

CONSTRUCTION MEDIATION IN SCOTLAND: A COMPARISON OF THE VIEWS AND EXPERIENCES OF LAWYERS AND END-USERS

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Recent research in different parts of the UK has pointed to growing acceptance of the mediation process from legal professionals with promises of headline grabbing, potential costs savings for hard pressed construction industry users. Nonetheless in many jurisdictions take up is low despite positive evidence relating to use and there is scant empirical knowledge about construction lawyers' role in the referral of cases to mediation and sophisticated evidence relative to lawyer and client interaction in the expediting use of the process. This paper draws upon recent work (both interview and questionnaire based) that the authors have conducted over the past 24 months with construction lawyers and end-users relative to their experiences of mediation in the Scottish construction field – a multiplicity of viewpoints not found in other comparable studies. The findings reveal a small yet significant measure of generally successful mediation activity and growing support for the process among both lawyers and end users. Nevertheless, the barriers to mediation's acceptance remain well-grounded, both throughout legal and client circles and various solutions to overcoming such obstacles are examined in the paper. Evidence gleaned in Scotland has significance beyond its borders given the commonality of issues pertaining to mediation growth across all developing jurisdictions and the presence of a dominant adjudication regime in Scotland which can be seen as a significant inhibiting factor in the use of mediation in many different countries.

Keywords: Construction Lawyers, end-users, mediation, Scotland.

INTRODUCTION

There has been much debate and discussion on the role that lawyers should play in the mediation process (Reich, 2002; Clark, 2012). It is widely recognised that the increasing involvement of lawyers can affect the way in which mediation is conducted, the lawyer-client power balance and the perception of the process itself (Wissler, 2003). It is also widely documented that the practice of mediation is affected by the way lawyers perceive and utilise it, such that they are commonly referred to as gatekeepers to the process (Welsh, 2004). Indeed, a growing body of research demonstrates that lawyers often control which disputes are mediated, the choice of mediator, and the prioritisation of interests within the process itself (see generally Clark, 2012). If we accept that lawyers' perceptions & values influence the ability of mediation to deliver potential benefits, then it follows that lawyers' interests need to be taken into account for mediation to be more widely adopted as a favoured

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means of dispute resolution; notwithstanding lawyers' interests can often diverge from those of their clients (Sela, 2009; Clark 2012). In terms of these interests, there is a significant amount of scholarship focusing on the ways in which lawyers reframe and edit disputes into a legal form that they best understand with the matter then entering a familiar, legal-centric process which ultimately produces outcomes limited by law (Felstiner and Sarat, 1980-81). Mediation represents a challenge to this dominant model and may be viewed with suspicion as a result.

Against this backdrop, the purpose of this paper is to compare and contrast data arising from the two groups of research subjects in respect of their views on, and experiences of the mediation process and explore some of the reasons why such differences exist. While most research in the mediation field has tended to focus on the views and experience of lawyers, the findings presented here are useful in helping us understand the different ways in which mediation and indeed dispute resolution more generally is perceived and encountered by both end-users and their lawyers.

Specifically this paper reflects upon research undertaken by the authors over recent years analysing the views and experiences of both lawyers and end-users (contractors and sub-contractors) relative to construction mediation in Scotland (Agapiou and Clark, 2011; Agapiou and Clark, 2012; Agapiou and Clark, 2013). Although research into construction mediation can be found in many other jurisdictions such as 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), the aim of our recent work was to fill a gap in the existing literature and shed significant new light on the use of, and attitudes towards construction mediation in Scotland.

METHODS

The research strategy combined both quantitative and qualitative research methods. The analysis articulated here draws on questionnaire survey and interview research carried out between 2010 and 2012. The method of data collection & analysis comprised two phases, involving initially construction lawyers and then construction contractors and sub-contractors:

The first phase involved the distribution of a questionnaire survey of 165 Scottish construction lawyers with a response rate of c. 30% (50 respondents), followed by a qualitative approach to produce 'thicker' descriptions (Geertz, 1973) of salient issues relative to construction lawyers' interaction with construction mediation, drawing upon semi-structured, face-to-face interviews of participants. The 11 interviewees were from various positions within the legal profession including advocates, solicitors and solicitor-advocates lasting on average around an hour.

In the second phase, a questionnaire survey was deployed to elicit the opinion of end-users and potential end-users relative to mediation based upon a sample of main and sub-contracting firms in Scotland. Using a membership list of contractors and subcontractors provided by the Scottish Building Federation (SBF), comprising mainly small and medium sized construction firms, we collected responses from 63 firms, representing a survey response rate of around 18%. The findings of the SBF questionnaire survey were subsequently discussed in semi-structured interviews with a panel of 9 industry experts.

In both cases, interview participants were recruited from those: (i) with prior experience of mediation in the construction context; and (ii) respondents who had provided detailed comments on mediation in the quantitative phase of enquiry. The

interviewees were also geographically dispersed within the Central Belt. The qualitative phase of enquiry involved an interview with each participant each lasting approximately one hour.

Whilst we are aware that the samples were 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.

All the interviews conducted in this research were recorded using a digital voice recorder and transcribed. Permission was sought from the participants to record the interviews. The audio files of all interviews were transcribed for the purposes of analysis. The statistical analysis of the quantitative 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.

The next section presents some of the key findings from the data analysis from the questionnaire and the participant interviews focusing on the views and experiences of lawyers and end users with respect to mediation.

FINDINGS AND ANALYSIS

Knowledge of Mediation

All lawyers who responded to our survey professed awareness of mediation, compared to 80% of the end-users. Given the wealth of publicity and awareness raising in respect of mediation experienced in Scotland over recent years, the lawyer unanimity in terms of knowledge holds few surprises, although the research did not glean what kind of understanding lawyers held about the process. The fact that one in five end-users was still unaware of mediation may reflect a more limited appreciation of the process in the public generally. Additionally, we might surmise that a far greater percentage of those that did not respond to the survey may be largely unaware of the process.

Equally, it is clear from the research that education and training provision, including CPD and on-going professional learning, has a significant role to play in expediting knowledge levels. Here there is a clear divergence between such exposure for lawyers and end-users. In our survey some 82% of lawyers had received training or education in mediation. This represents a significant increase from the 60% recorded in research into Scottish commercial lawyers' experiences of mediation undertaken around five years prior to this survey (Clark and Dawson, 2007). One of the starkest findings from the 2007 survey was that less than 4% of the commercial lawyers in the 2006 survey reported exposure to mediation in their university studies. That figure rose to 20% in the current study, suggesting an increased embedding of mediation in Scottish traditional lawyer education. It is also clear from the lawyer research that CPD and on-going professional training and education in mediation for legal professionals has risen sharply in recent years.

By contrast, clients generally lacked any training or education in mediation, with only 12% reporting any such exposure. Clearly respondents from the world of contractors and sub-contractors emanate from a whole range of professional and non-professional backgrounds which would at times militate against educational exposure to mediation in any initial training. A recurring theme in interviews with end-users, however, pointed to the dearth of ongoing professional mediation training provided in mediation

by professional bodies in the field such as RICS, Institute of Civil Engineers and Corporation of Architects. We shall return to the issue of education and training for end-users at the end of the paper.

Mediation Use

Lawyers were much more likely than clients to have instituted policies on mediation use. Some 66% of lawyers surveyed had a firm policy or practice of encouraging use of mediation, as opposed to only 19% of clients. This schism is to be expected perhaps, given that lawyers are repeat players in dispute resolution as opposed to their clients, many of whom will have had much more limited exposure to formal disputing practices generally and may not formulate policies in respect of their occurrences.

The professed policy of many lawyers to encourage the use of mediation chimes with reports that many large law firms in Scotland have changed the name of their litigation departments to 'conflict resolution' hubs to reflect a more holistic approach to dispute resolution (Clark, 2009). Nonetheless, it is difficult to determine how much store to put on such shifts in nomenclature or reported policies in favour of mediation use by lawyers, *per se*. Certainly our interviews with end users found few reporting that lawyers were often in favour of mediation in the construction sector. Equally such a sentiment was at times expressed by lawyer respondents to our survey themselves smarting at the lack of receptivity towards the process from their legal colleagues. We explore these matters further below.

In the lawyers' survey some 58% of respondents had represented a client in mediation on at least one occasion. For end-users who responded, the rate of use of mediation was 30%. The lawyer survey tracked 178 cases and revealed a settlement rate of 74% with a further 9% partially settling at mediation. The end-user survey uncovered only 37 cases with a lower settlement rate of 65% but with a further 14% partially settling. The disparity in the results in terms of volume may reflect the fact that our end-user based research was limited to SBF members and may also stem from the more limited response rate to that survey. Equally, there may clearly be double counting in much of the lawyer reported cases which will have inflated the number reported.

Nonetheless, there is a marked similarity in the types of cases commonly reported by lawyers and end-users as being mediated such as change to scope of work, payment, damages, professional negligence and delay. There were also similar reported settlement rates, particularly when partially settled cases are included. Importantly, there were also generally shared views in respect of high reported rates of satisfaction with mediation in terms of such factors as speed, cost, mediator performance and quality of outcomes.

End users and lawyers also espoused generally similar reasons for mediating, such as saving costs and time, seeking continuation of business relationships, and to a lesser extent procuring creative agreements. Although the data from clients was generally too limited to make any concrete assertions in this respect, it is clear from the lawyer survey that although the overall numbers of construction litigators that have mediated may remain low, many become repeat players. Almost all lawyer respondents that had mediated had done so more than once. In this sense, there was also a statistically significant correlation between rate of lawyer usage and levels of satisfaction suggesting that either lawyers became more satisfied the more experienced they became in the process, or that the more content lawyers sought out repeat experiences.

Attitudes to Mediation

It is perhaps in relation to attitudes towards mediation that most divergence between lawyers and their clients are to be found. Here we summarise some of the main issues uncovered. First, on the matter of judicial prompting of mediation, although the extent that the process should become entwined with formal courts and formal civil justice mechanisms has long been a controversial issue (see Clark, 2012; Genn, 2009); end-users were generally supportive of such measures. For instance, some 76% of end-users surveyed agreed that judges should refer more cases to mediation. The same proportion (76%) also agreed that rendering mediation a mandatory first step in litigation procedures was an attractive proposition.

Lawyers trod a little more cautiously on this territory. Nonetheless, 62% of lawyers surveyed were in favour of increased judicial promotion and a slim majority - 54% - supported compelling recourse to mediation. Given that previous research into Scottish commercial lawyers found a mere 27% of lawyers supporting mandatory mediation (Clark and Dawson, 2007), the tide may be turning within legal circles on this issue - at least for those who have become converts to the process.

When and how lawyers ought to be involved in mediation are emotive and divisive issues. While 74% of lawyer respondents suggested that legal practitioners made the best mediators, this view was not shared by clients. Only 4% of clients agreed with this proposition. By contrast, 88% of clients stated that those with industry experience as construction professionals were superior in the mediation role. Such matters tie into the longstanding debate regarding the identity of the rightful inheritors of the mediator's crown. While there is a significant and longstanding debate surrounding whether lawyers are the most appropriate professionals to act as mediators (Clark 2012), the extent that subject matter expertise in the area of dispute is an essential tool in the mediator's kit bag is also a moot issue (Burns, 2012). True facilitative mediators would argue that subject expertise is irrelevant and that core mediation skills, attributes and experience are the most salient requirements. 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 mediators would be able to bring industry norms and technical know-how into the mix which may be seen as valuable selling points.

One matter that affects the extent that mediation is adopted is the appeal of other options for disposing disputes that lie on the table. In this sense, it can be contended that one of the key roadblocks to mediation development in the construction sector in the UK is the dominant position of statutory adjudication as a default dispute resolution process in most construction contracts. Since its championing by the Latham Report in 1994 (Latham, 1994) adjudication has gained industry acceptance as the usual manner by which a binding (albeit temporary) resolution to disputes for which negotiations have proved incapable of settling can be gained. Our survey suggests that construction lawyers in particular have lined up to support the process in their droves. While the vast majority of lawyer respondents were disparaging about litigation and arbitration, some 84% agreed with the statement that "*adjudication is generally well adapted to the needs of the construction industry*". Furthermore, in interviews, the majority of lawyers were very positive about adjudication and generally viewed the process as the dominant and obvious next step to resolving disputes for which negotiations had failed to produce a settlement. Interviewees referred to such positive features of adjudication as getting a quick and binding

decision, the relatively low costs involved and the clarity and certainty of the process. We might observe here that adjudication represents a familiar type of process for lawyers. Its premise is adversarial, based on a familiar model of written pleadings and results in a decision rendered by a third party adjudicator. As such it represents well-trodden terrain for lawyers and a fits hand in glove with their general *modus operandi*.

In contrast to the generally positive appraisal provided by lawyers, consonant with anecdotal evidence of growing disquiet around the process, end-users were much more disparaging of adjudication. While joining hands with lawyers in their generally negative view of arbitration and litigation, a mere 25% of end-users agreed that adjudication was generally fit for the needs of the construction industry. In follow up interviews, a wide range of reasons for dissatisfaction was voiced. Such complaints included, poor standards of adjudicators, the high costs of the process, limitations of the paper-based approach of adjudication and the ability of one side to highjack the other with a claim.

Despite these negative views, many end-user interviewees suggested, however, that the heavy presence of adjudication in the construction industry and its cultural embedding in the industry had the effect to squeeze out any potential for mediation to develop further in the field. In terms of this dominance, it should be recalled that lawyers may be crucial in developing cultural norms in dispute resolution. By dint of their oft powerful position relative to their clients in respect of dispute resolution decisions, lawyers may legitimise new processes by way of how they explain and evaluate such mechanisms to their clients - what has been termed "*law talk*" (Felstinar and Sarat, 1980-81). While lawyer dominance is certainly true in respect of disempowered, 'one-shotter' clients (Johnstone, 1972) it can be questioned whether this holds true in respect of more sophisticated repeat player clients, particularly in an era where lawyers have lost ground in terms of social status, and the financial squeeze on legal business may have rendered external lawyers more subservient to the demands of their clients.

The fact that the adjudication process may be one which comports better with the interests of lawyers rather than their clients, begs the question as to the relative role of lawyers and their clients in decisions over which dispute resolution pathways to take. On this question, survey evidence from end-users reveals that one of the most common reasons (40%) as to why they had declined an offer from an opponent to mediate was that their lawyer had advised against it. Similarly, some 42% of end users viewed that lawyers acted as barriers to mediation's growth on the basis of their ignorance of the process and 43% blamed lawyers' negative perceptions of the process for their resistance. Such views are consistent with substantial evidence generally of lawyer resistance and cultural barriers towards mediation within legal circles globally and across different dispute areas (Peters, 2010; Clark 2012).

Such viewpoints were given further credence in the qualitative research where many end user interviewees elaborated on the ways in which lawyers discouraged mediation and pushed other more traditional alternatives. Sentiments expressed included: "*[l]awyers 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...*";

"[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."

Adding succour to the notion that lawyer resistance is a significant factor in stifling mediation in Scottish construction mediation circles were the views of lawyers themselves. First, interviews with lawyers found them espousing that they were typically in control of decisions relative to dispute disposal in construction matters even ultimately in respect of larger clients. The common sentiment expressed, also found in end-user interviews, was that once the matter escalated to lawyers, as experts hired by clients in need of their assistance, they called the shots. If legal professionals do indeed harbour an inherent preference for the familiar shores of adjudication, their gatekeeping effect may produce a difficult climate for those interested in expediting mediation use.

Lawyer disinterest may be predicated on a whole raft of reasons. One such reason may be cultural dissonance. Unlike adjudication, mediation may seem a rather alien process to the lawyer with its emphasis on mutual interests, information sharing, harmony and client empowerment (Clark, 2012). The idea of mediation may thus render the process unappealing for lawyers particularly when yoked to a general ignorance of what mediating entails, concerns over losing control of the matter at hand as well as financial considerations that might lead lawyers to more potentially lucrative modes of dispute resolution (Clark, 2012).

Lawyer respondents did not generally lay the blame for the limited uptake of construction mediation at the feet of the legal profession. In response to the statement that a barrier to mediation's development was its negative perception amongst lawyers, 26 percent of lawyers surveyed agreed albeit that some of those interviewed reflected on the difficulties of persuading their legal colleagues to mediate. Lawyer respondents were in fact more likely to view that negative perceptions of construction industry professionals were a barrier to development (38 percent). Although end-users were much more likely than lawyers to blame legal professionals for poor uptake of mediation (e.g. caused by lawyers' ignorance 43%; caused by lawyers' negativity towards the process, 42%) they did not shirk from laying the blame at the door of their fellow construction professionals (caused by lack of awareness in the construction industry, 63%; caused by negativity towards the process, 50%). In this sense it could be argued that the well renowned machismo inherent within the construction industry may militate against the adoption of more conciliatory methods of dispute resolution such as mediation (Brooker and Wilkinson, 2012).

While both lawyer and client respondents generally eschewed any notion that participation within mediation would be damaging to their reputation in the field (a mere 16% of clients and 8% of lawyers agreed with this statement) the interviewees for both groups revealed much more textured views on this matter. Many of those interviewed – both lawyers and end-users – pointed to the adversarial climate in construction law. Moreover, some end-users expressed the view that lawyers may be reluctant to propose mediation because their own clients would not like it. Certainly there has been significant debate surrounding the term 'mediation' itself. While mediation in practice may often amount to an arena of intense, tough negotiation, the current nomenclature may produce negative connotations such as weakness and compromise which would jar in 'hard-nosed' environments such as construction. Ross (2007) made the point that mediation in Scotland requires to be sold in a much more

‘selfish’ way – pointing to individualistic gains that could be gleaned from the process – rather than the emphasis on harmony and compromise often prevalent at present. Certainly we view that such an approach may yield positive results in the context of Scottish construction.

CONCLUSION

While there is evidence of a growing base of construction mediation in Scotland and seemingly real success in terms of the activity that has taken place, the overall level of use remains low. Coupled with growing dissatisfaction amongst the client base with adjudication and recent research in other jurisdictions pointing to significant financial benefits from mediating construction disputes (Gould *et al*, 2009) the case for developing further use of the process is strong.

In terms of expediting mediation, a two-pronged attack is required. Although our evidence suggests that practical exposure is the best way to drive future commitment to mediation use, education has a key role to play too. It seems that lawyers remain largely in control of decisions to mediate, even perhaps in respect of larger sophisticated players in the construction field. Quite rightly then educational efforts have often been targeted at the legal profession through increased exposure in university study and post qualifying level training. There is a small and growing cadre of lawyers that have become champions for the mediation process in Scotland (Clark, 2009) and we would expect this to continue to grow steadily.

What is lacking, however, is sufficient awareness raising and education for the client base. In this sense 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. To assist parties in crossing the Rubicon and dipping their toes into the waters of mediation, there needs to be greater education and training. There is a role here 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 with end users in particular revealed very powerful messages in this regard which may resonate well with industry peers.

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