

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 (Brooker and Wilkinson, 2010).

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 construction project would commence with an employer who knew exactly what he wanted, a

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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 adjournment before a closed record was produced, legal debates, and proof hearings which lasted for weeks.

Following recommendations in the Latham Report (1994), 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 (Macaulay 1999). Other criticisms of adjudication are increasing cost due to lawyer 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 (Agapiou and Clark, 2011, 2012).

Although extensive research has been carried out on Scottish construction lawyers' interaction with mediation (Agapiou and Clark, 2011, 2012), 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 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.

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' (Alper and Nichols, 1981).

The key principles of mediation are its voluntary nature, flexibility, impartiality and confidentiality. In the world of conflict resolution it is widely held that there are three theoretical models of mediation: Mainstream; Transformative; and Narrative. Whilst

it may be argued that all disputants are transformed to some extent in every mediated case, it is the Mainstream model that is generally used in the Construction Field

Hibbert and Newman (1999) 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 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 (1982) believes that informal justice, such as mediation, increases capacity of those already advantaged.

Clark (2012) maintains that, 'Mediation has often been painted as providing second class justice for the disenfranchised in society'. A central tenet of mediation is that the mediator is neutral and impartial. Hippensteele (2009) asserts that one cannot assume the neutrality of a mediator. As Grillo (1990) states, 'mediators, like all other human beings, have biases, values, and points of view'. Fiss (1983) dismisses the mediation process as mere 'settlement.' He sees mediation as the civil analogue to plea-bargaining. Fiss believes that consent to settlement is often coerced and is made by someone who lacks the authority to settle. A further criticism of mediation is that it lacks transparency. The strictures of confidentiality inhibit the accumulation of knowledge about the practice of mediation.

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 (1999) suggest that, 'Construction disputes are suitable for mediation by the evaluative approach; mediation by the facilitative approach is less attractive'.

RESEARCH METHODS

The research presented herein is part of a larger MSc Dissertation Submission that explored the views and attitudes of Scots Construction Mediators, employing quantitative and qualitative methods (Trushell, 2013). Given space constraints only details of quantitative phase of enquiry are presented here. This paper explores the attitudes and experiences of Mediators relative to the process, based on questionnaire survey of practitioners in Scotland. The questionnaire design was guided to large extent by previous quantitative research in this field (Agapiou and Clark 2011). It was important to follow a similar methodology in order to provide commonality across the studies for ease of comparison. The Participants were selected on the basis of mediators known personally to the primary author. 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. 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 questionnaire survey was designed to capture data related to the biography; training and experience of participants, and their opinions on how mediation could be promoted to the wider construction industry in Scotland. The attitudinal survey covering 17 items was prepared in a table format using a five-point Likert scale (see Table A1). The survey was carried out in 2013.

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.

Mediator Profiles

Figure 1: Primary Professions

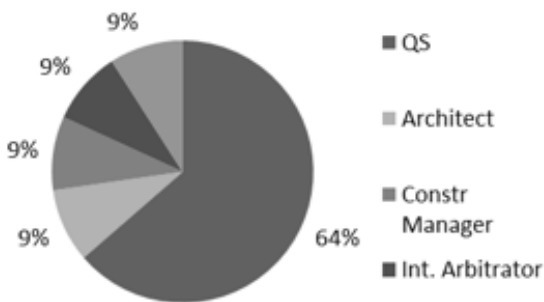


Figure 2: Mediators' Age

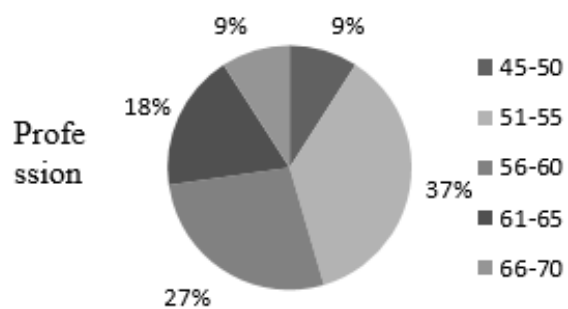


Figure 3: Years in Primary Profession

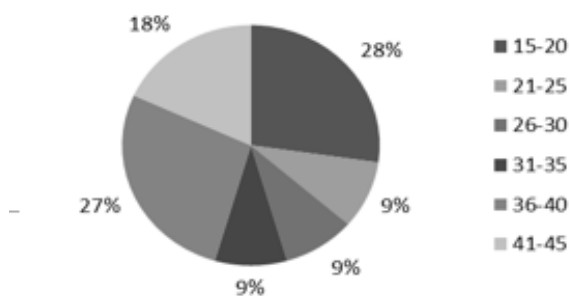
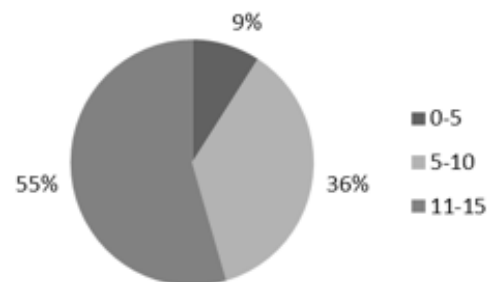


Figure 4: Years as a Mediator



The youngest was 47 years old and the oldest was 68, with an average age of 57.3 years. Some 91% were aged over 50 and 27% were over 60 years old. Construction mediation is clearly not a young person's profession. The range of primary professions of the mediators was narrow. Some 64% 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

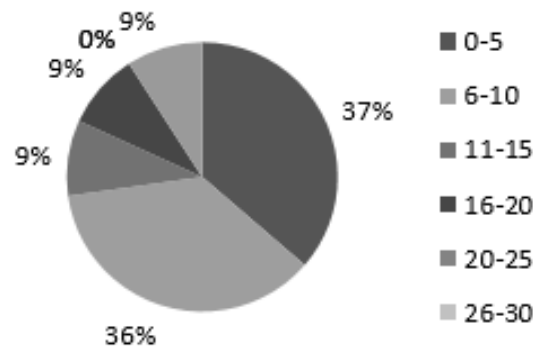
professions. The number of years practising as a mediator ranged from a minimum of two years to a maximum of 15 years with an average of 10.7 years. Just under half, 45%, had practised for less than 10 years whilst 55% had practised between 11 and 15 years. The mediators were, therefore, relatively experienced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

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 17 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 issue².

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

² Albeit that such data was collected prior to the roll out of the new statutory arbitration regimes under the Arbitration (Scotland) Act

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 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)

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 55% who strongly disagreed. A mere 18% 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% of respondents strongly agreed with the negative perception among lawyers, whereas 45% 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 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 27% strongly agreeing and 36% somewhat agreeing. An overwhelming 82% agreed there is a lack of awareness of mediation amongst construction professionals of which 36% strongly agreed and 45% somewhat agreed. A mere 9% somewhat disagreed and a further 9% 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 (Agapiou and Clark 2011, 2012 and 2013). Of the 17 questions answered by mediators five were not common with those answered by lawyers and contractors. Seven questions produced similar answers and the remaining seven questions were analysed to identify differences between the respondents. Whilst 80% of mediators and lawyers disagreed that mediation is inappropriate where there is an imbalance of power between the parties, 60% 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 mediators agree that arbitration is generally well adapted to the needs and practices of the construction community, 80% of lawyers and 56% 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 mediators and lawyers agreed that adjudication is generally well adapted to the needs and practices of the construction community, almost 60% of contractors disagreed. This may reflect the fact that in main contractor/sub-contractor disputes taken to adjudication some 70% of referring sub-contractors win at the expense of the main contractor respondents (Trushell *et al* 2012). Whilst about 65% of mediators and lawyers disagreed that default to adjudication in many construction disputes renders mediation obsolete, 42% of contractors agreed. Whilst about 65% of mediators and lawyers disagreed that mediation suffers from a lack of coercive power, 52% of contractors agreed. Whilst 54% of mediators and 42% of contractors agreed that a barrier to mediation's development is its negative perception among lawyers, 62% 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. 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. 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. Brooker and Wilkinson (2010) showed that mediation of construction disputes can flourish only with the active encouragement of government and its judiciary.

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Table A1: Attitudes

	Strongly Agree	Somewhat agree	Agree	Somewhat disagree	Strongly disagree	Disagree	Don't Know
Mediation is detrimental to the law	1 9%	0 0%	1 9%	1 9%	9 82%	10 91%	0 0%
Mediation is inappropriate where there is a power imbalance between the parties	1 9%	1 9%	2 18%	3 27%	6 55%	9 82%	0 0%
Judges should refer cases to mediation	2 18%	5 45%	7 64%	2 18%	2 18%	4 36%	0 0%
Making mediation a mandatory first step would be a positive development	2 18%	3 27%	5 45%	2 18%	4 36%	6 55%	0 0%
Litigation is generally well adapted to the needs and practices of the construction community	0 0%	3 27%	3 27%	3 27%	5 45%	8 73%	0 0%
Arbitration is generally well adapted to the needs and practices of the construction community	2 18%	7 64%	9 82%	2 18%	0 0%	2 18%	0 0%
Adjudication is generally well adapted to the needs and practices of the construction community	5 45%	4 36%	9 82%	1 9%	1 9%	2 18%	0 0%
Default to adjudication in many construction disputes renders mediation obsolete	1 9%	3 27%	4 36%	4 36%	3 27%	7 64%	0 0%
Mediation suffers from a lack of coercive power	2 18%	2 18%	4 36%	3 27%	4 36%	7 64%	0 0%
Lawyers will lose money if mediation grows	1 9%	3 27%	4 36%	4 36%	2 18%	6 55%	1 9%
Suggesting mediation to an opponent is a sign of weakness	1 9%	1 9%	2 18%	3 27%	6 55%	9 82%	0 0%
Construction contracts should contain a mediation clause	4 36%	3 27%	7 64%	3 27%	1 9%	4 36%	0 0%
A barrier to mediation's development is its negative perception among clients	3 27%	3 27%	6 55%	4 36%	0 0%	4 36%	1 9%
A barrier to mediation's development is its negative perception among lawyers	1 9%	5 45%	6 55%	4 36%	1 9%	5 45%	0 0%
Mediation training should be compulsory for lawyers	2 18%	6 55%	8 73%	2 18%	1 9%	3 27%	0 0%
Mediation training should be compulsory for construction professionals	3 27%	4 36%	7 64%	2 18%	2 18%	4 36%	0 0%
There is a lack of awareness regarding mediation amongst the legal fraternity	3 27%	4 36%	7 64%	3 27%	0 0%	3 27%	1 9%