

RICS Research

Construction clients and mediation:
a follow-up study of attitudes
and experience



A top-down view of a meeting table with hands, pens, and architectural drawings. The image is overlaid with a semi-transparent purple filter. Several hands are visible, some holding pens and pointing at architectural drawings on the table. There are also glasses of water and a clipboard with papers. The overall scene suggests a collaborative meeting or a design review session.

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a follow-up study of attitudes
and experience

Report for Royal Institution of Chartered Surveyors

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A report for Royal Institution of Chartered Surveyors

University of Strathclyde

Report written by:

Dr Andrew Agapiou

andrew.agapiou@strath.ac.uk

Professor Bryan Clark

bryan.clark@strath.ac.uk

RICS Research team

Dr. Clare Eriksson FRICS

Director of Global Research & Policy

ceriksson@rics.org

James Rowlands

Global Research & Policy Project Manager

jrowlands@rics.org

Amanprit Johal

Global Research & Policy Project Officer

ajohal@rics.org

Auriel Fielder

Global Research Co-ordinator

afielder@rics.org

Published by:

RICS, Parliament Square, London SW1P 3AD
United Kingdom

rics.org/research

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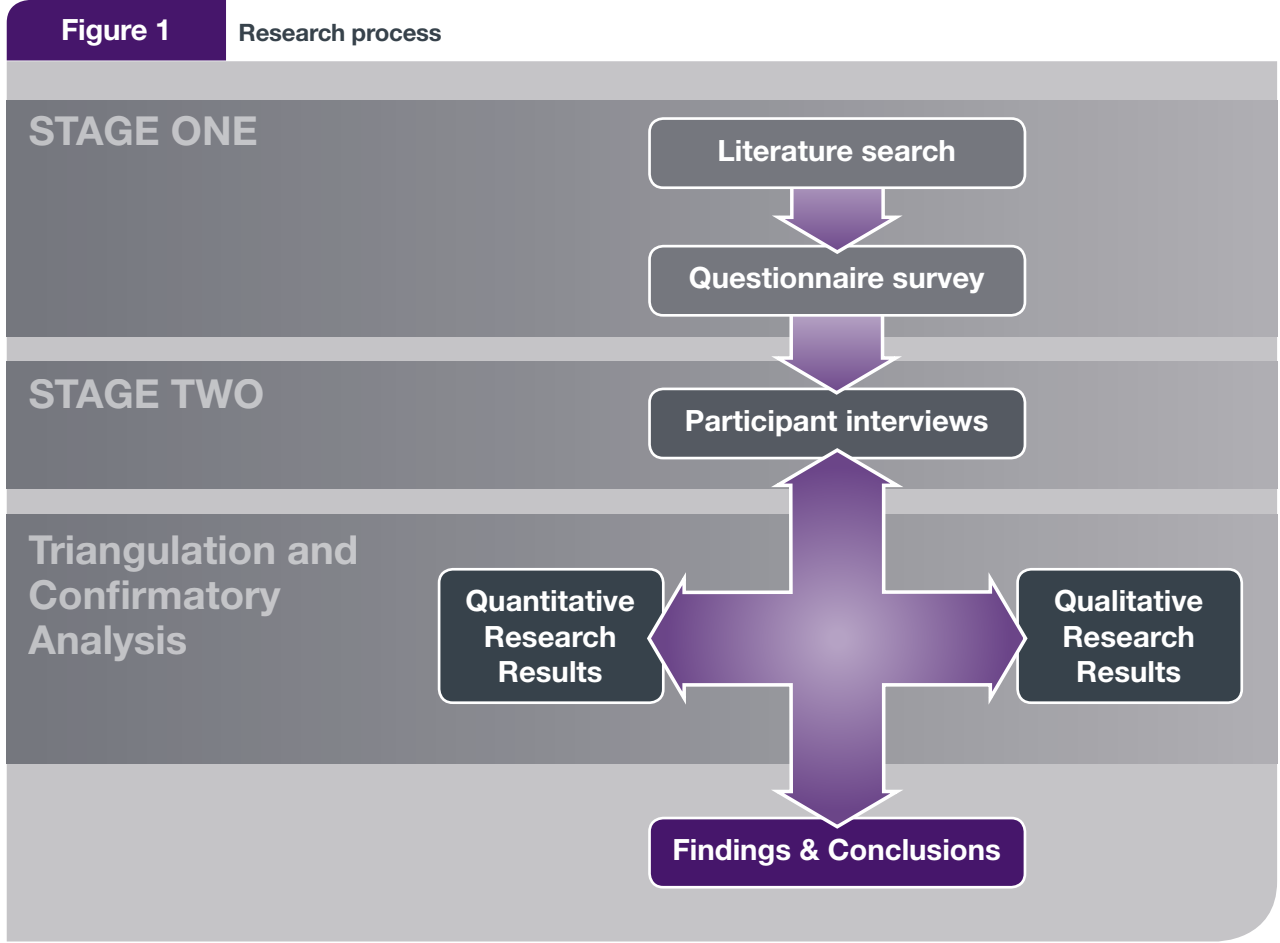
Executive Summary

Construction disputes by their very nature are often complex, sometimes multi-party disputes, many of which are not suited to either adjudication or traditional forms of dispute resolution (these being potentially slow, expensive and divisive). The sheer complexity of construction disputes often leading to expensive, time-consuming and stressful paths being trodden through the traditional resolution terrain, creates a compelling case for the introduction of alternative approaches within this adversarial industry. The construction industry has become increasingly aware of the substantial legal costs it burdens itself with as a consequence of its high incidence of disputes. Moreover, this expenditure, which globally represents a substantial sum each year, is by no means reflective of the hidden costs of disputes, such as the damage to reputations and commercial relationships; cost of time spent by executive personnel; and cost of lost business opportunities. Over recent years, the Scottish Government and key players in Scottish commerce have emerged as advocates of mediation as a first choice method of settling disputes. The value of mediation has also been widely acknowledged worldwide, as evidenced by the number of jurisdictions in which the courts enforce obligations on parties to negotiate and adopt mediation to

settle construction disputes. In most contexts, voluntary uptake of the process is low, however, and research into prospective client perceptions is particularly valuable.

The principal aim then of this study was to explore construction participants' [construction clients hereafter] awareness, attitudes and experiences relative to mediation, drawing upon quantitative and qualitative analyses of small and medium-sized contracting firms in Scotland. This was reflected in the main objectives of this research which were to evaluate the effectiveness of prevailing construction dispute resolution methods in Scotland; establish baseline information about the current extent of construction mediation activity in Scotland, determine the willingness of Scottish construction clients to shift away from traditional approaches to dispute resolution to mediation; and if they are, to ascertain the drivers towards the adoption of mediatory techniques, and if not the barriers to change.

A number of research methods were adopted for the investigation to ensure the reliability of validity of the research findings, involving the process of triangulation & confirmatory analysis (See Figure 1).





This involved a strategy that combined both quantitative and qualitative research methods. In stage one a questionnaire survey was deployed to elicit the opinion of construction clients relative to mediation based upon a sample of main and sub-contracting firms in Scotland. Stage two, employed a qualitative approach to produce ‘thicker’ descriptions of salient issues relative to construction clients’ interaction with construction mediation, drawing upon semi-structured interviews of industry participants. 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 discussed below are based on the survey responses and interviews with a panel of 9 industry experts.

This was a modest study and a first foray into client research in the area. Further research is required to illuminate further the findings unearthed here. In short, however, we can note that at the industry user level, and in respect of smaller firms at least, mediation may remain largely unnoticed, its potential unrealised. Take up is low and sophisticated awareness of the process and the benefits it can reap for participants scant.

Much effort thus far has been expended selling mediation to lawyers through educational drives, conferences, seminars and training. Such endeavours targeting undoubtedly key players in mediation’s progress is useful and continuing evidence of the same can be seen, for example, through the recent Law Society of Scotland’s, ‘Embedding ADR in Civil Justice’ conference’. Much more needs to be

done on the ground in repeating and escalating such efforts for the client base, however. It is also noteworthy that while there remains much ambivalence from legal the professional in Scotland (and the mediation community itself for that matter) regarding the extent that participation in mediation should in any sense be propelled through arm twisting (Clark and Dawson, 2007; Agapiou and Clark, 2011), nonetheless our analyses suggests that the appetite for more stringent efforts to drag parties into the mediation process may be stronger amongst the client base.

This is particularly true because in line with evidence worldwide, as our study suggests, when parties do try mediation, they are generally satisfied with their experiences and often settle their cases. Much research has also suggested that parties (clients and their lawyers) often become repeat players in the process and champions for its cause. Crossing the Rubicon is the hard part. While lawyers may often act as gatekeepers to dispute resolution methods by dint of their traditional dominance in the lawyer-client relationship, and exert significant influence on the dispute resolution choices of their clients. recent evidence suggests that clients may be increasingly wrestling control back from their legal advisors in such matters (Clark, 2012, chap. 2) and thus direct selling of mediation to the client base may be of increasing importance to help inform their dispute settlement deliberations. Further institutional scaffolding that may help to expedite use of mediation in the Scottish construction sector such as court promotion, professional rules mandating discussion and consideration of the process and contractual embedding remain largely absent in Scotland.



There is evidence from the investigation that more education in its procedures and their application could provide further opportunity to develop mediation as a settlement tool in Scotland by building on the more positive aspects in our investigation. Further education, training and publication of successful execution may be necessary to convince doubters that mediation needs to be part of the menu of methods of dispute resolution for the modern practitioner. A driving force for this may be its inclusion in statutory schemes as happened with the Civil Procedure Rules in England and Wales. The possibility of basing an approach on the foundation of the methodology underpinning Adjudication is a route the authors see as proven and attractive. The recommendations of the Gill review of civil justice however, would seem to suggest that there is little appetite for such a statutory framework, but for a light touch approach in Scotland.

There is an obvious niche for mediation in today's dispute resolution market and with other research showing a growing portion of the Scottish legal fraternity familiar and comfortable with the process, it is difficult to imagine it continuing to be confined to the perimeter of dispute resolution. However, to achieve widespread success with mediation (as in the USA) the UK construction industry will have to shed its adversarial nature and approach the resolution of its disputes in a more amicable fashion.

While negotiation may be the most common form of early dispute resolution, its failure should not necessarily entail the demise of collaborative attempts to broker settlement. However, the road of such cultural change may well be a slow one!

In order to improve utilization of mediation amongst construction enterprises in Scotland efforts from government agencies, professional bodies, industry bodies and academic institutions are required to promote and support mediation.

Those involved in the Scottish construction industry, particularly in the area of dispute resolution, must embrace the opportunities available to them, encouraging the appropriate use of both mediation as well as the other forms of dispute resolution accessible, or risk failing the industry. In such a vast industry there is room to utilize all the existing dispute resolution techniques to a greater or lesser extent. Undoubtedly adjudication will continue to be a major player; however it is difficult to imagine mediation not experiencing steady growth over the coming years developing its own elevated position within the dispute resolution market. Mediation should be adopted selectively minimising the number of failed mediations, thus avoiding the industry becoming disillusioned with the process.

Mediation is essentially a process of facilitated negotiation where parties in conflict are aided in reaching a resolution to their dispute by a third party neutral or ‘mediator’. Mediation is generally a voluntary² process and without prejudice to the parties taking further legal action if settlement is not forthcoming. It is also commonly asserted that mediation is private and confidential with information disclosed by the parties therein not admissible in evidence in subsequent legal proceedings. While this is clearly true to a point, the reality is slightly more ambiguous. It should be noted that the legal term ‘privilege’ refers to evidence that is not available for use in court proceedings, and applies to communications between lawyer and client. In Scotland there is no suggestion that this principle will apply to mediators³ while in England and Wales the question remains very much open.⁴ However, it seems that the courts will treat mediation discussions as confidential in the same way as contractual negotiations, but subject to the same limited exceptions that apply to other ‘without prejudice’ negotiations.⁵

In terms of how the mediation process unfolds, there are many forms in which it may take. The standard format in the construction/commercial field is probably one in which after separate pre-meetings with the mediator,⁶ disputing parties and their advisors come together jointly with the mediator and both present their opening statements setting out their case, positions and demands. Thereinafter a series of private meetings with the mediator (known as ‘caucuses’) may ensue with the mediator seeking more detailed information from each side, gleaning parties’ underlying interests and ‘bottom line’ and then shuttling back and forth between the participants with offers and counter-offers. When an agreement is in sight, parties may then reconvene in joint session to hammer out the details with any settlement reached typically drawn up in contractual form by legal advisors.

There are many different models of mediation, although the classic standard formulation is the ‘facilitative’ model, in which the norms upon which any outcome is agreed are created by the parties themselves, with the mediator purely assisting the parties to broker their own agreement. The mediator is neutral and impartial and has no stake in, nor expresses any view on the terms or quality of any agreement brokered. In an ‘evaluative’ model, however, the mediator is more proactive and it may be that, “[she] focuses... on the legal claims, assesses [their] strengths and weaknesses ... predicts the impact of not settling and pushes the parties to his/her evaluation of the appropriate settlement” (McAdoo and Welsh 1997, p.389). Similarly, a ‘directive’ style of mediation may, for example, entail the mediator taking more control of the mediation and steering it towards some pre-determined, desired outcome (Riskin 2003, p. 30).⁷

In a further dimension, mediators may adopt a ‘narrow’ or ‘broad’ approach. A narrow orientation focuses on the legal and monetary issues, while a broader orientation looks at the parties’ relationship, longer-term interests and wider societal or public interest issues (Riskin, 1996).⁸

Elen Waldman has suggested an alternative typology based on the norms according to which mediation decisions are made. She names three styles: ‘norm generating’, ‘norm educating’ and ‘norm advocating’.⁹ Under the norm-generating approach, the parties themselves provide the norms according to which the outcome is judged. A norm-educating mediator goes further, providing information on applicable legal and societal norms, but still leaving it to the parties to decide which, if any, they choose to apply. And a norm-advocating mediator insists that any settlement reached reflect particular applicable norms: *‘In this sense, her role extended beyond that of an educator; she became, to some degree, a safeguarder of social norms and values’*.¹⁰

In one sense mediation is nothing new. For example, mediatory forms of dispute resolution were practised in pre-capitalist, tribal societies, in ancient Greek cultures as well as in mediaeval England (Abel 1993; Levinson 1994). Nonetheless, the process has become increasingly common as a form of dispute resolution in the civil justice sphere across a number of dispute contexts and jurisdictions (for a review see Clark 2012: chap 1) since its modern advent in the Alternative Dispute Resolution movement occurring in the aftermath of the National Conference on the Causes of Popular Dissatisfaction with Administration of Justice (the ‘Pound Conference’) in Minnesota in 1976 (Sander, 1976).

Although across many jurisdictions, mediation’s origins often lay in the dispute areas of family and community matters, as we discuss below, in recent years the process has begun to take root in the arena of construction disputes (for a review see Brooker and Wilkinson 2010). In contrast to traditional means of resolving disputes, it is contended that as well as benefiting from privacy¹¹ mediation may be quicker, cheaper and an altogether more harmonious form of dispute resolution. Moreover, proponents suggest that mediation has the potential to lead to creative solutions beyond the gift of formal court adjudication (Sturrock, 2010).

2 Although in some contexts participation may be mandated. 3 See the discussion in the Scottish Law Commission Discussion Paper No. 92, (1991), para 1.3 and 2.1. A qualified privilege does apply in the family context under the Civil Evidence (Family Mediation) (Scotland) Act 1995. 4 *Brown v Rice & Patel (ADR Group intervening) unreported, [2007] EWHC 625, per Deputy Judge Isaacs QC at para [20]*. 5 Including unequivocal admissions or statements made – see *Cutts v Head 1984 Ch. 290; Daks Simpson Group Plc v Kuiper 1994 SLT 689* or where fraud, impropriety or misrepresentations in the negotiations are alleged – see *Unilever v Proctor and Gamble [2001] 1 AE 783*. 6 Co-mediation or mediating with an assistant mediator is common practice. 7 There are many other distinct styles of mediation, including ‘narrative’ and ‘transformative’ models See R.A.B. Bush and J.P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (2nd Edition)* San Francisco: Jossey-Bass, 2005. 8 See L. Riskin, “Understanding Mediators’ Orientations, Strategies and Techniques: A Grid for the Perplexed” [1996] 1 *Harvard Negotiation Law Review* 7. 9 E. Waldman, “Identifying the Role of Social Norms in Mediation: A Multiple Model Approach” (1997) 48 *Hastings law Journal* 703. 10 *Ibid*, p.745. 11 See cross reference above

1.1 Construction disputes

Such matters hold a certain resonance in the construction sector. The construction sector is renowned globally for its dispute ridden nature. Some common types of arising disputes in construction matters include delay, payment matters, changes to scope of work, professional negligence, and quality of work issues. Suspected aggressive, macho characteristics, the uncertainties that characterise many aspects of construction disputes and common pressures on finances and cash-flows may also fuel the rise and escalation of conflict between construction participants (see Brooker and Wilkinson 2012: p 3-4).

In an effort to help expedite the resolution of disputes in construction matters, various mechanisms have been deployed beyond the traditional routes of litigation and arbitration. For the UK, the creation of the Scheme for Construction Contracts and the Housing Grants Construction and Regeneration Act led to the development of the alternative methods of dispute resolution first proposed by in the Latham Report (Latham, 1994).

Adjudication, essentially a species of short form arbitration, was introduced on a statutory basis under the Housing Grants Construction and Regeneration Act 1996. Section 108 of the 1996 Act provides a legislative framework to facilitate the operation of the adjudication procedure.¹² The Local Democracy, Economic Development and Construction (Scotland) Act – the Construction Act 2009 – received Royal Assent in July 2009 (Brawn, 2010) and came into force on the 1st November 2011.¹³ The new legislation amends Part II of the Housing Grants, Construction and Regeneration Act 1996.

Adjudication was intended to allow disputes to be resolved on an interim basis, so that the relationship between the parties could be maintained after the dispute, with any final resolution of outstanding matters being picked up by negotiation or by other forms of dispute resolution.¹⁴ Since 1998 the statutory adjudication process has developed from a commercial pro-tem idea into a sophisticated dispute resolution mechanism, which requires very polished adjudication practitioners.

Although our recent research into Scottish lawyers generally found a profession at ease with adjudication practice (Agapiou and Clark, 2011; Agapiou and Clark 2012), for some time anecdotal concerns about the effectiveness of the adjudication process among construction industry participants have been voiced.¹⁵

Also, while it is generally recognised that the adjudication provisions under the 1996 Act have generally improved cash flow within the industry and dispute resolution process more specifically, it has often been described as 'ineffective' in other respects.

Indeed, it remains unclear whether adjudication has helped reduce claims-oriented attitudes prevalent in the construction industry, or has in fact fuelled more disputes. While the process is often described as being a cheaper and quicker option than litigation or arbitration, adjudication has not always been used in the manner intended and examples of its use in clearly inappropriate situations abound. For example, Akintoye¹⁶ states: *'the original objectives of the 'HGCR 1996' Act are being undermined by exploitation of 'loop-holes' stopping the flow of money through the supply-chain; lack of clarity relating to payment resulting in adverse effects on cash flow; increased litigation; and disputes under construction contracts were threatening the viability of individual businesses and eventually would undermine the long-term health of the construction industry'*

Minogue¹⁷ bemoans the increasingly legalistic character of adjudication, and states *'It has now adopted all of the hallmarks of a mini-litigation'*. She continues *'Most adjudications start with rather pointless jurisdictional and procedural wrangling. They continue with lengthy position papers that are pleadings in disguise. Parties then produce reports from independent programmers or cost advisers and even witness statements. Finally, as we have seen, despite the exemplary lead taken by the Technology and Construction Court, there is endless argument about enforcement'*.

Redmond¹⁸ re-iterates concerns with the adjudication process, stating that *'...disputes are taking much more than the basic 28 days. Some Adjudications last for months, limping in a haphazard way from extension to extension and costing well over £100,000 on each side'*. As we note below in section 4, both our quantitative questionnaire data and qualitative interview responses reveals a significant disquiet amongst construction industry participants with adjudication practice in Scotland.

¹² Eversheds (2005), Adjudication Client Briefing, www.eversheds.com/serv ¹³ Akintola Akintoye, Suresh Renukappa and Hamish Lal (2011) Perception of the UK industry on 'the new 2009 Construction Act': An empirical study, COBRA 2011 Proceedings of RICS Construction and Property Conference, 12-13 September 2011, School of the Built Environment, University of Salford, ISBN: 978-1-907842-19-1

¹⁴ Furst, S. & Ramsey, V (2001) *Keating on Building Contracts*. 7th edition. Sweet & Maxwell. ¹⁵ See for example, Kennedy and Milligan 2007

¹⁶ Akintoye supra n. 6 at p 610 ¹⁷ Minogue, A., 2010. *Blessed are the Peacemakers* Building Magazine 22 January, p51

¹⁸ Redmond, J., 2009. *Return of the Arbitrator*. Building Magazine, 27 November, p.51

The authors have already completed both questionnaire and interview based research into experiences and attitudes relative to construction mediation from the perspective of Scottish legal advisors (Agapiou and Clark, 2011; Agapiou and Clark, 2012). This work was able to track a small but seemingly growing case load of mediation in construction matters in Scotland as well as a burgeoning cadre of Scottish lawyers, while still generally cautious, growing in confidence in, and enthusiasm for the process. Both positive experiences and cautionary tales were regaled and views expressed on such matters as the interaction between mediation and construction adjudication, the role of clients in and around the mediation process, factors relevant to mediation success, barriers to development and opportunities for growth. That study tracked some 178 mediation cases in the Scottish construction sector¹⁹, with some 83% reportedly either settling or partially settling and general positive experiences within mediation evident. In general survey participants predicted a limited role for mediation to play in construction disputes particularly given the prevalence of statutory adjudication. Although both lawyers and construction industry professionals were blamed for stifling growth, legal professionals in the main saw a positive role and business opportunity for themselves in any further development of the process. It should be noted, however, that the perspective and experiences of legal advisors may not necessarily mirror the same in respect of users of mediation, however. Lawyers' interests or agenda in dispute resolution may not always concur with their clients. Thus the current work helps us to paint a more complete and nuanced picture of the current state of, and debates around construction mediation in Scotland. It is also worth noting that in terms of the literature on mediation generally (at least outside of research into court-annexed programmes) much more is currently known about the role and views of lawyers in the process than that of the end users. This work also thus adds to the general literature pertaining to mediation's utility as a form of civil disputing by its focus on end users.

A body of literature in the construction mediation field exists in many other jurisdictions, including England and Wales, the USA, South Africa and Australia. Before reviewing some of this work we should note that many of these studies have taken in place in contexts in which construction mediation lies at a more advanced stage of development.

In many such jurisdictions, mediation has been the subject of significant governmental and professional promotion and embedding into traditional dispute resolution pathways through for example, embedding in standard construction contracts, judicial initiation of the process, and legislative measures. The experiences relative to research recorded in these contexts must therefore be treated with caution when applied to Scotland – a jurisdiction which has hitherto lacked the institutional scaffolding to support mediation in such ways.

The first major survey into dispute resolution in the construction industry in England and Wales was conducted in 1994 (Gould, 1999). The research found that less than 30 % of the respondents had actually been involved in an Alternative Dispute Resolution (ADR) process and that the UK construction industry lacked an understanding of the principles of ADR. A second survey by Gould (Gould, 1999) reported an increase in mediation experiences but concluded that 'formal mediation', defined by Gould (1999) as a 'private, informal process in which parties are assisted by one or more third parties in their efforts towards settlement', was rarely employed. Brooker and Lavers' research (2000) into the processes, perceptions and predictions regarding dispute resolution in the UK construction industry, found that, on balance, negative experience with dispute resolution related to arbitration and litigation, while all other dispute resolution processes produced positive results. Negotiation produced the greatest level of positive experience, closely followed by mediation. Respondents from both UK surveys predicted that, of the dispute resolution processes in the UK, the use of adjudication would make the most significant increase in the UK construction industry over ADR processes such as mediation or expert determination. In a follow-up analysis, Brooker's study (2009) of the use of mediation to resolve construction disputes at the Technology and Construction Court in England would seem to indicate a significant steer from the judiciary on when construction cases are deemed appropriate for the process of mediation. It would seem from the analysis, *'that most cases at the TCC are identified as suitable, particularly if they involve small sums compared to litigation and where there is uncertainty about factual and legal issues'*.

More recently, Gould et al (2009) have investigated the use of mediation in UK construction disputes in which parties involved in litigation at the Technology and Construction Courts in London, Birmingham and Bristol were asked how they settled their disputes, and in particular their experiences with mediation during litigation.

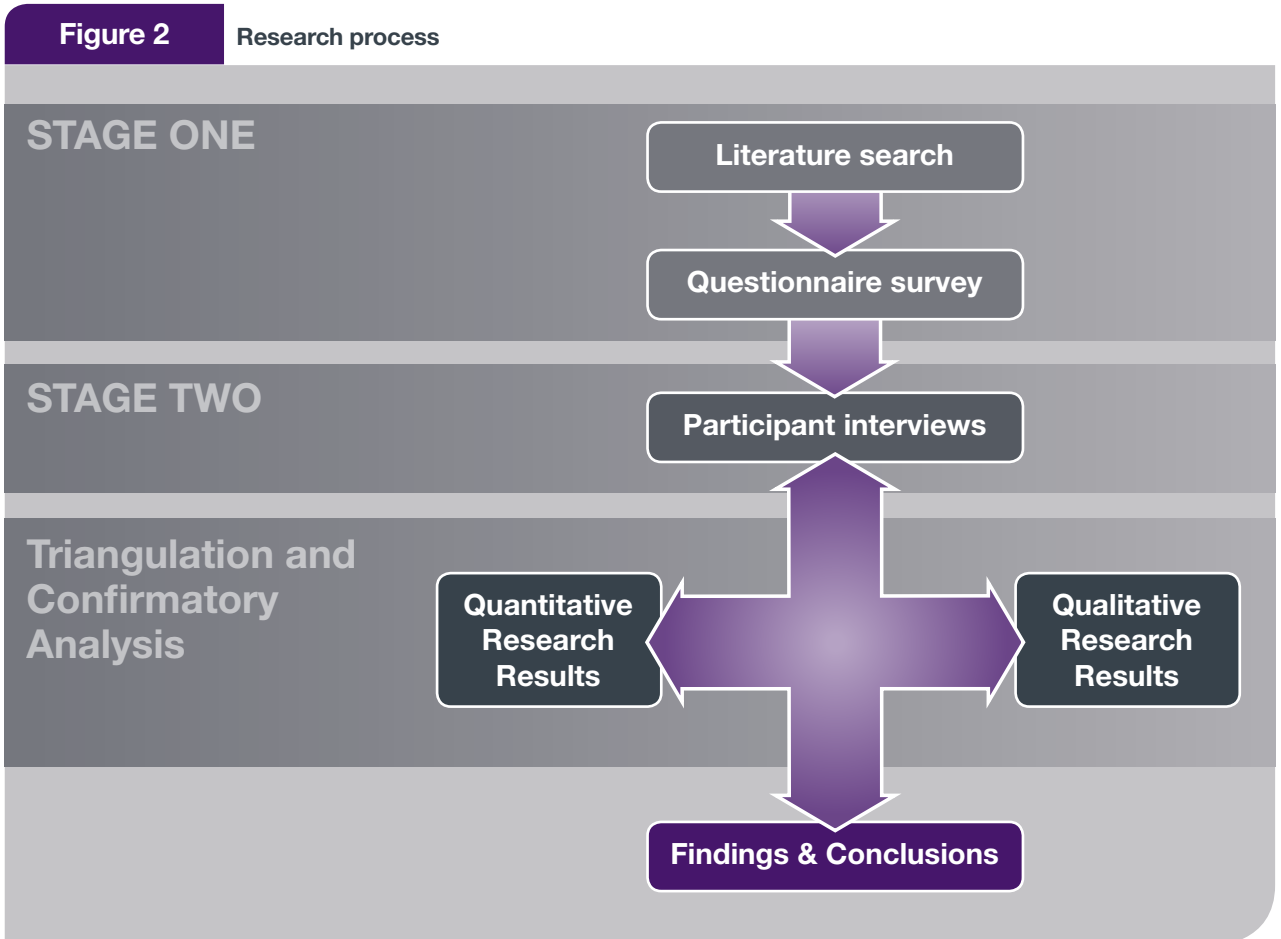
The aim of the research was to establish under what circumstances mediation offers an effective and efficient alternative to litigation, as well as to determine whether and at what stage the court could or should encourage mediation. The results of the survey showed that 35% of those cases that settled after commencing litigation in the TCC used mediation. The vast majority were undertaken as a result of the parties' own initiative, with the parties also agreeing the identity of their mediator. From this survey, Gould et al (2009) also concluded that successful mediations were undertaken throughout the litigation timetable, and that cost savings attributed to successful mediations were also significant.

In South Africa, research into ADR in the construction industry includes Schindler's (1989) research into the role of mediation and arbitration as dispute resolution mechanisms in the construction industry and Barth's (1991) investigation into the suitability of arbitration as a dispute settling mechanism in the construction industry. Schindler's (1989) research focused on the awareness, experience, attitudes and perceptions of architects, engineers and contractors to mediation and arbitration. Schindler (1989) concluded that these participants did not have much experience in mediation and yet had negative attitudes and perceptions about the process. Barth (1991), in investigating the suitability of arbitration as a dispute settling mechanism in the construction industry, found that mediation was considered a more suitable dispute settling mechanism than litigation or arbitration by the industry participants (including attorneys). Watson (1996) analysed 44 different disputes with a view to establishing the effectiveness of the different dispute resolution processes utilised. Watson (1996) found that 85 % of the cases were resolved through the mediation process at a fraction of the cost and in a fraction of the time involved in a number of arbitrations on similar issues. Povey's (2005) survey of mediation practice in the South African construction industry was a notable addition to the empirical evidence, replicating much of the approaches in previous research for a different context. From the survey, Povey (2005) found that that the practice of mediation in the South African industry was not consistent with the accepted principles of the process, that mediators did not as a matter of course assist parties in determining their own settlement, and that mediation activities centred mainly on the collection of information on the dispute by the mediator, as well as the formulation of a solution by the mediator.

The respondents to the survey also revealed that mediators' knowledge and use of specific mediation process skills and techniques was inadequate.



A search of the literature did not produce any widely-based analysis of construction participants' opinions on mediation in Scotland. Research into the subject of mediation, as a dispute resolution mechanism for use in the construction industry has, received some attention in other common law or 'mixed' jurisdictions, such as England, South Africa, New Zealand and Australia.²⁰ Such research has generally aimed at establishing the perceptions, attitudes and experiences of industry participants towards mediation as an alternative dispute resolution mechanism. Therefore a methodology was developed to build an improved picture of the understanding of mediation in the Scottish construction context, and whether the process was being used or was at least being considered for use in the resolution of disputes. Figure 2 illustrates the process adopted to collect primary data.



3.1 Questionnaire survey

The first stage of the research involved a questionnaire. The aim of this aspect of the research was to explore the utility of mediation in the construction industry in Scotland. The objective was to elicit views, practises and experience of mediation techniques rather than an in-depth account of a limited number of randomly chosen case studies. The structure of the questionnaire was based on that originally developed by Clark (2007) to assess the attitudes of Scottish Lawyers to Commercial Mediation. We utilised Survey Monkey to gauge the views of participants relative to mediation.

3.1.1 Sample selection & size

The Scottish construction industry is large and disparate in nature, and one of the first issues for the research team to resolve was the need to focus the study. It was decided to limit the research to that area of the construction industry where dispute is perceived to be most prevalent. According to Kennedy (2006) the most frequent disputing parties in the UK are the main contractor v domestic sub-contractor, client v main contractor and client v sub-contractor. The main focus of this research was therefore on main and sub-contracting firms based in Scotland. We selected the member companies of the Scottish Building Federation (SBF). Using the SBF membership list had a further advantage, in that their support was elicited and this was to be used in order to encourage a better response rate.

3.1.2 Piloting of questionnaires

Once the questionnaires were designed, they were tested on two separate groups, in order to measure their effectiveness. The aim of the pilot test was to assess how long the questionnaires took to complete, to evaluate how the questions would be interpreted for meaning and, more generally, to ensure the clarity and efficacy of the questionnaire. A small sample of SBF firms provided us with assistance in the pilot study process. The respondents were told the questionnaire was a pre-test and the group were questioned about their understanding of the questionnaire and asked to comment on possible rephrasing or clarity of questions. Following the test, certain revisions were undertaken.

3.1.3 Survey response rate

In order to improve the overall response rate we developed and uploaded 2 questionnaires onto Survey Monkey; one for those companies and firms who had used mediation and the other to those who had never used it. The length of the questionnaire to be completed was thus shortened accordingly. It was anticipated that this would lead to a better response rate. The final response rate from the survey was 18%. This figure compares favourably with other online surveys more generally, and specifically ones relate to the construction context (see for example, Fenn and Gould 1994; Stipanowich and O'Neal 1995; Belson, 1986).

3.1.4 Questionnaire data analysis

When all the questionnaires were returned through Survey Monkey, we proceeded with the analysis of the questionnaire data. The statistical analysis of the 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.

Table 1 Position of Interviewees and Company Size

Interviewee	Position	Company Turnover
A	Director	£2m
B	Quantity Surveyor	£5m
C	Commercial Manager	£40m
D	Commercial Manager	£200m
E	Commercial Manager	£100m
F	Quantity Surveyor	£60m
G	Director	£1.5m
H	Director	£4m
I	Director	£50m

3.2 Qualitative research

Denizen and Lincoln (2002) provide that the qualitative research ‘involves an interpretive, naturalistic approach to the world’ and the qualitative researchers study things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them’. Holmes et al (2005) point out that qualitative research will be used if the researcher wants to understand a phenomena about which s/he knows very little of, or who s/he does not have a complete knowledge of a particular entity. In this sense, while our quantitative data sheds significant new light on construction mediation in Scotland, we are nonetheless aware of the limitations of survey findings. In an effort to produce “thicker descriptions”²¹ of salient issues relative to participants” interaction with construction mediation and explore in more depth some of the key themes emerging in the survey research, we intended to conduct a number of follow-up interviews with respondents to the survey. However, very few of the respondents expressed a willingness to be involved in the next stage of enquiry; therefore an alternative approach was required to yield a more appropriately sized sample frame. The technique involved the researchers asking personal contacts within the construction industry to name five ‘influential’ individuals with whom they ‘talked to the most about mediation’. The individuals identified were asked the same question, and so on, until no new names were identified. These contacts were informed as to the nature of the research and asked to consent to an interview, which would last about 1 hour, or to identify another person from their organisation, who would be prepared to assist in the research.’ Thus, the sampling was done with a ‘snowballing’ strategy. The sample frame comprised 9 participants. All the respondents were based in small, medium-sized or large organisations with turnover that ranged from £1.5million to over £200million in the year 2012 (see Table 1).

The semi-structured face-to-face interviews were undertaken from April to May 2012. An interview schedule was used as the basis for conducting the process. The schedule was based around core questions developed around the key findings from the quantitative analysis and on issues raised and observed by the participants. Whilst we are aware that the sample was 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. The qualitative phase of enquiry involved an interview with the each participant each lasting approximately 1 hour. All the interviews were recorded using a digital voice recorder and transcribed. Permission was sought from the participants to record the interviews. The audio files of all 9 interviews were transcribed for the purposes of data analysis.

The next section presents the results of the data analysis from the questionnaire and the participant interviews.

Section Four presents the results from the primary research. As discussed in Section Three, the research utilised a questionnaire to survey attitudes and experiences of mediation in construction disputes among construction participants in Scotland, together with face-to-face interviews to probe answers and encourage interviewees to elaborate on relevant points arising from the initial stage of enquiry. The overall research question was broken down into four main parts:

- to evaluate the effectiveness of prevailing construction dispute resolution methods in Scotland;
- to track the extent, nature and success of current mediation practice in construction matters in Scotland;
- to determine the willingness of Scottish construction participants to shift away from traditional approaches to dispute resolution to mediation; and
- if they are, to ascertain the drivers towards the adoption of mediatory techniques, and if not the barriers to change.

The data from the participant interviews is presented together with the questionnaire results to establish whether there was a convergence of the results from the different phases of enquiry, to ascertain whether the existence of overlaps of different facets of the same phenomenon emerged or indeed whether contradictions and fresh perspectives emerged from the responses of the participants to issues explored under the quantitative analysis, i.e. survey research.

4.1 Knowledge levels

The survey first sought to establish basic awareness levels of mediation throughout the Scottish construction industry base. Around 80% of respondents professed awareness of mediation. While this seems high, given the decades of publicity and promotion afforded to mediation, the finding that one in five respondents had apparently not heard of the process may be surprising. Our qualitative analysis indicated that of the 9 interviewees who mentioned factors inhibiting the use of mediation in the construction industry, many respondents highlighted the dearth of knowledge within the industry as a significant factor militating against the use of the process. As participants B & G stated respectively:

'It's not something I've come across [in practice]. A lot of people don't really recognise the mediation process, and how it could be beneficial to maintain relationships and things'. (Participant B)

'It's difficult to force people to go to some process of which they know little and in which they have little confidence; because they're ignorant they don't actually understand the benefits and the crucial benefit must be continued business relationships and creativity of solutions.' (Participant G)

Furthermore, we might speculate that a significant proportion of those who did not respond to the survey were also unaware of the process. It is also worth noting that although the survey research method did not allow us to ask respondents what they thought that mediation entailed, given that relatively few respondents had practical experience of mediation or felt able to comment on its merit and disadvantages, we might surmise that there is a general lack of any sophisticated appreciation of the process at the industry user level.²²

Those survey respondents that had awareness of mediation had reportedly gathered information on the process from a wide variety of sources including the press/media, professional bodies, lawyers, colleagues and mediation organisations.

4.2 Policies on mediation use

In contrast to the widespread mediation pledges made, for example, by public bodies, large commercial entities and Scottish law firms to make use of mediation in resolving disputes (Agapiou and Clark, 2011), only a small minority of survey respondents (19%) said that their firm had a policy or practice to consider mediation. A small number (13%) in fact had a policy or practice never to mediate, while in the main respondents had no firm policy or practice as regards mediation use. Such findings are perhaps not surprising given the limited experience that the bulk of respondents had with mediation and (as elaborated further below) the lack of embedding generally of the process in construction matters.

²² Interviewees generally espoused a sophisticated understanding of mediation, primarily drawn from their personal experiences of the process rather than educational exposure *per se*.

4.3 Training and education

In sharp contrast to the high levels of construction lawyers who, in our study of legal actors experiences and attitudes relative to construction mediation, had reportedly received training or education in mediation, our survey found that industry participants in the main (88%) had no such educational exposure to the process. Respondents representing contractors and subcontractors may emanate from a wide variety of professional and non-professional backgrounds and hence the limited reported exposure to educational exposure to mediation perhaps holds few surprises. Nonetheless, a smattering of survey respondents had received relevant training/education either at university/college or through external training courses. Albeit it should be noted that such exposure to mediation was often limited in nature. According to Participant F:

‘...I’ve done a couple of CPD things, although even after the CPD courses I still wasn’t clear on what [mediation] was, I would have questioned how legally binding a mediation was. I think that would be another thing that would have to be... obviously, mediation is legally binding, but I would suggest that this is something that people don’t realise about it’ (Participant F)

Another participant suggested that rather than training in the art of mediation what was required was the provision of available case study material to promote the costs and benefits of the process as compared to litigation and adjudication.

‘I don’t know if bigger contractors get involved in mediation, if maybe there was case studies (sic) about things like that in some of the industry magazines that people start picking up and reading... [suggesting that it will] only cost them x amount to go to mediation, or would have cost x amount of adjudication, relationships were maintained. Everybody might think, actually, why don’t we do that?’ (Participant B)

One of the participants suggested that there was a central role for professional construction institutions in the process of education and training. Participant H stated:

‘... the Corporation of Architects, the RICS, the CIOB, the Institute of Civil Engineers, all of these people don’t promote mediation the way they ought to; because I suspect they don’t understand the benefits of mediation. They just think that, as I say, the macho world of construction which has used arbitration, litigation and now adjudication as the natural route to go when you’ve got a grouse’ (Participant H)





4.4 Mediation experience

The first and most striking aspect of the survey is that the vast majority of respondents (around two thirds) had no direct experience of mediation. From our survey we tracked 37 cases in which mediation had taken place. The most common types of dispute mediation were change to scope of work and payment (both 11 cases). Other reported cases included delay, professional negligence and damages. In addition to being the most common case types cited, change to scope of work and payment were also considered by respondents to be the two most amenable dispute areas for mediation. In respect of why these areas were seen as more amenable than others, few interviewees viewed specifically that some dispute subjects by their nature comported better than others with mediation. Participant F suggested however that mediation could be more relevant for the 'grey areas' as opposed to 'black and white' issues where adjudication would be considered more appropriate:

'In black and white issues I would say that the quickest or easiest way to go is to go through adjudication, because at the end of the day there isn't an awful lot of room for compromise; it's either yes, or it's no. Mediation, I think, would be more relevant for the grey areas, perhaps measurement issues that aren't quite clear. Again, perhaps where there are contractual issues where, yes, there might be two interpretations, but people are prepared to compromise and there's somebody else to meet' (Participant F)

Despite the very modest levels of take up, in general the mediations that did occur, can be considered to have been a success. Settlement rates were respectable and generally in line with levels reported elsewhere. From the reported cases, some 24 settled (65%) with another 5 (14%) partially settling.

We were unable to record what later outcomes occurred in respect of cases that did not settle at mediation, but there exists significant anecdotal evidence in the field that mediations which are not successful often proceed to resolve shortly afterwards at an earlier juncture that would otherwise be the case.²³

Aside from positive results relative to settlement, parties also seemed generally satisfied with the mediation process, in terms of such factors as speed, cost, the mediator and outcomes produced, although the data discerned a small measure of dissatisfaction with the costs time involved in the process. In respect of speed some 80% were of survey respondents were satisfied (either always, often or sometimes) with mediation; 85% were satisfied with cost; some 93% satisfied with the process involved and 73% satisfied with the outcome. The survey findings here generally replicate the positive evidence gleaned in the Scottish construction field from our recent study of construction lawyers (Agapiou and Clark, 2011).

²³ The research by Gould *et al* (2010), p. 60 into construction mediation in England and Wales found that 25% of those surveyed who had been involved in mediation suggested that participation was a 'waste of money'. Nonetheless, some 40% of respondents involved in failed mediation cited benefits of having participated in the process, including improving mutual party understanding, narrowing of issues and partial settlement, leading to early resolution.

Interviewees provided further insights into potentially beneficial experiences within mediation: For example, one interviewee (H) recounted an experience in which for the first time in the duration of the dispute the decision maker in the opponent organisation had become aware of the particular circumstances of the dispute. Others pointed to the costs savings of mediation relative to mediation and the collaborative atmosphere that the process fostered.

Given reported concerns over mediation's lack of coercive power, when compared to formal adjudicated outcomes which may carry with them the full force of law (at least on a temporary basis), it is notable that the majority of agreements reached at mediation recorded in the survey research were reportedly complied with. This finding may be of little surprise given the growing evidence of durability of agreements reached in mediation in Scotland (see eg Ross and Bain, 2010; Samuel 2002 (high levels – 90% and 100% respectively – of mediated settlements recorded as adhered to without further enforcement action in the Sheriff Court Small Claims context). Evidence regarding the common adherence to mediated outcomes is often attributed to the fact that active participation in mediation by parties may lead to increased 'ownership' of settlements produced (McEwen and Maiman, 1984). Nonetheless, some interviewees sounded a cautionary note regarding the non-binding nature of mediation. For example, while acknowledging the benefits of the mediation process, particularly with respect to the cost savings involved, Participant E noted that *"[t]he only problem I see with it is it doesn't result in a legally binding agreement"*.

In terms of why parties mediated disputes, a whole range of reasons were cited in the survey research, which mirrored commonly painted advantages of the process, the most prevalent being saving costs and time, seeking continuation of the business relationship, finding a creative agreement, the low value of the dispute at hand and assessing the risk of continuing the dispute. The issue of costs was paramount in the views of Participant I who had been involved in a Planning dispute. In recalling his positive experience with mediation hesitated:

'Cost was really reasonable. I'm suddenly sounding like an advocate strongly of this, but I mean it was definitely cheaper than going down the planning appeal route, it definitely kept lawyers away from it. We didn't put in a planning application until we'd gone through this process, and met in the halfway house, that we knew we were going to get a result going forward. So it was really constructive, it was good. Initially it was a bigger lump of expense, a spike early on in the process than a normal project would have been; not in the long run. It saved us probably having an aborted project that would have cost £50-100,000, £150,000; or in some cases [potentially more through] appeals. It also saved on time. Again, a little bit like the planning system elsewhere, there's a lot of upfront preparation now; but over the timeline of the whole project it's supposed to

be shorter, and that was very much our experience here, because if it had gone wrong we'd have been back to square one a year later and then trying to redesign the thing in retrospect' (Participant I).

While there was some indication from the survey research that low value disputes comported better with mediation, interviewees did not universally share this view: one of the Participants (H) suggested that the value of a dispute should not necessarily be a key factor in the decision to use mediation. He stated:

'I think mediation is appropriate to any dispute...what I was trying to say to the lawyer was, if you're going to try and service your clients in the current market you have to be able to offer up that service. What I could do, because lawyers don't do joined up thinking and I've had some recent experience where they're really lacking and they've put themselves up on this pedestal falsely, is that I'll work with you, we'll agree a fail cost, I'll do most of the work. We'll fight your involvement, it'll be x per cent, if you've then got to be involved and right letters it will be y per cent. If we go to adjudication it's a fixed fee or a percentage of what, either the value we start with or the value we recover.' (Participant H)

Few survey respondents had declined offers to mediate their disputes, but for those that did, factors which dissuaded them from mediating including the costs of mediation itself, a belief in the strength of their legal case, the idea that negotiation could settle the matter and a jaundiced view that the other side would not mediate in good faith. Echoing this, failed mediations were typically blamed on the reluctance of opponents to compromise, with some evidence of tactical use and disputes having become too personal to settle amicably.²⁴ We discuss the barriers to mediation developments including lawyer and industry ignorance and intransigence towards the process, below.

4.5 Attitudes on mediation

Survey respondents were asked to respond to a number of statements about mediation on a scale ranging from strongly agree to strongly disagree. Many respondents particularly those with no direct experience of the process, felt unable to offer such views. Nonetheless 25 respondents (40%) provided their perspectives on a range of key policy and practice issues surrounding mediation. Some of the main findings in this respect as well as interview responses are discussed here.

Despite more recorded ambivalence on this issue from our research into Scottish construction lawyers (Agapiou and Clark 2011), the vast majority of those industry participants that responded to the survey were in favour of some sort of institutional pushing of mediation to put wind in its sails. For example, 76% strongly or somewhat agreed that judges should refer more cases to mediation. Similarly, 76% survey respondents strongly or somewhat agreed that rendering mediation a mandatory first step in court litigation procedures was an attractive proposition.

This finding was echoed by a point made by one of the participants during Interview:

'I think we have to get it into the court system. We have to get the judges and the lawyers, and we have to get into the law schools. The law schools need to focus more on alternatives rather than just the aggressive legal path every single time. I think we need to win over judges. Some of the big hitters in terms of judges have gone over to become mediators which must speak volumes. And of course it takes money, and we're in very straitened times right now, so there needs to be some speculation to actually get the thing off and running. And I think it'll be evidence, eventually'
(Participant D)

Some 71% of survey respondents also favoured the widespread use of mediation clauses in contracts. On his latter issue, there was a general consensus among the interview participants for the inclusion of specific mediation clauses in standard construction contracts. Participant B, for example, stated:

'I think in the NEC3 contract you could insert a mediation agreement and outline how it would be done, who would do it, and I think that would be good'
(Participant B)

Although it is true that mediation provisions can already be found in some standard terms contracts, another one of the participants (F) suggested that current contractual arrangements for recourse to mediation as a mechanism to resolve disputes, which are typically non-binding in nature, were not favourable. He stated:

'I think, in some contracts that we sign up to, there are partnering agreements which, for want of a better phrase, aren't worth the paper they're written on. They sometimes have mediation sections within them, but again, as I say, they're not binding. So, if anything, I think that detracts from mediation, because essentially it's all part of this separate arrangement that can't be enforced, anyway'
(Participant F)

Echoing this view, many other interviewees referred to the fact that such provisions exist but are generally not adhered to in practice.

While the survey findings above broadly favouring mandatory referral to mediation may at first blush seem surprising, it needs to be remembered that a compulsory form of extra-judicial forms of dispute resolution (adjudication) is already prevalent within the construction field. Moves towards compulsory referral to mediation, either through contractual embedding or court promotion, also chime with recently expressed views that mandating the process may be necessary to expedite the use of mediation, at least at the outset until levels of acceptance thereto increase and evoke cultural acceptance of the process (Peters 2010; Clark 2012, chapter 5).

Generally speaking the senior judiciary in Scotland (save in the employment sphere, where there exists a recently established judicial mediation scheme in employment tribunals²⁵) has done little to suggest an appetite for more robust court promotion of the mediation (see Clark 2008), although it remains to be seen whether the current Scottish government's long awaited legislative response to the recent Gill review into civil justice (Gill 2009) will enhance the prospects of increased court initiation of the process taking place. It is worth noting that interview respondents were more reticent in expressing views regarding the desirability of compulsory recourse to mediation through court rules. This group, who arguably held a more sophisticated appreciation than the survey sample as a whole, focused to a greater extent on the need to grow mediation from the bottom-up through educational endeavours in the industry and throughout the legal profession.

4.5.1 Mediators and mediation style

In terms of who should mediate disputes the survey respondents were clear. Very few – a mere 4% – felt that lawyers made the best mediators, with a whopping 88% stating that in their view those with industry experience as construction professionals were preferred.²⁶ One of the participants expressed this point very succinctly when asked what skills mediators should possess. Participant A stated:

'To be sitting in the meeting and to be making decisions, and be able to refer to the contract or the act, you have to know these things off the top of your head almost. You definitely need construction knowledge, yes'.
(Participant A)

Such matters tie into the longstanding debate regarding the identity of the rightful inheritors of the mediator's crown. While there is significant debate surrounding whether lawyers are the most appropriate professionals to act as mediators (Clark 2012, chapter 4), whether subject matter expertise in the area of dispute is an essential tool in the mediator's kit bag is also a moot issue. True facilitative mediators would argue that subject expertise is irrelevant and that core mediation skills, attributes and experience were the most important factors. 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 may be able to bring industry norms and technical know-how into the mix.

Survey respondents also seemed to favour more directive or evaluative styles of mediation that is contemplated by the general, facilitative mediation discourse in the UK. Some 46% of survey respondents viewed that mediators should offer their own opinions on the merits of the dispute at hand. The debate over whether such activities are appropriate for mediators is a keenly fought one. Mediation purists have attacked the practice on a number of grounds. It has in particular been argued that such desires on behalf of clients may emanate from a misunderstanding of the mediation process and particularly a lack of knowledge as to what facilitative mediation may deliver (for a review of these debates see Clark (2012), para 4.3.6).

Given that many of the survey respondents had little experience of mediation it might be speculated that such views represent a naivety about what facilitative mediation can deliver in practice. It is also notable that our survey respondents did not generally discuss the importance of evaluative techniques in the context of their mediation experiences, but rather focused on mediatory process elements, party dialogue and conciliatory aspects of the process. Nonetheless we are aware that at least one industry mediation provider, Catalyst Mediation, has introduced an explicitly evaluative mediation option, in response to perceived market demand.

4.5.2 Mediation and other forms of dispute resolution

With regard to other means of resolving construction disputes, a mixed bag of responses was revealed. Despite the recent push to re-launch Scotland as a centre for arbitration excellence, few survey respondents (20%) thought the process well suited to the resolution of construction disputes. Litigation fared even worse with only 12% of respondents viewing that it passed muster. This somewhat jaundiced view of traditional forms of dispute resolution was shared by our respondents to our survey of Scottish construction lawyers, albeit that the lawyers were more dismissive of arbitration than litigation (Agapiou and Clark, 2011). Adjudication, the default process of dispute resolution in many standard contracts, which attracted high levels of praise in our recent survey of construction lawyers (Agapiou and Clark, 2011, with some 84% stating that the process was well suited to the resolution of construction disputes), did not so fare particularly well with our client respondents with only 25% viewing it in a similar positive light to the lawyers. At first glance, this seems a striking contradiction between the attitudes of clients and their lawyers relative to the process

Interviewee H focused on the poor standards of practice in the area: *"more and more...people are going down the route of adjudication and coming out very disappointed because the quality of adjudicators is very poor in Scotland. There's only one or two... reasonable adjudicators"* He was also negative about the costs involved in adjudication:

"[y]ou cannot determine what your costs are going to be, so it's an extremely high risk line to take in any dispute". Another interviewee (Participant E) recalled the high hidden costs involved in traditional dispute resolution pathways culminating in an adjudication, expressing the view that even in a winning case, the victor may only "break even". Respondent A noted soberly that *"you wouldn't entertain [adjudication] at less than £50K... because you spend up to that figure fighting it"*

The ability of one side to 'highjack' the other through the process and the adversarial nature of adjudication was also identified as being problematic. For example, Respondent I viewed that adjudication could be *"quite aggressive [with] no coming together of both sides... then they'll either be a great sigh of relief or a great spitting of the dummy if we didn't like the outcome."* Another interviewee (Respondent B) bemoaned the paper-based format of much adjudication: *"the fact that [adjudicators] don't always require a meeting is a bit worrying... sometimes a dispute is so intricate, to not be able to sit down face-to-face and explain the problems you have got, and why you think you're right to someone, I think that's a major failing of adjudication"*

Obviously the current work represents a first foray into the field and the findings must be viewed with caution. Nonetheless, this negative general appraisal of adjudication we detected chimes with recently voiced judicial concerns (Macob Civil Engineering Ltd v. Morrison Construction Ltd²⁷; William Verry (Glazing Systems) Ltd v. Furlong Homes Ltd²⁸) about the unsuitability of the process for handling more complex matters and anecdotal tales of poor quality adjudicators. A significant number of survey respondents (47%) – and something largely confirmed in interview responses – did view however that the prominent place enjoyed by adjudication in the construction dispute resolution landscape blocked out scope for increased mediation use. The unestablished nature of mediation both within the industry generally and large sections of legal practice may perhaps thus mean that it often simply fails to comport with the general *modus operandi* of clients and their lawyers in terms of dispute resolution pathways. It would be wrong to suggest that adjudication is not without its merits, however and many interview participants recognised that the process did at times meet client expectations and in particular, was often seen to be favourable given the binding (temporarily at least²⁹) nature of the process and the guarantee of it producing a decision. One interviewee also noted the merit of the mere presence of adjudication. In his experience, by dint of adjudication's presence as a contractual inclusion, parties in dispute would often be drawn around the table to agree to settle the dispute at hand (Respondent F) to avoid recourse thereto.

4.5.3 Ignorance and cultural barriers

In terms of other barriers to mediation's growth, survey respondents saw both a lack of awareness of mediation (63% strongly agreed or somewhat agreed) and a negative perception of the process (50% strongly agreed or somewhat agreed) existing within the construction industry as stifling mediation's promise. Interestingly they suggested that construction lawyers similarly may act as roadblocks to mediation's journey in the construction sector in view of their ignorance of the process (43%) and negative perceptions of it (42%). Although the possibility of socially desired responses cannot be ruled out, survey respondents were generally keen to play down, however, any notion that the supposed macho, adversarial environment of the Scottish construction sector militated against a role for mediation therein at least in this sense, only 16% of respondents agreed with the statement that *"If I participated in mediation more often my standing amongst colleagues would suffer"*. It should be noted that mere disagreement with this statement does not necessarily mean that cultural prejudices to mediation are not alive and well in the Scottish construction sector. Such views are elaborated below.

It may be difficult to establish exactly the extent that lawyer intransigence to the process has acted as a barrier to mediation or successful outcomes therein but evidence of some element of this certainly exists. Certainly there is substantial evidence generally of lawyer resistance towards, and cultural barriers towards mediation within legal circles globally and across different dispute areas (Clark 2012, chap. 2).

In terms of the current work, it is notable that some 40% of survey respondents revealed that they had received advice from their lawyers on occasion not to mediate. Interviewees in the current study often waxed lyrical on the negative impact that lawyers sometimes held for the development of construction mediation in Scotland. Emphasising the important roles that lawyers play in legitimising potential courses of action in dispute resolution, Participant D suggested that lawyers were somewhat cynical in their views of mediation, while others suggested that its use would be counter to the lawyer's best interests at least from a financial point of view:

'Lawyers 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...' (Participant D)

In response to the view expressed by lawyers that clients do not seek mediation, respondent A noted

"[i]ts 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. The lawyer never starts to say, could we please mediate over this issue? I can see why a lawyer would do that, because if it's mediation he writes a few letters in and that's his part done, really. So he's not going to want to do himself out of business, and I think that's a bad thing that subcontractors are very easily led by what their lawyer says'. (Participant A)

It was also suggested that in a cultural sense lawyers may feel uncomfortable within the mediation environment. Participant G noted that in the context of arbitration, *"lawyers who are representing the parties really wanted to be in the sheriff court, that's the truth of the matter because it is their home turf, they know the rules... They are indoctrinated by litigation"*

Some participants suggested that while lawyers were indeed often averse to mediation, the construction industry was equally adversarial in nature and somewhat reluctant to resolving disputes amicably. Participant E stated:

'I suspect they're not selling it to clients because... it's maybe seen as an admission of a weak position and lawyers never like that; you never admit liability, and they'll push it to the doors of the court rather than stay back and say look, this is ridiculous. So, the culture in lawyers has to be changed; but the whole culture of construction has to be changed as well. As I say, it is so macho, it's a fight them, beat them into the ground type industry and always has been and you might be able to get, as I used to say about darts, you might be able to get the darts out of the pub, but you'll never get the pub out of the players and it's going to take two or three generations and maybe the NEC contract is helping because it is allegedly less adversarial... The counter argument is that the contract has got bought off before it gets to disputes because the compensation events are terrible in my view but there's a generational thing, I really think there's a generational thing' (Participant E)

These sentiments were echoed by another Participant who characterised the industry culture as macho, adversarial and litigious. Participant F stated:

'It is seen as a sign of weakness in Scotland, in particular. There's nothing actually forcing people to go down that route. It's recommended and industry professionals and leaders often are quoted in the press or the trade journals saying, 'This is what we should be doing,' et cetera. But when it comes to the reality of that, people don't seem to have the same approach. I think there is, as we were talking earlier, there is a sort of machismo about the industry, here in particular, and an actually quite litigious environment when disputes are there' (Participant F).

The above comments suggest that an adversarial climate within the construction legal profession as well as within the industry itself is currently acting as a roadblock to mediation's development in the field. While it is understood that most disputes can be nipped in the bud at an early stage and settled by negotiation, there seems to be a proclivity from both lawyers and industry participants to take the view that if negotiations falter the next step to take is to enter into some form of adversarial dispute resolution process. Two points can be made here: first, standard negotiations, even where successful in terms of brokering an outcome, may often be wasteful, inefficient and in themselves needlessly adversarial (Menkel-Meadow, 1993: 363); secondly, the notion that simply because negotiations have failed should mean that mediation would be doomed to fail, is misguided. For example, where negotiation has failed, the intervention of a mediator to the dispute resolution process may effectively overcome certain heuristic biases of parties and their lawyers which can scupper bilateral negotiations. In this sense, lawyers involved in direct negotiations may engage in 'reactive devaluation', discounting offers made by their opponents and indulging their 'messianic certainties', taking an overly optimistic view of the merits and risks inherent in their own case.³⁰ Such unbridled optimism may fuel unrealistic posturing in settlement discussions.³¹ As Carrie Menkel Meadow (2000) has noted, "[d]istortions in thinking like reactive evaluation, availability, recency, primacy, loss and risk aversion, as well as overconfidence and labelling theory tell us that adversarial processes (and much legal reasoning) may actually impede good decision making by limiting what we can hear from the other side and how we can process important information... Mediators who are neutral offerors of proposals and information can correct reactive evaluation and reduce waste in informational distortions."³² Mediators may also help lawyers to deflate their own clients' over-optimistic, dogmatic positions (something that lawyers themselves may have difficulty achieving given their status as client 'champions').³³

5.0 Conclusions

This is a modest study and a first foray into the views and experiences of Scottish construction industry participants relative to mediation. Further research is required to shed more significant light on the findings unearthed here. In short, however, we can note that at the industry user level, and in respect of smaller firms at least, mediation may remain largely unnoticed, its potential unrealised. Take up is low and sophisticated awareness of the process and the benefits it can reap for participants scant. Much effort thus far in Scotland and across the UK has been expended selling mediation to lawyers through educational drives, conferences, seminars and training. Such endeavours targeting undoubted key players in mediation's development are useful and continuing evidence of the same can be seen, for example, through the recent Law Society of Scotland's, 'Embedding ADR in Civil Justice'³⁴ conference and associated drives by the Society to promote the process. While lawyers may often act as gatekeepers to dispute resolution methods by dint of their traditional dominance in the lawyer-client relationship, recent evidence suggests that clients may be increasingly wresting control back from their legal advisors in such matters (Clark, 2012, chap. 2) and thus direct selling of mediation to the client base may be of increasing importance to help inform their dispute settlement deliberations. Our research suggests that much more needs to be done on the ground in repeating and escalating such efforts for the client base. Levels of exposure of mediation to the client base seems low in terms of its presence in educational and training measures and dissemination throughout professional networks. Resistance to the process and lack of any sophisticated awareness of its merits may be stifling mediation's growth in the construction area at this time. Something within the culture of disputing practices in the Scottish construction industry must change before mediation will gain a more secure foothold.

There are downsides to mediation. Its non-binding nature and lack of coercive power may be challenging for parties in dispute to accept, particularly when set against the time honoured and relative finality of adjudication proceedings. Quality concerns may also continue to exist in Scotland with regard to mediation practice, particularly given the small pool of specialist construction mediators currently available in Scotland and the lack of any formal Authorised Nominating Bodies for mediators. In line with evidence worldwide, however, as our study suggests, when parties do try mediation, they generally enjoy it and often settle their cases. Much research has also suggested that parties (clients and their lawyers) often become repeat players in the process and champions for its cause. Interviewees in the current study in particular presented generally upbeat testimonials to mediation's promise and spoke cogently about the potential qualitative benefits of the process. Crossing the Rubicon is the hard part, however and clearly many potential users remain on the traditional river banks looking in.

Key institutional scaffolding that may help to expedite use of mediation in the Scottish construction sector such as court promotion, professional rules mandating discussion and consideration of the process and contractual embedding remain largely absent in Scotland. There remains much ambivalence from legal professional in Scotland (and the mediation community itself for that matter) regarding the extent that participation in mediation should be any sense propelled through judicial arm twisting or other coercive measures (Clark and Dawson, 2007; Agapiou and Clark, 2011). Nonetheless our survey results suggest that the appetite for stiffer measures to drag parties into the mediation process is more keenly felt amongst the client base than in legal circles, at least for those participants who have had successful experiences within the process. Other measures to help expedite the process may include the establishment of a distinct 'Scottish' Technology & Construction Court, following on the model in England & Wales to support court-annexed mediation. A fuller embedding of mediation in standard forms of contract was also strongly supported by participants to the study. Many noted that while it does appear in some contractual models, culturally the norm is to ignore the provision in favour of more tried and tested modes of dispute resolution. In this latter sense it is evident that bottom up as well as top down approaches are required to effect real cultural change.. 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. Our quantitative and qualitative findings strongly suggest that the lack of awareness, understanding and experience of mediation in the Scottish Construction Industry can be overcome by educating and training, and by involving government, professional institutions and specialist bodies such as CEDR, Core Mediation and Catalyst Mediation in the promotion of the process to all stakeholders within the construction context. There is a role for bodies such as RICS in this regard through its training and CPD provisions to help propagate the mediation message to its 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 revealed very powerful messages in this regard which may resonate with industry peers.

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RICS HQ

Parliament Square
London SW1P 3AD
United Kingdom

Worldwide media enquiries:

e pressoffice@rics.org

Contact Centre:

e contactrics@rics.org
t +44 (0)870 333 1600
f +44 (0)20 7334 3811

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Europe
(excluding United Kingdom and Ireland)
Rue Ducale 67
1000 Brussels
Belgium
t +32 2 733 10 19
f +32 2 742 97 48
ricseurope@rics.org

United Kingdom
Parliament Square
London SW1P 3AD
United Kingdom
t +44 (0)870 333 1600
f +44 (0)207 334 3811
contactrics@rics.org

Oceania
Suite 2, Level 16
1 Castlereagh Street
Sydney, NSW 2000
Australia
t +61 2 9216 2333
f +61 2 9232 5591
info@rics.org.au

Asia
Room 2203
Hopewell Centre
183 Queen's Road East
Wanchai
Hong Kong
t +852 2537 7117
f +852 2537 2756
ricsasia@rics.org

Africa
PO Box 3400
Witkoppen 2068
South Africa
t +27 11 467 2857
f +27 86 514 0655
ricsafrica@rics.org

Middle East
Office G14, Block 3
Knowledge Village
Dubai
United Arab Emirates
t +971 4 375 3074
f +971 4 427 2498
ricsmenea@rics.org

Americas
One Grand Central Place
60 East 42nd Street
Suite 2810
New York 10165 – 2810
USA
t +1 212 847 7400
f +1 212 682 1295
ricsamericas@rics.org

Ireland
38 Merrion Square
Dublin 2
Ireland
t +353 1 644 5500
f +353 1 661 1797
ricsireland@rics.org

India
48 & 49 Centrum Plaza
Sector Road
Sector 53, Gurgaon – 122002
India
t +91 124 459 5400
f +91 124 459 5402
ricsindia@rics.org