Part IV: RESEARCH REPORT

16 Background to the survey

As earlier sections of this report demonstrate, there is already some useful data in respect of the use and effectiveness of mediation in the construction industry, and of court-annexed mediation services. However, the evidence about the use, effectiveness and cost savings associated with mediations that take place in relation to construction litigation is mostly anecdotal. To address this, an evidence-based survey was developed between King's College London and the TCC.[1]

Parties to litigation in the TCC form a group with closely similar issues and interests. They have all commenced formal proceedings in the High Court in relation to construction and technology matters, these proceedings progressing towards a trial. Almost all will be represented by lawyers, so incurring their own legal fees – and the risks of paying the opposing side's costs. The obvious questions are:

1 To what extent do they use mediation in order to settle their dispute before the trial?

2 If they settle - via mediation or otherwise - at what stage do they do so?

3 Do they make any cost savings by using mediation, rather than conventional negotiation?

This group in fact falls into two sub-groups: first, those who settle their dispute after the commencement of court proceedings, but before judgment; and second, the (inevitably) smaller group whose cases progress all the way to trial, but may nonetheless have been involved in a mediation which did not resolve all – or perhaps any – parts of their dispute.

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

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

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

It had originally been hoped to identify which mediation techniques are particularly successful, but in the end this could not form part of the project.

The objective was to collect meaningful data that could not only inform parties, practitioners and mediators about the use of mediation (in commercial disputes, as well as construction disputes), but could also give the court objective data to assist it in its role of managing cases efficiently

17 Methodology

The courts and parties involved

Three TCC courts participated in the survey: the London,[2] Birmingham[3] and Bristol[4] courts. Between 1 June 2006 and 31 May 2008, the courts issued questionnaires to respondents who had been involved in TCC litigation. Each received a questionnaire 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 familiar with TCC litigation. The completed questionnaires were then returned to the Centre of Construction Law & Dispute Resolution at King's College London for collation and analysis.

The two sub-groups

Different questionnaires were designed for each sub-group: Form 1 where a case had settled[5] and Form 2 where judgment had been given.[6] Each form reflected the particular characteristics of TCC litigation processes; but there was a degree of commonality between them, to aid analysis and comparison. So each asked about the nature of the issues in dispute, whether mediation had been used, the form that the mediation took and also the stage in the litigation process at which the mediation occurred. However, other questions reflected the differences between the two sub-groups; it was specially important, for example, that the second sub-group should be able to comment upon any attempts to settle that had not been successful.

For those that settled during the course of litigation, it was of course highly unlikely that they would have already 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 been the case, unless they had already held a mediation which did not result in the case settling. However, those that progressed to a judgment could well have attempted a mediation before the commencement of litigation.

Putting the responses in context

It would have been ideal to know the total number of cases started in the three courts during precisely the same period as the survey – to give a base figure against which to map the survey data. However, the statistics in the TCC's Annual Reports cover 12 month periods to 30 September of each year, so the best that could be done was to use the TCC's own figures and from them to construct an estimate covering the survey period. This gave a raw figure of approximately 1,136 cases started.[7]

The number of cases *concluded* during the survey period would not be precisely the same as cases *started* in the same period, although there would also be substantial overlap. Further, not all of the TCC cases actually started in the survey period 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 example, there must of course have been some level of negotiation.

Timing has a further impact on the distinction between the figures in the TCC's *Annual Reports* and the number of cases to which the survey relates. The TCC figures count cases commenced in the court; but the survey focuses on cases that have settled. The time period between commencement and judgment is quite short in the TCC, compared to other courts: typically now only 12 months; and the court can deal with an application to enforce an adjudicator's decision extremely quickly. However, some cases will take longer, simply because all those involved in the case require it. So not all the cases commenced in a 12-month period will be neatly resolved within the same period; and a survey period covering cases that had settled or received judgment therefore includes some where the original action in the TCC had been started many years before the survey period began.

Adjusting the TCC-derived figure of cases started (1,136) for these factors led the team to calculate that approximately 800 cases were concluded in the London, Birmingham and Bristol

TCCs during the 24-month survey period. As each case had at least two parties, the projected population of respondents was at least 1,600 (claimants, defendants and third parties).

Actual responses

The number of responses received was 261: 221 to Form 1 and 40 to Form 2. As more than 90% of TCC cases settle before trial, there were far more potential respondents to Form 1 than those for Form 2. Thus the total of each category of response is in proportion to the size of each sub-group. In respect of the Form 1 responses, 25 were discounted as spoiled or incorrectly completed,[8] which resulted in an apparent response rate of more than 15% of the projected population. (The real rate must have been slightly lower, because some matters would have had more than two parties.)

18 Survey results I: TCC claims that settled (Form 1)

The topics of the questions on Form 1 were 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 cost of the mediation
Q10	What would have happened without any mediation
Q11	Level of cost saved by mediation

The responses to these questions are analysed 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

Q1 asked each respondent to identify (by reference to 13 categories) what the subject-matter of their case was. Respondents could select more than one category, where applicable, and there was a safety-net option of 'other', together with a request that they specify what 'other' constituted.

Figure 3a: What was the nature of the case?[9]

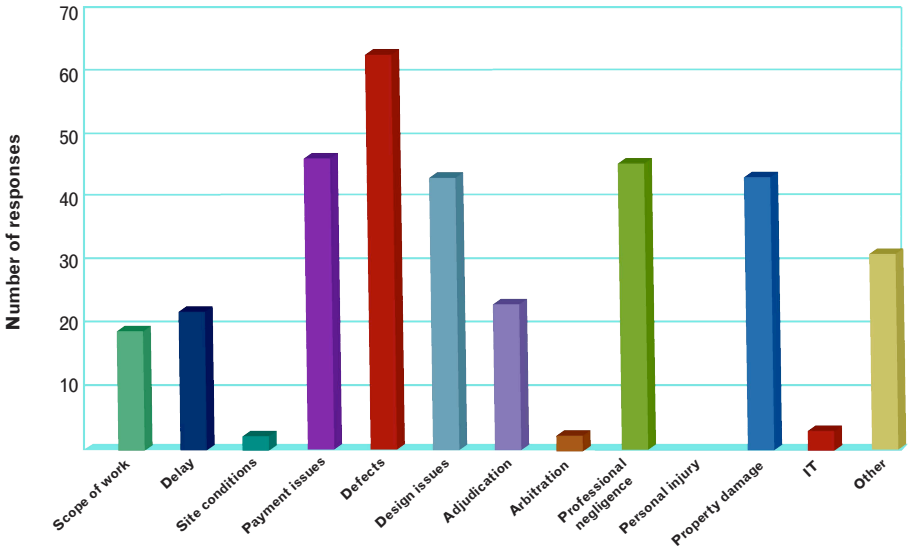
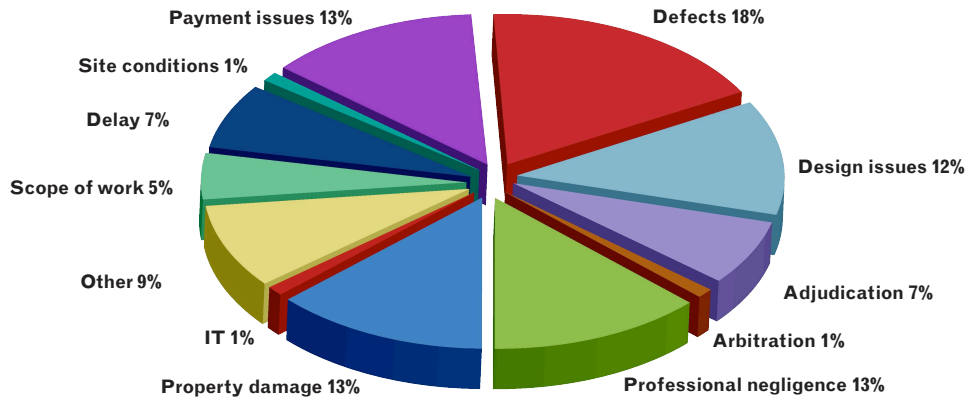


Figure 3b: What was the nature of the case?



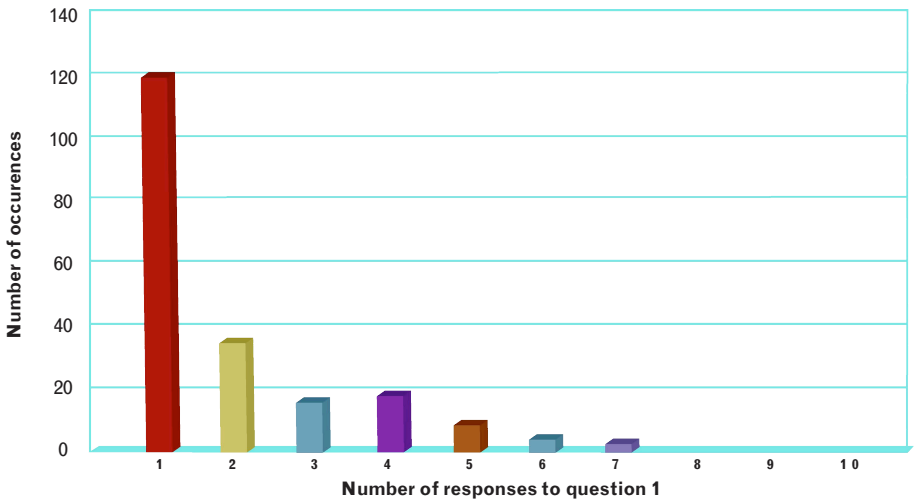
The responses to Q1 can be grouped into five categories, reflecting the types of case which occurred most frequently. Group 1 represents the most common type of dispute, Group 5 the least common:

Table 5: Frequency of different categories of case

Group 1	Group 2	Group 3	Group 4	Group 5
Defects	Payment issues Design issues Professional negligence Property damage	Change to scope of work Delay Adjudication	Differing site conditions Arbitration IT	Personal injury

The proportion of disputes relating to payment issues (13%) is lower than might perhaps be expected, given the frequency within which these are encountered within the 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, by their nature often complex and involving the use of expert evidence.

Figure 4: How many separate matters were involved in the case?



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

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.

Figure 5a: At what stage was most of the litigation settled or discontinued?

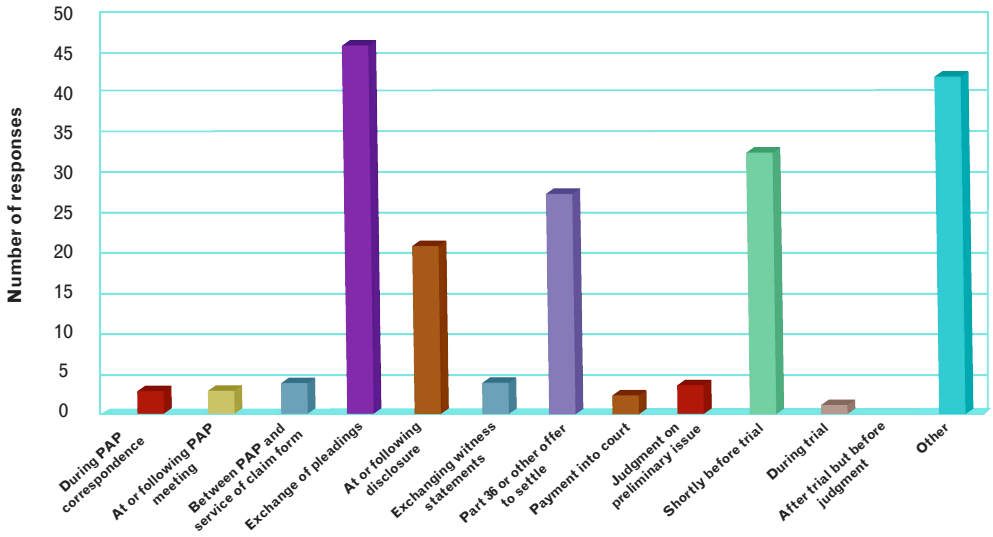
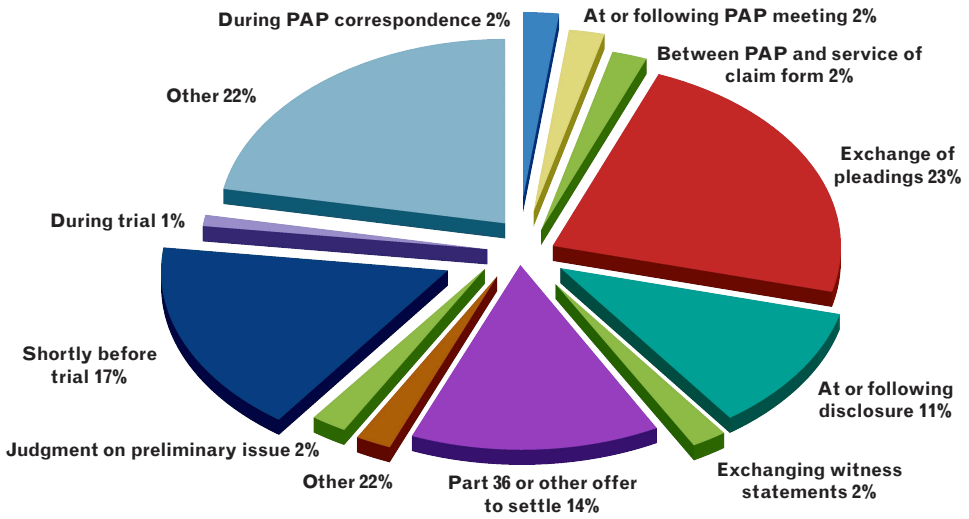


Figure 5b: At what stage was most of the litigation settled or discontinued?



From these figures, it is clear that there were four main stages at which litigation settled or was discontinued:

1 During exchange of pleadings;

2 During or as a result of disclosure;

3 As a result of a Part 36 or other offer to settle; and

4 Shortly before trial.

An analysis of the 'other' category identified a further three key stages at which settlement occurred:

5 After pleadings or at/around the time of the first CMC;

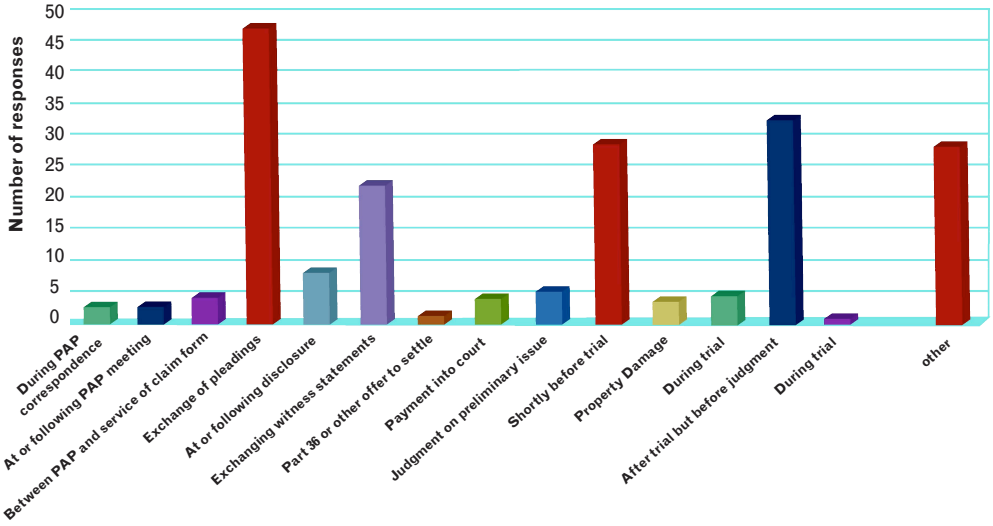
6 During the drafting of, or as a result of exchanging, expert reports;

7 After disclosure; and

8 Shortly before trial.

Figure 6 shows 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. This may well reflect the significance of the technical issues involved in the types of construction dispute covered by the survey.

Figure 6: The 'other' responses about the stage at which the litigation was settled or discontinued



Questions 3/4 – How settlement was reached

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

Figures 7a and 7b opposite summarise the responses to these questions on Form 1.

Figure 7a: How was settlement reached or the matter discontinued?

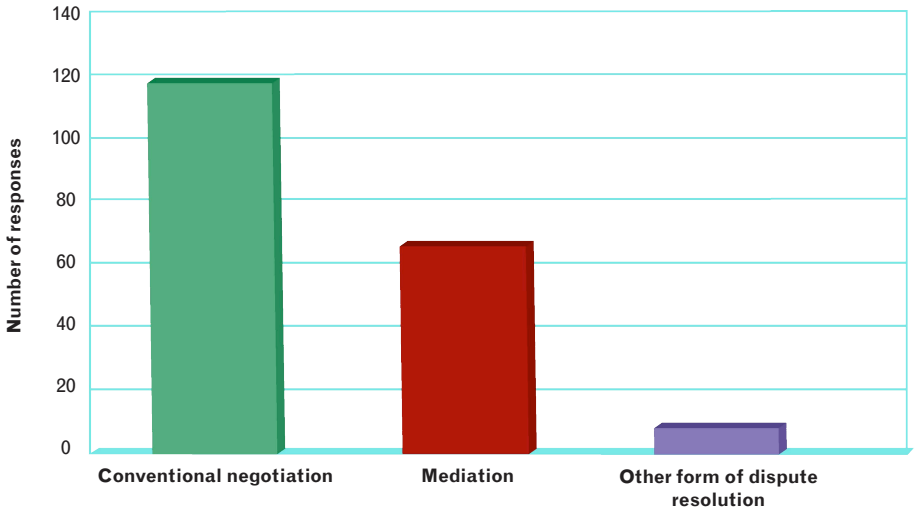
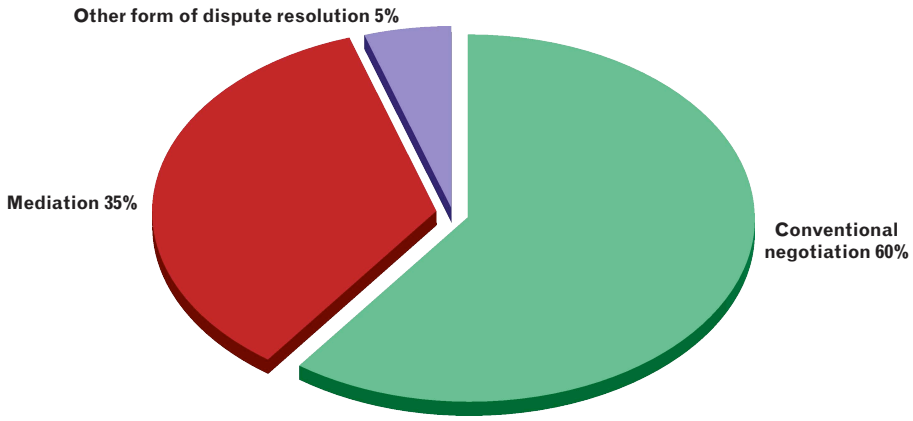


Figure 7b: How was settlement reached or the matter discontinued?



The data shows that the most popular method of bringing a settlement about was through conventional negotiation (60% of all responses). This was followed by mediation (35%, or 68 responses). These responses were then broken down further based on the information coming from answers to the remaining Form 1 questions.

Q4: If some other procedure, please briefly describe

The responses were as follows:

- *'The claim related to liability only. The claimant accepted liability following disclosure. Now parties negotiating quantum 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).

Q5 – Why was mediation undertaken?

Figure 8a: Why was mediation undertaken?

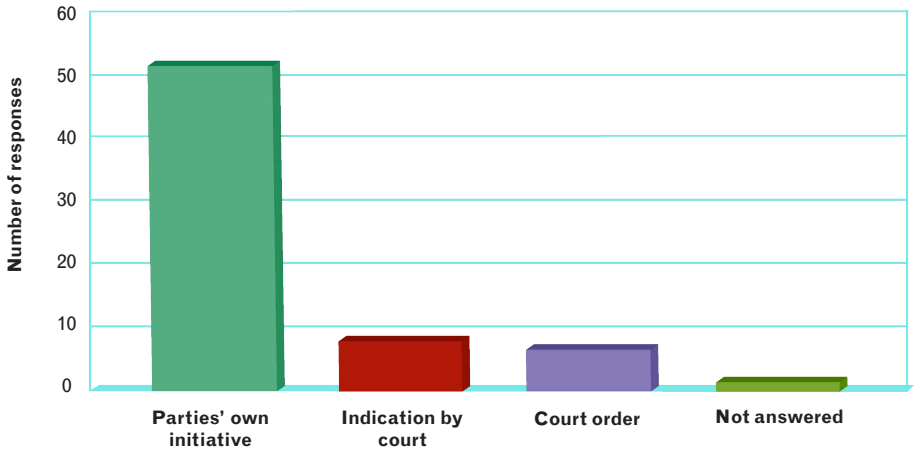
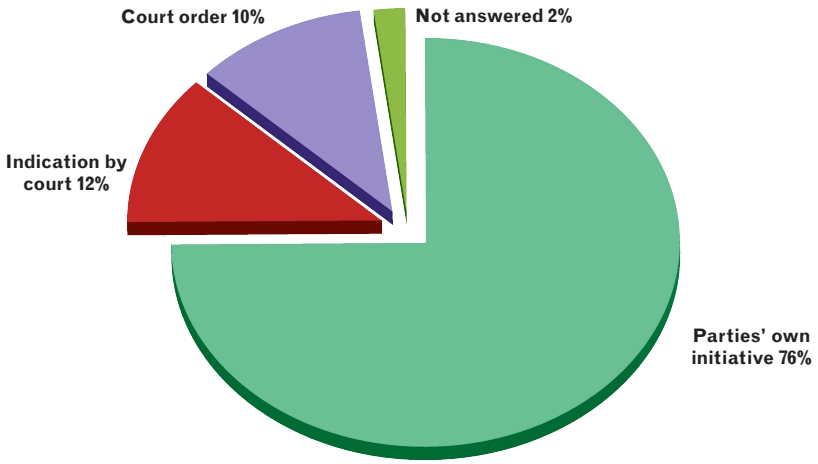


Figure 8b: Why was mediation undertaken?



Q6/7/8 – About the mediator

Figure 9a: What was the profession of the mediator?

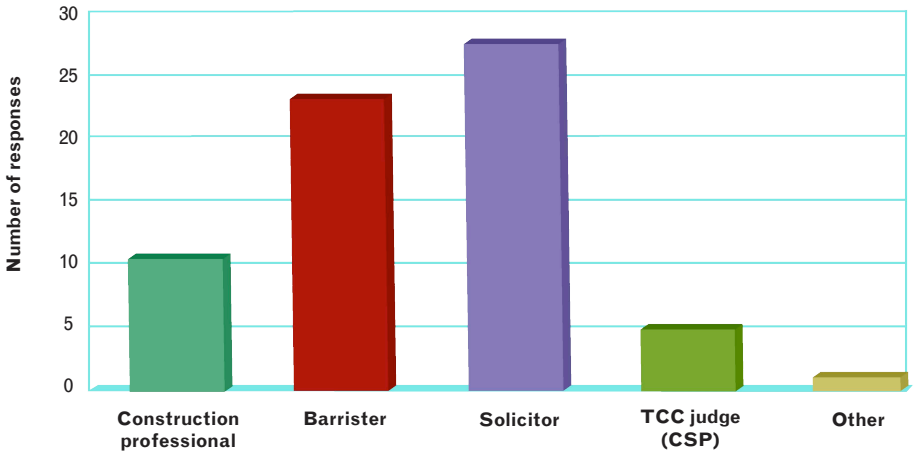
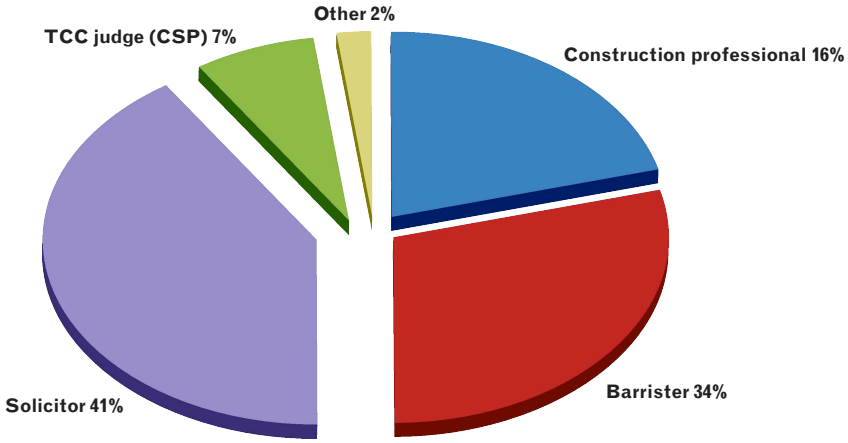


Figure 9b: What was the profession of the mediator?



The vast majority of mediations reported in the survey used members of the legal profession as mediators; perhaps this is unsurprising, since judges may be asked only when the parties have persistently refused mediation or where the case has special features.

Question 10 - If the mediation had not taken place, what would have happened?

Figure 10a: What would have happened, had the mediation not taken place?

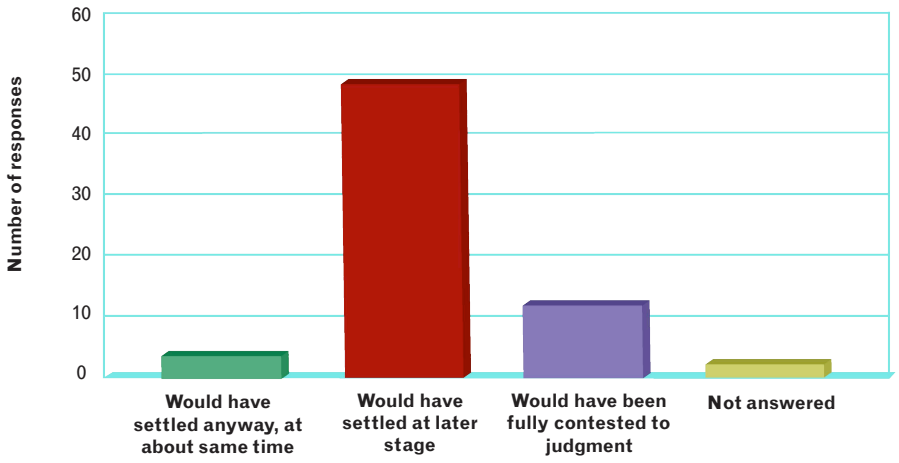
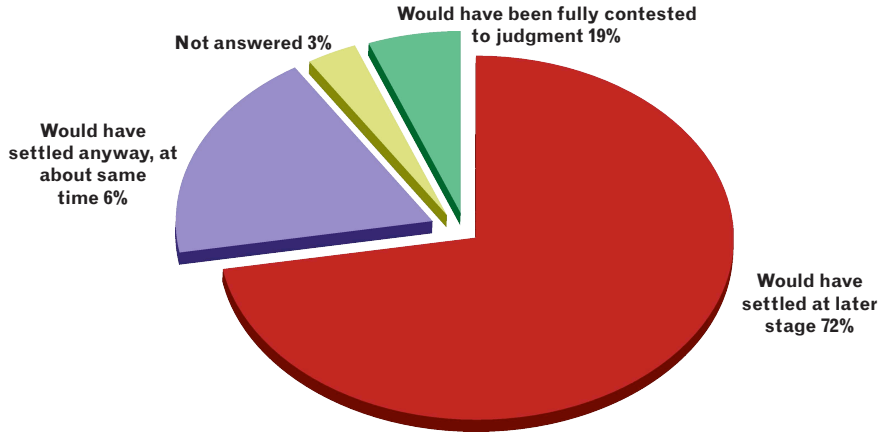


Figure 10b: What would have happened, had the mediation not taken place?



These two figures together demonstrate that a majority of respondents (72%) believed that the litigation would have settled, but at a later stage. However, 19% of the respondents believed that their cases would have been fully contested to judgment.

Q11 - If you have ticked the second or third box for question 10 [the action would have settled later or gone on to judgment], *what costs do you consider were saved by the mediation?*

This question asked respondents to estimate 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.

Figure 11a: What cost was saved by the mediation?

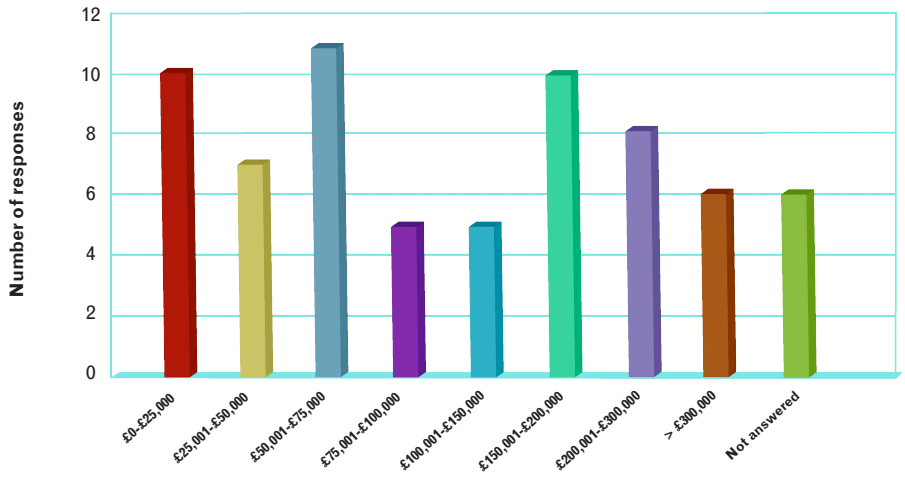
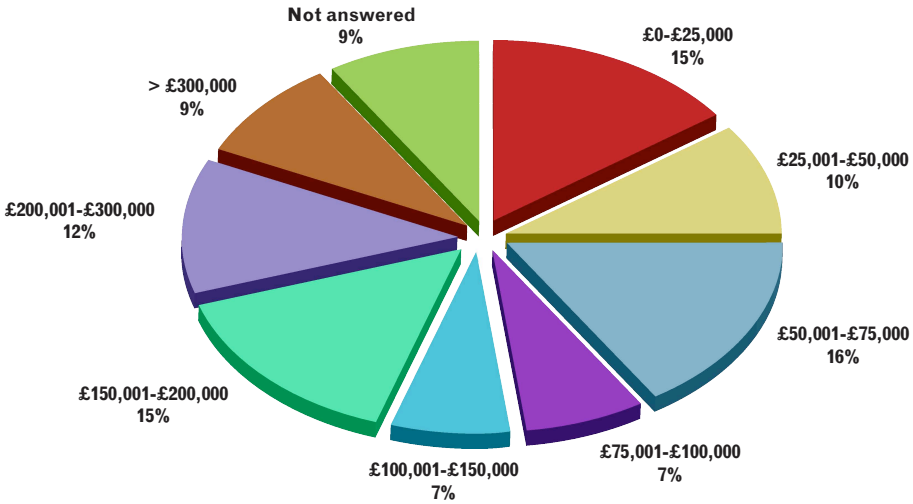


Figure 11b: What cost was saved by the mediation?

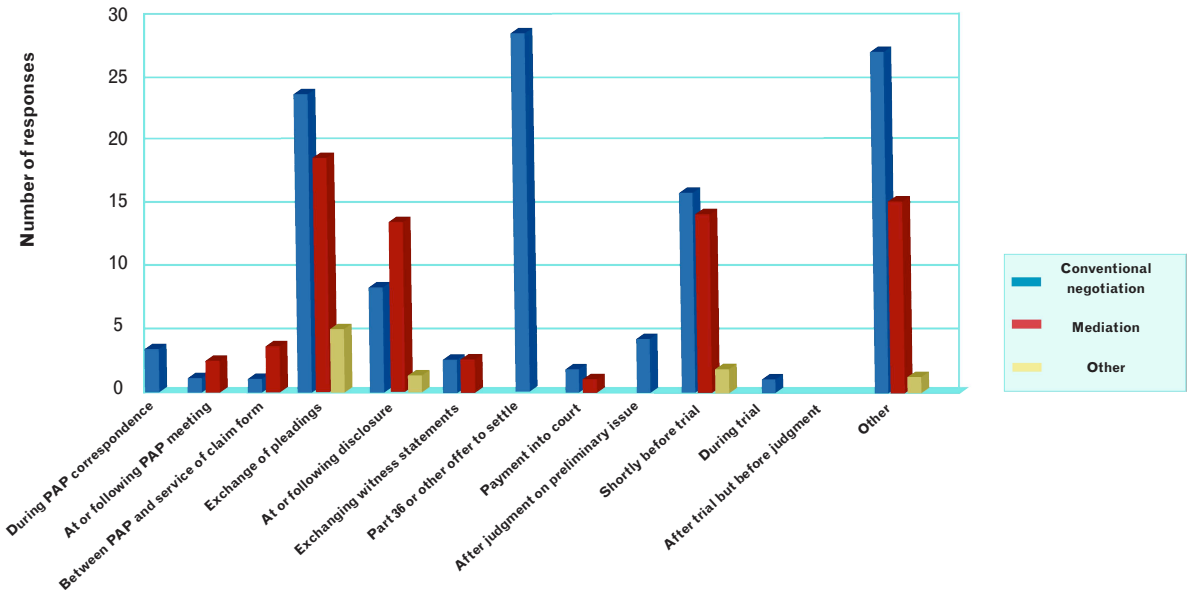


As can be seen, the perceived cost savings were substantial, with more than 9% of respondents estimating they had saved over £300,000 as a result of mediation.

Use of ADR at each stage

By combining the responses to 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.

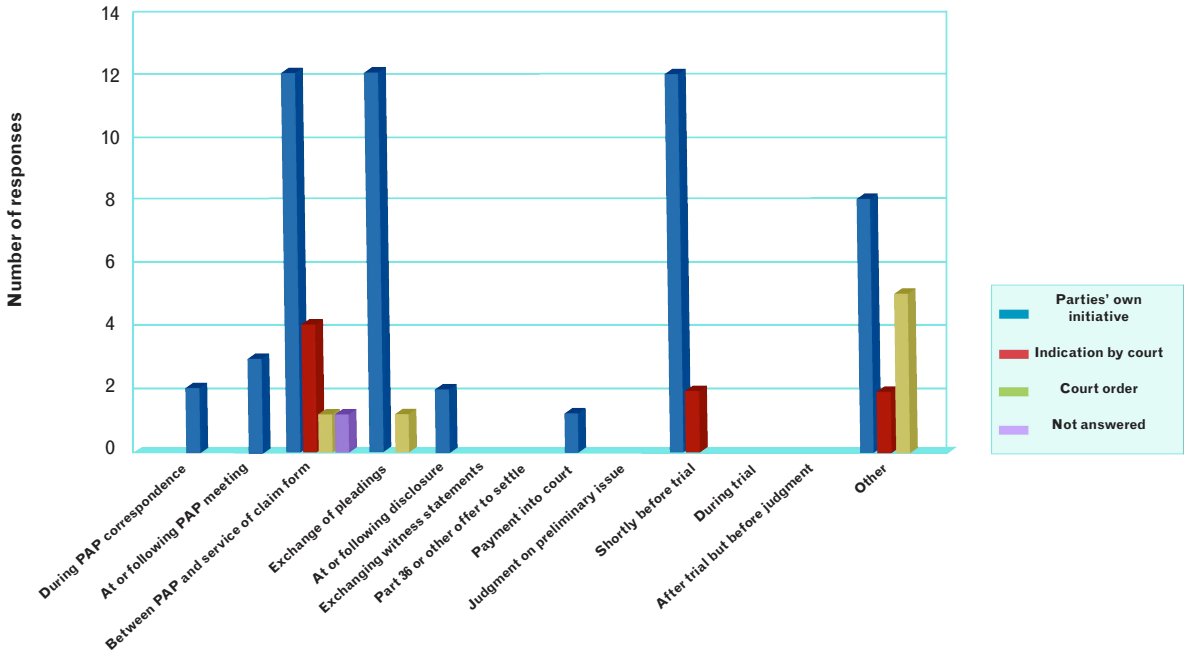
Figure 12: Type of ADR used at various stages of litigation



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 led 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, when mediation became almost as popular as negotiation.

Stage in the litigation process that mediation was undertaken

Figure 13: Type of ADR used at various stages of litigation



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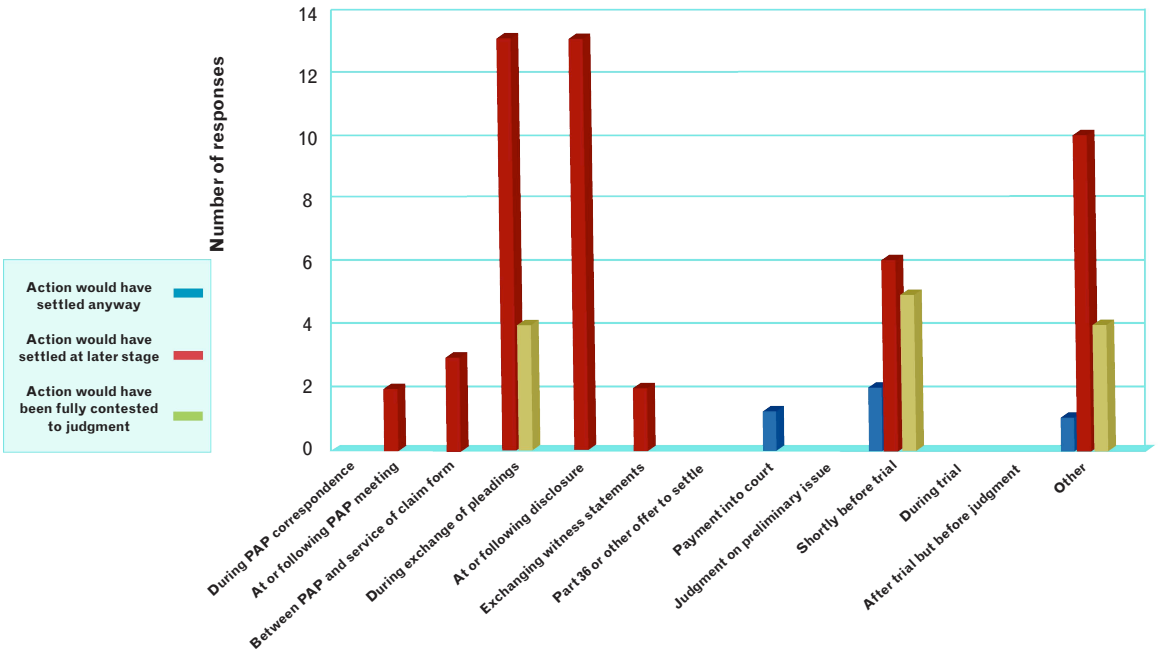
Stage in the litigation process that mediation was undertaken

Figure 13 below combines the answers to 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.

Figure 14: The stage at which settlement was reached as a result of mediation and respondents' perceptions of what would have happened, had mediation not been successful



This 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.

19 Survey results II: TCC claims that went to trial (Form 2)

A significantly lower number of responses was received to Form 2 than to Form 1. This is not surprising, given the small percentage of cases which go to trial in the TCC; but as a result the conclusions that can be drawn are less robust than those from the responses to Form 1.

Question 1: What was the nature of the case?

Figure 15a: What was the nature of the case?

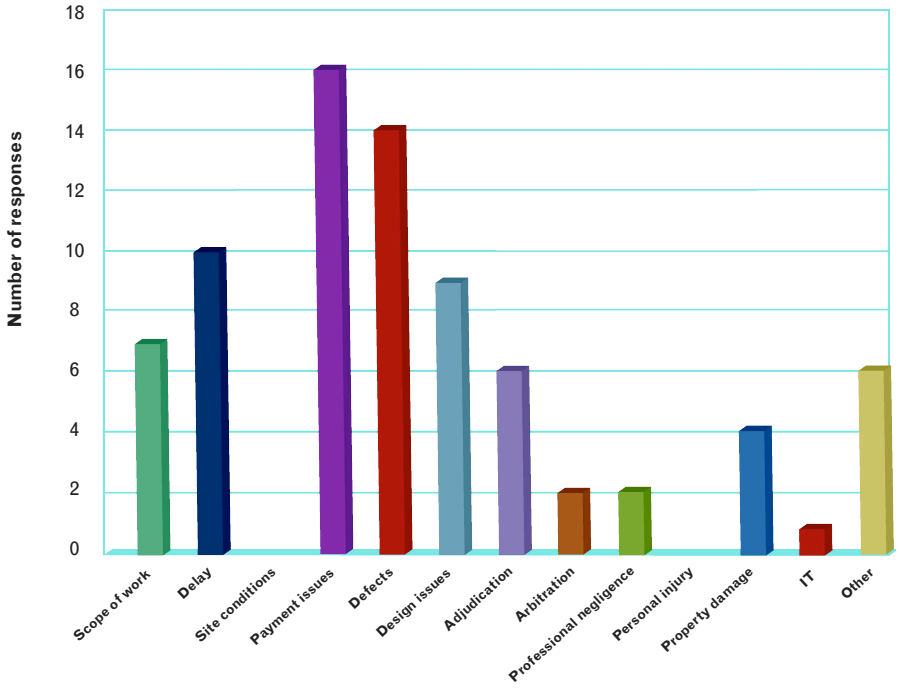
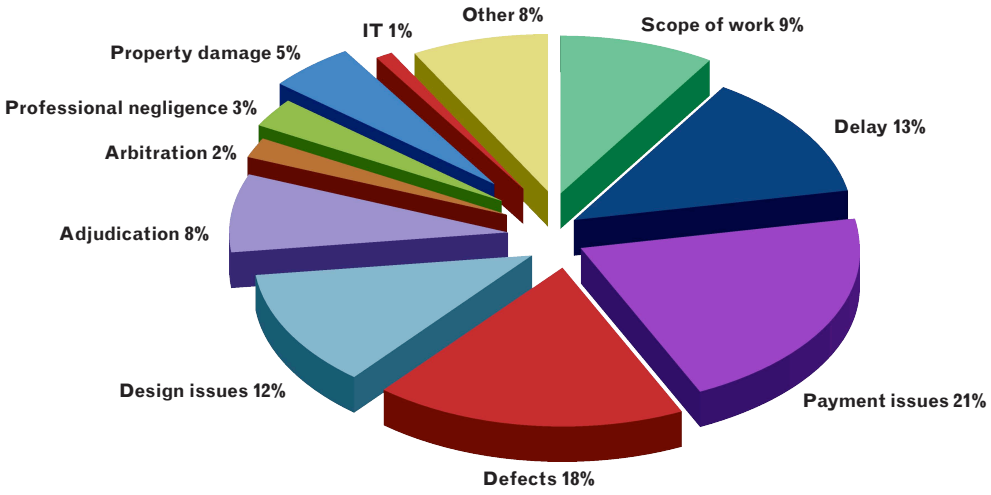


Figure 15b: What was the nature of the case?



As for Form 1, no responses identified 'personal injury' as a category; once again, payment issues and defects formed the largest categories. There is a lower occurrence of professional negligence cases in this group than in the Form 1 group (cases which settled prior to judgment): 3%, compared to 13%. This may mean that professional negligence cases are more likely to settle, so less likely to go to trial, than other types of TCC 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 in this group of cases is higher than in the Form 1 results (21% compared to 13%). This may indicate that where a payment issue has not been resolved by adjudication it is more likely that the claim will progress to judgment. In contrast, the percentage of defects claims remains the same in both groups of case. This may add support to the argument already mentioned that relatively few defects claims are dealt with effectively by adjudication.

Question 2: What attempts were made to resolve the litigation?

Figure 16a: What attempts were made to resolve the litigation?[11]

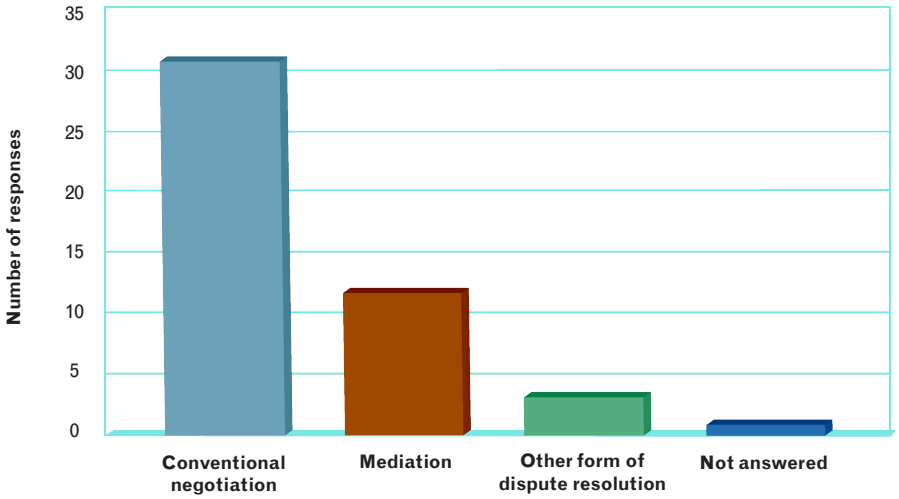
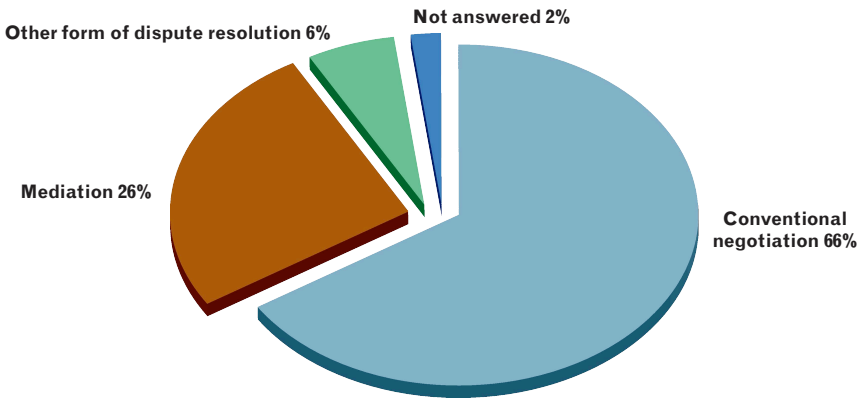


Figure 16b: What attempts were made to resolve the litigation?



Figures 16a and b above show results similar to those for Form 1. Conventional negotiation was the most popular dispute resolution technique. Mediation was attempted in 26% of cases (25% of Form 1 cases).

Question 4: Why was mediation undertaken?

Figure 17a: Why was mediation undertaken?

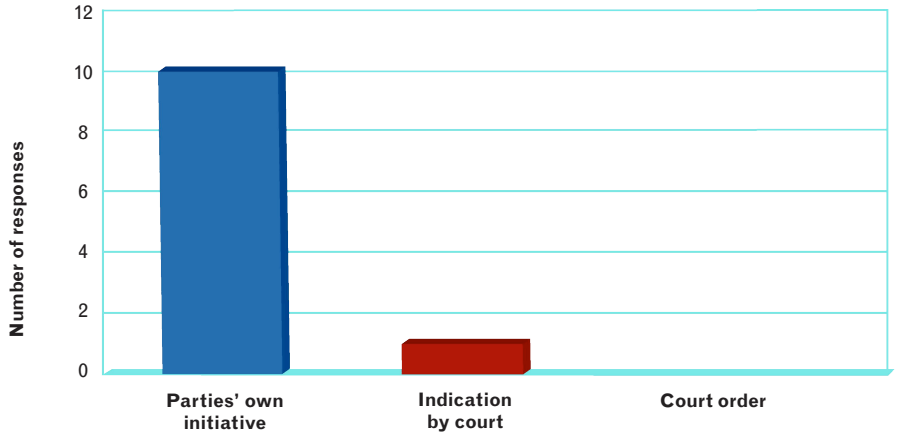
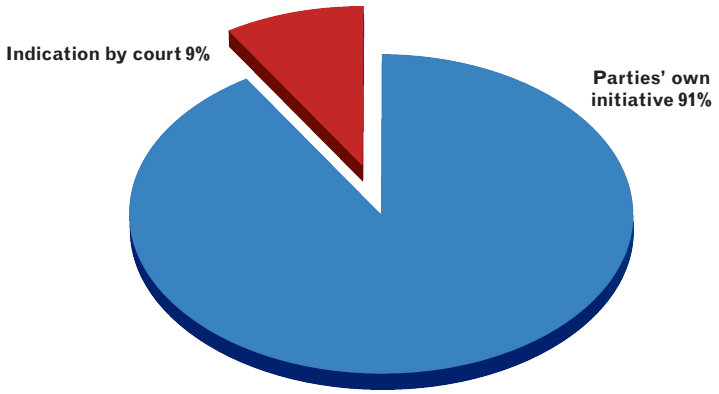


Figure 17b: Why was mediation undertaken?



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

Question 5: The mediator

Figure 18a: What was the profession of the mediator?

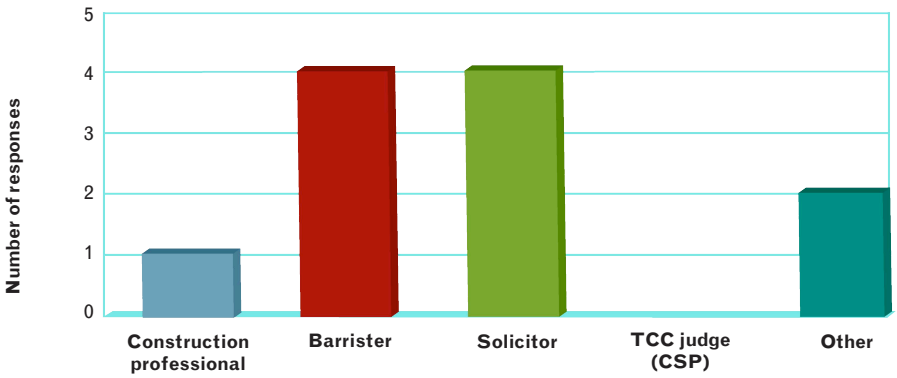
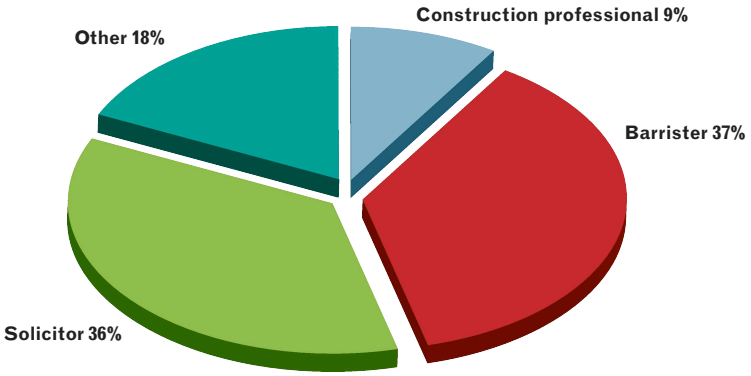


Figure 18b: What was the profession of the mediator?

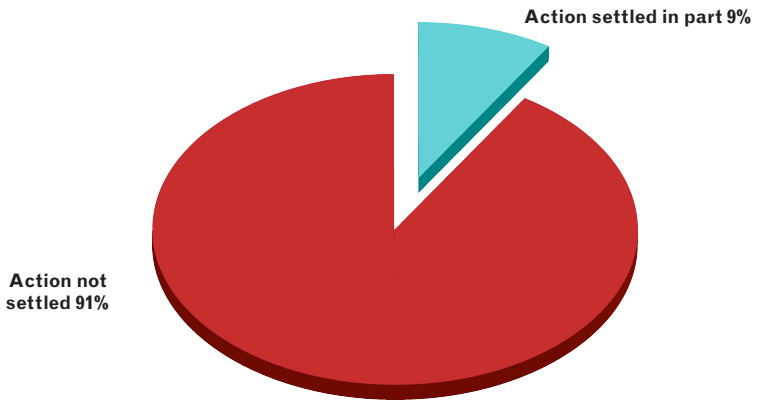


Once again, the most popular mediators are legally qualified, with only a small percentage of construction professionals appointed as mediators. There is also a complete absence of TCC judges in the responses to Form 2, suggesting that in the few cases where TCC judges were appointed as mediators the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

Question 10: What was the outcome of the mediation?

Figure 19a: What was the outcome of the mediation?

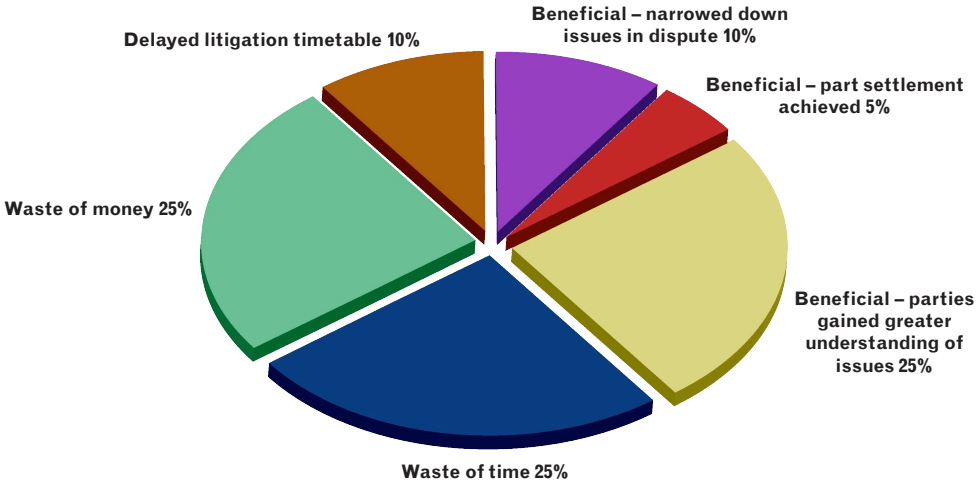
Figure 19b: What was the outcome of the mediation?



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- The impact of the mediation

Figure 20: What was the impact of the failed mediation?



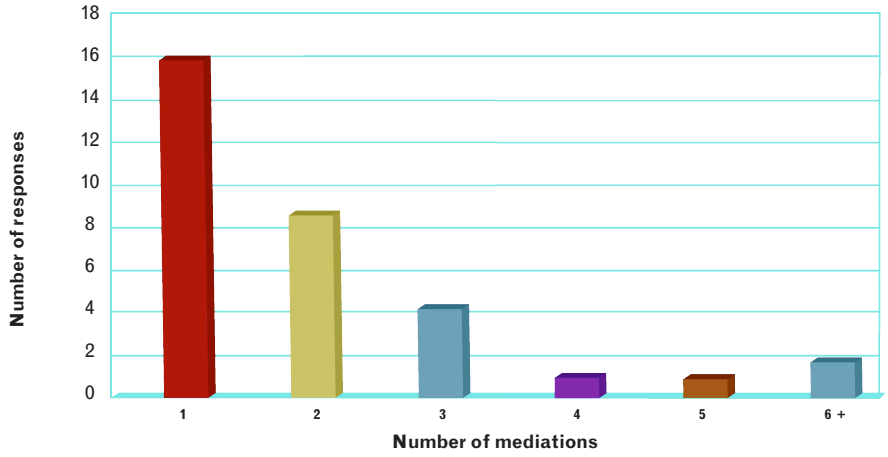
It might be thought that, where the parties do not settle in a mediation and go on to a trial, the mediation must in hindsight have been a waste of time and money. However, according to the respondents to Form 2, this is not always the case. Only 25% of respondents considered the mediation to have been a waste of time and only 25% thought it a waste of money; and only 10% considered that it delayed the litigation 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 for the parties in gaining 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 making the litigation more efficient as the parties headed towards the hearing.

20 Survey results III: data from both sub-groups

Mediators

The names of the mediators used cannot be disclosed, for reasons of confidentiality. However, the frequency with which the same names were reported (across both sub-groups) is worth reporting.

Figure 21: What was the outcome of the mediation?



Whilst most 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 which the participants are aware of who is perceived as being effective.

Appointing bodies

In most cases, no appointing body was used to choose the mediator; only 20% of respondents who had used mediation had done so. Where appointing bodies were used, CEDR and In Place of Strife accounted for five mediations each, ADRg for three and Consensus, Independent Mediators Ltd and the Association of Midlands Mediators for one each. In three mediations, the appointing body was named as a set of chambers.

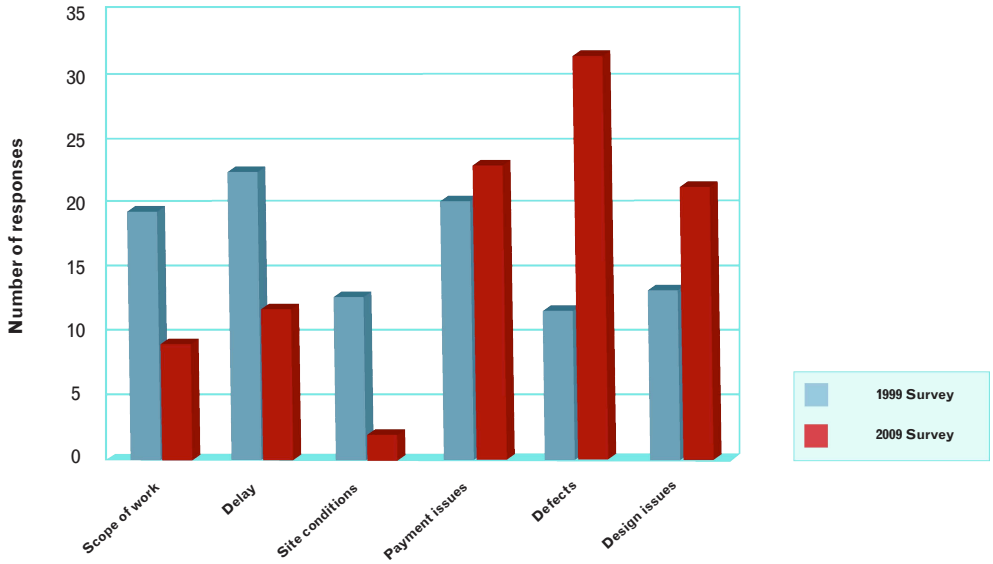
21 Analysis

Issues in dispute

The categories of issues reported in Forms 1 and 2 were almost identical to those of the 1997 survey, reported in 1999. That survey sought to gather data about the types of dispute resolution technique being used by the construction industry, in particular ADR, before the introduction of adjudication. Some adjustments are needed in order to permit a meaningful comparison. The original survey gathered information about negative and positive experiences with dispute resolution, and so the aggregate of those figures had to be taken in order to compare them with the King's College London survey. There was of course a different total 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, matching an average of 100 responses in 1997 against an average of 100 responses from the more recent survey:

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.

Figure 22: **Changes in the TCC workload**



Clearly, the number of disputes in respect of payment has remained at a similar level, whilst those about defective work have increased, as have those relating to design. However, disputes about changes in the scope of works appear to have halved, as have those dealing with delays; disputes relating to differing site conditions have substantially reduced. Leaving aside the possible unreliability of the figures, the TCC appears to be dealing with fewer disputes in these three categories than ten years ago.

One obvious expanation 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 design issues are inherently more likely to find their way to the court.

As Figures 3a and b above also show, defects (18%) has become the most common category of issue before the TCC, suggesting that the courts are better placed to deal with such claims (which often require extensive expert evidence) than adjudication. This category is closely followed by a second group comprising payment issues (13%), design issues (12%), professional negligence (13%) and property damage (13%). Disputes involving change to the scope of works, delays and differing site conditions appear less likely now to come before the TCC. So a surprisingly low number of typical mainstream construction disputes (variations, delays and site conditions) reach the court, again suggesting that adjudication may successfully settle 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, therefore, payment claims which do not get resolved by adjudication are equally unlikely to settle by negotiation or mediation.

Methods of settlement

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 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 turned out not to be successful, 91% of these occurred as a result of the parties own initiative. This suggests that the incentives to consider mediation coming from the CPR (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.

Timing of mediation

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 pattern is similar for mediations undertaken as a result of the indication from the court and/or an order: these too tended to occur during exchange of pleadings. Of successful mediations, a higher percentage of respondents whose mediations had taken place during exchange of pleadings and shortly before trial believed that the dispute would have gone progressed to judgment if mediation had not taken place. This potentially suggests that mediation was comparatively more successful at these stages.

Mediators

The vast majority of mediators were legally qualified; only 16% were construction professionals. As for using judges as mediators, uptake for the TCC Court Settlement Process appears very limited from the survey, though its success rate was exceptional. Parties' lack of enthusiasm (if that is what it is) suggests that the TCC may not encourage much additional business for the court in the long term by offering the CSP. 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 does not support arguments for greater regulation of mediators and supports the 'light touch' approach continued by the 2008 EC Mediation Directive (see section 7 above).

Unsuccessful mediations used a similar range of mediators to successful mediations, meaning that conclusions as to the type of mediator likely to encourage a successful outcome are hard to identify.

Cost savings

The cost savings attributed to successful mediations were significant, providing a real incentive for parties. Only 15% of responses reported savings of less than £25,000; 76% saved more than £25,000; and the top 9% of cases saved over £300,000. The cost savings were generally proportional to the cost of the mediation itself. 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. This survey therefore supports and adds to the evidence already gathered that mediation can make a significant impact.

The savings attributed to successful mediation in the TCC are higher than those identified by the VOL scheme, which no doubt reflects the higher value and complexity of TCC disputes, compared with those in the Central London County Court. These potential cost savings may explain the dramatic turnaround 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 in 2001. However, the King's College London survey indicates that even a failed 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.

1 The concept was developed jointly by Nicholas Gould and Rupert Jackson J (as he was then) in 2005.
2 In London, 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.
3 The Birmingham TCC deals with both High Court and County Court TCC cases.
4 The Bristol TCC deals with both High Court and County Court TCC cases.
5 Form 1 is attached as Appendix 1.
6 Form 2 is attached as Appendix 2.
7 For TCC statistics, see Table 4 in Part III above, also the *Annual Reports* for the years ending 30 September 2006-2008 inclusive; individually downloadable from www.hmcourts-service.gov.uk/infoabout/tcc/annual_reports.htm (accessed 10 December 2009). The TCC's 2006 *Annual Report* states that 108 new cases were started in the Birmingham TCC in that review period; from its 2007 *Annual Report* 213 were started in Birmingham during the next twelve months. No separate figures were available for the Bristol TCC for the year ending 30 September 2006; the analysis therefore assumed the same number of cases started in Bristol in that period as in the twelve months following (ie 18).
8 A spoiled response occurred where the answers to Q1, 2 and 3 were either left blank; or where one box only should have been ticked, but two or more had been ticked.
9 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.
10 Each number does not reflect the number of surveys issued or returned, as respondents could tick all the categories that applied. As in Form 1, there were 13 possible categories (including 'other').
11 The combined total is higher than the number of surveys issued or returned, as respondents could tick more than one category.
12 This includes all mediations – both successful and unsuccessful.
13 For the detailed report, see Nicholas Gould, Phillip Capper, Giles Dixon & Michael Cohen, *Dispute Resolution in the Construction Industry*, London, Thomas Telford (1999); also Nicholas Gould and Michael Cohen, 'ADR: Appropriate Dispute Resolution in the UK Construction Industry' (1998) 17 Civil Justice Quarterly ///.
14 This includes 9% of respondents who did not answer this question.
15 Anthony Lavers and Penny Brooker, 'Commercial lawyers' attitudes and experience with mediation' Web Journal of Current Legal Issues (27 September 2002); 'Construction lawyers' experience with mediation post-CPR' (2005) 21 Construction Law Journal 19; and 'Mediation outcomes: lawyers' experience with commercial and construction mediation in the UK' (2005) 5 Pepperdine Dispute Resolution Law Journal 161.