**Article title: Mediation in construction disputes in England**

Jackie Gregory-Stevens a: Ian Frameb and Christian Henjewelec

**Author Details**

Author a Name: Jackie Gregory-Stevens; FRICS, ACIArb, CEnv

Department: Engineering and the Built Environment

University/Institution: Faculty of Science and Technology; Anglia Ruskin University

Town/City: Chelmsford

Country: UK

Author b Name: Dr Ian Frame, ProfDoc, PGcert, MSc, BSc

Department: Engineering and the Built Environment

University/Institution: Faculty of Science and Technology; Anglia Ruskin University

Town/City: Chelmsford

Country: UK

Author c Name: Christian Henjewele, PhD, PGcert, MSc, BSc

Department: Engineering and the Built Environment

University/Institution: Faculty of Science and Technology; Anglia Ruskin University

Town/City: Chelmsford

Country: UK

**Corresponding author:** Jackie Gregory-Stevens

**Corresponding Author’s Email:** Jackie.Gregorystevens@googlemail.com

*Please check this box if you do not wish your email address to be published*

**Acknowledgments (if applicable):**

**** Babcock International Group

**Abstract**

**Purpose**

Adjudication was introduced to the English Construction Industry in 1996 in response to its litigious nature. At the time adjudication aimed to provide a time-efficient, cost-effective solution to construction disputes. The industry is concerned that adjudication is not always providing the expected benefits due to increasing cost, the length of time it takes to resolve disputes and the difficulty in maintaining good relationships between the parties in dispute. Mediation is recommended here as a most desirable approach to resolving disputes without affecting the relationship between the parties. However, the benefits of mediation have not been fully appreciated by all due to slow uptake.

**Methods**

This paper presents results from a study that investigated issues preventing greater use of mediation. The study involved 20 case studies of previous dispute resolutions, 10 in-depth interviews and 357 responses to a structured questionnaire survey involving the English construction industry.

**Findings**

The research found a limited detailed awareness of mediation within the English construction industry due to a lack of detailed knowledge among industrial stakeholders and a lack of emphasis from construction contracts. The study revealed that there is strong support for adjudication; however the majority of those with experience of adjudication would prefer to use mediation as the first step in resolving disputes.

**Originality**

This research identifies the support required for mediation and its preference among those with and without prior knowledge of both adjudication and mediation for the English construction industry. The paper provides an insight into barriers that need to be addressed to increase use of mediation.

## Introduction

Disputes in the English construction industry have been the subject of a number of Government reviews in an attempt to reduce both the issues that cause the disputes, and offer a cost effective, time efficient solution to resolve these disputes should they arise (Richbell, 2008:1; Latham, 1994:.87). It is estimated that disputes cost the construction industry 2% of the annual turnover (Richbell, 2008:1) and this is significant when compared to a profit margin of only 3% per annum.

Prior to the enactment of The Housing Grants (Construction and Regeneration) Act 1996 (HGCRA), the only options for the resolution of disputes to the industry were arbitration or the courts. The introduction of adjudication to the construction industry through the HGCRA was of significant help, enabling disputes to be resolved as the projects progressed without a serious effect on the cash flow. The intention for single issue disputes to be resolved during the contract, thereby releasing monies worked well, allowing the major disputes to be referred to arbitration or court after the works were complete. Adjudication was the first step towards a cost effective, timely dispute resolution process as acknowledged by the latest adjudication research data report by Trushell et al (2012).

Adjudication, which is promoted by the HGCRA, does not fully meet the needs and expectations of this litigious industry particularly due to the escalating costs of the process and also results in poor relationships among the disputing parties (Mason and Sharratt, 2013). On one hand, it precluded subcontractors from commencing arbitration until the project is complete. Whilst on the other hand the process is lengthy and often cost prohibitive. The industry and some of those using adjudication and even adjudicators themselves began questioning the effectiveness of adjudication (Redmond 2005; Bingham 2009; Redmond 2009; Minogue 2010). For example, Minogue (2010) questioned what has happened to adjudication, arguing that:

“*It has now adopted all of the hallmarks of a “mini litigation”… 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*”.

With this disappointment, Minogue (2010) goes further to advocate the banning of lawyers from adjudication, but the opportunity for this, she argues, has long since passed. Redmond (2009) reaffirms the concerns claiming 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”.

There are concerns that the HGCRA does not reduce construction disputes nor significantly lowers the cost of dispute resolution any longer – instead, it could be argued that, it does more to benefit the legal professionals. Mediation has therefore been championed as an alternative, supplement or precedent to adjudication (Gregory-Stevens et al, 2010). This follows on from the successful use of Mediation in the USA to resolve construction disputes. According to Burger (1982), Mediation in the USA has provided a cost effective dispute resolution since the early 1980s, and construction has experienced continued significant growth. Hensler (2003) reports that following the implementation of the court ADR schemes, it is estimated that nearly all federal courts and over half of state courts have provided access to mediation. As the use of mediation has grown, so the lawyers have become more exposed to the process, raising awareness of its benefits.

However, despite the support for mediation from those involved in the construction industry and seemingly from the major construction companies in England, there is still extremely low use of mediation against the other dispute resolution processes such as adjudication. This paper uses existing literature and data collected in England to identify some of the key issues on the apparent reluctance to use mediation in place of, primarily, adjudication.

To start with, the paper presents a summary of previous studies that have explored the various aspects of construction disputes to bring to light the extent and use of alternative dispute resolution methods. The second part the paper describes how primary data was collected from a selected population. Subsequently the paper presents a detailed analysis into the use of both adjudication and mediation and examines the factors that hinder the adoption of mediation as the first course of action in the English construction industry. The analysis leads to a discussion on what could be achieved to resolve the problems identified, and based on the findings, conclusions and recommendations are made.

## Mediation: policy and practices

Many construction projects (both building and civil engineering) are exceptionally complex, both in conception and delivery. There are a large number of parties involved in each project, often with a similar number of separate contracts and contractual relationships. The complexity of contractual relationships is often cited as being contributory to the adversarial nature of the construction industry (Murdoch and Hughes, 1992:1). It is also important to note that simple projects also frequently give rise to disputes. Existing empirical research (e.g. a study by Gould, 2009) confirms, however, that mediation is a successful process for delivering a cost effective, time efficient settlement to construction disputes. Despite this, usage is still low compared to adjudication.

Mediation is recognized as an important alternate form of dispute resolution for all types of disputes (Jackson, 2010) including construction disputes in England and other countries (Brooker and Wilkinson, 2010 and Stipanowich, 1996). Whilst the UK takes the credit of being the only country in the world to impose legislation to ensure the construction supply chain receives prompt payment to reduce pay-related disputes, there still continues to be a lack of use of the mediation process to resolve its construction disputes, particularly in England. It would appear that raising awareness of mediation has not been sufficient. Raising awareness also needs to be coupled with an understanding of the process, the benefits it can deliver and an increased accessibility to mediation. Mediation would appear to require the contractual support that adjudication currently enjoys with more robust clauses within the standard forms of construction contracts, encouraging parties to the dispute to engage in mediation prior to the default of adjudication. It is encouraging, however, that the major contractors and construction professionals appear to be willing to engage with mediation. This research would indicate that the requirement is to educate the supply chain in the detail of mediation. This is particularly important for main contractors, who hold a significant stake in a dispute from its rise to the methods of resolving it. Trushell et al (2012) present some interesting statistic on how UK’s construction disputes are distributed among the parties - as illustrated in figure 1. The statistics show that most disputes are between subcontractors and their main contractors (38%) and between employers and their main Contractors (35%). Taken together, these two categories account for over 70% of all disputes.



Figure 1: breakdown of construction by parties involved (based on Trushell et al, 2014)

Whilst there is a plethora of recent studies (Stipanowich, 1996; Thomson, 2001; Booker, 2007; Agapiou, 2011; Agapiou and Clark, 2012) to evidence that mediation is the right course of action for construction disputes, only a limited amount of studies exists into the actual use of mediation in England and barriers hitherto. For example in the USA, existing research (Stipanowich, 1996, Thomson, 2001) demonstrates that mediation can be used successfully to resolve disputes in construction and reports the survey by the American Bar Association which shows that members of the US Construction Forum have participated in between 10,000 and 15,000 mediations. In a more recent study in the USA, Fullerton (2005: 54 cited in Brooker, 2007) presents statistics from the national survey by Deloitte & Touche which illustrated that over 66% of contractors in the USA have used mediation.

In the UK, current information into the use of mediation is examined by three studies. The study by Gould (2009), which is UK-wide, focused on those cases reaching the Technology and Construction Courts, while the other two studies (Agapiou and Clark, 2012) and (Agapiou, 2011) considers the use of mediation in Scotland. None of these studies looked across all sectors of the construction industry in England, nor specifically explained why mediation is not more widely used in England. Gould’s (2009) study into those cases reaching the Technology and Construction Courts has shown that mediation could successfully be applied in England. The study showed that 90% of cases were settled before they reached court - thereby confirming that significant cost could be saved through the reduction in legal fees incurred by proceeding to court (Gould, 2009:6-7). The study also showed that in the cases where mediation did not settle the dispute, it was still often regarded as being beneficial, allowing an element of the dispute to be settled, or developing a greater understanding of the other party’s case.

The study by Agapiou and Clark (2011) has looked into the attitude of Scottish lawyers towards the use of mediation. Although the research concluded that there were hesitations from some lawyers to recommend mediation to their clients based on perceptions of reluctance from clients to engage in the process, the findings were generally supportive of mediation. For example, the study showed that 58% of lawyers had used mediation with a relatively high level of repeat usage from that group, indicating that once exposed to mediation on one occasion lawyers were likely to return to the process (Agapiou and Clark, 2011:165). The study further showed that the rate of settlement was 74%, increasing to 83% for partially settled cases. More interestingly, those who had experienced mediation strongly recommended that a judge should refer more cases to mediation and greater inclusion of robust mediation clauses in standard construction contracts (Agapiou and Clark, 2012:19). This closely agrees with the Civil Procedure Rules which clearly stipulates that cases should attempt meditation prior to litigation (Jackson, 2010).

## Data collection

Data for the analysis of the research presented here was collected in three main stages to reduce the subjectivity of the study. The first stage was the review 20 case studies to understand the primary issues involved in construction disputes. The case studies that were reviewed were documented disputes resolved through adjudication and mediation, each with 10 recent cases. Case studies were a useful source of initial insightful data (Yin, 2009; Cohen et al, 2000), which was then used to inform the second stage.

The second stage comprised of 10 in-depth Interviews with a range of professionals involved in disputes, to address the limited access to the confidential data from both the adjudication and mediation processes and to explore personal experiences of these professionals involved in dispute resolution. Participation was voluntary and included a cross section of construction industry stakeholders:

* Two participants from major contactors (from the UK top ten)
* Two regional contractors,
* Four sub-contractors,
* One client and
* One construction professional.

The interviews were structured, following a set list of questions with an open-ended question at the end to allow the interviewee to comment on any issues that they perceived with the use of adjudication and mediation in the construction environment. The transcripts from these interviews were analysed and coded using pattern matching logic as recommended by Yin (2014).

The third stage deployed a questionnaire survey to collect quantitative data from a larger sample of construction stakeholders. Its main aims were to validate the information gathered through interviews and case studies and capture the industry’s perception on dispute resolution and mediation. The design of the questionnaire considered the confidential nature of the information on disputes and therefore attitude scales was the preferred option for descriptive data (Oppenheim, 1992).

As this was an online survey, it was difficult to accurately anticipate the nature of respondents and the sample size – therefore the research was likely to lose control over the responses. The random sampling strategy had its problems (e.g. lack of control on who responds and getting the right professionals to represents stakeholders) but had obvious advantages of reducing selection biases. To optimise representation of all stakeholder groups (including in this case construction clients, consultants, main contractors, subcontractors, specialist subcontractors and the whole the supply chain); the survey was administered through websites subscribed to by both target professionals and stakeholder groups. A careful sampling strategy was considered to include representative groups from across all sections of the construction industry. For a balanced representation of all stakeholder groups, a desirable sample was sought to include representatives from each group as follows:

* Construction clients both public bodies and private sector companies
* Consultants, including design professional and project managers
* Main contractors both SMEs (turnover of less than £50million) and major or principal contractors with a turnover in excess of £50million)
* Subcontractors, including specialist subcontractors and suppliers

The survey instrument had 13 main questions drawn from the findings from the case studies and interviews, to test the primary barriers to greater use of mediation that were being indicated by these early results. The questionnaire was administered online via Survey Monkey® between June 2012 and January 2013. An invitation to participate in the online questionnaire survey was circulated through industry contacts, including five professional organisations (such as the RICS, RIBA and ICE), five local authorities (through the Local Government Association and other contacts) and several trade organisations (including the National Federation of Builders; Civil Engineering Contractors Association and the UK Contractors Group) as well as those attending trade association seminars. Memberships in these groups were in excess of 3000 – which was the target sample size. This was to ensure that a wide range of stakeholders of construction disputes would access the survey to optimise the return rate and its representativeness.

## Analysis and Findings

Following several reminders sent to respondents, the online survey was closed down after the set cut-off date. Whilst 368 professionals began the survey, 357 anonymous participants returned completed and usable questionnaires for analysis.11 incomplete questionnaires or those that contained spurious data (e.g. a respondent who claimed to have done 258 mediations) were excluded from the analysis. The response represents a return rate of 12% compared to the desirable sample size of 3000. The response rate was considered adequate for the purpose of this study, and it was representative of all stakeholder groups. The 12% response rate indicates the perceived importance of this study to the respondents. The returned questionnaires were then analysed utilising a statistical package SPSS version 20.

### Participation composition

The survey collected data from a range of stakeholders across the construction industry*,* representing all key parties who are likely to become involved in construction disputes. As shown in table 1,357 analysable responses were received, of which 36% were contractors (classified by turnover into major contractor with a turnover of £50m or more per annum and principle contractors with turnover unto £50m per annum), 49% were sub-contractors (including general subcontractors, specialist contractors and suppliers), 8% were clients (local authorities and private sector clients), and 8% were consultants (Designers and other professionals). The breakdown of the responses show that construction stakeholders (clients, contractors and their respective supply chains) of various sizes were represented in the survey. The overrepresentation of contractors and subcontractors was considered beneficial to the purpose of this survey as they are the parties who are most likely to raise a dispute and decide on the course of action.

Table 1: Breakdown of responses by stakeholder group and turnover

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Stakeholder group** | total | Annual Turnover £(’000,0000’) | | | | | |
| <0.3 | 0.3 - 1 | 1.0-5.0 | 5.0-10.0 | £10.0-50.0 | >50.0 |
| Local authority | 2 | 0 | 0 | 0 | 0 | 0 | 2 |
| Client other | 26 | 0 | 9 | 2 | 3 | 7 | 5 |
| Design/professionals | 27 | 11 | 7 | 3 | 5 | 1 | 0 |
| Principal Contractors | 12 | 0 | 0 | 0 | 0 | 0 | 12 |
| Main contractors | 115 | 0 | 0 | 4 | 46 | 65 | 0 |
| Subcontractors | 133 | 20 | 78 | 26 | 5 | 4 | 0 |
| Specialist subcontractors | 38 | 9 | 19 | 10 | 0 | 0 | 0 |
| Other (suppliers/logistics) | 4 | 1 | 2 | 0 | 0 | 0 | 1 |
| **Total** | **357** | **41** | **115** | **45** | **59** | **77** | **20** |

### Previous use of adjudication

To determine extent to which key stakeholders were involved in the adjudication process, respondents were asked to indicate if their organisations were previously involved in adjudication. Table 2 summarises previous involvement of key stakeholders in adjudication. The responses were analysed based on the stakeholder group so that the involvement of each category can be benchmarked.

Results show that less than 30% of the represented companies/organisations had previously used adjudication and the vast majority (66%) did not use adjudication. It is interesting to note that use of adjudication was evenly spread (nearly a third of organisations in all stakeholder groups used adjudication) which validates both the extent of disputes among stakeholders and that all stakeholder groups were equally prone to disputes although the involvement varies among stakeholders. For example, all the 12 major contractors in this survey had used adjudication while only 24% of subcontractors and 27% of main contractors had. The use of adjudication among clients (other than local authorities) and design professionals (representing the client) was at 29% and 30% respectively. The interviews and case studies carried out prior to the survey agree with the findings that consultants involved in adjudication were primarily supporting one party to the dispute, rather than being directly involved in the dispute itself.

Whilst representing an organisation in an adjudication process is a professional service and companies can only entrust qualified professionals to represent them in the proceedings, the position of most respondents to this survey would have given them the opportunity to represent the organisation should a dispute happen – therefore the findings are representative of the practice. By comparing the estimated number of businesses involved in construction (Office of national statistics, construction statistics branch, 2014), being over 200,000, with the total number of adjudications registered with the adjudication reporting centre over 14 years (Trushell 2012), being over 20,000, then the total percentage, based on a minimum of two parties to an adjudication, would appear to be in line with the previous data.

Table 2: Summary of previous use of adjudication

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Stakeholder group** | **Involvement with adjudication** | | | | **Percentage previous use of adjudication** |
| **Yes** | **No** | **Don't know** | **Total** |
| Clients | 8 | 13 | 7 | 28 | **29%** |
| Consultants | 8 | 14 | 5 | 27 | **30%** |
| Main contractors | 43 | 81 | 3 | 127 | **34%** |
| Subcontractors/supplies | 46 | 128 | 1 | 175 | **26%** |
| total response | 105 | 236 | 16 | 357 |  |
| Percentage | **29%** | **66%** | **4%** | **100%** |  |

### Use of mediation

To understand the level of awareness and the extent of use of mediation among the construction stakeholders, respondents were asked to indicate if their organisations were previously involved in mediation. The aim was to compare the use of mediation and that of adjudication. Results into the use of mediation is presented in table 3.

As table 3 shows, 13% of principal contractors, 48% of consultants and 23% of clients had previously used mediation. Among subcontractors, specialist and suppliers the use of mediation was as low as 9%. In terms of awareness of mediation most contractors (including principal contractors, main contractors and their subcontractors) said they were aware of mediation.

Table 3: breakdown of previous use of mediation by

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Stakeholder groups** | Previous involvement with mediation | |  |  |  |
| Yes | No | Don't know | total | % previous use |
| Client including local Authorities | 7 | 18 | 3 | 28 | 25 |
| Consultants | 13 | 14 | 0 | 27 | 48 |
| Principle/Main contractors | 17 | 110 | 0 | 127 | 13 |
| Subcontractors/Specialists/Suppliers/Others | 15 | 158 | 2 | 175 | 9 |
| **Total** | **52** | **300** | **5** | **357** |  |

Results into use of mediation raise an interesting question: why would subcontractors, who have limited resources to spend on more expensive dispute resolutions, not consider using mediation? The answer this question is explored in the subsequent analysis.

### Reasons for low use of mediation

To establish possible reasons for a low or slow uptake of mediation, particularly among the less resourced subcontractors, respondents were presented with a series of possible motivating factors that could influence their decisions to go for mediation or not. The factors were established from the interviews and case studies and used in the survey to rank the most important factors by taking the advantage of a wider sample size. Results from the analysis are summarised in table 4 ranked based on the number of responses agreeing to it as an influential factor.

Table 4: ranking of factors influencing the decision to decline mediation

|  |  |  |  |
| --- | --- | --- | --- |
| **Influencing factors** | **Total scores**  **(No. of responses)** | **Percent of total responses** | **Ranking** |
| Belief that adjudication was more appropriate. | 93 | 21% | 1 |
| Belief that the opposing party would not take part in good faith | 53 | 12% | 2 |
| The case type not appropriate for mediation | 52 | 12% | 3 |
| Did not know enough about what mediation entailed | 43 | 10% | 4 |
| Belief that negotiation was capable of settling the case | 42 | 9% | 5 |
| The strength of our legal case | 40 | 9% | 6 |
| Mediation would take too long | 36 | 8% | 7 |
| Mediating the case would have made us look weak | 34 | 8% | 8 |
| The high cost of mediation | 27 | 6% | 9 |
| Mediation would have involved compromise | 26 | 6% | 10 |
| **Total response** | **446** | **100%** |  |

Results indicate that the most important reasons for not engaging with mediation were: (1) preference for adjudication; (2) lack of trust; (3) limited understanding on the appropriateness of mediation. The dominance of adjudication hence lack of trust did not come as a surprise finding as this is well established in previous studies (Agapiou, 2013; Trushell et al., 2012; Mason and Sharratt, 2013). What is more interesting is the misconception that mediation is not capable of settling the case or it will make the parties look weak. The findings clearly indicate a limited understanding on the appropriateness of and the advantages of using mediation.

A detailed examination of the ranking by each stakeholder group is presented in table 5. The table explains how each group perceived the most important factor for not considering mediation as the right dispute resolution process. Results show that the parties ranked the factors differently, however, subcontractors, consultants and main contractors closely matched their top five factors. For example four out of the top five factors voted by main contractors were also voted on the top five by both consultants and subcontractors. This includes:

* Belief that other party would not take part in good faith was ranked the 1st by main contractors; 3rd by consultants and 4th by subcontractors;
* The case type not appropriate for mediation was ranked the 2nd by both main contractors and consultants but 3rd by subcontractors;
* Belief that negotiation was capable of settling the case was ranked the 3rd by main contractors; at 5th place by subcontractors and 8th by consultants;
* Belief that adjudication was more appropriate was ranked 4th by both main contractors and consultants but ranked 1st by subcontractors; and
* The strength of our legal case was ranked the 5th by contractors but the 1st by consultants and 10th by subcontractors.

Clients had relatively higher scores on most factors, with the top three scoring 32%, 25% and 25% respectively. The fourth to sixth factor each scored 21% while the seventh to ninths scored 18%, 18% and 15% respectively, and least ranked factor scored 7%. Consultants did not vote for both “*mediating the case would have made us look weak*” and “*mediation would have involved compromise*” signifying they had better understanding of mediation than their clients – which is also evident from the ranking of “*did not know enough about what mediation entailed*” at 7th place (9% of votes). This score is also similar to the related factor, “*the high cost of mediation*” ranked at the sixth place.

Table 5: detailed ranking by stakeholder groups

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Influencing factors** | **Ranking by stakeholder groups** | | | | **Overall ranking** |
| **clients** | **Consultants** | **main contractors** | **sub-contractors** |
| Belief that adjudication was more appropriate. | 1 | 4 | 4 | 1 | 1 |
| Belief that the opposing party would not take part in good faith | 2 | 3 | 1 | 4 | 2 |
| The case type not appropriate for mediation | 10 | 2 | 2 | 3 | 3 |
| Did not know enough about what mediation entailed | 5 | 7 | 8 | 2 | 4 |
| Belief that negotiation was capable of settling the case | 8 | 8 | 3 | 5 | 5 |
| The strength of our legal case | 7 | 1 | 5 | 10 | 6 |
| Mediation would take too long | 4 | 5 | 6 | 9 | 7 |
| Mediating the case would have made us look weak | 6 | 9 | 7 | 6 | 8 |
| The high cost of mediation | 9 | 6 | 9 | 8 | 9 |
| Mediation would have involved compromise | 3 | 10 | 10 | 7 | 10 |

Special attention was given to the ranking by subcontractors to be able to answer the question on why the use of mediation is relatively lower among them than other stakeholders. To better understands the reasons why they would not consider mediation, the top five factors were closely examined. These factors were voted by at least 10% of respondents from these groups while the bottom 5 factors received 7-9% of the votes. Specific scores were as follow:

1. 35% of subcontractors and suppliers believed that “*adjudication was more appropriate*”;
2. 15% of subcontractors and suppliers admitted that they “*did not know enough about what mediation entailed*”;
3. 15% of subcontractors and suppliers thought that “*the case type was not appropriate for mediation*”;
4. 11% of subcontractors and suppliers “*belief that the opposing party would not take part in good faith*”; and
5. 10% of subcontractors and suppliers “*believed that negotiation was capable of settling the case*”.

These results indicates the preference for adjudication (ranked at the top) was due to limited understanding of mediation - which is evidenced by the high ranking of factors that indicate mediation is not all-clear to some subcontractors at the 2nd, 3rd and 5th place respectively. Lack of trust with the other party seems to be an overarching reason among all stakeholders (ranked among the top 4 by all groups).

## Discussion

Findings from the analysis would appear to validate that the use of mediation is relatively lower than that of adjudication. One of the reasons for continued low use in the construction industry of mediation is the lack of detailed knowledge of the process, which is causing parties to decline mediation when it is offered. The problem is more prominent among subcontractors than with consultants and main contractors.

Findings from the present study indicate that it is possible to increase the use of mediation by up to 35% if proper level of detailed awareness is raised among subcontractors and suppliers. Similarly, better understanding of mediation among clients, consultants and main contractors would subsequently increase the involvement of the respective groups by 21%, 9% and 6%. Lack of full awareness has partly contributed to the misconception that mediation costs more or takes longer to resolve a dispute than adjudication. This is contrary to the established body of knowledge including the work by Jackson (2010) who considers the inclusion of ADR as key to the reduction in the costs of disputes and the work by Gould (2009), which confirms that significant cost savings can be made by using mediation through the reduction in legal fees for proceeding to court.

The previous study by Trushell et al, (2012) showed that subcontractors are directly involved in nearly six out of every 10 disputes (including subcontractor vs main contractor, subcontractor vs subcontractor, specialist subcontractor vs main contractor, etc.). Statistics from Trushell et al, (2012) show that 20,000 adjudications were registered in 14 years, around 10,800 of these (or 54%) may have involved a subcontractor. With a 35% increase in use of mediation among subcontractors, it would seem to suggest that, on average, at least 270 more cases every year would consider mediation before going for adjudication. Full awareness among all groups is likely to help the industry save even more in terms or cost, time and its image. The construction industry is aware that its image is important and the Considerate Contractor Scheme (CCS) was launched in 1997 in the UK with the aim of improving its image ([CCS,](http://www.ccscheme.org.uk/index.php/ccs-ltd/what-is-the-ccs) 2015). The scheme is supported by the UK Government and has over 1,000 companies registered including most of the major contractors operating in England.

Also the findings from this study would appear to indicate that those generally with the experience of adjudication and knowledge of mediation would opt for mediation, those with no experience of adjudication would consider adjudication before mediation. Given the nature of the construction industry in the UK, and also around the world, many stakeholders will work together on many different projects over time. It is therefore important that relationships and trust between the parties is maintained. Mason and Sharratt (2013) confirm that parties to adjudication are unlikely to work together again. The industry needs to reverse the culture of litigation by considering mediating before the more confrontational approaches. It is important to recognise that whilst it is possible to adjudicate after an unsuccessful mediation, once working relationship, good faith and trust between the parties is spoiled through adjudication, it cannot be restored by going back to mediation.

This study has shown that there is a perception that mediation is not always suitable for all disputes. Indeed a number of respondents have identified that their cases were not suitable for mediation, including those who have mediated and would use mediation. The Dispute Resolution Guidance for Government Departments and Agencies (2011: 4-5) identifies cases that are not suitable for mediation as “…for example, cases involving intentional wrongdoing, abuse of power, Public Law, Human Rights and vexatious litigants. There will also be disputes where, for example, a legal precedent is needed to clarify the law, or where it would be contrary to the public interest to settle”. Stitt (2004:18-21) also acknowledges that there are occasions when mediation may not be suitable. He suggests that these include situations where one party feels a legal precedent is required to be set by a court ruling, or there is a constitutional or other legal issue, or even a potential for violence. Parties could also settle without the aid of a mediator, especially when there is a low value to the dispute.

It was interesting to note that some respondents blamed the strength of the Legal system for their decision not to go for mediation. The fact is different from this perception as the English legal system promotes mediations as primary dispute resolution process. The Government report titled “*The* *Review of Litigation Costs: Final Report”*, Jackson (2010) reviewed civil litigation costs in England and Wales, and concluded that it is essential that steps are taken to reduce the significant costs involved in dispute resolution and advocated the inclusion of ADR as key to the reduction in these costs. Jackson (2010) also recommends that “for cases which do not settle early through bilateral negotiation, the most important form of ADR (and the form upon which most respondents have concentrated during Phase 2) is mediation”. He mentions many obvious advantages that mediation can offer including enabling many (but certainly not all) civil disputes to be resolved at less cost and greater satisfaction to the parties than litigation and the efficacy of joint settlement meetings in achieving a satisfactory resolution of many disputes. Gould (2009) found that although a significant number of construction disputes are resolved through adjudication, a significant number also go through the courts. The courts have also issued clear support to the CPR rules on the use of mediation prior to court, where appropriate, as is highlighted by the case of *Dunnett –v- Railtrack (2002)[1].* In this case, because the successful party had refused to enter into mediation in an attempt to resolve the dispute, the judge did not allow them to recover their full legal costs of the case.

## Conclusion

This paper is aimed at exploring the use of mediation to resolve construction disputes in England and the reasons why the industry has not embraced the benefits of mediation. Previous studies from the USA and Scotland and other parts of the world have shown that increased use of mediation was beneficial to the industry.

Using evidence from case studies, interviews and a survey of a wide range of construction stakeholders including clients, consultants, main contractors and subcontractors, the study established that the use of mediation varied. It was found that main contractors and particularly the consultants had a better understanding of mediation and therefore made relatively more use of the process than other groups. It was interesting to note that while contractors and subcontractors form more than 90 percent of all disputes, the use of mediation among them is currently at 13% and 9% respectively. A detailed analysis has shown that the low up take is contributed mostly by three reasons: (1) lack of detailed understanding of mediation process; (2) lack of trust that the other party will act faithfully and the dispute will be compromised; and (3) misconceptions that mediation is inappropriate or is not capable of solving the dispute.

[1] [2002] EWCA Civ 302

Following a rigorous analysis of the evidence the study established the possible saving the construction industry in England would achieve simply by raising awareness on the benefit of mediation to key stakeholder. However, for any changes to be effective it would be important for the legal profession to engage with the move away from adjudication as the primary dispute method and encourage the use of mediation. Although the study is not representative of the whole construction industry in the UK, the use of a range of methods and a wide representations from the active stakeholders in the English construction industry, makes it an interesting case for international comparison.

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