

A PROCESS ACCOUNT OF CONSTRUCTION MEDIATION

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This paper seeks to argue that construction mediation has hitherto been viewed and evaluated in a relatively narrow fashion. It suggests that whilst there are numerous and well-known benefits to the process, although these are not always accepted by all academics or practitioners, in such things as the speed of the potential settlement and lower cost implications there are other valuable benefits, benefits that tend not to be considered but have real value. The central claim is that construction mediation has the potential to become a transformative process. It argues that greater emphasis ought to be placed on the 'process' of dispute resolution and the attendant benefits that can result in the construction professional undergoing a developmental and maturing experience through engagement with mediation. These benefits ought to be then considered alongside other, more traditional accounts, of the strengths and weaknesses of mediation. The argument will be developed through reference to currently recognised models of mediation. It will conclude that through the use of mediation in dispute resolution the construction professional can develop both a range of important attributes such as more developed communication skills as well as important mental and social attitudes that can engender empowerment and may serve as an aid to cultural change in the industry.

Keywords: mediation, education, professional practice, transformation.

INTRODUCTION

This paper seeks to argue that mediation has been hitherto conceived in the construction industry, and indeed by practitioners in other related disciplines, as largely a 'problem-solving' mechanism. Mediation for many seems to exist only in opposition to litigation and other forms of adjudicative dispute resolution rather than being conceived and evaluated on its own terms. Whilst settlement is clearly an aim of mediation there is also the danger that the value of mediation is conceived in these terms alone. If this is the case, then its value, or 'success,' is conceived very narrowly. The aim of this paper is, then, to argue that there are wider values to mediation in a construction setting. These values can be considered as a 'group' of related attitudes, skills and perceptions that can positively affect the persons and organisations involved. By affecting growth in individuals an organisational change may follow. This, in turn, can result in a significant 'cultural' change in the industry itself, and associated professions, as a whole as well as having a positive impact on construction education. The paper begins by an overview of the development of mediation and proceeds to consider its current use of mediation in construction. It then considers the

question of how mediation success is conceived. The paper argues that both the current practice of construction mediation and the way in which its success is measured are too narrow. It argues instead that a wider understanding of mediation is required, one that shows awareness of the wider range of benefits and values that mediation enshrines.

CONSTRUCTION MEDIATION: A BRIEF ‘HISTORY’

Some attempts at outlining the history of ADR go back a matter of merely a couple of decades. This, however, presupposes a narrow conception of ADR firmly rooted in Western, indeed largely anglo-american assumptions. A more historical view is taken by Roebuck (2012) who in a number of works has examined different types of ADR in various phases of largely western European history. This awareness of non-western approaches to ADR has been the focus of the work of a number of scholars. Nader is particularly significant in this regard and her work has been widely discussed and cited. Other academics have focussed more particularly on one specific cultural or ethnic view of ADR. Goh (2002), focussing on China, argues that there is strong resistance to litigation in Chinese culture originating from Confucian teachings. Correspondingly, there is a very strong emphasis on settling disputes outside the structure of the courts. Whilst a rather more narrow account of the subject’s history predominates among the majority of scholars Menkel-Meadow (2000) however sees a large variety of sources as she seeks to trace the intellectual foundations of ADR.

British ‘historical’ accounts of ADR are more limited in scope and tend to not look far beyond the Latham Report (1996) and Lord Woolf’s Access to Justice Report (1996) although occasionally ventures into the 1970s are made. The story in the United Kingdom can largely be read as a narrative concerning the gentle but continuous encouragement of ADR in general and mediation by policy-makers and the judiciary from Woolf, for example, through to the recent reports by Lord Justice Jackson, Review of Civil Litigation Costs Review (2010) in England and Wales and Lord Gill (2010) in Scotland. In both these latter reports there was an emphasis on the efficacy of mediation as a speedy, cost-effective method of resolving disputes. Alternative dispute resolution has in its broadest in the guise of arbitration has been important to the construction industry since at least the 19th century. However, many have questioned whether, in fact, arbitration has become in recent times ‘litigation without the wigs’ (Speiaght and Stone 2004) due to its increasingly adversarial approach and its similarity to traditional litigation with its attendant cost implications (Latham 1993, Uff (2009). In the UK, despite this discontent there was little evidence of the widespread use of mediation in a number of studies from the 1990s (Gould and Cohen 1998; Brooker and Lavers 1997, 2000). A factor in this may have been the increasing use of statutory adjudication following its introduction in the Housing Grants, Construction and Regeneration Act 1996 following the recommendations by Latham (1994). There is evidence that there has, though, been some growth over the past decade or so possibly encouraged by a number of well-documented cases such as *Halsey v Milton Keynes* in the light of the implantation of the Civil Procedure Rules in 1998. Brooker (2010:164) suggests that “between 170 and 300 construction mediations [are] taking place annually.” Thus, whilst still small this is not a negligible figure. A recent study, however, by Gould *et al.* (2009) suggests that construction mediation may actually be more prevalent than was previously supposed. With there being a lack of any overarching reporting mechanism then the precise numbers of construction mediations can then only be estimated. Mediation clauses can now be inserted into a number of standard form contracts. The JCT Design and Build 2005

(section 9) specifically mentions the option of mediation whilst the ICE Conditions of Contract 2004 (clause 66) has the option of ‘amicable resolution’ (i.e. mediation) alongside adjudication and arbitration.

MEDIATION IN PRACTICE: ADVANTAGES AND CONCERNS

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

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

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

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

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

A number of concerns were found by Sidoli del Ceno (2010) in a study of commercial lawyers including those who engaged in construction work. The respondents’ perception that mediation was not ‘real law’ was noted as was the fact that the designation ‘mediator’ lacked status in comparison with ‘solicitor’ or ‘barrister.’ Further, there was ignorance of the possibilities of mediation and a feeling that traditional legal culture which emphasised the virtues of conflict and litigation were

additional factors that discouraged many from recommending the process and hence may hinder mediation's future growth and development.

MODELS OF MEDIATION

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

"The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do." (P.24)

Facilitative mediation, then, fits the description provided by Menkel-Meadow (1993) as "pure" mediation in that there is no adjudicative direction of any kind or any assumption of substantive expertise by the mediator. This can be contrasted with evaluative mediation. Brown (2003) states that:

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

Both these predominant models appear to implicitly depend on an 'outcome' being achieved. They can therefore, perhaps, be labelled as 'pragmatic' forms of mediation. The outcome is either the final settlement of the dispute or, at the very least, a partial settlement through a narrowing of the issues. Both of these models fail to consider, or at least, appear to ignore other strengths or possible advantages of mediation. Other models, which can be termed 'idealist,' attempt to move away from this.

Transformative mediation is one widely recognised approach that seeks to emphasise the value of the process itself and which distances itself from the rather narrow results driven conceptions discussed above:

"The transformative approach instead defines the objective as improving the parties themselves from what they were before. In transformative mediation, success is achieved when the parties as persons are changed for the better, to some degree, by what has occurred in the mediation process." (Bush and Folger 1994: 84)

An understanding of these models, their premises and what they seek to achieve is central to the issue of what constitutes mediation success. The two issues are, in fact, closely entwined.

MEDIATION AND SUCCESS – A CONTESTED NOTION

Success in mediation success is usually considered on a 'pragmatic' or 'outcome' model. Fisher and Ury (1981) which focuses on negotiated outcomes is an example of

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

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

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

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

MEDIATION AS PROCESS

The argument then has attempted to show that the two most widely used ‘pragmatic’ models of mediation in construction, the facilitative and the evaluative, are both fundamentally outcome or settlement based. These approaches largely ignore the process aspect alluded to above (Shepherd 1984). Whilst outcome and settlement are clearly goals of mediation it can be argued that mediation to be properly considered and utilised as a tool for dispute resolution in construction ought to be conceived more

widely. This emphasis on process and on the long-term benefits that can ensue from engaging in a non-confrontational and empowering process ought to be given more consideration by both scholars and construction professionals. The wider benefits that can emerge from the process of mediation have largely not been noted in relation to the field of construction or where they have they have been they have been dismissed (Oberman 2005) although they have been greeted with approval by many in other areas of dispute most notably in the context of domestic mediation.

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

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

Communication

Communication is considered to be an important attribute and, indeed, a central value in construction management (Dainty *et al.* 2006). There are many issues inherent within a construction context that make effective communication particularly problematic, for example, the uniqueness of each construction project and the

intensity and short time-scales involved in many contracts, (Loosemore *et al.* 2003). There is also the possibility for misunderstanding because of different ‘vocabularies’ (Delisle and Olson 2004) and issues of cultural preferences appears to be widely noted (Muller and Turner 2004). This is set only to increase in the light of increasing internationalisation. Mediation is a communicative process first and foremost. By engaging with the process of mediation construction professionals may develop better, more nuanced communication skills which in turn can lead to wider personal development.

Personal and professional development

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

Construction education

Construction Education necessarily involves the transferring of knowledge and the acquisition of practical skills (Senior 1998). Beyond the level of basic trade training however there is a widespread belief that construction education ought to encourage a variety of other skills. Ahn *et al.* (2010) are among many that have attempted to categorise the various elements required in a graduate level construction programme. They include leadership, problem-solving, collaborative skills, ethical issues amongst others. Many if not all undergraduate and postgraduate students study law as an element of their course. Litigiousness and procedure predominate. Mediation properly integrated into construction education has the possibility of changing the value set of construction managers. A widespread adoption of such values may subsequently contribute to wider cultural change within the industry.

Cultural change

The value of changing cultural norms and the varieties of ways in which this happens has been noted by, among others, Meyerson and Martin (1987). Mediation because of its strong emphasis on communication and on understanding the perspective of other party is ideally placed to help foster such change. The value of partnership and co-operation in construction has already been recognised by a number of authors (McDermott *et al.* 2005). With the construction industry having already changed significantly over recent decades (Greed 1997) and with more change likely mediation might also have a formative role in this by fostering a collaborative approach to dispute resolution and professional practice generally. Mediation might have a particularly important role in the growth of building information modelling (BIM) where there is inherently a shared reserve of ‘knowledge’ or ‘activity’. Possible legal problems with BIM have already been identified (Arensman and Ozbek 2012). Further, this collaborative and non-litigious approach might appeal particularly to women and other unrepresented groups (Gilligan 1998, Alberstein 2009). Change here should be considered as more than merely individual or organisational change. Rather it is a cultural transformation of the industry as a whole.

CONCLUSION

Society tends to have a settled view that the 'Law' in all cases is about, or ought to be about, 'justice'. Justice tends to be conceived as an unchanging, pyramidal structure with the judge or arbitrator delivering a top-down judgment with the parties being no more than bystanders to the process. This view of justice is not by any means the only one. Mediation, for example, works on a different paradigm:

"In mediation, justice can be understood as the justice that the parties themselves experience, articulate, and embody in their resolution of dispute" (Rock, 2006, 347)

If this account is accepted, at least in part, then this ought to open the gates to a consideration of mediation from the point of view of its process. The process of mediation, separated conceptually from any outcome or settlement that it might achieve, allows for individual professional development, organisational development and industry change. Those active in construction education might wish to reflect on this fully and consider how it might influence their practice. Finally, it can be argued that modern 'rights' discourse that feeds the insatiable growth of litigation has gone too far. We must try to address this by creating the necessary foundations for achieving a wider cultural change away from perennial conflict and towards a more conciliatory view of human interaction. On a mercenary note, profitability is likely to be increased by just such a move.

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