Construction Mediation as a Developmental Process

Sidoli Del Ceno (email: julian.sidolidelceno@bcu.ac.uk)
Birmingham City University

Abstract

This paper seeks to argue that construction mediation has hitherto been viewed and evaluated in a relatively narrow fashion. It suggests that whilst there are numerous and well-known benefits to the process, although these are not always accepted by all commentators, in such things as time and cost savings there are other valuable benefits, benefits that could be considered as in some ways more fundamental.

The paper seeks to argue that construction mediation is, or at least can be, partly a transformative process. It argues that greater emphasis ought to be placed on the ‘process’ of dispute resolution and the attendant benefits that can result in the construction professional undergoing a developmental and maturing experience through engagement with mediation. These benefits ought to be then considered alongside other, more traditional accounts, of the strengths and weaknesses of mediation. The argument will be developed through reference to currently recognised models of mediation. It will conclude that through the use of mediation in dispute resolution the construction professional can develop both a range of valuable abilities such as enhanced communication skills as well as important mental and social attitudes that create empowerment and may serve as an aid to cultural change.

Keywords: Mediation; Construction; Education; Professional Practice; Transformation
1. Introduction

This paper seeks to argue that mediation has been hitherto conceived in the construction industry, and indeed by practitioners in other related disciplines such as property management, as largely a ‘problem-solving’ mechanism. Whilst this is clearly an aim of mediation there is also the appended danger that the value of mediation is conceived in these terms alone. If this is the case, then its value, or ‘success,’ is conceived very narrowly. The aim of this paper is, then, to argue that there are wider values to mediation in a construction setting. These values can be considered as a ‘family’ of related attitudes, skills and perceptions that can positively affect the persons involved. By affecting growth in individuals an organisational change may follow. This, in turn, can result in a significant ‘cultural’ change in the industry, and associated professions, as a whole as well as having a positive impact on construction education. The paper begins by an overview of the development of mediation and proceeds to consider its current use of mediation in construction. It then considers the question of how mediation success is conceived. The paper argues that both the current practice of construction mediation and the way in which its success is measured are too narrow. It argues that a wider approach to construction mediation is required. Finally, drawing from the literature on ‘idealistic’ mediation an account of mediation as a developmental process is developed.

2. Construction Mediation: A brief ‘history’

Alternative dispute resolution in the guise of arbitration has been important to the construction industry since at least the 19th century. However, many have questioned whether, in fact, arbitration has become in recent times ‘litigation without the wigs’ (Speiaight and Stone 2004) due to its increasingly adversarial approach and its similarity to traditional litigation with its attendant cost implications (Latham 1993, Uff 2009). In the UK, despite this discontent there was little evidence of the widespread use of mediation in a number of studies from the 1990s (Gould and Cohen 1998; Brooker and Lavers 1997, 2000). A factor in this may have been the increasing use of statutory adjudication following its introduction in the Housing Grants, Construction and Regeneration Act 1996 following the recommendations by Latham (1994). There is evidence that there has, though, been some growth over the past decade or so possibly encouraged by a number of well-documented cases such as Halsey v Milton Keynes (Brooker 2009) in the light of the implantation of the Civil Procedure Rules in 1998. Brooker (2010:164) suggests that “between 170 and 300 construction mediations [are] taking place annually.” Thus, whilst still small this is not a negligible figure. A recent study, however, by Gould et al (2009) suggests that construction mediation may actually be more prevalent than was previously supposed. With there being a lack of any overarching reporting mechanism then the precise numbers of construction mediations can then only be estimated. Mediation clauses can now be inserted into a number of standard form contracts. The JCT Design and Build 2005 (section 9) specifically mentions the option of mediation whilst the ICE Conditions of Contract 2004 (clause 66) has the option of ‘amicable resolution’ alongside adjudication and arbitration. ‘Amicable resolution’ refers to conciliation (under the ICE Conciliation Procedure 1999) or mediation (under the ICE Mediation Procedure 2002) (Uff 2006).
3. Mediation in practice: Advantages and concerns

There are clear reasons for the both the judicial encouragement of mediation and its gradual increase in popularity. Many authors have noted the particular strengths of mediation over traditional litigation or, indeed, over other adjudication based systems. For instance, Brett et al (1996) noted the speed and cost savings in relation to both arbitration and litigation. The privacy of mediation, so useful in commercial settings, is also another important benefit although this, of course, also applies to other forms of alternative dispute resolution (Blake et al 2010). Mediation may also bring particular benefits to disputes where there is an on-going relationship to preserve: this is often characterised as being largely the preserve of family or domestic relationships, however, many commercial relationships, from landlord and tenant to employment disputes benefit from the preservation and enhancement of ongoing relationships and construction is no different in this respect (Kurtzberg and Henikoff 1997; Lowenstein 2000; Ezzel 2001). Feinberg (1996) notes its informality and flexibility. This flexibility, which could be termed creativity, is described by Boulle and Nesic (2001):

“...Parties may agree on outcomes which could never be available as a court remedy. Thus they may agree upon one party performing a personal service for another, on a dismissed employee being re-employed in another branch of the firm, or on one party giving the other an employment reference.” (p.40)

Further, a number of studies have reported high levels of user satisfaction with mediation in a number of different areas of dispute (Guthrie and Levin 1998, Wissler 2004). Whilst these benefits are not universally applicable to all construction disputes there appears to be at least the potential for mediation to be a valuable dispute resolution tool in some construction disputes and therefore a prima facie case for its validity as a method of construction dispute resolution has been made.

Clearly, whilst there are many advantages there are others who have sounded a cautionary note. Many of these objections are based around the role of lawyers and other professional advisors in regard to mediation. Genn (2005), for example, noted that some lawyers use their litigation skills in mediation. This can result in an inherently litigious and adversarial approach and one more akin to arbitration. Brooker and Lavers (2005) found that:

“Lawyer interviewees also report tactical advantages from engaging in mediation. These range from providing the opportunity to examine the strengths and weaknesses of the case to testing witnesses and evidence. The data suggests that lawyers are developing new practices in mediation, such as proposing the process in order to provide proof to the courts of willingness to compromise or participating in mediation in order to send messages to the opposition.” (pg 161)

The willingness of lawyers to use mediation potentially as a tactical weapon to further the interests of their clients was also noted by Brooker (2009). A number of concerns were found by Sidoli del Ceno (2010) in a study of commercial lawyers including those who engaged in construction work. The respondents’ perception that mediation was not ‘real law’ was noted as was the fact that the designation ‘mediator’ lacked status in comparison with ‘solicitor’ or ‘barrister.’ Further, there was
ignorance of the possibilities of mediation and a feeling that traditional legal culture which emphasised the virtues of conflict and litigation were additional factors that discouraged many from recommending the process and hence may hinder mediation’s future growth and development.

There are others who have fundamental rather than practical concerns with mediation. Fiss’ famous Against Settlement (1984) again assumes that mediation’s only benefit is its potential to settle claims and in doing so he accuses the process of compromising fundamental legal rights. Recently, some members of the English judiciary have criticised mediation using a similar line of argument. Lord Neuberger MR in the Slynn Memorial Lecture 2010 argued that the system of civil justice is part of the very constitutional framework of the country and that it guaranteed fundamental rights and freedoms. He argued that:

“...the justice system is part of our constitutional framework; it is part of government. The delivery of justice is not a service. On the other hand, the provision of mediation and other forms of ADR is a service. To conflate or confuse the two is to make a profound constitutional mistake.”

Jackson LJ (2010) whilst again encouraging the use of mediation stopped short of suggesting that it could ever be mandated despite the fact that mandatory mediation is common in Australia, parts of Europe and elsewhere without any corresponding jurisprudential concerns. The assumption here is again that mediation is only about settlement or the final outcome. Certainly two of the most common models of mediation, facilitative and evaluative, are concerned primarily with settlement. This is not the case, however, with other models. These varying accounts of mediation will be considered below and it will be argued that mediation, properly conceived, ought to be considered as something more than merely a tool for achieving settlement.

4. Models of Mediation

There are a number of differing conceptual models of mediation. Indeed, mapping the conceptual ground of mediation appears to be very much a work in progress as there appears to be is no agreed schema. For example, Menkel-Meadow (1995) derives eight models of mediation from existing literature whilst Boulle (2005) recognises four models and Alexander (2008) describes six ‘meta-models’. In jurisdictions where construction mediation is in its infancy a facilitative model tends to be favoured whereas those with a longer history of construction mediation (the UK and Australia are cited as examples) an evaluative model is often although not exclusively adopted (Brooker and Wilkinson, 2010: 193). Riskin (1996) describes the facilitative approach:

“The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.” (P.24)
Facilitative mediation, then, fits the description provided by Menkel-Meadow (1993) as “pure” mediation in that there is no adjudicative direction of any kind or any assumption of substantive expertise by the mediator. This can be contrasted with evaluative mediation. Brown (2003) states that:

“The evaluative mediator’s tasks include finding facts by properly weighing evidence, judging creditability and allocating burden of proof, determining and applying relevant law, rules or customs and rendering an opinion.” (p.290)

Both these predominant models appear to implicitly depend on an ‘outcome’ being achieved. They can therefore, perhaps, be labelled as ‘pragmatic’ forms of mediation. The outcome is either the final settlement of the dispute or, at the very least, a partial settlement through a narrowing of the issues. Both of these models fail to consider, or at least, appear to ignore other strengths or possible advantages of mediation. Other models, which are here termed ‘idealistic,’ attempt to move away from this. Transformative mediation is one widely recognised approach that seeks to emphasise the value of the process itself and which distances itself from the rather narrow results driven conceptions discussed above. It is associated primarily with the work of Bush and Folger (1994) who describe it thus:

“The transformative approach instead defines the objective as improving the parties themselves from what they were before. In transformative mediation, success is achieved when the parties as persons are changed for the better, to some degree, by what has occurred in the mediation process.” (pg 84).

Another model of the ‘idealistic’ persuasion seeks to argue that the insights of therapeutic jurisprudence can be productively applied to mediation. Daicoff (2006) is one who has recognised the link between mediation and transformative justice:

“All of the disciplines comprising the comprehensive law movement share at least two features in common: (1) a desire to maximize the emotional, psychological, and relational wellbeing of the individuals and communities involved in each legal matter; and (2) a focus on more than just strict legal rights, responsibilities, duties, obligations, and entitlements. These two features unify the vectors and distinguish them from more traditional approaches to law and lawyering.” (p.11)

The debate about models of mediation will not be settled here. It is likely to persist and indeed expand as non-western perspectives increasingly add to the debate (Auerbach 1983; Goh 2002; Law 2009; Bagshaw and Porter 2009). These models are, however, central to the issue of what constitutes mediation success.

5. Mediation and Success – A contested notion

The typical approach to mediation success is based on a ‘pragmatic’ or ‘outcome’ model. The well-known work of Fisher and Ury (1981) which focuses on negotiated outcomes is of that school. It is
also exemplified in numerous empirical studies. This pragmatic model is typically based around the number of cases that ‘settle.’ It appears that the ‘fact’ of settlement is considered to be central in most cases rather than any perceived qualitative aspect to the settlement itself. For example, Prince (2004) in a study of court-based mediation at Exeter County Court found that 70% of cases referred to the small-claims track in her study settled. This implicitly focuses the ‘success’ of mediation in terms of the rates of settlement although Prince does later raise other criteria and importantly notes that “there is not an obvious correlation between settlement and satisfaction.” (p76). Wissler (2004) in a survey that examined ten separate small claims mediation studies found again that “virtually all studies examined the rate of settlement in mediation.” However, other aspects were also examined. For instance, a number of studies sought to explore the impact on the parties’ relationships with each other. Further, many studies surveyed sought to consider the views and perspectives of the parties themselves. It is this aspect of mediation ‘success’ and the wider value or values that emerge from it that is perhaps the most enigmatic and hence the hardest to assess.

Importantly, Shepherd (1984) divides the concept of mediation success into two aspects – process and outcome. Clearly, it is the latter that has been the focus of most mainstream empirical studies which has understandably lead to the process aspect being somewhat under-considered. Furthermore, it is this outcome based approach with what can be termed its ‘concrete’ aspect of whether an agreement has been made or not that has come to dominate judicial thinking as was noted above. This fundamental assumption that outcome or settlement is the only driver of mediation has also been the basis of many fundamental critiques of mediation as noted earlier. It is perhaps reasonable to agree with Bercovitch (2007) in a study of mediation success where he concludes:

“Success in conflict management is an elusive quest. Often what appears as successful to one person may be seen as unsuccessful by others. What is more, mediation may seem successful at one time, only to be seen as totally unsuccessful months or years later. We face considerable challenges in thinking about success or evaluating mediation outcomes. As suggested above, there are different perspectives of thinking about success. It seems odd that so many of these perspectives define success in terms of some other equally complex abstract notion. The challenge we face is in recognizing the multiplicity of perspectives, and the different conceptions of, and approaches to, success.” (Pg 301)

It is this perspective that is developed below within the context of construction. It will aim to demonstrate that mediation success, which has been largely been conceived hitherto either as something that focuses on measuring the rate of settlement or as something concerned almost solely with personal growth, can actually be considered from both perspectives and that there exists a false dichotomy between ‘pragmatic’ and ‘idealist’ forms of mediation.

6. Mediation as development

The argument then has attempted to show that the two most widely used ‘pragmatic’ models of mediation in construction, the facilitative and the evaluative, are both essentially outcome or
settlement based. These approaches largely ignore the process aspect alluded to above (Shepherd 1984). Whilst outcome and settlement are clearly goals of mediation it can be argued that mediation to be properly considered and utilised as a tool for dispute resolution in construction ought to be conceived more widely. This emphasis on process and on the long-term benefits that can ensue from engaging in a non-confrontational and empowering process ought to be given more consideration by construction professionals. This is particularly true in the case of evaluative mediation where the mediator assumes a dominant role. Indeed, some have argued that evaluative mediation is not really a type of mediation at all but ought to be considered simply as another adjudicative method (Currie 2004). The wider benefits that can emerge from the process of mediation have largely not been noted in relation to the field of construction or where they have they have been they have been dismissed (Oberman 2005) although they have been greeted with approval by many in other areas of dispute most notably in the context of family and community mediation.

Brooker and Wilkinson (2010:11) argue that transformative and therapeutic mediation “are unlikely to be used extensively in construction mediation” although they concede that “some mediators may adopt some of the techniques within their practice.” The argument appears to be that for these more substantial changes in attitude to take place then more sessions of mediation over a greater time-frame are required and that these are unlikely to take place in a pressured commercial scenario when time is of the essence (Waldman 1998). If one assumes that these methods and processes are mutually exclusive then that may be the case. However, there is little to suggest that a facilitative approach which keeps outcomes as a central focus need ignore the value of the actual process. There is no reason why then they must be seen in opposition. Indeed, by giving greater emphasis to the process, and the wider values that they enshrine, an increase in the actual rate of settlement as participants gain greater understanding of the perspectives of others may ensue (Bush and Pope 2002).

Whilst it is easy to agree that there are at least two parts to mediation – process and settlement – there is perhaps really a third. This can be termed ‘post-settlement’ factors. It is what is taken away from the mediation as a whole including both the process and the outcome. Another model is not being offered however nor is an appeal to the active adoption of an ‘idealist’ model. It is, instead, an argument that mediation properly conceived as facilitative mediation carries with it - implicitly - the wider values argued for by scholars such as Bush and Folger (1994) and Daicoff (2006). Greater emphasis ought then to be given to understanding, assessing and quantifying these ‘further’ benefits of mediation and giving them a more concrete identity rather than dwelling on the potentially abstract notions of ‘transformation’ or ‘therapeutic jurisprudence’. Bush and Folger are aware of this criticism of abstraction but their attempt to move beyond the it nonetheless remains substantially wedded to jurisprudential notions of ‘empowerment’ and ‘recognition’ rather than overtly practical goals that can apply directly to commercial concerns. It is better, then, to use the term ‘educative’ or ‘developmental’ as these terms are more accessible to the construction professional not versed in philosophy or jurisprudence and they carry with it the notion of continuous professional learning that is widely understood. Mediation has the capacity, then, to provide an opportunity for the construction professional to learn and to grow. These are values that are innate but also can provide clear, practical benefits that can be added to the already well-established benefits of mediation as discussed earlier. These benefits, their scope and quantification is a separate task but in order to commence the discussion some possible examples, that are necessarily linked, will be briefly offered.
Communication

Communication is considered to be a central skill and, indeed, a value in construction management (Dainty et al., 2006). There are many inherent issues that make effective communication particularly difficult in a construction context, for example, the uniqueness of each construction project and the intensity and short time-scales involved in many contracts, (Loosemore et al, 2003). The possibility for misunderstanding because of different ‘vocabularies’ (Delisle and Olson 2004) and cultural preferences (Muller and Turner 2004) appears to be widely noted. Mediation is fundamentally concerned with communication. By engaging with the process of mediation construction professionals may develop better, more nuanced communication skills which in turn can lead to wider personal development.

Personal and Professional development

Mediation also typically involves reflection not just upon the dispute itself but also related issues that may have had a causal link to the dispute. Things such as record keeping, the handling of professional relationships and an awareness of the perspectives of others are matters that may be relevant to the dispute but are also of general relevance to a construction manager. Engaging with the process of mediation may allow the reflective professional to engage with many of these issues and may aid the development of important mental and social attitudes that create for mutually empowered and productive relationships. A widespread adoption of such values would subsequently contribute to wider cultural change.

Cultural change

Fostering behavioural change is one clear possible benefit of mediation. This should be considered as more than individual or organisational change. It should, instead, aim for the transformation of the culture of the industry as a whole. The value of co-operation and partnership in construction has been recognised by a number of authors (McDermott et al, 2005). With change occurring to the industry on many levels (Greed 1997) mediation might also have a formative role in this by fostering a collaborative approach to dispute resolution and professional practice generally. This approach might appeal particularly to women and other unrepresented groups (Gilligan 1998, Alberstein 2009).

7. Conclusion

Law and dispute resolution are typically conceived as being about achieving the ‘right result’. There tends to be an assumption that ‘justice’ necessitates this. Mediation, though, works on a different paradigm:

“In mediation, justice can be understood as the justice that the parties themselves experience, articulate, and embody in their resolution of dispute” (Rock, 2006, 347).
If this is accepted, at least in part, then this ought to open the gates to a consideration of mediation as a tool for development – individual professional development, organisational development and industry change. Construction education for one ought to consider this more fully. Finally, it can be argued that the habit of litigiousness which we have fallen into has gone too far and that now there must be some appetite for achieving a wider cultural change away from conflict and towards a more co-operative form of human interaction. Construction professionals ought to realise that their profitability would be aided by this.

8. References


