



## The Mediation of Construction Disputes: Recent Research

by Nicholas Gould

### Introduction

1. 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.
2. 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. 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.
3. Adjudication is now well established within the construction industry, and in other common law jurisdictions. 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](http://www.adjudication.gcal.ac.uk)). Other common law jurisdictions where adjudication has been introduced are Australia, Singapore and New Zealand. 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).

### New research: aims and purposes

4. There is 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 are 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.
5. 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 risk of paying the opposing parties' legal fees if their claim or defence is unsuccessful. The obvious questions are:

- To what extent do they use mediation in order to settle their dispute?
  - At what stage do they settle?
  - Do they make any cost savings by using mediation, rather than conventional negotiation?
6. This group can be divided into two sub-groups: first, those who settled their dispute after commencement, but before judgment; and secondly, 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.
7. The research therefore focused on issues specific to those two sub-groups, with three main research aims:
- to reveal in what circumstances mediation is an efficacious alternative to litigation;
  - to assist the court to determine whether, and at what stage, it should encourage mediation in future cases; and
  - to identify which mediation techniques are particularly successful.
8. 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

9. 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 who had settled during litigation and those who 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.
10. Three TCC courts participated in the survey: London, Birmingham and Bristol. 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.

11. Form 1 was issued where a case had settled, Form 2 where judgment had been given. 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. This article focuses on the majority reply, namely those replies to Form 1. The completed survey forms were returned to the Centre of Construction Law and Dispute Resolution at King's College London, where they were collated.

**Survey results**

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

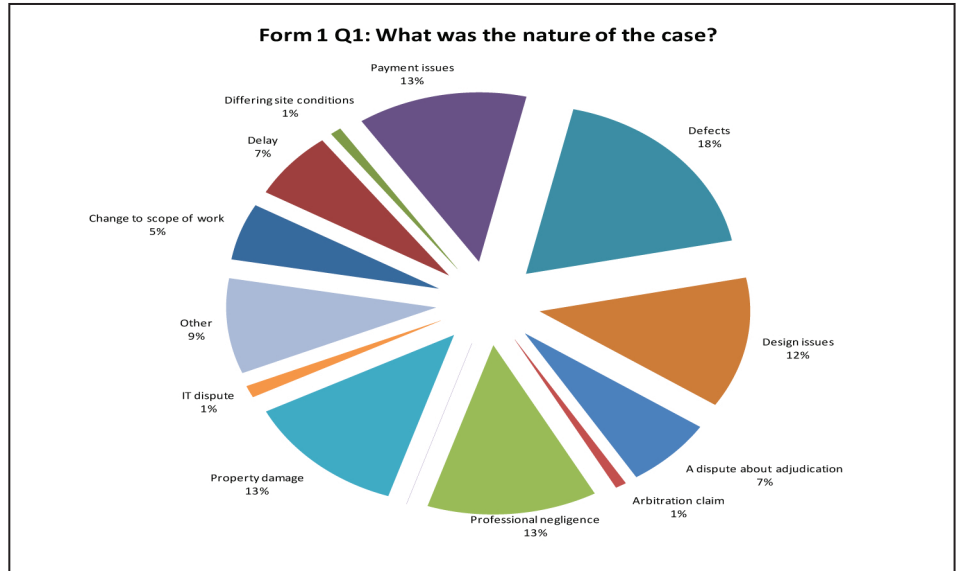


Chart 1: Percentage distribution of the cases in Q1

13. 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 (note that there were no reported personal injury claims):

Table 1: Frequency of different categories of case

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

14. Grouping the most frequently encountered issues referred to the TCC for resolution, it was clear that defects (18 per cent) was the most common category of case, closely followed by a second group comprising payment issues (13 per cent), design issues (12 per cent), professional negligence (13 per cent) and property damages (13 per cent). Change to the scope of works, delays and differing site conditions were now less likely to become matters that the TCC dealt with, perhaps now being resolved in adjudication.
15. 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.

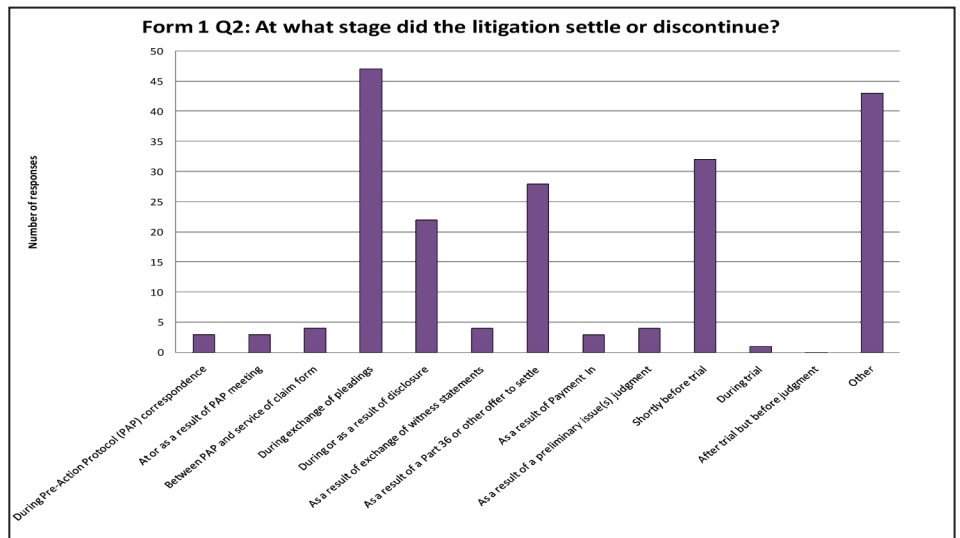


Chart 2: At what stage most of the litigation settled or was discontinued

16. From Chart 2 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; and
  - shortly before trial.
17. Q3 asked respondents to identify whether the case was concluded as a result of mediation, negotiation or some other method of dispute resolution.
18. Chart 3 shows that the most popular method of bringing a settlement about was through conventional negotiation (60 per cent of the responses). This was followed by mediation (35 per cent, or 68 responses). These responses were then broken down further based on the information supplied by the remaining Form 1 questions.

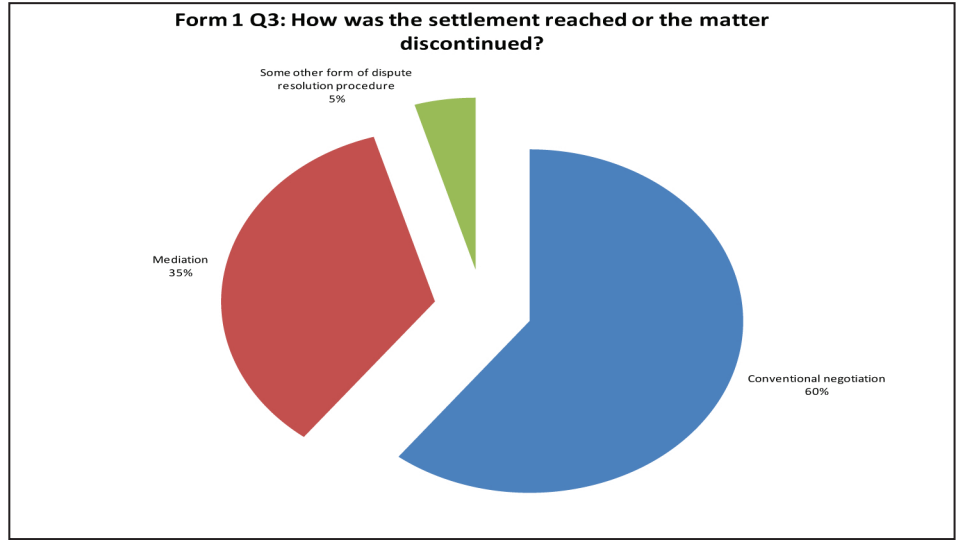


Chart 3: Percentage distribution of the methods whereby settlement was reached or the matter discontinued

19. By far the majority (76 per cent) 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 per cent and 10 per cent respectively).
20. The vast majority of mediations used members of the legal profession as mediators. The most popular mediators were solicitors (41 per cent of the mediations held). Barristers were appointed as mediators for 34 per cent of mediations. TCC judges were only used by five respondents, suggesting that the popularity of the TCC's Court Settlement Process was limited.

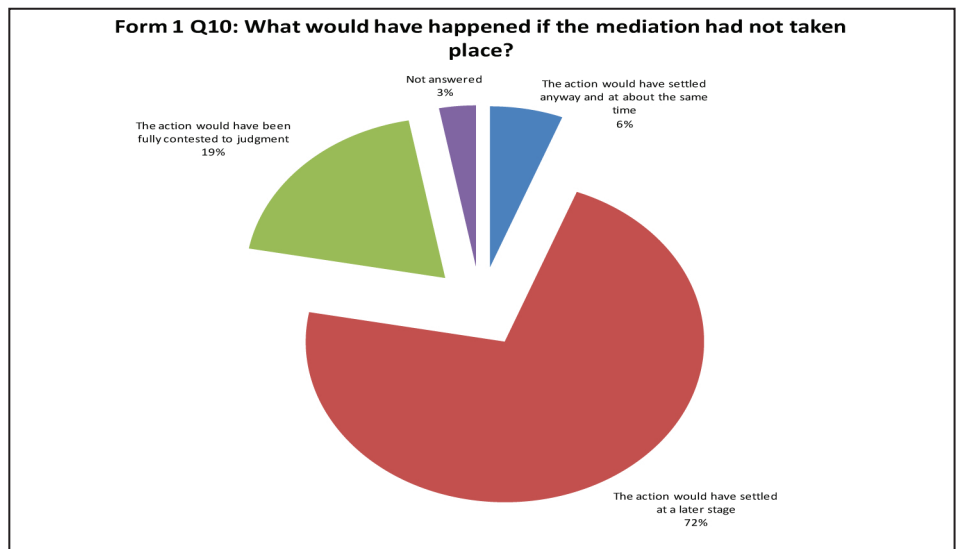


Chart 4: Percentage distribution of the perceived outcomes, had the mediation not taken place

21. Chart 4 demonstrates that the majority of the respondents (72 per cent) believed that the litigation would have settled at a later stage. However, 19 per cent of the respondents believed their cases would have been fully contested to judgment.

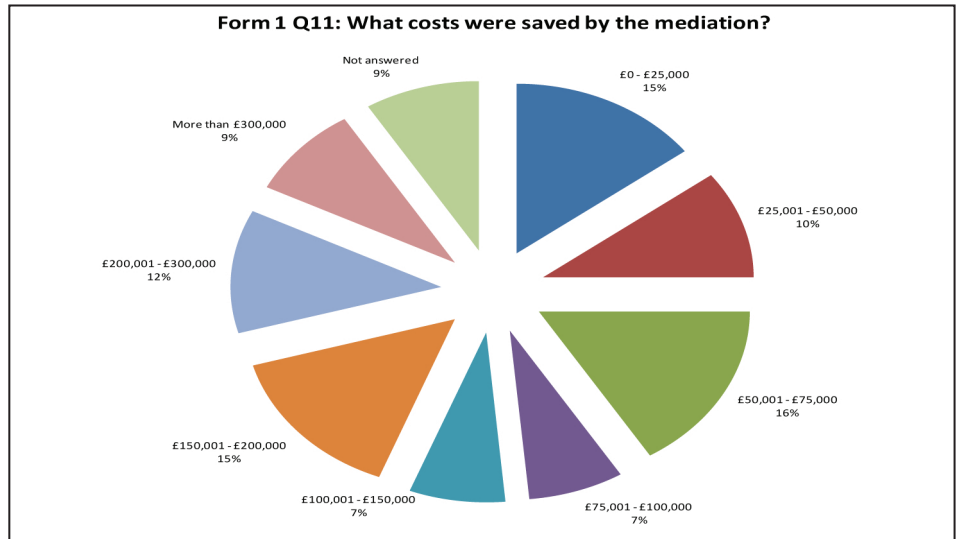


Chart 5: Percentage distribution of the estimated cost savings due to mediation

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

### Mediators

23. 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. 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

24. Appointing bodies for mediators were not widely used: only 20 per cent of respondents who had used mediation had used an appointing body. 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.

### The nature of the issues in dispute

25. 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. (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).) 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. The following six key issues in dispute can be identified:

- 1) Changes in the scope of works;
- 2) Project delays;
- 3) Differing site conditions;
- 4) Payment issues;
- 5) Defective work or product; and
- 6) Design issues.

26. 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 6 below:

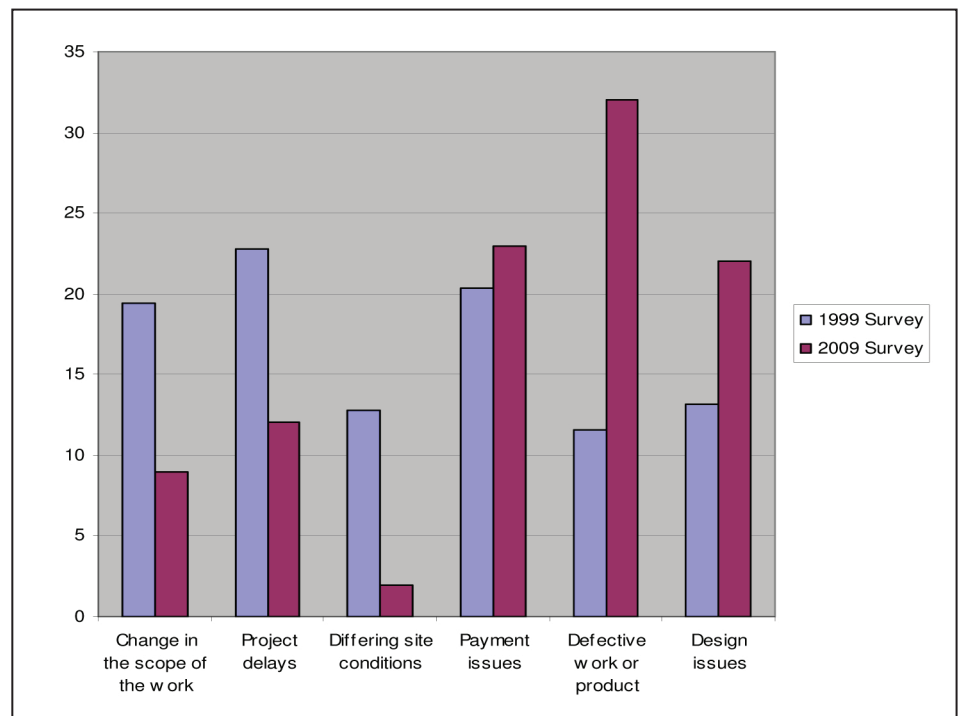


Chart 6: Types of issue from the survey reported in 1999, compared with those from the present survey

27. 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 that relate to changes in the scope of works, project delays and site conditions than those that generally were arising ten years ago.
28. One obvious explanation is that adjudication, introduced shortly after the conclusion of the older survey, is now dealing with delays, variations and site condition, while defects and design issues are more likely to find their way to the court. The highest proportion (18 per cent) is for defects claims, which are by their nature often complex and involve the use of expert evidence.

## Summary and conclusions

29. The completed survey forms provide an interesting insight into the types of claim being dealt with by the TCC. The TCC Annual Report 2006 does not provide an indication of the 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 per cent of claims for which settlement was reached prior to judgment to 21 per cent 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.
30. The number of defects claims being dealt with by the TCC is also high (18 per cent for both Forms 1 and 2), suggesting that the courts are better placed to deal with such claims (which often require extensive expert evidence) than adjudication. Design issues, also technically complex, represented 13 per cent of Form 1 cases and 12 per cent of Form 2 cases.
31. 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.
32. Mediation was undertaken on the parties' own initiative in the vast majority of cases. Of the successful mediations only 22 per cent were undertaken as a result of the court suggesting it or due to an order of the court. Even where mediation was unsuccessful, 91 per cent occurred as a result of the parties' own initiative: only one 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.
33. The cost savings attributed to successful mediations were also significant, providing a real incentive for parties to consider mediation. Only 15 per cent resulted in savings of between zero and £25,000, while 76 per cent (which includes 9 per cent of respondents who did not answer this question) resulted in cost savings of over £25,000, with 9 per cent 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 the parties realise that the potential savings resulting from the mediation will be higher.



34. The parties themselves generally decided to mediate their disputes at three key stages: as a result of exchanging pleadings; during or as a result of disclosure; and shortly before trial. The results are similar in respect of mediations undertaken as a result of the indication from the court and/or an order; these tended to occur during exchange of pleadings (possibly as a result of a first case management conference), as a result of disclosure and shortly before trial (possibly as a result of a pre-trial conference). Of successful mediations, a higher percentage of respondents believed that the dispute would have progressed to judgment if mediation had not taken place during exchange of pleadings and shortly before trial. This suggests that mediation may have been comparatively more successful at these stages.
35. The vast majority of mediators were legally qualified; only 16 per cent 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 settlement. Nonetheless, there is clearly a place for this distinct court service.
36. 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: 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.
37. For the vast majority of mediations, the parties were able to agree between themselves on the mediator to appoint; appointing bodies were only used by 20 per cent 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.
38. 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 mediation has transformed from a novel idea into its current position as an indispensable tool for construction litigators.

### Additional information

Nicholas Gould, Partner, Fenwick Elliott LLP and Visiting Senior Lecturer, King's College London, led the project, with coordination and drafting assistance from Claire King, Assistant Solicitor, Fenwick Elliott LLP and from Philip Britton, King's College London. The Research Assistant was Aaron Hudson-Tyreman, who liaised with the TCC during the

research period and collated the survey questionnaires. The analysis was carried out by James Luton, with assistance after the survey period from Julio Cesar Betancourt, Pilar Ceron, Cerid Lugar, Annabelle K Moeckesch and Ms Yanqiu Li, all either researchers or employed by the Chartered Institute of Arbitrators. The Summary Report of the Final Results was published on 7 May 2009 and can be downloaded from [www.fenwickelliott.co.uk](http://www.fenwickelliott.co.uk). A more detailed contextual report is nearing completion and will be available shortly. King's College London gratefully acknowledges the research funding, support, resources and guidance provided by the Society of Construction Law, the Technology and Construction Solicitors' Association (TeCSA) and Fenwick Elliott LLP. Thanks go also to the TCC – its judges, also in particular Caroline Bowstead, the TCC Court Manager, responsible for establishing the procedure for the court to issue survey forms. The CI Arb is also thanked for kindly providing research support once the survey was complete, to assist in analysing the forms and to gather relevant literature and data for the final detailed report.

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