

# CONSTRUCTION MEDIATION IN SCOTLAND: AN INVESTIGATION INTO ATTITUDES AND EXPERIENCES OF MEDIATION PRACTITIONERS

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Recent research on construction mediation in Scotland has focused exclusively on construction lawyers' and contractors' interaction with the process, without reference to the views of mediators themselves. This paper seeks to address the knowledge gap, by exploring the attitudes and experiences of mediators relative to the process, based on research with practitioners in Scotland. Based on a modest sample, the survey results indicate a lack of awareness of the process within the construction industry, mediations were generally successful and success depended in large measure to the skills of the mediator and willingness by the parties to compromise. Conversely, the results indicate that mediations failed because of ignorance, intransigence and over-confidence of the parties. Barriers to greater use of mediation in construction disputes were identified as the lack of skilled, experienced mediators, the continued popularity of adjudication, and both lawyer and party resistance. Notwithstanding the English experience, Scottish mediators gave little support for mandating disputants to mediate before proceeding with court action. A surprising number were willing to give an evaluation of the dispute rather than merely facilitating a settlement. The research concludes that, in Scotland, mediation had not yet become the indispensable tool for those seeking to resolve construction disputes due to lack of support from disputing parties, their advisors and the judiciary.

Keywords: Construction Mediators, Mediation, Scotland.

## INTRODUCTION

The construction process is extremely complex, even for a small project. It involves the construction of a unique, high value, capital project in the open air. It requires input from various designers, such as architects, engineers and quantity surveyors, and a myriad of trades-people coordinated by a main contractor, who is effectively a manager of the process due to the universal practice of sub-contracting all trades. This complex process creates a huge number of interfaces which inevitably creates friction, which in turn causes disputes. The friction is exacerbated by a 'macho' culture within the construction industry which is still male dominated and aggressive.<sup>4</sup>

Most construction disputes are about money, i.e. the contractor believes he is entitled to more money than the employer is willing to pay. In a perfect world a

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construction project would commence with an employer who knew exactly what he wanted, a design team that translated these requirements into precise drawings, specifications, schedules and bills of quantities, all of which were issued to competent, adequately resourced builders who submitted realistic tenders leading to the appointment of the lowest tenderer in the traditional procurement method. Thereafter, there would be no changes and the builder would simply construct the works in accordance with the contract documents and the final account would be the same as the tender price. No such project has ever been, or will ever be, accomplished. The one certainty in construction is change and it is change which causes conflict.

Traditionally, arbitration was considered a popular alternative to litigation and the industry recognized it initially to be an inexpensive, efficient, prompt, private and informal 'dispute resolution' process within which decisions were made by experienced industry professionals. The process was claimed to be quicker and cheaper than litigation, confidential and the arbitrator's award was final and binding on the parties with virtually no grounds of appeal to the courts. In reality, arbitration was slow and expensive with written pleadings, long periods of adjustment before a closed record was produced, legal debates, and proof hearings which lasted for weeks.<sup>5</sup>

Following recommendations in the Latham Report<sup>6</sup>, the Housing Grants, Construction and Regeneration Act 1996 provided for statutory adjudication of all disputes at any time for construction disputes within the definition of the Act. Adjudication has proved to be very popular with the construction industry as it provides a quick and relatively cheap resolution to construction disputes. It is considered to be 'rough justice', however, due to the tight time constraints.<sup>7</sup> Other criticisms of adjudication are increasing cost due to lawyer ~~involvement~~ involvement leading to challenges to the adjudicators' decisions on the grounds of lack of jurisdiction or breaches of natural justice. Against this backdrop, research points to construction mediation gaining increasing recognition as a simple, voluntary, without prejudice, cost-effective solution in which in which a neutral third-party actively assists parties in working towards a negotiated agreement, with the parties in ultimate control of the decision to settle and the terms of resolution.

Although extensive research has been carried out on Scottish construction lawyers' interaction with mediation<sup>8</sup> no single study exists which adequately captures the attitudes and experiences of mediators themselves, their predilection for the process, their views on its benefits, and the optimal regulatory and statutory environment required for mediation's further promulgation as the most effective

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<sup>5</sup> See discussion in F. Davidson, *Arbitration* (W.Green, London, 2000), pp13-20

<sup>6</sup> Latham Report 1994

<sup>7</sup> Macaulay, M. (1999), "Adjudication: rough justice?", *SLT*, Vol. 28, pp. 217-19.

<sup>8</sup> See e.g. A. Agapiou and B. Clark, 'An empirical analysis of Scottish construction lawyers' interaction with mediation: a qualitative approach', *Civil Justice Quarterly*, vol. 31, no. 4, (2012), p. 499.

means of Dispute Resolution within the Construction Arena. The principal aim of this paper was, therefore, to survey and report upon the attitudes and experiences of Scottish construction mediators.

## THEORETICAL MODELS OF MEDIATION

Mediation has been described as,

the art of changing people's position with the explicit aim of acceptance of a package put together by both sides, with the mediator as the listener, suggestion-giver, the formulator of final agreements to which both sides have contributed.<sup>9</sup>

The key principles of mediation are its voluntary nature, flexibility, impartiality and confidentiality. A wide range of models of mediation exist although in the main mediation uses a similar process as principled negotiation of identifying issues, considering the options and recording agreement. Although there is no set procedure for mainstream mediation, it generally takes the form of the parties meeting the mediator in plenary session. The mediator will describe the process of mediation which may be unfamiliar to the parties, his role in the process, the need for confidentiality, his inability to act as a witness in any future trial, and the possibility of separate meetings with each party. Each party is then invited to state its view of the dispute and its hopes and aspirations for the mediation. The mediation process may then start immediately, but in commercial mediations the parties are likely to go to separate rooms which the mediator will visit in turn using 'shuttle diplomacy' to broker a deal, a process unthinkable in arbitration. If the parties stay together the mediator will work with them to tease out the issues in conflict before trying to generate options for consideration by the parties towards a resolution of the conflict. It may be beneficial for each party to meet the mediator in caucus to resolve individual issues privately. When agreement is reached the terms of settlement are drafted and signed by the parties to confirm their agreement.

Not all disputes, however, lend themselves to settlement by mediation. Where the dispute rests on a point of law a party may require a decision by a court in preference to compromising a firmly held belief that they are correct in law. Personal injury cases seldom go to mediation as most settle by negotiation between the two parties. Matrimonial disputes in which physical abuse has taken place are also seldom mediated due to the fear of the abused meeting the abuser. Mediation requires disputants willing to compromise their positions to reach settlement and if one party is unwilling to compromise then mediation is unlikely to be successful.

Hibbert and Newman<sup>10</sup> list specific disadvantages of mediation: disclosure of parties' possible trial positions; equitable settlements depend on full discovery which results in delay and costs; its non-binding nature; use of delaying tactics; quick resolutions are prone to error and unfairness; uncertainty as to privilege of disclosures; and inequality of bargaining position and representation. One criticism of mediation is

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<sup>9</sup> Alper, B. S. and Nichols, L. W., (1981), *Beyond the Courtroom*, Lexington MA.

<sup>10</sup> Hibbert, P. and Newman, P., (1999), *ADR and Adjudication in Construction Disputes*, Oxford

that it is too focused on making a deal by urging parties to compromise. In striving to reach a settlement the rights and wrongs of a dispute may be overlooked just to do a deal. There may be no legal basis or foundation for the settlement at all. Abel's classic critique holds that informal justice, such as mediation, increases capacity of those already advantaged.<sup>11</sup> Although a central tenet of mediation is that the mediator is neutral and impartial, Hippensteele asserts that one cannot assume the neutrality of a mediator.<sup>12</sup> As Grillo states, 'mediators, like all other human beings, have biases, values, and points of view'.<sup>13</sup> A further criticism of mediation is that it lacks transparency. The strictures of confidentiality inhibit the accumulation of knowledge about the practice of mediation.

#### *Facilitative and Evaluative Approaches*

The facilitative approach, or interest-based approach, is generally thought to be the purest form of mediation. The mediator is interposed between the parties to explore their positions, to provide a means of communication, to enhance their common interests, and to produce an ambience conducive to the parties reaching their own solution to their dispute. The mediator would not express an opinion nor propose a settlement. The evaluative approach, or rights-based approach, focuses on the respective rights of the parties in dispute. The mediator attempts to evaluate the strengths and weaknesses of each party's case and indicates a view on a settlement. Hibbert and Newman<sup>14</sup> suggest that, '[c]onstruction disputes are suitable for mediation by the evaluative approach; mediation by the facilitative approach is less attractive'. The current study tests this assumption.

## **RESEARCH METHODS**

The entire research design of this research was constrained by the small population of practising Scottish construction mediators (thought to be circa. 20 in 2013). The design encompassed a Literature Search, Participant Interviews, Questionnaire Survey, Qualitative and Quantitative data analysis and Conclusion. The research questionnaire was designed to capture data related to the biography, training and experience of those interviewed before their opinion on the benefits of, and problems with, mediation were sought. The central section explored the process of mediation and the final section sought their opinions on how mediation could be promoted to the wider construction industry in Scotland. Data was collected during mid-2013.

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<sup>11</sup> Abel, R., (1982) *The Politics of Informal Justice*, New York.

<sup>12</sup> Hippensteele, S. K. (2009), "Revisiting the Promise of Mediation for Employment Discrimination Claims", *Pepperdine Dispute Resolution Law Journal*, vol. 9, no. 2.

<sup>13</sup> Grillo, T., (1990), "The Mediation Alternatives: Process Dangers for Women", *Yale Law Journal*, vol. 100.

<sup>14</sup> Hibbert, P. and Newman, P., (1999), *ADR and Adjudication in Construction Disputes*, Oxford

The choice of the most appropriate research methodology was guided to large extent by previous research in this field.<sup>15</sup> It was important to follow a similar methodology in order to provide commonality across the studies for ease of comparison. A mixed method was, therefore, adopted using semi-structured, face-to-face, expert interviews to provide rich, qualitative data. These data were supplemented by quantitative data provided by an attitudinal survey.

It is known that the Scottish construction mediation market is small. Those to be interviewed were selected on the basis of mediators active in the Scottish construction sector known personally to the main author, irrespective of nationality. This restriction necessarily excluded, for example, English mediators conducting an occasional mediation in Scotland. Every construction mediator identified and other contacts were invited to contribute additional names until the sample size grew to 11 in a snowball effect. Although this was statistically a small sample, it represented a large proportion of the practising construction mediators in Scotland at that time. Those to be interviewed were sent copies of the questionnaire and attitudinal survey before the interview so that they could consider their answers in advance. The questions were generally in accordance with the original questionnaire and supplemented by additional questions generated during the course of the semi-structured interviews. The interviews were recorded by digital voice recorded, transcribed into electronic files and stored on computer. The transcriptions were proof-read, corrected for typographical errors only and sent electronically to those interviewed to check for factual accuracy. The attitudinal survey covering 19 items was prepared in a table format using a five-point Likert scale. Those interviewed completed the survey in the presence of the interviewer who could explain and amplify the questions if necessary.

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<sup>15</sup> Agapiou, A and Clark, B. (2011), "Scottish Construction Lawyers and Mediation: an investigation into attitudes and experience", International Journal of Law in the Built Environment, Vol. 3, no. 2.

## CONSTRUCTION MEDIATION

### The English Experience

The growth of mediation in the U.K. construction industry was slow. In one 1994 study only 30% of the surveyed respondents had ever been involved in an ADR process.<sup>16</sup> By 2002, however, one survey showed that 70% in construction had used ADR at least once.<sup>17</sup> Genn claimed that *Dunnet v Railtrack*<sup>18</sup> caused a distinct increase in take-up of the voluntary mediation scheme (VOL) in the Central London County Court.<sup>19</sup>

The increased use of ADR and Mediation in practice was assisted by the Civil Procedure Rules<sup>20</sup> where the overriding objective was set out in Rule 1.1 as 'enabling the court to deal with cases justly'. Parties are obliged to achieve this objective by clearly setting out the issues in dispute, identifying key documents, and, in particular, attempting to avoid litigation by settling the dispute.<sup>21</sup> A claimant must comply with the Pre-action Protocol for Construction and Engineering Disputes before commencing proceedings in the court and, 'the court will look at the effect of non-compliance on the other party when deciding whether to impose sanction'.<sup>22</sup>

King's College London has sponsored a number of research papers in recent years relating to mediation practices in England. Gould's study into the use of mediation in the Technology and Construction Court 2006-2008 provided useful data. It showed that where mediation was successful significant cost savings were achieved by the parties. Only 15% reported savings of less than £25,000; 76% were in excess of £25,000; and the top 9% saved over £300,000. Cost savings were proportional to the cost of the mediation.<sup>23</sup>

The vast majority, ~~76%~~, of mediations were undertaken on the parties own initiative and only 22% were court suggested or by Order of Court. Even where unsuccessful, ~~91% of nine out of ten~~ mediations were as a result of the parties own initiative which supports the argument that court sanctions are effective and that advisors now routinely consider mediation as a viable option.<sup>24</sup>

<sup>16</sup> Peter Fenn and Nicholas Gould, 'Dispute resolution in the UK Construction Industry', DART conference proceedings, Lexington, KY, October 1994

<sup>17</sup> Penny Brooker and Anthony Lavers, 'Commercial lawyers' attitudes and experience with mediation', *Web Journal of Current Legal Issues* (27 September 2002) [Accessed 8 August 2013].

<sup>18</sup> [2002] EWCA CA Civ. 302; [2002] 2 All E.R. 850

<sup>19</sup> Genn, *Twisting Arms: court referred and court linked mediation under judicial pressure*, pp. 134-135.

<sup>20</sup> Civil Procedure Rules, London: Stationery Office, 1999, SI 1998/3132.

<sup>21</sup> Practice Direction – Protocols 1.4 (2).

<sup>22</sup> *Ibid.*, Para. 1.4.

<sup>23</sup> Nicholas Gould, C. King and P. Britton, *Mediating Construction Disputes: An Evaluation of Existing Practice* (London: King's College, 2010), p. 53.

<sup>24</sup> *Ibid.*, p. 50.

A significant finding was that parties decide to mediate at three key stages in the process: as a result of exchanging pleadings; during or as a result of disclosure; and shortly before trial. Of successful mediations, many parties thought that the dispute would have progressed to judgement had mediation not taken place.<sup>25</sup> The vast majority of mediators were legally qualified and only 16% were construction professionals. Only 20% of mediators were appointed by a Mediator Appointing Body and 80% the rest were agreed by the parties.<sup>26</sup> There was also a tendency to use the same mediators again and again which indicated a mature market in mediation.<sup>27</sup> The nature of cases brought to mediation were: building defects, 18%; payment issues, 13%; professional negligence, 13%; and property damage, 13%. Mediations usually concerned only one matter and sometimes two.<sup>28</sup> There was, however, a discernible change over time. Between 1999 and 2009 the number of cases relating to changes in scope of work, project delays and site conditions all decreased, whilst those relating to defective work and product and design issues increased significantly. Payment issues remained constant.<sup>29</sup> It would appear that adjudication is good at settling disputes about variations, delays and site conditions.<sup>30</sup>

There is currently no state control in England and Wales for the training, appointment and performance of mediators. There is, therefore, no moderation of courses or their contents.<sup>31</sup> Accreditation is, in practice, required for practitioners who wish to gain a reputation in mediation to gain appointments. A European Code of Conduct for Mediators was developed for, but not incorporated into, the European Mediation Directive (Directive 2008/52/EC). The Code states that the mediator must be competent, neutral, available, non-conflicted, fair and give no legal advice. Mediators' advertising must be professional and accurate, and the mediator must carry professional indemnity insurance. Mediation must be voluntary and the parties and/or the mediator should have power to terminate the mediation at any stage.<sup>32</sup> The Technical and Construction Court Settlement Scheme was introduced as a pilot scheme in June 2006 as a, 'confidential, voluntary and non-binding dispute resolution process'. The idea was to make use of the expertise of TCC judges as a result of their specialist knowledge.<sup>33</sup>

The U.K. government issued a formal written pledge which stated,

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<sup>25</sup>Ibid., pp.47-48.

<sup>26</sup>Ibid., p. 51.

<sup>27</sup> Nicholas Gould, C. King and A. Hudson-Tyreman, *The Use of Mediation in Construction Disputes, Summary Report of the Final Results* (London: King's College, 2010), p. 27.

<sup>28</sup>Gould et al, *Mediating Construction Disputes*, pp. 45-46.

<sup>29</sup> Nicholas Gould, *The Mediation of Construction Disputes: Recent Research* (London: Fenwick Elliott, 2009), p. 7.

<sup>30</sup>Ibid., p. 8.

<sup>31</sup>Nicholas Gould, *Alternative Dispute Resolution Workshop* (London: Institution of Civil Engineers, 2011), p. 21.

<sup>32</sup>Lawrence Boulle and MinyanaNesic, *Mediation: Principles, Process and Practice* (London: Butterworths, 2001), p. 437.

<sup>33</sup>Gould, *Alternative Dispute Resolution Workshop*, pp. 22-23.

Government departments and agencies make these commitments on the resolution of disputes involving them. Alternative dispute resolution will be considered and used in all suitable cases wherever the other party accepts it.<sup>34,35</sup>

### The Scottish Experience

Agapiou and Clark surveyed Scottish construction lawyers' experiences and attitudes to mediation and found that 90% of respondents were able to explain mediation as an ADR process, 82% had received some form of training in mediation and, indeed, 18% were accredited mediators. Two-thirds, ~~66%~~, of the legal firms had a policy of encouraging mediation and only 18% had no policy at all. Almost all, ~~97%~~, of those surveyed had experienced three or more mediations, 44% five or more and 21% ten or more. The types of disputes which were mediated were: payment issues, 29%; damages, 22%; professional negligence, 21%; changes to the scope of works, 11%; and delays, 10%. Settlement rates were high at 74% with a further 9% partially settled. Satisfaction were not so high with 63% often satisfied with the outcome, 43% with speed, 43% with cost and 50% with the mediator.<sup>36</sup>

The reasons for failure of a mediation were: entrenched or polarized positions, ~~80%~~; bad feelings between the parties, ~~60%~~; mediation attempted too late; and the lack of a skilled mediator. Lawyers would, however, recommend mediation for its speed, cost, creativity, confidentiality, and purely tactical reasons. The reasons for refusing to mediate were: clients' wishes, ~~31%~~; lack of good faith, ~~20%~~; and a belief in the strength of the case.<sup>37</sup>

The key skills of a mediator were considered to be: communication skills; the ability to build rapport and engender trust; empathy, flexibility and an open minded approach; an understanding of the commercial and business environment; and legal skills and experience.<sup>38</sup>

Barriers to the development of mediation were: its relatively early development phase; the variable quality of mediators; the lack of stringent regulation; and the paucity of suitably experienced construction mediators. Barriers within the legal profession itself were: mediation does not comport well with comfortable, well-worn practice norms; lawyers are uncomfortable with the role of mediation advocate; and a cultural change shift is required before mediation will gain full acceptance.<sup>39</sup>

<sup>34</sup>Lord Chancellor's Department 23 March 2001.

<sup>35</sup>See *Royal Bank of Canada v Secretary of State for Defence* [14 May 2003] HC Ch Div., Lewison, J.

<sup>36</sup>Agapiou and Clark, 'Scottish Construction Lawyers and Mediation: an investigation into attitudes and experiences', paras. 163-166.

<sup>37</sup>*Ibid.*, paras. 167-168.

<sup>38</sup>Andrew Agapiou and Bryan Clark, 'An empirical analysis of Scottish construction lawyers' interaction with mediation: a qualitative approach', *Civil Justice Quarterly*, vol. 31, no. 4, (2012), p. 499.

<sup>39</sup>*Ibid.*, pp. 501-502.



Lawyers recognised that support for mediation by the Scottish judiciary was largely absent and gave little support for mandatory mediation. Lawyers noted, however, that mediation flourishes under pressurized or mandatory environments.<sup>40</sup>

Lawyers found it difficult to predict settlement in mediation with factors such as prior relationships, value in dispute, and desired outcomes cited. As one lawyer said, 'it was not simple to say that certain dispute types or particular kinds of disputants rendered mediation more apt than others'. Timing was held to be important (not too far down the line), but there was also a view that parties do not settle until brow-beaten by the travails of the legal system.<sup>41</sup>

The ready access to now familiar statutory adjudication appeared to hamper the development of mediation. Adjudication was positively appraised as the natural port of call in construction disputes as it was quick and its decisions tended to be de facto final.<sup>42</sup>

Although lawyers often control access to mediation and become buyers of mediation services, they believed that sophisticated clients and repeat players with in-house legal teams determined the dispute resolution process. Lawyers had more positive views of mediation than their clients and blamed clients for refusing to mediate. Parties were the real barrier to mediation according to lawyers.<sup>43</sup>

In summary, lawyers recognised the need for institutional scaffolding, have little knowledge or experience or training in mediation, have concerns about fee income and see adjudication as a significant barrier to mediation.

Agapiou and Clark also surveyed Scottish contracting firms with a follow-up analysis of Scottish construction 'clients' who were, in fact, contractors and sub-contractors, not building sponsors.

These surveys showed that ~~80% of the most~~ respondents were aware of mediation but had little experience of it. Only ~~19% of the one in five~~ firms had a policy on mediation and, indeed, ~~13% a few~~ had a policy never to use mediation. Astonishingly, ~~88% almost 90%~~ of respondents had no exposure to mediator training and ~~66% two-thirds~~ had no experience of it. The types of dispute that were mediated included: changes to the scope of work, ~~30%~~; payment issues, ~~30%~~; and delays, professional negligence and damages. Settlement rates were high at ~~65% almost two out of three~~ with ~~a further 14% some~~ partially settled. Satisfaction rates were high too with 80% satisfied with the mediator, 85% with costs, 93% with the process and 73% with the outcome. Respondents particularly noted the cost savings compared with other dispute resolution processes, the collaborative atmosphere and that, perhaps for the

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<sup>40</sup>Ibid., pp. 503-505.

<sup>41</sup>Ibid., pp. 505-506.

<sup>42</sup>Ibid., p. 507.

<sup>43</sup>Ibid., pp. 509-510.

first time, the decision-makers opposite became fully aware of the circumstances of the dispute. The majority agreed that settlements were complied with.<sup>44</sup>

The reasons to mediate were: savings in cost and time; continued business relationships; creative agreements; the low value in dispute; and the risks associated with continuing the dispute. The reasons for refusing to mediate were: cost; strength of their case; belief that negotiation could settle the dispute; and a fear of lack of good faith in opponents. The reasons for failure of a mediation were: an unwillingness to compromise; tactical use of mediation; the dispute was too personal; lawyer resistance to settle; and ignorance of and hostility to mediation. Surprisingly, it was reported that 46% of mediators offered their own opinions on the merits of the case.<sup>45</sup>

Although [47% almost half](#) of respondents believed that the prominence of adjudication blocked out mediation, many complained about adjudication in terms of the poor quality of adjudicators, high costs and a threshold value in dispute of at least £50,000 to make it worthwhile.<sup>46</sup> [It is noted that, despite the hoped-for renaissance in arbitration following enactment of the Arbitration \(Scotland\) Act 2010, only 22 arbitrations were held in Scotland in the year to 30 June 2014, and many of them were agricultural.](#)<sup>47</sup>

In summary, the take-up of mediation by contractors was low, awareness of its benefits was low and education, conferences, seminars and training are needed. Contractors are perhaps wrestling back control of dispute resolution processes from lawyers. The need for a legal framework to mediation is recognised, as are stiffer measures to drag parties to mediation.<sup>48</sup> There was also a call for a Scottish Technology & Construction Court, but that is unlikely for want of business.<sup>49</sup>

### The International Experience

Fenn, O'Shea and Davies conducted an extensive survey of construction dispute resolution usage in 17 countries ending in 1998.<sup>50</sup> It was found that mediation was hardly ever used or not recognised as a valid dispute resolution mechanism in seven countries: Italy, Japan, Portugal, Romania, Scotland and Switzerland. Ireland used conciliation rather than mediation and Oman had no concept of non-binding dispute

<sup>44</sup> Andrew Agapiou, Bryan Clark and Gerry Keegan, 'Construction Disputes and Mediation: a study of the attitudes and experiences of Scottish contracting firms', Royal Institution of Chartered Surveyors COBRA Conference, 10-13 September 2012, Las Vegas, Nevada, USA, pp. 24-25.

<sup>45</sup>Ibid., pp. 25-26.

<sup>46</sup>Ibid., pp. 27-28.

<sup>47</sup> [The Scottish Arbitration Survey, Report No 1 \(Edinburgh: Aberdeen University et al, 2015\), p. 25.](#)

<sup>48</sup> [Agapiou, Clark and Keegan, 'Construction Disputes and Mediation'](#) ~~Ibid.~~, p. 29.

<sup>49</sup> Andrew Agapiou and Bryan Clark, 'A follow-up empirical analysis of Scottish Construction Clients' interaction with Mediation', *Civil Justice Quarterly*, vol. 32, no. 3, (2013), p. 379.

<sup>50</sup> Peter Fenn, Michael O'Shea and Edward Davies (eds.), *Dispute Resolution and Conflict Management in Construction, An international review* (London: Taylor & Francis, 1998).

resolution. Mediation was increasingly used in Canada, Malaysia and the Netherlands. In Australia, Quebec and Sweden mediation was widely used and effective. Mediation was the dispute resolution method of choice in China, Hong Kong and the USA, and was highly successful in these countries. In China, parties could proceed to adjudication or arbitration only after mediation had failed. All government contracts in Hong Kong had mediation clauses incorporated into the dispute resolution process and in the Airport Control Projects mediation was a condition precedent before attempting binding forms of ADR. Hong Kong was the only jurisdiction where mediation was actively supported and mandated in government contracts.<sup>51</sup>

Twelve years later Brooker and Wilkinson conducted a similar survey of mediation in eight countries in 2010.<sup>52</sup> It found that mediation was little used in Germany, Malaysia, New Zealand and Turkey. Success stories were reported in Australia and, to a lesser extent, England and Wales. In Hong Kong and South Africa some 80% of construction disputes were settled by mediation with equally high success rates.<sup>53</sup> It was concluded that mediation was only given a significant boost when courts and government showed an interest in ADR by developing strategies and policies to stimulate its use. Mediation needed a legal framework within the national court system for success and some form of coercion was helpful in the form of penalties for non-use or mandatory mediation without consent. Crucially, it was found that the integration of mediation within the legal frame leads to substantial growth in its use.<sup>54</sup>

As an exemplar, in Serbia a Law of Mediation has been passed, and appropriate bylaws regulating the manner of mediation training and registry maintenance have been adopted. A Center for Mediation has been established to promote mediation, including the use of premises in which to conduct mediations.<sup>55</sup>

## FINDINGS AND ANALYSIS

The data on Mediator Profiles, Mediator Training and Mediator Experience are presented in this section followed by the analysis of interviews carried out with the sample respondents relating to the benefits of mediation, the process of mediation and the promotion of mediation. The results of the attitudinal survey drawn from the same respondents follow thereafter.

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<sup>51</sup>Ibid., p. 176.

<sup>52</sup>Booker and Wilkinson (eds.), *Mediation in the Construction Industry, An international review*, p. 71.

<sup>53</sup>Ibid., p. 126.

<sup>54</sup>Ibid., pp. 199-200.

<sup>55</sup> Igor Matijevic, *Construction Industry and Mediation*(Belgrade): International Finance Corporation, 2008).

## Mediator Profiles

Figure 1: Mediators' Age

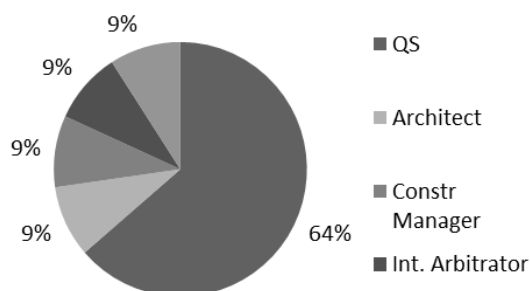


Figure 2: Primary Professions

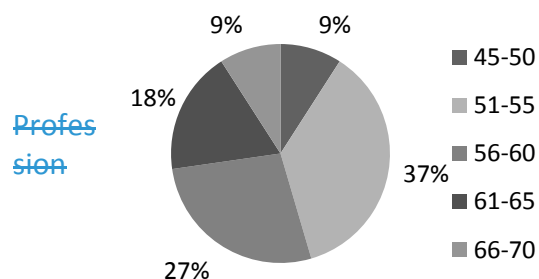
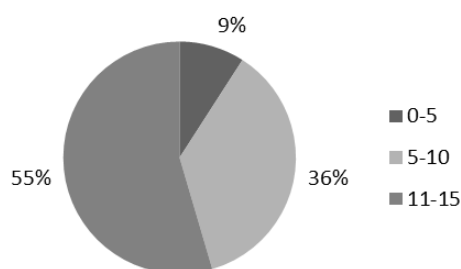
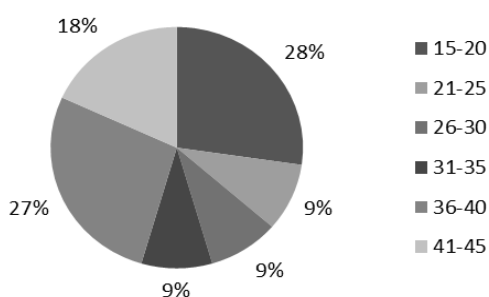


Figure 3: Years in Primary Profession \_\_\_\_\_ Figure 4: Years as a Mediator



A total of 11 construction mediators were interviewed, of whom two were women. The youngest was 47 years old and the oldest was 68, with an average age of 57.3 years. Some 91% Ninety one per cent were aged over 50 and 27% were over 60 years old. Construction mediation is clearly not a young person's profession.<sup>56</sup>

The range of primary professions of the mediators was narrow. Some 64% Two-thirds were quantity surveyors and there were one each of architect, construction manager and international arbitrator. Only one described himself as a professional mediator, although he had previously been a senior advocate.

The minimum period spent in their primary profession had been 15 years and the maximum was 45 years with an average of 30.7 years. Just over a third, 37%, ranged between 15 and 25 years and a further 45% had served over 36 years in their primary profession. The mediators were, therefore, highly experienced in their respective

<sup>56</sup> Bucklow's research for England and Wales published in 2007 found that the age range of commercial mediators was 44-77, the average age was 55, the average number of years practising as an accredited mediator was 13.4 years, 68% were men and 68% were lawyers.<sup>56</sup>

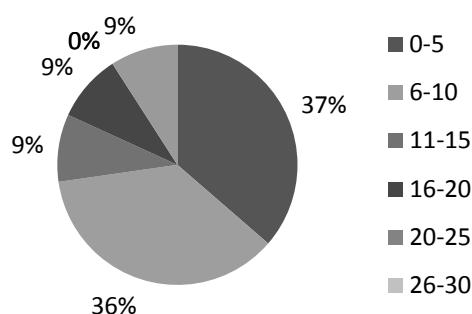
professions. The number of years practising as a mediator ranged from a minimum of two years to a maximum of 15 years with an average of 10.7 years. Just under half, 45%, had practised for less than 10 years whilst 55%the remainder had practised between 11 and 15 years. The mediators were, therefore, relatively experienced given the youthful age of the construction mediation profession itself.

#### *Mediator Training*

All but one of the mediators had undergone some formal training in mediation. Almost half had been trained by Core Solutions of Edinburgh and the others by The Royal Institution of Chartered Surveyors (RICS), Centre for Effective Dispute Resolution (CEDR), or the British Academy of Experts (BAE). Eight of the 11 mediators, 73%, were accredited by Core Solutions, The Royal Institution of Chartered Surveyors, or The Chartered Institute of Arbitrators. Eight mediators were members of a recognized mediator panel, such as The Royal Institution of Chartered Surveyors, The Royal Incorporation of Architects in Scotland, or The Professional Institute of Mediators.

## Mediator Experience

Figure 5: Number of Mediations



The number of mediations carried out by each mediator ranged from a minimum of one to a maximum of over 50. The average number was 7.2 per mediator, excluding the highest number which was regarded as an outlier. Just over a third, ~~37%~~, of mediators had carried out fewer than five mediations and a further third, ~~36%~~, had completed between six and 10 mediations. Another ~~18%~~ <sup>fifth</sup> had done between 11 and 20 mediations. Almost three quarters, ~~73%~~, had carried out fewer than 10, but one mediator had done over 50. The number of truly experienced Scottish construction mediators is, therefore, very small which is not surprising, given the small number of mediations carried out. The one full-time, professional mediator carried out most mediations as would be expected. The subject matter of disputes reflected the general topics of construction disputes, such as building defects, fees, extensions of time, payment, valuation of variations and final accounts. The amounts in dispute ranged from £75 (which failed to settle) to multi-million pounds. There was, however, a cluster around £10,000 to £200,000 with only a few above £1 million, although individual values were not disclosed. Settlement rates were generally high, ~~around 80%~~, but one respondent noted a recent trend against the expectation of settlement.

### Analysis of Interviews

#### *Benefits of Mediation*

Mediators perceived the benefits of mediation to be that it was quick, cheap, private, flexible and relatively straight-forward. It was less confrontational than either arbitration or adjudication, and maintained business relationships. Respondent E stated,

For me the benefits are turning off the tap. It's over with, it ends disputes and no matter what the result of it, it actually does end the dispute which is a useful thing. I think it's a useful thing for the parties so I see that as a benefit.

Significantly, Respondent J opined,

I think it is the engagement the mediation brings, the ability for people to truly understand where others are coming from and to recreate and enhance business relationship to locate the problem.

Mediators recommended mediation as a dispute resolution process by comparing the high legal costs of other alternative dispute resolution processes in relation to the amount in dispute. Respondent E said,

For that reason again and particularly when it's a private individual involved in things and they don't see a way out and it's actually going to become more and more expensive, it's not insurance backed, it's not backed by large companies.

The overwhelming view of mediators as to what factors lead to a successful mediation was the willingness of parties to compromise and to settle, as expressed by Respondent K,

I think commitment by both parties to reaching a settlement, I think it also requires openness and ability to compromise and one of the major factors is having a good mediator who brings out those elements in parties who are committed to those sort of discussions.

The importance of having a good mediator was stressed here and the belief that the mediator has to be 'quite imaginative in helping the parties, or at least helping the process, to find a sensible solution'. This was encapsulated by Respondent J who said,

I think the ability to focus on the real underlying issues. What parties really need to achieve and making sure they properly understand where each is coming from. Really good preparation of all of the different issues, not just legal and also quantification, of course, but again the underlying strategic and tactical needs and objectives of all those concern. Bringing together the key people. Good mediation skills.

Other factors can be negative, such as the desire to avoid legal proceedings and the risks associated with taking things forward. Reality checking was considered to be important for parties.

On the other hand, mediators believed that a refusal to mediate was caused by three general reasons: commercial, ignorance and over-confidence.

The commercial reality of mediation is that it ends the dispute and brings finality to the process. That means that payment must be made shortly after settlement. As Respondent A put it,

In my experience in the construction industry that has really been driven by the fact that a party might not have sufficient funds to actually meet the liability that has been put to them by the third party. So they want to extend the process, they want to spin it out as long as they can.

The beneficial speed of mediation may not, in fact, suit some commercial organizations. Faced with substantial payments, a company may want to write that down over a number of years, rather than make a single payment. There was also the point that Local Authorities and Public Bodies need to justify the terms of settlement. They need an audit trail and mediation may not provide that in the event of a

commercial settlement. It may be better for them that an adjudicator or arbitrator finds against them and orders payment to the other party.

Parties may refuse to mediate due to their ignorance of and uncertainty with mediation. This may be caused by poor advice, lack of good faith in the other party and the fear that the other party is simply engaging in a fishing expedition. Many parties will never have engaged in a mediation previously and so a reluctance to participate is understandable to some extent.

Construction has a reputation for macho-management and confident individuals. Mediators observed the detrimental effects of over-confidence. 'We're going to win in court, so why compromise in mediation?' 'Parties have a black and white view of the case and little risk of compromise'. Respondent I opined,

The big thing in my opinion is ego: the ego of the Contractor and the ego of the Engineer/Architect or Contract Administrator end up in differences of opinion and can become very much estranged.

Mediators experienced a range of factors leading to failure in mediation. Principal amongst them were unwillingness to compromise, stubbornness and intransigence. Expert advisors were identified as being particularly intransigent as they were unwilling to change their minds during a mediation.

Mediators detected hidden agendas during the process: parties coming with no intention to settle; those simply going through the motions because a contract required them to mediate; a refusal to even consider the other party's point of view.

Mediators cited lack of perseverance of parties to achieve settlement and lack of persistence on their own part to achieve a resolution. One mediator believed that failure was sometimes the result of personal issues overriding commercial issues due to ill feeling and lack of trust.

#### *Process of Mediation*

The mediators' experience of what types of dispute which come to mediation centred around financial matters. Money was at the root of most construction disputes, either directly or indirectly. Subject matters, therefore, related to claims for loss and/or expense, cost overruns, quantification, and extensions of time with consequential effects on liquidated damages. Unusually, the quantum of fire reinstatement cost was mediated by an insurance company. Defects in buildings were often mediated in terms of both liability and cost of making good. Professional negligence cases were mediated, although respondent G found it difficult to imagine a successful mediation in such a situation. An interesting example was the use of mediation to avoid an adjudication under a 'Tolent' clause.<sup>57</sup> The general consensus was, as respondent J put it, 'it is not just value and quantum [that can be mediated] but everything to do with contractual, alleged contractual, breaches'.

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<sup>57</sup>A 'Tolent' clause is where the contract provides that the Referring Party will bear all the costs of both parties in the adjudication. The objective of the clause is to deter adjudications.



The mediators generally struggled to identify matters unsuitable for mediation. As Respondent J opined, 'If any dispute is negotiable, it's mediatable, and I can't think at the moment that any dispute cannot be negotiable'. Respondent A thought that disputes involving heavy planning and programming issues were problematic. Respondent D believed mediation would be inappropriate in a dispute where there is a black and white answer involving, for example, a specific design loading set out in a Code of Practice. Respondent G reiterated his objection to using mediation in professional negligence cases. There was some hesitation in using mediation to settle points of law.

Of the 11 mediators interviewed, seven said they were facilitative, three were evaluative and one used both techniques. The evaluation style was closely related to mediators' primary profession as a quantity surveyor. Respondent H said,

what [the parties] wanted, which is familiar in the oil industry, is effectively a deal broker, a banger, bum kicker whatever you want to call it and that's what they wanted and that is what the oil industry general preferred and I suspect the sort of mainstream construction industry would probably, I guess, prefer that to a touchy feely mediator.

Respondent K ~~summed it up rather well when he~~ said,

I can't say I am too precious about that, I think that really comes down to what the parties require from you. I think a facilitative process is by far the gold standard which you would want to aim for, but very often in the commercial construction disputes I am involved in some form of evaluative input by the mediator is helpful to the parties in moving them to a conclusion.

Somewhat surprisingly, four out of the 11 mediators had never used a pre-mediation meeting. In contrast, Respondent J said, 'It would be almost unthinkable for me to start a mediation having not at least some contact in advance'. The use of a conference call instead of a pre-mediation meeting was fairly common. Those mediators who used such meetings believed they were beneficial because they helped parties to understand the process with which they were unlikely to be familiar, it allowed them to rehearse what they were trying to say, and to convey the feeling and emotion behind what they were trying to say at the mediation. Respondent A made the point, 'I think it allows the mediator to get focused on the key issues and to understand the parties' respective positions in advance of the mediation'.

Every mediator believed that preparation was an essential element in the successful outcome of a mediation. Parties should know what they want to achieve at the mediation and how they are going to achieve it. They must know their positions and interests very well and try to put themselves in the other party's shoes. Preparation should be no less than that for adjudication or arbitration. Both parties should have a willingness to settle and not expect to get everything they ask for. Parties should prepare careful opening statements setting out what they hope to achieve. Respondent B advocated the use of the Royal Institution of Chartered Surveyors' Guidance Procedure to prepare a brief summary a few pages long which are

exchanged prior to the mediation. Parties should anticipate the direction the other side will come from and have in mind how they want to influence the running of the day.

There was universal agreement amongst the mediators that decision-makers with authority to settle the dispute should participate in the mediation. If they could not be physically present then they should be available by telephone in the case of, for example, insurers. It was also generally agreed that people with knowledge of the problem, those with a factual background to the dispute, technical advisors and expert witnesses should be present. There were, however, different views whether lawyers should participate. Some mediators thought not, or only in an advisory capacity at best, whilst others thought their presence essential. If the mediation came down to a commercial settlement then lawyers could contribute little and even get in the way of a deal. If legal principles were at issue then lawyer input could be invaluable.

Mediators believed that parties keep control of the mediation process in one of two ways: one relating to emotions and the other to control of the mediation process itself.

When emotions became fraught the mediators thought that taking a break or separating the parties into private groups was beneficial. Deep breathing and trying to stay calm were also recommended. The example of a party becoming hot-headed, storming out and later returning to the mediation was given. Respondent A thought it essential for the parties not to allow the mediator to take control by having a game plan for the mediation, sticking to it and not being deflected from it. Respondent B confirmed this by saying, 'It's their process and what you are trying to do is to help them along the way to a settlement'. In contrast, Respondent H said, 'Well, I think, I'm not sure the parties should be in control of the process. It's really for the mediator to control the process, not in a dictatorial way, but in a facilitative or flexible way'. Respondent J summed it up by saying,

I think the short answer to your question is remembering that it is a business deal which they are doing and it is a business deal which only they can ultimately make, and that is how to keep control.

Problems encountered in mediation and how they were solved generated long, discursive answers from the mediators. Specific problems encountered included getting a party to identify what they are prepared to pay or what they are prepared to accept, which sets a line in the sand for both parties. Even simply getting parties into the same room to make opening statements was sometimes difficult. Another problem was getting parties through the first part of the day when relationships were made, to get the dispute moved along to a certain point by a certain time or else it is too late for things to happen. Mediators found it difficult to control parties' expectations and to control estrangements between parties. This was a major problem where there is a fundamental and diametrically opposed view on the state of affairs which led to the dispute. Respondent J reported the problem of a party withdrawing into himself, withholding information and withholding their thoughts,

particularly when they are in private sessions. The same Respondent also stated, 'I always say at the start, you will need to do more or less than you ever thought you would do, and getting past that is potentially most difficult'.

Respondent K recognised that advisors often had their own agendas which led to difficulties. For example, lawyers having given legal advice are very reluctant to change it, and the solution may be to sideline the lawyer in order to make progress.

It was clear that mediators had developed a number of techniques over the years to deal with the foregoing and other problems. These included allowing parties to let off steam and vent their anger; allowing parties to storm out and then negotiating their return; moving to caucus to defuse tense situations; sidelining intransigent advisors and dealing only with the principals; getting experts to crunch some numbers; eliciting parties' top and bottom lines to establish a zone of possible agreement.

In answer to the question, 'to what extent should a mediator offer an evaluation', the overwhelming response to this question was, 'Only if requested by the parties'. Some mediators qualified even that by suggesting that the mediator should only evaluate the principle and advise on strengths and weaknesses. Respondent E claimed that evaluation is almost always demanded by the parties. In contrast, Respondent J said, 'Well, in that situation I cannot think of circumstances [in] which I would offer that sort of thing'. He went on to say, however, 'there are ways of giving indications to parties of the potential risk they face viewed from the third party perspective without using the blunt instrument in saying it is worth £ {X}'. The reality was possibly stated by Respondent K, 'So certainly the purest mediators would not subscribe to that [evaluation], but living in the real commercial world I think it's an element that has to be brought into use'.

Mediators worked very hard indeed to encourage parties to settle. A common tactic was for the mediator to invite the parties to consider the consequences of failure to settle on the day, along the lines of, 'It's going to cost you a fortune at a later date'; 'Do you really want to walk away from here with it not settled'; 'Settle this today, because if you don't then what?'. Respondent B said, 'So I think I would try and be positive and would straightforwardly take the issues that are deal-breakers and see just how much of a deal-breaker they really were'. Respondent J said,

Now ultimately it is their choice, their responsibility [to settle or not], but I know from experience that the harder I work to help them to assess the pros and cons and to see the advantage of a resolution, the more likely it is that they will actually resolve the problem.

The general consensus was that Med-Arb should not be encouraged. There was considerable doubt amongst the mediators whether the process worked at all. There was great unease that a mediator having attempted mediation and failed, can then become the arbitrator in the same dispute having gleaned confidential information in caucus. There was more support for Med-Arb when it involved a different arbitrator from the failed mediator. As Respondent J put it, 'It is something I have never done. In fact, I have never needed to do it as I think a really good mediator would not need to do that, but that is a controversial statement'.

The mediators were equally divided in their answer to the question, 'is mediation about *just* settlement, or *just* about settlement'. Five mediators thought mediation was about just settlement, five thought it was just about settlement and one challenged its relevance as it was up to a party to refuse to agree to something which was unjust.

Those mediators who thought it was just about settlement supported the view that mediation was all about getting a deal. No party could be forced to agree to something with which it disagreed, Parties only agree to a settlement with which they can live. Justice, therefore, need not come into the settlement.

The contrary view of some mediators was that if both parties reach a win-win situation and settle, then that is a just settlement. Some mediators thought there was more to a good mediation than merely reaching settlement, such as the repairing or the re-creation of business relationships. Respondent J philosophized as follows –

I think the difficulty with the word settlement is it is a connotation for a legal result which is rights based, claims based and often money based. Mediation is about so much more.

#### *Promotion of Mediation*

One mediator thought mediation is promoted well enough as it was just one of many dispute resolution processes. Another mediator simply did not know. More positive means of promotion included legislative support, support in standard form construction contracts, and court support with cost penalties against non-participants, as practised in England. Greater support from solicitors who had successfully used mediation was called for. Respondent H called for more direct action, 'Light a small stick of dynamite under the legal profession's posterior'.

Another mediator said, 'It would continue to be a good thing if the Government would not only say it is a good thing, but use it'. The need to de-mystify the mediation process and for greater education was a popular theme amongst mediators. Respondent K stated,

young lawyers don't know the difference between alternative forms of dispute resolution so for me it is all about education of mediation's unique properties.

Some blame could be attributed to mediators themselves. Respondent J said, 'we are not awfully good, I think, at marketing the way that [mediation] could be such a success'.

The majority of mediators believed that construction contracts should be amended to promote mediation, but there were some emphatic negative responses. There was support for some sort of tiered dispute resolution structure starting with executive negotiation, moving through mediation to adjudication or arbitration or litigation. There was recognition, however, that mediation was a consensual process and parties should have an option to use it or not. Respondent I answered,

With an emphatic 'No'. Mediation is a voluntary process, therefore, if you include it in the contract it can be entered into with resentment and when you get resentment in a mediation, I had to come to this, I am forced by the contract to come to this, it doesn't work.

There was little support for mandatory mediation before court action. The majority of mediators again emphasized the consensual nature of mediation and believed that mandating parties would be counter-productive. There was widespread recognition that parties forced to mediate could not be forced to settle. Mediators were alive to the European Court of Justice's ruling that, with certain caveats, mandatory mediation was not of itself unlawful. Active encouragement to mediate before court action was supported in preference to making it absolutely mandatory. A small minority of mediators supported mandatory mediation. Respondent H cited the country of Columbia where, 'it is part of the civil [law] code [that] you cannot pursue civil litigation until you have been through a mediation process'. Respondent J came right off the fence by eventually saying,

If I had to make a decision on this I would now be more likely to fall down on the general proposition, subject to exceptions, that with the full use of expensive court procedure, in many circumstances, it can be appropriate for parties to be instructed to mediate.

There was general support amongst mediators that the construction professions should deliver more mediation courses. There was recognition, however, that mediator training was both time-consuming and expensive, and that the required pool for mediators was necessarily limited in Scotland. It was thought there were already enough mediation training providers, and so the professions should restrict themselves to providing mediation awareness training to encourage its wider. Respondent J said, 'I think I would like to see the culture change, which is happening elsewhere, promoted through training and education of which a part is the understanding of how mediation can work'. Respondent K believed that, 'whilst adjudication in the construction industry has been effective it has to a degree taken away the ability of the construction professional to negotiate and that is a sad loss that people do not negotiate as much as they should'.

### **Attitudes to Mediation**

The individual responses to the attitudinal survey were aggregated together and expressed as a percentage. The 'Strongly Agree' and 'Somewhat Agree' responses were consolidated into 'Agree', as were the 'Strongly Disagree' and 'Somewhat Disagree' responses into 'Disagree', to produce clear cut answers. The number of 'Don't Know' answers was extremely low with only four out of the 19 questions eliciting such a response. An overwhelming 91% of respondents disagreed that mediation was detrimental to the development of the law. Some 82% strongly disagreed with the statement. Only 18% of respondents agreed that mediation is inappropriate where there is a power imbalance between the parties. Some 82% disagreed, of which 55% strongly disagreed. Almost two-thirds, 64%, of respondents agreed that judges should refer cases to mediation. Members of the Scottish

judiciary appear to support the 36% of respondents who disagreed with the proposition. A small majority of 55% of respondents disagreed that making mediation a mandatory first step in dispute resolution would be a positive development, with 36% strongly disagreeing. It was perhaps surprising that less than half, 45%, of mediators agreed with the proposition. There was only muted support for mandatory mediation. In interviews it was clear that the majority of mediators again emphasized the consensual nature of mediation and believed that mandating parties would be counter-productive. There was widespread recognition that parties forced to mediate could not be forced to settle. Active encouragement to mediate before court action was supported in preference to making it absolutely mandatory.

Another way to expedite the help institutionally embed the process is by contractual inclusion. Only 64% of respondents agreed, 36% strongly, that construction contracts should contain a mediation clause, whilst only 9% strongly disagreed and a further 27% somewhat agreed with the statement, contrary to what might have been expected. While the majority of mediators answered in the affirmative, there were some emphatic negative responses in the interviews. There would seem to be some support for a tiered dispute resolution structure starting with executive negotiation, moving through mediation to adjudication or arbitration or litigation. There was also recognition, however, that mediation was a consensual process and parties should have an option to use it or not.

In terms of views of formal civil justice processes, only 27% of respondents somewhat agreed that litigation is generally well adapted to the needs and practices of the construction community. Some 73% disagreed, including 45% who strongly disagreed. Whilst litigation was not a favoured dispute resolution process, arbitration fared much better with 82% agreeing that the process is well adapted to the needs and practices of the construction community. No respondent strongly disagreed with the statement and 18% somewhat disagreed. Given the small number of construction arbitrations currently taking place in Scotland this result was surprising and certainly it is not reflected in the views of construction lawyers and contractors on this issue.<sup>58</sup>

It was, however, no surprise that 82% of respondents agreed that adjudication is well adapted to the needs and practices of the construction community, including 45% who strongly agreed. This perhaps reflects the fact that all but one of the mediators also practised as an adjudicator. Almost two-thirds, 64%, of respondents disagreed that default to adjudication in many construction disputes renders mediation obsolete. Over one-third, 36%, however, agreed with the statement. It should be noted that the Housing Grants, Construction and Regeneration Act 1996 does not make recourse to adjudication mandatory. It merely confers a statutory right on either party to a construction contract to take any dispute to adjudication at any time. On one view then, there is, therefore, no reason to believe that adjudication renders mediation obsolete. It may simply be that some types of disputes are more readily resolved by adjudication than by mediation and vice versa. Indeed, it is noted that there was a 30% reduction in the number of adjudications carried out in the

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<sup>58</sup> Albeit that such data was collected prior to the roll out of the new statutory arbitration regimes under the Arbitration (Scotland) Act

United Kingdom in the year to May 2011 with only a tiny recovery of +3% in 2012 (Trushell et al, 2012). Nonetheless research into the views of both construction lawyers and end-users suggested that the default presence of adjudication and its cultural embedding in the industry may militate against further mediation use (Agapiou and Clark, 2012, 2013)

In relation to other potential barriers to mediation's growth, a third of respondents, ~~36%~~, believed that lawyers will lose money if mediation grows, but more than half, ~~55%~~, disagreed and 9% didn't know. A convincing 82% of respondents disagreed that suggesting mediation to an opponent is a sign of weakness, including ~~half~~~~55%~~ who strongly disagreed. A mere ~~18%~~one in five agreed with the statement.

A small majority of respondents, ~~55%~~, agreed that a barrier to mediation's development is its negative perception among (a) clients and (b) lawyers. Further analysis, however, revealed different levels of agreement between the two factors. The negative perception among clients was split equally between strongly agree and somewhat agree in the responses. In contrast, only ~~9%~~one in ten respondents strongly agreed with the negative perception among lawyers, whereas ~~45%~~almost a half only somewhat agreed. Mediators, therefore, appear to believe more strongly that clients' negative perceptions of mediation are the bigger barrier than lawyers' perceptions. Almost three-quarters, ~~73%~~, of respondents agreed that mediation training should be compulsory for lawyers, although a quarter, ~~27%~~, disagreed. In contrast, two thirds, ~~64%~~, thought it should be compulsory for construction professionals, including ~~a quarter~~27% who strongly agreed. There also seemed to be recognition, however, that mediator training was both time-consuming and expensive, and that the required pool for mediators was necessarily limited in Scotland.

Respondents generally thought that there were already enough mediation training providers, and so the professions should restrict themselves to providing mediation awareness training to encourage its wider use. Mediators may believe that lawyers exert a greater influence than construction professionals in advising clients to use mediation and so need to know more about the process. A substantial majority of respondents, ~~64%~~, agreed there is a lack of awareness regarding mediation amongst the legal fraternity, with ~~a quarter~~27% strongly agreeing and ~~36%~~the-thirds somewhat agreeing. An overwhelming ~~82%~~majority agreed there is a lack of awareness of mediation amongst construction professionals of which ~~36%~~a third strongly agreed and ~~45%~~almost half somewhat agreed. A mere ~~9%~~one in ten somewhat disagreed and a further ~~9%~~one in ten surprisingly didn't know. The implications for mediation training needs amongst both lawyers and especially construction professionals are clear.

#### *Comparison with Lawyers' and Contractors' Attitudes*

The attitudes and experiences of Scottish construction lawyers and contractors had been previously surveyed.<sup>59</sup> It is worth noting that of the 19 questions answered by mediators five were not common with those answered by lawyers and contractors. Seven questions produced generally similar responses and the remaining seven questions were analysed to identify differences between the respondents. Whilst

<sup>59</sup> Agapiou and Clark, 2012/2013

~~80% of most~~ mediators and lawyers disagreed that mediation is inappropriate where there is an imbalance of power between the parties, ~~60% more than half~~ of contractors agreed with this statement. As contractors are likely to be the more dominant party in a mediation it is difficult to reconcile this answer with what happens in practice although it may be redolent of a lack of sophisticated appreciation of the mediation process. Whilst ~~82% of most~~ mediators agree that arbitration is generally well adapted to the needs and practices of the construction community, ~~80% of most~~ lawyers and ~~56% just over half~~ of contractors disagreed. The diametrically opposite view of mediators and lawyers is perverse but it may be reflected of the fact that the bulk of the construction mediators, also working as adjudicators would see opportunities to move in arbitration too in the aftermath of the changes heralded by the Arbitration (Scotland) Act. Whilst ~~over 80% of most~~ mediators and lawyers agreed that adjudication is generally well adapted to the needs and practices of the construction community, almost ~~60% a third~~ of contractors disagreed. This may reflect the fact that in main contractor/sub-contractor disputes taken to adjudication some ~~70% three-quarters~~ of referring sub-contractors win at the expense of the main contractor respondents.<sup>60</sup> Whilst about ~~65% two-thirds~~ of mediators and lawyers disagreed that default to adjudication in many construction disputes renders mediation obsolete, ~~42% almost half~~ of contractors agreed. Whilst about ~~65% two-thirds~~ of mediators and lawyers disagreed that mediation suffers from a lack of coercive power, ~~52% half~~ of contractors agreed. Whilst ~~54% half~~ of mediators and ~~42% of~~ contractors agreed that a barrier to mediation's development is its negative perception among lawyers, ~~62% almost two-thirds~~ of lawyers disagreed, perhaps unsurprisingly. In five out of the seven questions addressed above, it is contractors who are out of step with the mediators and lawyers. The admitted lack of awareness and experience of mediation by contractors appears to be confirmed.

## CONCLUSION

The research found that Scottish construction mediators believe that mediation is a successful dispute resolution process because it is quick, cheap, flexible, creative, confidential, non-confrontational and applicable to almost all disputes. A successful outcome depends on the skills of a good mediator, thorough preparation by all participants, the presence of key decision-makers, the parties' willingness to compromise, and the mediator's judicious application of pressure to settle. Mediations fail because of ignorance, over-confidence and intransigence of the parties, uncompromising expert advice, cynical commercial reasons, and fraught emotions. There are few experienced construction mediators in Scotland, and the continued popularity of statutory adjudication is a significant barrier. Mediators believe that clients' negative perceptions of mediation are a bigger barrier than lawyers' perceptions. This is an interesting issue that bears further investigation. It is clear from many jurisdictions that lawyers often hold the keys that will unlock the

<sup>60</sup> I. Trushell, et al 2012), Reports Nos. 11 and 12, Adjudicating Reporting Centre, Glasgow Caledonian University, Glasgow.



door to greater mediation use, even in respect of sophisticated repeat player clients (Clark, 2012: chpt 2). As noted above, Agapiou and Clark's previous research found that Scottish construction lawyers generally hold a high regard for adjudication. This positive view is not commonly shared with construction constructors and sub-contractors, however (Agapiou and Clark, 2012, 2013). This raises the issue as to whether or not lawyers are indeed favouring adjudication because it represents a forum that they are more comfortable with and also whether mediators are correct in their perception that clients represent a greater barrier to further mediation use than lawyers. It also suggests to us that to circumvent any lawyer resistance to construction mediation that does exist training and education should be targeted at the client market perhaps through professional organisations (see Agapiou and Clark, 2013)

Whilst accepting that a facilitative model was the purest form of mediation, about a third of the mediators were prepared to offer an evaluation of the dispute, possibly due to a substantial proportion being Quantity Surveyors with sound technical knowledge. All agreed, however, that the agreement of the parties was vital before an evaluation could take place. This finding is important given the fact that Agapiou and Clark's study of construction contractors and subcontractors (2013) found a significant number of respondents signalling a desire for more evaluative mediation strategies. This holds significant implications for mediation training in Scotland – most of which follows a general facilitative mediation model.

-There was little support for mandating parties to mediate before proceeding to court action. The mediators wanted judicial encouragement for mediation backed by some legislative support, mediation clauses incorporated into construction contracts, and government adoption of mediation as the default process in its own contracts. This view chimes with that of Brooker and Wilkinson (2010) who showed that across a multitude of jurisdictions mediation of construction disputes<sup>61</sup> can flourish only with the active encouragement of government and its judiciary. It is worth noting that the same relatively lacklustre development of mediation more generally exists in Scotland across a range of fields (Clark, 2012, chapter 1). The lack of court promotion in particular in Scotland is a significant differentiating factor with more mature jurisdictions across the common and civil law world (Clark, 2012, chapter 1) albeit that new Court Reform Act 2014 may present opportunities for future growth.<sup>62</sup> So a combination of 'top down' state prompting and 'bottom up' client base education and encouragement is likely to represent the best strategy for construction mediation development in Scotland.

<sup>61</sup> And mediation more generally

<sup>62</sup> See particularly ss 103(2)(b)(i) & 104(2)(b)(i) which allow the Court of Session to develop its own rules to promote the use of ADR within that court as well as the Sheriff Courts. It remains to be seen whether such rules will be developed.