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A follow-up empirical analysis of Scottish Construction Clients interaction with Mediation

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Introduction

Although across many jurisdictions, mediation's origins (in the modern sense at least¹) often lay in the dispute areas of family and community matters, in recent years the process has begun to take root in the arena of construction disputes (for an international review of developments see Brooker and Wilkinson 2010). In contrast to traditional means of resolving disputes, it is contended that mediation may be a quicker, cheaper, less adversarial and more harmonious form of dispute resolution than traditional methods. Moreover, proponents suggest that mediation has the potential to lead to higher quality, creative solutions beyond the gift of formal court adjudication (Sturrock, 2010).

Such characteristics of mediation hold a certain resonance in the construction sector. The construction sector is renowned globally for its dispute ridden nature. Some common types of arising disputes in construction matters include those pertaining to delay, payment matters, changes to scope of work, professional negligence, and quality of work issues. The suspected aggressive, "macho" characteristics of industry players, the uncertainties that characterise many aspects of construction contracts and common pressures on finances and cash-flows that blight the industry may also fuel the rise and escalation of conflict between construction participants (see Brooker and Wilkinson, 2012, p.3–4).

Such difficulties have of course long been recognised and in an effort to help expedite the resolution of disputes in construction matters, various mechanisms have been deployed beyond the traditional routes of litigation and arbitration. For the UK, the creation of the Scheme for Construction Contracts and the Housing Grants Construction and Regeneration Act 1996 led to the development of alternative methods of dispute resolution first proposed by in the government-sponsored Latham Report (Latham, 1994). In particular, the Act paved

¹ Generally seen to emanate from the National Conference on the Causes of Popular Dissatisfaction with Administration of Justice (the ("Pound Conference") in Minnesota in 1976 (Sander, 1976). The origins of mediation can be traced back pre-capitalist and tribal societies (see Abel 1993; Levinson 1994)

the way for the widespread use of adjudication, essentially a species of short form arbitration. Section 108 of the 1996 Act provides a legislative framework to facilitate the operation of the adjudication procedure.²

The relevant legislation has since been amended. The Local Democracy, Economic Development and Construction (Scotland) Act—the Construction Act 2009—received Royal Assent in July 2009 (Brawn, 2010) and came into force on the November 1, 2011.³ The new legislation amends Part II of the Housing Grants, Construction and Regeneration Act 1996 including changes to the statutory adjudication procedure.

The statutory roll-out of adjudication was intended to allow construction disputes to be resolved on an interim basis, so that the relationship between the parties could be maintained after the dispute, with any final resolution of outstanding matters being picked up by negotiation or by other, more formal means of dispute resolution.⁴ Since 1998 the statutory adjudication process has developed significantly from a commercial pro-tem idea into a sophisticated dispute resolution mechanism, which requires very polished adjudication practitioners.

Although our recent research into Scottish construction lawyers' views on and experiences of dispute resolution generally found a profession at ease with adjudication practice (Agapiou and Clark, 2011; Agapiou and Clark, 2012), for some time anecdotal concerns about the effectiveness of the adjudication process among construction industry participants have been voiced (Kennedy and Milligan, 2007). Also, while it is generally recognised that the adjudication provisions under the 1996 Act have generally improved cash flow within the industry and dispute resolution process more specifically, they have often been described as “ineffective” in other respects. In short, the process has been attacked on the basis that it is often subject to the manipulation of one of the parties (Akintoye et al, 2011); on the grounds that the process has become more legalistic and complex than was originally intended (Minogue, 2010); and also in the sense that exorbitant costs and delays inherent in the process have become more common (Redmond, 2009).

The authors have already completed both questionnaire and interview based research into experiences and attitudes relative to construction mediation from the perspective of Scottish legal advisors (Agapiou and Clark, 2011; Agapiou and Clark, 2012). This work was able to track a small but seemingly growing case load of mediation in construction matters in Scotland as well as a burgeoning cadre of Scottish lawyers, while still generally cautious, growing in confidence in, and enthusiasm for the process. Both positive experiences and cautionary tales were regaled and strongly held views expressed by lawyers on such matters as the interaction between mediation and construction adjudication, the role of clients in and around the mediation process, factors relevant to mediation success, barriers to development and opportunities for growth. That study tracked some 178 mediation cases in the Scottish construction sector,⁵ with some 83 per cent reportedly either settling or partially settling and general positive experiences

² Eversheds (2005), *Adjudication Client Briefing*, www.eversheds.com/serv [Accessed May 1, 2013].

³ Akintola Akintoye, Suresh Renukappa and Hamish Lal (2011) *Perception of the UK industry on “the new 2009 Construction Act”*: An empirical study, COBRA 2011 Proceedings of RICS Construction and Property Conference, September 12–13, 2011, School of the Built Environment, University of Salford, ISBN: 978-1-907842-19-1.

⁴ S. Furst & V. Ramsey, *Keating on Building Contracts*, 7th edn (London: Sweet & Maxwell, 2001).

⁵ Some double counting was doubtless evident in the figures.

within mediation evident. In general, survey participants predicted a limited role for mediation to play in construction disputes particularly given the prevalence of statutory adjudication. Although both lawyers and construction industry professionals were blamed for stifling growth, legal professionals in the main saw a positive role and business opportunity for themselves in any further development of the process. It should be noted, however, that the perspective and experiences of legal advisors may not necessarily mirror the same in respect of users of mediation, however. Lawyers' interests or agenda in dispute resolution may not always concur with their clients.

Thus the current work helps us to paint a more complete and nuanced picture of the current state of, and debates around construction mediation in Scotland. It is also worth noting that in terms of the literature on mediation generally (at least outside of research into court-annexed programmes) much more is currently known about the role and views of lawyers in the process than that of the end users.⁶ This work also thus adds considerably to the general literature pertaining to mediation's utility as a form of civil disputing by its focus on end users.

Research Methods

A body of literature in the construction mediation field of course exists in many other jurisdictions, including England and Wales (Gould, 1999; Gould et al, 2009), the USA, South Africa, and Australia (for a review of international evidence see Brooker and Wilkinson, 2010). It is worth noting, however, that much of this work has taken place in contexts in which construction mediation lies at a more advanced stage of development than is the case in Scotland. In many such jurisdictions, mediation has been the subject of significant governmental and professional promotion and embedding into traditional dispute resolution pathways through for example, embedding in standard construction contracts, judicial initiation of the process, and legislative measures. The experiences relative to research recorded in these contexts must therefore be treated with caution when applied to Scotland—a jurisdiction which has to date lacked the institutional scaffolding to support mediation in such ways.

In the present study, a methodology was developed to build an improved picture of the understanding of mediation in the Scottish construction context, and ascertain whether the process was being used or was at least being considered for use in the resolution of disputes by construction participants. We were also interested in determining the views of clients relative to any barriers to further take-up that existed as well as the drivers that might help expedite increased use.

Questionnaire survey

The first stage of the research involved a questionnaire. The aim of this aspect of the research was to elicit views, practises and experience of mediation techniques amongst the sample rather than an in-depth account of a limited number of randomly chosen case studies. We utilised Survey Monkey to gauge the experiences and views of participants relative to different aspects of mediation.

⁶ For a discussion of clients' views relative to mediation in different jurisdictions see, B. Clark, *Lawyers and Mediation* (London: Springer, 2012) at para.2.3.1.

Sample selection & size

The Scottish construction industry is large and disparate in nature, and one of the first issues for the research team to resolve was the need to focus the study. It was decided to limit the research to that area of the construction industry where dispute is perceived to be most prevalent. According to Kennedy (2005) the most frequent disputing parties in the UK arise in the *main contractor v domestic sub-contractor*, *client v main contractor* and *client v sub-contractor* settings. The main focus of this research was therefore on main and sub-contracting firms based in Scotland. We selected the member companies of the Scottish Building Federation (SBF). Using the SBF membership list had a further advantage, in that their support was elicited and this was to be used in order to encourage a better response rate.

Piloting of questionnaires

Once the questionnaires were designed, they were tested on two separate groups, in order to measure their effectiveness. The aim of the pilot test was to assess how long the questionnaires took to complete, to evaluate how the questions would be interpreted for meaning and, more generally, to ensure the clarity and efficacy of the questionnaire. A small sample of SBF firms provided us with assistance in the pilot study process. The respondents were told the questionnaire was a pre-test and the group were questioned about their understanding of the questionnaire and asked to comment on possible rephrasing or clarity of questions. Following the test, certain revisions were undertaken.

Survey Response rate

In order to improve the overall response rate we developed and uploaded two questionnaires onto Survey Monkey; one for those companies and firms who had used mediation and the other to those who had never used it. The length of the questionnaire to be completed was thus shortened accordingly. It was anticipated that this would lead to a better response rate. The final response rate from the survey was 18 per cent. This figure compares favourably with other online surveys more generally, and specifically ones relate to the construction context (see for example, Fenn and Gould, 1994; Stipanowich and O' Neal, 1995; Belson, 1996).

Questionnaire data analysis

When all the questionnaires were returned through Survey Monkey, we preceded with the analysis of the questionnaire data. The statistical analysis of the survey data was undertaken using the SPSS software package. We used descriptive statistics to identify the existence of any patterns in the responses provided and to present a profile of the sample population.

Qualitative research

Denizen and Lincoln (2002) provide that qualitative research “involves an interpretive, naturalistic approach to the world” and the qualitative researchers study things in their natural settings, attempting to make sense of, or interpret,

phenomena in terms of the meanings people bring to them. Holmes et al, (2005) point out that qualitative research will be used if the researcher wants to understand a phenomena about which they know very little of, or who they does not have a complete knowledge of a particular entity. In this sense, while our quantitative data sheds significant new light on construction mediation in Scotland, we are nonetheless aware of the limitations of survey findings. In an effort to produce “thicker descriptions” of salient issues relative to participants’ interaction with construction mediation (Geertz, 1973) and explore in more depth some of the key themes emerging in the survey research, we intended to conduct a number of follow-up interviews with respondents to the survey. However, very few of the respondents expressed a willingness to be involved in the next stage of enquiry; therefore an alternative approach was required to yield a more appropriately sized sample frame.

The technique involved the researchers asking personal contacts within the construction industry to name five “influential” individuals with whom they “talked to the most about mediation”. The individuals identified were asked the same question, and so on, until no new names were identified. These contacts were informed as to the nature of the research and asked to consent to an interview, which would last about one hour, or to identify another person from their organisation, who would be prepared to assist in the research. Thus, the sampling was done with a “snowballing” strategy. The sample frame comprised nine participants. All the respondents were based in small, medium-sized or large organisations with turnover that ranged from £1.5million to over £200million in the year 2012 (see Table .1).

Table .1 Position of interviewees and company size

Interviewee	Position	Company Turnover
<i>A</i>	Director	£2m
<i>B</i>	Quantity Surveyor	£5m
<i>C</i>	Commercial Manager	£40m
<i>D</i>	Commercial Manager	£200m
<i>E</i>	Commercial Manager	£100m
<i>F</i>	Quantity Surveyor	£60m
<i>G</i>	Director	£1.5m
<i>H</i>	Director	£4m
<i>I</i>	Director	£50m

The semi-structured face-to-face interviews were undertaken from April to May 2012. An interview schedule was used as the basis for conducting the process. The schedule was based around core questions developed around the key findings from the quantitative analysis and on issues raised and observed by the participants. Whilst we are aware that the sample was small and inviting respondents to self-select for interview has its methodological weaknesses, we pursued this approach as it was the most effective way to obtain access to participants with experience of mediation in the construction context in Scotland. The qualitative

phase of enquiry involved an interview with the each participant each lasting approximately one hour. All the interviews were recorded using a digital voice recorder and transcribed. Permission was sought from the participants to record the interviews. The audio files of all nine interviews were transcribed for the purposes of data analysis.

The next section presents the results of the data analysis from the questionnaire and the participant interviews.

Research Findings

This section presents the results from the primary research. The overall research question was broken down into four main parts:

- to evaluate the effectiveness of prevailing construction dispute resolution methods in Scotland;
- to track the extent, nature and success of current mediation practice in construction matters in Scotland;
- to determine the willingness of Scottish construction participants to shift away from traditional approaches to dispute resolution to mediation; and
- if they are, to ascertain the drivers towards the adoption of mediatory techniques, and if not the barriers to change.

The data from the participant interviews is presented together with the questionnaire results to establish whether there was a convergence of the results from the different phases of enquiry, to ascertain whether the existence of overlaps of different facets of the same phenomenon emerged or indeed whether contradictions and fresh perspectives emerged from the responses of the participants to issues explored under the quantitative analysis, i.e. survey research.

Knowledge levels

The survey first sought to establish basic awareness levels of mediation throughout the Scottish construction industry base. Around 80 per cent of respondents professed awareness of mediation. While this seems high, given the decades of publicity and promotion afforded to mediation, the finding that one in five respondents had apparently not heard of the process may be surprising. Our qualitative analysis indicated that of the nine interviewees who mentioned factors inhibiting the use of mediation in the construction industry, many respondents highlighted the dearth of knowledge within the industry as a significant factor militating against the use of the process. As participants B & G stated respectively:

“It’s not something I’ve come across [in practice]. A lot of people don’t really recognise the mediation process, and how it could be beneficial to maintain relationships and things.”(Participant B)

“It’s difficult to force people to go to some process of which they know little and in which they have little confidence; because they’re ignorant they don’t actually understand the benefits and the crucial benefit must be continued business relationships and creativity of solutions.”(Participant G)

Furthermore, we might speculate that a significant proportion of those who did not respond to the survey were also unaware of the process.

It is also worth noting that although the survey research method did not allow us to ask respondents what they thought that mediation entailed, given that relatively few respondents had practical experience of mediation or felt able to comment on its merit and disadvantages, we might surmise that there is a general lack of any sophisticated appreciation of the process at the industry user level.⁷

Those survey respondents that had awareness of mediation had reportedly gathered information on the process from a wide variety of sources including the press/media, professional bodies, lawyers, colleagues and mediation organisations.

Policies on mediation use

In contrast to the widespread mediation pledges made, for example, by public bodies, large commercial entities and Scottish law firms to make use of mediation in resolving disputes (Agapiou and Clark, 2011), only a small minority of survey respondents (19 per cent) said that their firm had a policy or practice to consider mediation. A small number (13 per cent) in fact had a policy or practice never to mediate, while in the main respondents had no firm policy or practice as regards mediation use. Such findings are perhaps not surprising given the limited experience that the bulk of respondents had with mediation and (as elaborated further below) the lack of embedding generally of the process in construction matters.

4.3. Training and education

In sharp contrast to the high levels of construction lawyers who, in our study of legal actors' experiences and attitudes relative to construction mediation, had reportedly received training or education in mediation, the present survey found that industry participants in the main (88 per cent) had no such educational exposure to the process. Respondents representing contractors and subcontractors may emanate from a wide variety of professional and non-professional backgrounds and hence the limited reported exposure to educational exposure to mediation perhaps holds few surprises. Nonetheless, a smattering of survey respondents had received relevant training/education either at university/college or through external training courses. Albeit it should be noted that such exposure to mediation was often limited in nature. According to Participant F:

“... I've done a couple of CPD things, although even after the CPD courses I still wasn't clear on what [mediation] was, I would have questioned how legally binding a mediation was. I think that would be another thing that would have to be [resolved]... obviously, mediation is legally binding, but I would suggest that this is something that people don't realise about it”(Participant F)

Another participant suggested that rather than training in the art of mediation what was required was the provision of available case study material to promote the costs and benefits of the process as compared to litigation and adjudication.

⁷ Interviewees generally espoused a sophisticated understanding of mediation, primarily drawn from their personal experiences of the process rather than educational exposure per se.

“I don’t know if bigger contractors get involved in mediation. [We need] case studies... some of the industry ... [suggesting that it will] only cost them x amount to go to mediation, or would have cost x amount of adjudication [and] relationships were maintained [in mediation]. Everybody might think, actually, why don’t we do that?”(Participant B)

One of the participants suggested that there was a central role for professional construction institutions in the process of education and training. Participant H stated:

“... the Corporation of Architects, the RICS,⁸ the CIOB,⁹ the Institute of Civil Engineers, all of these people don’t promote mediation the way they ought to; because I suspect they don’t understand the benefits of mediation. They just think that, as I say, the macho world of construction which has used arbitration, litigation and now adjudication as the natural route to go when you’ve got a grouse”(Participant H)

Mediation experience

The first and most striking aspect of the survey is that the vast majority of respondents (around two-thirds) had no direct experience of mediation. From our survey we tracked 37 cases in which mediation had taken place. The most common types of disputes mediated were change to scope of work and payment (both 11 cases). Other reported cases included delay, professional negligence and damages. In addition to being the most common case types cited, change to scope of work and payment were also considered by respondents to be the two most amenable dispute areas for mediation. In respect of why these areas were seen as more amenable than others, few interviewees viewed specifically that some dispute subjects by their nature comported better than others with mediation. Participant F suggested however that mediation could be more relevant for the “grey areas” as opposed to “black and white” issues where adjudication would be considered more appropriate:

“In black and white issues I would say that the quickest or easiest way to go is to go through adjudication, because at the end of the day there isn’t an awful lot of room for compromise; it’s either yes, or it’s no. Mediation, I think, would be more relevant for the grey areas, perhaps measurement issues that aren’t quite clear. Again, perhaps where there are contractual issues where, yes, there might be two interpretations, but people are prepared to compromise (Participant F)”

Despite the very modest levels of take up, in general the mediations that did occur, can be considered to have been a success. Settlement rates were respectable and generally in line with levels reported elsewhere. From the reported cases, some 24 settled (65 per cent) with another 5 (14 per cent) partially settling.

We were unable to record what later outcomes occurred in respect of cases that did not settle at mediation, but there exists significant evidence in the field that

⁸ The Royal Institute of Chartered Surveyors.

⁹ The Chartered Institute of Building.

mediations which are not successful often proceed to resolve shortly afterwards at an earlier juncture that would otherwise be the case.¹⁰

Aside from positive results relative to settlement, parties also seemed generally satisfied with the mediation process, in terms of such factors as speed, cost, the performance of the mediator and outcomes produced, although the data discerned a small measure of dissatisfaction with the costs and time involved in the process. In respect of speed, some 80 per cent of survey respondents were satisfied (either always, often or sometimes) with mediation; 85 per cent were satisfied with cost; some 93 per cent satisfied with the process involved and 73 per cent satisfied with the outcome. The survey findings here generally replicate the positive evidence gleaned in the Scottish construction field from our recent study of construction lawyers (Agapiou and Clark, 2011).

Interviewees provided further insights into potentially beneficial experiences within mediation. For example, one interviewee (Participant H) recounted an experience in which for the first time in the duration of the dispute the decision-maker in the opponent organisation had become aware of the particular circumstances of their case. Other interviewees pointed to the costs savings of mediation relative to mediation and the collaborative atmosphere that the process fostered.

Given reported concerns over mediation's lack of coercive power, when compared to formal adjudicated outcomes which may carry with them the full force of law (at least on a temporary basis), it is notable that the majority of agreements reached at mediation recorded in the survey research were reportedly complied with.¹¹ This finding may be of little surprise given the growing evidence of durability of agreements reached in mediation in Scotland (see, e.g. Ross and Bain, 2010; Samuel, 2002 (high levels—90 per cent and 100 per cent respectively—of mediated settlements recorded as adhered to without further enforcement action in the Sheriff Court Small Claims context). Evidence regarding the common adherence to mediated outcomes is often attributed to the fact that active participation in mediation by parties may lead to increased “ownership” of settlements produced (McEwen and Maiman, 1984). Nonetheless, some interviewees sounded a cautionary note regarding the non-binding nature of mediation as opposed to adjudicator's decisions which may be reflective of wider concerns in the industry. For example, while acknowledging the benefits of the mediation process, particularly with respect to the cost savings involved, Participant E noted that “[t]he only problem I see with it is it doesn't result in a legally binding agreement”.

In terms of why parties mediated disputes, a whole range of reasons were cited in the survey research, which mirrored commonly painted advantages of the process, the most prevalent being saving costs and time, seeking continuation of a business relationship, finding a creative agreement, the low value of the dispute at hand

¹⁰ The research by Gould et al (2010), p.60 into construction mediation in England and Wales found that 25% of those surveyed who had been involved in mediation suggested that participation was a “waste of money”. Nonetheless, some 40% of respondents involved in failed mediation cited benefits of having participated in the process, including improving mutual party understanding, narrowing of issues and partial settlement, leading to early resolution.

¹¹ Although mediated outcomes are typically captured in a legally enforceable contractual form, this does not have the same automatic effect in terms of enforceability as an adjudicator's decision (which is treated akin to the court judgement or an arbitrator's award). Nonetheless survey respondents revealed that agreements reached at mediation very rarely required enforcement proceedings.

and assessing the risk of continuing the dispute. The issue of costs was especially paramount in the views of Participant I who had been involved in a Planning dispute. In recalling his positive experience with mediation he stated:

“Cost was really reasonable. I’m suddenly sounding like an advocate strongly of this, but I mean it was definitely cheaper than going down the planning appeal route, it definitely kept lawyers away from it. We didn’t put in a planning application until we’d gone through this process, and met in the halfway house, that we knew we were going to get a result going forward. So it was really constructive, it was good. Initially it was a bigger lump of expense, a spike early on in the process than a normal project would have been; not in the long run. It saved us probably having an aborted project that would have cost £50–100,000, £150,000; or in some cases [potentially more through] appeals. It also saved on time. Again, a little bit like the planning system elsewhere, there’s a lot of upfront preparation now; but over the timeline of the whole project it’s supposed to be shorter, and that was very much our experience here, because if it had gone wrong we’d have been back to square one a year later and then trying to redesign the thing in retrospect”(Participant I).

While there was some indication from the survey research that low value disputes comported better with mediation than their higher value equivalents, interviewees did not generally share this view: in this sense, Participant H suggested that the value of a dispute should not necessarily be a key factor in the decision to use mediation. He stated:

“I think mediation is appropriate to any dispute ... what I was trying to say to the lawyer was, if you’re going to try and service your clients in the current market you have to be able to offer up that service. What I could do, because lawyers don’t do joined up thinking and I’ve had some recent experience where they’re really lacking and they’ve put themselves up on this pedestal falsely, is that I’ll work with you, we’ll agree a fail cost, I’ll do most of the work. We’ll fight your involvement, it’ll be x per cent, if you’ve then got to be involved and right letters it will be y per cent. If we go to adjudication it’s a fixed fee or a percentage of what, either the value we start with or the value we recover.”(Participant H)

Few survey respondents had declined offers to mediate their disputes, but for those that did, factors which dissuaded them from mediating included the costs of mediation itself, a belief in the strength of their legal case, the idea that negotiation could settle the matter and a jaundiced view that the other side would not mediate in good faith. Echoing this point, failed mediations were typically blamed on the reluctance of opponents to compromise, with some evidence of tactical use and disputes having become too personal to settle amicably.¹² We discuss the barriers to mediation developments including lawyer and industry ignorance and intransigence towards the process, below.

¹² Our interviewees did not report any experience of failed mediations so we were unable to collect further data on this issue.

Attitudes on mediation

Survey respondents were asked to respond to a number of statements about mediation on a five point scale ranging from “strongly agree” to “strongly disagree”. Many respondents particularly those with no direct experience of the process, felt unable to offer such views. Nonetheless 25 respondents (40 per cent) provided their perspectives on a range of key policy and practice issues surrounding mediation. Some of the main findings in this respect as well as related interview responses are discussed here.

Despite more recorded ambivalence on this issue arising from our research into Scottish construction lawyers (Agapiou and Clark, 2011), the vast majority of those industry participants that responded to the survey were in favour of some sort of institutional pushing of mediation to put wind in its sails. For example, 76 per cent strongly or somewhat agreed that judges should refer more cases to mediation. Similarly, 76 per cent of survey respondents strongly or somewhat agreed that rendering mediation a mandatory first step in court litigation procedures was an attractive proposition.

Such views were amplified by one of the participants during Interview:

“I think we have to get it into the court system. We have to get the judges and the lawyers, and we have to get into the law schools. The law schools need to focus more on alternatives rather than just the aggressive legal path every single time. I think we need to win over judges. Some of the big hitters in terms of judges have gone over to become mediators which must speak volumes. And of course it takes money, and we’re in very straitened times right now, so there needs to be some speculation to actually get the thing off and running. And I think it’ll be evidence, eventually”(Participant D)

Some 71 per cent of survey respondents also favoured the widespread use of mediation clauses in contracts. On this latter issue, there was a general consensus among the interview participants calling for the inclusion of specific mediation clauses in standard construction contracts. Participant B, for example, stated:

“I think in the NEC3 contract you could insert a mediation agreement and outline how it would be done, who would do it, and I think that would be good”(Participant B)

Although it is true that mediation provisions can already be found in some standard terms contracts, another one of the participants (F) suggested that current contractual arrangements for recourse to mediation as a mechanism to resolve disputes, which are typically non-binding in nature, were not favourable. He stated:

“I think, in some contracts that we sign up to, there are partnering agreements which, for want of a better phrase, aren’t worth the paper they’re written on. They sometimes have mediation sections within them, but again, as I say, they’re not binding. So, if anything, I think that detracts from mediation, because essentially it’s all part of this separate arrangement that can’t be enforced, anyway”(Participant F)

Echoing this view, many other interviewees referred to the fact that such provisions exist but are generally not adhered to in practice.

While the survey findings above broadly favouring mandatory referral to mediation may at first blush seem surprising, it needs to be remembered that a compulsory form of extra-judicial forms of dispute resolution (adjudication) is already prevalent within the construction field. Moves towards compulsory referral to mediation, either through contractual embedding or court promotion, also chime with recently expressed views that mandating the process may be necessary to expedite the use of mediation, at least at the outset until levels of acceptance thereto increase and evoke cultural acceptance of the process (Peters, 2010; Clark 2012, Ch.5).

Generally speaking the senior judiciary in Scotland (save in the employment sphere, where there exists a recently established judicial mediation scheme in employment tribunals¹³) has done little to suggest an appetite for more robust court promotion of mediation (see Clark 2012, para.5.2.6), although it remains to be seen whether the current Scottish government's long-awaited legislative response to the recent Gill review into civil justice (Gill, 2009) will enhance the prospects of increased court initiation of the process taking place. It is worth noting that interview respondents were more reticent in expressing views regarding the desirability of compulsory recourse to mediation through court rules. This group, who arguably held a more sophisticated appreciation of mediation than the survey sample as a whole, focused to a greater extent on the need to grow mediation from the bottom-up through educational endeavours in the industry and throughout the legal profession.

Mediators and mediation style

In terms of who should mediate disputes the survey respondents were clear. Very few—a mere 4 per cent—felt that lawyers made the best mediators, with a whopping 88 per cent stating that in their view those with industry experience as construction professionals were to be preferred.¹⁴ One of the interview participants expressed this point very succinctly when asked what skills mediators should possess. Participant A stated:

“To be sitting in the meeting and to be making decisions, and be able to refer to the contract or [relevant legislation], you have to know these things off the top of your head almost. You definitely need construction knowledge, yes” (*Participant A*)

Such matters tie into the longstanding debate regarding the identity of the rightful inheritors of the mediator's crown. While there is significant debate surrounding whether lawyers are the most appropriate professionals to act as mediators (Clark 2012, Ch.4), whether subject matter expertise in the area of dispute is an essential tool in the mediator's kit bag is also a moot issue. True facilitative mediators would argue that subject expertise is irrelevant and that core mediation skills, attributes and experience were the most important factors. Nonetheless, it is hardly surprising that construction professionals, used as they are to adjudicators with significant subject matter expertise, should demand the same from their mediators. Such

¹³ See <http://www.justice.gov.uk/downloads/tribunals/employment/judicial-mediation/JudicialMediationScotland.pdf> [Accessed May 1, 2013].

¹⁴ Of course this may well include lawyers well versed in the construction field.

mediators may be able to bring industry norms and technical know-how into the mix.

Survey respondents also seemed to favour more directive or evaluative styles of mediation than is contemplated by the general, facilitative mediation discourse in the UK. Some 46 per cent of survey respondents viewed that mediators should offer their own opinions on the merits of the dispute at hand. The debate over whether such activities are appropriate for mediators is a keenly fought one. Mediation purists have attacked the practice on a number of grounds. It has in particular been argued that such desires on behalf of clients may emanate from a misunderstanding of the mediation process and particularly a lack of knowledge as to what facilitative mediation may deliver (for a review of these debates see Clark, 2012, para.4.3.6).

Given that many of the survey respondents had little experience of mediation it might be speculated then that such views represent a naivety about what true facilitative mediation can deliver in practice. It is also notable that our interview participants did not generally discuss the importance of evaluative techniques in the context of their mediation experiences, but rather focused on mediatory process elements, opportunity for party dialogue and conciliatory aspects of the process. Nonetheless we are aware that at least one industry mediation provider, Catalyst Mediation, has introduced an explicitly evaluative mediation option, in response to perceived market demand.¹⁵

Mediation and other forms of dispute resolution

With regard to the value of other, more established means of resolving construction disputes, a mixed bag of responses was revealed. Despite the recent push to re-launch Scotland as a centre for arbitration excellence,¹⁶ few survey respondents (20 per cent) thought the process well suited to the resolution of construction disputes. Litigation fared even worse with only 12 per cent of respondents viewing that it passed muster. This somewhat jaundiced view of traditional forms of dispute resolution was shared by our respondents to our survey of Scottish construction lawyers, albeit that the lawyers were more dismissive of arbitration than litigation (Agapiou and Clark, 2011). Adjudication, the default process of dispute resolution in many standard contracts, which attracted high levels of praise in our recent survey of construction lawyers (Agapiou and Clark, 2011, with some 84 per cent stating that the process was well suited to the resolution of construction disputes), did not fare particularly well in the eyes of client respondents with only 25 per cent viewing it in a similar positive light to the lawyers. At first glance, this seems a striking contradiction between the attitudes of clients and their lawyers relative to the process. Various strands of criticism were identified by interviewees.

For example, Interviewee H focused on the poor standards of practice in the area:

“more and more ... people are going down the route of adjudication and coming out very disappointed because the quality of adjudicators is very poor in Scotland. There’s only one or two ... reasonable adjudicators”

¹⁵ <http://www.catalystmediation.co.uk/> [Accessed May 1, 2013].

¹⁶ See <http://www.scottisharbitrationcentre.org/> [Accessed May 1, 2013].

He was also negative about the costs involved in adjudication:

“[y]ou cannot determine what your costs are going to be, so it’s an extremely high risk line to take in any dispute”. Another interviewee (Participant E) recalled the high hidden costs involved in traditional dispute resolution pathways culminating in adjudication, expressing the view that even in a winning case, the victor may only “break even”. Respondent A noted soberly that “you wouldn’t entertain [adjudication] at less than £50K ... because you spend up to that figure fighting it”.

The ability of one side to “highjack” the other through the process and the adversarial nature of adjudication was also identified as being problematic. For example, Respondent I viewed that adjudication could be “quite aggressive [with] no coming together of both sides ... then they’ll either be a great sigh of relief or a great spitting of the dummy if we didn’t like the outcome.” Another interviewee (Respondent B) bemoaned the paper-based format of much adjudication:

“the fact that [adjudicators] don’t always require a meeting is a bit worrying ... sometimes a dispute is so intricate, to not be able to sit down face-to-face and explain the problems you have got, and why you think you’re right to someone, I think that’s a major failing of adjudication”

Obviously the current work represents a first foray into the field and the findings must be viewed with caution. Nonetheless, this negative general appraisal of adjudication we detected amongst the user base chimes with recently voiced judicial concerns (*Macob Civil Engineering Ltd v Morrison Construction Ltd*¹⁷; *William Verry (Glazing Systems) Ltd v Furlong Homes Ltd*¹⁸) about the unsuitability of the process for handling more complex matters and anecdotal tales of poor quality adjudication practice. A significant number of survey respondents (47 per cent)—and something largely confirmed in interview responses—did view however that the prominent place enjoyed by adjudication in the construction dispute resolution landscape blocked out scope for increased mediation use. The embryonic nature of mediation both within the industry generally and large sections of legal practice may perhaps thus mean that it often simply fails to comport with the general modus operandi of clients and their lawyers in terms of well-worn dispute resolution pathways. It would be wrong to suggest that adjudication is not without its merits, however, and many interview participants recognised that the process did at times meet client expectations and in particular, was often seen to be favourable given the binding (temporarily at least¹⁹) nature of the process and the guarantee of it producing a decision. One interviewee (Respondent F) also noted the merit of the mere presence of adjudication. In his experience, by dint of adjudication’s presence as a contractual inclusion, parties in dispute would often be drawn around the table to agree to settle the dispute at hand to avoid recourse thereto.

¹⁷ *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] C.L.C. 739; [1999] B.L.R. 93; [2000] 75 Con. L.R. 101.

¹⁸ *William Verry (Glazing Systems) Ltd v Furlong Homes Ltd* [2005] EWHC 138 (TCC).

¹⁹ Most interviewee respondents expressed the view that adjudication was in practice de facto final, however.

Ignorance and cultural barriers

In terms of other barriers to mediation's growth, survey respondents saw both a lack of awareness of mediation (63 per cent strongly agreed or somewhat agreed) and a negative perception of the process (50 per cent strongly agreed or somewhat agreed) existing within the construction industry as stifling mediation's promise. Interestingly they suggested that construction lawyers similarly may act as roadblocks to mediation's journey in the construction sector in view of their ignorance of the process (43 per cent) and negative perceptions of it (42 per cent). Although the possibility of socially desired responses cannot be ruled out, survey respondents were generally keen to play down, however, any notion that the supposed macho, adversarial environment of the Scottish construction sector militated against a role for mediation therein at least in this sense that only 16 per cent of respondents agreed with the statement that "If I participated in mediation more often my standing amongst colleagues would suffer". It should be noted that mere disagreement with this statement does not necessarily mean that cultural prejudices to mediation are not alive and well in the Scottish construction sector and interviewees (as well as lawyers interviewed in our previous study) often made reference to the existence of such barriers. It may be difficult to establish exactly the extent that lawyer intransigence to the process has acted as a barrier to mediation or successful outcomes therein but evidence of some element of this certainly exists. Certainly there is substantial evidence generally of lawyer resistance and cultural barriers towards mediation within legal circles globally and across different dispute areas (Clark 2012, Ch.2).

In terms of the current work, it is notable that some 40 per cent of survey respondents revealed that they had received advice from their lawyers on occasion not to mediate. Furthermore, interviewees in the current study often waxed lyrical on the negative impact that lawyers held for the development of construction mediation in Scotland. Emphasising the important roles that lawyers play in legitimising potential courses of action in dispute resolution, Participant D suggested that lawyers were somewhat cynical in their views of mediation, while others suggested that its use would at times be contrary to the lawyer's best interests at least from a financial point of view:

"Lawyers I've spoken to about mediation do tend to roll their eyes a little bit.... There seems to be a bit of cynicism there. I guess it might be the thought that their clients are giving up some [or] ceding control of the project or the outcome a little bit..."(Participant D)

In response to the view sometimes expressed by lawyers that it is clients that do not seek mediation, Participant A noted:

"[it's] for the lawyer to say, 'Well have you thought about mediation? Here's how it works, and it may just suit your particular dispute.' You don't get that kind of advice, in my experience I think the minute there's a dispute ... a subcontractor's first tendency is to go and speak to their lawyer, and then their lawyer starts writing letters, and then before you know it, it's adjudication or it's court. The lawyer never starts to say, could we please mediate over this issue? I can see why a lawyer would do that, because if it's mediation he

writes a few letters in and that's his part done, really. So he's not going to want to do himself out of business, and I think that's a bad thing that subcontractors are very easily led by what their lawyer says". (Participant A)

It was also suggested that in a cultural sense lawyers may feel uncomfortable operating within the mediation environment. Participant G noted that in the context of arbitration, "lawyers who are representing the parties really wanted to be in the sheriff court, that's the truth of the matter because it is their home turf, they know the rules ... They are indoctrinated by litigation".

Nonetheless, despite the blame being placed at the foot of lawyers, some participants suggested that while lawyers were indeed often averse to mediation, the construction industry was equally adversarial in nature and somewhat reluctant to resolving disputes amicably. Participant E stated:

"I suspect they're not selling it to clients because ... it's maybe seen as an admission of a weak position and lawyers never like that; you never admit liability, and they'll push it to the doors of the court rather than stay back and say look, this is ridiculous. So, the culture in lawyers has to be changed; but the whole culture of construction has to be changed as well. As I say, it is so macho, it's a fight them, beat them into the ground type industry and always has been and you might be able to get, as I used to say about darts, you might be able to get the darts out of the pub, but you'll never get the pub out of the players and it's going to take two or three generations and maybe the NEC contract is helping because it is allegedly less adversarial The counter argument is that the contract has got bought off before it gets to disputes because the compensation events are terrible in my view but there's a generational thing, I really think there's a generational thing"(Participant E)

These sentiments were echoed by another Participant who characterised the industry culture as macho, adversarial and litigious. Participant F stated:

"It is seen as a sign of weakness in Scotland, in particular. There's nothing actually forcing people to go down that route. It's recommended and industry professionals and leaders often are quoted in the press or the trade journals saying, 'This is what we should be doing,' et cetera. But when it comes to the reality of that, people don't seem to have the same approach. I think there is...a sort of machismo about the industry, here in [Scotland in] particular, and an actually quite litigious environment when disputes are there"(Participant F).

The above comments suggest that an adversarial climate within the construction legal profession as well as within the industry itself is currently acting as a roadblock to mediation's development in the field. While it is understood that most disputes can be nipped in the bud at an early stage and settled by negotiation, there seems to be a proclivity from both lawyers and industry participants to take the view that in the event that negotiations falter the next obvious step to take is to enter into some form of adversarial dispute resolution process. Two points can be made here: first, standard negotiations, even where successful in terms of brokering an outcome, may often be wasteful, inefficient and in themselves needlessly adversarial (Menkel-Meadow, 1993: 363); secondly, the notion that simply because

negotiations have failed should mean that mediation would also be doomed to fail, is misguided. For example, in circumstances in which negotiation proves futile, the intervention of a mediator to the dispute resolution process may effectively overcome certain heuristic biases of parties and their lawyers which can scupper bilateral negotiations. In this sense, lawyers involved in direct negotiations may engage in “reactive devaluation”, discounting offers made by their opponents and indulging their “messianic certainties”, taking an overly optimistic view of the merits and risks inherent in their own case.²⁰ Such unbridled optimism may fuel unrealistic posturing in settlement discussions.²¹ As Carrie Menkel Meadow (2000) has noted:

“[d]istortions in thinking like reactive evaluation, availability, recency, primacy, loss and risk aversion, as well as overconfidence and labelling theory tell us that adversarial processes (and much legal reasoning) may actually impede good decision making by limiting what we can hear from the other side and how we can process important information ... Mediators who are neutral offerors of proposals and information can correct reactive evaluation and reduce waste in informational distortions”.²²

Mediators may also help lawyers to deflate their own clients’ over-optimistic, dogmatic positions (something that lawyers themselves may have difficulty achieving given their status as client ‘champions’).

Conclusions

This study represents an important first foray into the views and experiences of Scottish construction industry participants relative to mediation. Further research is required to shed more significant light on the findings unearthed here. In short, however, we can note that at the industry user level, and in respect of smaller firms at least, mediation may remain largely unnoticed, its potential unrealised. Take up is low and sophisticated awareness of the process and the benefits it can reap for participants scant. Much effort thus far in Scotland and across the UK has been expended selling mediation to lawyers through educational drives, conferences, seminars and training. Such endeavours targeting undoubted key players in mediation’s development are useful and continuing evidence of the same can be seen, for example, through the recent Law Society of Scotland’s, “Embedding ADR in Civil Justice” conference and associated drives by the Society to promote the process.²³ While lawyers may often act as gatekeepers to dispute resolution methods by dint of their traditional dominance in the lawyer-client relationship, our research also suggests that cultural barriers remain alive and well at the industry level too and thus direct selling of mediation to the client base may be of increasing importance to help inform their dispute resolution deliberations. Our research suggests that much more needs to be done on the ground in repeating and escalating awareness raising efforts currently aimed at lawyers for the client base. Levels of exposure to mediation within client bases seem low in terms of their presence in

²⁰ Ross 1999, pp.38–42.

²¹ Goodman-Delahunty et al, 2010 *Malsch 1990*; Loftus and Wagenaar 1987–88.

²² Menkel-Meadow, 2000, p.34 (internal citations omitted).

²³ May 16, 2012, Edinburgh.

educational and training measures and dissemination throughout professional networks. Resistance to the process and lack of any sophisticated awareness of its merits may hence be stifling mediation's growth in the construction area at this time. Something within the culture of disputing practices in the Scottish construction industry must therefore change before mediation will gain a more secure foothold.

There are of course downsides to mediation and we do not suggest that it be rolled out in an unfettered, blanket sense. Its relative non-binding nature and lack of coercive power may represent a challenging prospect for parties in dispute to accept, particularly when set against the well-established and relative finality of adjudication proceedings. Quality concerns may also continue to exist in Scotland with regard to mediation practice, particularly given the small pool of specialist construction mediators currently available north of the border and the lack of any formal Authorised Nominating Bodies for mediators. In line with evidence worldwide, however, as our study suggests, when parties do try mediation, they generally enjoy it and often settle their cases. Much research has also suggested that parties (clients and their lawyers) often become repeat players in the process and champions for its cause. Interviewees in the current study in particular presented generally upbeat testimonials to mediation's promise and spoke cogently about the potential qualitative benefits of the process. Crossing the Rubicon is the hard part, however and clearly many potential users remain on the traditional river banks looking in.

Key institutional scaffolding that may help to expedite use of mediation in the Scottish construction sector such as court promotion, professional rules mandating discussion and consideration of the process and contractual embedding remain largely absent in Scotland. There remains much ambivalence from the legal professional in Scotland (and the mediation community itself for that matter) regarding the extent that participation in mediation should in any sense be propelled through judicial arm twisting or other coercive measures (Clark and Dawson, 2007; Agapiou and Clark, 2011). Nonetheless our survey results suggest that the appetite for stiffer measures to drag parties into the mediation process is more keenly felt amongst the client base than in legal circles. We do recognise that any appetite for more coercive measures to help expedite recourse to mediation is fraught with controversy, however. It is beyond the scope of this article to discuss in any detail the practical and policy debates surrounding mandatory mediation and other coercive measures designed to expedite use. We note here, however, that it has been argued that mandating recourse to mediation and hence denying access to the courts is anathema to notions of formal justice and in particular may impact detrimentally upon the weaker and more disenfranchised in society, including in the construction context, smaller, less powerful firms.²⁴

Other measures to help expedite the process may include the establishment of a distinct "Scottish" Technology & Construction Court, following on the model in England & Wales to support court-annexed mediation. A fuller embedding of mediation in standard forms of contract was also strongly supported by participants to the study. Many of our participants noted that while mediation does appear in some contractual models, culturally the norm is to ignore the relevant provision in favour of more tried and tested modes of dispute resolution. In this latter sense

²⁴ For a discussion see B. Clark, *Lawyers and Mediation* (London: Springer, 2012) at para.5.2.3.

it is evident that bottom up as well as top down approaches are required to effect real cultural change. The benefit of privacy in mediation may also be its worst enemy. Lack of dissemination of success stories relative to mediation is undoubtedly an inhibiting factor throughout the construction industry. Our quantitative and qualitative findings strongly suggest that the lack of awareness, understanding and experience of mediation in the Scottish Construction Industry can to some measure at least be overcome by education and training, and by involving government, professional institutions and specialist bodies such as CEDR, Core Mediation and Catalyst Mediation in the promotion of the process to all stakeholders within the construction context. There is a role for industry bodies such as the Royal Institute of Chartered Surveyors, Scottish Building Federation and Chartered Institute of Arbitrators (Scottish Branch) through their training and CPD provisions to help propagate the mediation message to their members by educational measures focusing on the sharing of positive experiences gleaned in the process. In this sense, the most compelling cases for mediation are not to be made by mediators or other advocates of the process but by those who have themselves sampled its wares, are keen to go back for more and able to speak the language of other potential users in articulating its benefits. The research interviews we conducted in particular revealed very powerful messages in this regard which may resonate well with industry peers.

Section 6: References

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