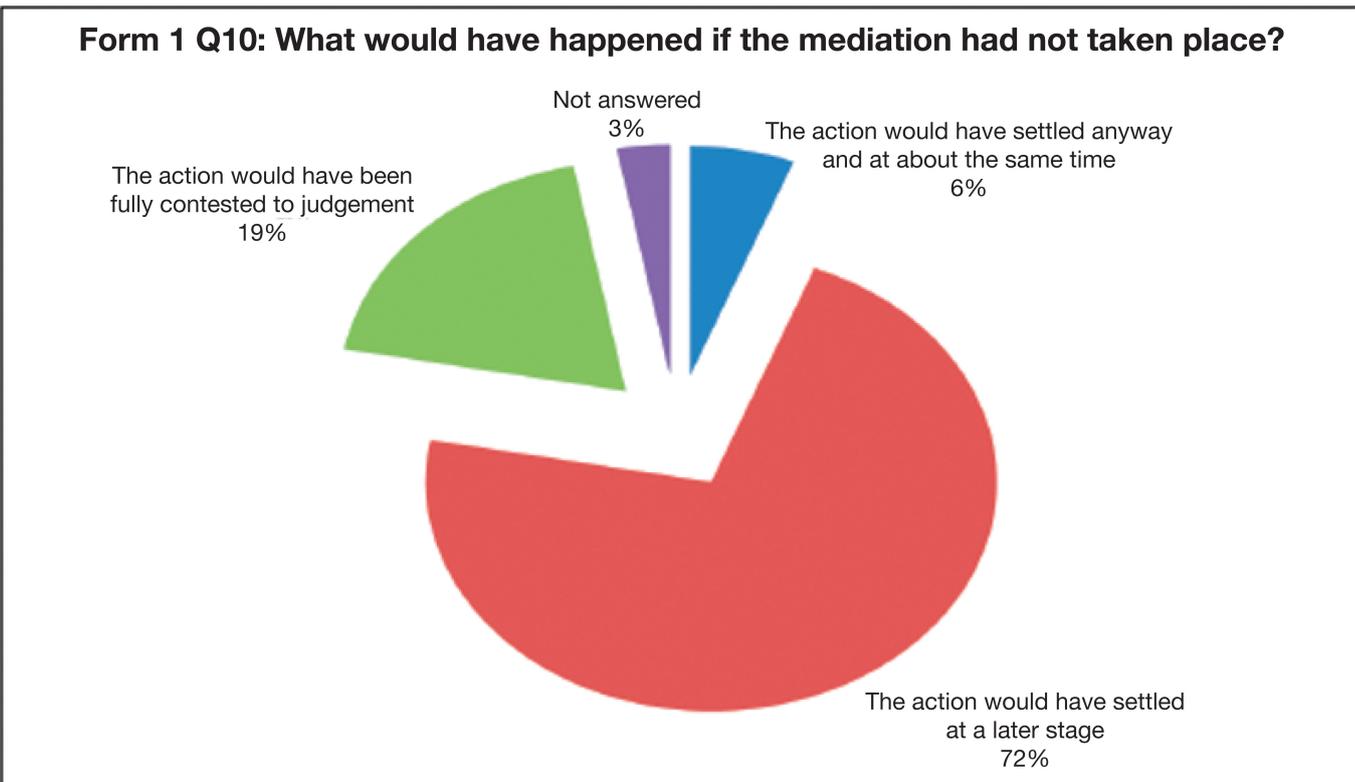


Figure 3: If mediation had not taken place⁴¹

Both forms asked about the nature of the issues in dispute, whether mediation had been used, the form that mediation took and also the stage in the litigation process at which mediation occurred.

As can be seen, the cost savings with the use of mediation were substantial, with more than 9 per cent of respondents estimating they had saved over £300,000 in costs as a result of mediation.

The chart demonstrates that the majority of the respondents (72 per cent) believed that the litigation would have settled at a later stage; however, 19 per cent of the respondents believed their cases would have been fully contested to judgment.

The combination of the TCC and King's College London Research and trends analysed by CEDR in their audit report highlight the rise, utility and use of mediation. The availability of online audio-visual mediation permits parties to engage in direct communication, which may increase the speed and efficiency and likelihood of using the mediation process.⁴²

THE PROCESS OF MEDIATION

There are three main phases to mediation:

- (1) Pre-mediation — agreeing to mediate and preparation;
- (2) Mediation — direct and indirect mediation;
- (3) Post-mediation — complying with the outcome.

Pre-mediation

The preparation phase of mediation develops from the initial inquiry, which may involve an explanation of the process, and an attempt to persuade reluctant parties to participate. A contract to mediate is frequently used in order to agree the terms and the ground rules for the mediation. This will include items such as costs, confidentiality, the without prejudice nature

of the mediation, authority to settle and timetable.

In most instances the parties will exchange written summaries of the dispute, and occasionally furnish copies of supporting documents. During this process, the mediator will be identified, and will become a party to the mediation contract.

From the mediator's perspective, the pre-mediation objective is merely to get the parties to the mediation. The strategy of the parties is less clear. Are they preparing their best case, do they consider innovative ways to settle, do they really calculate their 'best alternative to a negotiated agreement' (BATNA)?

Mediation

Most commercial mediations are conducted over the course of one day, although some may extend over several days, weeks or even months. Mediations are usually conducted on neutral territory, rather than the offices of one of the parties. This is an attempt to avoid the power imbalances which may occur as a result of one of the parties operating within familiar territory. The mediator's role involves managing the process, and so will receive and seat the parties, before carrying out the necessary introductions. During this first joint meeting, the mediator will establish the ground rules and invite the parties to make an opening statement.

The mediation process is flexible, and once the parties have made their opening statements, the mediator may decide to discuss some issues in the joint meeting or a caucus. A caucus is a private meeting between the mediator and one of the parties. The mediator will caucus with the parties in turn, in order to explore in confidence the issues in the dispute and the options for settlement. In a caucus, the mediator is mediating 'indirectly' with the parties, and this exploration phase of mediation serves to:

- (1) Build a relationship between the parties and the mediator;

- (2) Clarify the main issues;
- (3) Identify the parties' interests or needs;
- (4) Allow the parties to vent their emotions;
- (5) Attempt to uncover hidden agendas;
- (6) Identify potential settlement options.

While the mediator is caucusing with one party, it may be possible for the other party to work on a specific task set by the mediator. The mediator may also utilise further joint meetings in order to narrow the issues, allow experts to meet or broker the final settlement. The aim of mediation is to develop a commercially acceptable, workable agreement which can be written into a binding settlement contract.

Post-mediation

Post mediation will either involve execution of the settlement agreement, or a continuation towards the trial or arbitration hearing. The mediator may still be involved as a settlement supervisor, or perhaps further mediations.

If a settlement is not reached, this does not mean that the mediation was not successful. The parties may have a greater understanding of their dispute, which may lead to future efficiencies in the resolution of the dispute, or the parties may settle soon after the mediation.

The mediator's role

The mediator is the manager of the process. He or she should take control of the process and aid the parties to settlement. The CEDR states that the mediator fulfils several important roles during the mediation and is to manage the process, facilitate parties towards settlement and act as a problem solver. Given the rise in online mediation the CEDR has also published a guide to online mediation.⁴³

Finding your mediator

In the UK there are over 600 registered mediators and across the globe there are thousands. The CEDR provides five items

parties should consider when appointing a mediator.⁴⁴

Experience and background

The 2021 CEDR Ninth Mediation Audit found that a total of 44 per cent of mediators were qualified lawyers. Traditionally the mediation market was dominated by lawyers; however, now there is a mix of professionals. Some mediators are dual qualified solicitors and surveyors, architects and engineers. This can help speed the mediation process. Parties should not be afraid of asking the mediator of their relevant skills.

Personality and style

The mediation procedure involves building a rapport between the parties and the mediators. Contacting your mediator and looking at their social media presence may allow parties to learn more about them and see if their personality and style align with the parties and their representatives.

Attaining and maintaining professional standards

Parties must check that their mediator has obtained a qualification with a reputable and credible training provider. This provides certainty that the mediator has skills and knowledge required to manage the mediation.

Mediator fees

Mediation is viewed as being a cost-effective mechanism. There are a wide spectrum of rates available, which parties should enquire about. Often for disputes of low value mediators offer a fixed price.

Online dispute resolution

Over the past two years mediating online has become increasingly popular. While the CEDR recognise the mediators are good at conducting mediations online and providing the same experience as in-person mediation, you must ensure that your mediator is

comfortable with using videoconferencing platforms. The CEDR itself is a good starting point as they have some of the world's finest mediators. They ensure their mediators are of the highest standard by imposing a set of requirements and processes known as the mediator quality assurance. This programme ensures their mediators are up to date with the highest standard of training and monitored on a regular basis. The CEDR also publishes a Code of Conduct for Third Party Neutrals, which parties can refer to when choosing a competent mediator.

CONCLUSION

The mediation process can be a useful dispute resolution process which range from benefits when compared to the traditional formal adjudicative processes such as litigation and arbitration. As we have seen above the evidence suggests there is a growing role for mediation. Benefits include:

- Reductions in the time taken to resolve disputes;
- Reductions in the costs of resolving disputes;
- Providing a more satisfactory outcome to the dispute;
- Minimising further disputes;
- Opening channels of communication;
- Preserving or enhancing relationships;
- Savings in time and money;
- Empowering the parties.

With the increase in online mediation and analysis of case law, it is clear mediation is not limited to basic disputes and may be a better alternative for higher-level complex disputes than adjudicative procedures.

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