Fenwick Elliott

The construction & energy law specialists

RICS Legal Issues in Construction 2010 - The use of mediation in construction disputes

by Nicholas Gould, Partner

Introduction

The use of mediation can no longer be said to be a new phenomenon for the resolution of construction disputes. Mediation has now been used, in the commercial context, for the resolution of disputes in a wide range of industry sectors both before the commencement of and during formal proceedings. It can of course be used, in theory, at any stage not just during litigation but during or when other forms of dispute resolution, such as arbitration, are contemplated or progressing.

The use of mediation within contracts or as part of a dispute escalation clause has also become more popular, not just in the construction industry but in other commercial sectors as well[1]. A large range of dispute resolution techniques are available for use in the construction industry. Arbitration is perhaps sometimes still the default dispute resolution procedure, because it was originally included as the only dispute resolution procedure in the most popular standard form of contracts.

Adjudication is now well established within the construction industry, and other common law jurisdiction[2]. Litigation of construction related disputes has received special attention from the courts, originally with the establishment of the Official Referees, more recently renamed as the Technology and Construction Court (TCC).

While some useful data in respect of the use and effectiveness of mediation in the construction industry, and court annexed mediation services does exist, its is limited. The use, effectiveness and cost savings associated with mediations that take place in respect of construction industry litigation is mostly anecdotal. To address this, an evidence based survey was developed between King's College London and the Technology and Construction Courts. Working together, it was possible to survey representatives of parties to litigation in the Technology and Construction Court (TCC)[3].

The Summary Report of the Final Results was published on 5 May 2009 and is available as a free can be download.[4] This paper considers the context of that research, and reviews the research data set out in the Summary Report.

Spectrum of dispute resolution techniques

The "conventional" model of dispute resolution is one of an adjudicative process, most frequently fulfilled by the courts. According to Schapiro[5] the ideal court, or more properly the prototype of the court involves:

> "(1) an independent judge applying (2) pre-existing legal norms after (3) adversarial proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong."

1. See for example the dispute escalation clause in *Cable & Wireless Plc v. IBM United Kingdom Ltd* [2002] EWHC 2059.
2. Adjudication in England, Wales and Scotland was introduced in May 1998 by the implementation of Part 2 of the Housing Grants, Construction and Regeneration Act 1996. Its use has been reasonably well documented and the number of appointments made by the adjudicator nominating bodies demonstrates its wide use, as does the regular surveys produced by the Adjudication Reporting Centre, based at Glasgow Caledonian University. Other common law jurisdictions where adjudication has been introduced are Australia (now all of the States from Australia), Singapore, and New Zealand.
3. The concept and research proposal was developed jointly by Nicholas Gould and Lord Justice Rupert Jackson in 2005.
4. The Report can be downloaded from www.fenwickelliott.co.uk. Nicholas Gould, Partner, Fenwick Elliott LLP and Senior Visiting Lecturer King's College London lead the research with coordination and drafting assistance from Claire King, Assistant Solicitor, Fenwick Elliott LLP. The research assistant was Aaron Hudson Tyreman, who liaised with the TCC during the research period and collated the survey questionnaires. The final survey analysis was carried out by James Luton and research with assistance after close of the survey period was provided by Julio Cesar Betancourt, Pilar Ceron, Cerid Lugar, Annabelle K Moeckesch and Ms Yanqui Li, all of who are either researchers or employed by the Chartered Institute of Arbitrators. This Executive Summary Report of the Final Results was drafted by Nicholas Gould, with assistant from the research team. A final more detailed contextual report is nearing completion and will be available shortly. King's College gratefully acknowledges the Society of Construction Law, the Technology and Construction Solicitor's Association and Fenwick Elliott LLP for research funding, support, resources and guidance. Thanks must also go to the judges of the TCC, and in particular Caroline Bowstead, the TCC Court Manager, responsible for initially establishing the procedure for the issuing of Forms 1 and 2 from the TCC. The Chartered Institute of Arbitrators must also be recognised for kindly providing research support once the survey was completed in order to assist in the calculation and analysis of the survey Forms, and also the gathering of relevant literature and data for the final detailed report, which is due for publication soon.
5. Shapiro, M. (1981) *Courts: A comparative and political analysis,* University of Chicago Press, Chicago

He goes on to say that an examination of the courts across a range of societies reveals that the prototype "fits almost none of them." Nonetheless, this does provide a suitable starting point for what one might call the conventional model of dispute resolution. This is clearly at the formal binding end of the spectrum. At the other end of the scale, two way problem solving between the parties represents the informal, non-binding, approach, the successful outcome of which is an agreement to "settle".

In its most basic form direct negotiation provides a simple, party based problem solving technique. A further dimension is added when either party introduces advisers. Nonetheless, the essential feature of this process is that control of the outcome remains with the parties. Litigation and arbitration require the parties to submit their dispute to another who will impose a legally binding decision. Negotiation is a "process of working out an agreement by direct communication. It is voluntary and non-binding." The process may be bilateral (between two parties) or it could be multi-lateral (many parties). Each party may utilise any form of external expertise it considers necessary, and this is often described as "supported negotiating".

Mediation is a private, informal process in which parties are assisted by one or more neutral third parties in their efforts towards settlement. The new and distinguishing feature here is the addition of a neutral third party who aids the disputants towards settlement. A further important factor is that the mediator does not decide the outcome; settlement lies ultimately with the parties.

A distinction is often made between styles of mediation which are 'facilitative' and those that are 'evaluative'. During a facilitative mediation, the mediator is trying to re-open communication between the parties and explore the options for settlement. The mediator does not openly express his/or her opinions on the issues. If, on the other hand, the mediator is called upon to state his opinion on any particular issue then he/she is clearly making an evaluation of that issue.

Mediation or conciliation refers to a process in which an independent third party re-opens or facilitates communications between the parties and so aids the settlement process. The process can be facilitative in that the third party merely tries to aid the settlement process, or evaluative in that the third party comments on the subject matter or makes recommendations as to the outcome.

Some have added two further categories to this basic division. These are namely settlement mediation and transformative mediation. Settlement mediation is where the parties are encouraged to compromise in order to reach a settlement of the dispute between them using a relatively persuasive and interventionist approach. Typically this will involve moving the parties towards a central point between the parties' original position. Transformative mediation involves trying to get the parties to deal with the underlying causes of the problems in their relationship with a view to repairing their relationship as the basis of settlement.

In the UK, the facilitative style of third party intervention is most frequently referred to as mediation, and conciliation is reserved for the evaluative process. The Court Settlement Process recently piloted by the TCC could arguably fit more closely in the settlement mediation bracket which typically uses a high status mediator who is not necessarily an expert in the process of mediation itself.[6]

6. See The Four Models of Mediation by Margaret Drews, DIAC Journal of Arbitration in the Middle East, Volume 3, No.1, March 2008 pages 44 to 46

ACAS is most widely associated with this evaluative style of conciliation in labour disputes, and more recently the ICE in connection with conciliation in civil engineering disputes. On the other hand, CEDR promotes a style that is more focused towards the facilitative end of the spectrum and refers to this as mediation. The position is not necessarily the same internationally. Mediation refers to a more interventionist evaluative approach in some parts of the world.

Table 1: facilitative and evaluative processes

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

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.

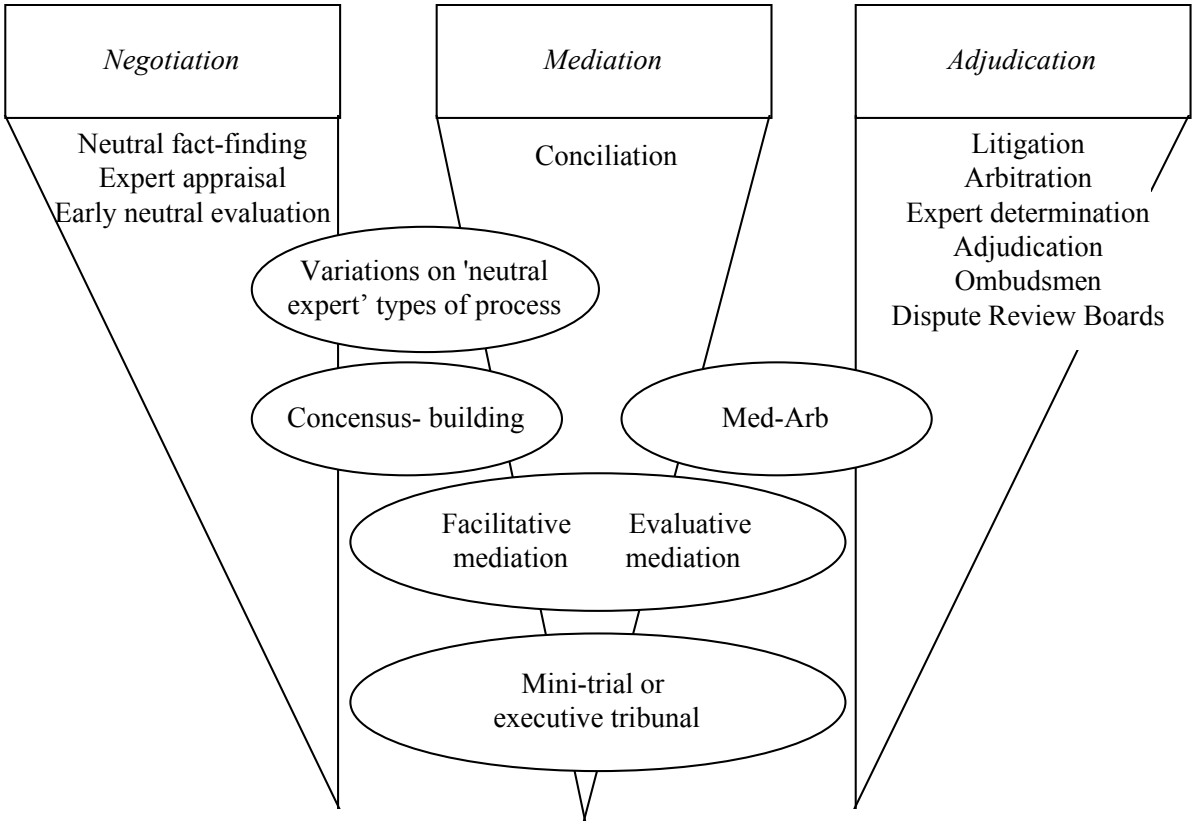
Nonetheless, at a basic level a distinction can be made between "settlement" processes and "decision" imposing processes. During negotiation, mediation and conciliation control of the outcome, or the power to settle, rests with the parties. By contrast, "adjudicative" or "umpiring" processes, such as litigation, arbitration and adjudication, rely on the judge, arbitrator or adjudicator having the power to impose a decision.

Table 2: Settlements and decisions

Control of the outcome rests with the parties	Decisions are imposed
Negotiation Mediation Conciliation	Litigation Arbitration Adjudication Expert determination

What we have then, are three core techniques, which may be employed in the resolution of disputes: Firstly, negotiation, which refers to the problem solving efforts of the parties; Second, third party intervention, which does not lead to a binding decision being imposed on the parties; and thirdly, the adjudicative process, the ultimate outcome of which is an imposed binding decision.

Figure 1: 'The Dispute Resolution Landscape'



Source: Mackie, K. Miles, D. and Marsh, W. (1995) ***Commercial Dispute Resolution: An ADR Practice Guide****, Butterworths, London, p. 50. The chart was derived from a chart by Professor Green of Boston University (1993).*

Such an approach has been adopted by Green and Mackie[7], who refer to the "three pillars" of dispute resolution. The discrete techniques may be introduced under one of the three pillars, depending upon the main characteristics of the particular technique; see diagram above.

Arguably, all dispute resolution techniques are built upon three basic principal methods: negotiation, mediation/conciliation, and some form of adjudicative umpiring process.

Essentially, categorisation can be by way of any number of core characteristics. An alternative approach to the one considered above could quite simply involve listing those techniques that lead to a binding outcome, and those which are non-binding. Further categorisation could be by way of those techniques which relate to dispute avoidance or the management of conflict, and those which relate to the resolution of disputes. Such an approach expands the range of techniques that need to be considered to include the broader view of "dispute response".

7. Mackie, K., Miles, D., and Marsh, W. (1995) *Commercial Dispute Resolution: An ADR Practice Guide*, Butterworth, London

Escalation or multi tier dispute resolution

Multi-tiered Dispute Resolution clauses have been defined as clauses which:

> "*…[provide] for distinct stages, involving separate procedures, for dealing with and seeking to resolve disputes*".[8]

The mechanisms chosen can include negotiation, mediation, adjudication (including DABs or DRBs) expert determination and/or arbitration. Examples of Multi-Tiered Dispute Resolution Procedures are found in FIDIC Red, Yellow and Silver books but are also common in bespoke contracts for large scale projects. Prestigious projects that have used such techniques include the Channel Tunnel and Hong Kong Airport.

In large scale projects the potential risks disputes bring with them are much larger. By providing for a tiered system of dispute resolution techniques it is hoped that disputes will be dealt with as soon as they arise and that the majority of disputes will be filtered out, or at least reduced in scale, as early on in the dispute resolution process as possible. This should serve to limit any damage to a commercial relationship which can occur due to litigation.

For the construction of Hong Kong's airport three different dispute resolution processes were provided for depending on the type of contract involved. The three types of contracts were for infrastructure projects, the new airport and construction projects. For the infrastructure projects any disputes between the Hong Kong Government and the Contractor were firstly referring the matter to an engineer.

The next step was referring the matter to mediation and finally the matter would be referred to adjudication. For the construction of the new underground line the process began by referring dispute to the engineer. This step was followed by mediation and/or arbitration. Finally, for the Airport itself, the dispute first went to an engineer following which the parties could appeal to the Project Director. If the Parties were still dissatisfied then the parties had 10 days within which to consult the DRB. The final step in the process was arbitration.

Keith Brandt observed there were very few referrals to the DRB.

> "*The DRB made six binding decisions, with only one case being taken to arbitration. A relatively low number of referrals suggests that the existence of the DRB deterred the referral of disputes and it may be that it encouraged a settlement of matters between the parties without further third party intervention*" [9]

The London Olympics 2012 has also opted for a multi-tiered dispute resolution system. The ODA has set up an Independent Dispute Avoidance Panel ("IDAP") of ten construction professionals under the Chairmanship of Dr Martin Barnes. Those disputes not resolved by the IDAP will then be referred to an Adjudication Panel, comprising eleven Adjudicators under the Chairmanship of Peter Chapman. [10]

The Courts will enforce Multi-tiered Dispute Resolution Provisions. In *The Channel Tunnel Rail Group Limited v Balfour,* [11] Lord Mustill emphasised that:

8. CM.Pryles, "Multi-tiered Dispute Resolution Clauses", Journal of International Arbitration, 2001, 18 (2: pages 159-176); and Tanya Melnyk "The Enforceability of Multi-tiered Dispute Resolution Clauses: The English Law Position" Journal of International Arbitration or Review, 2002, 5 (4), 113-138.
9. Keith Brandt "For Use and Development of Mediation Technique in the UK & International Construction Projects" a paper given at the Chartered Institute of Arbitrators Conference East greets West: New Opportunities for Dispute Resolution in Hong Kong on 2 February 2002, pages 10 and 11.
10. Ellis Baker "Is it all necessary? Who benefits? Provision for multi-tried dispute resolution in international construction projects. A paper presented to a joint meeting of the Society of Construction Law and the Society of Construction Arbitrators." January 2009, 154, page 22.
11. *The Channel Tunnel Rail Group Limited v Balfour Beatty Construction Limited* [1993] 61BLR1, HL

> *"having made this choice I believe that those who make agreements for the resolution of disputes must show good reasons for departing from them… that having promised to take their complaints to the experts and go if necessary to the Arbitrators, that is where the Appellants should go."*

The Courts will also enforce agreements to mediate where they are part of such a procedure. In *Cable & Wireless Plc v IBM United Kingdom Limited* [12] the Court was asked to award a stay of proceedings while the parties undertook the ADR processes provided for within that Contract. The ADR provisions were held to have binding effect.

The ADR clause was a sufficiently defined mutual obligation upon the parties to go through the process of initiating mediation, selecting a mediator and at least presenting the mediator with its case and documents. Since the clause described the means by which such an attempt should be made the engagement required not merely an attempt in good faith to achieve resolution of the dispute, but also the participation of the parties in the procedure specified. That procedure was for sufficient certainty for a Court readily to ascertain whether it should have been compiled with.

However, a note of caution has been sounded in the recent case of *Balfour Beatty Construction Northern Limited v Modus Corovest (Blackpool) Ltd*.[13] In this case the mediation agreement was characterised as nothing more than an "*agreement to agree*". Unlike the mediation agreement in *Cable & Wireless* case, it was held to be too uncertain to be enforced by the Court. The Judge went on to say that he would only stay a claim and counterclaim for mediation if he concluded that:

> "*a) the party making the Claim and or Counterclaim was not entitled to summary Judgment on that Claim and/or Counterclaim, i.e. that there was an arguable defence on which the other party had a realistic prospect of success; and*
>
> *b) the best way of resolving that dispute was a reference to mediation*"

Mediation and conciliation

The origins of mediation and conciliation can be traced to China some 3,000 years ago. More specifically, China has used these techniques as a primary dispute resolution process whilst other parts of the world have resorted to some form of adjudicative process. State courts have been used as a mechanism to support socialist ideals and, as such, have performed a controlling function with regard to activities considered as criminal.[14] On the other hand, activities relating to commerce fall outside of socialist ideals, as do non-criminal matters relating to private individuals. The resolution of these disputes by informal processes were encouraged in order to maintain 'harmony' in the community.

More recently, and probably during the past 10 to 15 years, there has been a growing international awareness of the benefits of mediation as a dispute resolution technique. In the US, research by Stipanowich has documented the rise of mediation, which was first taken seriously by the US construction industry.[15] Apparently the Army Corps of Engineers pioneered the process in order to reduce the high costs of litigation.

In the UK, this recent move towards mediation under the banner of ADR first developed in the area of family disputes. The commercial sector began to take an interest in the late

12. [2002] EWHC 2059.
13. *Balfour Beatty Construction Limited v Modus Corovest (Blackpool) Limited* [2008] EWHC 3029 (TCC); and Construction Industry Law letter, February 2009 page 2661.
14. Palmer, M. J. E. (1991) ADR; Mediation in China, lecture given t the London School of Economics, February.
15. Stipanowich, T. (1994) What's hot and what's not. *DART conference proceedings*, Lexington, Kentucky, USA

1980s and CEDR was formed in 1990 in order to promote ADR in the general commercial setting, primarily through mediation. Specifically in relation to the construction industry, the ICE established a conciliation procedure in 1988. More recently, the courts have piloted a court based mediation scheme.[16]

What is mediation and conciliation?

To mediate means to act as a peacemaker between disputants. It is essentially an informal process in which the parties are assisted by one or more neutral third parties in their efforts towards settlement. Mediators do not judge or arbitrate the dispute. They advise and consult impartially with the parties to assist in bringing about a mutually agreeable solution to the problem. Some definitions in circulation include :

> *"Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties."* [17]
>
> *"Mediation is a facilitative process in which disputing parties engage the assistance of a neutral third party who acts as a mediator in their dispute."* [18]
>
> *"Where two or more people or companies are unable to resolve a particular problem they invite a neutral person to help them arrive at a solution. The neutral person, or Mediator, will work hard with each side and help them to understand better their own and the other person's position, and explore alternative solutions"*[19]
>
> *"Mediation consists of the effort of an individual, or several individuals, to assist the parties in reaching the settlement of a controversy or claim by direct negotiations between or among themselves. The mediator participates impartially in the negotiations, advising and consulting the various parties involved."* [20]

There are two common threads. Firstly, the form of the third party intervention. The primary role of the third party is to facilitate other people's decision making. The process builds on negotiation, and the mediator fundamentally sustains and reviews the situation with the parties. Secondly, the third party should be independent of the parties in dispute. The essence of mediation that the mediator is impartial. The trust which develops during the process allows the mediator to perform "a bridging role" between the parties.

Confusingly, the term 'conciliation' is often used interchangeably with mediation. In the UK conciliation is usually taken to mean a more interventionist or evaluative style of mediation. However, there is no internationally agreed norm. The conciliation of labour disputes by ACAS is generally considered to be more evaluative, as is ICE conciliation. If the parties fail to settle under the ICE procedure, the conciliator will make a recommendation. However, the terms mediation and conciliation are often used interchangeably.

In practice, a mediation or conciliation may tend to be more towards one end of the scale than the other. It is perhaps more useful to make a distinction between facilitative and evaluative techniques. The process can be facilitative in that third party intermediary merely tries to aid communications between the parties. CEDR advocate a facilitative

16. Butler, N. (1997)
17. Goldberg, S. B. et al, (1992). p103
18. Brown, H. and Mariott, A. (1992) ADR Principles and Practice, Sweet and Maxwell, London. p108
19. British Academy of Experts (1992)
20. American Arbitration Association, (1992)

approach to mediation. At the other end of the scale is an evaluative approach where the third party comments on the subject matter and makes recommendations as to the outcome.

In summary, the main elements of mediation and conciliation are:

- That it is voluntary in the sense that the parties participate of their own free will.
- A neutral third party assists the parties towards a settlement.
- The process is non-binding unless an agreement is reached.
- The process is private, confidential and conducted without prejudice to any legal proceedings.

Benefits of mediation

Many consider that mediation and conciliation offer a range of benefits when compared to the traditional formal adjudicative processes such as litigation and arbitration. These 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
- Minimizing further disputes
- Opening channels of communication
- Preserving or enhancing relationships
- Savings in time and money
- Empowering the parties

The Mediation Process

There are, in general terms, three main phases to mediation:

1 Pre-mediation – agreeing to mediate and preparation;

2 The mediation – direct and indirect mediation;

3 Post-mediation – complying with the outcome.

This basic framework may be further developed. Goldberg et al suggests a 5-stage process[21], whilst Brown and Marriott divide mediation into ten stages[22].

Basic framework	The practice of mediation (Goldberg, et al p. 106)	The stages of mediation (Brown and Marriott, p. 121)
Pre-mediation	A: Pre-mediation - getting to the table	1: The initial inquiry - engaging the parties
		2: The contract to mediate
		3: Preliminary communications and preparations
The mediation	B: The opening of mediations	4: Meeting the parties

21. Goldberg
22. Brown, H. and Mariott, A. (1992) *ADR Principles and Practice,* Sweet and Maxwell, London.

	C: The parties' opening presentations	5: The parties' presentations
	D: Mediated negotiations	6: Information gathering
		7: Facilitating negotiations
		8: Impasse strategies
	E: Agreement	9: Terminating mediation and recording agreements
Post mediation		10: Post-termination phase

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 some instances, the parties may provide and 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 BATNAS?

The 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:

- Build a relationship between the parties and the mediator.
- Clarify the main issues.
- Identify the parties' interests or needs.
- Allow the parties to vent their emotions.
- Attempt to uncover hidden agendas.
- 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. It has been suggested that just because the parties do not settle, 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.

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. The impartial project mediation 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 outset of the project or during the course of the project as necessary.

The only publicly reported project where project mediation has been used was the Jersey Airport taxiway.[23] The contract sum was approximately £15 million, and the project mediation panel cost approximately £15,000. According to the article a variety of disputes were resolved and the project finished one day ahead of schedule and approximately £800,000 below budget. Much of the project's success has been attributed to the use of the contracted mediation process.

Project Mediation was launched in an updated form by CEDR Solve in December 2006. CEDR Solve produced a model product mediation protocol and agreement. This consists of:

(a) Non-binding guidance notes;

(b) The Model Project Mediation protocol; and

(c) The Model Project Mediation Agreement.

The aim of CEDR's Project Mediation is to help support the successful delivery of the project by identifying and addressing problems before they turn into disputes about payment and delay[24]. It consists of three main components:

(a) Access to two mediators for the duration of the project. These Mediators should ideally consist of a legally qualified Mediator and a commercial Mediator and should visit the project site to discuss progress and identify with the parties any actual or potential communication problems as early as possible. Project Mediators are (unlike members of Dispute Advisory Boards) able to request

23. Commercial Lawyer, Stopping disputes before they start, February 2001, p10
24. See CEDR Model Project Mediation Protocol and Agreement (first edition December 2006)

private advice and opinions from a Project Mediator[25] the cost basis for this is a monthly retainer and hourly rate for each Project Mediator;

(b) Prior to commencement CEDR Solve will arrange a half day Project Mediation Workshop 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 the ability to hold party Mediations throughout the project without having to seek their consent in advance. 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 projects, the project parties and any key suppliers;

(c) Should informal communications between the Mediators and the parties fail then formal Mediation can be started using the CEDR Solve rules. The advantage of this over any decision reached by a DAB is that it is not disclosable in subsequent proceedings;

It has been argued that Project Mediation is a cheaper alternative to DAB Dispute Resolution methods under the FIDIC form of Contracts.[26] This is because the detailed statements of case evidence and experts may not be necessary and instead the parties can simply exchange summary position statements and supporting documents followed by a one day Mediation. CEDR have emphasised that Project Mediation may be suitable for slightly smaller projects where the cost of a DAB panel is disproportionate to the contract value.

Since CEDR's Project Mediation was launched there has been consistent interest shown in the scheme with over 200 enquiries. 30 per cent were from organisations such as banks, investment corporations and pharmaceutical companies who were planning or funding large projects. 60 per cent were from law firms. A lot of interest has been from overseas (25 per cent). However, actual take up of the scheme has been limited suggesting it is used as and when disputes arise, not proactively.

The English court's approach to mediation

The English Courts have, since the early 1990s, attempted to encourage mediation. In 1993 the Commercial Court started encouraging ADR by making an order directing them to attempt it and informing the Courts of the steps taken to ADR if it failed. Although the scheme was non-mandatory the aim of the orders was to impose substantial pressure on the parties to mediate and 233 ADR Orders were made between 1996 and 2000[27]. In 1996 the Court of Appeal also established a voluntary ADR scheme and the Central London County Court also implemented a Voluntary Mediation pilot scheme (**"**VOL**"**) in April 1996.

One the key aims of Lord Woolf's recommendations in his review of the Civil Justice system and Access to Justice Reports of 1995 and 1996, was to encourage ADR especially at an early stage before matters had reached litigation. In the introductory chapter of his Access to Justice Report he wrote that:

> *"Two other significant aims of my recommendations need to be borne in mind: that of encouraging the resolution of disputes before they come to litigation, for example*

25. "Project Mediation: an alternative to FIDICS dispute Adjudication Board?" by Karen Gidwani, Fenwick Elliott LLP and PLC Construction
26. See "It's like partnering with teeth", Building Magazine, 8 December 2006
27. See Court-based initiatives for non-family civil disputes: The commercial Court and the Court of Appeal, by Professor Hazel Genn, Faculty of Laws at University College London, Executive Summary

by greater use of pre-litigation disclosure and of ADR, and that of encouraging settlement, for example by introducing plaintiffs' offers to settle, and by disposing of issues so as to narrow the dispute. All these are intended to divert cases from the court system or to ensure that those cases which do go through the court system are disposed of as rapidly as possible. I share the view, expressed in the Commercial Court Practice Statement of 10 December 1993, that although the primary role of the court is as a forum for deciding cases it is right that the court should encourage the parties to consider the use of ADR as a means to resolve their disputes. I believe that the same is true of helping the parties to settle a case."[28]

The aim of encouraging mediation (both before litigation is started and afterwards) is reflected in the Civil Procedure Rules that were drafted by Lord Woolf and came into effect in 1999 and the Pre-Action Protocols that accompany them.

The Civil Procedure Rules

ADR and its principles are now embodied at the heart of the CPR. The overriding objectives of the CPR are set out at CPR Part 1:

"***Rule 1.1 The overriding objective***

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
(2) Dealing with a case justly includes, so far as is practicable—
(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate—
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Rule 1.2 Application by the court of the overriding objective

The court must seek to give effect to the overriding objective when it—
(a) exercises any power given to it by the Rules; or
(b) interprets any rule.

Rule 1.3 Duty of the parties

The parties are required to help the court to further the overriding objective."

Essentially, the courts are to deal with cases justly, ensuring that cases are dealt with expeditiously and fairly. However, this is not to be done at any cost, and the courts are expected to save expense if reasonably possible. In order to achieve this goal, the courts are to proactively manage cases and encourage parties to use ADR.

28. See Access to Justice, Chapter 1, paragraph 7 (d) available at http://www.dca.gov.uk/civil/final/sec2a.htm#c1

All parties to litigation have an obligation to assist the court to further the overriding objective. Assistance includes clearly setting out the issues in dispute, identifying key documents and in particular attempting to avoid litigation by settling the dispute.[29] This assistance is expected from the parties even before proceedings are commenced in the court by the requirement for the parties to follow pre-action protocols.

The Practice Direction – Protocols expressly provides that:

> "*The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if this paragraph is not followed then the court must have regard to such conduct when determining costs*".[30]

The Court of Appeal confirmed in *Halsey v Milton Keynes NHS Trust* that a reference to ADR would usually be understood by the Courts as being a reference to some form of mediation by a third party.[31]

For building and engineering disputes, the applicable protocol is the Pre-action Protocol for Construction and Engineering Disputes.[32]

The Pre-action Protocol for Construction and Engineering Disputes

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

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

The Pre-Action Protocol for Construction and Engineering Disputes provides for a pre-action meeting but also recommends that the parties should consider whether some form of ADR is more suitable than litigation.[33] 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 that of the Court system.[34]

In light of the *Halsey*[35] judgment the protocol expressly recognises that the parties can not be forced to mediate or enter into any form of alternative dispute resolution. However, when considering this recommendation the parties will be aware of the very real cost consequences that could result from a failure to consider mediation and generally act in accordance with the applicable pre-action protocol.

29. See Practice Direction – Protocols, rule 1.4 (2)
30. See Practice Direction – Protocols, rule 4.7
31. Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576 at [5]
32. As revised from 6 April 2007 and updated on 19 November 2008
33. Pre-Action Protocol rule 5.4
34. *Burchell v Bullard and others* [2005] EWCA Civ 358 at [43
35. *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576

Cost sanctions

Civil Procedure Rule 44.5 provides a list of the factors that can be taken into account in deciding the amount of costs that the Court will award to a successful party. Rule 44.5 (3)(a)(ii) further provides that:

> *"the efforts made, if any, before and during the Proceedings an order to try and resolve the dispute"*

are among the factors to which the Court **must** have regard providing a strong incentive to the parties to try and settle the dispute before judgment. This incentive has been strengthened by case law which strongly supports the use of mediation prior to trial.

In *Dunnett v Railtrack Plc* the Court of Appeal refused to award Railtrack its costs even though the appellant in the matter Mrs Dunnett had failed to overturn the first instance County Court Judgment dismissing her claim. She had suggested ADR prior to the Appeal but this had been turned down by Railtrack. The Court of Appeal pointed to the value that mediators can add in providing satisfactory results which are "*quite beyond the power of lawyers and courts to achieve*". He stated that:

> *"…if they [lawyers] turn down out of hand the chance to alternative dispute resolution when suggested by the Court, as happened in this case, they may have to face uncomfortable costs consequences".*[36]

The next case to reach the Court of Appeal on the issue was *Halsey v Milton Keynes General NHS Trust*[37] benefited from submissions from the Law Society, the ADR Group, The Civil Mediation Council and CEDR. [38] In its Judgment the Court of Appeal sought to lay down guide lines for the Courts in dealing with the costs in situations where Mediation has been refused.

The Court of Appeal did not accept the Civil Mediation Council's argument that there should be a general presumption in favour of Mediation. Instead it accepted the Law Society's submission that the question of whether Mediation had been "*unreasonably*" refused should depend on a number of factors which will be evaluated by the Court in each case. [39] These factors included but were not limited to: (i) the nature of the dispute; (ii) the merits of the case; (iii) whether other methods of settlement have been attempted; (iv) whether the costs of the ADR would be disproportionately high; (v) delay in suggesting mediation which may have the effect of delaying the trial; and (vi) whether the mediation had a reasonable prospect of success.

Lord Justice Dyson emphasised that the Courts have no power to order Mediation and raised the question of whether a Court ordering mediation might infringe Article 6 of the Human Rights Act 1998. He did, however, uphold the fact that the Court had jurisdiction to impose a costs sanction on unsuccessful parties who unreasonably decline to mediate.

The Judgment of *Hickman v Blake Lapthorn and Another*[40] the principles laid down by Halsey were implemented with the Court seeking to summarise the key principles laid down by the Court of Appeal. These were stated to be as follows:

36. *Dunnett v Railtrack Plc* [2002] EWCA Civ 303 at[14] and [15]
37. *Halsey v Milton Keynes General NHS Trust* [2004] EWCA siv 576
38. See Philip Britton's paper, Court Challenges to ADR in Construction: European & English Law. A paper based on the essay awarded the Norman Royce Prize 2008 by the Society of Construction Arbitrators December 2008, 152 page 30
39. See Twisting Arms: Court Referred and Court Link Mediation under Judicial Pressure by Professor Dame Hazel Glenn, Professor Paul Fend, Mark Mason, Andrew Lane, Nadia Bechai, Lauren Gray, Dev Vencappa, Ministry of Justice Research Series 1/07, May 2007
40. [2006] EWHC 12 (QB)

> *"(a) A party cannot be ordered to submit to mediation as that would be contrary to Article 6 of the European Convention on Human Rights - paragraph 9.*
>
> *(b) The burden is on the unsuccessful party to show why the general rule of costs following the event should not apply, and it must be shown that the successful party acted unreasonably in refusing to agree to mediation - paragraph 13. It follows that, where that is shown, the court may make an order as to costs which reflects that refusal.*
>
> *(c) A party's reasonable belief that he has a strong case is relevant to the reasonableness of his refusal, for otherwise the fear of cost sanctions may be used to extract unmerited settlements - paragraph 18.*
>
> *(d) Where a case is evenly balanced - which is how I understand the judgment's reference to border-line cases, a party's belief that he would win should be given little or no weight in considering whether a refusal was reasonable: but his belief must be unreasonable - paragraph 19.*
>
> *(e) The cost of mediation is a relevant factor in considering the reasonableness of a refusal - paragraph 21.*
>
> *(f) Whether the mediation had a reasonable prospect of success is relevant to the reasonableness of a refusal to agree to mediation, but not determinative - paragraph 25.*
>
> *(g) In considering whether the refusal to agree to mediation was unreasonable it is for the unsuccessful party to show that there was a reasonable prospect that the mediation would have been successful - paragraph 28.*
>
> *(h) Where a party refuses to take part in mediation despite encouragement from the court to do so, that is a factor to be taken into account in deciding whether the refusal was unreasonable - paragraph 29.*
>
> *(i) Public bodies are not in a special position - paragraph 34."*

The Court of Appeal has since emphasised in *Burchell v Bullard* that mediation was important as a track in its own right running parallel to mediation stating that:

> *"The Court has given its stamp of approval to mediation and it is now the legal profession which much become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With Court fees escalating it would be folly to do so."* [41]

Interestingly the introduction of the outcome of the *Dunnett v Railtrack* case appeared to dramatically increase demand for the VOL scheme at Central London Court which was running at the time.[42] However, after the *Halsey* judgment (making it clear that mediation could not be ordered by the Courts) the ARM scheme suffered from a low uptake although Professor Genn notes in her May 2007 report that the *Burchell* case came out after the end of the ARM scheme implying that this may have increased the uptake of the scheme.

41. *Burchell v Bullard and others* [2005] EWCA Civ 258 at [43]
42. See Twisting Arms: Court Referred and Court linked to Mediation under Judicial pressure at page 200

This suggests that judicial policy on costs awards, and the extent to which failure to mediate will be taken into account when making a costs award, has a very real impact on whether parties will decide to mediate a dispute. However, a study of these schemes also indicated that the threat of sanctions was not necessarily particularly effective in terms of settlement rates.[43]

Regulation

There is currently no state control in England and Wales for the training, appointment and performance of mediators.[44] Instead reliance has been placed on market based solutions with the institutions developing codes of conduct for their mediators and forms of accreditation.

The Academy of Experts, the ADR Group, the Centre for Dispute Resolution, the Commercial Mediation Centre and the Law Society of England and Wales have all developed codes of conduct for mediators.[45] A European Code of Conduct for Mediators was also developed during the course of the consultation process for Directive 2008/52/EC (the "European Mediation Directive") but this code of conduct was not incorporated into the European Mediation Directive itself when it was adopted on 21 May 2008.

Laurence Boulle and Miryana Nesic have listed the key characteristics of the codes as being:

1. Competance – The mediator must have sufficient knowledge of the process and subject matter in dispute;

2. Neutrality – The mediator must conduct the proceedings fairly and even-handedly and not do anything that would give rise to doubts about his independence. In particular, the mediator must not impose a solution on the parties;

3. Confidentiality – Any information given or arising out of the mediation is confidential and that information must be kept confidential by the mediator. In addition, the mediator may not be called as a witness in later proceedings;

4. Availability – The mediator must be sufficiently available to enable them to conduct the mediation expeditiously;

5. Voluntary – The mediator must ensure that all the parties are participating in the mediation voluntarily;

6. Power to terminate – The parties and/or the mediator should have the power to terminate the mediation at any stage if necessary;

7. Conflict – The mediator must disclose any potential conflicts and only proceed with the consent of all parties;

8. Fairness – The mediator should generally ensure that the process of the mediation itself is fair rather than the outcome;

43. See Twisting Arms page 205
44. Andrew Boon, Richard Earle and Avis Whyte, "Regulating Mediators?", Legal Ethics, Voulme 10, No 1; and Philip Howell-Richardson, "Europe's Changing mediation landscape", The In-House Lawyer July/August 2008
45. Laurence Boulle and Miryana Nesic, "Mediation: Principles Process and Practice", Butterworths, 2001, page 437

9. No legal advice – the mediator should not provide legal advice unless asked to give a non-binding evaluation as part of the process agreed by the parties;

10. Advertising – Any advertisements by the mediator should be professional and accurate;

11. Professional Indemnity Insurance – Should be obtained and maintained by the mediator.

The training of mediators is currently market driven and there are no statutory qualifications. However, training institutions point out that accreditation is, in practice, required for practitioners who wish to gain a reputation in mediation and obtain appointments.[46] There is also no moderation of the content of courses or the standard of those courses.[47]

Instead institutions run their own training schemes. Commercial mediators training schemes include those run by The Academy of Experts, the ADR Group, the Centre for Effective Dispute Resolution (CEDR), the Chartered Institute of Arbitrators, the Law Society and the RICS. The recently passed European Mediation Directive also aims to encourage effective quality control mechanism and initial and continuing quality training of mediators but, once again, relies on market based solutions.

TCC Court Settlement Service

Early in 2005, HHJ Toulmin CMG QC began to consider whether judges in the TCC should provide an ADR service[48] and a proposal entitled "*Court Settlement Process*" was published at the end of the same year. In June 2006, a pilot scheme was introduced into London's TCC. The Court Settlement Process was described as "*a confidential, voluntary and non-binding dispute resolution process*"[49], during which the parties to the dispute seek to reach an amicable settlement. The case management judge from the TCC would then conduct the process. The pilot scheme had been planned to conclude in July 2007, but was later extended to the end of that year due to the few cases initially.[50]

The idea behind the scheme was to make use of the expertise the judges of the TCC have as a result of the specialist nature of the cases brought before it. This expertise might, it was argued, assist the parties in reaching a settlement.

Under the Court Settlement Process the case management TCC Judge could decide (either of his own volition or at the request of the parties) to offer a Court Settlement Conference. If the parties agreed to this, the date and length of time needed for the conference (not usually longer than a day) would then be fixed and embodied in a Court Settlement Order. The Court Settlement Conference consists of what seems to be a basic mediation service with the parties free to communicate with the TCC Judge in private (unless otherwise agreed by the parties).

If the Court Settlement Conference was successful then a Settlement Agreement signed by the parties will be entered into in the usual way. Any agreements reached which are not recorded in a settlement agreement will not be binding on the parties. If a settlement could not be reached, then the Judge may send the parties an assessment setting out his views on the dispute including, without limitation, his views on prospects

46. See for example, CEDR's website which states that "the market dictates that most mediators who get work have some form of accreditation" at http://www.cedr.com/training/forthcoming/mst.php
47. Boon et al, page 38
48. Technology and Construction Court, *Annual Report for the year ending 30th September 2006*.
49. Technology and Construction Court, 'Court Settlement Process' <http://www.hmcourts-service.gov.uk/docs/tcc_court_settlement_process.pdf> accessed 16 February 2009. (the "CSP")
50. Technology and Construction Court, Annual Report of the Technology and Construction Court (2006-2007).

of success on individual issues, the likely outcome of the case and what an appropriate settlement would be. This was of course confidential between the parties.

If the Court Settlement Conference was unsuccessful the case would then be taken by another case management judge and the settlement judge would not take part in any part in the subsequent proceedings. The Court Settlement Process was private and confidential and any documents produced for that process were privileged.[51] The process is therefore in some ways less like mediation and closer to ICE conciliation and/or Dispute Review Boards (albeit with one and not three members).

> Before the pilot scheme was implemented, it was subject to a consultation process and concerns were raised about the scheme. For example, the Chartered Institute of Arbitrators was concerned that mediation was not a judicial function and could be seen as a breach of natural justice. They were also concerned that the process could compromise the Court's impartiality and neutrality threatening public confidence in their processes. They also argued that the qualities needed from a Judge (the ability to consider, weigh and determine the issues) are very different to those making a good mediator (the ability to facilitate negotiations).[52]

Opinion was otherwise relatively mixed as to the benefits of the scheme. The Technology and Construction Solicitors Association (TeCSA) was against the proposal whilst the Technology and Construction Bar Association (TeCBAR) was neutral. Others were broadly supportive. Philip Norman of Pinsent Masons suggested that the proposal was not so much mediation but rather an opportunity for the TCC judges to "bang the parties' heads together".[53] He went on to conclude that:

> *"the process will be useful where litigation progresses to trial solely because of the characters involved (clients and lawyers alike), whose participation has avoided early settlement. A judge's views will bring into sharp focus the merits, and more importantly the litigation risk in each party's case."*[54]

King's College and TCC mediation research

The Centre of Construction Law and Dispute Resolution at King's College London, ("King's College") carried out a survey on the use, and in particular the effectiveness, of mediation in the TCC from 1 June 2006 to 31 May 2008. The survey was set up by agreement between King's College and the TCC Judges, following an indication by the Judge in charge that empirical data as to the effectiveness of mediation would be helpful.[55] The Survey was designed in consultation with the TCC.

Existing Data

Some statistical data in respect of the use of mediation is available. A number of construction specific surveys do exist in the USA and UK. The Turner Kenneth Brown Report tested the reaction to ADR in the UK construction, insurance and information technology sectors. Reactions were very positive, but there was very little real experience in the use of ADR. Stipanowich reported on two USA based surveys in respect of the use of ADR in the construction industry.[56] A large number of mediation experiences were reported, affirming the wide use of mediation within those sectors.

51. See the CSP
52. Philip Norman, 'Another String to the Bow' (2006) *Construction Law Journal* <http://www.pinsentmasons.com/media/1235259662.htm> accessed 10 February 2009.
53. Philip Norman, ibid
54. Philip Norman, ibid
55. See (2005) 21 Construction Law Journal 265 at 267
56. Stipanowich, T. (1994) *What's Hot and What's Not*, DART Conference Proceedings, Lexington, Kentucky, US, October 1-19.

In the UK, Fenn, and then Fenn & Gould, reported on a survey of mediation in the English construction industry, which was loosely based upon Stipanowich's US survey. In the early 1990s, few mediations had taken place in respect of construction disputes in England.

A more extensive survey was carried out by Gould in 1996-98.[57] By this time 43% of the respondents had been involved in a mediation during their career. Lavers & Brooker undertook a quantitative postal survey and reported that 66% of the respondents had used mediation and 80% had either used it or proposed it in respect of cases with which they were involved.[58]

Data is also available in respect of court supported mediation. In the UK, the Central London County Court undertook a pilot mediation scheme which commenced in April 1996. This was initiated as a result of Lord Woolf's Access to Justice Report of 1996. Parties to litigation in that court were invited to attempt mediation on a voluntary basis. The take-up was low, but nonetheless interesting[59].

As a result of the Central London County Court scheme, an automatic referral to a mediation pilot project was undertaken for a 12 month period from April 2004 to March 2005. 100 cases each month were randomly allocated to mediation. Findings show that the settlement rate followed a broadly downward trend over the course of the pilot. The settlement rate was as high as 69% of those cases initially referred in May 2004, but dropped to 37% in respect of those cases referred in March 2005[60].

Court annexed mediation

England is not the only country to link mediation to its court services. The practice has been much more wide spread in the US. In Canada, the court annexed ADR programme referred to as the Mandatory Mediation Rule 24 Pilot Project was initiated in Ottowa and Toronto in January 1999. The research that is available shows that litigants consider that mediation had a positive impact on the litigation and reduced costs[61].

Specifically in relation to the TCC in the UK, the Court Settlement Service began early in 2005. HHJ Toulmin CMG QC considered whether judges in the TCC might be able to provide an ADR service[62]. As a result of these considerations TCC, a Court Settlement Process was established. The process is confidential, voluntary and non-binding.

The parties to litigation are assisted by a judge to reach an amicable settlement. It is the case management judge from the TCC that conducts the process. If the matter settles, then clearly nothing further needs to be done. If it does not, then a new judge is assigned to take the matter over, thus preserving the confidential nature of the discussions that the case management judge may well have had with each party in the absence of the other during the settlement process.

Aims and purpose

There is, therefore, some useful data in respect of the use and effectiveness of mediation in the construction industry, and court annexed mediation services. However, the use, effectiveness and cost savings associated with mediations that take place in respect of construction industry litigation is mostly anecdotal. To address this, an evidence based survey was developed between King's College London and the Technology and Construction Courts. Working together, it was possible to survey representatives

57. Gould, N. and Cohen, M. (1998) *ADR: Appropriate dispute resolution* in the UK construction industry, volume 17, Civil Justice Quarterly, April, Sweet & Maxwell.
58. Lavers, A. and Brooker, P. (2001) *Commercial and Construction ADR; Lawyer's Attitudes and Experience*, Civil Justince Quarterly, 20 Oct, 327-347.
59. For further details see Prof. Genn's report *Twisting arms: court referred and court linked mediation under judicial pressure*, Ministry of Justice research series 1/07, (May 2007).
60. See once again Prof. Genn's report.
61. Robert G. Hann and others, (2001) *the valuation of the Ontario mandatory mediation programme (rule 24.1); final report – the first 23 months,* 12 March. See also Sue Prince (2007) *Mandatory mediation: the Ontario experience*, 26 C.J.Q. 79, 83 and the Ontario Civil Justice Review, Supplemental and Final Report (1996).
62. See the Technology and Construction Court annual report for the year ending 30 September 2006.

of parties to litigation in the Technology and Construction Court (TCC)[63]. The obvious questions which the survey aimed to answer were:

- To what extent do they use mediation in order to settle their dispute
- At what stage do they settle? And
- Do they make any costs savings by using mediation, rather than conventional negotiation?

Parties to litigation in the TCC provided a good opportunity to survey a group dealing with similar issues and interests. They have all commenced formal proceedings in the High Court in respect of construction and technology matters and will be progressing towards a hearing. Many of them will of course have settled their dispute before the hearing. Almost all of those parties will be represented by lawyers, and so will be incurring legal fees and taking the risks of paying the opposing parties legal fees. The obvious question is to what extent do they use mediation in order to settle their dispute, at what stage do they settle and is it possible to identify whether they make any costs savings by using mediation rather than conventional negotiation?

This group can de divided into two sub-groups: first, those that settled their dispute after commencement, but before judgment; second, the group who progressed all the way to trial, but nonetheless might have been involved in a mediation that did not resolve the entirety or any part of the dispute. The number of claims that do not settle before judgment is always much lower than those that do settle and we therefore expected a small number of responses from the second sub-group. For example, 366 new claims were issued in the London TCC during October 2007 to September 2008 but there were only 399 trials that reached judgment during that period (Judiciary of England and Wales, 2007-2008).

The research therefore focused on issues specific to those two sub-groups, but with three main research aims, to:

1 Reveal in what circumstances mediation is an efficacious alternative to litigation;

2 Assist the court to determine whether, and at what stage, it should encourage mediation in future cases; and

3 Identify which mediation techniques are particularly successful.

The first two research aims were accomplished by way of questionnaires. The last aim was to be accomplished via the use of follow up interviews with those who responded to the survey. The following deals with the results of the surveys and therefore the first two aims above.

The objective was to collect meaningful data that may assist not only parties, practitioners and mediators in respect of the use of mediation (in commercial disputes as well as construction disputes), but also to provide the court with objective data that may assist it in the efficient management of cases.

The period the survey was conducted in also coincided with the introduction of the TCC Court Settlement Process at the TCC. Under the Court Settlement Process the TCC case management Judge could decide (either of his own volition or at the request of

63. The concept was developed jointly by Nicholas Gould and Lord Justice Rupert Jackson in 2005.

the parties) to offer a Court Settlement Conference. If the parties agree to this, the date and length of time needed for the conference (not usually longer than a day) would then be fixed and embodied in a Court Settlement Order. The Court Settlement Conference consists of a basic mediation service with the parties free to communicate with the TCC Judge in private (unless otherwise agreed by the parties). The survey was therefore a chance to assess its popularity.

Methodology

The two different questionnaire survey forms were designed for respondent in the two sub-groups and, in particular, to allow the second sub-group to comment upon any attempts to settle that had not been successful. The forms also reflected the characteristics of TCC litigation processes in that the forms took into account the various stages of the litigation process TCC litigants will pass through prior to judgment and the introduction of the TCC Court Settlement Process which uses TCC Judges as mediators. The commonality of Forms 1 and 2 was to aid analysis between the two sub-groups, whilst allowing specific responses for the peculiarities of those that had settled during litigation and those that had pursued litigation to judgment, but should be able to comment upon their attempts to settle that had not prevailed.

The very nature of the respondents was unique and somewhat specific. All of the respondents had been involved in TCC litigation. They only received a survey form because they were the point of contact for a party to the litigation, either the party itself or a representative. A large proportion of the respondents were therefore solicitors, many of which were familiar with TCC litigation.

From 1 June 2006, for a period of 2 years, until 31 May 2008, the TCC issued questionnaire survey forms to litigants. From 1 was issued where a case had settled[64]. Form 2 was issued where judgment had been given[65]. Both survey Forms asked about the nature of the issues in dispute, and whether mediation had been used, the form that the mediation took and also the stage in the litigation process at which the mediation occurred.

For those that settled during the course of litigation, it was of course highly unlikely that they would have been involved in a mediation during the pre-action protocol process. They would not have commenced litigation (and therefore have been on the record at the TCC) if that had not been the case, although they may have held a mediation before that didn't settle. However, those that progressed to a judgment could have attempted a mediation before the commencement of litigation. The questionnaire, therefore, tries to take into account as much commonality as possible between Forms 1 and 2. However, some specific details in respect of the dispute resolution process were collected taking account of the sub-groups and perspectives.

The survey forms were issued by the TCC to the litigants from 1 June 2006 to 31 May 2008. The completed survey forms were then returned to the Centre of Construction Law at King's College where they were collated[66]. Three TCC courts participated in the survey. These were the London TCC[67], the Birmingham TCC[68], and the Bristol TCC[69].

64. Form 1 is attached at Appendix 1.
65. Form 2 is attached at Appendix 2.
66. Aaron Hudson Tyreman was engaged as a research assistant for the two year period. He liaised with the TCC, and collated the returned forms, carrying out an initial analysis. The analysis was then refined with the assistance of James Luton of the Chartered Institute of Arbitrators.
67. The TCC at St. Dunstan's House, next to the Royal Courts of Justice issued the forms. This court deals with a higher volume of High Court TCC cases. The Central London Civil Justice Centre did not participate in the survey, but deals only with approximately 75 County Court cases each year.
68. The Birmingham TCC deals with both High Court and County Court TCC cases.
69. The Bristol TCC deals with both High Court and County Court TCC cases.

The TCC gathers some statistics in respect of the work that it carries out. However, the TCC's reporting period runs from 1 October to 30 September and so statistics are not automatically available for the identical period covered by this survey. It is possible nonetheless to calculate from the TCC's two recent annual reports the approximate number of cases commenced during this period.

The annual reports for 2006 and 2007 suggest that approximately 1,136 were commenced in those courts during the survey period[70]. The number of cases concluded during the survey period would not be precisely the same, but the figures would no doubt be very similar. In addition, there would also be a substantial overlap between the 12 month period in any event.

Further, not all of the TCC cases reach a reportable conclusion for the purposes of the King's College survey. For example, a claim form might be issued but not be pursued, there may be judgment in default of acknowledgment of service or the parties may simply resolve their dispute without taking any further action. In this latter case, there must of course be some level of negotiation.

A further characteristic of the distinction between the number of cases identified in the TCC reports and the number of cases which the responses relate was the timing. The TCC reports compile cases commenced in the TCC. The survey focuses on cases that have settled. The time period between commencement and judgment is now quite short in the TCC when compared to other courts. A typical case in the TCC may now take only 12 months from commencement until judgment. However other cases will require longer quite simply because the parties and those involved in the case require the time. On the other hand, an enforcement of an adjudicator's decision can be dealt with extremely quickly.

Clearly, all of the cases commenced in a 12 month period will not be neatly resolved within that corresponding period. Some will be settled within a very short period of weeks, while others may take many years. Correspondingly, the survey period covered cases that had settled or received judgment, the original action for any particular case commencing in the TCC in some instances, many years before the commencement of the survey.

Adjusting the TCC figure of 1,136 to take these factors into account leads to approximately 800 cases concluded in the London, Birmingham and Bristol TCCs during the 24 month survey period. There will be at least 2 parties for each case, so during the survey period there were at least 1,600 parties (claimants, defendants and third parties) progress through the TCC.

The number of responses received was 261. This consists of 221 responses to Form 1 and 40 responses to Form 2. The number of responses in respect of both forms represents a proportionate response to the sub-groups. More than 90% of TCC cases settle before trial, and so the sub-group of respondents to Form 1 was much larger that the sub-group receiving Form 2. In respect of the Form 1 responses, 25 were discounted as they had been spoiled or incorrectly completed[71].

70. The TCC's annual report for the year ending September 2006 states that 392 new cases were commenced in the London TCC during this period, and 108 new cases in the Birmingham TCC. The TCC's annual report for the year ending September 2007 states that 407 new cases were commenced in the London TCC during this period and 213 in the Birmingham TCC. No separate figures were available for the Bristol TCC for the year ending 30 September 2006. The figure therefore assumes that the same number of cases were commenced in the year ending 2006 (i.e. 18) as the year ending 2007.

71. A spoiled response occurred where the answers to questions 1, 2 and 3 were either left blank or when one box only should have been ticked, but two or more had been ticked.

Nevertheless, the survey produced a very good response rate of almost 17% based upon the total response of 261 forms, against a projected population of around 1,600. If there were approximately 800 cases during the two year survey period, then there would of course be a minimum of two parties in respect of each claim. There were no doubt more than 1,600 because some of the matters would have more than two parties.

Survey results

Form 1; TCC claims that settled

14.1 Form 1 – Results

The subject matter of the questions contained on Form 1 was as follows:

Question 1:	The Nature of the case
Question 2:	The stage at which the action was resolved
Questions 3/4:	How settlement was reached
Question 5:	Why mediation was undertaken
Question 6/7/8:	The mediator's profession, identity and nominating body if applicable
Question 9:	Approximate costs of the mediation
Question 10:	What would have happened absent any mediation
Question 11:	Level of costs saved by mediation

The results of the responses to the questions included in Form 1 are set out below. The responses to questions 4, 7, 8 and 9 were not as useful as the responses received to the other questions.

Question 1 – The Nature of the case

What was the nature of the case (please tick all those that apply)?

Question 1 asked the respondent to identify (by reference to 13 categories) what the subject matter of their case was. Respondents were asked to select more than one category where applicable and a default option of "other", together with a request that they specify what "other" constituted, was also provided for.

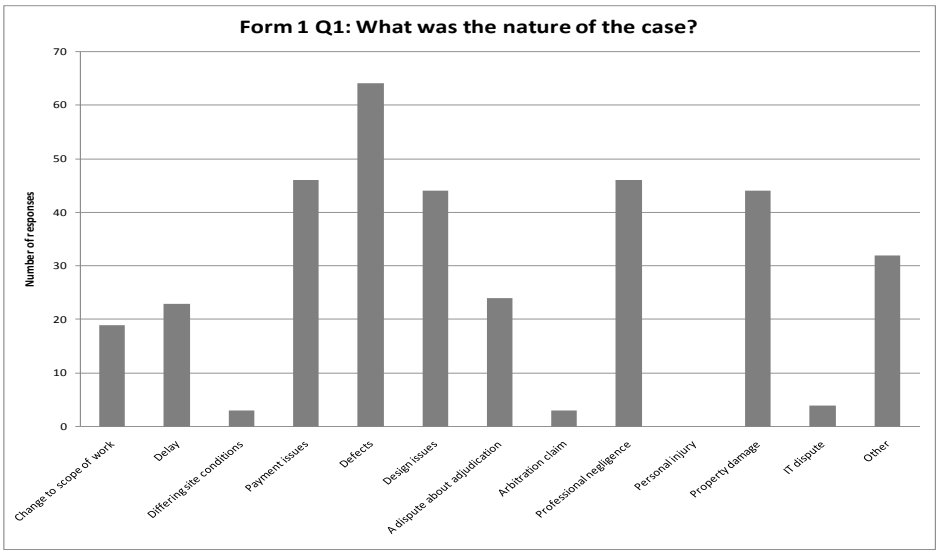


Chart 1: The numerical distribution outlining the nature of the cases.[72]

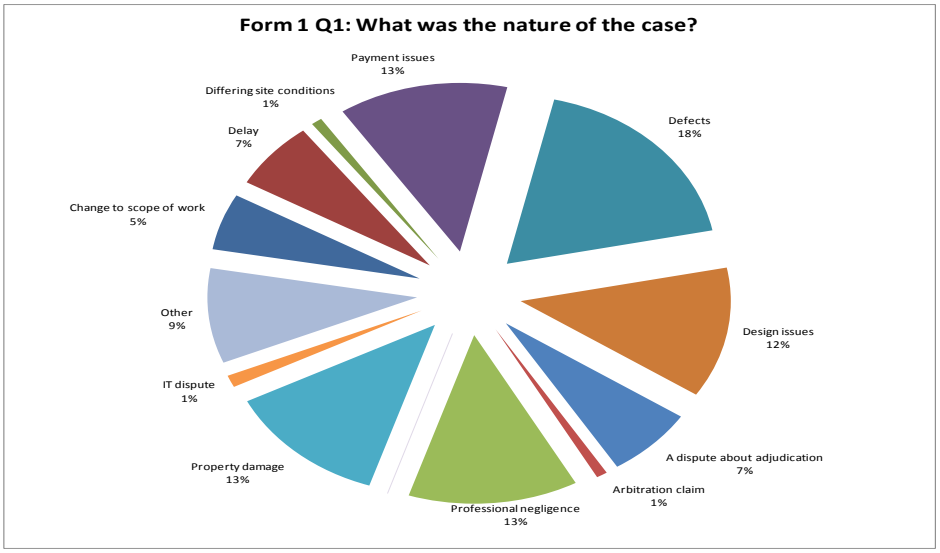


Chart 2: The percentage distribution for the cases in question 1.

The responses to Question 1 can be grouped into five categories reflecting which type of case occurred most frequently. Group 1 represents the most common type of dispute with Group 5 representing the least common type of dispute.

Group 1	Group 2	Group 3	Group 4	Group 5
Defects	Payment issues	Change to scope of work	Differing site conditions	Personal injury
	Design issues	Delay	Arbitration Claim	
	Professional Negligence	A dispute about adjudication	IT Dispute	
	Property Damage			

Table 1: Frequency of different categories of dispute

72. The number against each type of case is not reflective of the number of surveys issued or returned as there was an option to 'tick all that apply' included within the survey.

Grouping the most frequently encountered issues referred to the TCC for resolution, it is clear that defects (18%) was the most common category of case, closely followed by a second group comprising payment issues (13%). Change to the scope of works, delays and differing site conditions were now less likely to become matters that the TCC dealt with, perhaps now being resolved in adjudication. For example, the Adjudication Reporting Centre's Report No.4, January 2002, (see www.adjudication.gcal.ac.uk/report4.doc), collected some data on the subject matter of disputes. It ranked the main issues as follows: Failure to comply with payment provisions (26%); Valuations of variations (23%); Valuation of final account (17%); Extensions of time (10%); and Loss and expense (10%).

Chart 4 below analyses the number of different types of dispute occurring in any given case.

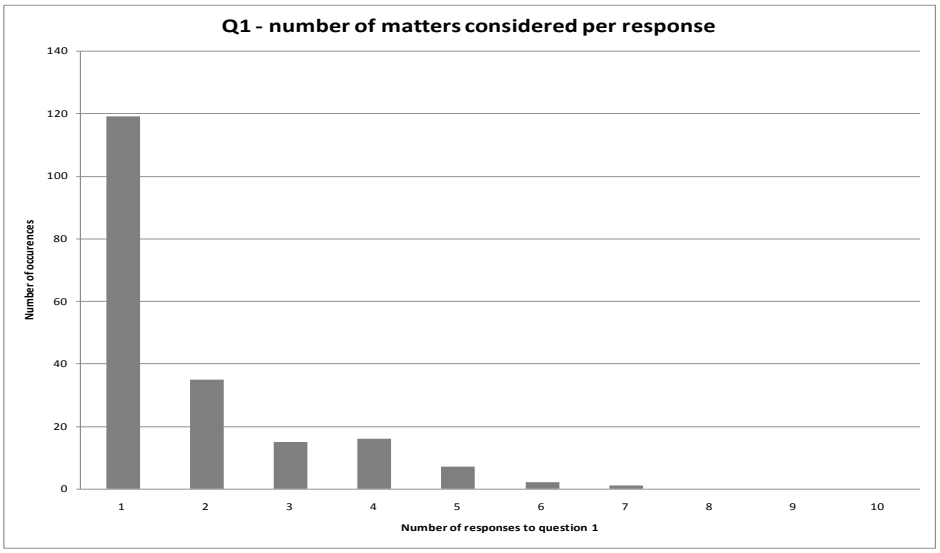


Chart 3: Number of matters outlined in Question 1 per response to the survey

The majority of responses were just involving one type of dispute. However, a significant proportion involved cases with two issues.

Question 2 – The stage at which the action was resolved

At what stage did the litigation settle or discontinue (please tick only one)?

Question 2 sought to ascertain the stage at which the litigation settled or was discontinued by reference to 13 categories consisting of 12 specified stages of the litigation and one "*other*" category. The respondents were asked to specify what "*other*" consisted of where applicable.

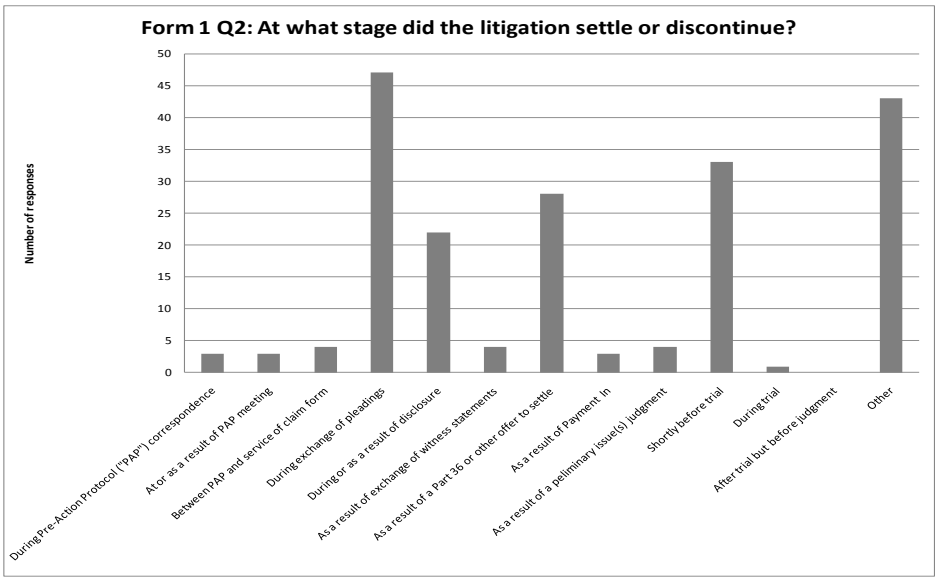


Chart 4: Chart showing at what stage most of the litigation settled or discontinued

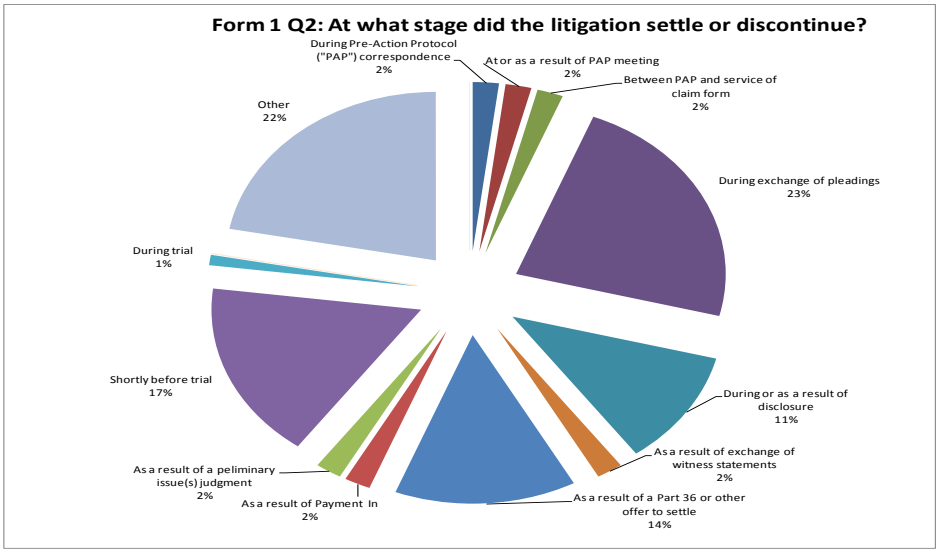


Chart 5: A percentage distribution of the responses outlining the stages at which the litigation settled.

From Chart 4 and Chart 5 it is clear that the main stages at which the litigation settled or discontinued were:4 and Chart 5 it is clear that the main stages at which the litigation settled or discontinued were:4 and Chart 5 it is clear that the main stages at which the litigation settled or discontinued were:

- During exchange of pleadings;
- During or as a result of disclosure;
- As a result of a Part 36 or other offer to settle;
- Shortly before trial.

An analysis of the "other" category identified a further three key stages at which settlement occurred. These were:

- After pleadings/at or around time of first CMC;
- During drafting or, or as a result of exchanging, expert reports; and
- After disclosure.

Chart 7 incorporates these three stages identified into a chart showing the stages at which the litigation was most likely to settle or discontinue, and reduces the "other" category to take into account the three other distinct stages identified when the responses were analysed. It appears from this that the drafting and/or exchanging of

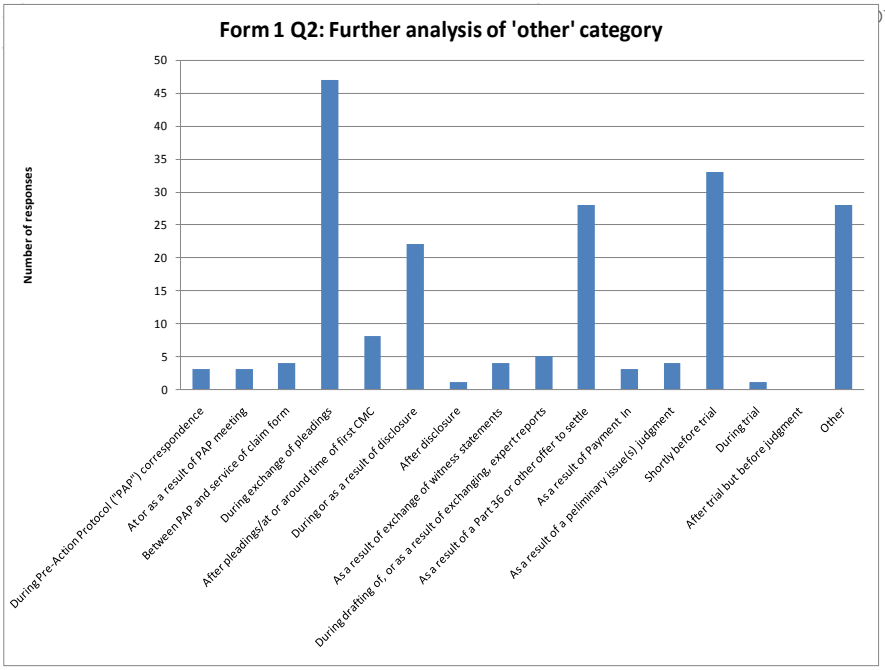


Chart 6: Form 1, Question 2 outlining at what stage the litigation was settled or discontinued.

Questions 3/4 – How settlement was reached

Question 3

Was the settlement reached or the matter discontinued following (please tick only one)?

Question 3 asked respondents to identify whether the case was concluded as a result mediation, negotiation or some other method of dispute resolution. Respondents were asked to specify what was meant by "other" in Question 4 (as to which see below).

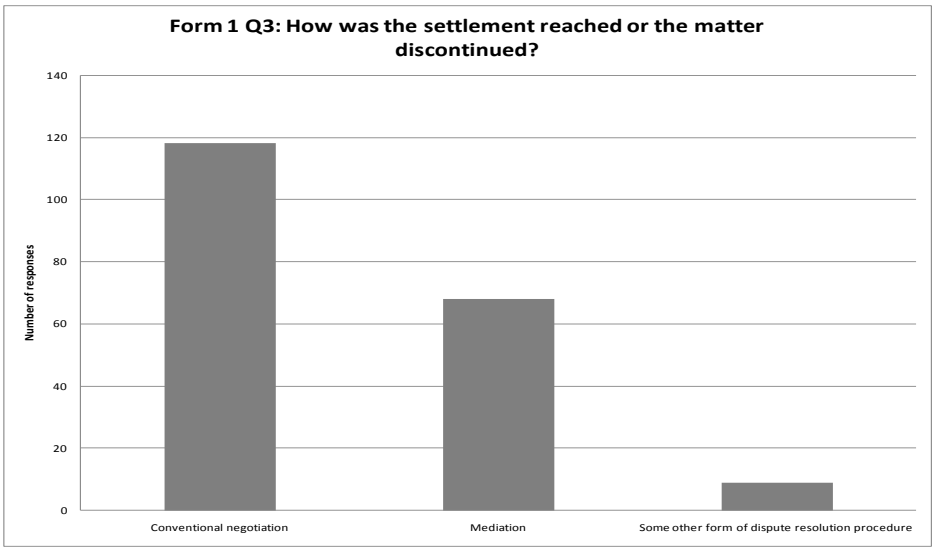


Chart 7: The most frequent method whereby the settlement was reached or the matter discontinued

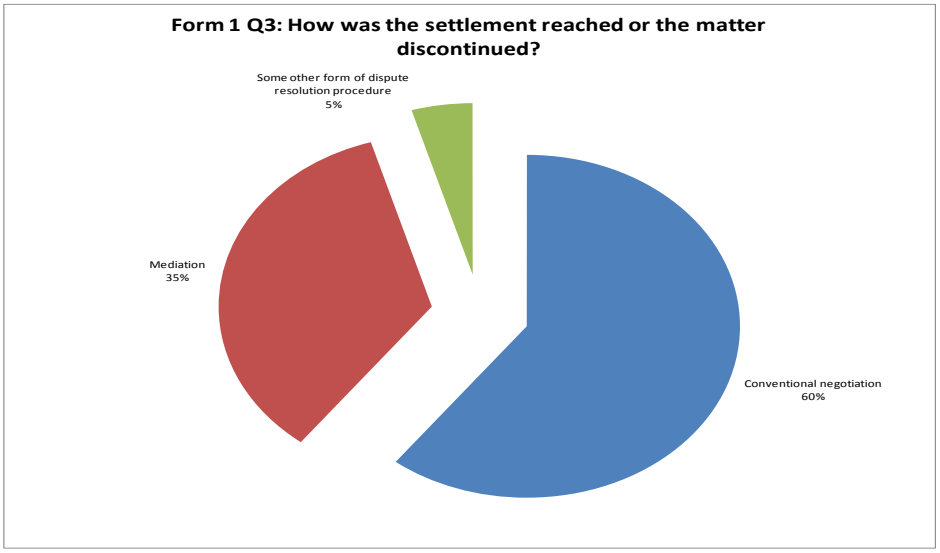


Chart 8: Percentage distribution of methods whereby settlement was reached or the matter discontinued

Chart 7 and Chart 8 identified that the most popular method of bringing a settlement about was through conventional negotiation with 60 per cent. of the responses. This was followed by mediation which carried 35 per cent. of the responses. This 35 per cent. (which constitutes 68 responses) of the responses was then broken down further based on the information supplied by the remaining Form 1 questions.

Question 4

If some other procedure please briefly describe

Question 4 asked those replying 'other' in response to question 3 to specify what method of ADR was used.

The responses were as follows (as direct quotes):

- The claim related to liability only. The claimant accepted liability following disclosure. Now parties negotiating question of dispute.
- Mediation which led to a conventionally negotiated settlement.
- Adjudication.
- Without prejudice meeting/PAP meeting before applying to add additional defendants
- Related to Part 8 claim on interim and final accounts.
- One part related to enforcement of adjudication and other to a part 8 claim on interim and final accounts.
- Defendant made offer to settle by way of Part 36 offer by serving Form N242A.
- Party to party contact, not involving solicitors.

Some of these responses should arguably have been included in the negotiation category (for example, the party to party contact and the reference to a Part 36 offer being made.)

Question 5 – Why mediation was undertaken

Was the mediation undertaken:

On the parties' own initiative
As a result of some (if so what) indication from the Court
As a result of some (if so what) order from the Court

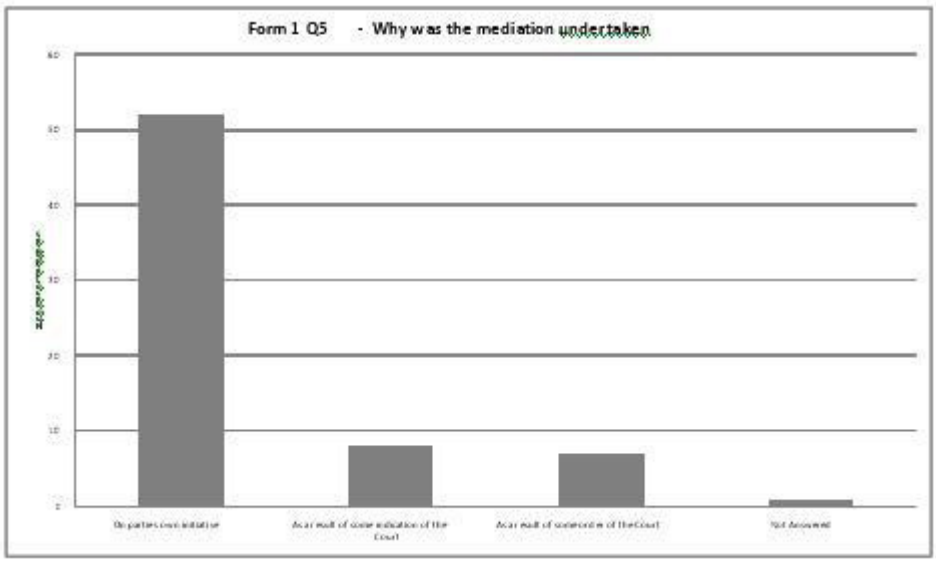


Chart 9: Why was mediation undertaken?

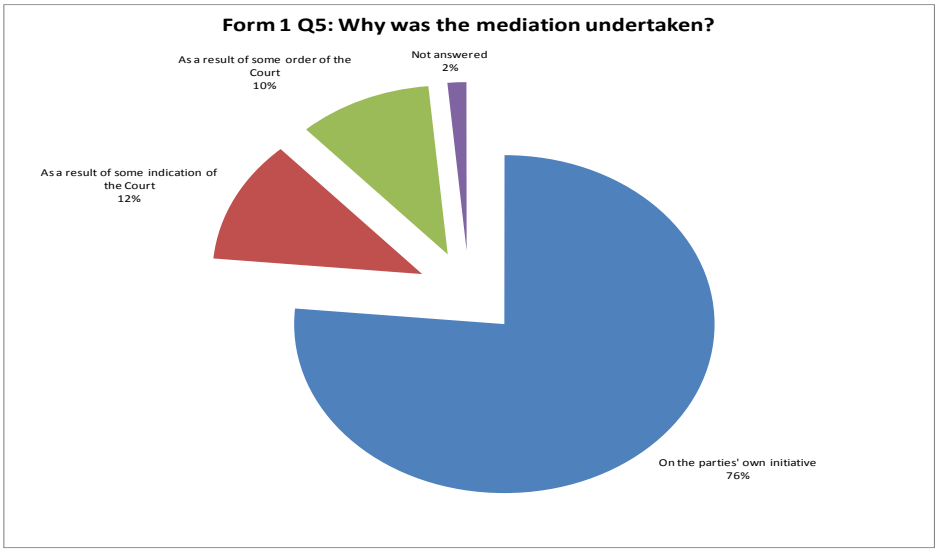


Chart 10: A percentage distribution outlining how the mediation was undertaken

By far the majority (76%) of mediations were carried out on the parties own initiative. The percentage of mediations carried out as a result of an indication from the Court or an order from the Court was similar (12% and 10% respectively).

Question 6/7/8 – The mediator's profession, identity and nominating body if applicable

Question 6 - Was the mediator a:

Construction Professional
A TCC Judge as part of the Court Settlement Process
Barrister
Solicitor
Other (please specify)

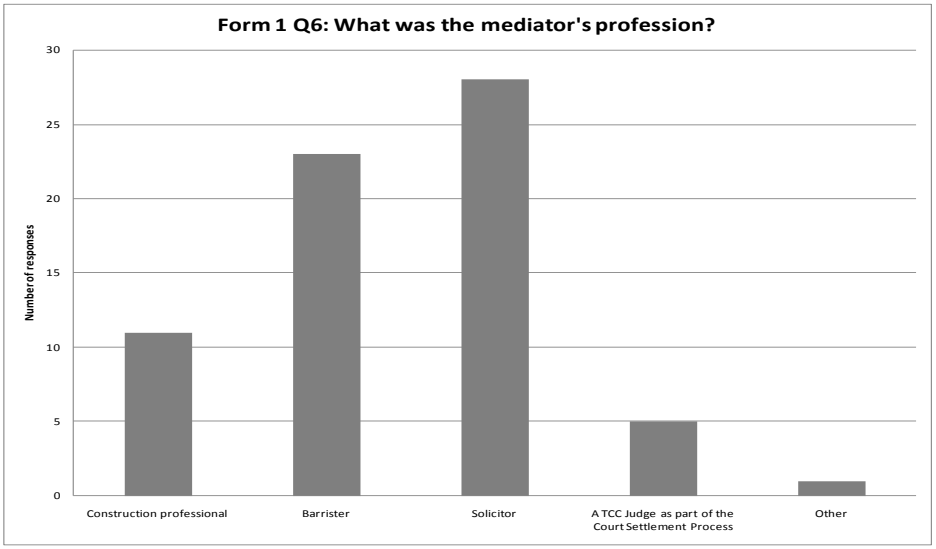


Chart 11: A chart showing the profession of the mediators used.

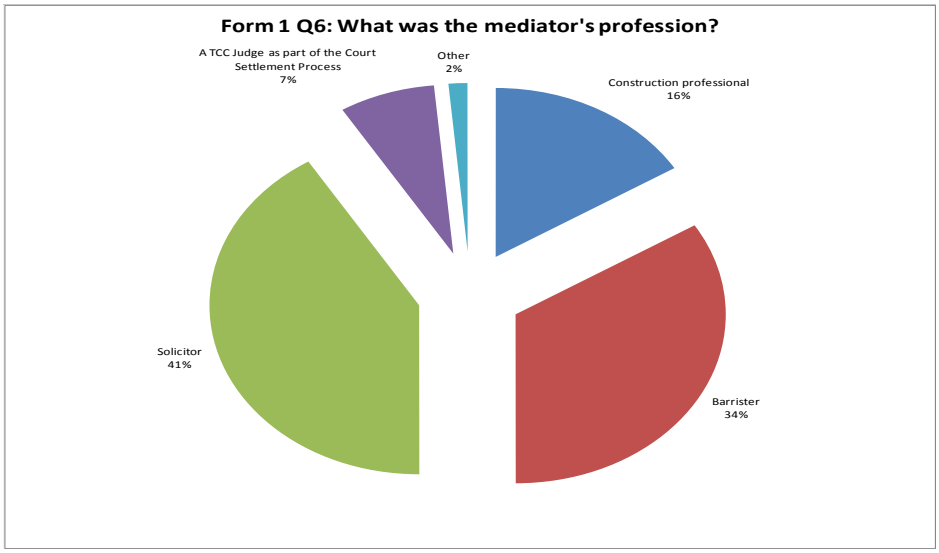


Chart 12: A percentage distribution of the profession of the mediator.

The vast majority of mediations used members of the legal profession as their mediators. The most popular mediators were solicitors who were appointed for 41% of the mediations held. Barristers were appointed as mediators for 34% of mediations. TCC Judges were only used by five respondents suggesting that the popularity of the TCC's Court Settlement Process was limited.

Question 10 - If the mediation had not taken place, is it your opinion that (please tick only one)?

The action would have settled anyway and at about the same time
The action would have settled at a later stage
The action would have been fully contested to judgment
Not answered

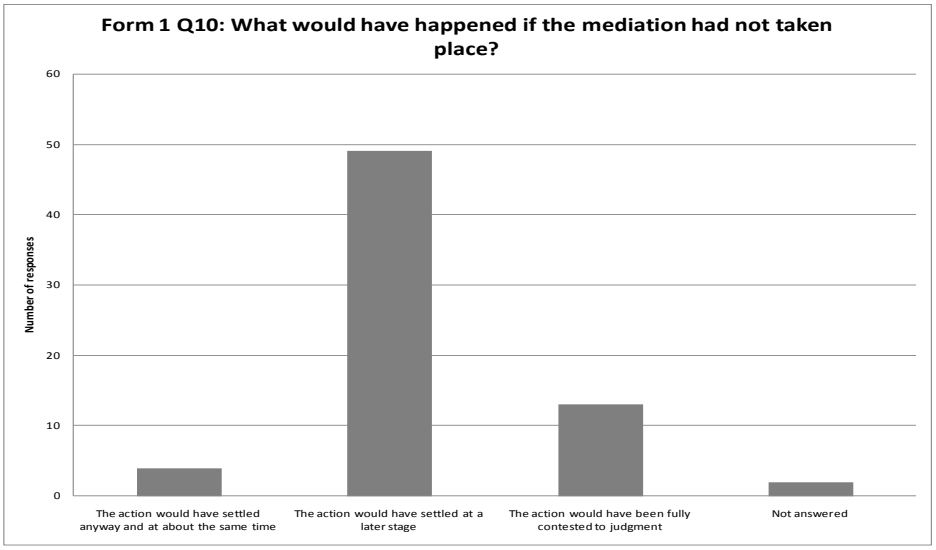


Chart 13: Chart identifying the parties' perception of what would have happened on their case if that matter had not settled in mediation

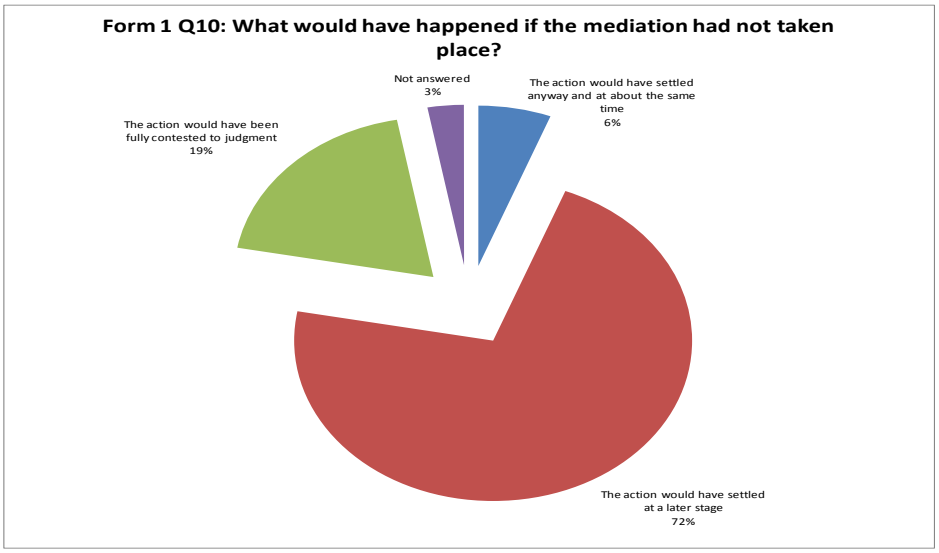


Chart 14: A percentage distribution of the perceived outcome if the mediation had not taken place

Chart 13 and Chart 14 demonstrates that the majority of the respondents (72%) believed that the litigation would have settled at a later stage. However, 19% of the respondents believed their cases would have been fully contested to judgment.

Question 11 - if you have ticked the second or third box for question 10, what costs do you consider were saved by the mediation? In other words what is the difference between the costs which were actually incurred on the mediation and the notional future costs of the litigation which were saved by all parties? Please tick only one.

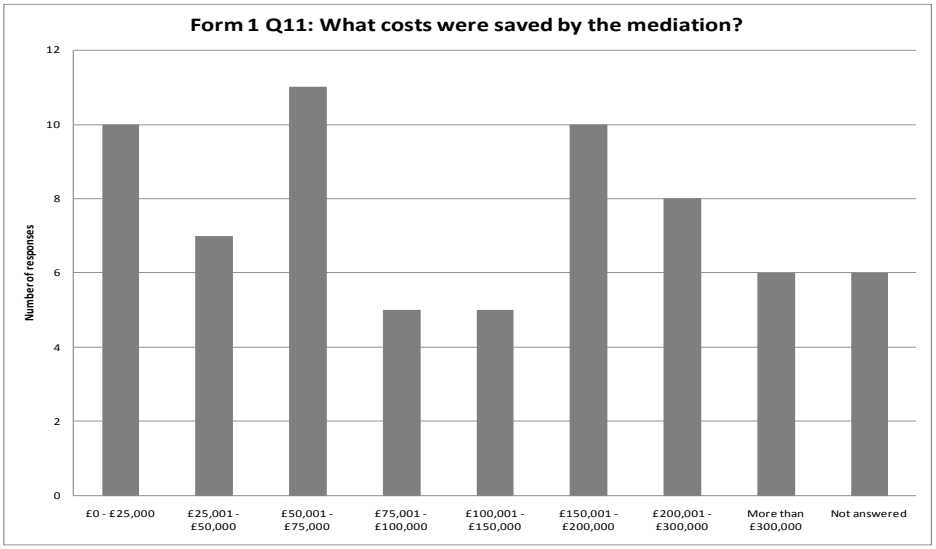


Chart 15: Estimated cost savings due to mediation.

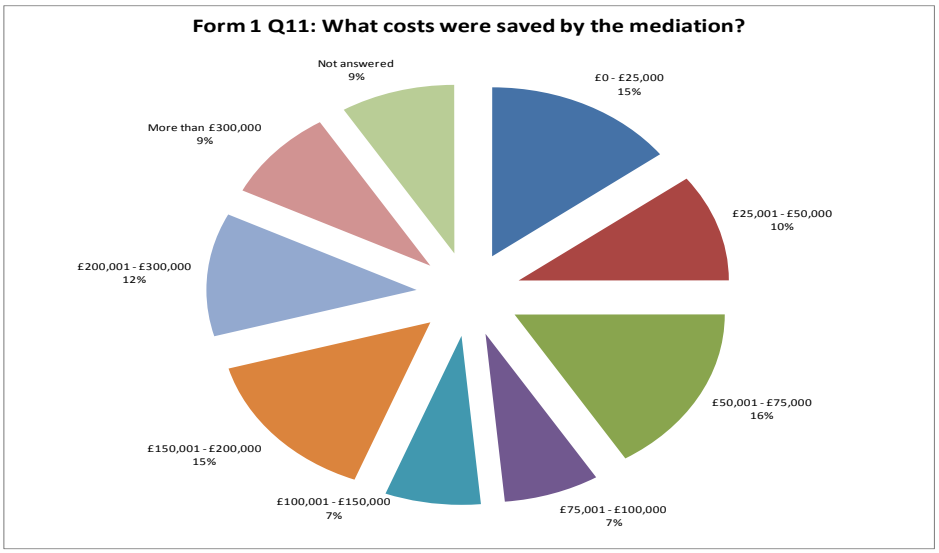


Chart 16: A percentage distribution of the estimated cost savings due to mediation

As can be seen from these charts the cost savings were substantial with more then 9% of respondents estimating they had some over £300,000 in costs as a result of mediation.

Form 1 Analysis

Effectiveness of ADR Method at each stage of the litigation process

By combining the results of Questions 2 and 3, it is possible to identify the method of ADR (negotiation, mediation or other) that the respondents used at different stages in the litigation process. The results are set out in Chart 17 below.

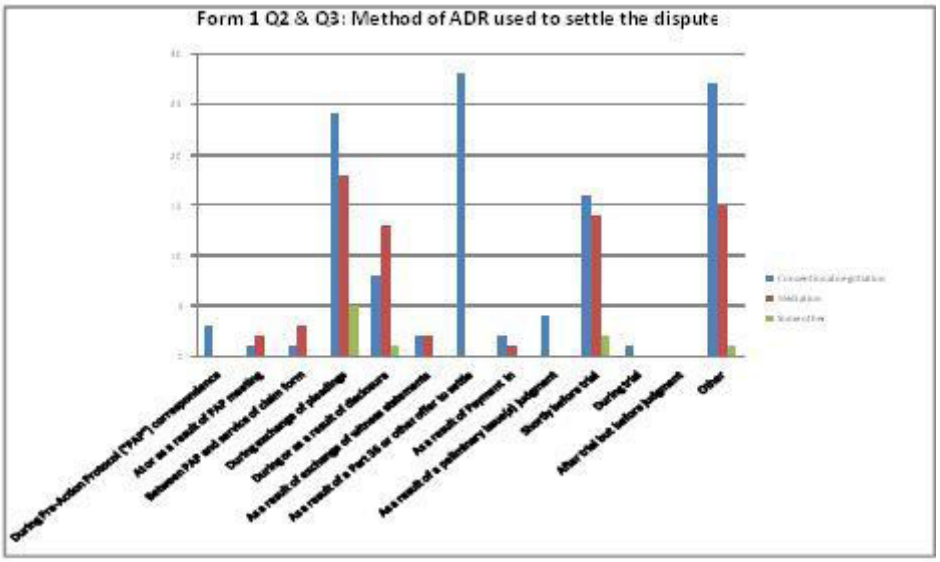


Chart 17: Effectiveness of type of ADR at various stages of litigation

It is perhaps no surprise that negotiation, which was the most frequently used technique, was used throughout the litigation process. However, mediation was the most frequently used dispute resolution process that lead to a settlement in the phase during or just after disclosure.

Interestingly, mediation was more widely used in the early stages of the litigation process than later on, and its use then reduced until shortly before trial. Shortly before trial mediation was almost as popular as negotiation.

Stage in the litigation process that mediation was undertaken

Chart 18 compares the results of Questions 2 and 5. It identifies at which stage mediation was undertaken and also why that mediation was undertaken.

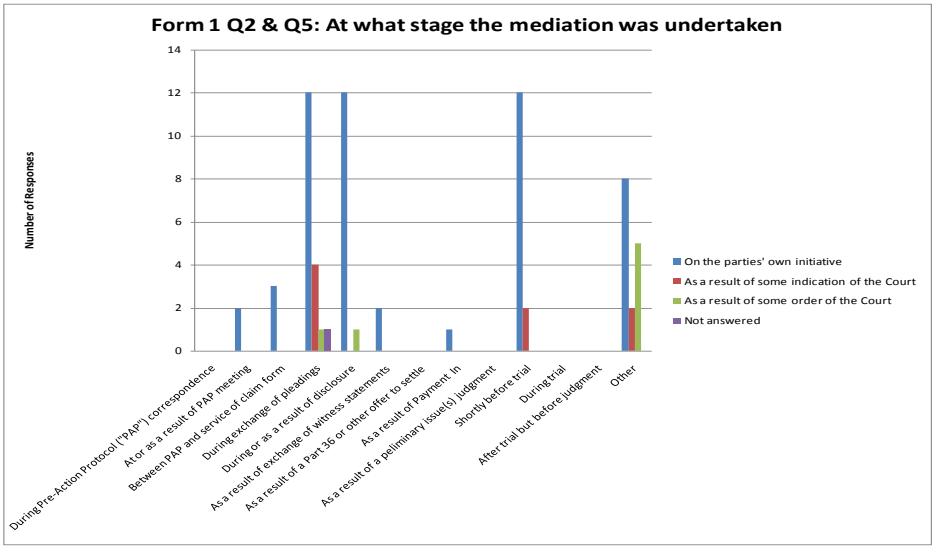


Chart 18: Chart showing which stage in the litigation process mediation was undertaken

There appear to be three key stages at which the parties undertook mediation under their own initiative. These were, namely; during the exchange of pleadings, during or as a result of disclosure and shortly before trial. Mediations undertaken as a result of an indication from the Court and/or an order were undertaken during exchange of pleadings (possibly as a result of a first case management conference), during or as a result of disclosure and shortly before trial (possibly as a result of a pre-trial conference).

Stage of Settlement/Perceived Outcome if no mediation

Chart 19 below compares the results of Questions 2 and 10 in order to ascertain whether there is any link between the stage at which settlement was reached as a result of mediation and the respondents' perceptions of what would have happened if the mediation had not been successful.

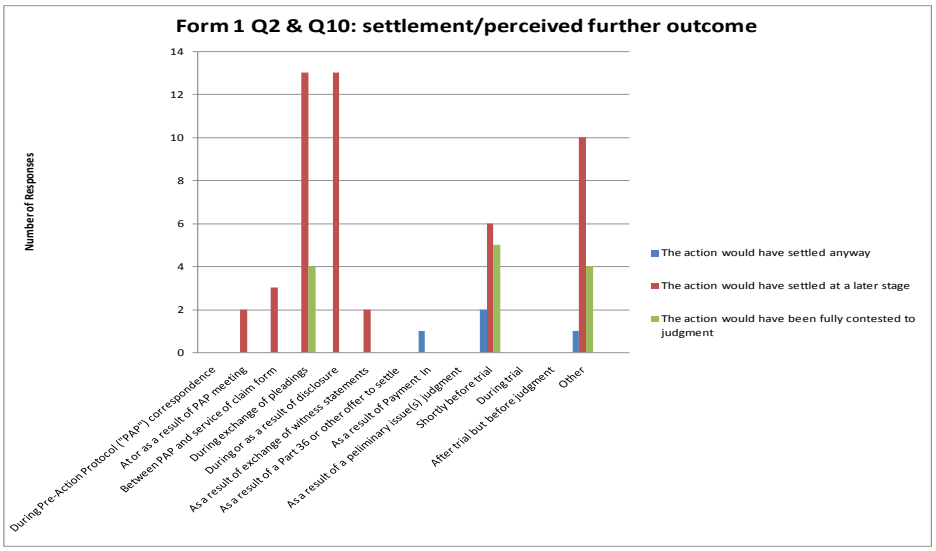


Chart 19: Comparison of the stage settlement was reached as a result of mediation and the parties' perceptions as to what would have happened if mediation had not been successful.

Chart 14 identified that 72% of the responses to Question 10 believed that the action would have settled at a later stage. This perception was most likely to occur during an exchange of pleadings or as a result of disclosure. In contrast the perception that the action would have been fully contested until judgment, if mediation was not successful, was much stronger during the exchange of pleadings and shortly before trial.

Form 2; TCC Claims that progressed to a judgment

Forty responses were received to Form 2, a significantly lower number of completed survey forms than are available for Form 1. This is not surprising given the large number of cases one would expect to settle before reaching trial in the TCC. Clearly, as a result of the lower number of responses to Form 2, the conclusions reached as a result of any analysis are less robust than those reached on the basis of completed Form 1s.

Question 1

What was the nature of the case (please tick all those that apply)?

Charts 20 and 21 set out the type of disputes encountered within each case and the percentage distribution of these types of cases.

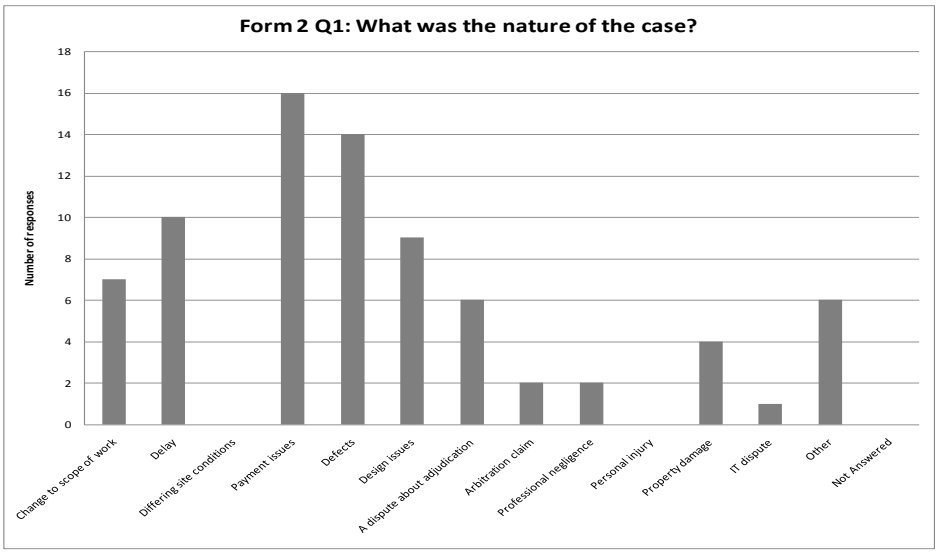


Chart 20: Distribution of the type of the disputes within each case. [73]

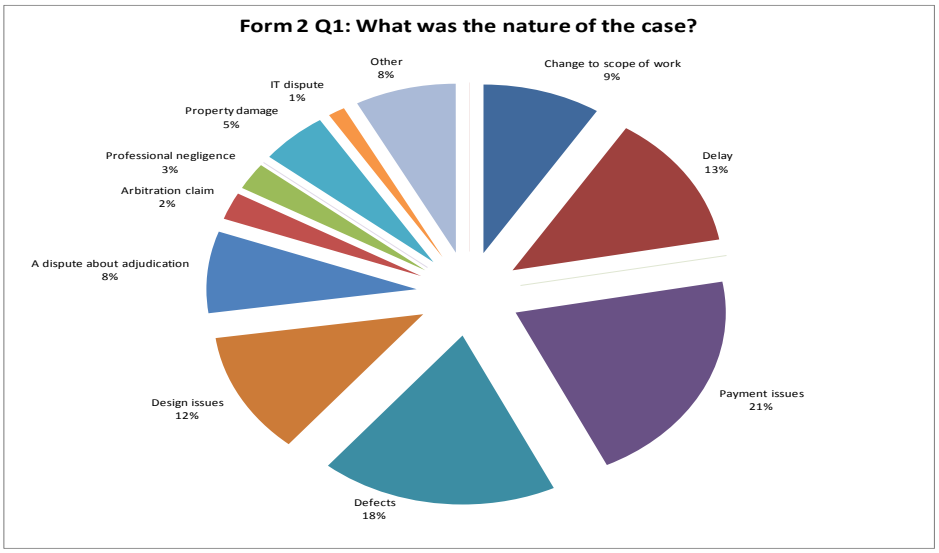


Chart 21: A percentage distribution of the cases in question 1.

As for Form 1, Personal Injury returned no responses and once again, payment issues and defects returned the greatest responses. There is a lower occurrence of professional negligence cases that did not settle prior to Judgment (3 per cent compared to 13 per cent). This would appear to suggest that professional negligence cases are more likely to settle and less likely to go to trial than other types of cases. This is perhaps due to the damage to a reputation that can result if a professional is found to be negligence. The risk is too high to take.

Interestingly the percentage of payment issues that were not settled is higher when compared to the Form 1 results (21 per cent compared to 13 per cent). This may indicate that where a payment issue is not resolved by adjudication it is more likely that the claim will progress to judgment. In contrast the percentage of defects claims remains the same whether or not the claim settled prior to judgment. This may support the argument that less defects claims are dealt with effectively by adjudication.

73. Please note that each number is not reflective of the number of surveys issued or returned as there was the option to 'tick all that apply'. There are 13 (including 'Other') unique outcomes.

Question 2

Were attempts made to resolve the litigation by (please tick all those that apply)?
Conventional Negotiation
Mediation
Some other form of dispute resolution procedure
Not answered

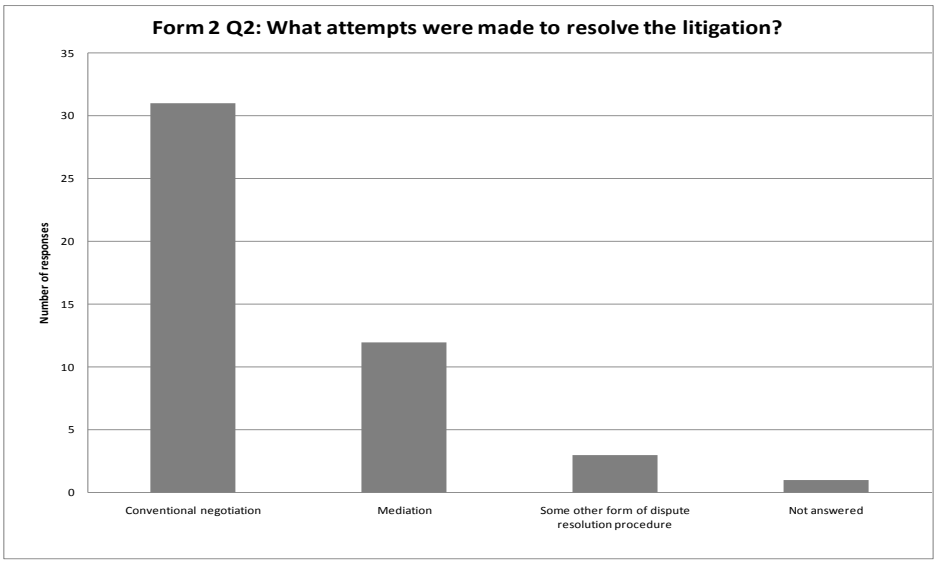


Chart 22: Use of different forms of ADR to resolve the litigation[74]

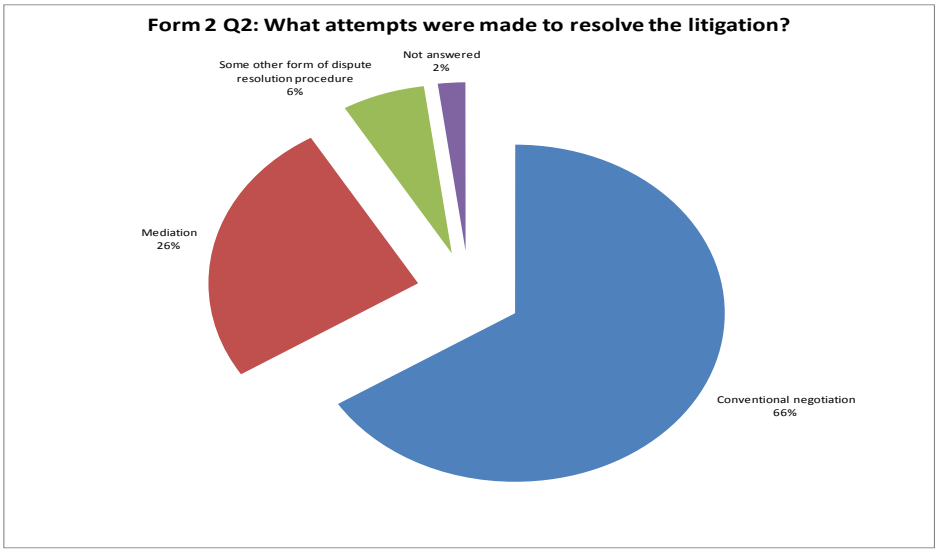


Chart 23: Percentage distribution of methods of ADR used to resolve the litigation.

Charts 22 and 23 showed similar results as for Form 1. Conventional negotiation was the most popular dispute resolution technique. Mediation was attempted in 26% of cases, a slight reduction on Form 1 cases where mediation was used in 25% of cases.

74. The number is not reflective of the number of surveys issued or returned as there was the option to 'tick all that apply'.

Question 4

Was the mediation undertaken:
On the parties' own initiative
As the result of some indication from the Court
As the result of some order from the Court

Charts 24 and 25 show why mediation was undertaken in the small number For 2 cases that did undertake mediation.

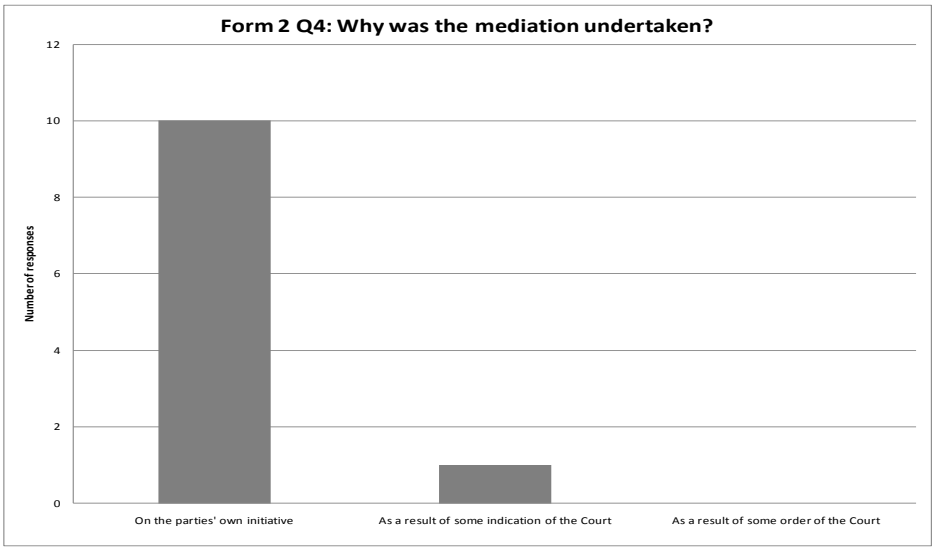


Chart 24: A count identifying why the mediation took place.

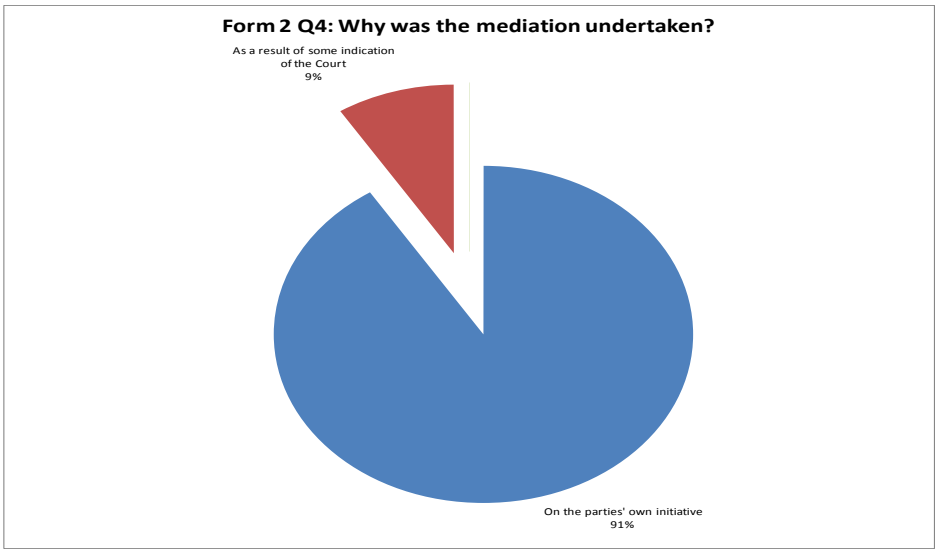


Chart 25: A percentage distribution of why the mediation took place.

As with the Form 1 cases, mediation was generally attempted without the need for the Court to suggest or order it.

Question 5

Was the mediator:
Construction Professional
Barrister
Solicitor
A TCC Judge as part of the Court Settlement Process
Other

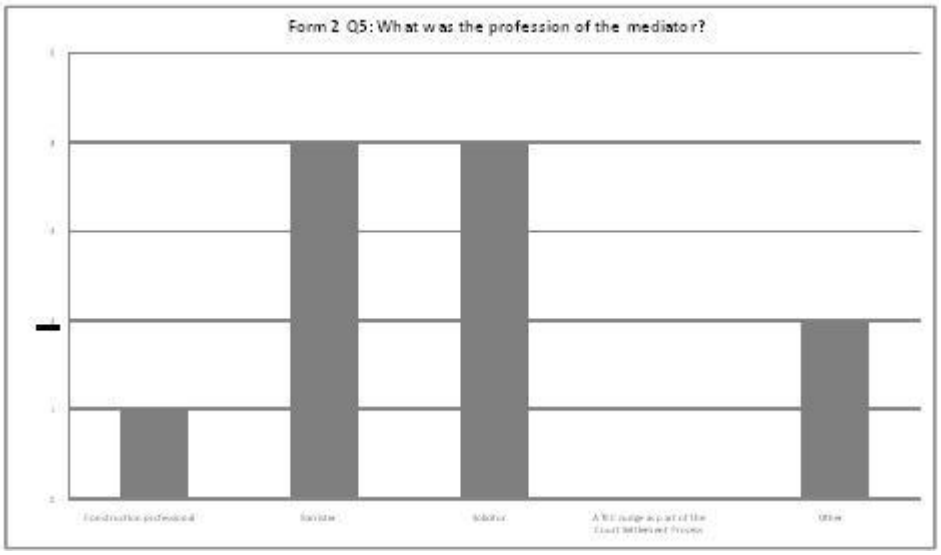


Chart 26: The number of mediators of each type of profession.

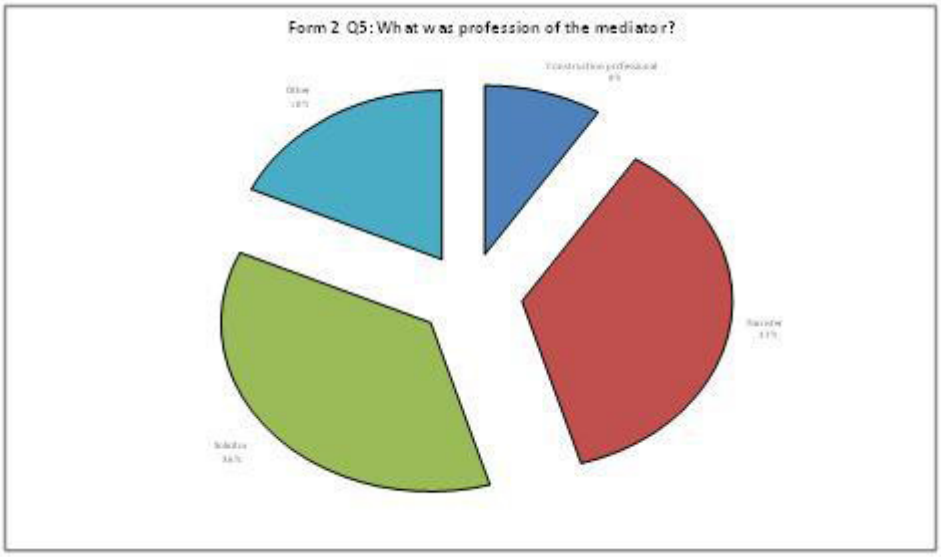


Chart 27: A percentage distribution showing the profession of the mediators used

Once again the most popular mediators are legally qualified with only a small percentage of construction professionals appointed as mediators. There is also a complete absence of TCC judges in the responses to Form 2 suggesting that in the few cases TCC Judges were appointed as mediators the mediations were successful.

Question 10

What was the outcome of the mediation?

Charts 28 and 29 set out what the overall results of the mediations attempted by the Form 2 respondents was.

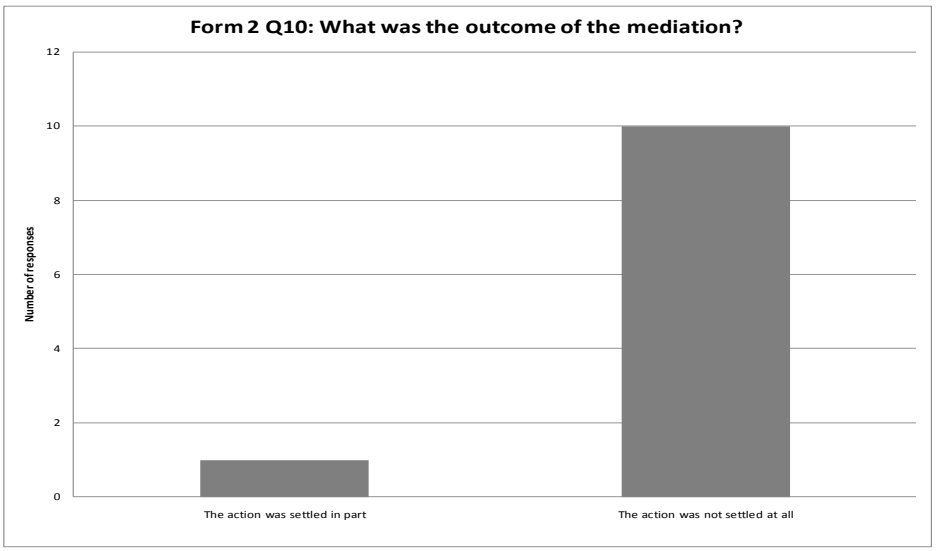


Chart 28: Result of mediations attempted

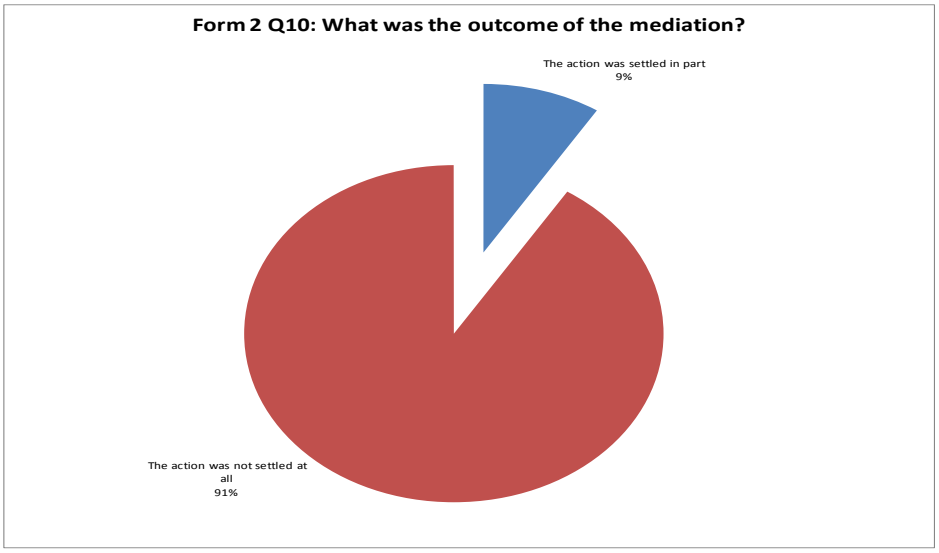


Chart 29: The percentage distribution of results of mediation.

One mediation resulted in a partial settlement. Unsurprisingly the rest did not settle. The one that resulted in a partial settlement went on to judgment, as of course did the rest.

Question 11

Was the mediation (please tick all those that apply)?

Beneficial to the progress of the litigation in terms of narrowing down the issues in dispute
Beneficial to the progress of the litigation in that part settlement was achieved
Beneficial in that you or your client gained a greater understanding of the issues in dispute
A waste of time
A waste of money
A cause of delay to the litigation timetable

Chart 30 sets out the responses of the Form 2 respondents to Question 11 which attempted to establish whether the mediation, albeit unsuccessful, was in some ways a positive experience.

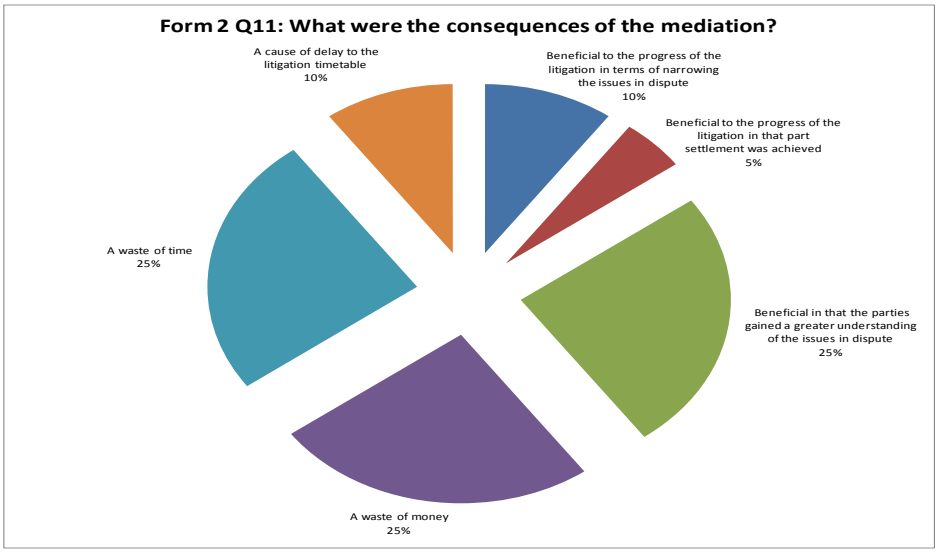


Chart 30: A percentage distribution of the opinions of parties on the failed mediation.

It could be assumed that in all cases where the parties do not settle in mediation and go on to a trial, that the mediation was in hindsight a waste of time and money. However, accordingly to the respondent and Form 2 this is not the case. 25% considered that mediation to have been a waste of time and 25% thought it was a waste of money. Only 10% considered that there was a delay to the time table.

More positively, 25% considered that the mediation was beneficial in that the parties gained a better understanding of the issues in dispute before continuing to trial. Further, 10% actually considered that the mediation narrowed the issues in dispute and so made the litigation more efficient as the parties headed towards the hearing.

Delay to the litigation timetable also appears comparatively rare. This could arguably be due to the practice of judges allowing for mediation in the timetable leading up to trial.

Form 1 and 2 results

Mediators

The names of the mediator used for mediations can not be disclosed for reasons of confidentiality. However, the frequency with which the same mediators were used can be considered.

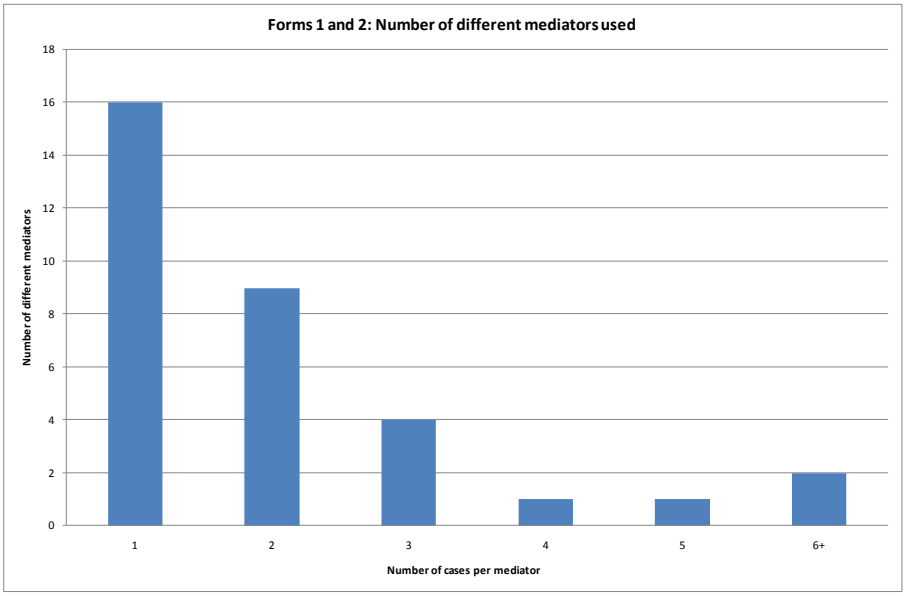


Chart 291: A count of the number of cases per mediator undertook in the study

Whilst the majority of mediators took on just one case a large number of mediators were repeatedly used. One mediator was assigned 14 cases. This suggests a relatively mature market in that the participants are aware of who is perceived as being effective in the market place.

Appointing Bodies

Appointing Bodies for mediators were not used in the majority of cases. Only 20 per cent of respondents who had used mediation had used an appointing body to locate a suitable mediator.[75] Of the appointing bodies used CEDR and In Place Strife were used for five mediations each. The ADR Group was used for three mediations. Consensus, Independent Mediators Limited and the Association of Midlands Mediators were used for one mediation each. In three mediations the appointing body was named as a set of chambers.

Analysis and discussion

Before considering mediation in particular, the nature of the issues in dispute between the parties is of interest. The list of issues set out in Forms 1 and 2 were almost identical to those of an earlier survey carried out in 1997 and reported in 1999.[76] That survey sought to gather data about the types of the dispute resolution technique being used by the construction industry, in particular ADR, before the introduction of adjudication. It is possible to compare the responses, although some adjustments are needed in order

75. This includes mediations that were successful and unsuccessful.
76. See the detailed report in Gould, N., Capper, P., Dixon, D. and Cohen, M. (1999) *Dispute Resolution in the UK Construction Industry*, Thomas Telford, London. See also Gould, N. Cohen, M. (1998) "ADR: Appropriate Dispute Resolution in the U.K. Construction Industry" 17 Civil Justice Quarterly, April, Sweet & Maxwell, London.

to show a meaningful comparison. First, the original survey collated information about negative and positive experiences with dispute resolution, and so the aggregate of those figures is taken in order to compare those figures to the most recent survey. There was of course a different number of respondents, and those responding to the earlier survey were from a broader background. Nonetheless, a comparison of the following six keys issues in dispute can be made:

1 Changes in the scope of works;

2 Project delays;

3 Differing site conditions;

4 Payment issues;

5 Defective work or products; and

6 Design issues.

Adjusting the 1999 survey report figures in order that it is possible to compare an average of 100 of those responses against an average of 100 responses from the most recent survey provides a simple way to compare the results. The results are set out on Chart 32 below.

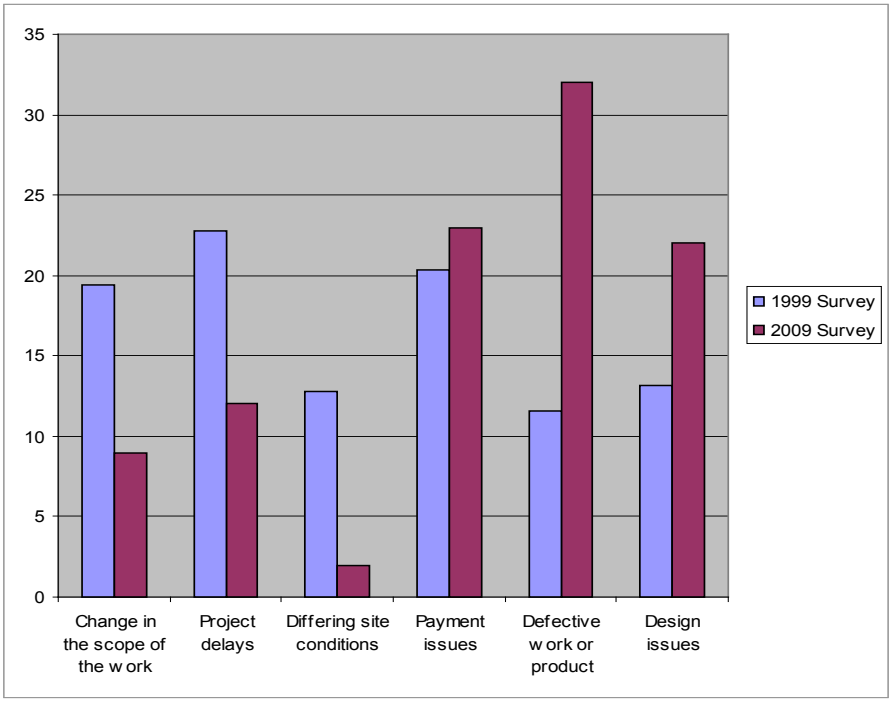


Chart 302: Comparison of types of dispute reported in 1999 Survey v and 2009 Survey

Clearly, the amount of disputes in respect of payment has remained at a similar level whilst it appears that defective work has increased as have the number of disputes relating to design. However, changes in the scope of works have halved as have those disputes dealing with delays while disputes relating to differing site conditions has substantially reduced. Regardless of any abnormalities in the adjustments to the figures it seems clear that the court appears to be dealing with less disputes which relate to changes in the scope of works, project delays and site conditions than those that were generally arising 10 years ago.

One obvious argument is that adjudication, which was introduced shortly after the conclusion of the older survey is now dealing with delays, variations and site condition issues, while defects and designs are more likely to find their way to the court. A line diagram showing perhaps more clearly the difference between the two survey results appears at Chart 33.

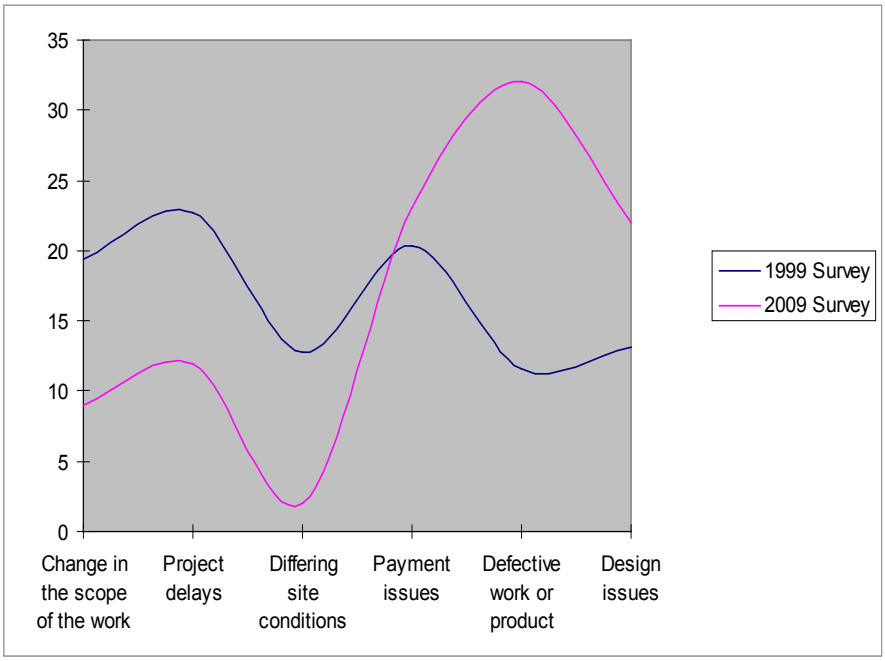


Chart 313

Discussion

Nonetheless, in terms of grouping the most frequently encountered issues referred to the TCC for resolution it was clear that defects (18%) was the most common frequently, closely followed by a second group comprising payment issues (13%), design issues (12%), professional negligence (13%) and property damages (13%). Change to the scope of works, delays and differing site conditions were less likely to become matters that the TCC dealt with.

When taken as a whole, the data derived from the various surveys charting the use of mediation over the years (both court annexed mediation and "free standing" mediation), show the transformation of mediation from a novel idea to its current position as an indispensible tool for construction litigators.

Costs savings?

In terms of cost savings, the King's College Survey supports and adds to the evidence gathered that mediation can result in significant costs savings. The savings attributed to successful mediation in the TCC are higher than those identified in the cost savings identified by the VOL scheme (where 1 in 3 had saved more than £10,000.00). This no doubt reflects the higher value and complexity of those disputes progressing through the TCC than those in the Central London County Court.

These potential cost savings may explain the dramatic turn around from the positive but uninformed attitude shown to mediation in the Fenn & Gould 1994 survey, to the

85% satisfaction rate found in Brooker & Lavers Survey found in 2001. However, even where mediation did not result in a settlement, the King's College Survey indicates that mediation was not always regarded a negative. The mediation was often still viewed as beneficial allowing an element of a dispute to be settled, narrowing the disputes or contributing to a greater understanding of the other side's case generally.

Should mediation be mandatory?

There is, however, little evidence from the surveys on mediation carried out over the years to support the use of mandatory court-annexed mediation. The only evidence for mandatory mediation is found in the Ontario mandatory mediation scheme carried out in the mid-1990s. However, it is noticeable that when the period within which the mandatory mediation must occur was extended, settlement rates increased. This suggests that forcing parties to mediate too early could be detrimental to their chances of settlement. Similarly, settlement rates fell in the voluntary mediation scheme following the case of *Dunnett v Railtrack* which led to a dramatic uptake in the numbers of parties mediating disputes.

The settlement rates within the King's College Survey are high, but it is interesting that the majority of mediations were undertaken at the parties' own initiative and not as a result of court suggestion or court order. It appears that users of the TCC (who are arguably more commercial and sophisticated than their County Court colleagues) see the advantages of mediation where negotiations have failed.

The provisions of the Civil Procedure Rules and case law highlighting the risks to the parties should they not mediate have clearly filtered to practitioners. It is perhaps as a result of this that the TCC Court Settlement Service proved less popular than traditional mediation, which uses mediators unconnected to the TCC itself. Perhaps the maturity of the market is such that the parties prefer now to decide at what stage a mediation should take place, and the identify of the mediator. The TCC service, by its very nature fixes both of those decisions for the parties.

Timing

In terms of the timing for mediation, the parties did not wait until the hearing was imminent before trying and settle the dispute. Successful mediations were mainly carried out during exchange of pleadings or as a result of disclosure. Having said this there were still a substantial number of respondents who mediated shortly before Trial. A timetable leading to the hearing should therefore allow sufficient flexibility for a mediate along the way. Ultimately, it is perhaps best to leave the timing of an attempt to mediation to the parties' advisors especially where they are sophisticated and commercial advisors such as those found in the TCC.

Mediators

The sophistication of those in the TCC 'market' is perhaps demonstrated by the limited use of appointing bodies (only 20% of respondents stated they had used appointing bodies). The repeated use of specific mediators, the appointment of mediators via agreement and the use of legally qualified mediators in the vast majority of cases suggests that regulation of mediators in this area is not fundamental.

Professor Genn's concern about the ethics of mediators and their power, as exercised in the Central London County Court, seems to be unfounded in relation to the TCC. Again this may reflect the greater experience and sophistication of the users of the TCC when compared to the Central London County Court.

Summary and Conclusion

Mediation appears to be a good alternative to litigation where the parties undertake it at their own initiative. Mediation was undertaken on the parties' own initiative in the vast majority of cases. Of the successful mediations only 22% were undertaken as a result of the court suggesting it or due to an order of the court. Even where mediation was unsuccessful, 91% occurred as a result of the parties' own initiative: only 1 out of 11 unsuccessful mediations were ordered by the court. This suggests that the incentives to consider mediation provided for by the Civil Procedure Rules (namely, costs sanctions) are effective; and that those advising the parties to construction disputes now routinely consider mediation to try and bring about a resolution of the dispute.

In addition, where mediation is successful the cost savings attributed to the mediation were significant, providing a real incentive for parties to consider mediation. Only 15% resulted in savings of between zero and £25,000. 76% resulted in cost savings of over £25,000 (this includes 9% of respondents who did not answer this question), with 9% saving over £300,000. The cost savings were generally proportional to the cost of the mediation itself with greater cost savings being found the higher the costs of the mediation were. This may be an indication that high value claims spend more money on the mediation itself presumably because they realise that the potential savings resulting from the mediation will be higher.

The parties themselves generally decided to mediate their disputes at three key stages: as a result of exchanging pleadings; during or as a result of disclosure; and shortly before trial. The results are similar in respect of mediations undertaken as a result of the indication from the court and/or an order; these tended to occur during exchange of pleadings (possibly as a result of a first case management conference), as a result of disclosure and shortly before trial (possibly as a result of a pre-trial conference). Of successful mediations, a higher percentage of respondents believed that the dispute would have progressed to judgment if mediation had not taken place when this was undertaken during exchange of pleadings and shortly before trial. This indicates that mediation may have been comparatively more successful at these stages suggesting that the Courts should seek to encourage mediation at these stages in future cases.

The completed survey forms provide an interesting insight into the types of claim being dealt with by the TCC. The TCC *Annual Report 2006* does not provide an indication of the types of disputes disputes now coming before the court. Our survey indicates that a surprisingly low number of typical mainstream construction disputes (variations, delays and site conditions) now come before the TCC, suggesting that adjudication is successful in settling such disputes promptly. However, the percentage of payment disputes increases from 18% of claims for which settlement was reached prior to judgment to 21% where no settlement was reached prior to judgment. Arguably, payment claims that do not get resolved by adjudication are therefore less likely to settle by negotiation or mediation after the commencement of TCC proceedings, so are more likely to result in a hearing and be resolved by the court giving a judgment.

The number of defects claims being dealt with by the TCC is also high (18% for both Forms 1 and 2), suggesting that the courts are better placed to deal with such claims (which often require extensive expert evidence) than adjudication. Design issues, also technically complex, represented 13% of Form 1 cases and 12% of Form 2 cases.

Where a settlement was reached prior to judgment, the most successful method used was conventional negotiation, not mediation. That said, the majority of respondents who had used mediation said it resulted in a settlement. Even where the mediation did not result in a settlement it was not always viewed negatively.

The vast majority of mediators were legally qualified; only 16% were construction professionals. The uptake for the TCC Court Settlement Process appears very limited; only five respondents stated that they had used it (7.35% of the mediations held), though these five experiences resulted in settlement. Nonetheless, there is clearly a place for this distinct court service.

Unsuccessful mediations used a range of mediators similar to those in successful mediations, so conclusions are hard to draw about what type of mediator is most likely to result in success. What is clear is that the parties generally opt for legally qualified mediators, perhaps diminishing the strength of the arguments for greater regulation of mediators and supporting the market-based approach adopted by the recent EC Mediation Directive 2008/52/EC.

For the vast majority of mediations, the parties were able to agree between them on the mediator to appoint; appointing bodies were only used by 20% of respondents. There was also a tendency to use the same mediators again, suggesting a comparatively mature market, parties' advisors suggesting well-known mediators within the construction disputes field.

Taken as a whole, the data derived from the various surveys charting the use of mediation over the years, show how mediation has transformed from a novel idea into its current position as an indispensable tool for those seeking to resolve construction disputes.

Nicholas Gould
Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London
WC2B 4HN

Appendix 1 - Questionnaire Form 1

Technology and Construction Mediation Survey

A research project by

The Technology and Construction Court and King's College, London

This survey is part of a research project by the Technology and Construction Court and the Centre of Construction Law and Management, King's College London. The goal of this survey is to gather information regarding the use of mediation in TCC disputes and the effectiveness or otherwise of court instigated ADR processes, in particular mediation. The analysis aims to:

1. reveal in what circumstances mediation is an efficacious alternative to litigation;
2. assist the court to determine whether, and at what stage, it should encourage mediation in future cases; and
3. identify which mediation techniques are particularly successful.

You should only disclose information that you and the parties are happy to disclose. It is fully understood that there may be good reasons why you may be unwilling to answer some of the questions.

Your details will be treated in the strictest confidence. Publication of the results of this questionnaire will be restricted to statistical data and analysis based upon the responses received.

Please insert Claim Number (clearly) ☐ **F1**

1. What was the nature of the case (please tick all those that apply)?

- ❑ Change to scope of work
- ❑ Delay
- ❑ Differing site conditions
- ❑ Payment issues
- ❑ Defects
- ❑ Design issues
- ❑ Other (please specify)
- ❑ A dispute about adjudication
- ❑ Arbitration claim
- ❑ Professional negligence
- ❑ Personal injury
- ❑ Property damage
- ❑ IT dispute

2. A what stage did the litigation settle or discontinue (please tick only one)?

- ❑ During Pre-Action Protocol ("PAP") correspondence
- ❑ At or as a result of PAP meeting
- ❑ Between PAP and service of claim form
- ❑ During exchange of pleadings
- ❑ During or as a result of disclosure
- ❑ As a result of exchange of witness statements
- ❑ Other (please specify)
- ❑ As a result of a Part 36 or other offer to settle
- ❑ As a result of a Payment In
- ❑ As a result of a preliminary issue(s) judgment
- ❑ Shortly before trial
- ❑ During trial
- ❑ After trial but before judgment

3. Was the settlement reached or the matter discontinued following (please tick only one)?

- ❑ conventional negotiation
- ❑ mediation
- ❑ some other (if so what, see 4 below) form of dispute resolution procedure

4. If some other procedure please briefly describe:

If the answer to question 3 was "mediation" please continue. If not please go to Personal Details.

5. Was the mediation undertaken:

- ❑ on the parties' own initiative
- ❑ as a result of some (if so what) indication of the Court
- ❑ as a result of some (if so what) order of the Court

6. Was the mediator a:

- ❑ Construction Professional ❑ Barrister ❑ Solicitor
- ❑ A TCC Judge as part of the Court Settlement Process
- ❑ Other (please specify) _____

7. Please state the name of the mediator: _____

8. Please state name of Nominating Body: _____

9. What were the approximate costs (in the lead up and on the day) of the mediation in respect of:

the mediator (overall costs)	£
room hire for the mediation	£
your firm's costs	£
your client	£
any other costs, e.g. experts	£

10. If the mediation had not taken place, is it your opinion that (please tick only one):

- ❑ the action would have settled anyway and at about the same time
- ❑ the action would have settled at a later stage
- ❑ the action would have been fully contested to judgment

11. If you have ticked the second or third box for question 10, what costs do you consider were saved by the mediation? In other words what is the difference between the costs which were actually incurred on the mediation and the notional future costs of the litigation which were saved by <u>all</u> parties? Please tick only one.

- ❑ £0 - £25,000
- ❑ £25,001 - £50,000
- ❑ £50,001 - £75,000
- ❑ £75,001 – 100,000
- ❑ £100,001 - £150,000
- ❑ £150,001 - £200,000
- ❑ £200,001 - £300,000
- ❑ More than £300,000

Personal details (optional). You may attach your business card here instead.

Name _____
Firm's name _____

Address _____
Phone _____
Email _____

Thank you for completing this survey

Please **return** this questionnaire to (and address any questions to) **Aaron Hudson-Tyreman**, at The Centre of Construction Law and Management, King's College London, The Old Watch House, Strand, London, WC2A 2LS or fax to 0207 872 0210.

Do you wish to receive a copy of the results (please provide contact details) YES ☐
NO ☐

Appendix 2 – Questionnaire Form 2

Technology and Construction Mediation Survey

A research project by

The Technology and Construction Court and King's College, London

This survey is part of a research project by the Technology and Construction Court and the Centre of Construction Law and Management, King's College London. The goal of this survey is to gather information regarding the use of mediation in TCC disputes and the effectiveness or otherwise of court instigated ADR processes, in particular mediation. The analysis aims to:

1. reveal in what circumstances mediation is an efficacious alternative to litigation;
2. assist the court to determine whether, and at what stage, it should encourage mediation in future cases; and
3. identify which mediation techniques are particularly successful.

You should only disclose information that you and the parties are happy to disclose. It is fully understood that there may be good reasons why you may be unwilling to answer some of the questions.

Your details will be treated in the strictest confidence. Publication of the results of this questionnaire will be restricted to statistical data and analysis based upon the responses received.

Please insert Claim Number (clearly) _____ **F2**

1. What was the nature of the case (please tick all those that apply)?

- ❑ Change to scope of work
- ❑ Delay
- ❑ Differing site conditions
- ❑ Payment issues
- ❑ Defects
- ❑ Design issues
- ❑ Other (please specify)

- ❑ A dispute about adjudication
- ❑ Arbitration claim
- ❑ Professional negligence
- ❑ Personal injury
- ❑ Property damage
- ❑ IT dispute

_____

2. Were attempts made to resolve the litigation by (please tick all those that apply)?

- ❑ conventional negotiation
- ❑ mediation
- ❑ some other (if so what, see 3 below) form of dispute resolution procedure

3. If some other procedure please briefly describe:

_____

_____

If the answer to question 2 was "mediation" but that mediation did not result in a complete settlement please continue. If not please go to Personal Details.

4. Was the mediation undertaken:

- ❑ on the parties' own initiative
- ❑ as a result of some (if so what) indication of the Court
- ❑ as a result of some (if so what) order of the Court

5. Was the mediator a:

- ❑ Construction Professional
- ❑ Barrister
- ❑ Solicitor
- ❑ A TCC Judge as part of the Court Settlement Process
- ❑ Other (please specify) _____

6. Please state the name of the mediator: _____

7. Did the parties agree on the identity of the mediator? YES ☐ NO ☐

8. Please state name of Nominating Body (if applicable): _____

9. What were the approximate costs (in the lead up and on the day) of the mediation in respect of:

The mediator (overall costs)	£
room hire for the mediation	£
your firm's costs	£
your client	£
any other costs, e.g. experts	£

10. What was the outcome of the mediation?

- ❑ the action was settled in part
- ❑ the action was not settled at all

11. Was the mediation (please tick all those that apply)?

- ❑ beneficial to the progress of the litigation in terms of narrowing the issues in dispute
- ❑ beneficial to the progress of the litigation in that part settlement was achieved
- ❑ beneficial in that your or your client gained a greater understanding of the issues in dispute
- ❑ a waste of money
- ❑ a waste of time
- ❑ a cause of delay to the litigation timetable.

12. If you ticked the last box for question 11 then, if known, please state length of delay:
Years: _____ Months: _____ Days: _____

Personal details (optional). You may attach your business card here instead.

Name _____
Firm's name _____

Address _____
Phone _____
Email _____

Thank you for completing this survey

Please **return** this questionnaire to (and address any questions to) **Aaron Hudson-Tyreman**, at The Centre of Construction Law and Management, King's College London, The Old Watch House, Strand, London, WC2A 2LS or fax to 0207 872 0210.

Do you wish to receive a copy of the results (please provide contact details) YES ☐ NO ☐