An investigation of construction lawyer attitudes to the use of mediation in Scotland

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Abstract:

An examination of the literature specific to Alternative Dispute Resolution in the construction industry in Scotland offers a snapshot of a discipline whose research base is in its infancy (Agapiou, 2010). It is widely documented that legal advisers generally perform a gate-keeping role, advising clients on the most appropriate form of dispute resolution for particular cases. Is it reasonable to believe that the attitudes of construction lawyers in Scotland creates a real limit on what could be implemented by a government that seeks to promote modern methods of dispute resolution as part of its civil justice reform agenda? Drawn from a questionnaire survey, this paper seeks to add to the dispute-resolution literature by identifying the attitudes of construction lawyers on the use and effectiveness of mediation to resolve construction disputes in Scotland. Despite the small sample used in this study, there is little evidence within the study that the inherent conservatism of lawyers in Scotland in their approach to the conduct of disputes brought to them by clients has militated against the use of mediation: this is contrary to anecdotal evidence in the construction industry. Neither does it seem, that the lack of knowledge of mediation, far less experience of its operation, along with fear of the unknown as opposed to an adversarial process which for all its imperfections lawyers understand unequivocally has prevented the use of Mediation to resolve construction disputes. Interestingly, there would also appear to be some evidence of a modest bottom up growth of construction mediation according to the research findings.

Keywords:

Attitudes, Dispute Resolution, Lawyers, Mediation, Scotland

Introduction

The construction industry is highly litigious and ongoing disputes can be costly not merely in a financial sense but also in terms of the breakdown of otherwise profitable relationships often engendered by conflict (Oladapo & Onabanjo, 2009).

While arbitration and adjudication are commonly deployed in the Scottish construction sphere as dispute resolution tools, the adversarial nature of such processes may hold deleterious consequences for parties in terms of financial costs, delays, risks and ensuing loss of business. Proponents argue that mediation is a cheaper, quicker, and altogether more harmonious method of dispute resolution than traditional, adversarial methods. Despite evidence of modest growth in the use of mediation within Scottish civil and commercial disputes generally (Clark and Dawson, 2007; Clark, 2009), and evidence of the growing use of construction mediation in other jurisdictions (such as England and Wales) (Brooker, 1998, 2009; Gould et al, 2009), little evidence can be gleaned from the literature regarding construction mediation in Scotland. According to Sarat and Felstiner (1989, p 1664),"lawyers' assimilation, acceptance, rejection, integration, or other response to alternatives to established norms of litigation practice is critical to both the practical consequences and the impact of civil justice reform and innovation." Thus, given the 'gatekeeper' role that lawyers play they may be crucial in helping expedite the development of any innovations in the field. Despite the fact that much has been written about lawyers' role in, and experiences of mediation in commercial disputes in Scotland, and construction matters in other jurisdictions such as England and Wales (Gould et al, 1998; Brooker, 2009) and the USA (Stipanowich, 1994), little is known about construction lawyers' interaction with the process in Scotland. More generally, Scottish civil justice is in a state of upheaval. A fundamental review of the civil court system has recently been undertaken under the auspices of Lord Gill which may lead to radical reforms of the incumbent system[1]. Concurrently, a new Arbitration Act has recently been passed by the Scottish Parliament, the intention of which is to create a modern, efficient framework for arbitration and thus position Scotland as an attractive centre for international dispute resolution. Against this backdrop, this paper focuses on the utility of mediation as a process of dispute resolution within the sphere of Scottish construction disputes, as well as the role of lawyers within the process.

The aim of the research was to explore the utility of mediation in the construction industry in Scotland. The objective was to elicit views, practices and experience of mediation techniques rather than an in-depth account of a limited number of randomly chosen case studies. A questionnaire approach was used for this initial stage of the enquiry. The structure of the questionnaire was based on that developed by Clark to assess the attitudes of Scottish Lawyers to Commercial Mediation (Clark & Dawson, 2007) and adapted to the construction context.

Primary data collection and analysis

Having defined the framework for the opinion survey, the next step was to develop the necessary data collection tools in accordance with the research objectives. The questionnaire was distributed to 165 legal professionals randomly selected from the membership lists of professional associations for solicitors, advocates and mediators based and operating in Scotland.

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[1] The Report of the Scottish Civil Courts Review was launched by the Lord Justice Clerk, the Rt Hon Lord Gill, on Wednesday, 30 September 2009. The Report, which is in two volumes, is now available on-line @ http://www.scotcourts.gov.uk/civilcourtsreview/

Questionnaire Development

Since the questionnaire was to be self-administered, there was a need for it to be self-explanatory. In order to achieve this, a covering letter and an introductory page describing the aims and objectives of the research was attached to the questionnaire. The questionnaire was divided into three sections as described below;

Section One: the use of Mediation in Construction Disputes

A number of variables from the survey were selected from the questionnaires as the basis for assessing the use of mediation in construction disputes including the background and experience of the respondents in the legal profession, their training in mediation and organisational policies and practices towards mediation.

Section Two: Experience of the use of Mediation

In terms of experiences of mediation, respondents will asked to rate their responses to a number of questions ranging from client representation, levels of satisfaction with different elements of the process, factors leading to a failed mediation process, the decisions to recommend mediation to a client and reasons to refuse mediation proposals from the opposing party in a case.

Section Three: Attitudes to Mediation

The respondents were then asked to rate their perceptions of dispute resolution, alternative dispute resolution and mediation and indicate views on key policy issues relative to mediation's development. The purpose of these questions was to ascertain an understanding of the barriers to the utility of mediation in construction disputes.

Data collection process

The questionnaire survey employed sixty-nine (69) items to collect data on lawyers' experience and attitudes to mediation. A brief description of the items used for the purpose of data collection is presented below.

Eleven (11) items on a 5-point Likert scale with anchors ranging from always relevant to never relevant were used to collect data on factors relevant to a decision to recommend mediation. Seven (7) items on a 5-point Likert scale with anchors ranging from always relevant to never relevant were used to collect data on factors relevant to a decision to decline a proposal of mediation from an opposing party. For those with experience of mediation, four (4) items on a 5-point Likert scale with anchors ranging from always satisfied to never satisfied were used to collect data on satisfaction with different elements of mediation. Seven (7) items on a 5-point Likert scale were used to collect with anchors ranging from always to never on factors contributing to a failed mediation. Nine (9) multiple responses items were used to collect data on client representation in mediation by type of case and whether cases were settled, partially settled or not settled. In addition, Eleven (11) multiple response items were used to collect data on professional designation and training in mediatory techniques. Twenty (20) items on a 5 –point Likert scale with anchors ranging from strongly agree to strongly disagree were also used to collect data on attitudes to mediation. Data on organisational policy and practice were also collected.

Questionnaire Data Analysis

The analysis of quantitative data generated from the survey was based on the work of Coakes (2005), Piaw (2006) and Zulhabri et al (2005). This involved descriptive statistics due to the exploratory nature of the study and the non-parametric data generated from the survey. A number of statistical tests were also be applied for the purpose of analysis, including the utilization of Bi-variate analysis using Chi-Square (CS) Tests for independence, correlation analysis (measure of association) using Cramer's V (CV) and Contingency coefficient (CC) for nominal data and spearman's rank (SR) order for ordinal data. Initially, measurements of the coefficient of reliability, Cronbach's alpha, was undertaken to establish the validity and reliability of the survey instrument. This allowed items to be regrouped or excluded from the instrument where the value of alpha was less than 0.65, in line with statistical conventions. The Quantitative data were processed and analysed using SPSS 9.0 software package. The questionnaire was distributed to a total of 165 legal professionals randomly selected solicitors, advocates and mediators based and operating in Scotland. Fifty-questionnaires were completed and returned. This represented a response rate of 30.3%. According to Ellhag and Boussabaine (1999) and Idrus & Newman (2002) such a return rate is sufficient for the purpose of analysis for studies within the construction context. However, this remains a small sample and so the results should be viewed with caution. Below the numerical results for each survey question are given and the proportion of each result as a percentage of all responses to each question is provided in brackets. The survey results were presented in either diagrammatic or tabular form where appropriate.

Professional designation

Of the total, 82 % of the total 50 respondents described themselves as Solicitors, 6% as Commercial Attorneys, and the remainder as Advocates, Solicitor/Advocates and QCs. Figure 1 illustrates the breakdown of respondents by professional designation.

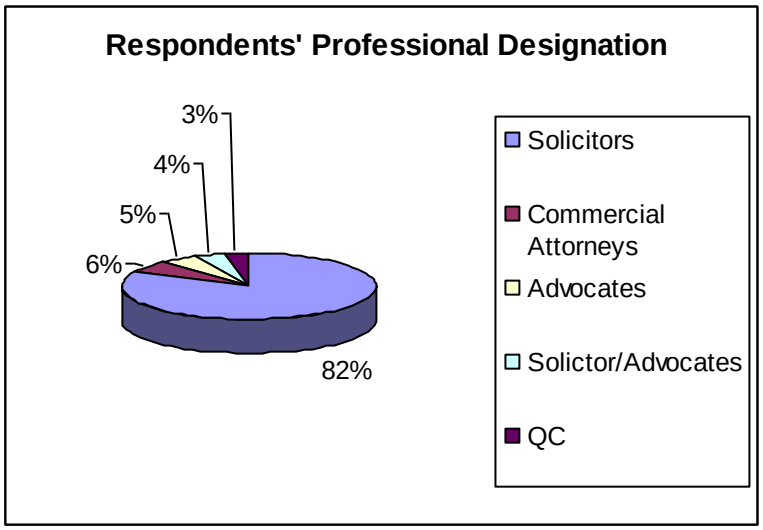

Figure 1: Breakdown of respondents' professional designation

Knowledge of Mediation

In terms of knowledge of mediation, when respondents were asked whether they would be able to explain the process of mediation to a client, an overwhelmingly majority, 90%, were able to provide an explanation of the process with confidence.

Mediation training

Of the total number of respondents' around 82% had receive some form of training in mediatory techniques with 26% of those having attended external courses on mediation and 14% attended in-house training sessions. It seems that only about one-fifth, 18%, were trained as accredited mediators and the same proportion of respondents, 20%, having some exposure to mediation within their degree or diploma courses. Perhaps this is a reflection of the relatively novelty of mediation as a dispute resolution mechanism within Scotland per se and the lack of taught provision within the respective Law Schools more specifically? Nonetheless, the latter figure represents a rise from a 2005 study of Scottish commercial lawyers, in which only 4% of respondents indicated that they had any exposure to mediation in Law School (Clark and Dawson, 2007) Figure 2 illustrates breakdown of respondents' training in mediation.

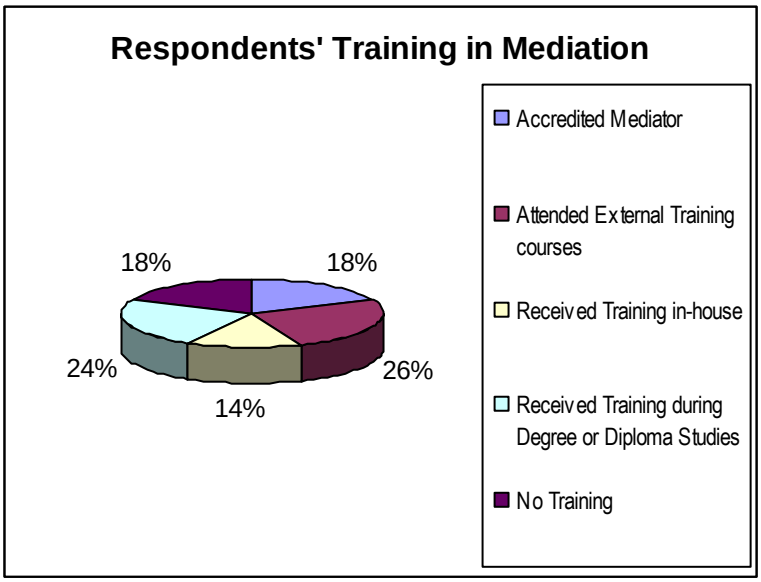

Figure 2: Breakdown of respondents' training in mediation

Years in legal practice

In terms of numbers of years of experience within the legal profession, 46% out of the total respondents were first admitted to practice law between 1991 and 2000, 32% between 2001 and 2009, and 20% between 1981 and 1990. Thus, it seems that those with some level of seniority within the legal profession, at least 9 years in the case of this study, are largely involved with decision making in terms of the settlement of disputes. This is consistent with more than 58% of the total respondents who had acted as a party representative in mediation on a least one occasion, as illustrated Table 1.

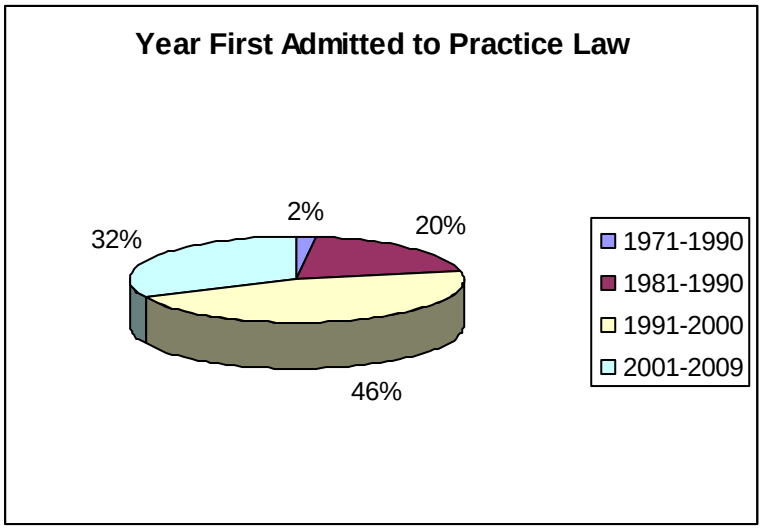

Figure 3: Respondents' years of experience in the legal profession

From a statistical perspective, there does not seem to be a close association however between the number of year in legal practice and respondents representation in mediation as borne out by analysis in terms of the quantity of mediation cases (CS sig. values $p = 0.00 > \alpha = 0.05$; SR $r < 0.25$).

Perhaps, this is a reflection of the inherent conservatism or the entrenched position of the legal establishment towards the utility of mediation? Equally it may be redolent of the fact that mediation is still a relatively new form of dispute resolution in Scotland.

Organisational policy and practice

In terms of organisational policy and practice in respect of the use of mediations it seems that around two-thirds of firms/organisations would consider them (66%), whereas 18% of respondents' firms have no policy or practice in respect to mediation. This finding chimes with recent work suggesting that mediation is being increasingly seen as a legitimate tool for the resolution of disputes in Scottish legal circles (Clark, 2009)

Experience of the use of Mediation

In terms of experiences of mediation, respondents were asked to rate their responses to a number questions ranging from client representation, levels of satisfaction with different elements of the process, factors leading to a failed mediation process, the decisions to recommend mediation to a client and reasons to refuse mediation proposals from the opposing party in a case.

2.1.1 Client representation in mediation

In terms of those respondents who had working experience of mediation (58% of the total number of respondents), 97 % had represented a party in 3 or more cases, 44% in 5 or more cases and 21 % in 10 or more mediation cases.

In terms of type of case in which respondents were involved it seems that those relating to payment (24 % of the total number of cases) and damage (22% of total cases) were most common with those related to professional negligence (20% of total cases), change of scope (13% of total cases), delay (10% of total cases) less so. The percentage of disputes relating to payment seems much lower than might perhaps than expected, given the frequency within which these issues are often encountered within the construction context. This may demonstrate the impact of statutory adjudication in reducing the number of payment disputes that are mediated, as for example suggested in a study of construction mediation in England (Gould et al, 2009) . Equally it may be that payment disputes are more amenable to early resolution between lawyers. Of the most common issues payment and damages the total number of cases wholly settled was 35 and 36 respectively. The number of payment-related cases that were partially settled or not settled at all was 16, whereas the number of damages-related cases partially or not settled was 10. In respect of the other types of case, it seems that for professional negligence –related issues, respondents' indicated that the majority (86 %) of the total numbers of cases were settled. The equivalent figure for change of scope and delay was 60 and 63 percent respectively.

It seems that damage-related cases are by far the highest percentage of cases settled by mediation according to respondents, 90%. The type of case recording the lowest number of settlement as indicated by respondents was for delay-related issues (57%). Seemingly, there is a tendency for the most common types of case encountered, i.e. those related damage, payment and professional negligence to be wholly settled through mediation. This might be because these issues are much less contentious than for example defect-related matters which are inherently more complex and rely more heavily on expert evidence (Gould et al, 2009). Table 1 illustrates the breakdown of the total number of times respondents' have represented a party in mediation by type of case and the number of those cases that wholly settled and partially settled or not settled.

Table 1: Breakdown of the total number of times respondents' have represented a party in mediation by type of case and the either number wholly, partially or not settled.

Types of case	Total number of cases	Number of cases that settled	Number of cases not settled	Number of cases partially settled
Professional negligence	37	32	4	1
Change to scope of work (extra work)	28	17	8	3
Payment Issues	51	35	9	7
Delay	19	12	4	3
Damages	40	36	2	2
Others	3	0	3	0
Total	178	132	30	16

Satisfaction with different elements of the mediation process

Overall, it would seem that a large proportion of the respondents who had experience of mediation were satisfied with the mediation process. Around 33.3% were always satisfied and 43.3% often satisfied with the speed of the process. Around 27% and 43% of respondents were either always satisfied or often satisfied with the cost of mediation respectively. A closer examination of the results of the survey also indicates that the respondents were more satisfied than not with the mediator and the outcome of the mediation. In particular, almost 50% of the respondents were often satisfied with the mediator and 63.3% often satisfied with the outcome of mediation. Table 2 provides a breakdown of frequency and percentage response for respondents' satisfaction with different elements of the mediation process.

Table 2: Breakdown of frequency and percentage response for respondents' satisfaction with different elements of the mediation process

Element of the mediation process	Always satisfied	Often satisfied	Sometimes satisfied	Rarely satisfied	Never satisfied	Total (%)
The speed of mediation	10 33.3%	13 43.3%	7 23.3%	0	0	30 100%
The cost of mediation	8 26.6%	13 43.3%	6 20%	3 10%	0	30 100%
The mediator	5 16.6%	14 46.6%	10 33.3%	1 3.3%	0	30 100%
Outcome of mediation	4 13.3%	19 63.3%	7 23.3%	0	0	30 100%

Further statistical analysis of the data would seem to indicate a relationship and positive correlation between the satisfaction of respondents and the number of times respondents have represented a party in a mediation (CS sig value $p = 0.00 < \alpha = 0.05$; CV $r > 0.76$ and CC $r > 0.70$). Thus, it would seem that the level of the satisfaction of respondents increases as their level of use of mediation increases, as would be expected. Equally it is likely that those who have positive experiences with mediation may typically reuse the process.

Factors leading to a failed mediation

In terms of the factors leading to a failed mediation, it seems that there is little agreement from the respondents with experience any failed mediation, 15 in total, as to the contributory factors leading to failure. For instance, despite the fact that client factors were cited more heavily than other factors, only 33.3 % of respondents always attributed the failure of mediation to parties' entrenched or polarised positions and 26.6% to bad feeling between disputing parties. Almost half the respondents, 46.6% and around one-third often attributed failure to parties' positions, bad feeling and unrealistic expectations of the parties to the failure of the mediation process. Almost one-half of the respondents, 42% in total, rarely and never attributed failure of the mediation to the lack of skills of the mediator.

Interestingly, though around one-third, 28% in total did always or often attribute the failure of the process to the skill of the mediator. There would seem to be a polarisation of views in relation to this particular question, particular in regard to the levels of approval for the mediator as a critical success factor in mediation, illustrated in Table 2. It would be interesting to see if there is some correlation between this view and that of industry's clients in respect to the role of the mediator, particularly given that there is available evidence from England that industry participant perceive the involvement of a third party as detrimental to the whole process of dispute resolution in the construction industry (Brooker, 2009)

Table 3 provides a breakdown of frequency and percentage response of the contributory factors leading to a failed mediation.

Table 3: Breakdown of frequency and percentage response of the contributory factors leading to a failed mediation

Contributory factors leading to a failed mediation	Always	Often	Sometimes	Rarely	Never	Total (%)
Unrealistic expectations of parties	1 7%	4 29%	8 57%	0 0%	1 7%	14 100%
Parties entrenched/polarised in their position	5 33.3%	7 46.6%	3 20%	0 0%	0 0%	15 100%
Bad feeling between the parties	4 26.6%	5 33.3%	6 40%	0 0%	0 0%	15 100%
Lack of skills of the mediator	1 7%	3 21%	4 29%	3 21%	3 21%	14 100%
Mediation was only being used tactically	0 0%	1 8%	5 38%	3 23%	4 31%	13 100%
Conflict of evidence	0 0%	1 8%	2 15%	5 38%	5 38%	13 100%

The decision to recommend Mediation to a Client

In terms of the decision to recommend the mediation process to a client, it seems from the analysis of the respondent data that there are several critical and determining factors. It can be seen from Table 4 that these include reduction in client legal costs, achieving a speedier settlement and the possibility of achieving a creative settlement to a dispute. Indeed, respondents were more likely to have always considered reduction in legal costs, a speedier settlement and a creative one to the decision to recommend mediation to a client as relevant than any other factors.

These findings are consistent with those shown in Table 2. However, other factors associated with the decision to recommend mediation such as gaining information on the other side's case, narrowing the issues in a dispute and weakness's in a client case seem much less relevant and critical in respect of a decision to recommend mediation.

Nevertheless, the respondents considered that weakness in a client case, narrowing issues as well as enabling continuation were sometimes relevant to a decision. Interestingly, the low size of financial sum was sometimes considered relevant to the decision to recommend mediation to a client. The fact that speed and cost were considered relevant and critical factors in the decision to recommend mediation may suggest a close association or correlation between the decision to recommend and a representation of a client. The analysis does indeed indicate that there is a statistical association and relationship between the decision to recommend mediation to a client and the representation of a client in a mediation (CS sig values $p = 0.00 < \alpha = 0.05$; CV $r > 0.70$; CC $r > 0.70$). This analysis would seem to suggest that those more likely to recommend mediation to a client are more likely to represent a client in mediation. Thus, experience and a track record in mediation would seem to be critical factors for legal counsel in respect to their recommendation to clients. Table 4 illustrates the frequency and percentage response of relevant factors to the decision to recommend mediation to a client.

Table 4: Breakdown of the frequency and percentage response of relevant factors to the decision to recommend mediation to a client

Factor relevant to the decision to recommend mediation to a client	Always relevant	Often relevant	Sometimes relevant	Rarely relevant	Never relevant	Total (%)
A reduction of legal costs for your client	20 57%	11 31%	4 11%	0 0%	0 0%	35 100%
Low size of the financial sum in dispute	7 20%	3 9%	16 46%	6 17%	3 9%	35 100%
Achieving a speedier settlement	17 49%	16 46%	1 3%	1 3%	0 0%	35 100%
The possibility of reaching a creative settlement	8 23%	14 40%	13 37%	0 0%	0 0%	35 100%
The possibility of assessing the risk of continuing the dispute	7 20%	11 31%	11 31%	5 14%	1 3%	35 100%
A weakness in a client's case	3 3%	4 11%	18 51%	8 23%	2 6%	35 100%
Narrowing the issues in dispute during mediation	5 14%	8 23%	15 43%	4 11%	3 3%	35 100%
Enabling continuation of a business relationship	6 17%	8 23%	15 43%	4 11%	2 6%	35 100%
Gaining information on the other side's case	4 11%	4 11%	7 20%	16 46%	4 11%	35 100%
The privacy of mediation	7 20%	9 26%	9 26%	7 20%	3 3%	35 100%

The decision to refuse a proposal for mediation from the opposing party in the dispute

In respect to the decision to refuse a proposal for mediation, around one-third, 31%, of the respondents always considered the clients' wishes not to use mediation as relevant. Interestingly, it could be that at least some clients are averse to the whole process of mediation involving a third party, preferring rather to settle disputes on an amicable basis through negotiation or failing that seeking a ruling from an authoritative third party. It could also be that clients may have a negative perception of the process or harbor misconceptions of the process. Further research probing the views of the client base may be required to learn more about the perception of disputants regarding mediation. Any client reluctance to use mediation begs the question as to who controls the decision to mediate or otherwise – lawyer or client? While the issue of the power relationship between lawyers and clients in the Scottish construction industry will be explored further by the authors in follow up interviews, for a general discussion of this issue, see Clark (2009)About one-fifth of the survey respondents considered the belief that the opposing party would not take part in good faith as always relevant. There also seems to be a general belief among the sample that negotiation was capable of settling a case, but only on some occasions was this considered relevant. By far the largest proportion of respondents, 50%, considered belief in the strength of a client's case as a relevant factor in the decision to refuse a proposal, but only sometimes. The belief that recovery of documents was essential before reaching settlement was considered much less relevant by the respondents, with 38% considering it a relevant factor only sometimes and 38 % considering it rarely relevant.

Table 5: Breakdown of frequency and percentage response of factors determining the decision to refuse a proposal for mediation from the opposing party in the dispute

Factors determining the decision to refuse a proposal for mediation from the opposing party in the dispute	Always relevant	Often relevant	Sometimes relevant	Rarely relevant	Never relevant	Total (%)
Client did not want to use mediation	8 31%	7 27%	9 35%	2 8%	0 0%	26 100%
Belief in the strength of the client's case	1 4%	5 19%	13 50%	5 19%	2 8%	26 100%
Belief that the opposing party would not take part in good faith	5 19%	6 23%	9 35%	4 15%	2 8%	26 100%
Case type not appropriate for mediation	3 12%	8 31%	9 35%	4 15%	2 8%	26 100%
Belief that negotiation was capable of settling the case	2 8%	6 23%	12 46%	5 19%	1 4%	26 100%
Belief that recovery of documents was essential before reaching settlement	1 4%	1 4%	10 39%	10 39%	4 15%	26 100%

Attitudes to Mediation

The purpose of this section was to ascertain respondents' attitudes to various key policy issues relative to construction mediation's development. A summary of initial findings in this respect are set out below. The analysis was undertaken using ratings based on 5-point Likert scale with anchors ranging from strongly agree to strongly disagree in which respondents were asked to rate their response to a number of statements in respect to their attitudes to dispute resolution more generally and to mediation specifically. Table 6 illustrates the frequency and percentage response of respondents' attitudes to dispute resolution and mediation. In terms of different types of dispute resolution mechanisms available, 23 % of the respondents somewhat disagreed that litigation was generally well adapted to the needs and practices of the construction community, whereas around one-third, 32%, somewhat agreed. Perhaps, this reflects in part clients' perceptions of the lengthy time and high costs associated with litigation and the public nature of the process as compared to mediation.

There was no indication that the use of mediation in the construction context was a sign of weakness. A large proportion of the respondents somewhat disagreed, 40% or strongly disagreed, 52%, with suggesting mediation to an opponent was a sign of weakness (52%). A high proportion of the respondents considered Arbitration unsuited to the needs and practices within Construction. A striking figure, some 80% of the respondents somewhat disagreed and strongly disagreed that Arbitration was generally well adapted to the needs and practices of the construction community. Whether the recent reforms to the process heralded by the new Arbitration Act 2010 will alleviate such concerns remains unclear (see Dundas, 2010). By contrast, 84% strongly or somewhat agreed that Adjudication was generally well adapted to the construction context. At face value then it could be suspected that the popularity of this default mechanism in many construction contracts may render mediation unnecessary in the construction sphere. Nevertheless, only one-third of respondents, 34%, considered that the default to Adjudication in many construction disputes would render mediation obsolete. This finding may suggest that in some circumstances respondents would recommend mediation to clients as an alternative to more embedded methods of dispute resolution such as adjudication. The authors will endeavour to ascertain more about the relationship between adjudication and mediation in follow-up interviews. In terms of measures designed to aid the further entrenchment of mediation as a dispute resolution process in construction matters, a large proportion of the respondents, 62%, strongly and somewhat agreed that construction contracts should have a mediation clause, such as those provided within JCT Standard Forms of Building Contract as well as ICE contract versions[2]. A small majority of the respondents, 54 %, strongly or somewhat agreed that judges should refer more cases to mediation. Nevertheless, opinion was split on whether making mediation a mandatory first step would be a positive development. Whereas, 44% strongly and somewhat agreed with the statement, 46% somewhat and strongly disagreed.

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[2] Examples of how mediation is addressed in Construction Contracts include JCT Standard Form of Building Contract (2005) Section 9.1 and ICE Conditions of Contract – Measurement Value 7th Edition (1999) Clause 66A(2)(a)

The issue of court referral to mediation is of long standing controversy. Unlike other jurisdictions, e.g. England and Wales and many parts of the USA, where court initiation and even compulsion (in the USA) is commonplace, Scotland has had only very limited experience with court referral of the process. While many would argue that in keeping with the original ethos of mediation, participation in the process should remain purely voluntary, others have pointed to the shot in the arm that court initiation can provide mediation.

Clearly the current research indicates a significant opinion within Scottish legal circles desirous of increased court promotion. For a summary of the debates around court promotion of mediation see Clark (2008). Interestingly, opinion was split equally on Scots lawyers' awareness of mediation. Equal numbers, 44 %, of respondents strongly or somewhat agreed with the statement and also strongly or somewhat disagreed. Although the vast majority of respondents felt able to explain mediation to a client, it may be that a higher proportion of those that did not respond were less familiar with mediation, thus reflecting the current finding. In order to alleviate such reported ignorance, interestingly, only a small majority, 52%, strongly and somewhat agreed that mediation training should be compulsory. In fact only 18% strongly agreed with the proposition. In terms of the how mediation fits with cultural norms and the usual modus operandi of lawyers, it seems that an overwhelming majority disagreed that widespread use of mediation would be detrimental to the legal profession in Scotland. Indeed, when respondents were asked to whether a lawyer's standing amongst colleagues would suffer as a consequence of their involvement with mediation, a large majority, 74%, disagreed that there would be a negative perception. It could be that the perception of the legal fraternity as inherently conservative towards non-court sanctioned dispute resolution is unfounded, or that perhaps this was the most socially-acceptable response? Other opinions expressed by respondents seem to suggest that former rather than the latter. Indeed, a large majority, 88%, strongly or somewhat agreed that mediation would provide lawyers with an opportunity to offer further services to their clients. Similarly, many of the respondents also considered mediation as an opportunity to enhance their fee earning potential, with 78% strongly disagreeing that the growth of mediation would be detrimental to future earnings. While such findings may lend weight to the argument that lawyers may seek to 'milk' mediation there is nothing inherently wrong with professional seeking to access new markets, and there currently exists scant evidence of lawyer highjacking of construction mediation in Scotland.

Table 6: Breakdown of frequency and percentage response of respondents' attitudes to mediation

Attitudes	Strongly agree	Somewhat agree	Somewhat disagree	Strongly disagree	Don't know	Total (%)
If a lawyer participated more often in mediation his/her standing amongst colleagues would suffer	0 0%	1 2%	11 22%	37 74%	1 2%	50 100%
Mediation is detrimental to the development of law	3 6%	19 38%	13 26%	12 24%	3 6%	50 100%
Mediation is inappropriate where there is a power imbalance between the parties	1 2%	8 16%	27 54%	13 26%	1 2%	50 100%
Judges should refer more cases to mediation	2 4%	26 52%	5 10%	12 24%	5 10%	50 100%
Making mediation a mandatory first step would be a positive development	2 4%	20 40%	7 14%	16 32%	5 10%	50 100%
Legal practitioners make the best mediators	1 2%	16 32%	21 42%	1 2%	11 22%	50 100%
Litigation is generally well adapted to the needs and practices of the construction community	2 4%	16 32%	23 46%	9 18%	0 0%	50 100%
Arbitration is generally well adapted to the needs and practices of the construction community	1 2%	8 16%	23 46%	17 34%	1 2%	50 100%
Adjudication is generally well adapted to the needs and practices of the construction community	12 24%	30 60%	7 14%	1 2%	0 0%	50 100%
Default to adjudication in many construction disputes renders mediation obsolete	0 0%	17 34%	17 34%	14 28%	2 4%	50 100%
Mediation suffers from a lack of coercive power	1 2%	12 24%	20 40%	14 28%	3 6%	50 100%
Mediation is an opportunity for lawyers to offer further services to their clients	11 22%	33 66%	2 4%	2 4%	2 4%	50 100%
Lawyers will lose money if mediation grows	0 0%	3 6%	23 46%	16 32%	8 16%	50 100%
Suggesting mediation to an opponent is a sign of weakness	0 0%	1 2%	20 40%	26 52%	3 6%	50 100%
Construction contracts should contain a mediation clause	6 12%	25 50%	9 18%	5 10%	5 10%	50 100%
A barrier to mediation's development in Scotland is its negative perception among clients	2 4%	17 34%	15 30%	4 8%	12 24%	50 100%
A barrier to mediation's development in Scotland is its negative perception among lawyers	1 2%	12 24%	26 52%	5 10%	6 12%	50 100%
Mediation training should be compulsory for lawyers	9 18%	17 34%	14 28%	5 10%	5 10%	50 100%
There is a lack of awareness regarding mediation amongst the legal fraternity in Scotland	1 2%	21 42%	17 34%	5 10%	6 12%	50 100%
Mediation is of more utility in low value disputes	1 2%	4 8%	20 40%	19 38%	6 12%	50 100%

Summary and Conclusions

Construction disputes by their very nature are often complex, sometimes multi-party disputes, many of which are not suited to either adjudication or traditional forms of dispute resolution (these being slow and expensive). UK surveys of construction lawyers have so far confirmed mediation a suitable forum for such disputes, the opinion being it can be effective in all types of construction disputes irrespective of the relationships involved. Also, with the advantages of mediation in construction dispute resolution having been long recognised in other jurisdictions, it is difficult to imagine similar recognition not developing within Scotland. Our study suggests that this process is at least beginning and while the total recorded cases remain low[3], increasing numbers of construction lawyers hold many positive perceptions regarding the benefits of using mediation, seeing it as a well established part of their business. It should be noted that this initial study serves as a starting point for our future research. The initial study is cross-sectional in nature in that it represents a *snapshot* in time. It is recognized that the introduction of mediatory techniques into construction disputes will have a cumulative effect on the Scottish legal fraternity over time. Cross-sectional studies are often unable to yield information about the direction of causal relationships between variables that are interrelated in a complex way. Neither do cross-sectional studies permit researchers to assess the effectiveness of intervention strategies. Therefore, the need for follow-up studies, which identify the effect of policy and organizational change over time, is recognized. Although, it is also recognised that on-going changes to the dispute resolution landscape will add more uncertainties into the context, the findings of the initial study will act as a springboard from which a more extensive follow-up study will be undertaken. In-depth interviews exploring selected relationships in depth and detail will be a key component of the follow-up study. While it is also recognized that the interview sample will be much smaller and the findings less generalisable than those from the questionnaire survey, these qualitative data will supplement the quantitative data to offer insightful explanations of the use of mediation in construction disputes.

References

Agapiou, A (2010) Scottish Construction Lawyers and Mediation, Robert Gordon University, Unpublished LLM Dissertation.

Boussabaine A. H., Elhag, (1999) A Neural Network approach for forecasting Cost-Flow for water industry projects, Journal of Engineering, Construction and Architectural Management, Vol. 6 No. 3, pp.213-224.

Brooker, P and Lavers, A (1998) Perceptions of alternative dispute resolution as constraints upon its use in the UK Construction industry, Construction Management and Economics 15, 519-529.

Brooker, P (2005) Construction lawyers' experience with mediation post-CPR 21 Construction law Journal 19-46

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[3] Clearly there may be double counting in the figures, in that different respondents may be referring to the same case. Equally our methodology in no way has allowed us to track all construction mediations in Scotland that have taken place.

Brooker, P (2009) Criteria for the appropriate use of mediation in construction disputes: Judicial statements in the English Technology and Construction Court, International Journal of Law in the Built Environment, Volume 1 (1), p82-97

Clark, B and Dawson, C (2007) Scottish Commercial Lawyers and ADR: Awareness, Attitudes and Experience. Civil Justice Quarterly, April

Clark, B (2009) Mediation and Scots Lawyers: Past, Present and Future, May,
Edinburgh Law Review

Clark, B (2008) Institutionalising Mediation in Scotland, 3, Juridical Review 193

Coakes, S.J. (2005) SPSS: Analysis Without Anguish: Version 12.0 for Windows, Wiley

Dundas, H (2010) The Arbitration (Scotland) Act 2010: Converting Vision into Reality, Arbitration, 76, p 2-15

Gould, N. and Ors (2009) The Use of Mediation in Construction Disputes: Summary Report of the Final Results, King's College London and HMCS, 7 May 2009

Gould, N, Capper, P, Dixon, G and Cohen, M (1999) Dispute resolution in the construction industry, 1st Edition, Thomas Telford, ISBN 0727728369.

Idrus, A.B. and Newman, J.B. (2002) 'Construction related factors influencing choice of concrete floor systems', Construction Management and Economics, 20(1), pp 13-19

Oladapo, A & Onabanjo, B (2009) A study of the causes and resolution of disputes in the Nigerian Construction Industry, RICS COBRA Research Conference, University of Cape Town, 10-11th September, pp 7-22.

Piaw, C. H (2006) Basic Research Statistics (2006), McGraw-Hill Education

Sarat, Austin D. and William L.F. Felstiner. (1988) Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction. *Law & Society Review.* 22:4:737-770.

Stipanowich (1994) What's Hot and What's Not. DART Conference Proceedings, Lexington, Kentucky, US. October 16-19.

Zulhabri, J, Jaalunlaili Abdullah, and Rosli Mohamad Zin (2005) Findings of Alternative Dispute Resolution Application and obstacles towards active development of ADR in the Malaysian Constriction industry, 3r Conference of Law and Technology.