Preliminary Findings

Survey of In-House use of Commercial Mediation

7 March 2013

Introduction

As part of CEDR's role as an innovator in the field of ADR we are always looking to see what changes might be taking place. In the last year we noticed a new trend; greater representation in mediations by in-house lawyers - in approximately 35% of our cases last year there was direct in-house engagement in the referral process. Historically almost all requests for mediators have come from private practice lawyers representing their clients, with very little direct in-house contact. Therefore CEDR decided to start looking in more detail into why this change might have occurred.

The preliminary results of this first survey were delivered on 7 March 2013 at the Walbrook Club, London, as part of a wider session to a group of in-house dispute resolution practitioners who had helped in compiling the survey.

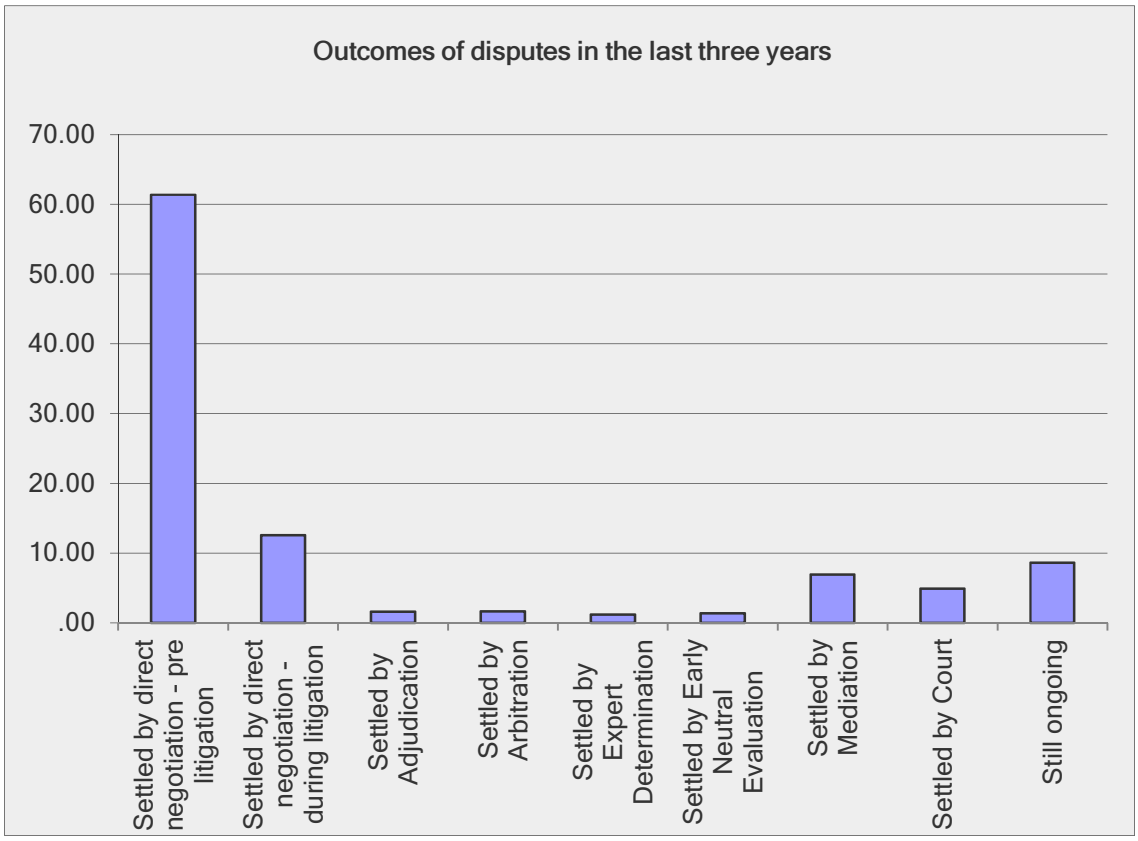
About the survey group

50 individuals responsible for dispute resolution undertook the survey and whilst this is not a fully statistically significant sample it does provide us with very interesting information and insight into how mediation is used in-house. Of the 50 people that took the survey, nine in ten were lawyers, the others with responsibility for dispute resolution who took part were Chief Executives, Directors and Managers. Of the lawyers that took the survey the largest group were General Counsel, Senior Legal Counsel and Heads of Department.

The survey was all-encompassing in background, covering 20 industry sectors (including public sector and charities), with the four most popular being Banking and Finance, General Commercial, Healthcare and Telecommunications. 90% of those that responded to the survey were based in the UK and 10% were based in other jurisdictions. Over half of respondents work in organisations with legal teams of less than 15 members whereas over a fifth had departments with over 40 lawyers. This last fact is probably reflected in the large number of well-known or household names represented by those who took part in this survey. Experiences of mediation varied hugely from nil to in excess of one hundred cases, in a couple of instances.

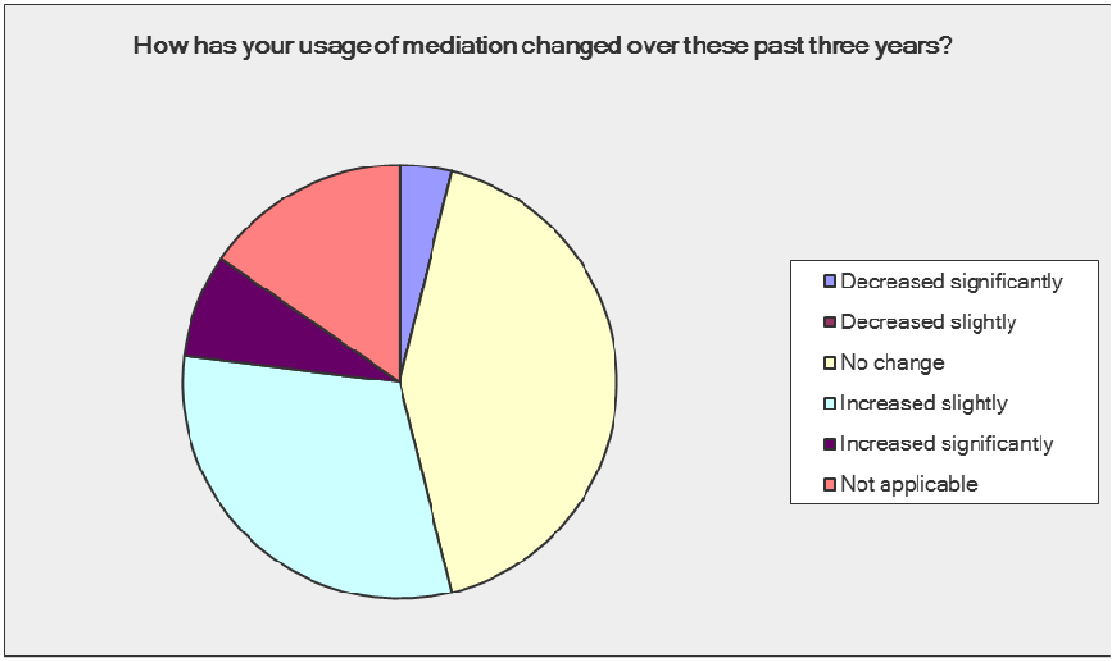
Prevalence of dispute resolution and attitudes to mediation

On average those taking the survey said their teams spent 42% of their time on contracts, by far the largest single activity. Dispute resolution was the second most time-consuming activity, divided into disputes with external parties (19% of time) and disputes with internal parties such as employees (9%).



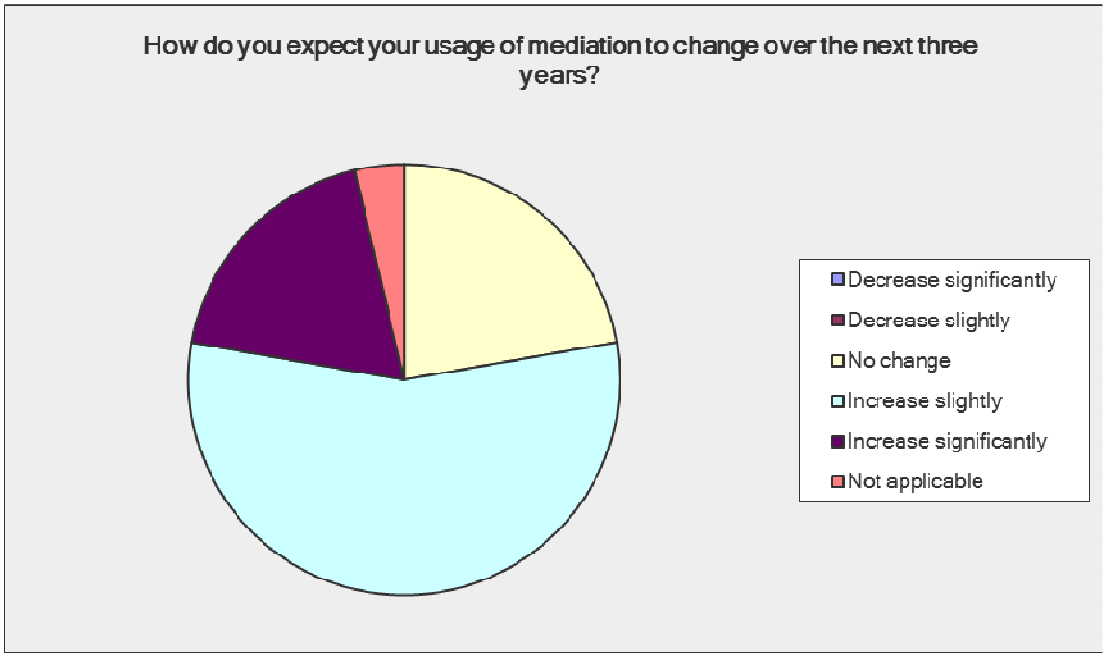
When asked what happened with disputes handled in the last three years we were told that over 60% were settled by negotiation pre-litigation. A further 12% were settled by negotiation following commencement of litigation. The third most frequent outcome was settlement by mediation. This was higher than all other ADR processes combined at 6% (including arbitration which alone was under 2%). Resolution by mediation was even higher than receiving judgements at court, 5%, whilst 9% of cases from this period were still on-going.

Only 13% of respondents said they had never used mediation. Just under half said they used mediation in 10% of cases and 40% said that they used it in between 30%-90% of all their disputes.



42% of respondents had not seen any change although almost as many (40%) had seen an increase in its use, with 8% saying growth had been significant. Only 4% had seen a decrease in its use. When we asked those who had seen an increase as to why that might be, a number of the responses indicated an increasing appreciation of the value of the process:

- *"Resolution and mediation is now a more common form of dispute resolution process in contracts."*
- *"Parties see the value in it and are beginning to hear it produces results."*
- *"I am a strong proselytiser for mediation and the message is gradually getting across."*
- *"I have more confidence."*
- *"Mediation is supported by our trade unions and the organisation where appropriate."*



We then asked if the use of mediation would grow in the next three years. Remarkably, nearly three quarters of respondents said yes and 18% said they expected the growth to be significant. No one expected to see the use of mediation decrease. When prompted for the reason for the predicted growth, these were some of the suggestions:

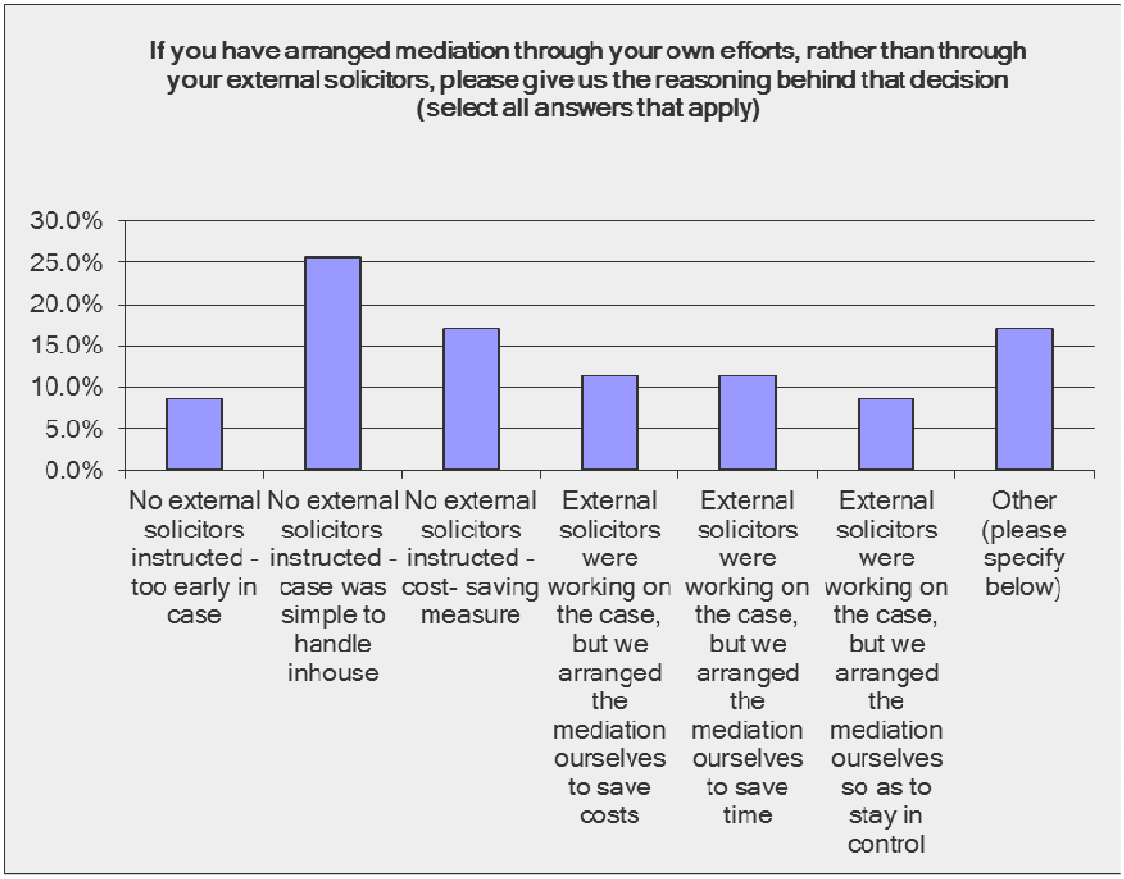
- *"The cost and time in litigating major disputes."*
- *"Court delays are increasing and most court litigation needs a swift outcome."*
- *"Changes to CFAs, better understanding of mediation by the business and more buy in from lawyers."*
- *"Public knowledge of mediation and its benefits."*
- *"Civility of mediation over litigation."*
- *"1. Ability to find good mediators; 2. Cost of court/arbitration."*
- *"Increase litigation in developed markets, cost and outcomes."*
- *"Recession."*
- *"The judicial preference for parties to attempt to resolve disputes other than through court litigation."*

The question 'What would encourage greater use of mediation?' was met with the following suggestions:

- *"CEOs and CFOs should be targeted from a marketing perspective. Left with the lawyers to decide, there is a 'comfort' with litigation as the power in the handling of the dispute passes to the legal department."*
- *"Regulators could apply their influence on parties to encourage them to incorporate mandatory mediation and/or adjudication within their standard terms, as a means of relieving some of the regulatory burden and cost."*
- *"More awareness of the wider business advantages of mediation."*
- *"Training on the benefits of mediation in comparison to other alternative dispute resolution procedures."*
- *"Marketing mediation as a solution in Continental Europe, particularly France."*
- *"Enforceability."*

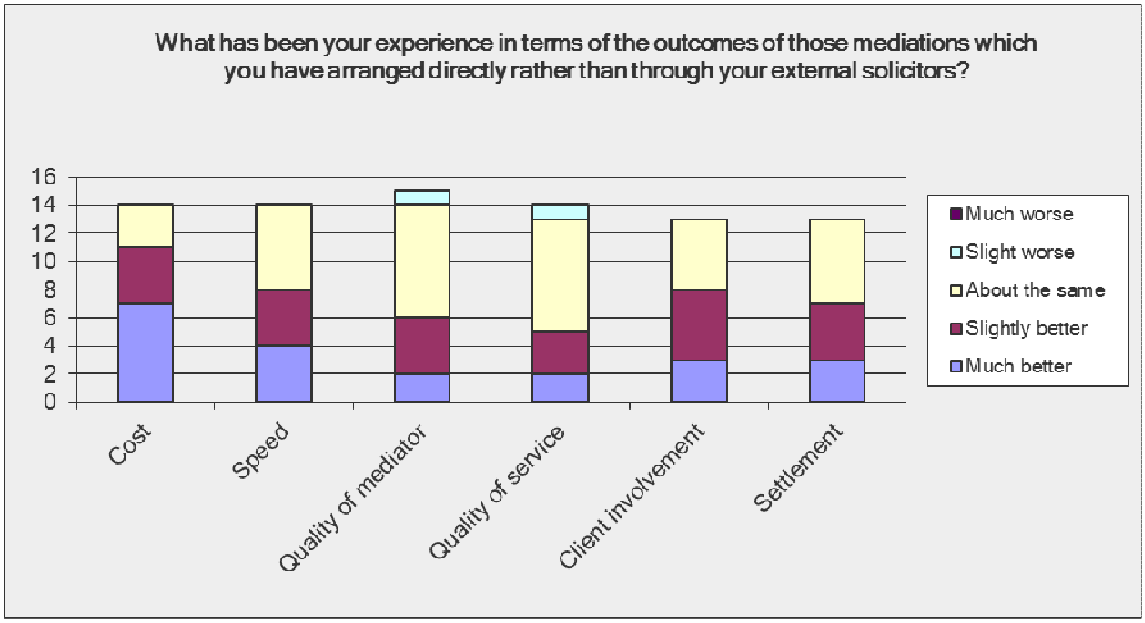
Mediation arrangements

Respondents said that in the last year, in most instances, they were arranging the mediation themselves, rather than using a law firm. Most frequently (in over 350 occurrences) this was by going direct to the mediator.



We asked why in-house teams were arranging mediations themselves. In over half of cases external solicitors were not instructed, the main reason being that a case was felt to be quite straightforward to handle. Where external solicitors had been instructed the reasons for not involving them in the mediation included saving time or money by making the arrangements in-house (23% of cases) and keeping greater control of the matter (9%).

When asked if they thought the mediation had been better or worse for arranging it themselves, the majority of respondents under most criteria identified that there was either no difference or they felt it had been the mediation had been better. Cost and internal 'client' involvement came out as areas where a clear advantage was felt.



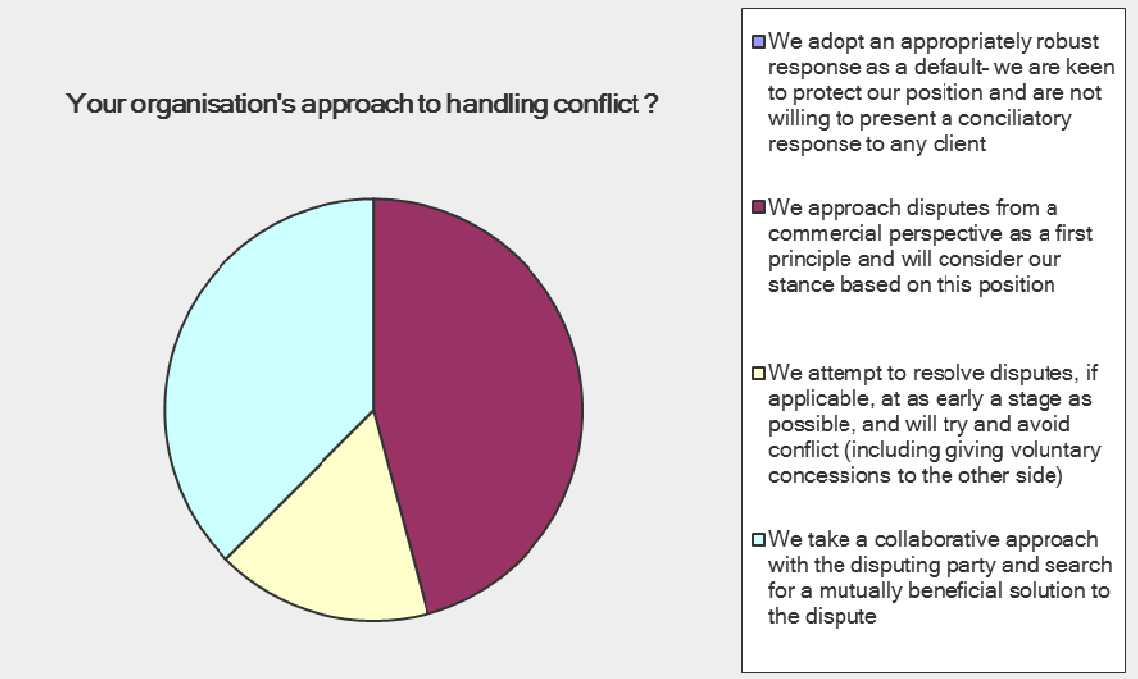
We then asked the qualitative question: 'Which cases might the respondent be more likely to use mediation for?' The answers showed two main points: where commercial issues were more dominant than legal arguments, mediation was valued; and, that it was felt that the process particularly suited employment disputes.

- *"Would go direct if little legal argument but a factual / commercial issue is at stake. Would also be more inclined to go direct if litigation had not begun."*
- *"Mediation creates a direct link between the parties rather than a court procedure that places litigation at the centre of the all cases rather than placing the parties interest at the centre of such attention."*
- *"Where parties have some knowledge of mediation."*
- *"Simple employment disputes - where a grievance has been raised or discussed but not formally made."*

When choosing a mediator, the respondents said that Professional Reputation was predominant in their selection. This included the mediator's experience (both professional and sector), their personal style and qualifications. Interestingly what was not considered as important was their settlement rate for cases. Other significant factors were availability and the fee charged.

Preparing for conflict

A fifth of respondents said they did not use ADR Clauses in contracts, whereas 79% said that they did use them. The most popular clause was mediation, cited by 62% of people, followed by arbitration clauses used by 50%.



We asked those taking the survey to identify with one of four statements relating to dispute handling. Almost half (46%) opted for the statement; "We approach disputes from a commercial perspective as a first principle and will consider our stance based on this position". The second most popular statement was on taking a collaborative approach and finding a mutually beneficial solution (37%). No one selected the statement purporting an automatically robust and non-conciliatory response.

When asked about relationships with the other side following a dispute, 42% said relations were not adversely impacted (although a third thought that they were likely to be). The remainder (21%) thought that the relationship improved following the dispute (presumably as the dispute had resulted in issues being addressed).

Comments from respondents in this section were as follows:

- *"The message is clear that we are open to talk and have a track record of resolving fairly."*
- *"We will always look to seek a win-win and the long term implications. The dispute is generally short term."*
- *"Need to adopt a collaborative approach to resolve amicably and to a mutual outcome. Even if the dispute causes strain among the parties the overriding objective to resolve quickly helps improve the on-going relationship."*
- *"Disputes are part of our business - once settled, both sides move on."*

- *"As a large Multi-National Company we are conscious of our reputation and a little sensitive to the assumption that our size means we are a bully or invulnerable but we also know that many who may have a dispute with us may wish/need to deal with us in the market so both usually have a pragmatic approach to ADR."*

The respondents were asked how they might work with the other side. It was identified that they were most likely to jointly discuss the issues early on, clarify the facts of the case, involve decision makers in the business and hold a face to face meeting with the other side. Of the activities rarely undertaken, the most popular approach was to use a neutral person to chair meetings for the parties.

Finally we asked the question: 'What would make those in-house better at using mediation?' A number of the responses alluded to building capabilities:

- *"Train in-house counsel in mediation skills."*
- *"There are courses on assertiveness and dealing with litigation arbitration etc. but nothing on how to resolve a dispute without recourse to a formal process i.e. negotiating techniques."*
- *"Understanding the commercial benefit and gaining buy-in from senior leaders."*
- *"Strategic planning, early case assessment, clear thinking and good negotiation/communication skills."*

Conclusion

The findings from this survey form the start of an on-going discussion which CEDR intends to conduct with In-House Corporate Counsel and Senior Management about what it needs and wants from the field of Alternative Dispute Resolution. What this survey provides is an initial insight into the pressures of dispute resolution and in-house legal teams and how they choose (or do not choose) to use mediation to help meet the demands of their organisation. We take away from this survey that, whilst negotiation is by far the most popular method for early dispute resolution, mediation is consciously being used by in-house teams. We also take away that whilst in-house teams are happy to involve external advisors when appropriate, there is substantial and growing confidence for mediations to be set up internally. When looking at attitudes to dispute resolution, where choosing the best course of action and collaborating are favoured over fighting all challenges, it is not surprising that in-house contracts are including ADR clauses to ensure preferred methods of dispute resolution are used and that the use of mediation is expected to continue to grow in the next three years.

It is clear that there are still areas in dispute resolution practice that can be developed and enhanced and we hope that you will join us in our on-going discussions about how we can make this happen.

CEDR
March 2013