

ALTERNATIVE DISPUTE RESOLUTION IN THE UK CONSTRUCTION INDUSTRY

Nicholas Gould¹

Masons Solicitors, 100 Barbirolli Square, Manchester M2 3SS UK; Visiting Research Fellow, University of Westminster, Department of the Built Environment, 35 Marylebone Road, London NW1 5LS UK

Alternative Dispute Resolution (ADR) has attracted a great deal of attention amongst the legal and construction professions of the UK construction industry since the mid-1980s. Not only does ADR provide an opportunity to resolve disputes more efficiently than the traditional methods of arbitration and litigation, but it also provides increased scope for the involvement of non-lawyers. Construction professionals can and are becoming increasingly involved in mediation, conciliation, expert determination and adjudication.

Essentially, this research focuses on the perceptions of the key individuals in the field of construction disputes. The results of the largest postal survey of its kind compare the range of dispute resolution techniques. The dispute resolution pathway is most frequently dictated by the construction contract - a factor which has been further complicated by the unilateral right to adjudication under the Housing Grants, Construction and Regeneration Act 1996. In parallel, the "softer approaches" of mediation and conciliation are developing and playing an increasing role in the resolution of construction disputes. Finally, the above factors coupled with the developments in dispute resolution clauses and the vying for dispute resolution services produces a dispute resolution landscape which is dynamic and developing.

In conclusion, the research demonstrates that few in the industry have enough experience of the range of dispute resolution techniques required to make an adequate assessment of which technique is best for a particular dispute.

Keywords: Adjudication, ADR, litigation.

INTRODUCTION

Alternative Dispute Resolution (ADR) is a structured process with third party intervention which does not lead to a legally binding outcome imposed on the parties.

More recently the 1990s appear to have witnessed an enormous growth in the "ADR debate" with an ever-increasing sphere of academics, lawyers and consultants entering the arena. The concept of dispute resolution techniques as an alternative to the traditional court-based system is not new. Nonetheless the ADR movement brings with it a connotation of innovation. The more recent advent of the acronym is essentially taken to describe the use of a third party mediator who assists the parties to arrive at a voluntary, consensual, negotiated settlement. Whilst the origins of mediation may be ancient and eastern the recent more formalised technique has principally developed in the USA (Stipanowich 1994). It would seem then that of the ADR techniques mediation is the technique most frequently referred to. In the UK, mediation was initially taken seriously in the resolution of family disputes (Dingwall

¹nick.gould@masons.com

and Eeklaar 1988). But, has mediation, or other alternative methods attracted equal attention across the range of construction disputes?

ACKNOWLEDGEMENTS

This research was supported by funds from the Department of the Environment (now the DETR), under the heading Partners in Technology. Further funding was provided by the Society of Construction Law. Initial funding was provided by the CVE Educational Initiative Centre. Industry support was provided by Professor Phillip Capper of Masons and Giles Dixon of Nabarro Nathanson. The funders and industry support is gratefully acknowledged.

CONTEXT

Three main factors have and are currently impacting upon dispute resolution in the construction industry. First, the general dissatisfaction with arbitration and the presumed growth of conflict and dispute in the industry led to a review of the contractual and procurement systems in the UK construction industry by Sir Michael Latham (1994). In his report, he spotlights the lack of trust in the industry and the need for greater cash flow management. His recommendation for “expert adjudicators” has now been incorporated in part 2 of the Housing Grants, Construction and Regeneration Act 1996. This new breed of statutory adjudicator enjoys wide ranging powers in relation to construction disputes, which arguably could have a dramatic effect upon the landscape of construction disputing. Nevertheless, earlier research by Fenn and Gould (1994) has demonstrated that the use of such an expert is virtually unknown in the construction industry.

Second, recent proposals by Lord Woolf (1996) have suggested that a new pro-active approach is required by the court to the resolution of disputes. He suggests that a fast track system should be available for less complex cases, while more complex cases are dealt with on a multi-track basis. Lord Woolf’s pro-active approach advocates that Judges should case and manage the disputes, taking the lead early on in the proceedings in order to move the dispute onto the point where it can either be settled by the parties or the dispute sufficiently defined to enable a more efficient trial of the core issues. Third, the Arbitration Act 1996 is the product of a major review of the law affecting domestic and international arbitration.

The literature available indicates that ADR is a widely discussed discipline within the jurisprudence of construction disputes. Many writers provide an anecdotal review of the subject matter. Few venture beyond the normative to consider the reality of ADR. Nonetheless some empirical research does exist. The Turner Kenneth Brown report (1993) found that executives responsible for company legal services believed that ADR offered more advantages than disadvantages, with 75 considering ADR a positive step and only 6% considering it negative. Others seek to identify the causes of construction disputes (Kumaraswamy 1996). More recently Brooker and Lavers report (1997) on their work in relation to ADR in construction disputes and accuse contractors of avoiding mediation.

DISPUTE RESOLUTION PROCESSES

The following definitions were used for the purposes of the survey:

- **Negotiation** is the process of working out an agreement by direct communication. It is voluntary and non-binding. Unlike ADR, there is no neutral third party.
- **Mediation** is a private, informal process in which parties are assisted by one or more neutral third parties in their efforts towards settlement. Mediators do not judge or arbitrate the dispute. Rather, they advise and consult impartially with the parties to assist in bringing about a mutually agreeable resolution of the dispute.
- **Conciliation** and mediation are often used interchangeably. The term **MEDIATION** is used in this survey to cover both processes.
- **Med-arb** is a two-stage procedure where the mediator becomes an arbitrator if mediation fails.
- **Executive tribunal** is a more formalised method of ADR consisting of one or more executives from each side and a neutral mediator/chairman. The executive(s) must have powers to settle the dispute. This procedure is sometimes termed “mini-trial”.
- **Expert determination** is a means by which the parties to a contract jointly instruct a third party to decide an issue.
- **Adjudication** is where a third neutral party gives a decision that can be binding on the parties in dispute unless or until revised in arbitration or litigation.
- **Arbitration** is a process, subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties choosing. The arbitration award is final, except for a few safeguards, and enforceable by law.
- **Litigation** is the process of submitting the dispute to the courts, which will dictate a final legally binding and enforceable remedy.

RESEARCH METHODOLOGY

A detailed investigation of secondary material was carried out at the commencement of the project, and updated during the course of the study. Primary research included a survey and series of interviews. A survey was conducted by the University of Westminster with the industry support of solicitors Masons and Nabarro Nathanson. 490 replies were received from the 7,530 fielded questionnaires, which represents a response rate of around 6.5%. The respondents included Lawyers and non-Lawyers who represented a spread of industry clients, contractors and consultants.

Potential interviewees were then selected from the survey respondents and an examination of the literature. Interviewees were finally selected across the range of industry sectors and included clients, consultants, lawyers, contractors and sub-contractors. Most interviewees were very generous with their time. Each interviewee was asked to suggest others for interview, those whom the interviewee considered to be a key actor in the field. This form of triangulation had the benefit of crosschecking the original interview register.

SURVEY

The Survey was in four parts. The first sought to collect information on the perceptions of dispute resolution techniques. Second, data was collected on the actual usage of these techniques during the past twelve months together with the total career experience. Third, we asked respondents about their predictions for the future usage

of the techniques in the next five years. Finally, we asked respondents to focus on one positive and one negative experience of dispute resolution.

The response was a mature one with over 70% of the respondents claiming more than 21 years in the construction industry. Further, and by way of a general observation, a large proportion of the respondents held very senior posts within the construction industry. Respondents were asked, on the basis of their experiences, to rate the effectiveness of a variety of dispute resolution techniques. A matrix styled format was used for these questions, with the techniques along the top and the benefits down the left-hand side. Respondents were asked to complete the boxes with a number between 1 - 5, where "1" indicates very ineffective and "5" indicates very effective. The results are displayed below. The first figure in each box indicates the average response, and the figure below shows the percentage of respondents who completed this box.

Table 1: Perceptions of dispute resolution

	Negotiation	Mediation, Med-Arb, Executive Tribunal	Expert Determination	Adjudication	Arbitration	Litigation
a Reducing time to resolve disputes	3.9 96.6%	2.4 73.5%	2.3 71.9%	2.2 73.5%	1.6 89.9%	1.3 89.9%
b Reducing the costs of resolving disputes	4.2 95.8%	2.5 72.9%	2.3 71.6%	2.2 73.5%	1.4 89.7%	1.2 88.9%
c Providing a satisfactory outcome of case	3.7 96.0%	2.3 71.9%	2.1 70.3%	2.0 71.9%	2.4 88.9%	2.2 88.6%
d Minimising further disputes	3.3 94.4%	2.1 70.3%	1.9 70.0%	1.8 71.9%	2.2 87.8%	2.0 87.0%
e Opening channels of communication	3.9 95.2%	2.5 70.6%	1.8 68.7%	1.8 71.6%	1.6 87.3%	1.4 86.2%
f Preserving or enhancing job relationships	3.8 94.4%	2.3 70.8%	1.8 69.0%	1.7 71.1%	1.4 86.2%	1.1 86.2%

N.B. Top figure is average response, bottom figure is the percentage of respondents who had had some experience.

Some general observations may be made. First, clearly all respondents perceive negotiation as the most effective dispute resolution technique in terms of time, costs, satisfaction, minimisation of further disputes, etc. Second, respondents considered that they were most able to answer the questions relating to negotiation, slightly less confident in the areas of arbitration and litigation, and particularly unsure about mediation processes, expert determination and adjudication. Respondents were asked to provide their actual usage of the techniques during the preceding 12 months and over the whole of their career.

Table 2: Number of times respondents participated in techniques during career

	Number of times respondents had participated in the techniques in the preceding 12 months	Number of times respondents had participated in the techniques during their career
Mediation/Conciliation	251	1024
Med-Arb	28	71
Executive Tribunal	32	151
Expert Determination	178	943
Adjudication	193	1096
Arbitration	711	6324
Litigation	890	8950

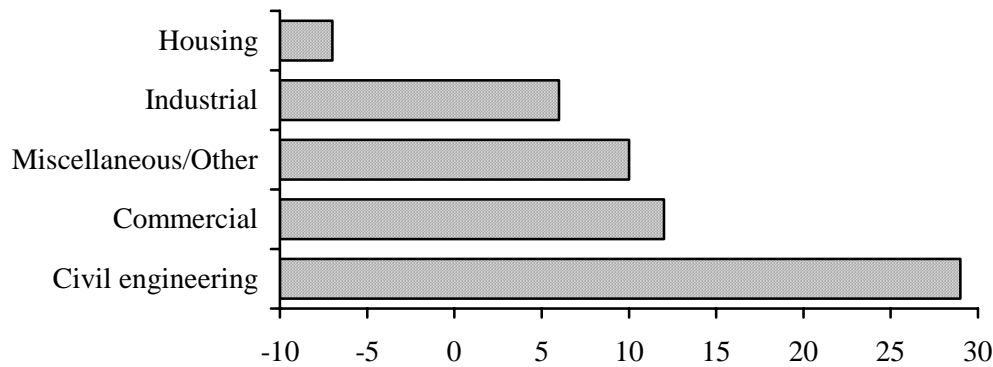


Figure 1: Difference between negative and positive experiences by type of project

Table 2 indicates the number of responses. For example, in the preceding 12 months the respondents were basing their responses on a total of 251 mediations. The mediation experience during the preceding 12 months equates to approximately 25% of the respondents total career experiences. On the other hand, the preceding 12 months accounted for only around 10% of the career experience in the areas of arbitration or litigation. It could be suggested then, that the instances of mediation are in fact increasing.

POSITIVE AND NEGATIVE EXPERIENCES WITH DISPUTE RESOLUTION TECHNIQUES

Some 285 positive experiences with dispute resolution were recorded in contrast to 232 negative experiences. The contract sums in these experiences range from £4,000 to £300 million, with the highest sum in dispute being £250 million (with a contract sum of £89 million). In general the amounts in dispute did not exceed the contract sums, and there was little correlation between the contract sum and the amount in dispute (0.36). More interestingly, almost 80% of the contract sums mentioned in these experiences were less than £5 million. Experiences relating to each sector of the industry were reported. On balance the negative experiences related to arbitration and litigation while all other dispute resolution processes produced a positive result on balance. Negotiation produced the greatest level of positive experiences closely followed by Mediation. The remaining techniques, med-arb, executive tribunal, expert determination and adjudication, produced only a limited range of actual experiences, but nonetheless they were mostly positive.

Arbitration and litigation produced a balance of negative experiences with dispute resolution. On the other hand, all of the other techniques produced, on balance, a positive result. Negotiation and mediation are particularly noteworthy. Not only does the response demonstrate that these techniques are clearly producing positive experiences, but also that these techniques are becoming increasingly used. Positive experiences with mediation reached similar levels to that of litigation. Further, negotiation is the most favoured technique.

Respondents were asked to identify the main reason for the positive or negative result. In both instances the attitude of the party's adviser was described as the key reason for the positive technique. A large proportion was unable to identify the main reason for

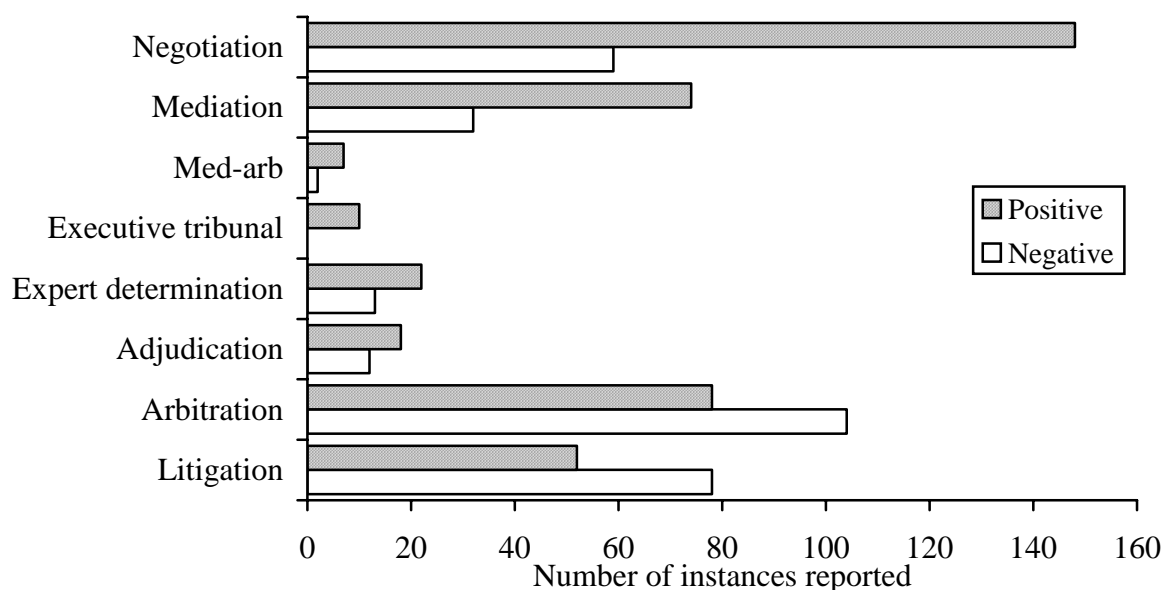


Figure 2: Techniques used by all respondents in positive and negative experiences

the positive or negative experience (26% positive and 23% negative, see table 3). In relation to negative experiences, the particular technique used was identified as the second most likely cause of the bad experience.

In addition, respondents were asked to identify why a particular technique was used. Almost half of the positive experiences stated that the technique was selected because of previous experience of the technique. In relation to negative experiences, most respondents stated that the techniques were used because the other side made the choice. The contract clause was also identified as a major factor in the predetermination of the dispute resolution pathway. Perhaps those who thought that the choice of dispute resolution technique was selected by the other side are in fact referring to the application, by the other side, of the contractual method of dispute resolution?

PREDICTIONS FOR THE FUTURE

Respondents were asked to indicate their predictions about future increases or decreases in certain techniques over the 5 years following the survey. In general, most respondents consider that negotiation would remain the same (52%) or increase slightly (28%) with 11% considering that it would increase significantly. Only 9% thought that the use of negotiation would decrease. A high proportion of the respondents thought that mediation based processes would increase slightly (43%) whilst 14% thought that it would increase significantly.

Notably, 24% thought that it would remain the same with 9% considering that it would decrease slightly and 4% significantly. Most respondents thought that med-arb would remain the same, reinforcing the hypothesis that the technique is little used and relatively unknown. A similar comment applies in relation to executive tribunals. Executive determination produces similar results, but with a slight skew towards a modest increase.

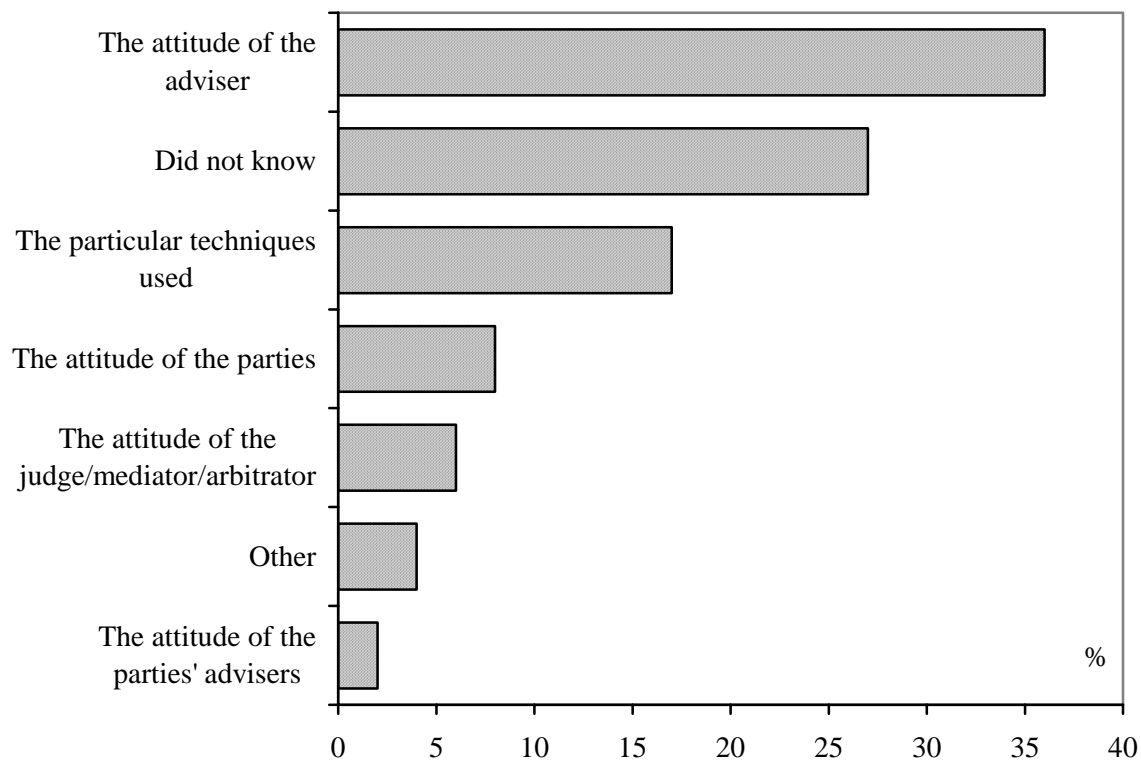


Figure 3: The main reason for the positive experience

Adjudication on the other hand produced a distinctive skew towards a significant increase, perhaps demonstrating a wide awareness of the impending statutory right to adjudication under part 2 of the Housing Grants, Construction and Regeneration Act 1996.

However, and as has already been mentioned, it would appear that this awareness is particular to the respondents of this survey. Many in the construction industry, in particular the clients, seem relatively unaware of statutory adjudication under the Act.

Predictions in the area are difficult at present. A series of inter-connected events has complicated matters. First, the dissatisfaction with arbitration has apparently been addressed by the Arbitration Act 1996. However, the survey shows that respondents considered that Arbitration, in general, would decrease. Further, the respondents also considered that the use of Litigation would decrease. In reality it may be that this response represents the respondent's hopes rather than the respondent's actual prediction.

Secondly, the much-debated mechanics of the statutory right to Adjudication is leading many in the industry to consider the likely usage of other techniques under the regime of a unilateral right to Adjudication. Some suggest that many in the industry may call upon the adjudicator early on in the negotiating process. This may result in increased polarisation and heightened conflict early in the disputing process. This may reduce or remove the possibilities for settlement through either negotiation or mediation. The speed and interim binding nature of the decision leaves little room for manoeuvre, unless both parties are dissatisfied with the adjudicators decision. If this were the case then negotiations may recommence in search of a more appropriate settlement. Mediation may then have an opportunity to play a part.

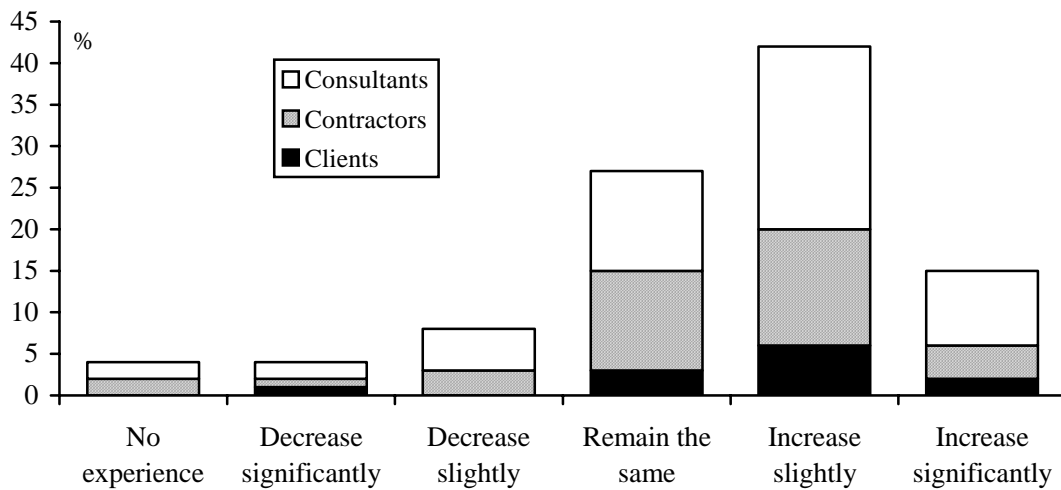


Figure 4: Predictions for the future use of mediation over the next 5 years

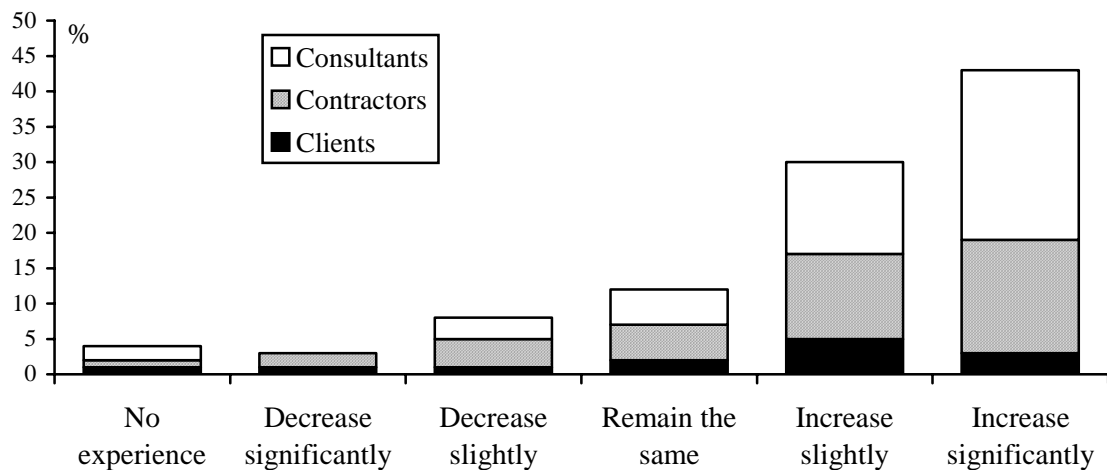


Figure 5: Predictions for the future use of adjudication over the next 5 years

Another school of thought suggests that under the threat of adjudication the parties may attempt to settle the dispute more rapidly through conventional negotiations. Perhaps mediation may be called upon more frequently in order to aid the settlement process. However, such a hypothesis is based upon the presumption that the parties will act reasonably and with enough commercial sense to actively seek a settlement.

CONCLUSION

The ADR banner has been increasingly adapted and may be used to describe three distinct movements. First, the development of a new professional group seeking to institutionalise party supported negotiations. These new professional groups are essentially non-lawyers who advocate the use of mediation or conciliation in dispute resolution. The second distinct movement could be described as the lawyer's counter attack or the remodelling of litigation practise. This movement may include such things as the "mini-trial" which seeks to ensure that lawyers are included as part of the mediation process. Finally, the courts have entered the ADR arena by attempting to regulate the pathway to trial and also by offering court annexed ADR. It is not surprising then that ADR has been described as little more than a "fugitive label" for the proponents of these individual movements.

Frequently, the construction contract will deal specifically with the resolution of disputes. Initially construction contracts included by default, arbitration clauses. More recently, dispute resolution clauses have become sophisticated and include amicable settlement, conciliation, dispute review advisers and dispute resolution panels. Further, all construction contracts must now make provision for the Housing Grants, Construction & Regeneration Act 1996 and provide a right to adjudication in accordance with the strict timescales laid down in that Act.

Undoubtedly then the statutory right to adjudication will have a dramatic impact upon the landscape of construction disputing. Nonetheless, and at the same time, mediation has been and is continuing to develop at a slow but steady rate. It is suggested that facilitative mediation is most appropriate when the parties have exhausted negotiations but they share a mutual imperative, which dictates that a commercial settlement is clearly the most appropriate route.

The appropriateness of any particular dispute resolution technique would depend on the nature of the dispute and the individual personalities involved. The survey clearly demonstrates that the industry's preferred method of dispute resolution is negotiation. Negotiation is frequently called upon as the first step in the resolution of disputes or disagreements. If negotiations prove unsuccessful then the parties will turn to their legal rights. Most frequently a dispute resolution in a construction contract will set out a pathway to a binding resolution of the dispute. The advantage of adjudication during the course of the project is that those who refuse or are unable to find compromise will be subject to a rapid binding process, which deals with the issues in dispute, at least until the end of the project. The disadvantage is that the behavioural conflict, which may not have been dealt with during adjudication, may continue to hinder the progress of the works. It would seem then that those key players in the system who are able to pursue every option during negotiations are most likely to avoid disputes, settle any differences or disputes early on, and benefit from an on-going working project relationship. Nonetheless, few in the industry have experienced the range of techniques that exist, and so most in the industry do not have enough experience to select the most appropriate technique for a particular dispute.

The industry is moving towards multi-stage or multi-tiered dispute resolution processes by including detailed rules in relation to dispute resolution in the construction contracts. Adjudication will no doubt form a part of that process. It remains to be seen what impact adjudication will have on the continuing development of mediation in the construction industry.

REFERENCES

- Brooker, P and Lavers, A. (1997) *Contractor's negative attitudes are hindering the development of ADR*, paper delivered to the ARBRIX Club, Kings College, London.
- Dingwall, R. & Eeklaar, J. (1988) *Divorce mediation and the legal process*, Oxford; Clarendon Press.
- Fenn, P. & Gould, N. (1994) *Dispute Resolution in the UK Construction Industry*, DART Conference Proceedings, Lexington, Kentucky, USA, October 16 - 19
- Fenn, P. & Speck, C. (1995) The occurrence of disputes on UK construction projects,' *Procs, ARCOM 11th Annual Conference*, 18-20 September, **2**, 581-590.
- Gould, N. and Cohen, M. (1998) ADR: appropriate dispute resolution in the U.K. construction industry *Civil Justice Quarterly* **17** 103-127

- Kumaraswamy, M. M. (1996) Is construction conflict congenital? *Procs ARCOM 12th Annual Conference*, **1**, 190-199.
- Latham, M. C. (1994) *Constructing the team*, London; HMSO
- Roberts, S. (1983) Mediation in family disputes, *Modern Law Review* 537.
- Roberts, S. (1995) *Litigation and settlement reform of civil procedures*, eds Zuckerman, A.S. and Cranstone, R.
- Stipanowich, T. (1994) What's hot and what's not, *Procs DART Conference* , Lexington, Kentucky, October 16 - 19.
- Turner Kenneth Brown (1993) *Alternatives to Litigation in the UK*, Turner Kenneth Brown Library.
- Woolf (1996) *Access to Justice: Final Report*, London; HMSO.