THE USE OF MEDIATION IN CONSTRUCTION DISPUTES

A research project conducted by

The Centre of Construction Law and Dispute Resolution,
King's College London and
The Technology and Construction Court

Summary Report of the Final Results

7 May 2009

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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 is available for use in the construction industry. Arbitration is sometimes still the default dispute resolution procedure, perhaps because it was originally included as the only procedure in the most popular standard forms of contract.

Adjudication is now well established within the construction industry, and in other common law jurisdictions.[2] Litigation of construction-related disputes has received special attention from the courts, originally with the establishment of the Official Referees, in 1998 renamed the Technology and Construction Court (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.[3] A large number of mediation experiences were reported, affirming the wide use of mediation within those sectors.

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1 See eg the dispute escalation clause in *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm).

2 Adjudication in England, Wales and Scotland was introduced in May 1998 on implementation of Part II of the Housing Grants, Construction and Regeneration Act 1996. Its use has been reasonably well documented; the number of appointments made by the adjudicator nominating bodies demonstrates its wide use, as do the regular surveys produced by the Adjudication Reporting Centre, based at Glasgow Caledonian University (www.adjudication.gcal.ac.uk). Other common law jurisdictions where adjudication has been introduced are Australia (now all States and the Northern Territory), Singapore and New Zealand.

3 Stipanowich, T. (1994) *What's Hot and What's Not*, DART Conference Proceedings, Lexington KY (USA), 16-19 October.

In the UK, Fenn, and then Fenn & Gould,[4] reported on a survey of mediation in the English construction industry, 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.[5] 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; 80% had either used it or proposed it in respect of cases with which they were involved.[6]

Data is also available in respect of court-supported mediation. In the UK, the Central London County Court undertook a pilot mediation scheme, commencing in April 1996. This was initiated as a result of Lord Woolf's *Access to Justice* report.[7] Parties to litigation in that court were invited to attempt mediation on a voluntary basis (as a result, it was known as the VOL Scheme). The take-up was low, but nonetheless interesting.[8] As a result of this scheme, an automatic referral to a mediation pilot project was undertaken for a 12-month period from April 2004. 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: as high as 69% of cases initially referred in May 2004, but dropping to 37% for cases referred in March 2005.[9]

Court-annexed mediation

England is not the only country to link mediation to its court services. The practice has been much more widespread in North America. In Canada, the court-annexed ADR programme known as the Mandatory Mediation (Rule 24(1)) Pilot Project was initiated in Ottawa and Toronto in January 1999. The research available shows that litigants consider that mediation had a positive impact on the litigation and reduced costs.[10]

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4 Fenn, P. & Gould, N. (1994) *Dispute resolution in the UK construction industry*, DART Conference Proceedings, Lexington, KY (USA), 16-19 Oct.

5 Gould, N. and Cohen, M. (1998) 'ADR: Appropriate dispute resolution in the UK construction industry', 17 Civil Justice Quarterly 103-127.

6 Lavers, A. and Brooker, P. (2001) 'Commercial and Construction ADR: Lawyers' Attitudes and Experience', 20 Civil Justice Quarterly 327-347.

7 Lord Woolf, *Access to Justice*, Interim Report (HMSO, June 1995) and Final Report (2 vols) (HMSO, July 1996).

8 For further details see Hazel Genn, *Twisting arms: court referred and court linked mediation under judicial pressure*, Ministry of Justice Research Series 1/07 (May 2007), downloadable from www.justice.gov.uk.

9 See Professor Genn's report n 8.

10 Robert G. Hann and C. Baar, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1) Final Report: The First 23 Months* (Queen's Printer, Alberta, 2001). See also Sue Prince (2007), 'Mandatory mediation: the Ontario experience', 26 Civil Justice Quarterly 79, 83; and the Ontario *Civil Justice Review*, Supplemental and Final Report (The Queen's Printer, Toronto, 1996).

In the TCC in the UK, HHJ Toulmin CMG QC asked whether judges in the TCC might be able to provide an ADR service.[11] As a result of these ideas, a Court Settlement Service began early in 2005. The process is confidential, voluntary and non-binding. Under it, the parties to litigation are assisted by a judge – the TCC case management judge – to reach an amicable settlement. 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.

New research: aims and purposes

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 TCC. Working together, it was possible to survey representatives of parties to litigation in that court.[12]

Parties to litigation in the TCC provide a good opportunity for a survey of a group with similar issues and interests. They have all commenced formal proceedings in the High Court in relation to 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, so will be incurring legal fees and taking the risks of paying the opposing parties' legal fees. The obvious questions are:

- 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?

This group can be divided into two sub-groups: first, those that settled their dispute after commencement, but before judgment; and second, the (no doubt smaller) group who progressed all the way to trial, but nonetheless might have been involved in a mediation that did not resolve all or any parts of the dispute.

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

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[11] See the TCC *Annual Report for the Year Ending 30 September 2006*, downloadable from www.hmcourts-service.gov.uk/infoabout/tcc/annualreports.htm.

[12] The concept was developed jointly by Nicholas Gould and Rupert Jackson J (as he was then) in 2005.

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

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

3 To identify which mediation techniques are particularly successful.

The objective was to collect meaningful data that could 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 to assist it in the efficient management of cases.

Methodology

The two different questionnaire survey forms were designed for respondents in the two sub-groups, but also to reflect the characteristics of TCC litigation processes. The commonality between the two forms was to aid analysis and comparison between the two sub-groups, whilst allowing specific responses to reflect the peculiarities of those that had settled during litigation and those that had pursued litigation to judgment. It was vital that the second sub-group should be able to comment upon any attempts to settle that had not been successful.

Three TCC courts participated in the survey: London,[13] Birmingham[14] and Bristol.[15] Between 1 June 2006 and 31 May 2008, these courts issued questionnaire survey forms to respondents. All the respondents had been involved in TCC litigation, receiving 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 whom were familiar with TCC litigation. Form 1 was issued where a case had settled;[16] Form 2 where judgment had been given.[17] Both forms asked about the nature of the issues in dispute, whether mediation had been used, the form that mediation took and also the stage in the litigation process at which mediation occurred.

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 this had not been the case, although they might have held a mediation before which did not

[13] The TCC at St. Dunstan's House issued the forms. This court deals with a higher volume of High Court TCC cases than any other TCC. The Central London Civil Justice Centre did not participate in the survey, but deals only with only approximately 75 County Court TCC cases each year.
[14] The Birmingham TCC deals with both High Court and County Court TCC cases.
[15] The Bristol TCC deals with both High Court and County Court TCC cases.
[16] Form 1 is attached as Appendix 1.
[17] Form 2 is attached as Appendix 2.

result in the case settling. However, those that progressed to a judgment could have attempted a mediation before the commencement of litigation.

The completed survey forms were then returned to the Centre of Construction Law and Dispute Resolution at King's College London, where they were collated.[18]

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, so statistics are not directly available for the same period as covered by the survey. It is possible nonetheless to estimate from the TCC's two most recent Annual Reports (2006 and 2007)[19] the approximate number of cases commenced during this period. These suggest that approximately 1,136 cases were commenced in the three courts during the survey period.[20] 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 necessarily reached a reportable conclusion for the purposes of the survey. For example, a claim form might be issued, but not pursued; there might be judgment in default of acknowledgment of service; or the parties might simply have resolved their dispute without taking any further action. In this last case, there must of course have been some level of negotiation.

A further characteristic of the distinction between the number of cases identified in the TCC's *Annual Reports* and the number of cases to which the survey responses relate derives from the timing. The TCC counts cases commenced in the court; but 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: typically now only 12 months. However, some cases will take longer, quite simply because the parties and those involved in the case require the time. On the other hand, enforcement of an adjudicator's decision can be dealt with extremely quickly. Clearly, not all the cases commenced in a 12-month period will be neatly resolved within the same period. Some will be settled within a very short period of weeks, while others may take many years. So the survey period, covering cases that had settled or received judgment, included ones where the original action in the TCC had been begun many years before the survey started.

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18 Aaron Hudson-Tyreman was engaged as 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 CIArb.

19 For TCC *Annual Reports*, see n 11.

20 The TCC's 2006 *Annual Report* n 11 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 2007 *Annual Report* 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 30.09.2006. The analysis therefore assumes that the same number of cases were commenced in Bristol in the year ending 30.09.2006 as in the year ending 30.09.2007 (ie 18).

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 two parties for each case, so during the survey period there were at least 1,600 parties (claimants, defendants and third parties) progressing through the TCC.

The number of responses received was 261, 221 responses to Form 1 and 40 to Form 2. The number of each category of response is in proportion to the size of each sub-group. More than 90% of TCC cases settle before trial, so there were far more potential respondents to Form 1 than those for Form 2. In respect of the Form 1 responses, 25 were discounted as they had been spoiled or incorrectly completed.[21] This resulted in a very good response rate of almost 17%, against a projected population of around 1,600 (there must in fact have been more than 1,600, because some of the matters would have more than two parties).

Survey results I

Form 1: TCC claims that settled

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

Q1	The nature of the case
Q2	The stage at which the action was resolved
Q3/4	How settlement was reached
Q5	Why mediation was undertaken
Q6/7/8	The mediator's profession, identity and nominating body if applicable
Q9	Approximate costs of the mediation
Q10	What would have happened without any mediation
Q11	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 Q4, 7, 8 and 9 were not as useful as the responses received to the other questions.

Q1 – The nature of the case

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

Q1 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

[21] 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.

applicable and a default option of 'other', together with a request that they specify what 'other' constituted, was also provided for.

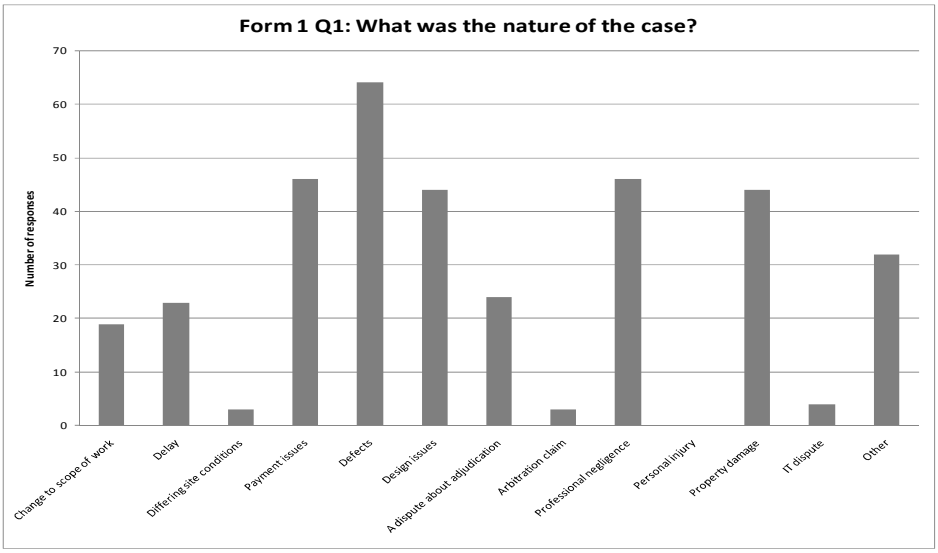

Chart 1: Numerical distribution according to the subject-matter of each case[22]

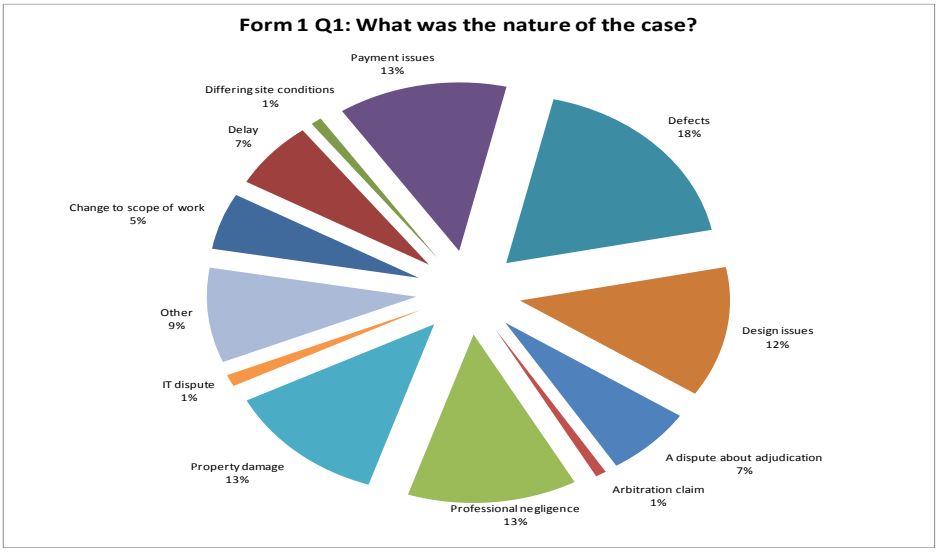

Chart 2: Percentage distribution of the cases in Q1

The responses to Q1 can be grouped into five categories, reflecting which type of case occurred most frequently. Group 1 represents the most common type of dispute and Group 5 the least common:

Group 1	Group 2	Group 3	Group 4	Group 5
Defects	Payment issues	Change to scope of work	Differing site conditions	Personal injury

22 The number against each type of case does not reflect the total number of surveys issued or returned, as some respondents used the 'tick all that apply' option

	Design issues	Delay	Arbitration claim	
	Professional negligence	A dispute about adjudication	IT dispute	
	Property damage			

Table 1: Frequency of different categories of case

The proportion of disputes relating to payment issues (13%) is lower than might perhaps be expected, given the frequency within which these issues are often encountered within the construction industry. This may demonstrate the impact of adjudication in reducing the number of payment disputes that reach the TCC. The highest proportion (18%) is for defects claims, which are by their nature often complex and involve the use of expert evidence.

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

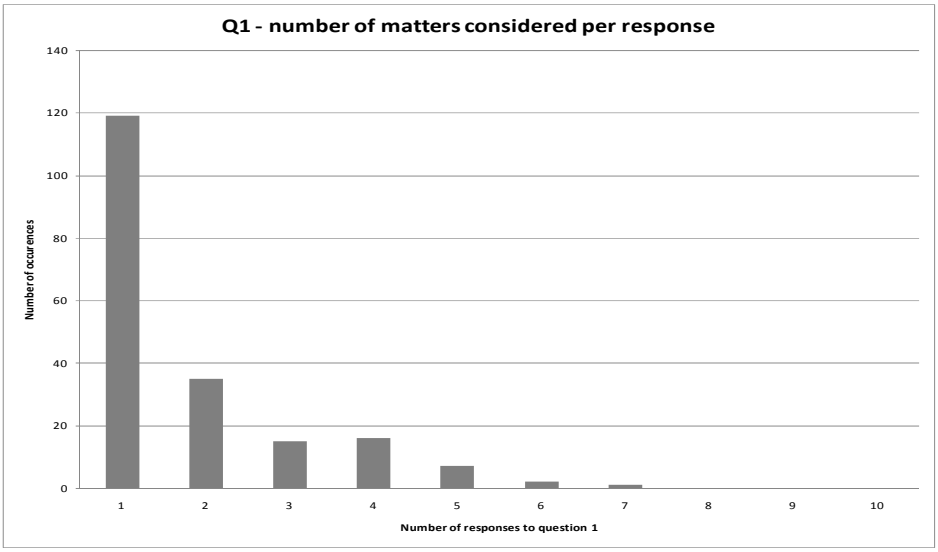

Chart 3: Number of matters outlined in responses to Q1

The majority of responses reported only one issue in the dispute. However, a significant proportion involved cases with two issues.

Q2 - The stage at which the action was resolved

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

Q2 sought to ascertain the stage at which the litigation settled or was discontinued, by reference to 13 categories, of which 12 referred to specific stages of the litigation and one was an '*other*' category. Respondents were asked to specify what '*other*' consisted of, where it applied.

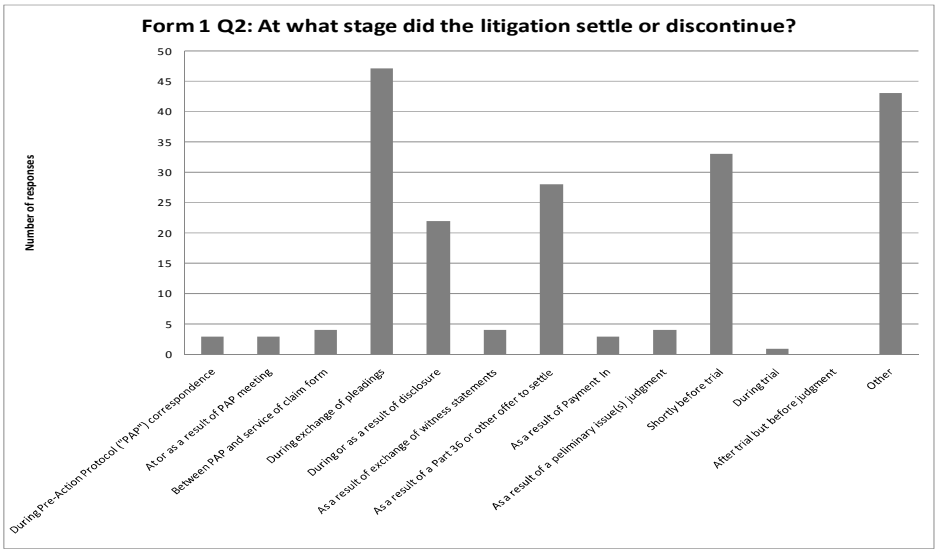

Chart 4: At what stage most of the litigation settled or was discontinued

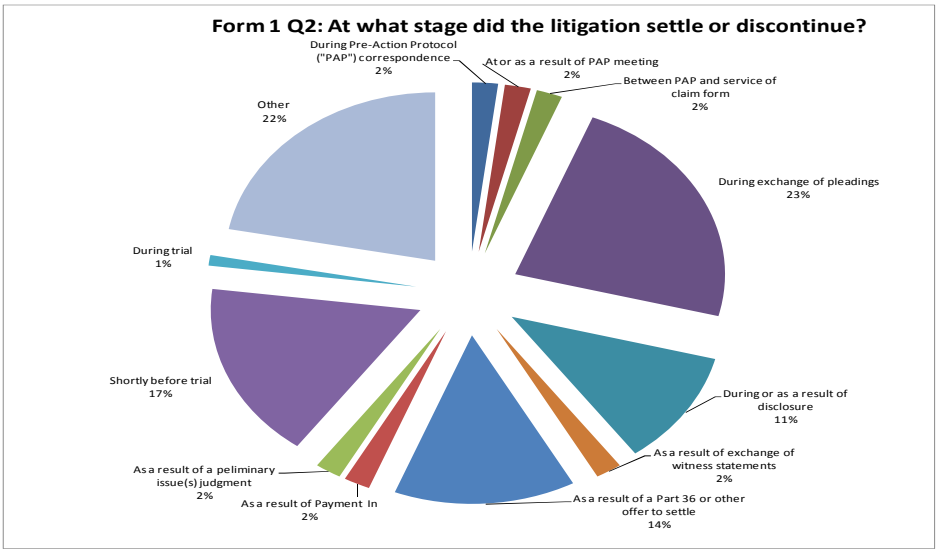

Chart 5: Percentage distribution of the responses giving the stage at which the litigation settled

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

- 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:

- After pleadings/at or around time of first Case Management Conference

- During drafting or, or as a result of exchanging, expert reports
- After disclosure.

Chart 7 incorporates these three stages into a chart showing all the stages at which the litigation was most likely to settle or discontinue. It appears from this that the drafting and/or exchanging of expert reports seem to be more significant events than the exchange of witness statements in encouraging mediation in construction disputes.

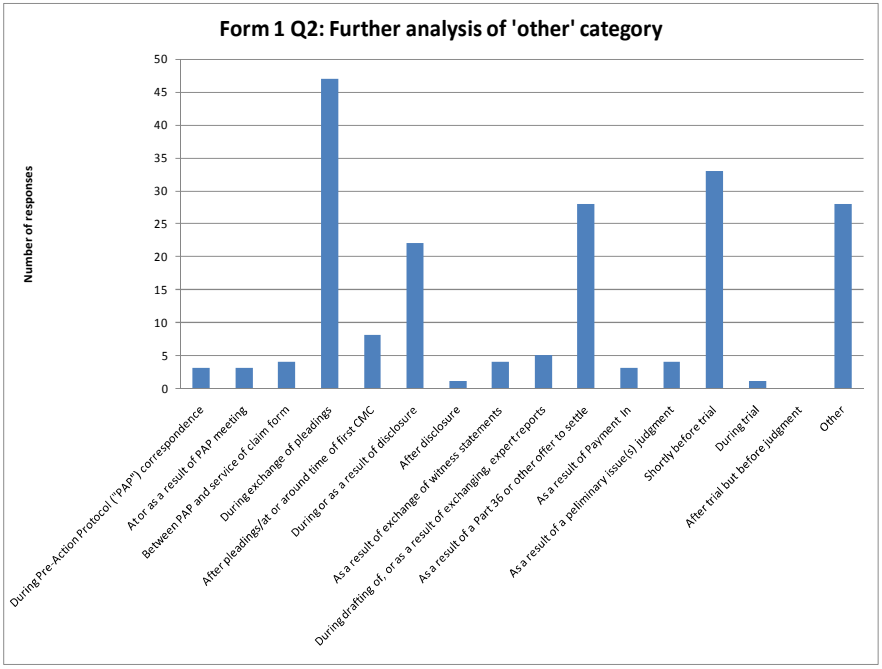

Chart 6: Form 1, Q2, outlining at what stage the litigation was settled or discontinued

Questions 3/4 – How settlement was reached

> *Q3: Was the settlement reached or the matter discontinued following … (please tick only one)?*

Q3 asked respondents to identify whether the case was concluded as a result of mediation, negotiation or some other method of dispute resolution. Respondents were asked to specify what was meant by '*other*' in Q4 (as to which, see below).

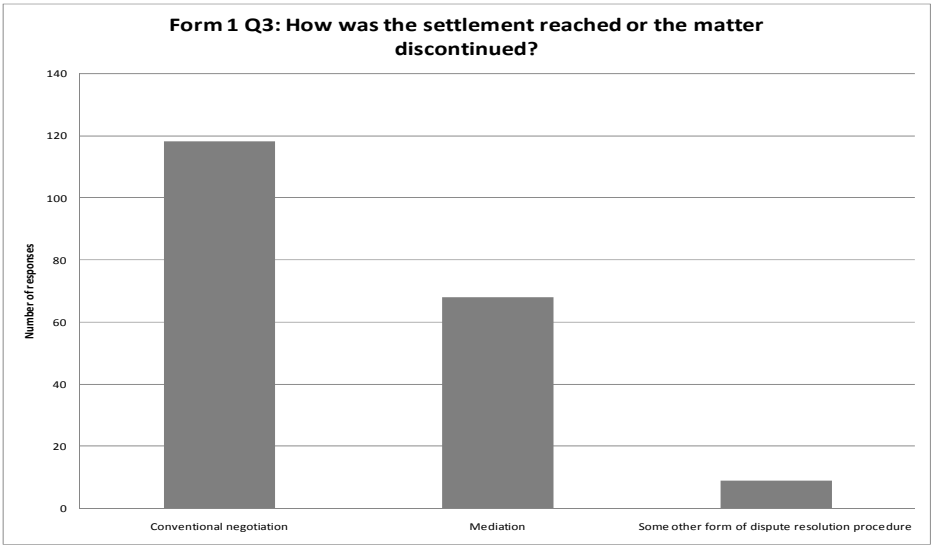

Chart 7: The most frequent methods whereby settlement was reached or the matter discontinued

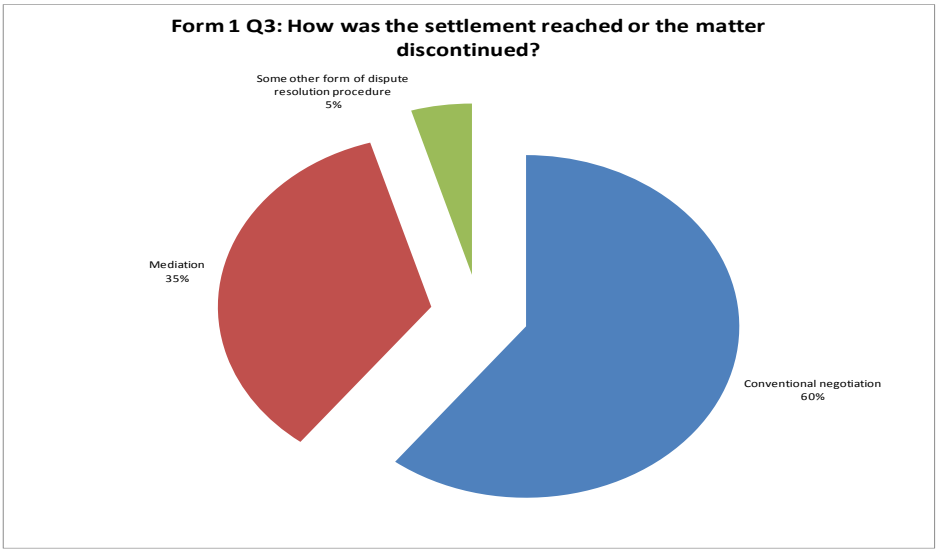

Chart 8: Percentage distribution of the methods whereby settlement was reached or the matter discontinued

Chart 7 and Chart 8 show that the most popular method of bringing a settlement about was through conventional negotiation (60% of the responses). This was followed by mediation (35%, or 68 responses). These responses was then broken down further based on the information supplied by the remaining Form 1 questions.

Q4: If some other procedure, please briefly describe

The responses were as follows (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/Pre-Action Protocol 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.)

Q5 – 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?

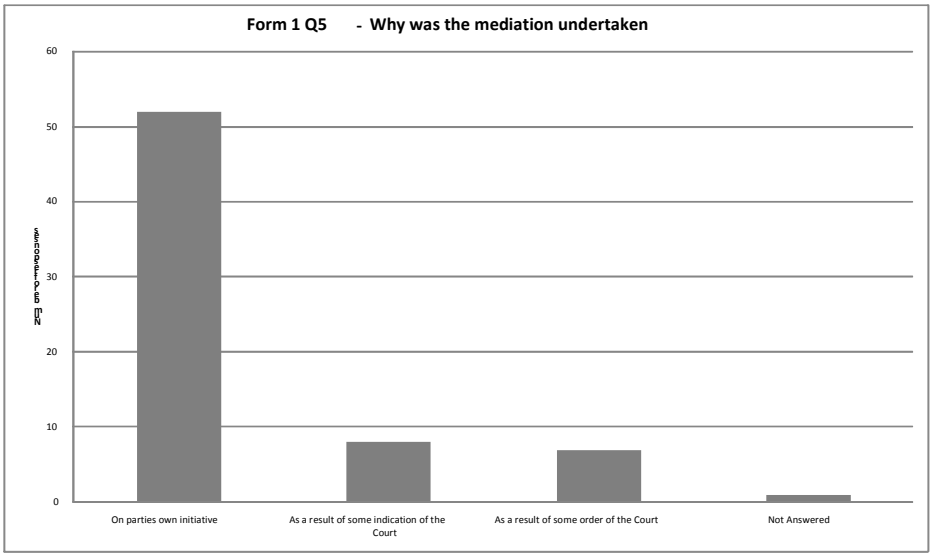

Chart 9: Why was mediation undertaken?

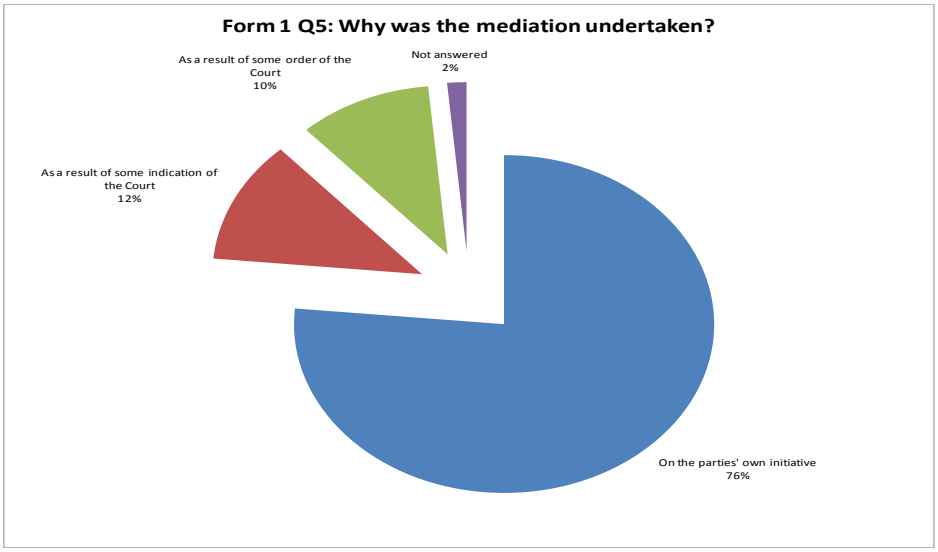

Chart 10: Percentage distribution outlining how mediation was undertaken

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

Q6/7/8 – The mediator's profession, identity and nominating body if applicable

Q6 - Was the mediator a:

Construction professional?

TCC Judge as part of the Court Settlement Process?

Barrister?

Solicitor?

Other (please specify)?

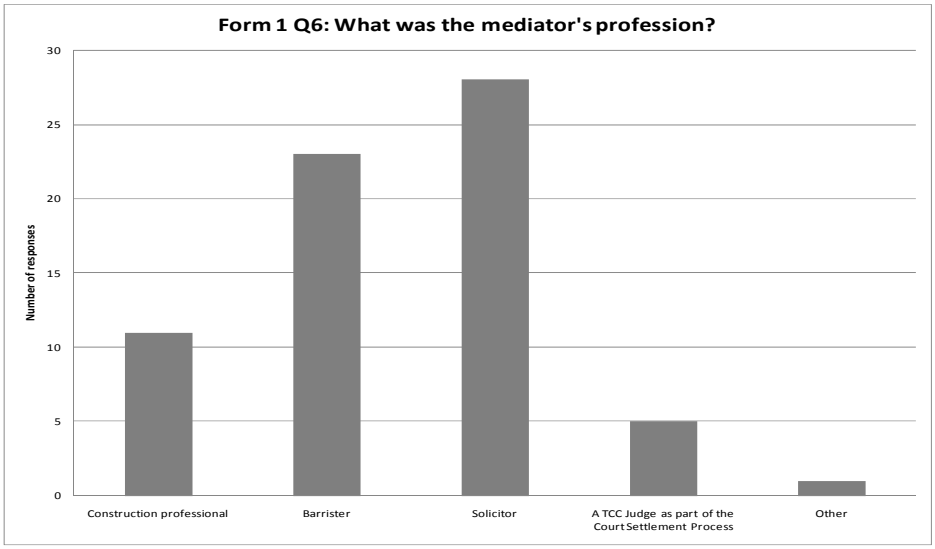

Chart 11: The profession of the mediator used

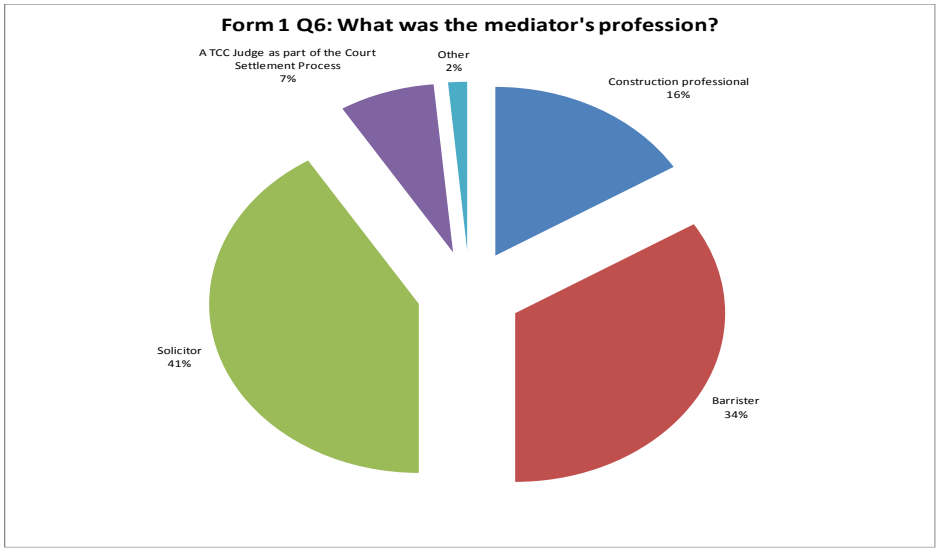

Chart 12: Percentage distribution of the profession of the mediator

The vast majority of mediations used members of the legal profession as mediators. The most popular mediators were solicitors (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

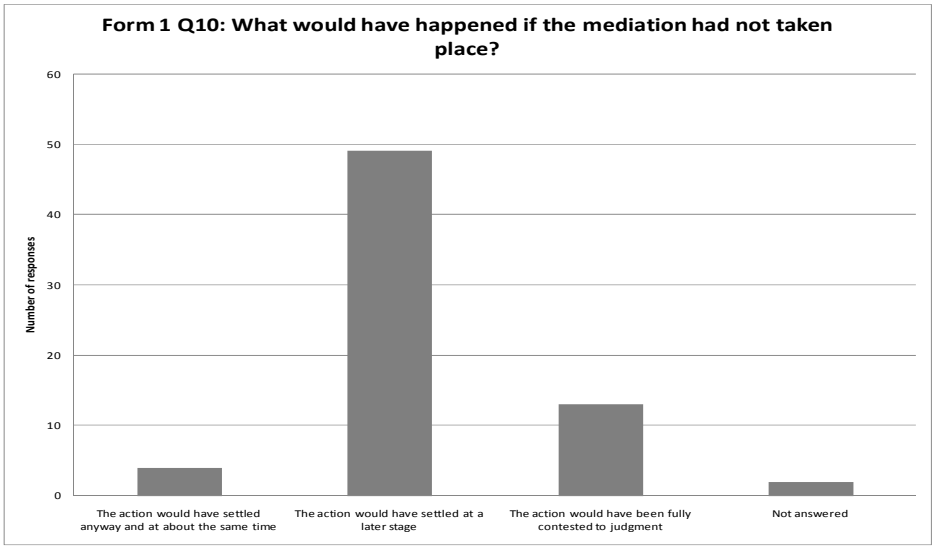

Chart 13: The parties' perception of the outcome in their case, if it had not settled through mediation

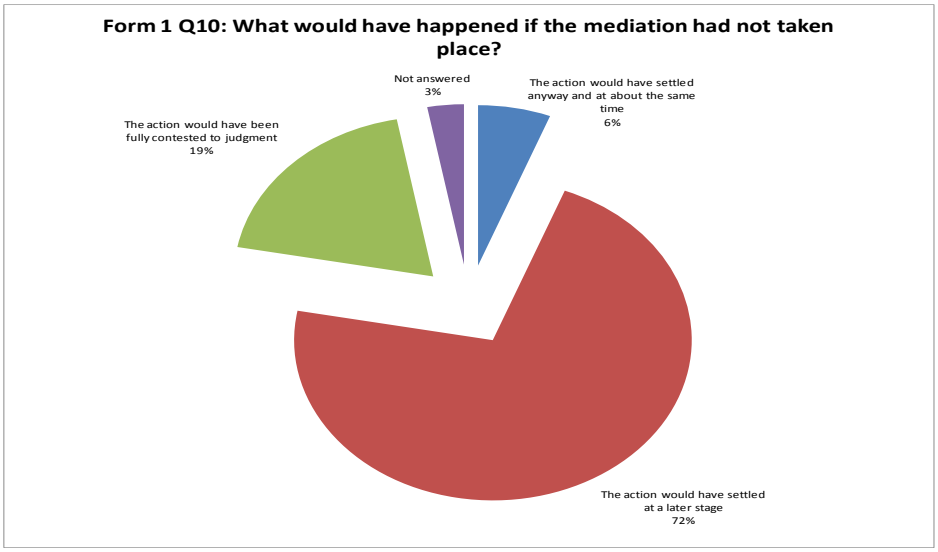

Chart 14: Percentage distribution of the perceived outcomes, had the mediation not taken place

Chart 13 and Chart 14 together demonstrate 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.

Q11 - 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.

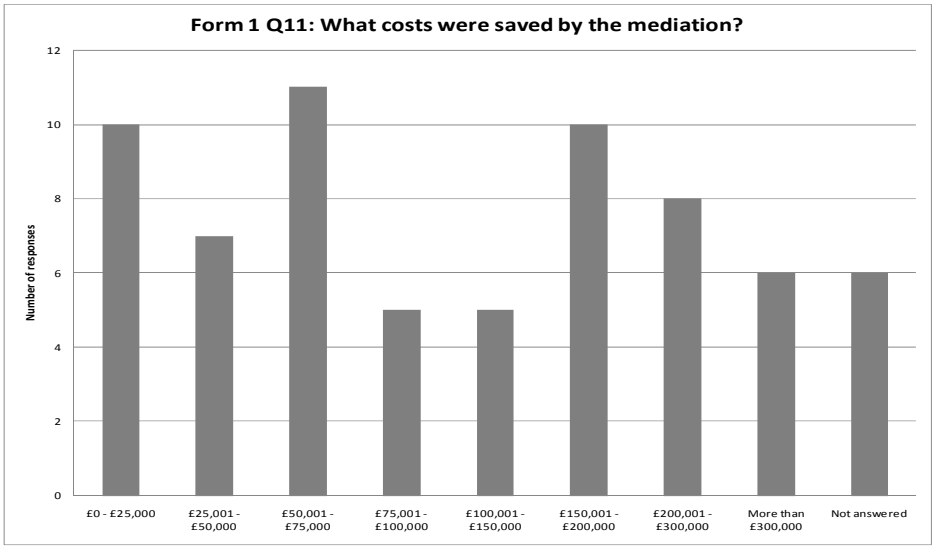

Chart 15: Estimated cost savings from mediation

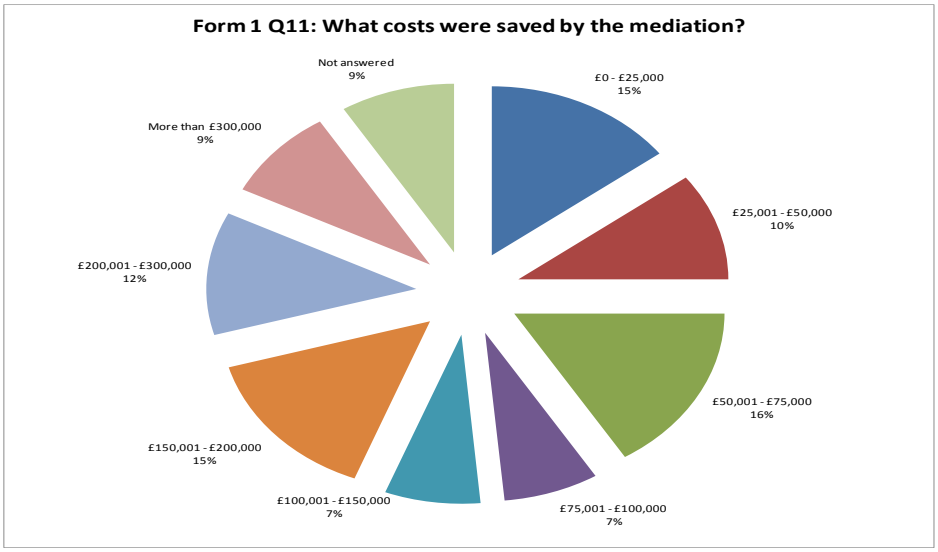

Chart 16: Percentage distribution of the estimated cost savings due to mediation

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

Effectiveness of ADR method at different stages of the litigation process

By combining the results of Q2 and Q3, 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:

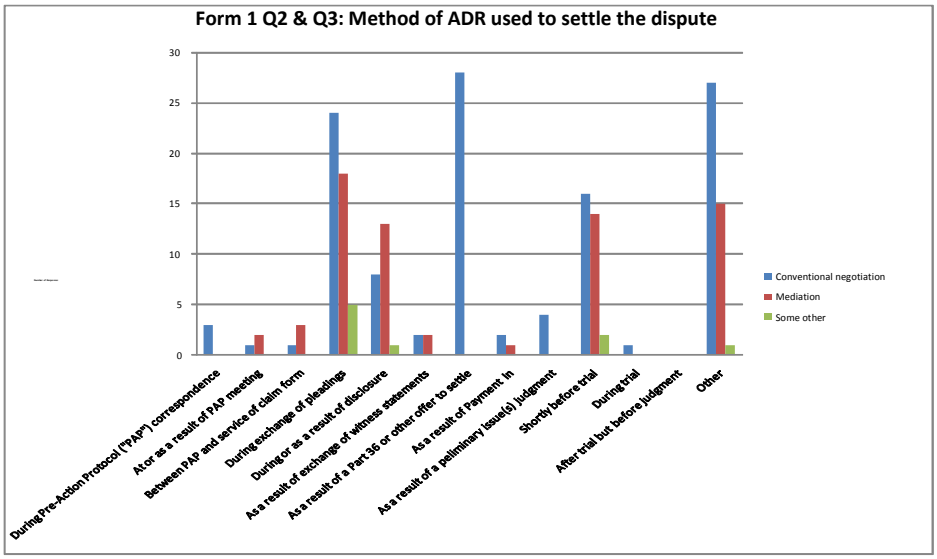

Chart 17: Type of ADR used at various stages of litigation

It is perhaps no surprise that negotiation, 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, its use then reducing until shortly before trial. But, 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 Q2 and Q5. It identifies at which stage mediation was undertaken and also why that mediation was undertaken.

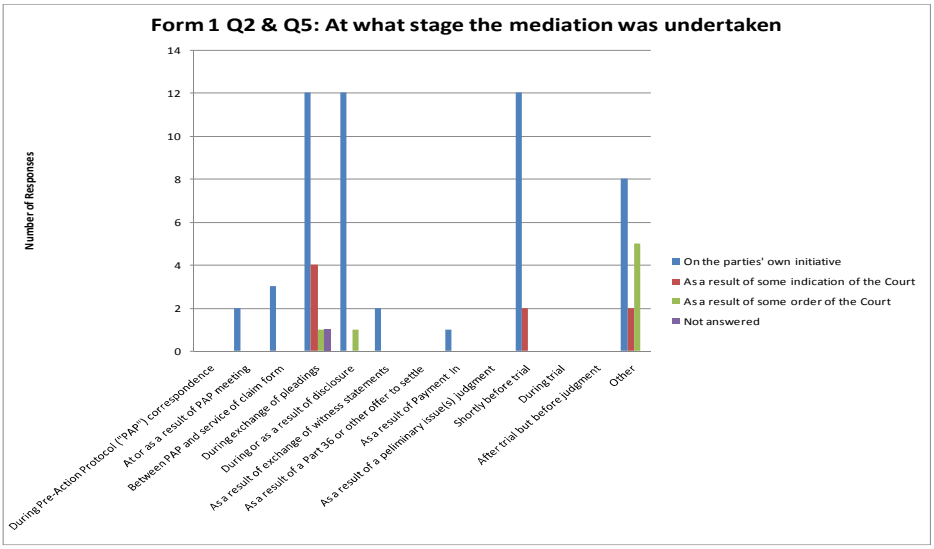

Chart 18: Stages in the litigation process where mediation was undertaken

There appear to be three key stages at which the parties undertook mediation under their own initiative: 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 took place 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 Q2 and Q10 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, had the mediation not been successful:

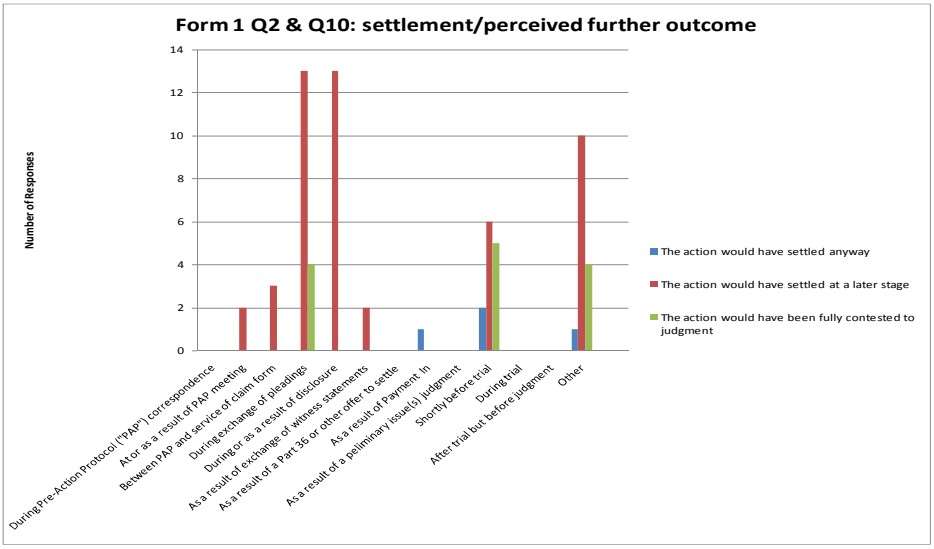

Chart 19: Comparison between the stage settlement was reached as a result of mediation and the parties' perceptions of the outcome, had mediation not been successful

Chart 14 shows that 72% of the respondents to Q10 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.

Comparison of costs incurred for mediation with perceived cost savings

Chart 20 compares the level of costs incurred in the mediation with the perceived cost savings resulting from the successful mediation:

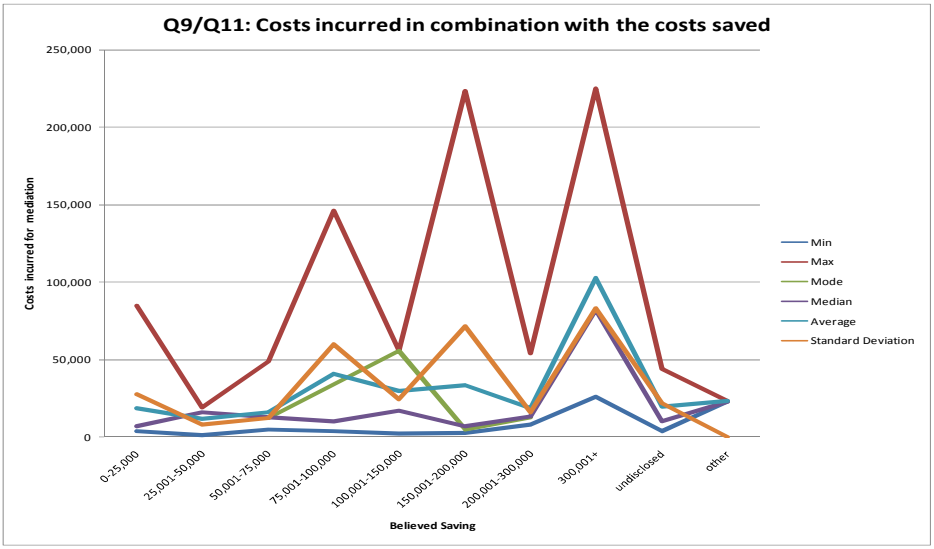

Chart 20: Minimum, maximum, mode, median, average and standard deviation values of the costs incurred in the mediation, compared to perceived cost savings

The costs of the mediation (broken down into costs of the mediator, room hire, solicitor's costs for the party responding, client's costs and any other costs such as those related to experts) were added together. Where no response was provided regarding costs incurred, the response to both questions was excluded from the graph.

Overall there is a noticeable positive gradient to the graph, indicating that generally the higher the costs of the mediation itself, the greater the cost savings going forward. This may be an indication that the higher value claims spend more money on the mediation itself but, presumably, are prepared to do so as the potential savings resulting from the mediation will be higher.

Survey results II

Form 2: TCC claims that progressed to a judgment

As a result of the lower total 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.

Q1 – What was the nature of the case (please tick all those that apply)?

Charts 21 and 22 set out the type of disputes encountered within each case and the percentage distribution of these types of cases.

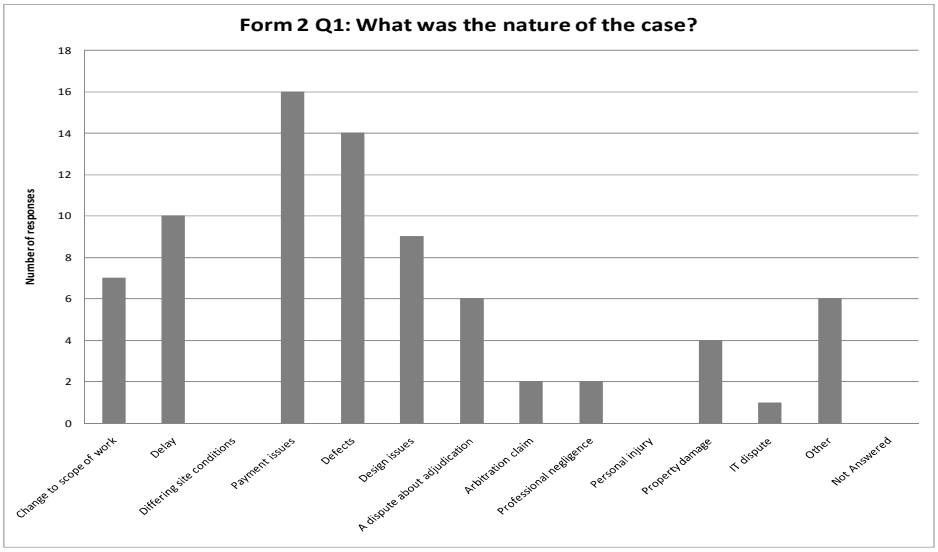

Chart 21: Distribution of the type of disputes[23]

[23] 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 were 13 (including '*other*') different outcomes.

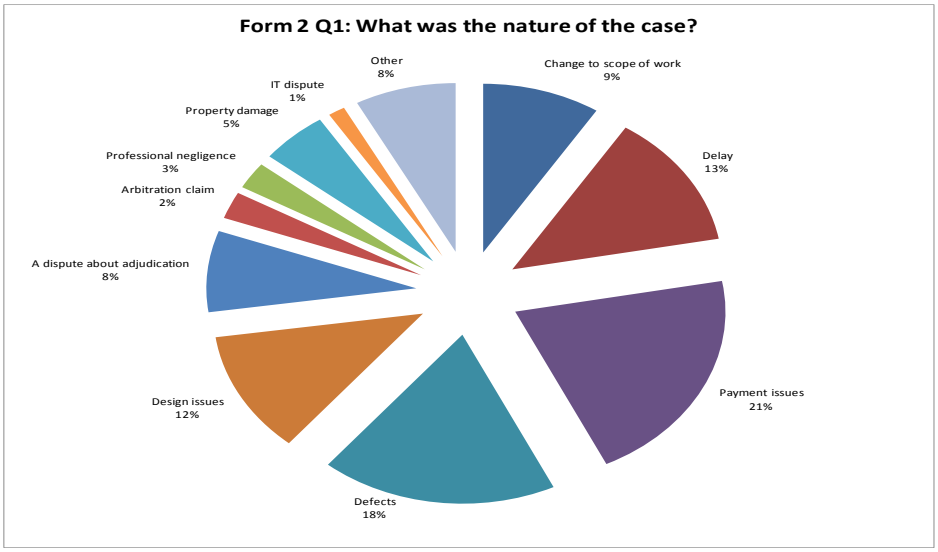

Chart 22: Percentage distribution of the types of case in Q1

As for Form 1, Personal Injury as a category 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%, compared to 13%). This appears to suggest that professional negligence cases are more likely to settle and less likely to go to trial than other types of case. This is perhaps due to the damage to a reputation that can result if a professional is found to be negligent: the risk is too high to take.

Interestingly the percentage of payment issues that were not settled is higher than in the Form 1 results (21%, compared to 13%). 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 few defects claims are dealt with effectively by adjudication.

Q2 - Were attempts made to resolve the litigation by (please tick all those that apply) by:

Conventional negotiation?

Mediation?

Some other form of dispute resolution procedure?

Not answered

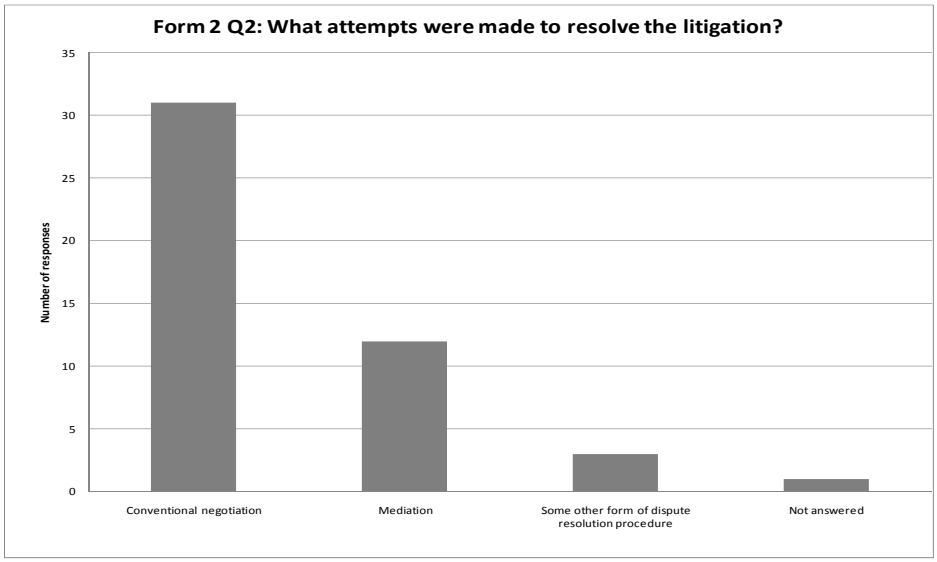

Chart 23: Use of different forms of ADR to resolve the litigation[24]

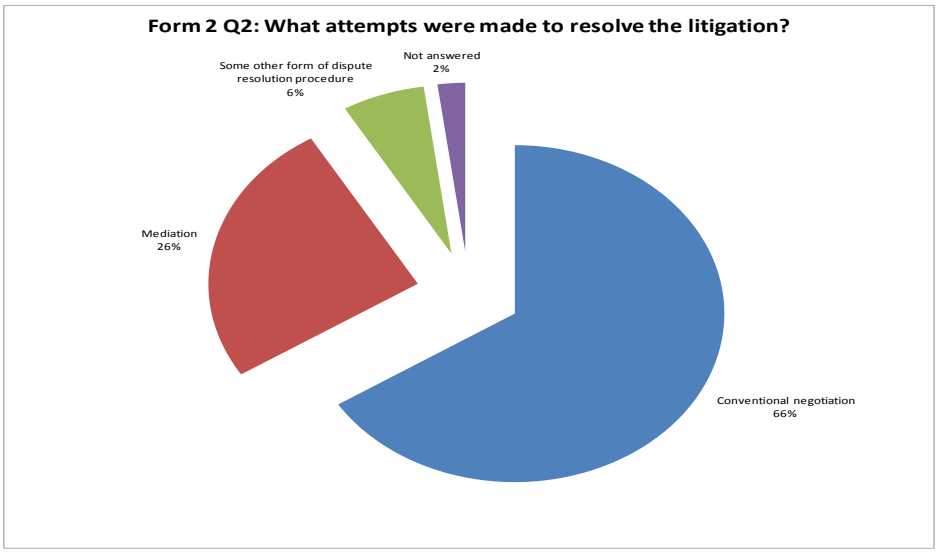

Chart 24: Percentage distribution of methods of ADR used to resolve the litigation

Charts 23 and 24 show results similar to those 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.

Q4 - 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 25 and 26 show why mediation was undertaken, in the small number of cases that did:

[24] The numbers do not reflect the total number of surveys issued or returned, as there was the option to '*tick all that apply*'.

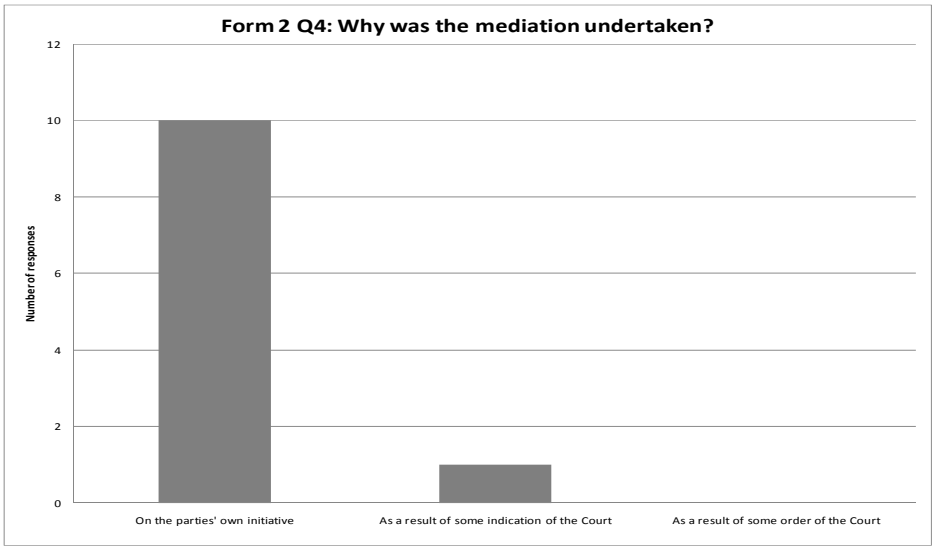

Chart 25: Why mediation took place

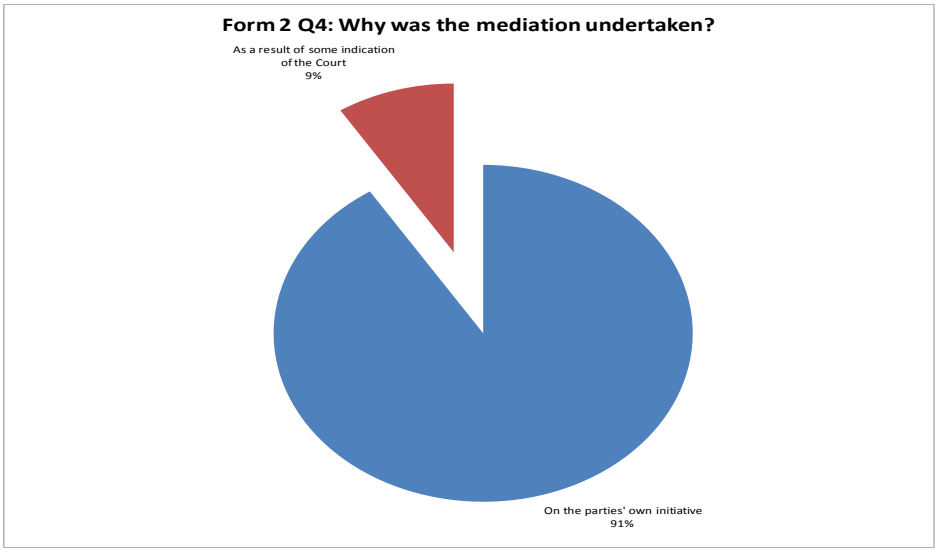

Chart 26: Percentage distribution of why mediation took place

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

Q5 - Was the mediator:

Construction professional?

Barrister?

Solicitor?

A TCC Judge, as part of the Court Settlement Process?

Other?

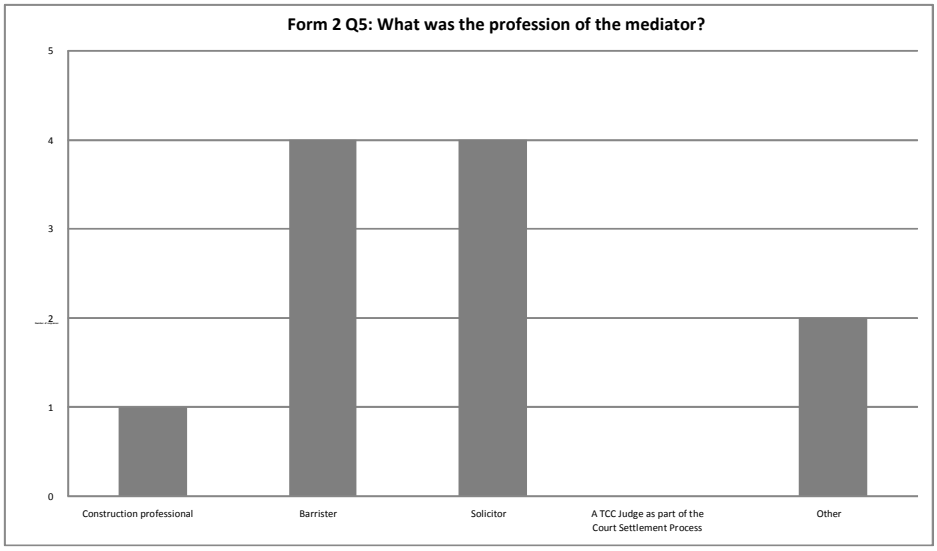

Chart 27: The number of mediators of each type

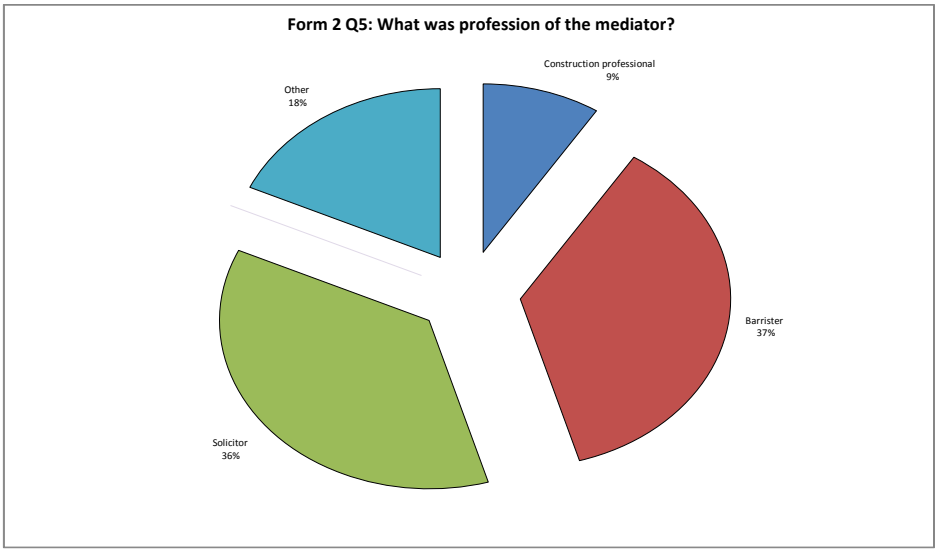

Chart 28: Percentage distribution showing type of mediator used

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.

Q10 - What was the outcome of the mediation?

Charts 29 and 30 set out the overall results of the mediations attempted by the Form 2 respondents:

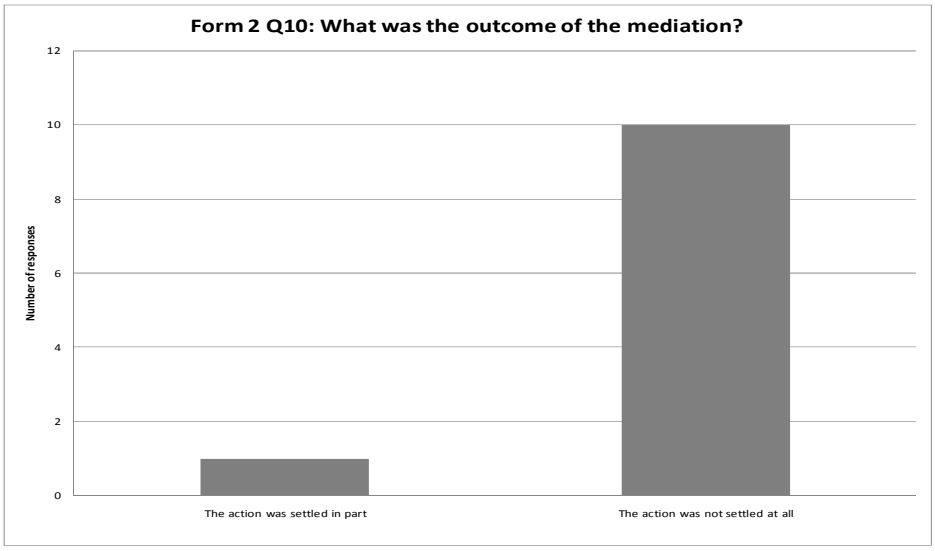

Chart 29: Result of mediations attempted

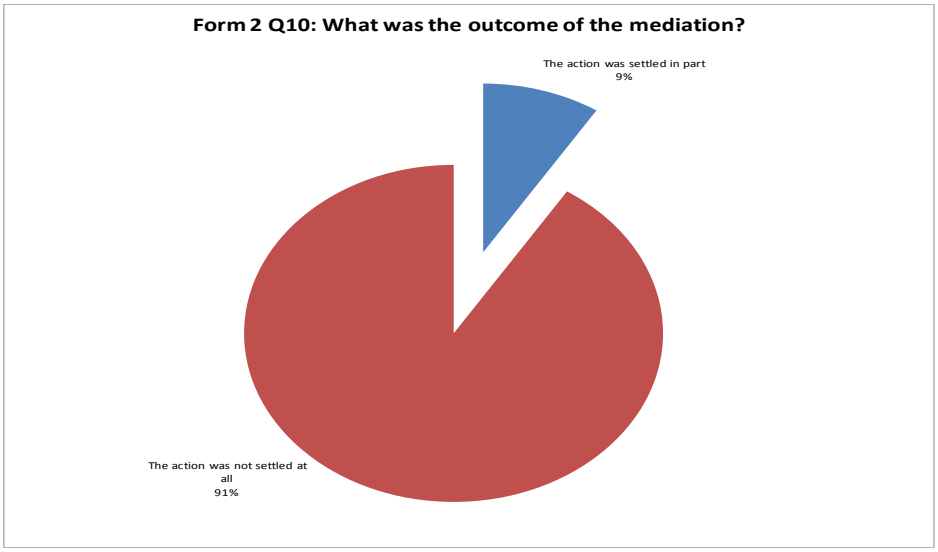

Chart 30: Percentage distribution of results of mediation

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.

Q11 - 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 31 sets out the responses of the Form 2 respondents to Q11, which attempted to establish whether the mediation, albeit unsuccessful, was in any ways a positive experience:

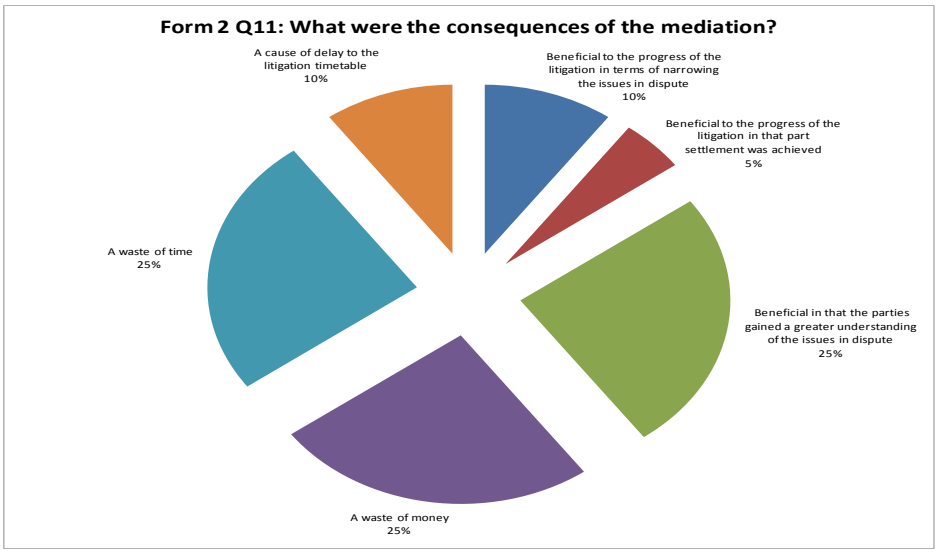

Chart 31: Percentage distribution of the opinions of parties on the failed mediation

It could be thought, in 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, according to the responses to Form 2, this is not the case. Only 25% considered the mediation to have been a waste of time; 25% thought it was a waste of money; and only 10% considered that it caused delay to the timetable (this could perhaps be because judges allow for mediation in the timetable leading up to trial).

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, so made the litigation more efficient as the parties headed towards the hearing.

Results common to both Forms 1 and 2

Mediators

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

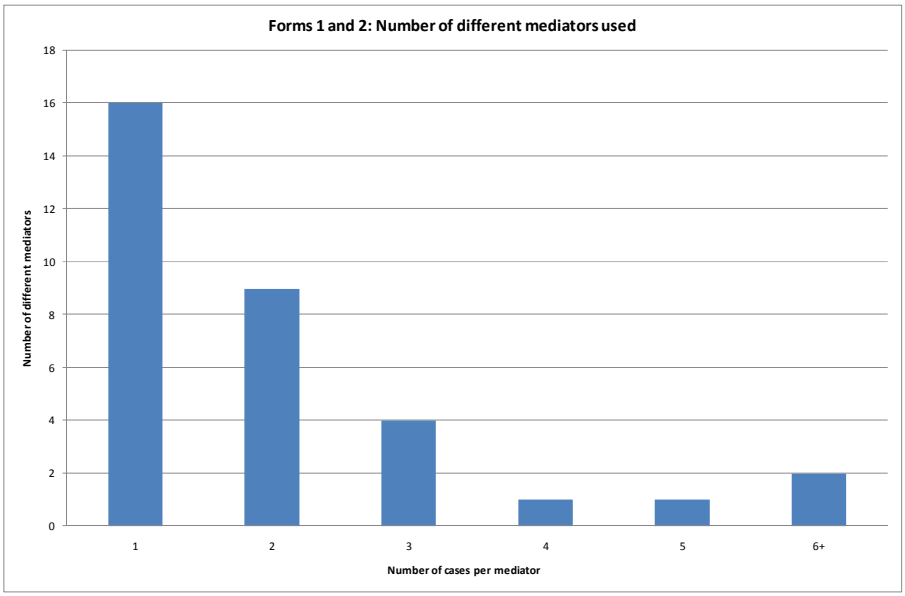

Chart 31: The number of cases per mediator

Although most mediators took on just one case, a large number were used repeatedly: one was assigned 14 cases! This suggests a relatively mature market, with participants aware of those perceived as being effective.

Appointing Bodies

Appointing Bodies for mediators were not widely used: only 20% of respondents who had used mediation had used an appointing body.[25] Of the appointing bodies used, CEDR and In Place of Strife were used for five mediations each; The ADR Group for three; and Consensus, Independent Mediators Ltd and the Association of Midlands Mediators for one each. In three mediations, the appointing body named was a set of barristers' 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 reported in Forms 1 and 2 was almost identical to those of an earlier survey carried out in 1997, reported in 1999.[26] That survey sought to gather data about the types of dispute resolution techniques 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 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

25 This includes mediations that were both successful and unsuccessful.

26 See the detailed report in Gould, N., Capper, P., Dixon, D. and Cohen, M. (1999) *Dispute Resolution in the UK Construction Industry* (London, Thomas Telford). See also Gould, N. and Cohen, M. (1998) n 5.

different number of respondents, and those responding to the earlier survey were from a broader background. Nonetheless, a comparison of the following six key 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 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 in Chart 32 below:

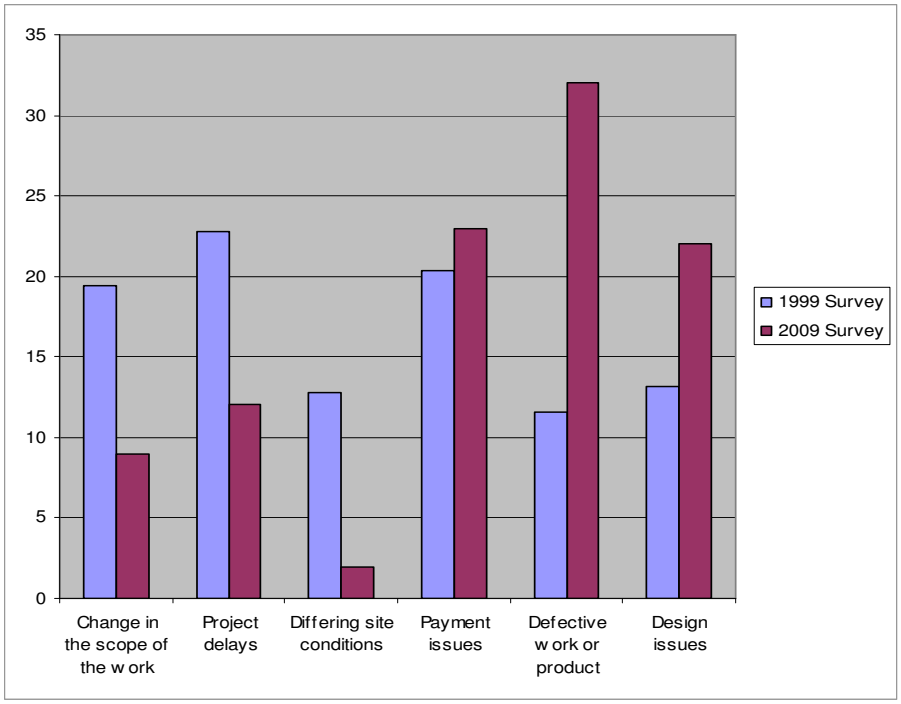

Chart 32: Types of issue from 1997 survey, compared with those from present survey

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

One obvious explanation is that adjudication, 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 differences between the two survey results appears at Chart 33.

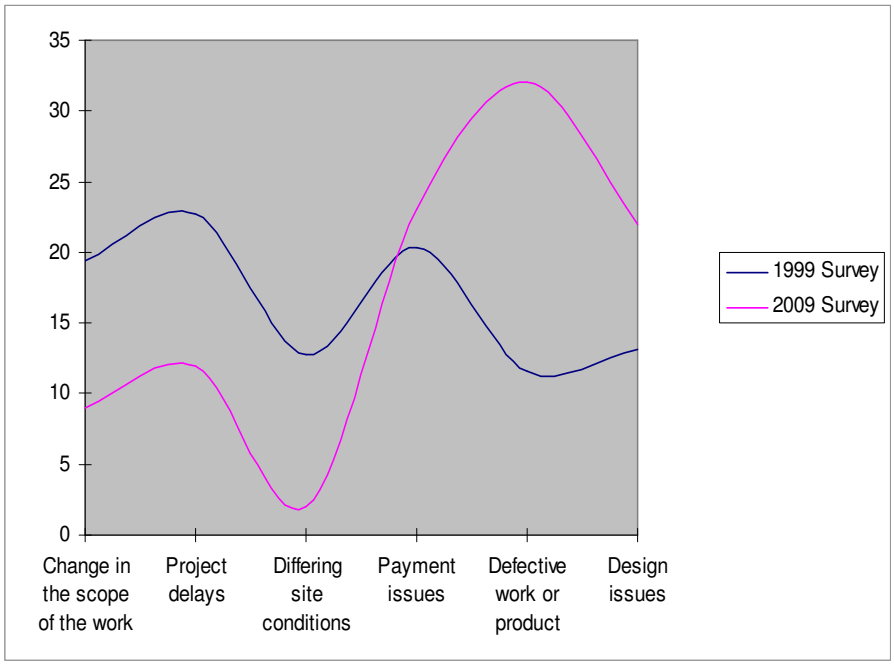

Chart 33: Further analysis of differences between types of case in the two surveys

Grouping the most frequently encountered issues referred to the TCC for resolution, it was clear that defects (18%) was the most common category of case, 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 now less likely to become matters that the TCC dealt with.

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 how it has been transformed from a novel idea into its current position as an indispensible tool for construction litigators.

Costs savings?

In terms of cost savings, the present 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). This no doubt reflects the higher value and complexity of those disputes progressing through the TCC, compared to those in the Central London County Court where the VOL Scheme operated.

These potential cost savings may explain the dramatic turnaround from the positive but uninformed attitude shown to mediation in the Fenn & Gould 1994 survey,[27] to the 85% satisfaction rate Lavers & Brooker found in 2001.[28] However, even where mediation did not result in a settlement, the present survey indicates that mediation was not always regarded as negative: it 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 this is found in the Ontario scheme carried out in the mid-1990s.[29] 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 *Dunnett v Railtrack plc*,[30] which led to a dramatic uptake in the numbers of parties mediating disputes.

The settlement rates within the present 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 down 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 whom to appoint as mediator. The TCC service by its very nature takes both of those decisions for the parties.

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27 See n 4.

28 See n 6.

29 See n 10.

30 *Dunnett v Railtrack plc* [2002] EWCA Civ 303, (Practice Note) [2002] 1 WLR 2434. For an overview, see Shirley Shipman, 'Court Approaches to ADR in the Civil Justice System' (2006) 25 Civil Justice Quarterly 181; for comparisons with New South Wales (where the courts, as in South Australia, have clear statutory powers to order mediation against the will of the parties), see Brenda Tronson, 'Mediation Orders: Do The Arguments Against Them Make Sense?' (2006) 25 Civil Justice Quarterly 412.

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 mediation 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 practise in the TCC.

Mediators

The sophistication of those in the TCC 'market' is perhaps demonstrated by the limited use of 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 should not be a priority.

Professor Genn's concern about the ethics of mediators and their power, as exercised in the Central London County Court,[31] seems to be unfounded in relation to the TCC. Again, this may reflect the greater experience and sophistication of the users of the TCC, as compared to the Central London County Court.

Summary and conclusions

The completed survey forms provide an interesting insight into the types of claim being dealt with by the TCC. The TCC *Annual Report* 2006[32] does not provide an indication of the number of payment disputes coming before the court; our survey indicates that a surprisingly low number of typical mainstream construction disputes (variations, delays and site conditions) now do so, 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 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

31 See n 8.

32 See n 11.

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.

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 was ordered by the court. This suggests that the incentives to consider mediation provided for by the CPR (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.

The cost savings attributed to successful mediations were also 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,[33] 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 gone progressed to judgment if mediation had not taken place when this was undertaken during exchange of pleadings and shortly before trial. This suggests that mediation may have been comparatively more successful at these stages.

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, though these five experiences resulted in

[33] This includes 9% of respondents, who did not answer this question.

settlement. The general lack of enthusiasm suggests that the TCC may not encourage much additional 'business' in the long term by offering the 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.[34]

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.

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London
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Email: ngould@fenwickelliott.co.uk

[34] Directive 2008/52/EC of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters, OJ L 136/3 (24 May 2008), adopted under article 61(c) TEC and deriving from the Green Paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 (April 2002). 'Cross-border' is defined in article 2; Recital 8 unsurprisingly confirms that member-states may extend the application of the principles contained in the Directive to situations with no cross-border element.

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 ☐

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:

4. reveal in what circumstances mediation is an efficacious alternative to litigation;
5. assist the court to determine whether, and at what stage, it should encourage mediation in future cases; and
6. 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 ☐