Practice and Procedure in the Mediation of Construction Industry Disputes: An Exploratory Study

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Abstract

Mediation is emerging as the most commonly used non-adjudicatory method of resolving construction industry disputes. The essence of mediation is resolution based more on party interests rather than legal rights. The construction professions should therefore be able, with some training, to participate in construction mediations not only as advocates but also advocates on behalf of parties to mediation. Unfortunately, the vast majority of the informants used in the reported studies into experience of construction mediation from the UK have been legal professionals. As a first step to identifying the knowledge, understanding and skills necessary to empower the construction professions to play a greater role, an exploratory study was undertaken to capture experience from the perspective of the built environment professions. It entailed semi-structured telephone interviews with sixteen non-lawyer mediators with experience of construction mediation. The interviews allowed the development of a rough picture of construction mediation, particularly the aspects pertaining to the appointments of mediators, mediation styles, mediation procedure, durations of mediations, barriers to settlement, training received, and settlement rates. The study suggests that future research should focus on the costs of mediation, mediation procedure in terms of the specific tasks within phases, party representation and the roles of participants.

Keywords: construction, disputes, mediation, mediator, ADR
1. Introduction

Construction projects are prone to disputes because of a multiplicity of factors such as technical and organisational complexity, supply chain fragmentation and the large sums of money often involved. Traditionally, these disputes were resolved by litigation where attempts at amicable settlement failed. The negative impact of litigation on the cost and duration of disputes and working relationships led to the use of arbitration as an early alternative to litigation. However, arbitration is being perceived as no less costly, slow and damaging to relationships as litigation. The perceived shortcomings of litigation and arbitration, with their rise in costs, delays, and adversarial relationships, have encouraged the rapid growth of alternative dispute resolution (ADR) processes, such as mediation (Chau, 1992; Steen, 1994; Cheung, Suen and Lam, 2002).

The basic concept of mediation entails an independent and neutral third party assisting the disputants to work out for themselves a solution to their dispute. Originating in the late 1960s in the USA (Tackaberry and Marriott, 2003), mediation is now the mandatory first instance method of resolving disputes in some of the states in the USA (Reid 2003; Tackaberry and Marriott 2003) and Canada (Prince 2007) as well as many other jurisdictions. Another development in the use of mediation is an increase in the flexibility in the styles in which it may be conducted. The styles are sometimes categorised as being facilitative, evaluative, narrative or transformative although this oversimplifies the flexibility of mediation as conceptualized by others as a continuum of strategies embodying elements of each of the four categories (Gulliver 1979; Roberts 1992; Palmer and Roberts 1998). In complex cases co-mediation, which involves two mediators acting together, may offer advantages over mediation by a single mediator (Charlton and Dewdney 2004).

The original impetus for the development of mediation was recognition within the more enlightened sections of business communities of the strong commercial case for resolving disputes by assisted negotiation rather than by litigation or arbitration. Several other developments portend a continuing growth trajectory for mediation. These include civil reform in many countries aimed at improving access to justice, transfusion of the outcomes of the civil litigation reform initiatives into commercial arbitration, EU Directive on mediation of civil commercial disputes and globalisation.

Civil litigation reform in many jurisdictions has resulted in disputants being required to make reasonable effort to resolve their dispute by mediation or other appropriate ADR technique before the court can entertain litigation. For example, English civil litigation is governed by the Civil Procedure Rules (CPR), which came into force in 1999 as the final outcome of Lord Woolf’s investigation into necessary reform in civil litigation. The overriding objective of the CPR, as stated in Rule 1.1, is to ensure that cases are dealt with justly. Treating a case justly includes: ensuring that the parties are on an equal footing; saving of expense; ensuring proper proportionality in terms of the amount involved, the importance of the case, the complexity of the issues and the financial positions of the parties; ensuring that the case is dealt with expeditiously and fairly.

In relation to construction disputes the CPR are supplemented by the Pre-Action Protocol for Construction and Engineering Disputes, which is designed to encourage greater contact between the
parties at the earliest opportunity for the purpose of sharing information relevant to the dispute, thereby promoting settlement without litigation. It requires parties at the pre-action stage of their dispute to follow a procedure involving a Letter of Claim, Letter of Response and Pre-Action Meeting as vital signposts. The purpose of these steps is to ensure that, before court proceedings commence, the claimant and the defendant have a reasonable amount of information on their respective positions on the issues in the dispute. It also encourages them to meet and, if necessary, to carry out further pre-action investigation to plug any gaps in the information necessary to dispose of the dispute without the need for the proceedings.

The court is required to promote the overriding objective by managing cases actively. In particular, the court must not only encourage parties to use ADR to resolve their dispute but also facilitate such procedure. Steps available to the court in this respect include proposing ADR to the litigants and staying court proceeding in favour of ADR. The parties themselves are under a duty to assist the court in furthering the overriding objective by seriously considering resolution of their dispute without litigation. To underline the importance of this duty, the court may impose cost sanctions against a party who unreasonably refused to consider ADR or failed to comply with the Protocol. Judges use ADR and mediation interchangeably when describing the duty to consider alternatives to litigation. According to the Master of the Rolls, the head of the courts in civil jurisdiction in England and Wales, as part of the effects of the CPR, the court may even direct parties to take part in a mediation process or attend a mediation hearing at the pre-trial stage of litigation proceedings (Clarke 2008).

It is gradually dawning on arbitrators and arbitration institutions that, after losing ground in popularity to ADR techniques, it is also in danger of even falling behind the new national litigation regimes being created by the civil litigation reform initiatives. It has also been argued that to arrest this trend mediation should be adopted as an integral part of arbitration proceedings (Woolf, 2009).

Considering the large volume of cross-border trade within the EU and the disputes flowing from them, the concerns about the cost and delays of litigation of commercial disputes before national courts and access to justice agenda could not have gone unnoticed by the EU. After many years of deliberation the European Parliament and Council adopted in 2008 an EU Mediation Directive that has to be implemented by all Member states by 2011. Implementation must address such elements of mediation as court support for mediation, recognition and enforcement of settlement agreements, compellability of mediators as witnesses in subsequent legal proceedings; training of mediators, ethical standards and quality control systems, and online access to information on mediators.

Mediation is increasingly the resolution process of choice for most insurers and other multinational companies from jurisdictions with established practice of mediation (Kallipetis 2007; Brady 2009). Gould and Cohen (1998) report a growing practice by UK insurers involved in disputes of requiring their lawyers to justify failure to use mediation. The effect of globalisation inexorably leads to a global expansion of mediation.
The growth of mediation presents, all members of construction supply chains and the related organisational umbrella or professional bodies, great opportunities and challenges. The opportunities reside in the growing requirements for professional services as mediators and advocates that disputants need for effective mediation. None of the traditional professions can validly lay claim to unique competence to provide these relatively new services (Roberts 1992). “Turf wars” are therefore being waged. As the first professional contact often made by project owners in the procurement cycle, the built environment professionals are best placed to take advantage of this opportunity by developing additional capability to take on roles as mediators and advocates. However, this opportunity also poses a challenge to the built environment professional institutions to innovate their institutional arrangements and procedures to facilitate their rapid acquisition of the relevant knowledge, understanding and skills. Our contacts with industry suggest that, compared to the legal profession, the built environment professions and their professional bodies have been extremely slow in responding to this challenge.

This paper is from a study aimed at investigating the extent of the construction professions’ participation in mediations and examining the process knowledge and understanding necessary for development of the relevant skills. The rest of the paper is structured in four sections. An overview of reported research into construction mediation is provided in the first section. The second section contains brief description of the research method used in the study. The findings are presented and discussed in the third and conclusions are drawn in the final section.

2. Overview of previous construction mediation research

Most of the early studies into mediation of construction disputes were surveys aimed at producing descriptive statistics on mediation of construction in terms of extent of use, type of disputes, settlement rates and projections of future use of the resolution method. Chau (1992) reported a settlement rate of 90% achieved in mediations in Hong Kong. Stipanowich (1996) reported that, in a study of 455 construction mediations/conciliation cases in the US, 59.1% of them resulted in settlement of all the referred issues. A further 7.9% resulted in partial settlement. Interestingly, a settlement rate of 71.5% was achieved for evaluative mediations as compared to a settlement rate of 55.2% for facilitative mediations. That study found that mediation “typically requires relatively little time or money (nearly half the reported mediations were concluded in two days or less; fewer than 10% of the cases consumed more than six days, and more than half of the reported mediations cost $3,000 or less excluding attorneys fees), and fewer than one in 10 mediations cost more than $20,000”.

In the UK Gould and Cohen (1998) carried out a survey to gauge the adoption of ADR methods by the UK construction industry and found that respondents had participated in a total of 1024 mediations, 251 occurring in the preceding 12 months. The overwhelming view of respondents was that the use mediation was set to increase considerably. Lavers and Brooker reported similar type of ADR pulse measurement research but focused on only legal professionals (Lavers and Brooker 2001; 2005). A part of their study was based on data collected by semi-structured interviews with representatives of professional bodies for the legal professionals and their related organisations and
the department of Government responsible for the administration justice. This part of their research produced very interesting insights on the provision of ADR services by legal professionals, ADR training being undertaken and evolving ADR practice from the perspective of the legal profession. The second part of the research produced a more detailed picture of the profession’s engagement with and perceptions of ADR and mediation as mechanisms for resolving construction industry disputes.

A team in City University of Hong Kong report research into the dynamics of mediation of disputes in the Hong Kong construction industry in terms of links between what they refer to as “mediator tactics”, “sources of disputes” and mediation outcomes. Three main outputs are: (i) a logistic regression model relating mediator tactics to mediation outcomes (Yiu et al 2006); (ii) linear regression models showing a positive correlation between mediator tactics and mediations outcomes (Yiu et al 2006). (iii) multiple regression models linking mediator tactics, sources of disputes and mediation outcomes (Cheung et al 2007; Yiu et al 2007; Yiu et al 2007).

A recent study led by Nick Gould is probably the most extensive investigation into construction mediation in the UK (Gould et al 2009). The data collection method employed was a quantitative questionnaire survey of the legal representatives of parties to litigation of about 1,600 disputes commenced in the Technology and Construction Court (TCC), the division of the High Court for England and Wales that deals with construction disputes and other disputes of a very technical nature. The key questions that the study sought to answer were: the extent to which they used mediation to settle their disputes; the stage at which settlement was achieved and costs saved by settlement by mediation. To collect data for answering the questions, two sets of questionnaire were designed and handed out to the legal representatives on commencement of proceedings in the TCC in relation to the disputes. One of the forms was to be completed and returned where a case settled before trial. The other was to be filled and returned where the case went to trial. There were 221 responses in relation to disputes that were settled without trial and 40 from disputes that went to a full trial.

Among others, the study made the following findings:

1. Solicitors and barristers accounted for over 70% of the mediators appointed.

2. The vast majority of mediator appointments were made by the parties themselves without any involving any mediation support services provider (MSSP).

3. The main stages at which settlement occurred were: during exchange of pleadings; during or as a result of disclosure; as a consequence of offers to settle and shortly before trial.

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1 A mediation support services provider is body that promotes mediation by undertaking training and accreditation of mediators and providing access to their services.
4. Some of the mediations that did not result in settlement still produced benefits such as better understanding of the dispute, narrowing down of the issues in dispute and generally more efficient litigation than would have been the case without mediation.

5. Considerable savings in costs were made. In 10 of the mediations the cost savings were estimated to have been in excess of £300,000.

3. Methodology

The lack of established knowledge on the issues of interest suggested as an appropriate starting point exploration using a qualitative approach. The data collection method adopted was a semi-structured telephone interview with mediators with direct experience of mediating construction disputes. This method was used in preference to face-to-face interviews because it offers the advantages of convenience to the interviewees and, therefore, better chances of committing them to participate, a short timetable and economy. Every mediator access to whom had been arranged with the assistance of MSSPs based in England and Wales accredited by the Civil Mediation Council, was interviewed for about 30 minutes over the phone. Each interview was audio-recorded for transcription and analysis. As a fail-safe measure, brief notes were also taken during the interviews.

An important consideration in the design of the interviews was the mediator’s duty of confidentiality to the parties to any dispute that he or she mediates. To assure candidates for the interviews that participation in the study would not risk them being put in breach of this duty, the researchers made undertakings of confidentiality to the MSSP and the mediators. The mediators were also reminded at the start of each interview that they could stop the interview at any stage and direct their relevant information to be excluded from the study.

4. Findings and discussion

4.1 Mediator’s background

Fifteen of the sixteen mediators interviewed belonged to the construction industry. They have all been trained in facilitative mediation by various institutions in the United Kingdom such as CEDR, the Academy of Experts, and the ADR Group. The average number of years as a mediator was ten whilst the average number of mediations conducted per year was nine. It would therefore appear that the mediators interviewed spend only a small fraction of their professional time mediating disputes.
4.2 Mediator appointment

There are three main appointment routes: (i) joint appointment by the parties; (ii) appointment by a MSSP or other third party at the request of one or both parties; (iii) appointment by the court. The route taken in any particular case depends on the parties, the nature of the dispute and the contract from which it has arisen. For example, under the Construction Mediation Procedure developed by the Institution of Civil Engineers (ICE) of the UK, the parties have 28 days, after either party has made a formal written request to resolve an existing dispute by mediation, to make a joint appointment of a mediator. Failing such a consensual appointment, either party may request the ICE to make the appointment (ICE, 2002).

All the interviewees reported that most of their appointments were by the joint action of the parties. This practice is in line with the findings in the survey by Gould et al (2009). It would therefore appear that the role of MSSPs as appointers of mediators is much less than the situation with arbitrators and adjudicators.

4.3 Mediation style

All the mediators interviewed use the facilitative style because that was the style in which they had been trained. However, they would have no difficulty taking on the role of an evaluative mediator if the disputant or the MSSP that appoints require them to do so. The survey of lawyer mediators carried out by Lavers and Brooker (2001) found evaluative mediation to be more prevalent. This raises the question whether the tradition of lawyers always acting in advisory capacity explains the difference.

4.4 Mediation process road map

To be effective, a mediator must possess a reasonable level of process knowledge in terms of the phases of the process, their flow from the commencement to the conclusion of the mediation, the tasks by the disputants and the disputants within each phase, the challenges faced and the coping strategies and tools for meeting them. The flexible nature of mediation means that there is no standard mediation procedure in the sense of having labels given to stages, phases or tasks that are universally accepted. It should therefore occasion little surprise that different writers and mediation support services providers have published procedures based on different structuring of the processes within mediation. For example, whilst the CEDR (2004) mediation procedure has the same five phases as that described by Richbell (2008), they differ slightly in terms of the labels employed for the phases. Procedures described by other writers such Charlton and Dewdney (2004), Stitt (2004), Spencer and Brogan (2006) and Ramsey et al (2009) differ on the number of phases and stages recognised. However, very little differences were found when the individual tasks to be formed were compared across writers.
The interviewee saw the procedural flexibility as an advantage of mediation. Two findings concerning procedure call for comment. Firstly, contrary to the procedures described by some writers, pre-mediation meetings are rarely held. Whilst this has the advantage of avoiding the costs of the meetings, it misses the opportunity to identify possible obstacles and to think up avoidance strategies before the mediation, which omission may generate additional cost albeit of a different kind. Charlton and Dewdney (2004) and Spence and Brogan (2006) suggest that a mediator may follow up on the relations between the parties after the mediation or, where they failed to settle at the mediation, to find out whether they managed to settle it by some other means. Taken in their totality, the interviews suggest that this is rarely the practice in construction industry mediations in England and Wales. Most of the mediators interviewed consider the mediation concluded after the agreement is signed. None could recollect having contacted the parties to follow up as suggested in the literature.

4.5 Duration

Most mediators stated that they rarely need more than a day to mediate. This corroborates the views of writers such as Charlton and Dewdney (2004) and Richbell (2008). However, Stipanowich’s (1996) study found an average of 7.44 days and durations ranging from one day to one year. This difference of experience suggests major differences in mediation between the US and the UK, which needs further research.

4.6 Barriers to settlement

A multiplicity of factors are identified in the literatures as barriers to settlement in mediation. They include unsuitability of the disputes for mediation, unrealistic expectations by the parties or the mediators, lawyers with negative attitudes in mediation, lack of authority to settle, reactive devaluation, power imbalances, hidden agenda, lies, personal attacks, lack of funds to meet any agreed settlement. The interviews suggest as the most common barrier is unrealistic expectations and lack of funds with which to comply with any settlement.

4.7 Skills of an effective mediator

A common feature of practitioner literature on mediation is some attempt to describe the skills of an effective mediator. Legal expertise tends to be towards the bottom of the list of priority. There is some empirical support fort the relatively low priority of legal expertise. A survey reported by Bucklow (2007) found the most important attributes of a mediator as listening, building rapport with people, having empathy, being patient, having a sense of humour and having stamina/persistence. The interviewees in study the identified with prompting only patience, understanding and ability to establish rapport as the most important mediator attributes. In the interest of certainty, a harmonised body of essential mediator knowledge, understanding and skills is still to be developed from a more comprehensive investigation.
When the interviewees were asked to describe the attributes considered necessary for effective mediation their responses were couched in language that often conflated in one attribute the different concepts of knowledge, understanding, skills, competences and behaviours. This semantic ambiguity is also a feature of the mediation literature produced by practitioners. The psychology of and training requires explicit attention to the different concepts in the design of any intervention.

### 4.8 Mediator training

Mediation training in the UK is undertaken by various organisations often based on their preferred mediation style (Fenn 2006). Most of these organisations were set up by members of the legal profession although most of them now include non-lawyer on lists of mediators. The professional bodies for the built environment professions have only just started to organise training for their members. The training is a two stage process, academic treatment of mediation practice and procedure followed by pupillage under the supervision of an experienced mediator. The mediators interviewed had been trained for 3-5 days in a facilitative style. This raises doubt in the ability for a mediator to apply several styles of mediation when the need arises although the interviewees stated that they would have no problem adopting the evaluative approach if required to do so.

The semantic ambiguity already referred to may be responsible for what looks like a minimalist approach to mediator training, which may be appropriate only for a small group of trainees. Gulliver (1979) doubts whether it is possible to understand mediation without understanding of negotiation. This view is echoed by Palmer and Roberts (1998), thus suggesting that any effective training must first impart knowledge and understanding of the theories of not only mediation but also negotiation. Skill development by role plays and pupillage can then follow. Five days may well be adequate for trainees with reasonable levels of such prior knowledge and understanding from formal education or reflection on a long period of practice. There is the danger of the cost of mediation limiting access to it unless a sufficiently large pool of mediators keeps costs at affordable levels. To produce such a pool without compromising on quality the training may need a longer period of instruction to develop the foundation knowledge and understanding.

### 4.9 Success of mediation

The question of the measure of success of a mediation receives different answers from people. Full settlement of the issues is the most widely used measure. On this basis the interviewees reported success rate ranging from 68%-100%.
5. Summary conclusions and recommendations

Most of the literature on construction mediation categorizes it into facilitative and evaluative mediation although transformative and narrative mediation are beginning to appear in the literature. It is to be noted that these labels are used as shorthand for particular types of intended final outcomes and that most mediations entail varying degrees of each of the four behaviours or impacts suggested by the labels.

The interviewees reiterated features of mediation already reported by other researchers such as the preponderance of practice towards facilitative mediation, joint appointment of the mediator by the parties themselves, high settlement rates and training provided by a few industry-based organisations set up by the members of the legal profession. They also described as common procedures similar to that recommended by CEDR.

On the issue of skills of an affective mediator the interviewees mentioned with prompting only patience and understanding and ability to establish rapport …Similarly, the responses on barriers to settlement recognised only unrealistic expectations, lack of finances to meet any settlement… Limitations in the methodology may be responsible for the omission of others. A follow-on study that deals more comprehensively with the issues of barriers and skills is called. Such a study should also consider producing a more detailed mediation that recognises the wide range of tasks that may have to performed in

Civil reform initiatives, enlightened attitudes to conflict resolution within the business community, and moves within the EU to reduce the cost of cross-border trade have worked together to put mediation of a trajectory of greater use by the UK construction industry. Most of the reported research into construction mediation has relied largely on legal informants as informants. Wider studies aimed at capturing the experience of the built environment professions as mediators and advocates and mapping out training requirements to increase their participation in such roles is called for.

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References


