

**An Investigation of the Development of Mediation in the
UK Construction Industry**

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Abbreviations

ACAS	-	Advisory Conciliation and Arbitration Service
ADR	-	Alternative Dispute Resolution
CEDR	-	Centre for Effective Dispute Resolution
CIArb	-	Chartered Institute of Arbitration
CPR	-	Civil Procedure Rules
GDP	-	Gross Domestic Product
GVA	-	Gross value added
HGCRA	-	Housing Grants, Construction and Regeneration Act, (1996)
ICE	-	Institute of Civil Engineering
OGC	-	Office of Government Commerce
PAP	-	Pre-Action Protocols
PhD	-	Doctor of Philosophy
PMBok	-	Project Management Book of Knowledge
RICS	-	Royal Institution of Chartered Surveyors
TCC	-	Technology and Construction court
UK	-	United Kingdom
UKCG	-	United Kingdom Contractors Group
UoM	-	University of Manchester
USA	-	United States of America

List of cases

Burchell v. Bullard ([2005] EWCA Civ 358).

Halsey v. Milton Keynes General NHS Trust ([2004] EWCA Civ 576)

Hurst v. Leeming ([2001] EWHC 1051 (Ch)).

Susan Jane Dunnett v. Railtrack Plc. ([2002] EWCA Civ 302).

Abstract

The University of Manchester
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Mediation has been regarded as one of the effective dispute resolving techniques. However, the issues pertaining to the development of mediation have been overlooked and are therefore less well known. There has been limited discussion about mediation and some of the theoretical explanations about its development in the construction industry were not well investigated or documented. The main purpose of this research was to investigate the development of mediation by focusing on investigating the barriers which impede the use of mediation in resolving construction industry disputes in the UK. Gaps in the literature were identified in the research but no hypothesis was generated. The interpretive research model was an ideal paradigm for this research as it assisted in structuring the whole process of the investigation. A grounded theory strategy was adopted as it helped to capture the overall mediation phenomenon in a construction environment.

Semi-structured interviews, with sixteen leading mediators from around the UK, were used for this study. The interviews were recorded and transcribed. The interview transcripts were analysed using grounded theory analysis, through manual coding techniques. From the findings, two categories of barriers were identified: barriers arising from the public (lack of social awareness, disputatious culture, process barrier, insufficient planning, security and the introduction of adjudication) and barriers caused by the disputants' legal advisors (ignorance, personal agendas and the conventional method of resolution). The study also explores some information on the mediation system such as financial issue was the main dispute in construction industry; facilitative mediation is the most appropriate mediation process and in appointing the mediator, excellence in mediating skills is more important than his or her professional background; also it is inappropriate/counterproductive to impose mandatory mediation on construction disputes.

The limited amount of literature dealing with mediation in the UK construction industry is one of the limitations of the research, as it complicated the process of designing the interview questions. Some potential sources of bias for the research are identified through the areas of data presentation and data interpretation. This research has provided theoretical and practical contributions to mediation development within the context of the UK's construction industry. Further research is suggested to validate the research findings and to evaluate the quality of the mediation process, based on the gender and professional background of the mediator.

Keywords: construction, dispute, mediation, alternative dispute resolution (ADR), United Kingdom (UK).

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Chapter 1 - Introduction

1.1 Introduction

This research is concerned with the problems associated with mediating construction disputes in the UK. The research proposes to investigate the development of mediation in the UK construction industry, which is one of the main contributors to the nation's economy. However, it is exposed to risks and complexities (John, 2003).

During the literature review there were some information gaps in both the literature and research. The researcher found that the quantity of literature which focused on mediation's development, especially in the construction sector, was limited. Thus, the research will investigate the development of mediation in the UK's construction industry. In particular the research is focused on investigating and identifying the barriers which may influence the adoption of mediation as a dispute resolution process.

The chapter is divided into three sections: the first section presents the background context of the research study, in which the basic understanding about construction sectors, construction issues and dispute resolution is set out. The second section outlines the areas of concern: information concerning research gaps, previous research studies, research problems and the study's approach to information gathering is presented. Finally, details of the research motivation, research aim, research questions and outline of the thesis structure are presented and explained.

1.2 Background context

In today's increasingly competitive market, the successful implementation of a project is not easily achieved. The construction industry is one of the major contributors to a country's economy (John, 2003). In 2012, the construction sector contributed more than £80 billion to the UK's economy, as well as providing more than 2 million jobs (Rhodes, 2014). However, the industry is exposed to risks and complexities and is regarded as a tough and competitive business, in which conflict and litigation are claimed to proliferate (Tazelaar & Snijders, 2010). Disputes are common in the construction industry, especially in the UK (John, 2003), therefore it is important to manage any dispute before it escalates. In order to achieve this, there are several techniques that can be used: for example, negotiation and the alternative dispute resolution (ADR) technique. In ADR, there are several different approaches which can be tried, ranging from a non-formal technique (mediation) to a more formal procedure (arbitration) (Fenn, 2010).

It is important to use a step-by-step approach if any issues arise; for example negotiation, mediation, adjudication, arbitration and litigation. If negotiation fails to solve the issues, the next available approach is through mediation (Chung et al., 2009). Mediation is an approach for resolving a dispute with the help of an acceptable neutral third party. The third party is there to assist the disputing parties in resolving their differences, without offering any recommendation or solution to the dispute (Fenn, 2010). The purpose of a mediator is to help the parties to negotiate the issues and let them decide on the settlement agreement (Gould, 2010).

1.3 The area of concern

Recently, researchers have shown an increased interest in mediation. To date, there have been several studies done in the field of construction mediation (Gould, 2010). Some of the research studies (for example, Bristow, 1995; Fenn et al., 1998; Gould, 2010; Kennedy, 2006; Kumaraswamy, 1996; Semple et al., 1994; Steen, 1994; Treacy, 1995; Watts & Scrivener, 1993) were focussed on the qualitative approach to information gathering through questionnaires, or by analysis or examination of case studies (e.g., Watts & Scrivener, 1993), for the causes of conflict and disputes. Such research also addresses issues such as the quantity of mediation (for example the uptake or the use of mediation), the process and benefits of mediation of which the statistical findings show the level of awareness of the public, especially the disputing parties.

However, the researcher found that academic research in the area of the development of mediation is lacking, especially in the field of the UK construction industry. There is a lot of literature on the causes of disputes (see Gould, 2010 and Kumaraswamy, 1996 for a review). According to Fenn et al., (1997), little empirical evidence has been structured to justify the theories on conflict and dispute. The factors illuminating what prevents people from mediating a construction dispute are not well investigated. There has been little discussion about this issue and most importantly, some of the theoretical explanations about the development of mediation in this sector were not documented.

The construction sector is a major contributor to the UK's GDP (UKCG, 2009). However, it is exposed to conflicts and disputes (John, 2003). Therefore there is a need for more research into issues related to construction disputes. One of the most significant research tasks is to identify, or to point out, the barriers which impede the spread of mediation in the UK's construction industry.

1.4 Research interest

The interest for the research study began with the lack of literature and the lack of research into conflict and dispute resolution (Fenn et al., 1997). There were a few researches, for example Gould (2010), on the development of mediation in construction industry. However the focus was on mediation and causes of disputes; the topic of mediation's development is less well developed. From that point, the researcher tried to understand the theory behind the areas of negotiation, dispute resolution techniques and disputes in the construction industry. What can be seen was that dispute resolution techniques play an important role in, and make an important contribution to, the construction sector.

Another reason for this research study was the gaps in the literature on mediation in the construction industry. The lack of empirical evidence concerned with dispute resolution and mediation added to the puzzle. There is no clear answer to questions such as 'what are the factors which prevent people from mediating the dispute, and how the factors may affect the mediation process?' This highlighted the lack of reference points for the researcher, points that could have aided him to acquire an understanding of which aspects of mediation development can contribute to development of the construction sector in the UK.

Therefore the researcher aimed to initiate research which is focussed on the application of construction mediation. The research will contribute to a stream of literature that examines mediation's development, through evaluating and investigating the barriers which impede the adoption of mediation as a dispute resolution mechanism in the UK's construction industry and hence will improve the quality of mediation proceeding.

1.5 Research aim and objectives

The main aim of this study is to investigate key aspects of the development of mediation, especially in the UK construction industry.

The focus is to identify the barriers which impede the use, or the spread, of mediation in the UK construction industry. It is important to evaluate the development of mediation in order to appreciate the quality of that mediation process.

In order to achieve this aim, the objectives are as follows:

1. To review the literature and existing studies on ADR, especially on mediation.
2. To examine the implementation and planning of mediation in UK construction industry.
3. To investigate the current mediation technique in the UK construction industry; its procedures, advantages, limitations and its development based on information achieved through interviews
4. To identify the possible barriers that impede the use of mediation in UK construction industry.
5. To study the impact of mediation development in relation to the UK's government policy for construction.

1.6 The research questions

The literature outlined in sections 1.2 and 1.3 have highlighted that there is a lack of an appropriate measure to evaluate the development of mediation in the UK construction industry. As the background information was not enough to provide a clear picture of the development of mediation, especially in the UK construction industry, several questions arose:

- How do parties adopt the mediation approach to solve disputes and why?
- What are the limits of mediation in resolving construction disputes?
- Can today's mediation process still be used for future's construction disputes?
- What are the barriers to the widespread use of construction mediation?
- Should mandatory mediation be introduced in the construction industry and what will be the potential implications?

1.7 The outline of the thesis structure

To achieve the research aim and objectives and to answer the research questions, the investigation was set out clearly and the thesis was structured and organised into six chapters.

Chapter One – Introduction

The chapter covers the introduction to the research, in which the rationale of the study is provided. This includes describing the importance of the topic, background context, area of concern, research interest, the aim and objectives, the research questions and outlines of the research questions and a brief outline of the thesis structure. Therefore, chapter one provides an overview of the entire research.

Chapter Two – Literature Review

The chapter offers a critical review of relevant literature. The conceptual framework of the literature review is described. It begins with introducing information about the construction industry, which is related to the research topic. This includes describing the economic aspects and other issues relevant to the construction industry. Then the history and the theory of alternative dispute resolution (ADR) and mediation are critically assessed. The implementation of ADR in English law, and the implementation of mandatory mediation, are both addressed. There has been limited discussion about mediation and some of the theoretical explanations about its development in the construction industry were not well investigated or documented.

Chapter Three – Mediation

The chapter offers a critical review of mediation. The chapter briefly focuses on the implementation of mediation in the UK construction industry and how any changes may affect the research study. The amount of available literature was sparse and hence there was no hypothesis generated to inform this research. However, the theoretical findings, based on the review, are analysed to formulate the research questions, which will then be answered in the discussion chapter. Some of the information in the chapter was used to design the interview questions used in this study.

Chapter Four – Methodology

To achieve the research aim and objectives, certain methods and techniques to undertake the study were introduced. The chapter presents the methodological issues related to the way the research was conducted. The chapter provides an overview of the research methodology and provides its justification; explores and explains the choice of data collection techniques; explains research related ethical issues and describes the validation issues pertinent to the research. The ‘research onion’ diagram was used as a reference for the selection of the appropriate research methodology; hence, the researcher decided upon an interpretivist philosophy with grounded theory as the research strategy. The investigation employed a qualitative

design and the data collection method was through semi-structured interviews. The sampling procedure is also explained and justified.

Chapter Five – Results

The chapter is comprised of the analysis of the data and the results. The data were analysed using a manual coding process. The outcomes from the data analysis were elaborated. The barriers to, the spread of mediation in the UK construction industry were identified. The study also explores core construction disputes, the appropriate mediation process, an appropriate professional background for the construction mediator and the imposition of mandatory mediation for construction disputes. In this section several new ideas were generated and presented in five different sections.

Chapter Six - Discussion

The outcome from the results and analysis were critically reviewed and brought forward from the interviews. The discussion is informed by the need to answer the research questions. The chapter includes the description of the discussion from the research study, problems and limitations of the study, recommendations for future research and the study's contribution to knowledge.

Chapter Seven – Conclusion

The chapter summarises the findings of the research. Conclusions are drawn from the issues of the development and the implementation of the process of mediation, a process which was addressed throughout the study. The literature review, the research methodology, analysis and the result of the collected data and the discussion of the study are all summarised, after which the recommendations generated from the study, any issues for further research and the contributions to knowledge are addressed.

1.8 Summary

This chapter presented a general introduction to this research with its focus on the development of mediation to resolve disputes in the UK's construction industry. The construction sector has been exposed to complexities and disputes, as it is one of the major contributors to the UK's economy. The approach to resolving a dispute had to be examined in order to obtain good quality dispute resolution techniques. One of the ways of evaluating the development of mediation is by identifying the barriers to the use of that process in the UK's construction industry. The purpose of conducting the research study was to understand the development of mediation plays in achieving success in the construction industry. It is thought that the development of efficient mediation is vital and acts as a key factor to achieving excellence in the industry. In this chapter the background context and the areas of concern were presented and explained. Moreover the chapter has identified the significance of the research, the research aim and the research questions.

Chapter 2 - Literature review

2.1. Introduction

The purpose of this chapter is to present the literature that is relevant to the research proposal and the associated methodology. The conducted research was done in order to understand the development of the dispute resolving processes, especially mediation, such as its nature and complexity, which may create ‘*what*’, ‘*how*’ and ‘*why*’ questions. There are only a limited number of literature sources and publications about the current research topic. Therefore the literature review is a crucial element of, and plays an integral part in, the creation of the research questions as well as in deciding upon appropriate research methodologies.

The first section of this chapter explores the methodology employed to do the literature review for the research. In this section, several concepts were derived from the research title and research aims in order to narrow down the research area. The second section of the chapter offers a general description of the construction industry in the UK. This includes how construction affects the economy of the UK, issues in the construction industry and the explanation of construction disputes in the UK. The final section examines the available literature on alternative dispute resolution techniques (ADR). It looks at how ADR techniques shape the construction industry in the UK.

2.2 Methodology for conducting a literature review

2.2.1 Introduction

The purpose of this section is to explore the options regarding the methodology for carrying out the literature review on the research topic. In order to explore what constitutes an appropriate and systematic literature review, sources for the literature, as well as the concept of a literature review, first had to be investigated (Fellow & Liu, 2008). The main aspects of such an investigation include finding out the available sources for the literature (Fellow & Liu, 2008); a second aspect is to define the concepts which were used in doing the literature review (Blaxter et al.,

2006). The concepts helped to narrow down the research area (Kumar, 2011) in order to investigate the barriers which impeded the spread of mediation in the UK construction industry. The concepts were derived from the research title and the research aim.

2.2.2 Literature review

A literature review is a critical summary and assessment of the range of existing materials dealing with knowledge and understanding in a given field (Blaxter et al., 2006). Babbie (2004) highlighted the importance of the literature review and identified several questions which are important for this research, in order to produce a systematic and critical review of the published material. These questions included: ‘what have other people said about the topic?’, ‘what are the theories addressed?’, ‘what is the previous research on the subject of interest?’, ‘are the findings consistent?’ and ‘are there any flaws in the existing research that you can identify or can you make recommendations for improvement?’. Using the questions provided by Babbie (2004), helped the researcher to provide a comprehensive analysis and presentation of the research study which consists of several sections: current status of the construction environment, literature review on alternative dispute resolution (ADR) with a particular focus on mediation, and the development of mediation in the construction industry. Therefore, it is important to define the purpose of the research study to avoid deviating from, or altering, the topic and research questions during the stage of data gathering.

2.2.3 Literature search

The literature search is the process of finding the relevant published material (Blaxter et al., 2006). A literature review involves compiling information from different sources. According to Fellow and Liu (2008), the aim of any literature search is to identify a list of books, scholarly journal articles, conference papers, and websites, all of which contain the actual information needed for the research. In order to look for information, it was easier to search the literature through several databases, such as library catalogues, Emerald, Science Direct or Internet search engines (Google Scholar).

Singleton and Straits, (2010) state: *“When you initiate a literature search, you should have at least a general idea of what you want to study. You need to have narrowed down the topic at the outset, although eventually it will be essential to do so.”* (Singleton & Straits, 2010: p.568). This view is supported by Kumar (2011) who explains that in searching the literature that is relevant to the research study, it is crucial to have at least some idea of the broad subject area, in order to set parameters for the research. Therefore the researcher took the idea suggested by Singleton and Straits (2010) and Kumar (2011) and explored several concepts for the literature review. Looking at the aim of the research and the research title, some of the concepts were identified. For the research the concepts were: construction in the UK, construction disputes, the alternative dispute resolution techniques (ADR), the concept of mediation and the development of mediation. Figure 2.1 shows the summary of the concepts. From these concepts, the barriers to mediation use were investigated and identified.

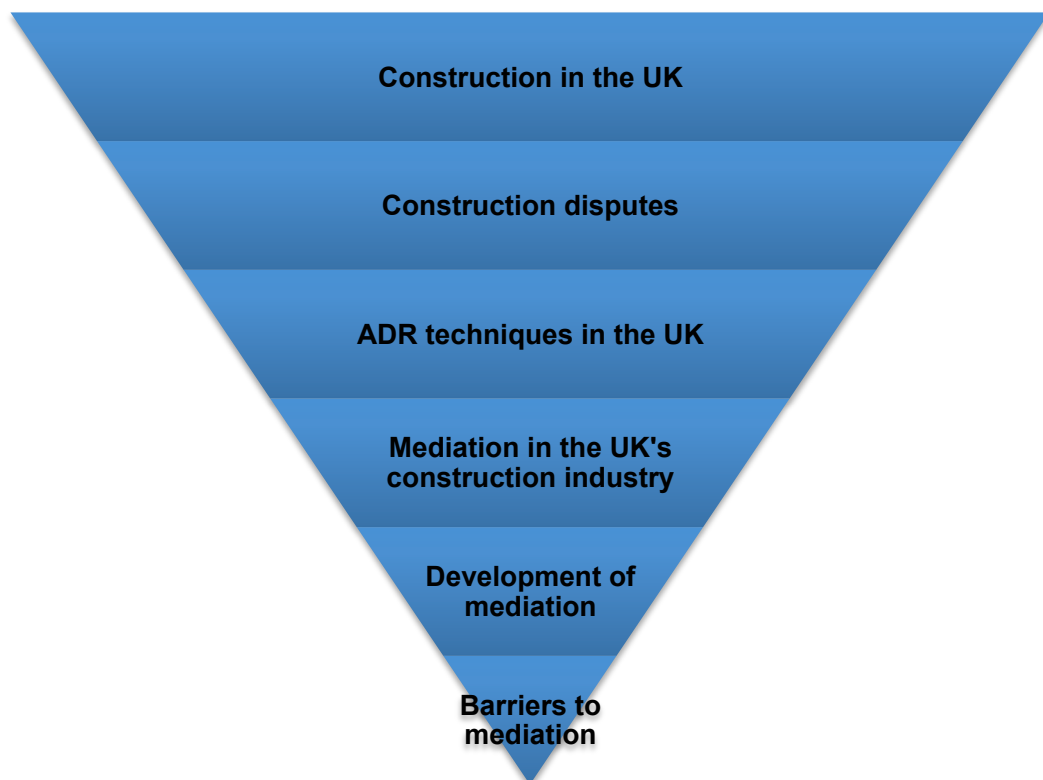


Figure 2.1 The concepts involved in the literature review.

For this project, the focus is on the UK construction industry. There is a wide range of areas covering this concept; therefore to limit the range of the study, the researcher focused on the economic status of the construction industry and the main construction disputes. Another concept examined was alternative dispute resolution (ADR) techniques. This is because ADR has been used to resolve construction disputes. Therefore, to limit the range of the ADR techniques being considered, certain issues were prioritised: the main types of ADR techniques and the establishment of ADR in English law.

The other topic that was identified was mediation. In the mediation section, the terminologies and the characteristics of mediation were explained. Other important topics that were investigated include mediation models and mediation stages. The final concept examined was the development of mediation where the review focused on the mediation process in the construction industry. Some aspects covered here are the theory of mediation development and the contentious issue of mandatory mediation. With the main concepts derived, the next step was to identify some ideas relevant to the broad subject area and the problems found in it. The concepts were then narrowed down in order to investigate the barriers inhibiting the use of mediation in the UK's construction industry.

There is a plethora of research studies conducted on the topic of mediation; however the majority of current research is not relevant to the present study. The available research literature includes information on workplace disputes and commercial mediation, which were thought to have a high level of relevancy towards construction mediation. The key points the literature review concentrated on are mediation characteristics as well as barriers to, and government involvement in, construction mediation. The researcher also used some sources from the British Library website to look for similar PhD topics on the related research area in the UK. Table 2.1 shows some of the PhDs which have addressed the topics of mediation and construction disputes. The present research utilised the John Rylands University library catalogues as the primary search engine.

Title	University	Author	Year
Minimizing construction disputes	University of Salford	GE Younis	1994
Factors which impact on the choice of alternative dispute resolution in the construction industry	Oxford Brookes University	Penny Brooker	1997
Project dispute resolution satisfaction of construction clients in Hong Kong	University of Wolverhampton	Sai-On Cheung	1998
Land use planning, supermarkets and reciprocated ideologies; the construction and mediation of articulated discourses	Loughborough University	Michael Terence Casselden	2001
Exploring justice in professional mediation	University of Hull	Luis Arturo Pinzon Salcedo	2002
The combination of mediation to workplace justice	University of Kent	Cheryl Dolder	2005
Investigation of Korean construction mediation models	University of Manchester	Kyung Ryun Lee	2010

Table 2.1 Some of the PhD topics on mediation and construction disputes

Sources: British Library (available online: <http://www.bl.uk>)

2.2.4 List of search terms and key words

After the initial literature examination and consideration of the research topic, a list of search terms and key words were identified. The list was compiled by trial and error and by rating the suitability of the articles in the search results. This resulted in the narrowing down and selection of five key-word search terms that were believed to yield the desired search results. The words that were used to search the databases were: *mediation*, *negotiation*, *alternative dispute resolution*, *dispute*, and *construction law*. These words were chosen as they would provide search results within journal articles that would include information on the meaning of the word mediation, the process, the history and aspects of mediation, how disputes have evolved, why disputes have evolved and how mediation may help to resolve them. Table 2.2 and 2.3 show examples of peer review journals that were used in this research. The journals were chosen, based on their relevance to the research study.

Title	Publisher	Author	Year
Causes and effects of delays in Malaysian construction industry	International Journal of Project Management	Murali Sambasivan, Yau Wen Soon	2007
AHP – and simulation-based budget determination procedure for public building construction projects	Automation in Construction	Yu-Ting Lai, Wei-Chih Wang, Han-Hsiang Wang	2008
KNN based knowledge-sharing model for severe change order disputes in construction	Automation in Construction	Jieh-Haur Chen	2008
Understanding time delay disputes in construction contracts	International Journal of Project Management	K.C. Lyer a, N.B. Chaphalkar. G.A. Joshi	2008
Fuzzy case-based reasoning for coping with construction disputes	Expert Systems with Applications	Min-Yuan Cheng, Hsing-Chih Tsai, Yi-Hsiang Chiu	2009
Formulating disputes	Journal of Pragmatics	Fleur van der Houwen	2009
Improving agent-based negotiation efficiency in construction supply chains: a relative entropy method	Automation in Construction	Xialong Xue, Qiping Shen, Heng Li, William J. O'Brien, Zhaomin Ren	2009

Table 2.2 Examples of peer reviewed journals from various sources

Title	Publisher	Author	Year
Improving agent-based negotiation efficiency in construction supply chains: a relative entropy method	Automation in Construction	Xialong Xue, Qiping Shen, Heng Li, William J. O'Brien, Zhaomin Ren	2009
Dispute resolution and litigation in the construction industry. Evidence on conflicts and conflict resolution in the Netherlands and Germany	Journal of Purchasing and Supply Management	Frits Tazelaar, Chris Snijder	2010
Dispute resolution in the international electricity trade	Energy Procedia	Baoqing Han	2011
A duration analysis of environmental alternative dispute resolution in Japan	Ecological Economic	Shigeru Matsumoto	2011
Application of neural networks for detecting erroneous tax reports from construction companies	Automation in Construction	Jieh-Haur Chen, Mu-Chun Su, Chang-Yi Chen, Fu-Hau Hsu, Chin-Chao Wu	2011

Table 2.3 Examples of peer reviewed journals from various sources (cont.)

2.3 Construction in the UK

2.3.1 Introduction

The purpose of this section is to understand the information that is related to the construction industry in the UK, such as the economy and relevant contemporary issues. The first aspect explained and discussed, regarding the economy of construction, was how the construction industry may contribute to the growth of the UK's economy. The second section covers the main issues in construction. In this section it was shown that the construction industry was exposed to some difficulties and complexities in which disputes frequently happen. The third section identifies and explains construction disputes, which often occur in the industry. In this section, the relationship between the current economic status and construction disputes is explained and is shown to be strongly established.

2.3.2 Construction economy

It is becoming increasingly difficult to ignore the importance of the construction sector to the UK's economy. A number of studies have found that the construction sector is the 'backbone' of the country (see Rhodes, 2014; UKCG, 2009). According to the UK Construction Group (UKCG, 2009) the construction sector in the UK is a major contributor to the UK's GDP and a driver of historical GDP growth. The study also showed that the construction sector is an important driver of growth of other sectors in the UK. In another study, according to Rhodes (2014), in 2012 the construction industry had contributed about £83 billion to the country, as well as providing 2.15 million jobs in 2012. The study correlates with UK Construction's economic analysis (Department for Business, Innovation & Skills, 2013) which shows the construction sector in the UK contributed nearly £90 billion to the economy in 2011. From the study, the Department for Business, Innovation and Skills (2013) has identified that the construction sector consists of over 280,000 businesses supporting 2.93 million construction - related jobs, which is equivalent to almost 10% of UK employment (Department for Business, Innovation & Skills, 2013).

When all the information was looked at carefully, previous studies (Department for Business, Innovation & Skills, 2013; Rhodes, 2014; UKCG, 2009) have reported that the construction sector plays an important role in the UK's economy. One of the reasons for this, as the study by the UK Construction Group (UKCG, 2009) indicated, is that the sector is not only involved with immediate economic production, but it is also concerned with investment over and above consumption. Hence this provides significant long-term economic and social benefits to the UK (UKCG, 2009). The UKCG (2009) also identified that one of the key points in the construction sector is that it has one of the lowest levels of imports. According to the Department of Business, Innovation and Skills (2013), the UK owns a world-class reputation for its professional construction services. This idea correlates with the theory provided by UKCG (2009) that, with a low level of imports and having a world class reputation, the stimulus for spending stays within the national economy. In support of this view, Figure 2.2 shows the number of jobs in the construction industry over the last thirty years. It can be seen that over the past ten years, the largest number of workforce jobs in the construction industry were in 2006 and 2008; in both years there were 2.30 million jobs.

Workforce jobs in the construction industry, UK		
	Millions	% of all jobs
1983	1.85	7.1%
1993	1.85	6.7%
2003	2.08	6.8%
2004	2.17	7.0%
2005	2.23	7.1%
2006	2.32	7.3%
2007	2.31	7.2%
2008	2.32	7.3%
2009	2.13	6.8%
2010	2.03	6.5%
2011	2.07	6.5%
2012	2.03	6.4%
2013	2.12	6.5%

Source: ONS Nomis Database, Workforce Jobs
Notes: Q4 each year

Figure 2.2 Workforce jobs in the UK's construction sector. (Taken from The Construction Industry: Statistics and Policy (Rhodes 2014))

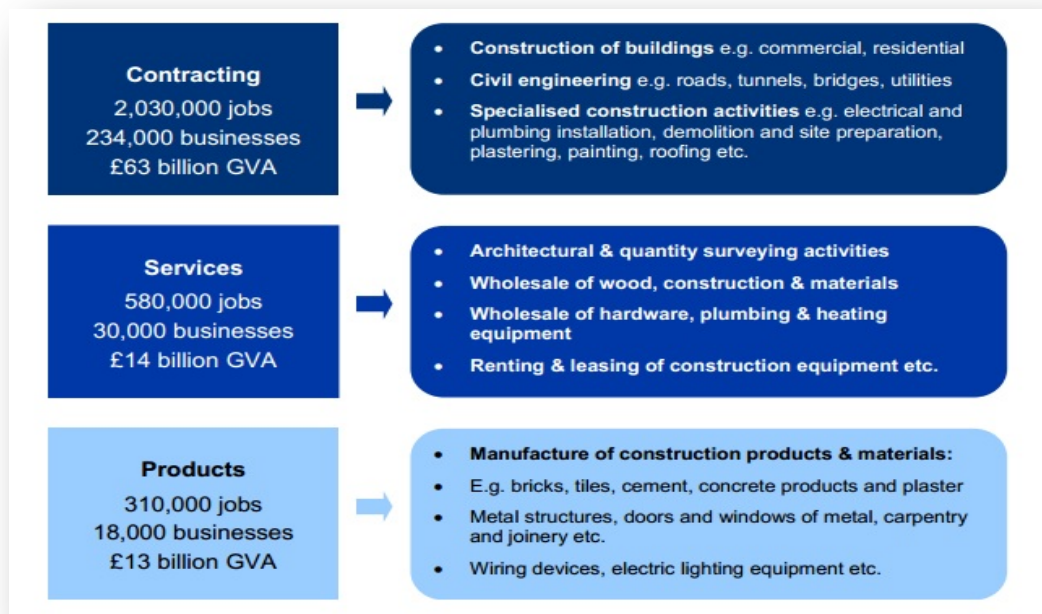


Figure 2.3 Composition of the UK construction sector. See *UK Construction Economic Analysis* (Department for Business, Innovation & Skills, 2013).

Recent evidence suggested that the UK's construction sector is one of the strongest construction sectors in the overseas market (Department for Business, Innovation & Skills, 2013). In fact, the sector is also one of the largest construction markets in Europe, when measured by employment and with enterprises and gross value added (Department for Business Innovation & Skills, 2013). Figure 2.3 shows more information on the construction activities and products, in terms of gross value added (GVA) and employment (Department for Business, Innovation & Skills, 2013). However in 2008, the construction sector was affected disproportionately due to the recession (Department for Business, Innovation & Skills, 2013). In 2007 the construction sector accounted for 8.9% of the UK's GVA but by 2011 the sector's contribution had decreased to 6.7%. The data in figure 2.4 shows that in early 2012, the construction contracting industry returned to recession for the third time in 5 years (Rhodes 2014).

The output in the construction sector fell faster than the whole economy in 2008. This collapse was mainly driven by falling rates of private housing and private commercial building. There was a faster recovery in the construction sector than the economy as a whole in 2009 and 2010. 2011 saw broadly flat growth for both sectors, followed by another contraction in 2012 (Rhodes 2014).

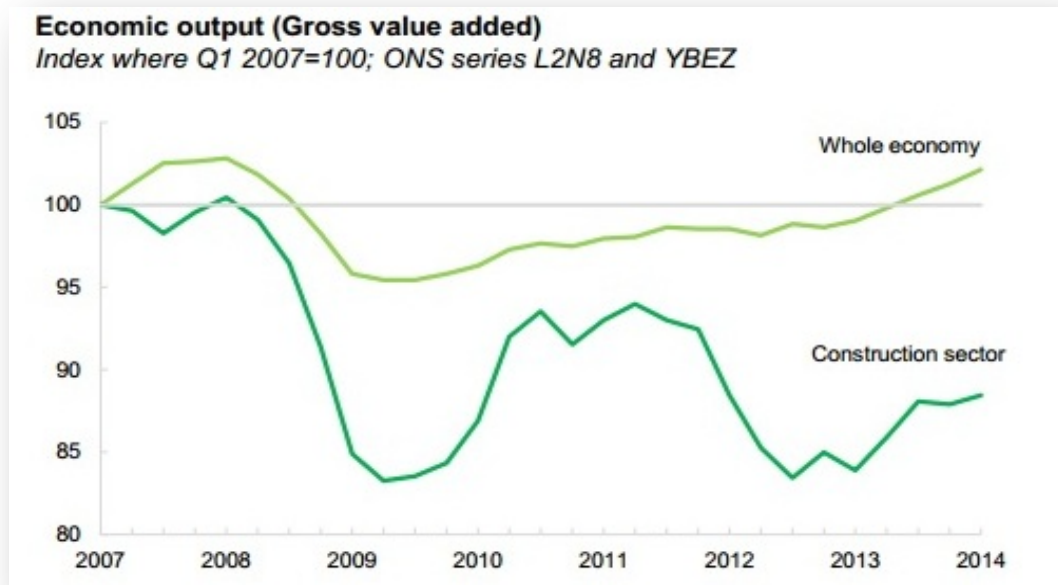


Figure 2.4 The impact of recession on construction sectors. See *The Construction Industry: Statistics and Policy* (Rhodes, 2014).

Based on the information given above, it can be seen that the construction sector plays an important role in the development of the country. One question that needs to be asked is how this information and ideas fit into the research. As was mentioned earlier, in 2012, the sector contributed more than £80 billion to the economy and provided more than 2.0 million jobs (Rhodes 2014). However, the construction industry is regarded as a tough and competitive business (Tazelaar & Snijders, 2010), exposed to risks and complexities (John, 2003). It is important to improve, or at least maintain, its current status by reducing those risks. So far, there has been little discussion regarding construction disputes and dispute resolution techniques (Fenn et al., 1997). Therefore research needs to be done to improve the area of dispute avoidance models and dispute resolution techniques, which is why this project focused on the investigation of dispute resolution procedures and the techniques they employ.

2.3.3 Issues in construction (construction disputes)

In today's increasingly competitive market, the successful implementation of a project is not easily attained. A number of studies have found that the construction industry is a major contributor to the country's economy (see Department for Business, Innovation & Skills, 2013; Rhodes, 2014; UKCG, 2009) however, it is exposed to a range of risks and complexities (John, 2003). This view is supported by Cheung and Yiu (2007), who pointed out that the complexities involve interrelated activities like planning site operations, control, safety and management. It is regarded as a tough and competitive business, in which conflict and litigation have been claimed to proliferate (Tazelaar & Snijders, 2010).

Disputes are common in construction industries, especially in the UK, and continue at a high level, with significant wastage of cash resources and time (John, 2003). Traditionally, most standard forms of contract provide for final and binding arbitration of such disputes; that is, to negotiate on small, uncomplicated issues. Alternatively, in the absence of standard forms of agreement, disputes have been settled in the courts (Jannadia et al., 2000; John, 2003). Diekman et al., (1994) stated that the main sources of dispute are people, process and products. Szasz et al., (2011) argue that their data support the view of Diekman et al., (1994) that the issues resulting in dispute are often related to human emotions of anger and distress; the perennial 'heart ruling head' problem. Szasz et al (2011) also pointed out that one of the reasons for the human emotions of anger and distress is that people hail from different cultures, backgrounds, education etc, and often have differing opinions.

In the last 20 years some developments have been made in the methods of dispute prevention and resolution (Jannadia et al, 2000). However, the theories were not sufficient to support the term 'development' in alternative dispute resolution (ADR) techniques, especially mediation. In order to define or evaluate development in ADR techniques, especially mediation, the research study was conducted via an exploratory approach, employing a qualitative research design to explore and investigate the barriers towards the use of mediation; the results and findings are presented in chapter 5. Based on the information given above, disputes are a common occurrence in the construction sector, which is also continuously being exposed to risk and difficulties (John, 2003). It is therefore important to address disputes

effectively. As such, in doing the research, it is important to know and understand the definitions of disputes, and the types of disputes in the construction sector.

2.3.3.1 Construction disputes

Disputes are common in the construction industry (Love et al., 2008), despite improvements to safety, contractual processes (Hauck et al., 2004), and technological implementations (Peansupap & Walker, 2005). Due to their unpleasant nature, Fenn (2009) considers disputes to be similar to dysfunctional conflicts, as they may destroy a long-term relationship between the involved parties.

Different researchers have different views towards construction disputes, based on their research studies (see Cakmak & Cakmak 2014; Cheung 1999; Cheung et al., 2007; Fenn et al., 1997; Gould 1999; Kumaraswamy, 1997). For example, Cheung (1999) has identified that a construction dispute is complex due to its nature. Newey (1992) pointed out that the nature of the construction industry is be characterised by the size of the industry, number of parties (public and individuals) involved, the construction site environment and the duration of the project. Chinyio and Akintoye (2008) also pointed out that there are often many stake-holders involved in the construction industry. According to Lyer et al., (2008), construction disputes arise due to the size and complexity of the project and varied interpretations of the technical terms in the contract. This view is supported by Cakmak and Cakmak (2014) who explain that the construction industry is a complex and competitive environment because of the different views, talents and levels of construction knowledge of the parties involved in a construction project. Cheung et al., (2007) provide an in-depth analysis of the construction dispute and explain that some issues arise from the parties involved on a project, as they may come from different cultures, backgrounds and education, and often have a different opinions or agendas which may produce an adversarial attitude. They also identified these factors as a major challenge to effective dispute resolution. It has been suggested that due to the potentially abrasive nature of the construction industry, disputes are inevitable (Hibberd & Newman, 1999).

Kumaraswamy (1997) listed a number of the main causes of construction disputes, which are set out in figure 2.5. The summary of the main causes of construction disputes is that they stem from a variety of causes such as: different objectives, interests, perspectives, management styles, unrealistic expectations, misunderstanding, communication problems, and ignorance of necessary training (Gould, 1999; Kumaraswamy, 1997). A study by Lyer et al., (2008) indicated that the time duration to settle a dispute in India might take from 5 to 15 years. Hence, this results in an increase in the total number of pending issues each year; a most inefficient and unsatisfactory situation. In dealing with disputes, the vital aspect is to understand the cause and effect of the dispute. Therefore, it is necessary to understand how a dispute has arisen in the first place in order to manage and resolve it. The premise is elaborated in chapter 5.

2.3.3.2 Typical types of construction disputes

The construction industry has been one of the most significant dispute areas in the UK (Fenn 2010). According to CEDR, between 1998 and 1999, construction cases made up 30% of all applied mediation cases (CEDR). In 2004, construction disputes were ranked the second largest in the number of mediation cases, after commercial, contract and services disputes (CEDR).

There are many issues or problems which arise in the construction industry. The study by Gould et al. (2009) has identified payment provisions as the major causes of dispute in the construction sector. Apart from the payment provisions, the second most common type of dispute is on the issue of defects (Gould et al., 2009). However, Szasz et al., (2011), pointed out that the issues that arise in disputes are frequently related to human emotions of anger and distress. There is an inconsistency with this argument. There are many possibilities that can initiate or trigger a dispute. Important questions arise: ‘what initiates the dispute?’ and ‘with the human emotion related issues, how do the parties approach the dispute resolution technique to handle the issues?’. The discussion of how parties approach the dispute resolution technique goes into detail in chapter 6. It is important to identify the main source of any construction dispute for, as Fenn (2009) stated, a dispute may destroy a long-term relationship between parties.

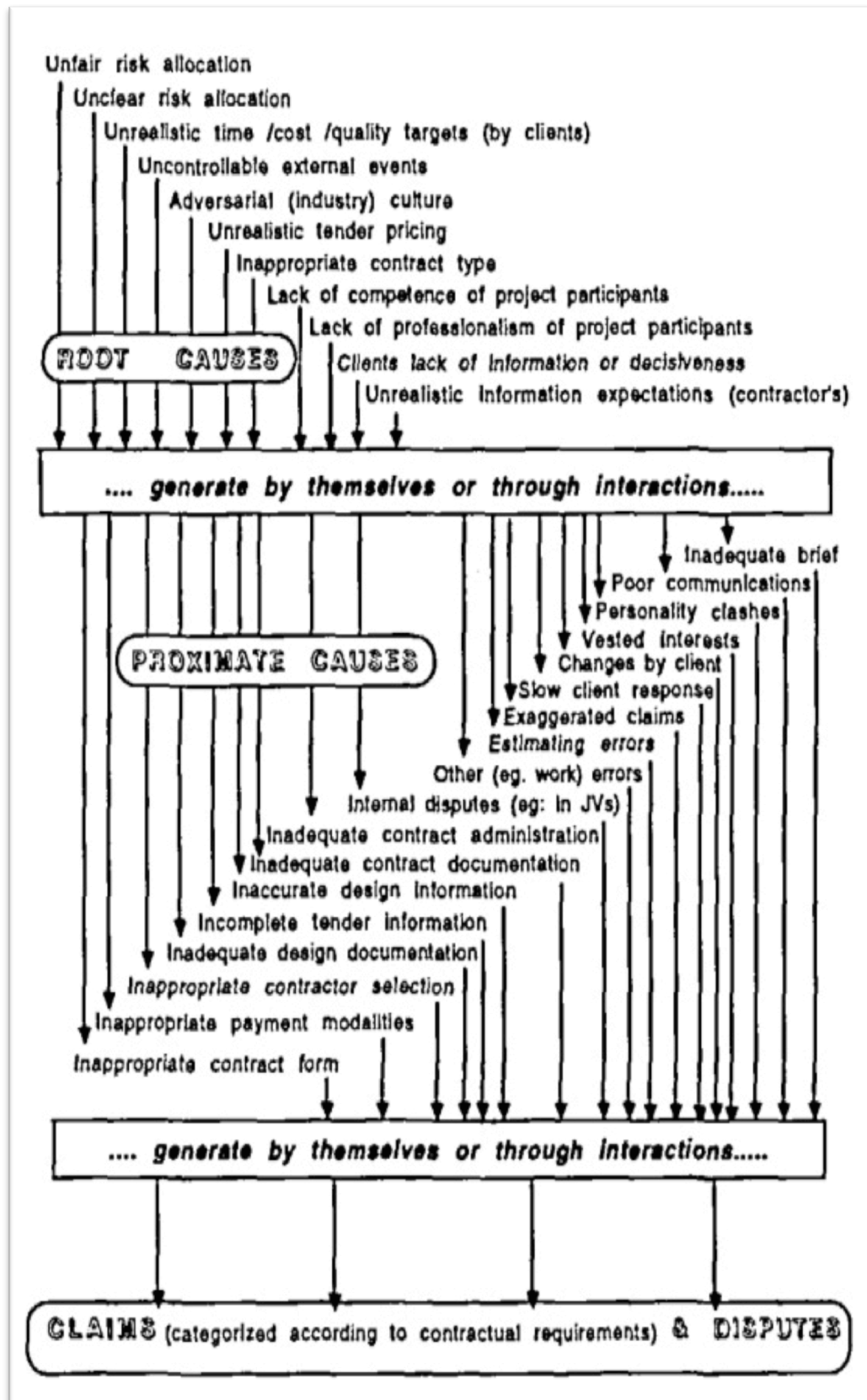


Figure 2.5: Common causes of construction claims and disputes. (Kumaraswamy, 1997)

2.4 Alternative dispute resolution (ADR)

2.4.1 Introduction

This section focuses on the available literature on alternative dispute resolution techniques (ADR). The focus seeks to understand how these techniques were shaped in relation to the UK's construction industry; to gain insights into the strategies for implementing the techniques; understand the barriers to, and criticisms of, the ADR process and the growth of ADR techniques, specifically mediation. The first sub-section explains dispute resolution, which includes the nature, the size and complexities of the construction project. The second sub-section explains the ADR techniques, including their benefits and clarifies the types of approach under ADR. The final sub-section looks at the establishment of the use of ADR techniques in English law, and considers the relationship between ADR and the law. For example, the government's attempts to channel some of the disputed issues towards ADR, in order to reduce the number of court cases dealing with disputes, are examined.

2.4.2 Dispute resolution

According to Cheung (1999), the nature of a dispute in the construction industry is likely to be complex. This view is supported by Qu and Cheung (2010), who wrote that conflict and dispute events are common in the construction industry. By taking this issue into account, the appropriate dispute resolution technique should be selected to solve the dispute as efficiently and effectively as possible (Taylor & Carn, 2010). However, if the wrong technique is selected to solve the dispute, the tendency for project failure is high and invites the development of an adversarial environment (Keil, 1999).

According to Cheung (1999), the prevention of disputes is far more effective than having to go through the bother of finding a cure (resolving a dispute). The reason for this is because the use of preventive procedures or techniques may avoid an increase in disputed issues. He added this approach might preserve the parties' relationship and enable them to refocus on the project's goals (Cheung, 1999).

However, such explanations tend to overlook the fact that the dispute preventive procedures do not guarantee total dispute elimination. In fact, many researchers argue that the strategy of dispute preventive procedure may not greatly help to eliminate a dispute. For example, Jannadia et al., (2000) argue that despite close monitoring and careful planning, it is highly unlikely that disputes can always be prevented. As mentioned previously, the construction industry is the backbone of the country, as it is one of the major contributors to the economy. Therefore, it is a 'must' to improve the system or at least maintain its current status. Hence, it is argued that the systems for dispute avoidance or prevention, and dispute resolution techniques, need to be improved. This research will be mainly focused on the area of resolving construction disputes through the process of mediation.

As the current preventive measures may not guarantee dispute elimination (Jannadia et al., 2000), dispute resolution systems may be seen as a substitute or alternative. Disputes cannot be avoided through conflict management; however, there is a wide range of techniques available for inclusion in commercial contracts, in order to resolve potential and real disputes (Gould, 1999). As such, suitable dispute resolution techniques should be chosen in order to solve any dispute efficiently and effectively (Taylor & Carn, 2010).

Some of the dispute resolution techniques are industry-specific, while others are more generic and accessible. These techniques are employed in order to conclude or resolve a dispute in absolute terms, if at all possible (Gould, 1999). The dispute resolution process may lend itself to third party intervention (Fenn et al., 1997). According to Cheung (2010), any dispute which arises has to be resolved; ADR techniques can be introduced with the aim of alleviating the time and cost burdens associated with the formal resolution methods of litigation and arbitration (Cheung, 2010). In a review of dispute resolution processes, Gould (1999) has placed them in three basic categories: negotiation, mediation/conciliation and adjudicative umpiring. Table 2.4 shows the meaning of each of the three basic categories, presented below.

Negotiation	The process of resolving a dispute through actual contact and communication, which is voluntary and the outcome is non-binding.
Mediation or conciliation	This process involves a private informal agreement when one or more neutral parties assist with the resolution of a disagreement, in order to reach a settlement.
Umpiring	A process whereby a third party enforces a binding decision on the parties concerned with the dispute.

Table 2.4. The three basic categories of dispute resolution (Gould, 2004).

Essentially, categorisation can be achieved by any number of core characteristics. An alternative approach to the one considered above is illustrated in Figure 2.6; it simply involves listing those techniques that lead to a binding outcome, and those which are non-binding (Gould, 2010).

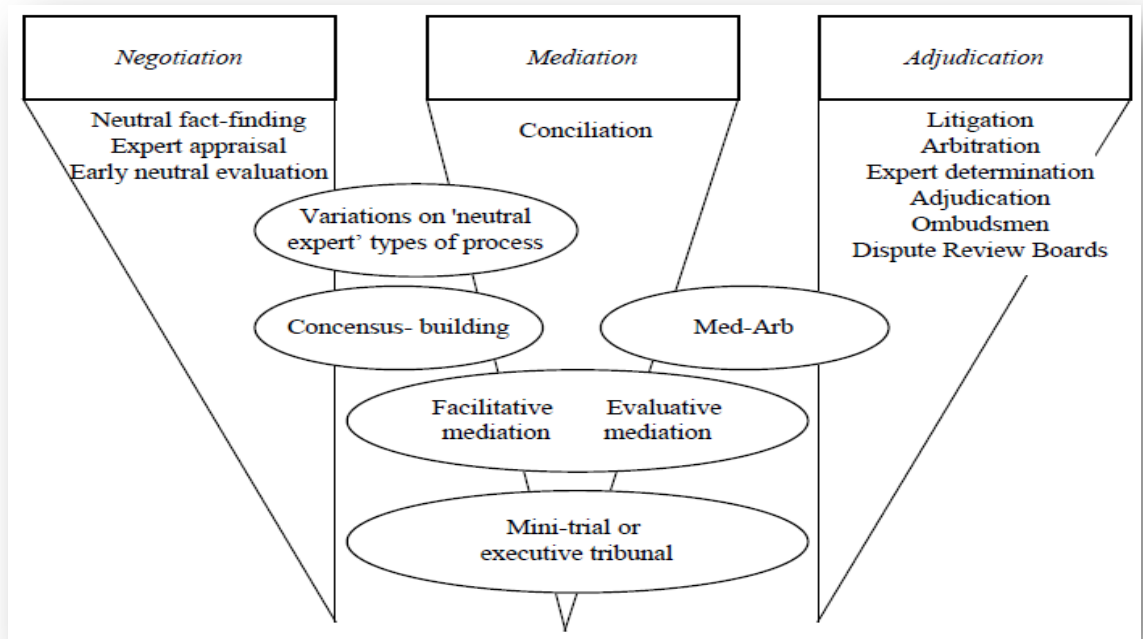


Figure 2.6: The dispute resolution landscape. (Sources: Gould, 2010)

2.4.3 Alternative dispute resolution (ADR) techniques

Alternative dispute resolution (ADR) is an alternative approach for resolving disputes (Cheung & Yeung, 1998). OGC (2002) defines ADR as a process involving an external third party in order to deal with a range of dispute resolution processes. It is a process which, if successful, can save time and money, but even if it is not, little is lost and there is always the option of arbitration (Hogbin, 1995). Fenn (2009) highlighted that ADR techniques are non-confrontational and an effective process which can preserve the parties' relationship. This view is supported by Matsumoto (2011) who stated that the use of this method, with the assistance of the neutral third party, is not an adversarial process.

While the concept of ADR has been broadly defined, the OGC (2002) defines the term as a range of procedures or techniques that can be regarded as an alternative to litigation; procedures which generally involve the intercession and assistance of a neutral and impartial third party. Cheung and Yeung (1998) discuss the benefits of ADR and explains that the technique allows the parties to concentrate on the key issues and thus achieve substantial savings in time and cost. Brown and Marriott (1999) pointed out that the use of ADR techniques empowers the parties and preserves varying degrees of control on the dispute; this scenario is in stark contrast to that of litigation. The explanation is supported by Hogan-Lovells (2010) who writes that ADR methods have promoted harmonious settlements, and therefore are able to satisfy the interests of all parties.

In that respect, what are the types of ADR techniques? Gould (1999) pointed out that the ADR techniques comprise a range of techniques from informal negotiation (mediation and adjudication etc.) to formal proceedings, like arbitration. However the key problem to these resolution techniques is that they are still developing. Talking about mediation for example, according to Bucklow (2010), reasons for the slow growth of mediation include a lack of confidence in the process and also a lack of understanding of the process.

ADR techniques arose as a response to the high cost and lengthy process of litigation (Cheung & Yeung, 1998). As far as ADR is concerned, a win-win target and some preventive measures are desirable. However, when trying to achieve a win-win outcome for the negotiation, by using a prevention technique, the outcome may not be a best solution in some cases and may not guarantee total dispute elimination. Therefore, the level of skill in handling the issues in dispute is of paramount importance. Previously, arbitration and litigation were the only other techniques available and very few cases were brought to court, as most of the issues were settled by negotiation. However, many concerns have been expressed recently about the capability of the traditional approaches, leading to the growth of new techniques such as mediation (Gould, 1999). Some legal proceedings or rights are enforced to solve controversial issues. However, in terms of the time period, the flexibility of such arrangements and the overall fees, it is not always appropriate to go to court as trials are expensive, time consuming and the procedure is not confidential (Cheung, 1999).

ADR has increased in popularity within the UK construction industry since the addition of adjudication in contracts following the Housing Grants, Construction and Regeneration Act (1996), and recommendations by the OGC (2002). In recent years, the use of ADR has been recognised worldwide. After the introduction of ADR, only a small percentage of cases were brought to trial. This is supported by Gould (1999), who suggested that interest in ADR occurred mostly after the US litigation explosion in the 1960s, that some even described as an epidemic, causing a growing interest in ADR techniques in order to avoid litigation.

In the UK, apart from the Housing Grants, Construction and Regeneration Act (1996), another reason for the popularity of ADR is the recommendation by the UK's government through the pledge of the 23rd March 2001 that 'all government departments will only go to court as a last resort; instead choosing to settle their disputes by mediation or arbitration whenever possible' (OGC, 2002). The Latham Report (1994) stated that the objectives of the process were to reduce conflict and litigation, and encourage the industry's productivity and competitiveness. This, it was argued, can be achieved through the use of ADR techniques.

In practicing alternative dispute resolution (ADR), the parties are more concerned with the benefits, such as the shortest time and cost minimisation, or intangibles such as preserving the relationship (Cheung, 1999). In India, for example, research by Lyer et al., (2008) showed the average time taken to reach a resolution in court is normally between 5 and 15 years. Although it is not compulsory in the UK to seek legal advice for choosing ADR (InfoLaw, 2011), the long-term duration of litigation will contribute to an increase in dispute issues passing through the ADR filter. However, there are some limitations to the process. For example some of the ADR techniques are non-binding and therefore lacking in force (Roberts, 1993). Brooker and Laver (1997), who did a study on ADR in the UK's construction industry, pointed out that the proposal of using an ADR approach by one side may be seen as a weakness. In addition, it was viewed that using ADR may result in a loss of advantage for one side, and consequently may jeopardise one's position in future legal proceedings.

Such findings provide an understanding that ADR suffers from specific weaknesses. As mentioned earlier, according to Bucklow (2010) the lack of confidence in the process and also a lack of understanding are the reasons for the slow development of mediation. A weakness with this argument is the failure to address how effective the ADR process is in dealing with complicated construction disputes. The result can be found at chapter 5 and is discussed in chapter 6.

By looking at the information given on ADR and the legal system, it can be questioned whether ADR techniques are in fact legal procedures, as the definition of ADR is insufficient and therefore can be confusing. According to Richbell (2008), adjudication is one of the ADR techniques that is becoming an expensive process, as it is one of the court-bound legal processes. However, Cheung (1999) pointed out that an ADR technique does not require any legal profession background or input. The view is supported by Jannadia et al. (2000), where in their study on '*Dispute Avoidance and Resolution*' they find that the procedure of ADR is outside the legal system. In fact, ADR is a technique that provides solutions in terms of achieving project objectives like on-time completion, upholding the standard and quality of work and completing work within the project costs (Cheung, 1999). Therefore looking at the statements from Cheung (1999) and Jannadia et al. (2000) it can be

concluded that ADR is not a legal process. Parties can choose any ADR technique to settle their issues in relation to the nature of the dispute (Info Law 2011).

ADR acts as an umbrella term for a variety of techniques that involve the use of a third-party neutral in the pursuit of a business solution (Gould, 1999). The main types of ADR techniques are: mediation, adjudication and arbitration.

2.4.3.1 Arbitration

Arbitration is one of the techniques used in resolving disputes which is an alternative to litigation (Uff, 2009). It offers a private, confidential and binding form of settlement, which is resolved by an award decided by an independent third party: the arbitrator (Fenn, 2010). In a usual arbitration proceeding, one independent party (but it may be up to three, particularly in international disputes) with industrial, subject-specific expertise, often a lawyer, will hold a formal hearing and will reach a binding decision (Richbell 2008). Arbitration is different from court proceedings, however it is conducted in a manner which is similar to litigation (Broadbent 2009) and conducted in accordance with the law (Uff, 2009). In a usual arbitration proceeding, there is a group of people seated around a row of tables, in a room. It may look like a conference or a business meeting (Blackaby et., al, 2009). The arbitrator, who is either chosen by the parties or nominated by an independent body like the court or a professional institution, (Fenn 2010), will make a decision within a procedural environment of the parties' choosing (Uff, 2009). In a traditional form of arbitration, the process is private and voluntary and is dependent on the parties' agreement to be bound by the decision made by the arbitrator(s) (Uff, 2009). However, presently arbitration is a compulsory, non-consensual form of dispute settlement (Uff, 2009), as it has been stated in most of the contracts that any dispute must be resolved by arbitration (Broadbent, 2009). According to Uff (2009), arbitration proceedings can occur without the presence of the parties or their representative, unlike other forms of ADR. The award will be decided within a timescale of 100 days (Uff, 2009).

2.4.3.2 Adjudication

Adjudication is one of the ADR techniques used to resolve construction disputes. It is similar to arbitration, but of a much more abbreviated nature (Broadbent, 2009). According to Richbell (2008), adjudication is a time limited, fast-track form of arbitration. It was introduced into the United Kingdom by part 2 of the Housing Grants, Construction and Regeneration Act, 1996 (HGCRA) (Gould & Linneman, 2008). Adjudication is particularly common in the construction industry because of the statutory right, but it is also generally available in any sector (Richbell, 2008). Under section 108(3) of the Housing Grants, Construction and Regeneration Act (1996), the existence of a dispute must be referred to adjudication (UK Legislation, 2013).

Adjudication is well established in the UK construction industry and it has produced several significant benefits (Richbell, 2008). It has substantially reduced the workload in the courts (Gould & Linneman, 2008). Adjudication appears to be an unsophisticated process; it is a speedy and more 'rough and ready' means of resolving disputes (Broadbent, 2009). The adjudicators are usually experienced specialists in the area of dispute (Richbell, 2008). However, adjudication is becoming highly expensive, as it is one of the court-bound legal processes. (Richbell, 2008). The decision is made by the impartial person (the adjudicator) who is required to reach that decision within 28 days (Fenn, 2010). The decision is binding and based upon the relevant law and the adjudicators have to decide who wins, and who loses, if there is no win-win resolution, rather than the parties deciding their own outcome. (Richbell, 2008).

2.4.3.3 Mediation

Mediation is defined as ‘the administration and enforcement of rules or social norms for disputants’ conformity’ (Fuller, 1971; Menkel-Meadow, 2001; Qu & Cheung, 2010). According to Kressel and Pruitt (1989) the process of mediation is similar to negotiation but it is assisted by a neutral third party, who helps the disputing parties to reach an agreed settlement. Yiu et al. (2007) also state that mediation is a form of assisted negotiation, as the mediator can bridge the communication gap between the disputants, thus helping to reach a settlement.

According to Qu and Cheung (2010) flexibility, cost effectiveness and non-threatening features are the most important elements for settling disputes. These features are all offered by mediation (Qu & Cheung, 2010). They added that mediation is an integral part of the dispute settlement provisions in various standard forms of construction contracts. The use of mediation in this way has become more popular; moreover, it has been used in a commercial context in resolving disputes in various industries, both before the commencement of, and during, formal proceedings (Gould, 2009).

Mediation is a form of elective ADR. Mediation is a ‘without prejudice’ negotiation process, meaning it cannot be referred to in open correspondence, or in court, prior to judgement (Nigel, 2009). The use of mediation in resolving construction disputes is not a new phenomenon. Although its use and effectiveness are limited, it can be employed to resolve a wide range of disputes. It appears as a better alternative to litigation, when the parties undertake it on their own initiative (Gould, 2009). By taking the decision to try mediation, the parties increase significantly the chance of a successful outcome because, according to Genn et al., (2007), the percentage settlement rate is about 80% (four out of five cases in the UK). In addition, the flexible process of mediation allows the generation of innovative settlements that are not possible in arbitration and litigation (Cheung, 2010).

2.4.4 Establishment of alternative dispute resolution (ADR) techniques in English law

The literature review considered information on the theory of ADR. For example, according to Sanchez (1996) the ADR system was introduced during the 5th century and has been adopted worldwide since then. One of the striking observations to emerge from the literature was that in the early days of construction most disputes were settled at informal meetings on the basis of a handshake (Treacy, 1995). From this statement, it can be seen that ADR is a way of resolving disputes without going to court to determine the outcome (Nigel, 2009). The ADR approach is becoming increasingly common, and is regularly adopted once a dispute has arisen (Bondy et al., 2005). The reason for this is because ADR promises to offer an effective method of resolving any legal crisis, not only in the construction industry but also in other fields, such as the workplace (Nigel, 2009).

In the UK, the ADR movement is receiving active support from the government (Bondy et al., 2005). The role of the courts is to deal with cases justly, expeditiously and fairly, this does not mean it should be done at any cost. Additionally, the courts are also expected to reduce expenses within reason (Gould, 2010).

Therefore, in order to reduce the number of court cases, there has been a concerted effort by the government to push disputants away from the courts by channelling some of the cases to alternative resolution models (Genn, 2005). In April 1999, Civil Procedure Rules (CPR) and Pre-Action Protocol (PAP) were introduced (Bondy et al., 2005). The CPR and PAP (which are only valid in England and Wales) consist of a simple procedure that is to accelerate the litigation procedure so that a proportion of the cases would settle out of court thereby reducing the cost of running the court services (Nigel, 2009). According to Cheung (2010), UK jurisdiction is one of the forerunners of the common law system in introducing ADR in civil procedures.

According to Donohoe, (2006), in 1990 and 1991, approximately 350,000 claims were issued in the Queen's Bench Division of the High Court. Ten years later, after the introduction of CPR and PAP, less than 20,000 claims were being issued

each year, and the annual numbers have remained constant ever since (Donohoe, 2006). This view is supported by Gould (2010) who writes that the number of cases brought to court is decreasing due to the introduction of CPR and PAP.

Active case management under the CPR included ‘encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and facilitating the use of such a procedure’ (Donohoe, 2006). Under these new rules, the courts were given the powers to order parties to attempt mediation. However, if any party does not co-operate with the judge’s suggestion to use ADR to solve the dispute, then it may face potentially heavy-cost sanctions at the end of the litigation (Donohoe, 2006; Genn, 2005; Nigel, 2009). There was a dramatic increase in court-issued fees and fees payable to the court throughout the duration of the pre-trial part of the case, which in turn may have contributed to the decline in the numbers of issued claims. The drop in litigated cases can be considered as evidence of a successful change, overturning more than a century of wasteful and expensive litigation (Nigel, 2009).

There are some cases which demonstrate the implementation of such procedures by the court. A synopsis of the measures implemented can be found in the case of *Halsey v. Milton Keynes General NHS Trust* ([2004] EWCA Civ 576). Although this is not an example of a construction dispute, the most important aspect is the result of the court implementation procedure on CPR and PAP. In this case, Mrs Halsey filed a case to court against the Milton Keynes general hospital following the death of her husband. The hospital had made an offer to settle the case, but Mrs Halsey rejected the offer and suggested mediation. The hospital refused to mediate the case on several occasions on the grounds that there was no liability and the sum of money involved was so low that it did not justify the use of Trust funds (Donohoe, 2006). In the end, the NHS paid in the region of £100,000 in legal costs (Donohoe, 2006). The next major case was *Susan Jane Dunnett v. Railtrack Plc.* ([2002] EWCA Civ 302). During proceedings, the court had suggested the parties engage with ADR. Ms. Dunnett indicated on more than one occasion that she was willing to use ADR, but Railtrack refused each request. Although Dunnett failed in her action against Railtrack, the Court of Appeal refused to allow Railtrack to recover costs against Dunnett.

From the two cases above, it is evident that judges are now committed to channeling the litigants towards ADR as the preferable means of dispute resolution. This has sent a clear message to any party to use ADR as a dispute resolving technique; together with notice that the refusal to engage with ADR may involve hefty financial implications. Therefore, it is the responsibility of the parties and their legal advisors to consider ADR as a means of dispute resolution before entering the expensive judicial process. There is some information in the literature discussing and highlighting the importance of ADR in English law (See Bondy et al., 2005; Donohoe, 2006; Genn, 2005; Nigel, 2009). Based on this, is there evidence to suggest that the disputing parties can still use the judicial process in resolving disputes without facing financial sanctions? The answer to the question can be found in the case of *Hurst v. Leeming* ([2001] EWHC 1051 (Ch)). In this case, Leeming was successful in the action. However, Hurst argued that he will not pay any recovery costs to Leeming as he had suggested mediation, but had been rejected by Leeming for several reasons, one being ‘*The lack of any real prospect of success in mediation*’. The judge held that reason was the most important factor in allowing Hurst to recover costs, despite a refusal to use ADR (Donohoe, 2006).

From the case above, it can be seen that the disputing parties can still recover costs, despite a valid reason to refuse to use ADR. Therefore, it is the responsibility of the disputing parties to engage with ADR and to refuse using ADR when they can provide strong reasons. However, if the dispute is small, the usage of ADR is appropriate. Another case, which is related to this issue, is *Burchell v. Bullard* ([2005] EWCA Civ 358). This is one of the construction disputes that was brought to court. The case arose following disputes concerning the construction work by Burchell (contractor) on Mr. and Mrs. Bullard’s (employer) house in Bournemouth, England. During the construction work, disputes arose between the parties as the stage payment was not paid and Burchell left the site. Before trial, Burchell suggested to mediate the issue. However, Mr. and Mrs. Bullard refused to mediate as the matters being disputed were technically complex and they therefore argued that mediation was not an appropriate route to settlement. In the end, the Court of Appeal’s judges were reluctant to penalise the Bullards on the same basis as was applied in *Dunnett v Railtrack* (Donohoe, 2006). However this small building dispute is an example ‘*par excellence*’ of disputes which are appropriate for ADR. If the

court feels that ADR had a reasonable chance of success for a case, but is rejected, then the court has the right (under CPR) to award or refuse costs (Donohoe, 2006).

The four cases are examples of the implementation of ADR in English law. Although the use of ADR is not compulsory in English construction law cases, a party should know that an unreasonable rejection of ADR can lead to the imposition of a cost sanction.

2.5 Summary

This chapter explores the literature review conducted on the topic of the thesis. The chapter was divided into 3 sections. Section one referred to the method of searching the literature; section two concentrated on the general understanding about the UK's construction industry and the final section focused on explaining the alternative dispute resolution (ADR) techniques.

The first section explained the appropriate method for searching the literature. It is crucial to have enough background information about the proposed research study. Several search databases were used to investigate the literature. The process of how the 'concepts' were derived from the research title and the main aims was explained. This was done in order to narrow down the amount of literature for the research and to limit the area of the literature search so that it is easy to concentrate on the actual concept; that is to define the quality of construction mediation. The terms or the keywords used to search for the concepts were the result of using trial and error methods. The second section explained and explored the general theory about the construction industry in the UK. Some general information about the construction economy was explained, in particular how the industry provides long-term economic and social benefits to the UK. The construction projects are also exposed to risks and complexities, as the industry is regarded as a tough and competitive business. Disputes will arise due to this. As a result, a dispute may destroy long-term relationships between parties and increase the number of contentious issues each year.

The third section explored the terminology of alternative dispute resolution techniques for use with the UK's construction industry. It was explained how the nature of the construction industry makes its disputes more complex than ordinary civil cases. One of the approaches to address construction disputes is through some preventative measures. Such measures should be implemented, as preventing disputes in the first place is far better than having to resolve them. However the preventive measures will not guarantee total dispute elimination. Therefore alternative dispute resolution techniques (ADR) have been introduced as an option. The ADR techniques have become more popular within the UK's construction industry since the addition of adjudication to the construction contract. Another factor accounting for the increase in popularity of ADR techniques was the government's efforts to channel some of the dispute cases to alternative dispute resolution techniques (ADR), in order to lower the number of court cases. In this case, the parties are ordered to attempt mediation through the CPR and PAP rules. As a result, there has been a growing awareness of the benefits of mediation. Many commercial sectors have begun to take an interest in, as well as promote, mediation as one of the viable alternative dispute resolution techniques.

Chapter 3 - Mediation

3.1 Introduction

This section explains the terminology of mediation, a technique that is used to solve construction disputes. The goal of this section is to provide an understanding of the process of mediation, as one of the alternative dispute resolution (ADR) techniques. This is then followed by an explanation of how mediation can be used to solve complex construction disputes and to identify the barriers which can prevent the spread of mediation in the UK construction industry.

3.2 Development of mediation

Mediation is an effective tool for tackling a wide range of issues. In this section, the development of mediation is explained and explored. Several factors have influenced mediation's development in the UK. The history of mediation is explained in the first part of this section, followed by exploring the development of mediation. One of the questions about mediation relates to the issue of making mediation mandatory; a topic that is already the subject of debate in the UK. A pilot study was carried out to investigate the feasibility of mandatory referral to mediation in the UK. However the results were negative as more than 80% of the disputing parties objected the mandatory referral. One of the key features of mediation is that it is a voluntary process. Therefore, making mediation compulsory would not be an easy decision to take.

For this section it is important to examine the criteria and factors that affect the development of mediation in the UK's construction industry. The development of mediation was recognised within business industries, as a way of resolving disputes by assisted negotiation, rather than by litigation or arbitration (Tembo et al., 2010). It was then turned into a formalised version of dispute solving in the USA (Gould, 2010). Another development of mediation noted in the literature was the flexibility of the mediation style in which it is conducted. This oversimplifies the flexibility of mediation, a procedure that has been conceptualised by others as a continuum of strategies embodying elements of each of the four categories (Gulliver, 1979; Palmer & Roberts, 1998; Robert, 1993).

Most studies of construction mediation have only focussed to produce descriptive statistics in terms of the extent of use, type of disputes, settlement rates and projections of future use of the resolution methods. For example, Chau (1992) reported a settlement rate of 90% in Hong Kong; a study by Stipanowich (1996) in the US reported that 59.1% resulted in settlement of all the referred issues, while a further 7.9% resulted in partial settlement (Gould, 2010). Previous studies have reported that mediations require relatively little time or money (Tembo et al., 2010). However, the researchers have not treated the investigations into construction mediation in much detail. The theory behind the areas of conflict and disputes was not well documented (Fenn, et al 1997).

According to Genn (2005), the history and development of mediation in the UK were accelerated with the implementation of Woolf's reform. Since 1990, the English courts have encouraged the use of mediation for all litigants. Although the scheme was non-mandatory, it imposed substantial pressure on the parties to choose ADR (mediation) as a dispute resolution technique. In 1996, the Court of Appeal established a voluntary ADR scheme, and the Central London County Court implemented a voluntary mediation pilot scheme. The aim of encouraging mediation is to reflect the CPR and PAs drafted by Lord Woolf, which came into effect in 1999. This is to highlight the incentives to consider mediation, provided the CPR (cost sanction) is effective, and that those advising the parties in construction disputes now routinely consider mediation to try and bring about a quick and economical resolution of the dispute (Gould, 2009).

The moves towards mediation in the UK began to be developed in the area of family disputes, with the commercial sector beginning to take an interest in the late 1980s (Gould, 2010). Fenn and Gould (in 1994) did a study on the growth of mediation in the UK. The study revealed that the growth of mediation was slow, as only 30% of the respondents had been involved in an ADR process (Gould, 2010). However, the use of mediation is growing because it was the preferred choice of dispute resolution by insurers and some multinational companies (Kallipetis, 2007; Brady, 2009). Gould and Cohen (1998) reported a growing practice by UK insurers involved in disputes of requiring their lawyers to justify a failure to use mediation as the procedure of choice.

The PAPs for construction and engineering apply to all disputes, including professional negligence claims against architects, engineers and quantity surveyors. It provides for a pre-action meeting but also recommends that the parties should consider whether choosing ADR is more suitable than litigation. These provisos accord with the Court of Appeals recognition in *Burchell v Bullard* that mediation should act as a track to a just result, running parallel with that of the court system (Gould, 2009). Lord Justice Dyson emphasised that the court has no power to order mediation, but has jurisdiction to impose a cost sanction on unsuccessful parties who unreasonably refuse to mediate (Donohoe, 2006). However the limitation with the above explanation is that it does not elaborate further about the outcome of the dispute. For example, does mediation produce a lasting solution with this reform? It should be emphasised that mediation is a voluntary, non-binding process in which all parties reach a negotiated agreement. Mediation involves a facilitated, confidential and voluntary negotiation whereby a third, neutral party, the mediator, facilitates a process for disputing parties to reach a mutually satisfactory resolution. In mediation proceedings, the responsibility for making decisions belongs to the parties involved (Persson & Castro, 2008).

Mediation appears to receive little resistance from construction practitioners, owing to its emphasis on confidentiality (Cheung, 2010). Mediation enthusiasts (providers) have been promoting the advantages of mediation since 1980. The interest in mediation was low until the early 1990s, at which point the government and judiciary appeared convinced by the claimed benefits of mediation (Derek et al., 2009). It is important to view mediation as a dispute resolution process in its own right, where the parties come to an agreement, rather than using somebody to make a determination of their dispute. There is also the possibility that parties may regard mediation as a way out of their dispute resolution process, rather than as a dispute resolution process in itself (Ramsey, 2011).

From the description of the information given above, the development of mediation can be seen in the area of resolving disputes (Tembo et al., 2010), the flexibility of the process (Fenn, 2010) and the increase in the number of cases for mediation (Brady, 2009; Kallipetis, 2007). It is interesting to note that the government and several private bodies play a big role in promoting the mediation process as an effective dispute resolution mechanism. However, the issue of the public's awareness is still a problem, and that raises the question of whether the public's awareness of mediation is enough. Another factor which needs to be studied is the elements which stop people from choosing mediation as a dispute resolving mechanism. In relation to this, there is an ongoing debate about imposing mandatory mediation. Will such an approach produce a positive impact on the development of mediation?

3.3 Mediation theory

The mediation process is the continuation of negotiation (Bercovitch & Rubin, 1992). It is further elaborated by Brown (2010) that mediation is one of the ADR techniques which is seen as an ideal way to solve most issues. However, one question that needs to be asked is 'how effective mediation is in resolving construction disputes?' The research to date has mostly focused on the quantitative approach of mediation, rather than the qualitative approach. What is known about mediation is that it involves the role of a neutral third party (the mediator) who is trained to assist the parties to reach a settlement (RICS, 2013). One of the roles of the mediator is to help translating/explaining the disputing parties and to ensure them understand with the information regarding the dispute and mediation procedure (Yates, 2010). The mediator is specially trained to a nationally accredited standard, but unlike arbitrators or judges has no power to impose a settlement on the parties (RICS, 2013). Mediation helps to solve most disputes and achieve success; however, its outcome depends on the type of individuals or organisation participating and the level of commitment of the participants (Yates, 2010).

The goal of this section is to explore the usage of mediation in resolving construction disputes. In order to identify the gaps in the literature, which include evaluating and identifying any potential barriers to the use of mediation in the construction industry, this section is divided into four categories: recent research, characteristics of mediation, mediation models and stages of mediation.

3.3.1 Research in construction dispute and mediation

There are several studies on the topic of construction disputes and mediation. Some of the research studies (for example Bristow, 1995; Fenn et al, 1998; Gould, 2010; Kennedy, 2006; Kumaraswamy, 1996; Semple et al, 1994; Steen, 1994; Treacy, 1995; Watts & Scrivener, 1993) were focussed on the qualitative approach through questionnaires. Others analysed or examined case studies (e.g. Watts & Scrivener, 1993) as a way of trying to find out the causes of conflict and disputes, the quantity of mediation (for example the uptake or the use of mediation), the process and benefits of mediation, of which the statistical findings show the level of awareness of the public, especially the disputing parties. For example, according to Gould (2010), in 1994, Fenn and Gould have researched the use of mediation in the English construction industry. Their work was based on Stiapanwich's research into the use of mediation in the USA. In particular Stiapanwich investigated the use of ADR in the US construction industry, where a large number of mediation experiences have been reported. It was stressed that mediation is widely used in that sector. In the UK, it was reported that relatively little mediation had taken place as at the early 1990's.

Gould carried out more extensive research in 1996, as did Lavers and Brooker in 2001 (Gould 2010). Both studies indicated an increase of uptake in mediation in the construction industry. However, the researches were done based on a quantitative basis and the statistical data presented showed the use of mediation in the construction industry in the UK. Perhaps not enough attention has been paid to evaluating the theory on conflict and dispute, as well as those of mediation (Fenn et al., 1997). The present research is focused on the development of mediation, with the aim of identifying the barriers, which impeded the use of mediation in the UK construction industry.

3.3.2 Benefits and characteristics of mediation

Mediation is a quicker and cheaper method than litigation for resolving construction disputes (Cheung, 2010). Gould (2010) has identified some characteristics of mediation which can be differentiated in terms of their benefits, from the traditional formal types of adjudicative processes, such as litigation and arbitration. These benefits include the following (Gould, 2010):

- Reduction in the time taken to resolve disputes
- Reduction in the cost of resolving disputes
- Providing a more satisfactory outcome to the dispute
- Minimizing further disputes
- Opening channels of communication
- Preserving or enhancing relationships.
- Savings in time and money
- Empowering the parties.

Fenn (2010) has summarised the main features of the benefits into 6 main characteristics:

- *Consensual*. The parties in the dispute agree to seek business solutions assisted by their advisers and a neutral mediator (Fenn, 2010).
- *Control*. In mediation, the parties in the dispute are the ones who create the agreement which works for them. The parties also agree a timetable, procedure, and the agenda. The outcome is a contractual agreement or consensual award. However, if the dispute is to be settled by other traditional and formal adjudicative processes (adjudication or arbitration), the settlement agreements to the dispute are imposed by the third party (the arbitrator or the judge) (Fenn, 2010).
- *Cost savings*. A court process can be expensive. Perhaps a better use of funds would be to spend the money to solve the problems, or to repair any damage. The cost of mediation is very reasonable compared to other dispute resolution mechanisms. In mediation, the emphasis is on the key issues and not on exhausting every avenue to substantiate a case or to deny the evidence from the other side before the tribunal (Fenn, 2010).

- *Continuing business relations.* Mediation is a ‘win-win’ solution focused on the communication between parties. Mediation looks to the future and can help to build a framework for future business plans, based upon the parties’ mutual interest and needs (Fenn, 2010).
- *Confidentiality.* The meetings are private, and should be used to explore creative solutions and agree to pragmatic settlements. The parties in the dispute can speak openly and directly to each other about the issues, without the proceedings being a matter of public record. The mediation process provides a non-threatening, informal procedure as an initial step in resolving the issues. If the mediation process fails to resolve the issue, or if the issue is not appropriate for mediation, the parties are free to pursue all of their legal remedies (Fenn, 2010).
- *Creative.* In mediation, commercial and business solutions are not limited by legal rules. The parties, with the help of the mediator, can explore their current or future interests and any other issues in order to achieve a solution. The final agreement can be on anything, based on the parties’ negotiation, as long as it is not in violation of the law (Fenn, 2010).

Jannaidia et al., (2000) classified the characteristics of mediation into speed, cost, expertise, privacy and practicality. These characteristics were then grouped in terms of quicker resolution, cheaper cost, and flexibility of the process. In terms of ‘cost’, mediation proceedings are not expensive (Bondy et al., 2005). This is because it is an informal process that is designed to produce a speedy resolution. A King’s College survey supports and contributes to the evidence that mediation can result in significant cost savings (Gould, 2009). The courts require a lot of preparatory procedures and it may take months, or even years, before a case comes to trial. For that reason, the process is expensive. Mediation however can be settled, and an agreement obtained, in a couple of hours (Carbone, 2014).

All the information given above is to describe the benefits of mediation in support of the argument that mediation is one of the best approaches for resolving construction disputes. Additional support for this view comes from Brooker and Lavers (2001), who carried out research on mediation and showed there was an 85% satisfaction rate regarding the potential cost of mediation. Another remarkable result from the King's College survey shows that even when mediation did not result in a settlement, the outcome was not always regarded as negative. The reason for this is because mediation is often viewed as beneficial, as it allows the dispute to be settled by narrowing the dispute's focus or contributing to a greater understanding of the other side's case (Gould et al., 2009).

3.3.3 Drawbacks of mediation

From the information above, it can be argued that mediation is suitable for resolving many issues. However, the researcher has noticed several, potentially major drawbacks of mediation. One question that needs to be answered is whether its cost and time duration can be predictable. Although mediation helps to narrow down the issues, and the issues are then remediated, there will be an issue on cost and time duration to achieve the settlement agreement. However, if other dispute resolution methods were used (for example adjudication or arbitration) the parties would then be guaranteed to have the settlement agreement bonded upon them.

To support this view, the researcher referred to the publication '*Mediation and Judicial Review*' (Bondy et al., 2005), which stated that in terms of costs, mediation can be expensive. Specifically, if mediation fails, it can be equally as expensive as litigation. The CPR and PAPs, which were introduced in 1999, exist only to reduce the number of cases being processed in court. This does not mean that the CPR and PAPs can produce a cost benefit to all parties. If an early-mediated dispute resolution is achieved, the overall cost will be lower than that of a trial. If the mediation fails to achieve a resolution, or the nature of the dispute deteriorates and needs more time for resolution, there will be considerable variance in the cost of representation, mediator's fees and the point in the litigation process at which the mediation takes place. As the Court of Appeal stated, heavy cost sanctions would be imposed on those who unreasonably disagree to use mediation; some high profile parties can use mediation to create tactical delays and cause prejudice by forcing the

opposing party to withdraw or settle. For a party with limited means, the decision to engage in mediation may be risky in view of the fact that it cannot guarantee a binding outcome (Bondy et al., 2005).

Another issue that was noticed by the researcher was in relation to the flexibility of mediation. Referring to the existing literature, the most compelling characteristic of mediation is its flexibility (Cheung 2010; Nigel, 2009). The outcome can be tailored to meet the needs of the parties, which has the potential to preserve or restore relationships. In a mediation session, issues are, at least in theory, be discussed in a creative and proactive manner. The sources of the dispute, especially those related to the information, goals, methods for resolving disagreements and the parties' feelings can be identified and solved. If the issues are brought to court, not all issues will be discussed, only those pertaining to legal matters (Gould, 2010). However, according to Bondy et al., (2005), the term 'flexibility' does not guarantee fairness or just outcomes. By individualising disputes that may have structural roots, mediation is offering somewhat superficial resolutions. Fairness and justice are prescribed in different ways. The right outcome is not necessarily determined by law. The process used is most important, regardless of its outcome (Bondy et al., 2005).

From the information described above, it can be inferred that mediation is a technique which offers speedy settlement, via an economical approach to resolving disputes. The number of mediation cases is increasing and the success rate can be said to be 80% - 90%, which shows an extremely positive outcome (Gould, 2010). However, the increase in numbers of mediation cases can be misleading, since it is not clear whether it is growing because of increasing awareness of the effective and efficient nature of mediation or due to an increase in the number of construction disputes. It is also worth bearing in mind that, according to Cheung (1999), construction disputes are complex. There is little information regarding these issues, leading to additional questions. For example, does the public especially those involve in construction dispute, understand the meaning of mediation, or do they know it only as one of several dispute resolution techniques?

Another question is whether the public, that is the disputing parties, knows their role during the mediation proceedings, and what they should do during, and expect from, such a mediation process. This aspect is important, because if the people do not understand the definition of mediation, they will see the characteristics or stages of mediation from different perspectives. For example, some tactical approaches can be made and therefore may ruin the mediation process. Another factor of relevance is the mode of mediation: the facilitative mode is popular, but is it suitable to be used to solve complex issues in the construction industry?

The results of the research and discussion regarding the above question are included in chapter 5 and chapter 6. The next section will describe the types of mediation process. By describing the appropriate mediation models, it may help to look for any potential weakness or other factors, which can stop people from choosing to mediate their dispute.

3.3.4 Mediation models

The description of mediation models is included in this thesis in order to know what types of models are available. Initially mediation theory only recognised one type, known as facilitative mediation. However, some mediators concluded that, in certain situations, they should consider the parties' rights. Therefore, mediation now encompasses several different problem-solving models: settlement, transformative, evaluative and facilitative. The underlying ideologies of these mediation models differ in varying degrees, such as their process and goals (Fenn 2010). A brief description of each model follows.

3.3.4.1 Settlement mediation

Settlement mediation is also known as compromise mediation (RICS, 2013). The main objective is focused on encouraging incremental bargaining towards a compromise, at a central point between parties' positional demands (Fenn, 2010). In this mediation model, the mediator's main role is to determine the parties' bottom line and then to move them in incremental steps to a compromise point through persuasive interventions. This type of mediation is often used in commercial, personal injury and industrial disputes (RICS, 2013).

3.3.4.2 Transformative mediation

Transformative mediation is different from other modes of mediation, as its goal is to transform the conflict interaction. Transformative mediation focuses on two main key interpersonal processes, empowerment and recognition. The mediator's main role is to empower the parties to make their own decisions and take their own actions (Fenn 2010). A secondary, albeit important, role is to foster and develop recognition for and between the parties (RICS, 2013). The mediators leave the responsibility for the process and the outcome with the disputing parties (Fenn, 2010).

3.3.4.3 Evaluative mediation

Evaluative mediation is focused on reaching a settlement according to the legal rights of the parties (RICS, 2013). In this type of mediation, the mediator structures the process and, if necessary, makes some recommendations in relation to the potential outcome of the issues, so as to assist the parties in reaching a settlement (Brooker, 2007; Hibberd & Newman, 1999). This is done by assisting the parties in reaching a resolution by pointing out the weakness of their cases, and predicting what a tribunal would be likely to do (Fenn, 2010). This type of mediation is more focused on the legal aspect of the parties, as opposed to their personal interests and needs, while it involves an evaluation based on concepts of fairness (RICS, 2013). The mediators often meet the disputing parties, together with their advisors, in separate meetings, practicing shuttle diplomacy (Fenn, 2010). Evaluative mediation is a useful tool for specific areas and complex cases, such as the ones often encountered in construction disputes (Gould, 1999).

3.3.4.4 Facilitative mediation

Facilitative mediation is the most widely used technique, as it minimises the empowerment of any third party, as well as any external influences (RICS, 2013). In this type of mediation, the mediators manage the whole mediation process and the parties decide the outcome (Treacy, 1995). The mediator structures the process and helps to assist the parties in reaching a mutually agreeable resolution (Fenn, 2010). In this model the role of the mediator is to help the parties to find their own solution to a dispute (RICS, 2013) without making any recommendations or offering any

opinion about the outcome of the case (Treacy, 1995). The mediator gathers information from the parties by asking questions; he or she then validates and normalises the parties' points of view and searches for common points underneath the positions taken by the parties. The mediator ensures that the parties come to an agreement based on information and understanding, without major influence by and from the parties' advisors. During the mediation process, the mediator holds a joint session with both parties, in order to hear their points of view. The mediator holds regular private meetings (caucuses) with both sides in order to explore their opinions and to test the parties' positions (Fenn, 2010).

After examining the mediation models in detail, facilitative mediation can be said to be a highly suitable model for resolving construction disputes. Furthermore, the mediation provider (for example, RICS and CIARB) in training new mediators. According to Gould (1999), facilitative mediation was most widely used in the UK (Gould 1999) and the mediation training bodies in the UK (for example, the Royal Institute of Chartered Surveyors, RICS and the Chartered Institute of Arbitration, CIArb) are focused mainly towards the facilitative mediation model (RICS, 2013). However, it is appropriate to ask: 'can the facilitative model be used to determine the quality of the mediation process?' and 'will it be appropriate for use in future construction disputes?' The results of the research and discussion about facilitative mediation are included in chapter 5 and chapter 6.

3.3.5 Stages of mediation

The mediation procedure is constructive and involves the chance for personal development and social growth for the parties (Steffek, 2012). According to Fenn (2010), there is no set procedure in the mediation process since it is flexible by nature, so the process can be tailored to suit any party and any case. However, in theory a typical mediation process may consist of five main stages: 1) preparing, 2) opening (a joint meeting), 3) exploration (caucuses), 4) negotiation (further joint meetings) and 5) closing (Richbell, 2008).

In a mediation process, the stages listed above will not be easy to identify, sometimes the flow does not run smoothly. The five stages of the mediation process may sometimes become three: preparing, presenting (which includes exploring) and negotiating (which includes concluding) (Richbell, 2008). As such, there are instances when a typical mediation process may consist of only three main phases (Gould, 2010).

- Pre-mediation – agreeing to mediate and preparation
- Mediation – direct and indirect mediation
- Post-mediation – complying with the outcome.

3.3.5.1 Pre-mediation

The first phase of the mediation process is the pre-mediation step. It is focused on getting the parties into the mediation process. This is the preparation stage, developed from the initial inquiry, which may involve an explanation of the process, and an attempt to persuade reluctant parties to participate (Gould, 2010). Although this is the introductory phase, it still is crucial as it can influence the final outcome of the mediation's proceeding. At this stage, the mediator begins to develop a relationship with the parties and educates the parties by explaining the process of mediation (RICS, 2013). This may include aspects relating to the overall cost, confidentiality and privileges, such as the nature of the mediation (mediation without prejudice), authority to settle and the timetable (RICS, 2013). The parties may provide and exchange written summaries of the issues, as well as some copies of supporting documents. A contract to mediate is frequently used, in order to agree the terms and the ground rules for the mediation (Gould, 2010). At this stage, the mediator informs the parties about their roles, as well as the roles of the lawyers, other advisor and the mediator (RICS 2013).

3.3.5.2 The mediation

According to Gould (2010), most commercial mediations are conducted over the course of one day; however, in some circumstances the process may extend over several days, weeks or even months. Mediation proceedings are usually conducted in 'neutral territory', not at the office of one of the parties, in order to avoid any potential power imbalances.

The mediator arranges an open session or a joint meeting with the disputants. The mediation process commences in less formal and more confidential surroundings, as the parties wish (Goldberg, 1992; Palmer & Roberts, 1998). At this stage, the mediator establishes the ground rules and invites the parties to make opening statements (Gould, 2010). The mediator runs the session and stops the session if any party feels uncomfortable. The mediator starts the mediation proceedings by explaining how the session works, setting the agenda and giving everyone time to put forward the key issues. The meeting should be an open and frank discussion of the issues, led by the mediator, to ensure fairness and appropriate conduct (Richbell, 2008; RICS, 2013).

The mediation process is flexible. After all of the parties have made their opening statements, the mediator then arranges for the private meetings (caucuses) with each party in turn. The private meeting (caucus) is between the mediator and one of the parties. The mediator often shuttles backwards and forwards to clarify issues, explore in confidence the issues in the dispute and search the opinions for settlement possibilities. Nothing said in a private discussion with one person or party will be repeated to the other without permission (Richbell, 2008; RICS, 2013). In this stage, the mediator is mediating ‘indirectly’ with the parties. This exploration phase of mediation serves to (Gould, 2010):

- Build a relationship between the parties and the mediator
- Clarify the main issues
- Identify the parties’ interests or needs
- Allow the parties to vent their emotions
- Attempt to uncover any hidden agenda
- Identify potential settlement options

While the mediator is having a private meeting with one party, the other party is working on specific tasks given by the mediator (RICS, 2013). The mediator may also arrange for further joint meetings in order to narrow down the issues and allow the legal representatives or the experts to meet or broker the final settlement (Gould, 2010).

3.3.5.3 Post- mediation

Post-mediation is the phase whereby the parties make the decision for settlement or a continuation towards a trial or an arbitration hearing. After the mediation proceedings, if the parties do not settle the issues it does not mean that the mediation was not successful. The parties may have a greater understanding of the issues, which may lead to higher efficiency in the future in terms of the resolution of their dispute, or the parties may settle soon after the mediation. The mediator can still be involved as a settlement supervisor or perhaps in further mediations (Gould et al., 2010). However, if the parties have reached an agreement, the settlement agreement is drawn up and the parties will sign that agreement (Folberg, 1984; Hibberd & Newman, 1999; Moore, 2003).

3.3.5.4 The analysis of mediation stages

The above describes a typical mediation process encountered during mediation proceedings. Although there is no set procedure in mediation, the described process can be considered as a guide to what happens, or is likely to happen. There is little information which can help in evaluating the development of mediation. However, the method or the process and the skills used by the mediator can be used in assessing and identifying the barriers which impede the use of mediation for dispute solving. The main topic in this session is that mediators play an important role because they help the parties solve their problems and thus achieve a settlement. They are also able to shape the process to suit the needs of the parties. Therefore, the mediator's skills need to be analysed. As the literature relies heavily on quantitative research, it does not clearly explain whether it is an advantage for a mediator to have a construction background or if mediating skills are paramount in mediating construction disputes. The results of this research and the discussion regarding a mediator having a subject-specific background are available in chapters 5 and 6.

3.4 EU mediation directives

In September 2011, the European Parliament published a review on the *Implementation of the Mediation Directive by member states and its impact on mediation* (Hardy, 2010). The objective of the directive is to enforce the use of mediation as an alternative and cost effective approach to civil litigation **for cross-border commercial disputes**. Under this directive, all the agreements reached through mediation will, or should, occur under the same conditions. This allows the courts to refer parties to mediation and the refusal to mediate the issue may result in one or more of the disputing parties facing cost sanctions (CEDR).

The agreements reached through mediation are voluntary, the directive requires all the member states to establish a procedure whereby an agreement may, at the request of the parties, be confirmed by a court or public authority (Libralex, 2014). This will allow the agreements reached through mediation, throughout the EU, to take place under the same conditions as those established for the recognition and enforcement of court decisions in civil and commercial matters (EUR-Lex, 2014). According to Hillig and Huhn (2010) the number of mediation cases throughout the European Union may grow. Note the directive is to enforce the use of mediation as a cost effective alternative to civil litigation for cross-border commercial disputes, and NOT within individual member states.

3.5 Should mediation be mandatory?

One of the questions which need to be addressed is whether mandatory mediation would make a positive impact on mediation's development. According to Dendorfer, (2011), to impose mandatory mediation will strengthen the awareness and acceptance of mediation in legal communities as well as the public. Parties who bring commercial disputes to the English High Court are well experienced in the virtues of ADR and do not need compulsion to settle, since they are using ADR in order to avoid litigation (Genn et al., 2007). However, there is evidence to show that there is a lack of education and understanding towards mediation, and that is the reason why mediation has not been widely utilised (Hardy, 2010).

A law article (Gazette, 2003), states that Dutch courts were the first in Europe to introduce a mediation system through legislation, providing for mandatory mediation before the start of a civil action, subject to statutory exceptions. Since 2001, Germany has had a mandatory procedure for mediation by a judge. Section 278 (2) of the German Code of Civil Procedure directs judges to order mediation hearings prior to initial hearings, unless the parties have already attempted mediation or if mediation would be fruitless (Gazette, 2003). There seems to be a general debate on the issue of imposing mandatory mediation. Mandatory mediation is an undesirable direction to follow because the essence of mediation is in its voluntary nature (Gazette, 2011). However, politicians and senior judiciary have been making efforts to move cases away from the courts, and into mediation, for the past ten years (Hardy, 2010). This view is strongly supported by Mr. Justice Ramsey, to the extent he has suggested compulsory mediation for civil disputes and criminal cases in the UK, should be in place by 2020 (Gazette, 2011).

In comparing the settlement rate of mediation's results between mandatory and voluntary cases, the voluntary approach to mediation proved to be more successful than the mandatory approach (Gould, 2010). The sustainable result of the mediation proceeding can only be achieved based on voluntary referral (Dendorfer, 2011). According to Gould (2010), the King's College survey on the successful rate of mediation concluded that it is high. Interestingly, the majority of mediations undertaken resulted from the parties' own initiatives, rather than as a result of a court suggestion or order. The dramatic uptake in the number of parties mediating disputes began with the successful outcome of the *Dunnett v Railtract* case, after which, the settlement rates increased. This indicates that mediation may have been comparatively more successful at this stage, suggesting that the courts should continue to encourage mediation in future cases (Gould, 2010). However, according to Hardy (2010), a one-year pilot study in London on the feasibility of mandatory mediation was completed in March 2004. In this study, the parties had the right to decline, subject to the risk of an adverse-costs sanction for an unreasonable refusal to mediate. The result of the trial was negative, as 80% of those referred to mediation objected to the referral (Hardy, 2010).

Should mediation be mandatory in the construction industry? There is little evidence to support the adoption or use of mandatory mediation. One of the research questions for this study is to investigate whether it is appropriate to introduce mandatory mediation for the construction industry in the UK. The results can be found in chapter 5; the discussion is in chapter 6.

3.6 The research

3.6.1 Research questions

As mentioned earlier, there is limited literature available on construction dispute mediation; equally, not much research has been done on the development of mediation in the construction industry. There has been little discussion about this issue and most importantly, some of the theoretical explanations about the development of mediation in construction industry were not documented. Therefore, this research concentrates on the area of the development of mediation which is focusing on investigating the barriers which impede the use of mediation in the UK's construction industry. In particular, the researcher addressed various aspects such as the terminology, ideology, process and procedure; the type of construction mediation process mainly used; the main disputes in construction and the appropriate backgrounds of mediators. As the background information was not enough to provide a clear picture of the development of mediation, especially in the UK construction industry, several questions arose:

- How do parties adopt the mediation approach to solve disputes and why?
- What are the limits of mediation in resolving construction disputes?
- Can today's mediation process still be used for future's construction industry's disputes?
- What are the barriers to the widespread use of construction mediation?
- Should mandatory mediation be introduced in the construction industry and what will the potential implications be?

3.7 Summary

This chapter explores the literature of mediation, especially the development of mediation, mediation theory, benefits and characteristics of mediation, mediation models, stages of mediation and mandatory mediation. The chapter also explores several research questions which arise from reviewing the literature on mediation.

There has been a positive approach by the government in promoting mediation as a dispute resolution mechanism. One of the features for mediation's development is the increase in flexibility of the mediation style. Another feature, which shows the development of mediation in the UK, was through the implementation of Lord Woolf's reform. However, making mediation a mandatory approach to dispute resolution does not show any sign of being adopted by the construction industry.

There have been several studies done on exploring the uses of mediation in the construction industry. The present research is used to examine the quality of those investigations, and it is focused on finding out the barriers to the use of mediation in the UK construction industry. The characteristics of mediation were identified and explained, as it seems potential users sometimes misunderstand them, making it difficult to reach a settlement via mediation. To prevent that from happening, the facilitative mode of mediation is used, as it is the most popular practice employed in the UK.

The final section of the chapter was used to point out the problems encountered during the literature review process. Initially, after observing the information from the literature, knowledge and information gaps were identified, especially in illustrating the development of mediation for the solution of construction disputes. This current research initiative is based upon, and informed by, a qualitative research methodology.

Chapter 4 - Methodology

4.1 Introduction

The purpose of this chapter is to present the methodological issues related to the way the research was conducted. More specifically, it will present what will be done to achieve the aim and to answer the research questions, what method was used and how the data was collected. The aim of the research is to investigate the development of mediation by focussing on identifying the barriers which impede the use of mediation in the UK construction industry. The research has created some '*what*', '*how*' and '*why*' questions. The methodology was selected after assessing the different types of strategies which are appropriate for this research. Most strategies relate to one another in different ways, although each has a primary focus (Gill & Johnson, 2002). Furthermore, the study required the justification of an appropriate research strategy prior to the selection of appropriate methods for carrying out the investigation, depending on the current knowledge and the nature of the topic (Saunders et al., 2012).

In conducting a research project, depending on its nature there are certain steps which should be followed (as shown on Figure 4.1). Following the determination of the research title, a literature review must be done in order to obtain greater clarification of the topic or field. The literature review helps, in a systematic way, to better understand the research topic's issues or problems, and thus to generate the research questions. The hypotheses or assumptions are then created with the help of this clarified picture (Ghauri & Gronhaug, 2002).

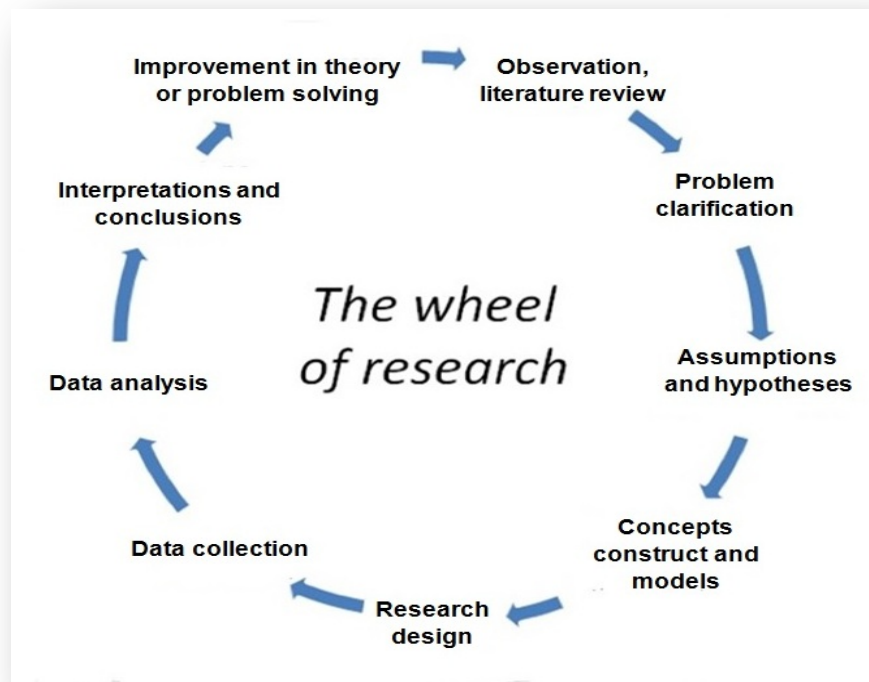


Figure 4.1: The wheel of research (Source: Ghauri & Gronhaug, 2002)

The research process for this study was structured by using the research ‘onion’ as shown in Figure 4.2. This process helped the researcher to follow a step-by-step process, in order to obtain a precise outcome. In this chapter, the method of how the research was conducted is elaborated and divided into eight sections. Section 4.1 explains the basic idea of the methodologies used for the research. Section 4.2 explores the selection of the appropriate methodology, which includes the exploration of the appropriate research philosophy; the selection of the research approach; the research purpose; the suitable research strategy; the ideal research design and choosing the systematic data collection approach. Section 4.3 explains the selection of research sampling based on grounded theory. Section 4.4 describes the research procedure, involving a systematic step-by-step procedure in order to obtain richer in-depth results. Section 4.5 explains and describes the ethical considerations associated with undertaking the study. Section 4.6 describes the appropriate process of analysing the data. Section 4.7 elaborates the quality of the research through its validity and reliability and section 4.8 summarises the whole methodology of the project.

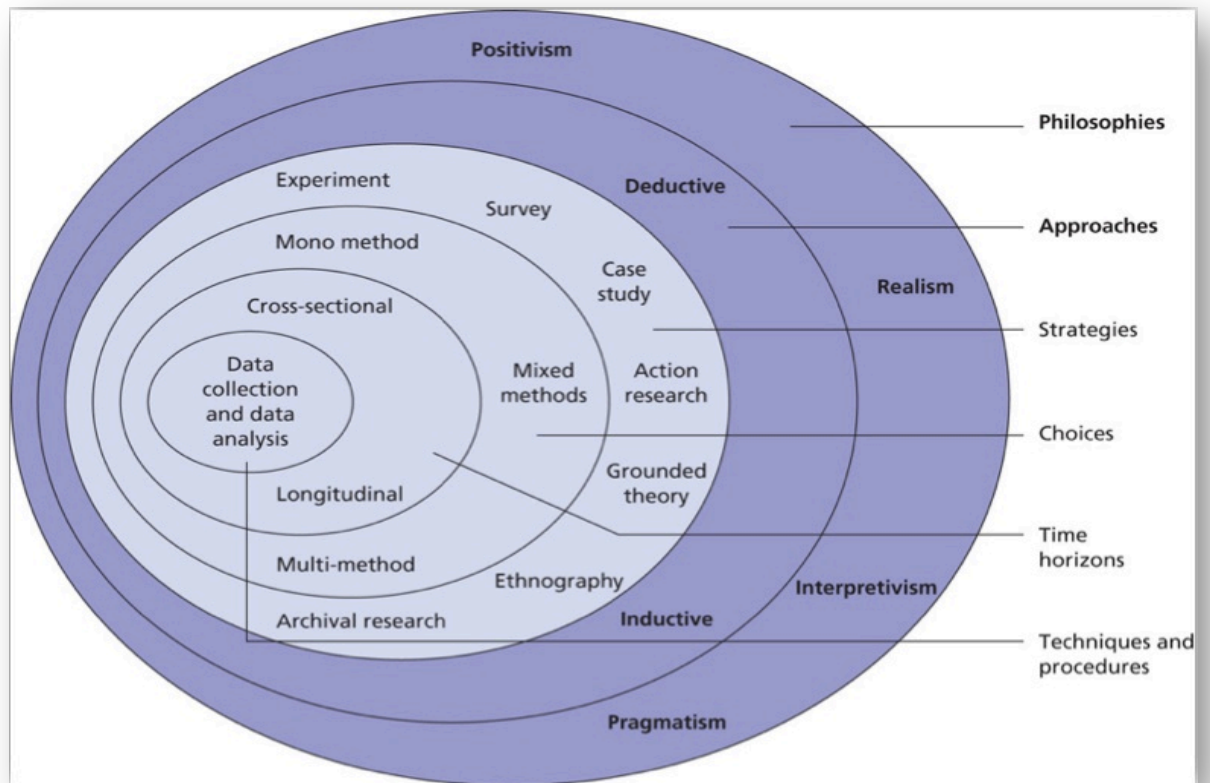


Figure 4.2: Research Onion (Source: Saunders et al., 2012)

There are several approaches to, and types of, research methodology used with reference to the research onion. Table 4.1 shows the summary of the research methodologies presented in the chapter.

Research philosophy	Positivist and interpretive
Research approaches	Inductive and deductive
Research strategies	Case study method, action research method, and grounded theory
Research design	Qualitative research design, quantitative research design, and mixed methods
Data collection techniques	Participant observation, in-depth interviews, semi-structured interviews and unstructured interviews.

Table 4.1: List of research methodologies available for the research

4.2 Research process

At the planning stage of an empirical initiative, dilemmas will inevitably arise, especially in choosing appropriate strategies and methods for answering the research questions. Furthermore, the assumptions formulated and knowledge gained should be judged by the selected methods and strategies (Gill & Johnson, 2002). To answer the research questions, such as: ‘Can today’s mediation approach still be used for future’s construction disputes? i.e. in what circumstances does it relate to the overall cost, duration, flexibility or quality of the mediation process?’ it is essential to look into these challenges.

The research was formulated in relation to the question that needs to be answered. The assumption of the knowledge and realities encountered in the research will shape the understanding of the research questions, the methods used to address and interpret the findings (Saunders et al., 2012). This assumption had underpinned the research strategies and the way the study was influenced and structured by the research process ‘onion’ (see Figure 4.2) (Saunders et al., 2012). The research ‘onion’ presents a clear framework of the most suitable methods and strategies required to address a research study. Furthermore, it promotes knowledge as the way to answer research questions.

The process outlined in Figure 4.2, consists of philosophies, approaches, strategies, choices, time horizon, techniques and procedures. After deciding on a suitable philosophy, other elements were selected from each layer, which assisted in answering the research questions. Each element in each different layer was examined to ascertain how their strength might help to address the research questions. In practice the research approaches, strategy, purpose, design and analysis depend on the researcher’s selection of a suitable investigative paradigm. Hence, the researcher’s understanding of the appropriate paradigm, shapes and structures the whole methodology of a research design. Therefore, it was an advantage to explore the appropriate research model in order to produce a valid and precise outcome. The next section will attempt to compare and contrast the available paradigms used in social science research. It is followed by the selection of the appropriate approach for this research and explanations for adopting such a model.

4.2.1 Research philosophy

Knowledge is a complex phenomenon influenced and developed by various contextual variables (Saunders et al., 2012). The research philosophy is used as a guide on how a specific piece of research should be conducted. In this respect, a research philosophy represents a researcher's perception of the way knowledge is constructed (Saunders et al., 2012) and eventually will help the researcher to choose the appropriate research design (Esterby-Smith et al., 2012). Furthermore, it will help the researcher to identify the appropriate methods for data collection and analysis. There are several research philosophies identified and recognised in the literature; however the two primary paradigms are *positivist* and *interpretive* (Rossman & Rallis, 2003). The philosophies provide a distinctive view of the way knowledge is developed. The research philosophy should be clearly established as it has a significant impact on the methodological framework applied (Saunders et al., 2012). An overview of the two primary paradigms can be found below.

The positivist paradigm

Positivism applies scientific reasoning and law-like generalisations in the process of knowledge construction (Remenyi et al., 1998). The research methodology, which is influenced by this research paradigm, is characterised by a highly transparent structure to facilitate replication (Gill & Johnson, 2002). Using positivism, the researcher can identify causal explanations and fundamental laws that explain regularities in human social behaviour (Esterby-Smith et al., 2012). To achieve this, the generalisation of the results from ample sample sizes is necessary, utilising a hypothetico-deductive process (Holden & Lynch, 2004).

A positivist paradigm involves the formulation of hypotheses developed from the researcher's conceptualisation of a particular phenomenon (Holden & Lynch, 2004). According to Tuli (2010), the type of methodology for use with a positivist research paradigm is a quantitative research method, which emphasises the measuring of variables. This approach relies on the values of reason, truth and validity and a focus on facts that are collected, using the quantitative operational concept via statistical relationships (Saunders et al., 2012). One of the principles of positivism assumes that the purpose of theory is to generate hypotheses which can be

tested and that will thereby allow explanations of laws to be assessed (Bryman, 2008). A positivist researcher uses experimental designs, which focus on gathering data in the form of numbers, to enable evidence to be presented in quantitative form (Tuli, 2010).

The strength of positivism is that it can provide wide coverage of a range of situations and it can provide a fast and economical way of doing research (Esterby-Smith et al., 2012). The downside of this research paradigm is that this method is inflexible and artificial; it is not suitable if the researcher wishes to understand processes or the significance that people attach to actions (Esterby-Smith et al., 2012). In summary, in looking at the positivist paradigm's main terminology, it attempts to test a hypothesis using valid, reliable and precise variables. Thus generalisation of data to a broad population is an important aspect for this philosophy.

Interpretive paradigm

In contrast to positivism, interpretivism focuses on the meaning of social phenomena, rather than their measurement. Thus, the aim of the interpretive paradigm is to understand how people make sense of their words (subjective reality and attached meaning to it) (Gill & Johnson, 2010). This is accomplished by identifying and exploring how different aspects in a particular context are associated, and not to prove or disprove a hypothesis (Oates, 2006). Using interpretivism, it is important for the researcher to understand the motives and meaning and to explain a problem in its contextual setting (Esterby-Smith et al., 2002).

Generalisation to a sample or population is not important in interpretivism; the intent is to capture a deeper understanding of a specific phenomenon, which could be employed to inform other contexts. Interpretive researchers try to make sense of the way research participants understand and conceptualise events; these different aspects are assumed to impact on an individual's behaviour (Kaplan & Duchon, 1988).

According to Tuli (2010), qualitative methodology is usually used for this approach. Researchers use qualitative methodology via such activities such as observing, interviewing key people, taking life histories, constructing case studies, and analysing existing documents or other cultural artifacts (Tuli, 2010). The weakness about this paradigm is to do with its validation. According to Tuli (2010), some issues of trustworthiness and credibility, as opposed to the positivist criteria of validity, reliability and objectivity, are key considerations for this paradigm. In summary, the main goal of an interpretive paradigm is to capture a deeper understanding about a phenomenon using a valid and precise methodology. Thus the process of generalisation is not an important aspect of this philosophy.

Identifying a suitable research philosophy

While conducting research, it is important to explore the philosophical views which may influence the methodology and results of that research, as such philosophies govern the whole methodology and process of the investigation (see Figure 4.2). Therefore, choosing a suitable paradigm is crucial.

This current research is concerned with the construction dispute mediation phenomenon in the UK. Existing literature lacks the presence of theories about disputes in the construction field and a dispute resolving mechanism in the UK. As a result some research questions arose and were used to investigate the barriers to the use of construction mediation in the UK. The background information was not enough to build up ideas about the research area; as a result there were no hypotheses generated in the research. However, the research questions helped to guide the research in the right direction. The appropriate approach was to interact with the experts (leading construction mediators) in order to explore the breadth and depth of their knowledge and experience in mediating construction disputes.

By looking at the factors explained above, positivism was deemed not suitable for employing with this research, as the key point was to understand the reality of the problem being investigated. The positivist paradigm is inappropriate as a method for exploring human emotions and feelings and cannot adequately interpret people's perceptions and behaviour. As mentioned earlier, the positivist paradigm can only be used to identify causal explanations and fundamental laws that explain regularities in human social behaviour (Esterby-Smith et al., 2012).

The philosophy incorporated in the context of this research is, therefore, the interpretive paradigm. According to Saunders et al. (2012) the interpretive paradigm advocates that it is necessary for the researcher to understand differences between humans in our roles as social actors. The aim was to understand the contextual setting for the individuals. Therefore, it was appropriate to interact with the experts about the research. According to Neuman (1994), the interpretive paradigm helps to interpret and understand how people see the world. Moreover, there were some opportunities to observe and explore how the experts described their knowledge about mediation and shared their experiences in mediating construction disputes. As a result of these considerations, the interpretive approach was used as a means of adding richness to the research.

According to the interpretive paradigm, the research approach is inductive as it aims to develop and build theory in order to generate hypotheses based on qualitative research (Saunders et al., 2012). Some interpretive research methods include: case studies, action research, hermeneutic analysis, ethnography, semiotic analysis, narrative analysis and grounded theory (Myers & Avison, 2002). A summary of the appropriate research approach, research strategies and research design is shown in Figure 4.3. The rationale of the selected research design, research methods, and data collection methods are explained later in the chapter.

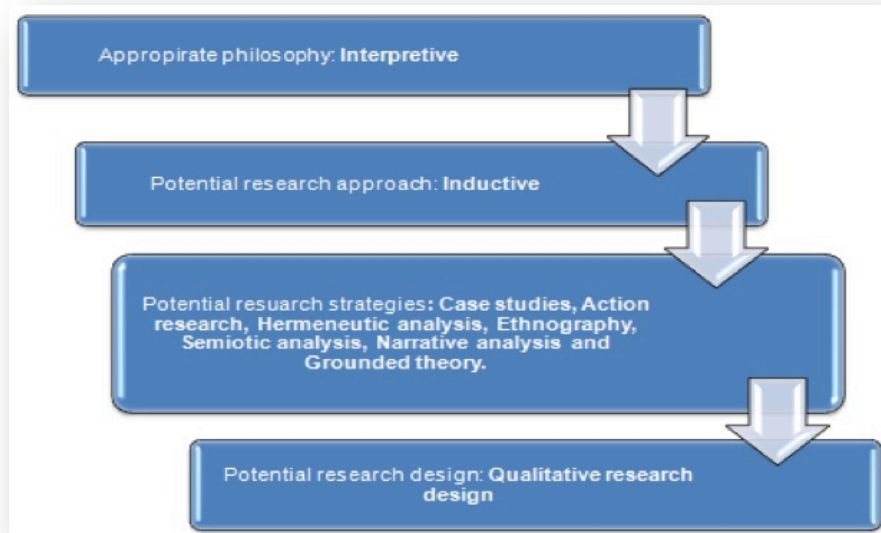


Figure 4.3: The summary of the appropriate research approach, research strategies and research design.

4.2.2 Research approaches

Reviewing the literature provides a foundation in a research study. It enables the development of better understanding and insight into previous research and an understanding of relevant trends that have emerged. Research into existing literature, for the purposes of a report, is the best way of clarifying thoughts and understanding regarding the topic being investigated. It helps to organise ideas into a coherent statement of the researcher’s intent. However, it is simply not possible to achieve ‘great ideas’ without a research approach; it is therefore crucial to select the most suitable option. There are basically two types of research approaches: deductive and inductive (Saunders et. al., 2012).

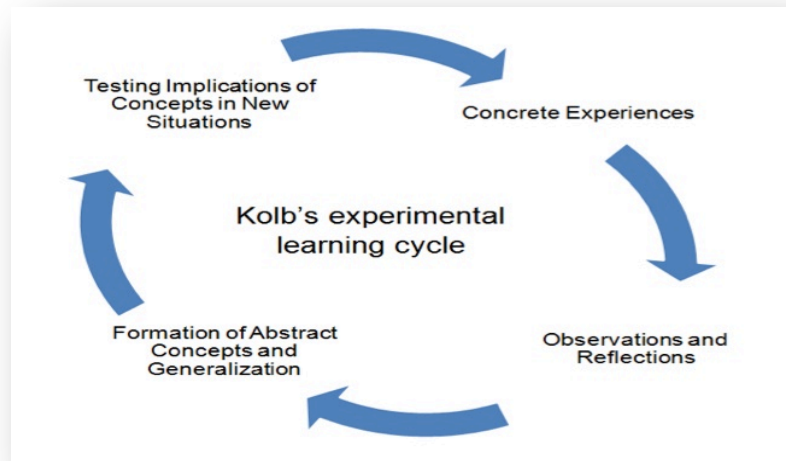


Figure 4.4: Kolb's experimental learning cycle (Source: Gill & Johnson, 2002).

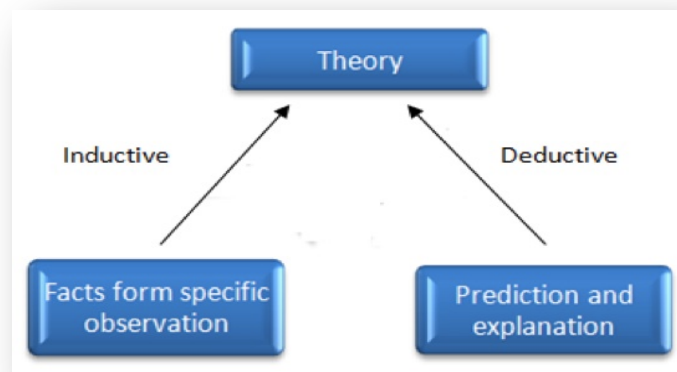


Figure 4.5. Summary of differences between inductive and deductive paradigms, based on the literature.

The deductive approach

Deduction is based on logic and draws conclusions through logical reasoning in which hypotheses and theories help to explain or predict an outcome (Ghauri & Gronhaug, 2002). In addition, it is an approach that entails the development of a conceptual and theoretical structure prior to its testing through empirical observation (Gill & Johnson, 2002). The deductive approach relates to Kolb's learning cycle (as shown in Figure 4.4) as its primary focus is theory testing.

The approach begins by analysing the theories or the hypotheses; in other words ‘concrete structures’. The theories are tested by observation, which then formulates the concept and allows for the generalisation of ideas (Ghauri & Gronhaug, 2002). The approach will assist in justifying the theories and ideas gained from the literature. Therefore, the approach acts as an important tool for qualitative research and develops a theoretical or conceptual framework, which subsequently can be tested using data (Saunders et al., 2012). Figure 4.5 shows a summary of this approach.

The inductive approach

Induction is the opposite of deduction. This approach is used to explore data, and develop or construct theories and explanations from specific observations which can be related to the existing literature (Gill & Johnson, 2002). The inductive approach is based on empirical evidence and focuses on theory building (Ghauri & Gronhaug, 2002).

The approach relates to the right-hand side of Kolb’s learning cycle (see Figure 4.4). It begins with gathering observations and reflecting on past experience through the formulation of abstract concepts, theories and generalisations that explain past and predict future experiences (Gill & Johnson, 2002). The main purpose of this approach is to develop a better understanding of the nature of the problem under investigation by collecting and analysing data and, consequently, developing a theory. Existing literature suggests the approach is often used in qualitative research (Saunders et al., 2012). Figure 4.5 shows a summary of the inductive research approach relative to the deductive research approach.

Identifying a suitable research approach

This current research seeks to understand the extent to which the development of mediation may have an impact on the construction industry, particularly in the UK. The questions arising from research reported in the existing literature were the key factors informing this project. Without the presence of a hypothesis in the initial stages, the research pursued an exploratory direction, a method linked to the inductive approach (Gill & Johnson, 2002).

The deductive approach is not suitable for this research, as it does not fit the research criteria. The deductive approach begins with a set of hypotheses in order to test the results or predict the outcome (Ghauri & Gronhaug, 2002). However, due to limited literature on construction dispute and construction mediation, no hypothesis or hypotheses were generated. Therefore, it was impossible to test for the result, or to predict the outcome, without the presence of hypotheses.

The research approach which was identified as suitable was the inductive approach. An inductive approach was used to explore data collected and develop theories which can relate to the existing literature (Ghauri & Gronhaug, 2002). The researcher reviewed the literature and attended several mediation symposia and workshops, as well as accredited mediation training. The purpose of attending these events was to get some information and to gain a greater understanding of mediation terminology through interacting with the experts, which were not available on the literatures. This suited the criteria for the inductive research approach, which is concerned with generating new theories from the data (Ghauri & Gronhaug, 2002). To strengthen the justification of using the inductive research approach, the researcher used the interpretive paradigm at the start of the research. There was a strong connection between the interpretivist research paradigm and the inductive research approach; the latter is closely associated with the interpretivist research paradigm, as it allows the researcher to employ subjective reasoning using various real life examples (Ridenour, Benz, & Newman, 2008).

4.2.3 Research purpose (Type of research)

The suitability of the research purpose depends on the research questions and the objectives identified from the literature (Saunders et al., 2012). The research purpose helps to determine the analysis of the findings and the conclusions drawn from it. A research purpose is often characterised by one of the three constituents: exploratory, descriptive and explanatory. Depending on the research study, sometimes there are a few cases with more than one purpose, which may change over time (Saunders et al., 2012).

Exploratory research purpose

The key characteristics of exploratory research in solving a problem are its flexibility and adaptability to change (Ghuri & Gronhaug, 2010; Saunders et al., 2012). The term ‘flexibility’ in exploratory research does not mean absence of direction regarding enquiry; instead, the meaning is to try to narrow the focus as the research progresses (Saunders et al., 2012). Exploratory research is carried out to investigate the possibilities of undertaking a broader more detailed research study (Kumar, 1996). In this way, the researcher must be willing to change direction in order to obtain a result, results or new information (Saunders et al., 2012). Therefore, this current researcher was required to have the key skills of the ability to observe, to obtain information and to construct explanations (Ghuri & Gronhaug, 2002).

When a research problem is hardly understood, an exploratory research design is preferred (Ghuri & Gronhaug, 2010). Exploratory research is a method of discovering what is happening, seeking new insights, asking questions and assessing phenomena in a new light (Robson, 2002; Saunders et al., 2012). According to Marshall and Rossman (1999), the purpose of exploratory research is to investigate little-understood phenomena, to identify or discover important categories of meaning and to generate hypotheses for further research. Therefore, it is useful in clarifying the understanding of a problem. The data were gathered by reviewing the literature and conducting interviews, to reveal a pattern in the phenomena of the study, which may assist in the development of hypotheses (Saunders et al., 2012).

Descriptive research purpose

When a research question is structured and well understood, a descriptive approach is deemed suitable (Ghauri & Gronhaug, 2002). The descriptive approach applies to a study that is used to portray an accurate profile of people, events or situations. It involves observing behaviour and describing the behaviour without influencing it in any way (Saunders et al., 2012). Such research could be both qualitative and quantitative in describing the past or some existing phenomena. A clear understanding of the phenomena is required to facilitate the data collection. The research may be an extension of a piece of exploratory research or actual explanatory research. Therefore, it is an approach which is very useful in generating hypotheses for further research (Saunders et al., 2012). Descriptive research can be concrete or abstract. A good description of research can provoke the 'why' questions regarding any explanatory investigation (Vaus, 2001). In order to produce good descriptive research, the researcher collected the data via a survey using personal interviews. Sampling is important in descriptive research, as a detailed plan must be made with regards to 'who' and 'how many' to interview. Thus the key characteristics of descriptive research are structure, precise rules and clear procedures (Ghauri & Gronhaug, 2010).

Explanatory research purpose

When the research question is structured, an explanatory approach is deemed appropriate (Ghauri & Gronhaug, 2002). An explanatory approach involves a study that explains the behaviour of the research. It tries to clarify why and how there is a relationship between two aspects of a situation or phenomenon (Kumar, 1996). It emphasises the casual relationship between variables by explaining problems or situations based on the research study. The relationship can be either negative or positive and can be achieved through interviews, group discussions, questionnaires etc. (Saunders et al., 2012).

Identifying a suitable research purpose

The main purpose of the research was to carry out a major study that captures the factors which demonstrate the development of mediation in the UK's construction industry. It will assist in formulating questions of 'why', 'how' and 'when' and will make use of the data from the literature, interviews and case studies to answer the research questions (Saunders et al., 2012). Therefore, the researcher looked at the problem from a different perspective in order to understand its situation. Looking into the literature was not the main concern here. As mentioned before, the research is informed by the interpretivist research paradigm; that is by looking at the research aims and research questions.

Choosing the appropriate research purpose depends on the aim of the research and its questions. It has been found from existing literature that the development of mediation has not been clearly defined, nor energetically studied. The research did not generate any hypotheses due to the limited amount of literature; it will therefore be difficult to explain the actual nature of the research, especially the situations and factors which contribute to barriers to the development of mediation in the field of construction. Furthermore, according to an interpretivist research paradigm, the research's purpose steers more towards exploratory and descriptive methods; therefore, an explanatory model is unsuitable in this case.

A descriptive research model was not suitable for this current research as it did not fit the research criteria. According to Saunders et al., (2012), a descriptive research approach is a study that is used to describe a phenomenon and to test a hypothesis. With limited background information about the research area, it will be difficult to design the questions to fit the descriptive criteria and it will be impossible to describe the nature of the research; thus testing the hypothesis is not the main criteria for the research. This research purpose is focused on the 'what is going on' type of questions (Saunders et al., 2012). With limited literature about the topic area, hypotheses were not generated; thus some 'what', 'why', 'how' questions were created.

In this case the key skills relevant to the ability to observe, obtain information and construct explanations are required (Ghauri & Gronhaug, 2002). Exploratory research is a method of discovering what is happening, seeking new insights, asking questions and assessing phenomena in a new light. Such research is mainly undertaken when there is little or no information available to the research study. It is useful in clarifying the understanding of a problem.

By looking at the research criteria (the aim, objectives and research questions), the present research study is suitable for the adoption of an exploratory model. Even though there was much research on mediation and ADR, the researchers were focused on different areas of research; for example some research focused on the quantities of mediation (their suitability with respect to certain type of dispute). Some of the factors were not important to the research and, as a result, it was not possible to establish a hypothesis. With little information, exploratory research helped to discover ‘what is happening’, as well as seeking new insights in order to understand the problem.

The data were gathered by reviewing the literature and conducting interviews, to reveal a pattern in the phenomena of the study which may assist in the development of hypotheses (Saunders et al., 2012). Therefore, this research pursued an exploratory study, which aimed to develop a better understanding of the research topic. Such a focus has helped to determine crucial facts about mediation: particularly the strategy of implementing the technique; how mediation has been shaped; the drivers, barriers and the criticisms of the process, and the growth of mediation.

In an exploratory study, semi-structured and in-depth interviews can be very helpful to find out what is happening and to seek new insights. The participants may also lead the discussion into areas that had not been previously considered. This may add significance and depth to the data obtained (Saunders et al., 2012). The choice of data collection will be explained further in the research.

4.2.4 Research strategy

A research strategy is designed to enable a researcher to answer particular research questions and meet the objectives of the research. Dilemmas often arise, especially in selecting the appropriate strategies and methods for answering the research questions (Gill & Johnson, 2002).

There are several research strategies that can be used. Choosing the appropriate one was guided by the research aim and the research questions. Each strategy can be used for any research purpose (exploratory, descriptive and experimental); some belong to the deductive research approach and others to the inductive research approach (Saunders et al., 2012). Despite the research strategy, the research questions produce some challenges that need to be resolved through an extensive exploration of the literature on the theory of mediation. However, choosing the appropriate strategy can be made easier by referring to the ‘research onion’, through the selected research paradigm and research approach.

The research philosophy for this study is focused on the interpretive model, as well as using an inductive research approach. Interpretive research methods may include **case studies**, **action research**, ethnography, semiotic analysis, narrative analysis and **grounded theory**. An inductive approach was used to explore data collected and to develop theories, which can relate to existing literature. As shown in Figure 4.3, presented in Section 4.2.1, the most appropriate strategies for this research will be: case study, action research or grounded theory. These are discussed below.

Case study research

This research strategy involves an empirical investigation of a particular contemporary phenomenon within its real-life context, using multiple sources of evidence. Its main goal is towards the description of the reconstruction of a case (Flick, 2009). The importance of a case study is placed in the context of the boundaries between the phenomenon being studied and the context within which it is being studied. The limits and boundaries of the phenomenon are not clear, and there is no experiment and no control over that phenomenon (Flick, 2009).

This approach is most suitable for the exploration of contemporary cases or events and is primarily useful in the study of ‘why’ and ‘how’ questions (Saunders et al., 2012). The value of any case study will depend, to a great extent, on how well the study objective is focused on (Hakim, 2000). The case study strategy is useful, especially in understanding the context of the research and the processes being enacted, as it has the ability to generate answers to the questions of why, what and how (Saunders et al., 2012). A case study design should also be considered when it is difficult to manipulate the behaviour of those involved in an investigation or to cover contextual conditions, as they are relevant to the phenomenon under study (Yin, 2003). In most instances, case studies will require two or more data collection methodologies (Gill & Johnson, 2002).

The case-study model is usually used in explanatory and exploratory research. The data collection techniques employed may vary and are likely to be used in combination, involving questionnaires, observations, document analysis and interviews (Saunders et al., 2012).

Action research

Action research has various definitions; Marshall and Rossman (1999, p.5), describe action research as follows:

“Action research challenges the claims of neutrality and objectivity of traditional social science and seeks full collaborative inquiry by all participants often to engage in sustained change in organizational, community or institutional contexts”.

Action research is useful for dealing with and answering ‘how’ questions (Saunders et al., 2012). It is different from other research strategies because of its explicit focus on action, in particular promoting change within an organisation. Its strengths are a focus on change, the recognition that time needs to be devoted to diagnosing and planning; taking action and evaluating; and the involvement of researchers throughout the process (Marshall & Rossman, 1999; Saunders et al., 2012). The goal of action research is to contribute to the practical considerations of individuals’ related and close issues, and to contribute to the goals of social science

by joint cooperation within a mutually acceptable ethical framework (Rapoport, 1970).

According to Rapoport, (1970), three dilemmas in action research are apparent: ethics or personal over-involvement with the research; goals, which are the two taskmasters in social science (subject and science); and initiatives. Finally the greatest difficulty associated with adopting the action research method is not the poor understanding of the method by individuals who review the method, but the poor understanding of the method by the individuals who conduct the research (Baskerville & Wood-Harper, 1996).

Grounded theory research

Grounded theory is a qualitative research approach, which aims to conduct field research and subsequently to analyse the data that will guide the generation of the grounded theory (Oates, 2006). Grounded theory is inductive, assisting the researcher to formulate or generate a theory (from qualitative data) through interviews or observations (Glaser & Strauss, 1967). It is a style of doing qualitative analysis that includes a number of distinct features, such as theoretical sampling and certain methodological guidelines, such as the making of constant comparisons and the use of a coding paradigm to ensure conceptual development and density (Strauss, 1987).

The first step when using this model is data collection, through observation or interviews. From the data collected, the key points are coded, which are extracted from the interview transcript's text. The codes are grouped into concepts in order to make them more workable and categories are formed from these concepts, which eventually will generate some theories (Berkeley, 2004). This is the type of research method which starts without any hypothesis. Data collection based on grounded theory starts without an initial theoretical framework (Saunders et al., 2012).

Grounded theory is ideal for exploring integral social relationships and the behaviour of a group, where there has been little exploration of the contextual factors that could affect individuals' lives (Crooks, 2001). Although grounded theory will, in most cases, produce a simple conclusion, it is considered an example of the best theory based on an inductive approach, (Saunders et al., 2012). Opposite to other

strategies, grounded theory is developed from the data generated; that data may lead to the generation of assumptions, which are then tested to confirm if they are true or false (Saunders et al., 2012). Grounded theory research often results in a high degree of ecological validity that is crucial here (Gomm et al., 2000).

Identifying an appropriate research strategy for the study

The main purpose of the research was to investigate the development of mediation in the field of construction. From the literature, grounded research can help to capture the overall nature of mediation in the construction industry. In the search for, and justification of, the appropriate research strategy, the method chosen for the fieldwork will need to meet three considerations: the type of question, the extent of control an investigator has over actual behavioural events and the degree of focus (Yin, 1994).

This study created some ‘*what*’, ‘*how*’ and ‘*why*’ questions, which led to the researcher concluding that a case study could be chosen as the appropriate research strategy. A general objective of the strategy is ‘how it may help’ to achieve the research objectives. However, referring back to the research questions of the study, for example “*why should mandatory mediation be introduced in the construction industry and what will be the potential implications?*”, employing a case study strategy is not suitable, because it may not be able to investigate a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident and it relies on multiple sources of evidence (Saunders et al., 2012).

In qualitative research, the researcher is the primary instrument for conducting the research (Golafshani, 2003; Patton, 2002; Sakaran, 2002). The fundamental characteristics of case study are observing and interpreting. With no appropriate training, the researchers are left to rely on their own intuitions and abilities throughout the research. Therefore, the tendency of observation bias may occur. Moreover, there are a lot of games being played during the negotiations associated with dispute resolution. That is one of the main reasons why case study is not appropriate for this research. One of the weaknesses of case study research is on the extrapolation of data to the general population (Darke et al., 1998). Case study

provides little basis for scientific generalisation because it uses only a small number of subjects, and some case studies may involve only one subject (Yin, 1994). Therefore, the findings from one case study cannot be used to generalise to a wider population. However, the generalisability of the research findings may grow as the number of cases covered increases (Yin, 1994).

As mentioned earlier, the nature of the construction industry is complex and construction disputes are often complicated, as they involve very large parties. For example, the dispute category is on financial issues; however the nature of the dispute and what is causing the financial issues in one construction dispute case will almost certainly not be the same with other construction dispute cases. Therefore, a small number of case studies may not be enough for the generalisability of the research findings. In this case one solution is to do many case studies, so that the data can be analysed to generalise the findings to the whole population. Furthermore it will take time for the data collection and to analyse the findings, as well as the need to initiate periodic follow ups (Hakim, 2000).

Action research was considered and also found not suitable for the research. Action research strategy is focused on 'how' questions (Saunders et al., 2012). By referring to the 'how' question, it will not help to inform the research throughout, and may not achieve the best outcome. Action research strategy is focused on behaviours which, in particular, will promote change within an organisation (Marshall & Rossman, 1999; Saunders et al., 2012) and involves joint cooperation between practitioners and researchers (Rapoport, 1970). This however could affect the ecological validity of the research findings. Moreover, action research may need the use of a control group (Gill & Johnson, 2002). Referring to the research aim, the use of action research to capture the development of mediation in the construction industry may not therefore be suitable. Furthermore, there will be no control group, which will be used as a reference. It should be noted that there is no intention to change anything in mediation, only to investigate the barriers which impeded, or are impeding, the spread of mediation, especially in UK construction industry.

Grounded theory is well suited for studies of human interaction and exploratory research (Berkeley, 2004), a fact which may help to identify the situated nature of certain information and practice. When referring to the main criteria of the research, the use of grounded theory strategy is suitable. Research into existing literature has revealed there is a lack of information about the research topic; hence there is no clear boundary and the information may not be easily manipulated (Saunders et al., 2012).

Grounded theory methodology strategy would help to understand the extent to which mediation can be developed, in terms of its technique, by investigating what is going on; and also looking into how, and in what circumstances, the research questions may influence the whole research process and its development (Saunders et al., 2012). Grounded theory may help to provide a natural means to understand the nature of mediation in the complex environment of a construction dispute. It portrays what actually happen in the construction environment and during the mediation proceedings. From here, certain activities can be captured which can reflect the knowledge of mediation, and the attitudes of the people involved in a construction dispute. Such information may eventually produce ideas about some features which are impeding the spread of mediation, as well as overcoming the barriers which impede the use of mediation as a dispute resolution mechanism. This therefore may help to produce a rich or thick outcome description of the research.

The data collection method that could be employed was either interviews or observations. The findings from these methods will then be used to generate theories. With this type of data collection, the research strategy can be used to accomplish various aims, such as to provide a description and generate theory. Theory development is likely to have important strengths, arising from the intimate linkage with empirical evidence (Saunders et al., 2012).

4.2.5 Research design

A research design is introduced to understand a specific phenomenon. It relates to the choice of strategy of how to answer the research questions. The design will contain clear objectives, derived from those research questions, and specify the sources from which to collect data (Ghauri & Gronhaug, 2002). A research design is divided into three types: qualitative, quantitative and mixed methods. The justification of a particular choice should always be based on the research questions, as well as being consistent with the research philosophy (Saunders et al., 2012).

Quantitative research

A quantitative study is a method that is used for testing objective theories by investigating the causal relationships between variables (Cresswell, 2009; Denzin & Lincoln, 2000). This research design involves the use of methodological techniques (Marvasti, 2004) to represent the human experience in numerical form (Creswell, 2009). A quantitative research design is based on the assumption that it should be founded on an objective view of the world. These variables can be measured, so that numbered data can be analysed using statistical procedures (Creswell, 2009). Therefore, this can be used either to describe the characteristics of phenomenon, or to test hypothetical predictions about a phenomenon (Gill & Johnson, 2010).

Quantitative researchers use mathematical models, statistical tables and graphs and usually write about their research in impersonal, third person prose (Denzin & Lincoln, 2000). They are deliberately unconcerned with rich description because such detail interrupts the process of developing generalisations (Denzin & Lincoln, 2000). When we talk about the paradigm of a piece of research, quantitative research design can be characterised under positivism and the researcher may adopt some of the characteristics of the positivist claims for developing knowledge.

As mentioned in Section 4.2.1 referring to research philosophies, positivism is based on the values of reason, truth and validity and focuses purely on facts, gathered through direct observation and experience, and measured empirically using quantitative methods (Gill & Johnson, 2010). Quantitative research requires a large sample to ensure the reliability of the outcomes (Johnson & Onwuebuozie, 2004). It will require greater resources in collecting data.

Qualitative research

Qualitative research emphasises the qualities of entities, processes and meanings, which are not experimentally examined or measured, in terms of quality, amount, intensity or frequency (Denzin & Lincoln, 2000). Research focusing on uncovering a person's experience or behaviour, or designed to uncover and understand a phenomenon about which little is known, are typical examples of qualitative research (Ghauri & Gronhaug, 2010). According to Creswell (2009), qualitative research is a method used to explore and understand the meaning of an individual's behaviour and the reasons behind such behaviour.

A qualitative researcher stresses the nature of reality, the relationship between the researcher and studied area and the situational constraints that shape inquiry (Denzin & Lincoln, 2000). Qualitative data embraces an enormously rich spectrum of cultural and social artifacts (Dey, 1993). Furthermore, qualitative research focuses on the quality of the data; it provides a detailed description and analysis of the quality or the substance of the human experience (Marvasti, 2004). It does not involve the use of statistics to 'describe' the characteristics of the phenomenon and to test the hypothesis (Gill & Johnson, 2010). Qualitative research is most useful in exploratory research for hypothesis building and explanations (Ghauri & Gronhaug, 2010).

With the qualitative approach the researcher may adopt some characteristics of constructivist perspectives for developing theories (Gill & Johnson, 2010). The process employed with a qualitative research design involves generating questions and procedures, data building from particular to general themes, and with the researcher interpreting the data. Furthermore, qualitative research does not necessarily employ a large sample size, as does the quantitative method (Ghauri & Gronhaug, 2010). It investigates the 'why' and 'how' of decision making. In other words, qualitative methods produce information and generate theories beyond the particular case studied, and the final written report has a flexible structure. According to Creswell (2009, p.4) "*those who engage in this form of inquiry support a way of looking at research that honours an inductive style, a focus on individual meaning, and the importance of rendering the complexity of a situation.*" Qualitative data

sources include observation and participant observation in fieldwork, documents, interviews, and the researcher's impressions and reactions (Myers & Avison, 2002).

Mixed methods research design

'Mixed methods' is an approach that involves both qualitative and quantitative designs to acquire data. The design involves the formulation of assumptions accompanied by the use of qualitative and quantitative approaches to data gathering, resulting in a combination of both approaches. Thus, such a model collects and analyses both types of data from two different types of research design, thereby producing a stronger study than those using either qualitative or quantitative research (Creswell, 2009).

Although the mixed methods approach uses both qualitative and quantitative research designs, qualitative data are analysed qualitatively and quantitative data are analysed quantitatively (Saunders et al., 2012). The term 'mixed method research' describes the procedures in collecting and analysing both quantitative and qualitative data in the context of a single study (Teddlie & Tashakkori, 2003). The use of mixed methods models offers the researcher the practicality of different techniques and can be a link between quantitative and qualitative approaches to information gathering.

The use of multiple methods in doing research, according to Tashakkori and Teddlie (2003), is useful and provides better opportunities to answer the research questions. The major advantage of using a mixed methods paradigm in research is: it can be used for different purposes in a study. For example, by using interviews at an exploratory stage, in order to get a feel for the key issues before using a questionnaire to collect explanatory data (Saunders et al., 2012).

The main aim of using a multiple research design is to benefit from the strengths of both methods and minimise the weaknesses (Johnson & Onwuegbuzie, 2004). However, quantitative and qualitative research designs have their own strengths and weaknesses (Smith, 1981). As the data collection techniques, and the results obtained, are related the results will be affected by the techniques and procedures used to obtain data (Saunders et al., 2012). There are several factors that may influence the researcher: among them commitments to particular methods,

expectations of those likely to form the audience for the findings, and methods with which the researcher feels comfortable (Bryman 2007).

With inductive research approaches, the selection of a research design can be made easy. One aspect that needs to be considered in choosing the research design is to take account of the influences on the research procedure or strategies (Creswell, 2009). A research study examines individual and social problems and attempts to make sense of them in terms of the meanings people bring to them (Saunders et al., 2012).

Identifying an appropriate research design

Table 4.2 shows the summary of the chosen research methodology, based on an interpretive research philosophy.

Table 4.2: Suitable research methodology identified for the research

Appropriate philosophy	Interpretive
Research approaches	Inductive
Research strategies	Grounded theory
Research design	Qualitative research design
Potential data collection techniques	Participant observation and interviewing,

The aim of introducing the research design for the research was to understand the construction mediation phenomenon in the UK. In justifying the appropriate design, the study's criteria such as the aims, research questions and the purpose of the research, were carefully examined. Limited information was available on construction mediation, which led to the creation of some research questions in order to narrow down the research into a more defined area of study. As a result, no hypotheses were generated and the main purpose of the research was to generate a theory regarding this research area.

The research involved some leading mediators, who are members of certain mediation bodies in the UK (eg: ADR GROUP, CEDR, CIArb, RICS), as the research participants. Therefore the strategy for research sampling (please refer to section 4.3 for the sampling strategy) and time duration for the interviews were crucial considerations when trying to fit the research into the participants' busy timetables.

Quantitative research design is used to test hypotheses (Cresswell, 2009; Denzin & Lincoln, 2000) therefore there should be enough background information about the specific research area (Tashakkaori & Teddlie, 2003). This is an important point as the background information can be used to design the questions for the data collection. However, according to Johnson and Onwuebuze (2004), the researcher's theories or categories that were used might not reflect local constituencies' understanding. The questions used for the data collection did not give the participants opportunity to respond in their own words as they were forced to choose their answers from fixed responses (the questionnaire's prescribed options).

It may take a large sample for generalisation purposes and therefore the research design is expensive to conduct, when compared with qualitative research, as it may require a large sample and thus the data analysis may be more time consuming (Johnson & Onwuebuze, 2004). According to Driscoll et al., (2007) the outcome produced by quantitative research is lacking in depth. The knowledge produced by the study may be general and too abstract for the direct application in the specific local situation context and with specific individuals (Johnson & Onwuebuze, 2004). According to Silverman (2005), quantitative research ignores social interaction and the cultural environment. It may also neglect other aspects such as political, cultural and social construction of the variables under research (Denzin & Lincoln, 2000). The nature of qualitative research requires the identification variables to test the hypotheses (Gill & Johnson, 2010). However, the research topic is not currently sufficiently covered in the existing literature; as a result it is not possible to derive hypotheses and variables which can be used in a quantitative testing environment. Because of those factors, a quantitative research design was deemed not suitable for the research.

The mixed methods information gathering model is an approach which involves both qualitative and quantitative designs to acquire data (Creswell, 2009). The research method need background information about the specific research area (Tashakkaori & Teddlie, 2003). Therefore, one of the purposes of the mixed methods research design is to test for the hypotheses. One of the weaknesses pointed out by Johnson and Onwuebuzie (2004) refers to the difficulty for one researcher to conduct both qualitative and quantitative research, especially in the case where the research should be undertaken concurrently. Such a situation may demand a large sample therefore the cost of conducting the research using mixed methods research design is expensive compared to qualitative research on its own, and thus the data analysis may be more time consuming (Johnson & Onwuebuzie, 2004). By looking at the criteria of qualitative and quantitative research designs, it may be difficult to plan and implement one approach by drawing on the finding of another approach. It may well create a problem when analysing the data and how to interpret the conflicting results (Johnson & Onwuebuzie, 2004). As a result, a mixed methods model was not chosen for the main research design.

Qualitative methods can be used to understand complex social processes and to capture essential aspects of a phenomenon from the perspective of study participants (Denzin & Lincoln, 2000). The research design is effective for studying participants' attitudes and behaviour and for examining social processes over time. According to Patton (2002), qualitative studies are exploratory in nature and use the inductive approach to generate novel insights (starting with observations and developing hypotheses). The main concept for the research design is that the researcher will act as the 'instrument' (Denzin & Lincoln, 2000). Therefore this will help the researcher 'get close to the data' (Saunders et al., 2012) by interacting with participants, understanding their way of life, values, culture and beliefs and endeavouring to apprehend their experiences and emotions (Creswell, 2013). The sampling can be focused on a small group, as the main empirical objective is to conduct the interview until it reaches the point of data saturation, when no new information is yielded (Patton, 2002). Looking at those reasons, qualitative methods met the criteria of the research. As the background information about the research area is severely limited, by using the qualitative approach, some theory can be generated.

Qualitative research design can produce in-depth outcomes by interacting with the participants about their knowledge and experience in mediating construction disputes in the UK. The research design may help to validate significant exclusions or misunderstandings of mediation, and to develop a deeper understanding of the factors contributing the most to mediation and, perhaps, to its development in the UK. The sampling procedure and the time can be adjusted to suit the participants' busy schedules. Therefore it was finally decided that a qualitative research design was suitable for the research.

4.2.6 Data collection

Data collection refers to the process of collecting and preparing data. As the research was focused on a qualitative research design, according to Collis and Hussey, (2009), the data collected are normally transient, understood only within their context. The data collection is usually associated with an interpretive methodology, which produces results with a high degree of validity (Collis & Hussey, 2009). There are several types of data collection that can be used, depending on the research strategy and design. In considering which type of data collection is optimal, the main factors to take into account are how the type of data collection can be used to answer the research questions or meet the research objectives (Saunders et al., 2012). As the research strategy is based on grounded theory, the use of either interviews or observation would be suitable (Esterby-Smith et al., 2012; Saunders et al., 2012).

Observation

Observation is a significant tool in qualitative research as the researcher can actually capture what individuals are doing and pay attention to their behaviour and attitudes (Saunders et al., 2012). Observation is a form of data collection in qualitative research which entails noting and recording other people's behaviour in a way that allows some type of learning and analytical interpretation (Ghauri & Gronhaug, 2010). It is rewarding and enlightening to pursue, as it may add considerably to the richness of the research data being gathered (Saunders et al., 2012). Observational information is useful in providing more data about the problem under study (Yin, 2003).

Observation is an everyday skill that can be used in qualitative research and which involves all the senses (Flick, 2009). This is essentially what observation involves: the systematic observing, recording, describing, analysing and interpreting of people's behaviour. Observation helps the researcher to find out how certain processes take place and work (Saunders et al., 2012). The main advantage of using observation is that information can be collected in a natural setting. Moreover, we can interpret and understand the observed behaviour, attitudes and situation more accurately, and capture the dynamics of social behaviour in a way that is not possible through questionnaires and interviews (Saunders et al., 2012).

Interviews

The interview is a process of a real interaction between the researcher and the participant (Ghuri & Gronhaug, 2010). The main purpose of the interview is to allow the participant to focus on what he or she felt was important in relation to the topic; in this case construction mediation. It is a useful way to get some data quickly (Marshall & Rossman, 1999) and considered as the best data collection method in qualitative research (Ghuri & Gronhaug, 2010). Although it is time consuming to run or undergo an interview session (Esterby-Smith et al., 2012) it is highly likely to generate some rich data (Suter, 2012). Interviews can be highly formalised and structured or informal and unstructured conversations. They can be categorised as one of the following (Saunders et al., 2012):

- Structured interviews
- Semi-structured interviews
- Unstructured or in-depth interviews

The structured interview uses structured identical sets of questions, referred to as interviewer-administered questionnaires. The researcher will read out each question and then record the response offered by the interviewee. There will be some social interaction between the researcher and the participant, such as the preliminary explanations that the researcher should provide (Saunders et al., 2012). An advantage of structured interviews lies in the uniformity in the behaviour of the researcher (Ghuri & Gronhaug, 2010). The interview questions should be read exactly as written and in the same tone of voice for every participant in order to avoid any bias.

As structured interviews are used to collect quantifiable data they are also referred to as ‘quantitative research interviews’. Semi structured and in-depth interviews are not standardised and are often referred to as ‘qualitative research interviews’ (Saunders et al., 2012). Structured interviews are often used in descriptive studies to identify general patterns, and in an explanatory study to understand the relationships between variables in a statistical sense (Saunders et al., 2012).

In semi-structured interviews the researcher will have a list of themes and questions to be covered during the interview. The themes and questions may vary from interview to interview. The researcher may exclude some questions in particular interviews, given a specific organisational context that is encountered in relation to the research topic. The order of questions may vary depending on the flow of the conversation. Some additional questions may be required to explore the research question and objectives, given the nature of events within particular organisations (Saunders et al., 2012). Semi-structured interviews are often used in exploratory studies to identify new insights and to understand the relationships between variables (Saunders et al., 2012).

Unstructured interviews are informal and are used to explore in-depth understanding about a certain area of interest. There will be no predetermined list of questions for the interview; however the researcher needs to have a clear idea about the area that is to be explored (Saunders et al., 2012). In-depth interviews (unstructured) are the most fundamental of all qualitative methods (Esterby-Smith et al., 2012) and are considered an advantage in the context of discovery (Ghauri & Gronhaug, 2010). The interview is informal in a sense that it is a free flowing conversation, giving the opportunity for the participant to talk about events, behaviour and beliefs in relation to the topic area (Saunders et al., 2012). In this way information can be gained more accurately, especially with some complicated or sensitive issues, as the participants are free to answer according to their own thinking (Ghauri & Gronhaug, 2010). Unstructured interviews are highly suitable for exploratory and inductive types of research, in order to find out what is happening and to identify new insights (Saunders et al., 2012).

Identifying appropriate methods of data collection

Upon further investigation of the research methodology, there is a link between research purpose and research strategy. By employing an exploratory research purpose, an inductive research approach and grounded theory, also employing a semi-structured interview was an appropriate choice.

Using observations may help in a sense that such an approach can explore and describe the overall process of resolving a construction dispute. The researcher is new to the dispute resolution field, therefore observation bias can eventually occur, and some crucial elements of a given situation may not be noted or recorded. It may also take the researcher longer than desirable to conduct data collection in order to get a rich outcome. The presence of the researcher in the actual mediation proceedings, as an observer, may influence the behaviour of the disputing parties and therefore it may affect the flow of the whole mediation proceeding. Therefore the proceeding may not occur in a natural setting. For those reasons, observation is not suitable for including in this research.

The interviews provide the opportunity for the interviewer to explore a number of views and issues and, simultaneously, allow the participants to frame and structure their responses appropriately (Saunders et al., 2012). The participants may come from different backgrounds. Furthermore, they will have different perceptions regarding the development of mediation, especially regarding the term, the influences on, the drivers of and the barriers to construction mediation. In doing the research, a small sample was chosen to enable more in-depth, higher quality interviews, so allowing the researcher to spend an adequate amount of time with every participant and collect enough data within the limited time.

In-depth interviews are usually found in qualitative research. They allow some discussions to reveal and understand the 'what' and 'how' questions, but also to place more emphasis on exploring the 'why' questions. Moreover, such interviews may also lead the discussion into areas which the researcher may not have previously considered, but which may be important for the research (Saunders et al., 2012).

Even though in-depth interviews looked appropriate, due to the limited background information about the research area, they weren't. The interview session needed to be completed in 30-45 minutes, in order to suit the busy schedules of the research participants. It would be difficult for the researcher to talk about the events, the behaviour and beliefs about construction mediation within the prescribed time limited. Therefore, a set of interview questions needed to be prepared so that all the questions can be managed within the limited time frame. Without the interview questions, some important areas may not be covered and it may alter the whole outcome of the research. As a result, in depth interviews would not provide data that is useful for the purpose of answering the research questions. Therefore, in-depth interviews were not considered suitable for use in this research.

The use of semi-structured interviews as a data collection method will assist the researcher to collect valid and reliable data relevant to the research questions and objectives. Interviews will provide the researcher with useful data to assist in the formulation of research questions and objectives relevant to understanding the research topic to a greater extent and to seek new insights (Saunders et al., 2012).

As mentioned above, for the unstructured or in-depth interview, there will be no predetermined list of questions for the interviewee to face (Saunders et al., 2012); however, this research is based on the use of semi-structured interviews. The researcher designed a set of questions as a guide for the conversation and to maintain the discussion's focus on the topic of construction mediation. Some of the questions were extracted from the literature on workplace mediation and commercial mediation sources, which were thought to have a high level of relevancy towards the topic of construction mediation; especially the attitudes of the disputants. The questions were designed to allow the participant to talk freely, without interference. During the interview, certain patterns or themes are likely to emerge which can help to describe the thoughts and experiences of the participant. For these reasons, semi-structured interviews were deemed appropriate to employ in the study. In order to address the issue of the quality of data, this point will be further explained in Section 4.7 when addressing the quality of research.

4.3 Research sample

In research design, one of the central features is sampling (Flick, 2007), where a sample refers to a subset of a population (Collis & Hussey, 2009). The selection of a study sample is an important step in the design and development of any piece of research, considering the practical and ethical difficulties of studying a whole population (Marshall, 1996). One aim of qualitative studies is to provide enlightenment and understanding of complex psychosocial issues and therefore they are most useful for answering *why* and *how* questions (Marshall, 1996).

For interviews, sampling is oriented to finding the right people, those who have experiences that are relevant to the study. Sampling in most cases is purposeful; random or formal sampling is rather exceptional (Flick 2007). As mentioned earlier, this research is informed by grounded theory research strategy; therefore the final sample size decision will be taken during the process of collecting and analysing the data (Flick 2007). Within grounded theory the sampling approach is termed as theoretical sampling (Saunders et al., 2012; Struss & Corbin, 1998). According to Rubin and Rubin (1995), sampling in qualitative research should be interactive and flexible. This means the researcher should be ready to adapt to the conditions in the field and to the new insights resulting from data collection, which might suggest changing the original sampling plan (Flick, 2007).

The interviews should continue until they achieve theoretical saturation or a point when no new insights would be obtained from expanding the sample further (Flick, 2007). Sampling in qualitative research should be based on the progress of the analysis of the data collected. After the data have reached theoretical saturation, there is no need to continue, instead the researcher should move on and generate hypotheses out of the data categories that analysis has revealed (Bryman, 2007). The key idea of theoretical saturation will be discussed later in section 4.3.1.

4.3.1 Sample size

Selecting research settings and populations involves identifying those who, by virtue of their relationship with the research questions, are able to provide the most relevant, comprehensive and rich information (Ritchie & Lewis, 2003). According to Ritchie and Lewis (2003. pp.78):

“Qualitative research uses non-probability samples for selecting the population for study. In a non-probability sample, units are deliberately selected to reflect particular features of or groups within the sampled population”

For this research, the most important aspects that need to be considered in terms of the population sample are the experiences, knowledge and involvement in mediation, especially dealing with construction disputes. There are many mediators with different backgrounds who may have a range of varied experiences. As a result, considering the population, the sample size will be substantial. However, since this is qualitative research, the sample size is usually small. There are 3 main reasons for this (Ritchie & Lewis, 2003 pp 83).

- If the data are properly analysed, there will come a point where very little new evidence is obtained from each additional fieldwork unit. Increasing the sample size no longer contributes new evidence.*
- Statements about incidence or prevalence are not the concern in qualitative research. There is therefore no requirement to ensure that the sample is of sufficient scale to provide estimates or to determine statistically significant discriminatory variables.*
- The type of information that qualitative studies yield is rich in detail. There will therefore be many hundreds of bits of information from each unit of data collection. In order to do justice to these, sample sizes need to be kept to a reasonably small scale.*

Table 4.3: The summary of the main reasons for sample size

If the population is relatively small, a random sample should be selected to provide an unbiased subset of the population (Collis & Hussey, 2009). Therefore, care is taken to ensure the sample is unbiased in the way it represents the phenomena under study. A random sample is one where every member of the population has a chance to be chosen. Therefore, the sample is an unbiased subset of the population, which allows the assumption that the results obtained from the sample are representative of the whole population (Collis & Hussey, 2009).

Doing research with a larger research sample is more likely to be representative of the population than a smaller sample. Hence, results rendered from a larger population sample are more likely to be able to be validly extrapolated to the general population. In other words, research which seeks to generalise the results must have a sample size which reflects the size of the population (Collis & Hussey, 2009). However, an important factor in qualitative research is that the sample size is not a critical issue; the critical issue is whether saturation has been achieved (Glaser & Struss, 1967). According to Patton (2002) there are no rules in qualitative research for deciding sample size; therefore, the issue of sample size is not an important aspect of qualitative inquiry. From a pragmatic perspective it is reasonable to suggest that an appropriate sample size for a qualitative study is one that adequately answers the research questions (Marshall, 1996).

Larger amounts of interview data gathered in a piece of research may result in more patterns being noted in the results, which can be used to further explore an area in a certain direction. If the size of a sample is large, the substantial amount of information gathered from the participants may be too much, and therefore too time-consuming for the researcher to analyse (Johnson & Turner, 2003; Mariampolski, 2001; Marshall & Rossman, 2006). According to Saunders et al (2012), the sample size depends on the research questions and objectives, since these will guide the direction of the research, its usefulness, credibility and the available resources (Teddlie & Tashakkori, 2009). Therefore, the validity and understanding gained during data collection, and the skills of analysis, are more important than the size of the sample. Collis and Hussey (2009) added that sample size is linked to the confidence and the accuracy of the results obtained. It can sometimes be difficult to

obtain a sample of willing volunteers, especially if the research is dealing with sensitive issues (Collis & Hussey, 2009).

The interviews should continue until they achieve theoretical saturation. Corbin and Struss (2008) define theoretical saturation as ‘when no new data are emerging’. The decision as to when the saturation will be reached is subjective and depending on the level of the researcher’s experience (Charmaz, 2006; Corbain & Struss, 2008). After the data have reached theoretical saturation, there will be no need to continue; instead the researcher should move on and generate hypotheses out of the categories identified (Bryman, 2007). The key ideas of theoretical saturation are:

- | |
|---|
| <ul style="list-style-type: none">• No new or relevant data seem to be emerging regarding a category• The category is well developed in terms of its properties and dimensions demonstrating variation• The relationships among categories are well established and validated |
|---|

Table 4.4 Key ideas on theoretical saturation (adapted from Bryman, 2007)

The process of data collection and data analysis continues iteratively throughout the process until new data no longer generates new insights. At this point it is said that the data have reached theoretical saturation (Glaser & Strauss, 1967). In the study, the point of data saturation was considered to have been reached after conducting thirteen interviews, as no new data or relevant information emerged with respect to the research questions. The researcher conducted another three additional interviews in order to confirm that the point of data saturation had occurred; the data collection process was then stopped. Therefore, sixteen semi-structured interviews were conducted for this research.

4.3.2 Theoretical sampling

Theoretical sampling is mainly associated with the development of grounded theory (Struss & Corbain, 1998).

Strauss (1987) described theoretical sampling as follows:

“It is a means whereby the analyst decides on analytic grounds what data to collect next and where to find them. The basic question in theoretical sampling:

- What groups or subgroups of populations, events activities (to find varying dimensions, strategies etc) does one turn to next in data collection and for what theoretical purpose?

So this process of data collection is controlled by the emerging theory”

Table 4.5 Description of theoretical sampling (Strauss, 1987, pp. 38-39).

From theoretical sampling it can be inferred that the research process involves data collection and analysis, until the point of theoretical saturation is reached and no new analytical data will be obtained. Struss and Corbain (1998) suggest that different sampling strategies be adopted in different stages of a research project. Initially, while categories are being identified and named, sampling is open and unstructured. As the theory develops and the categories are integrated along dimensional levels, the sampling becomes more purposive and discriminatory in order to maximise opportunities for comparative analysis (Ritchie & Lewis, 2003).

According to Flick (2007), most of the sampling for qualitative analysis is purposive sampling. Purposive sampling is an example of non-probability sampling in which decisions concerning the participants selected in a study are dependent on the researcher’s own judgements (Saunders et al., 2012).

According to Ritchie and Lewis, (2003, p. 79):

“Members of a sample are chosen with a purpose to present a location or type in relation to a key criterion. This has two principal aims. The first is to ensure that all the key constituencies of relevance to the subject matter are covered. The second is to ensure that, within each of the key criteria, some diversity is included so that the impact of the characteristics concerned can be explored”.

The decisions about the selection of criteria to be looked for are often made in the early stage of the research (Ritchie & Lewis, 2003). In this current research, the participants were selected based upon a variety of criteria which may include expert knowledge of the research issue and willingness to participate in the research (Sakaran, 2002). They will be informed by a range of factors including the principal aims of the study, the research gaps, and the importance of the study. This will be further explained in the ethics section of this chapter. The process of purposive sampling requires a clear objective, so that the sample stands up to independent research (Ritchie & Lewis, 2003). This form of sampling technique is often used when working with very small samples (Saunders et al., 2012).

The research focused on a varied population sample from different professional backgrounds who have been involved in the UK construction industry, ranging from lawyers, project managers, consultants and construction business owners from England and Wales (complies with CPR and PAP). The sample was selected based on their capabilities and experiences of dealing with disputes in the construction industry.

The research process involved employing theoretical sampling to recruit the participants. Theoretical sampling can be regarded as a type of purposive sampling in which the researcher chooses a participant on the basis of their potential contribution to the development and testing of theoretical constructs (Ritchie & Lewis, 2003). According to Collis and Hussey (2009), the expected response rate for a questionnaire survey will be about 10% or less. For the purpose of the present research, in an attempt to compensate for the issue of the low response rate, approximately 50 potential participants were contacted to take part in the research.

However, due to the low response rate from the contacted participants, the research was further publicised by advertising through some appropriate social media such as LinkedIn and Twitter, to allow for those interested in participating to come forward.

Struss and Corbain (1998) suggest that different sampling strategies should be adopted in order to achieve the effectiveness of theoretical sampling. In this regard, the researcher includes self-selection sampling and snowball sampling, in order to attract more participants to participate in the research interview. Self-selection sampling is a form of non-probability sampling in which the researcher allows an individual to identify their desire to take part in the research (Saunders et al., 2012). This particular method of sampling may produce biased samples, as the sampling frame cannot be identified and a random sample cannot be selected (Collis, 2009). Snowball sampling is a non-probability sampling technique which involves asking available participants who have already been interviewed to identify other participants who fit the selection criteria (Ritchie & Lewis, 2003). It is commonly used when the key selection criteria of the members were not widely disclosed (Ritchie & Lewis, 2003) and when it is difficult to identify any available potential research population members (Saunders et al., 2012).

The data collections were carried out in between June 2012 to January 2014 with sixteen different accredited mediators. The process continued until no new data was discovered and it was said to have reached the point of theoretical saturation.

4.4 Ethical considerations

In the context of research, 'ethics' refers to the appropriateness of the behaviour in relation to the rights of those who are the subject of, or are affected by, the research work (Saunders et al., 2012). The researcher should be able to predict and address the various ethical issues that could arise. In order to be in line with ethical guidelines, the interview questions were designed in such a way as to ensure the rights of the participants were not negatively affected in any way. It is the researcher's responsibility to deal with, adhere to and respect the rules and regulations set out by the University of Manchester.

Before commencing the research interviews, the researcher had applied for formal ethical clearance from the Ethics Committee of the University of Manchester. Upon receiving ethical approval, a set of documents comprising of an ethical consent letter, a participant information sheet and consent form were sent to a list of selected leading mediators (see Appendices 3, 4 and 5). The documents contained a brief outline of the research aim and highlighted their rights in relation to voluntary participation in the study and their right of withdrawal at any time without penalty. This is important for authorisation purposes, in order to gain access and contact the participants. Any researcher is considered as a visitor to a private office, so the researcher's behaviour should be regulated by a rigorous code of ethics.

With the Ethics Committee's approval, the data collection part of the research started by conducting the interviews and analysing the data. In addition, assurance was given to the participants regarding confidentiality and anonymity. Respective participants were asked to read and sign the consent forms and given opportunities and ample time (up to a month) to ask questions about the research before sending the consent form back. After permission was granted, the researcher then proceeded further by making the appointment and holding the research interview.

The research procedure will address any ethical issues that may emerge. Therefore, the researcher needs to preserve the confidentiality of the participants (Creswell, 2009) in the interviews, since this form of information gathering involves collecting data from individuals about individuals (Punch, 2005). At the start of the interview, the identified ethical guidelines were addressed. Each participant was briefed regarding the aims of the interview and the expected time the interview would take. Consent to participate in the study and to record the interview were obtained from the participants. Additionally, they were informed of their right to withdraw from the research at any point before, during or after the interview.

During the research interviews there was only minimal physical or psychological risk to participants. The interviews were conducted during each participant's free time. The study was arranged thoughtfully to limit any disruption to the participants working activity. There was no intrusive investigation, as the study is not seeking any sensitive information. However, there was an incident of inadvertent disclosure of confidential information during one interview. Each participant was

given the information sheet and consent form about the research. The researcher will ensure that no personal information will be made available or will be used in any written reports, publications or conference presentations. Emphasis was placed on the anonymity of the study's participants and the responses gathered from them. Protocols relating to privacy and confidentiality were maintained throughout the study (Saunders et al., 2012).

To ensure confidentiality of the personal data, no participants were identified in the data analysis or in the thesis. No one, apart from the researcher and his supervisor, was able to access the data without the researcher's permission and all individual names were encoded on the data documents. Assurance was given to the participants regarding confidentiality and anonymity and participants' particular contributions to the study were anonymous; pseudonyms would be used where necessary or helpful. Protocols relating to privacy and confidentiality will be maintained throughout the study. All data was rendered anonymous by removing any identifying information from all the collected data before the data was transcribed. During the interviews, all participants were informed that they can withdraw from the study at any stage, at any time, without prejudice. If the participants withdraw from the study, all data collected from the interview will be removed from the data set. Unfortunately, if the data has been transcribed, (as the participants' information will be anonymous), it will be impossible to remove the data from the data set.

4.5 Data collection procedure

One of the fundamental criteria for mediation is confidentiality. As a result it is difficult to estimate the total number of annual mediations that take place in the construction sector. It is also difficult to identify the overall number of accredited mediators based in the UK, as there are various mediation providers and some of those mediators were trained overseas. However, the identification of participants was done by using various local mediator provider websites. From there the researcher had the opportunity to learn some important elements of the mediator participants, through their capabilities of handling a project. After the identification of potential participants, each was contacted via email, (see Appendix 1). Once a positive reply was received the researcher sent the respondent a formal letter, which contained a cover letter, participant information sheets and a consent form (see

Appendices 3, 4 and 5). The consent form included a section where the participant consented to participate in the interview. Participants were then contacted via telephone to arrange an appointment to conduct the interview. Providing participants with a list of the interview themes before the interview, where this is appropriate, was designed to aid the research interview. The provision will also promote validity and reliability by enabling the participants to consider the information being requested, as well as allowing them the opportunity to assemble supporting organisational documentation from their files (Saunders et al., 2012).

There was no expected number of participants, as the main focus was to obtain data until it had reached the point of saturation. Some of the participants were also recruited from networking during the alternative dispute resolution (ADR) training and mediation symposiums which the researcher attended. However, due to the low response rate from the contacted participants, the research was further publicised by advertising through some appropriate social media such as LinkedIn and Twitter, to allow for those interested in participating to come forward. From there the researcher used snowball sampling by asking the available participants to identify other potential participants who fitted the selection criteria.

During the interview, the first impression may have a significant impact on the outcome, as the interviewer and participant may be complete strangers. The first impression is related to the issue of credibility and the level of the participant's confidence. The interview is likely to occur in a setting that is unfamiliar to the researcher, but familiar to the interviewee. Nevertheless, it is the interviewer's responsibility to shape the beginning of the interview, to establish credibility and gain the participant's confidence (Saunders et al., 2012).

Before the interview of each participant, an introduction to the research was conducted. At this stage the main purpose of the research was stated, as were the significance of the study to the participants and the explanation of the ethical considerations of confidentiality and anonymity. After the introductory stage was completed and the participant understood the whole procedure, the interview session began. During the interview session, the conversations were audio recorded, with permission from the participants. The recorded conversations were then transcribed for the purpose of further data analysis. During the interview, some notes about

important features, ideas, concepts and themes about construction mediation, which emerged during the interviews, were written down. A review of existing literature resulted in the collection of different concepts, which assisted in identifying important themes and ideas to look out for during the interviews.

All data collections were conducted at the participant's office to comply with the ethical requirements relating to this research project. Due to the limited time availability of the participants, some of the research interviews were done via the telephone. The first two interviews were used as a pilot study. The purpose was to test the suitability of the questions and the duration of the research interview. The nature of the questions was reviewed to enhance understanding of the research amongst participants, which assisted in achieving the aim of the study.

4.6 Data analysis

After the interviews were completed, the next step was analysing the interview data. All interviews were recorded and transcribed. The transcriptions were read carefully to gain an overall picture regarding the development of mediation, to obtain a general sense of the information and reflect on that data's overall meaning. After that was done a detailed analysis began with the coding process (Creswell, 2009).

LeCompte and Schensul (1999) define analysis as the process used by the researcher to reduce the amount of collected data into a story and its interpretation. In order to reduce the amount of collected data, Bernard (2000) suggested several approaches as appropriate for data analysis; these included interpretative analysis, narrative and performance analysis, disclosure analysis, grounded theory analysis, content analysis and cross cultural analysis.

The strategy used in this research study is grounded theory analysis. Grounded theory is a set of systematic procedures for the data collection and its analysis throughout the research process i.e. the process of analysis took place from the first time the data was collected and continues until the research study is completed (Bryman, 2007). Furthermore, many researchers call for analysis to get started from the early stages of data collection. Silvermen (2005) stated that it is better to analyse the data as soon as the researcher has collected it. Additionally

Miles and Huberman (1994), support the idea of analysing the data from the start, to assist the researcher in making headway and in thinking about the existing data.

4.6.1 Data preparation

The data collected from the semi-structured interviews, together with the notes written down during the interview, were gathered for analysis. In this section the focus was to convert all the qualitative data gathered from the interviews to word-processed text, which would later be used in the data analysis (Saunders et al., 2012).

4.6.2 Transcribing

The interviews were audio-recorded and subsequently transcribed, to convert the data into a word-processed text, using the participants' actual words. The task of transcribing an audio recording is a time consuming process. The duration of the research interview was around 30 to 40 minutes, yet it took approximately seven to eight hours to transcribe the whole of an interview. A sample of the transcripts can be found in Appendix 7.

There are several problems that may occur during the process of transcription; such as the misunderstanding of the sentence structure, or mistaking words or phrases for others (Gubrium & Holstein 2002). However there are several ways which can be used to overcome the problems, such as maximising the recording quality, flagging ambiguity in the interview, using consistent notation systems, reviewing the transcription and using a member check (Gubrium & Holstein, 2002). Using member checking is to determine the accuracy of the qualitative findings through talking/reading the final report, or specific descriptions or themes, back to participants in order to determine whether these participants feel that their responses have been recorded accurately (Creswell, 2009)

According to Saunders et al. (2012), there are a number of possible ways of reducing the vast amount of personal time needed to transcribe interviews verbatim. One of them is by not transcribing the entire interview but to transcribe only those sections which may produce a significant impact on the research. The interviews, which were transcribed earlier, were read several times to look for the robust section,

as a reference for transcribing the other interviews. The recordings of the other interview sessions were carefully listened to several times in order to locate the robust section which needed to be transcribed. Those sections that were transcribed were checked again by yet another listening session with the recording (Saunders et al., 2012).

Each interview that was transcribed was saved as a separate word-processed file. All the file names maintained confidentiality and preserved participant anonymity. In the transcription of the interviews, there were several techniques that were used for early data analysis. Some researchers use different coloured fonts but, for this analysis, the researcher used the comment and tracking function of Microsoft Word to record ideas and comments which was helpful to identify key concepts and themes.

4.6.3 Data analysis

By looking back to the literature, the grounded theory methodology was developed by Glaser and Struss, through collaboration in medical research on dying patients. In the research they developed the constant comparative method, later known as grounded theory methodology (Glaser & Struss, 1967).

The data analysis for the research is using grounded theory methodology. The data are used to develop an inductively derived grounded theory about a phenomenon (Collis & Hussey, 2009). In this method data collection, analysis and the theory are closely related to one another (Bryman, 2007). According to Creswell (2009), in analysing qualitative data, there are some precise procedures that are needed to be followed which are outlined below:

- Comprehend and manage the data
- Integrate related data drawn from different transcripts and notes
- Identify key themes or patterns from them for further exploration
- Develop and/or test hypotheses based on those apparent patterns or relationships
- Draw and verify conclusions

Based on the procedures mentioned above, grounded theory is structured and systematic, with a set of procedures to follow at each of the analyses. In grounded theory, coding is one of the most central processes (Gill & Johnson, 2002). The codes are labels which enable the qualitative data to be separated, compiled and organised. Comparisons of differences and similarities between different codes will be made continuously, to ensure that codes with similar contents are given the same labels (Creswell, 2009).

By looking at the literature, different grounded theorists have different procedures for data coding. Strauss and Corbin (1998) for example, lay down a structured method for coding data: open coding, followed by axial coding and then selective coding. Glaser (1978) on the other hand, has a different approach, as there are two stages of coding: substantive and theoretical coding. The substantive code is to conceptualise the empirical matter and theoretical code is to conceptualise the substantive codes and to identify the relationships between substantive codes in order to integrate the analysed data into the theory (Glaser, 1978). Before the coding began, the transcripts were read again and the recordings were listened to many times, to understand the data and to identify any potential themes and concepts. The research uses three coding steps: open coding, axial coding and selective coding (Collis & Hussey, 2009).

Data management: data analysis

There are several different approaches to qualitative data analysis. In general, qualitative data analysis is a difficult task, which includes reading a large amount of data, looking for similarities and differences of the data, and subsequently identifying and developing the categories (Denzin & Lincoln 1994). Nowadays, the majority of qualitative researchers use computer software for the analysis of data. Examples of such programmes are the *MAXqda*, *Atlas.ti*, *QSR NVivo* or *Hyper RESEARCH* (Creswell, 2009). The study considered *QSR NVivo* in data analysis. With the improvement of rigour, text searching, writing tools, visual display and exports, this software may help in analysing the data efficiently (Creswell, 2009).

The available software was *QSR NVivo*. This software was only a tool for managing qualitative data. It is less useful in handling the thematic ideas emerging during the data analysis process. Furthermore *QSR NVivo* is known to lack the power to identify the interrelationship of these thematic ideas; a process that is essential for gaining a deep understanding of the data (Welsh, 2002). Grounded theory is full of the intricacies of data management, which not only focuses on the data but also includes systematic and rigorous procedures (Glaser, 2003). In using computer analysis software, the theoretical quest is crucial for culminating grounded theory generation and creativity and it is argued that computer sorting blocks this process (Glaser, 2003). Therefore, the analysis using the computer software tends to weaken meaning by simply reducing the occurrences and the re-occurrences of codes to numbers (Glaser, 2003; Welsh, 2002).

According to Glaser (2003) it would be inappropriate to use computer analysis with this particular set of research data, since it only concentrates on the type of data but ignores the essential linking strategies, which connect data during its analysis (Glaser, 2003). Glaser (2003) also suggested for the new researcher to use manual coding, as the computer-based approach can lead to a thin level of data analysis, since such novice researchers have never experienced a theoretically complete grounded theory. According to Basit (2009), the use of computer analysis software may not be feasible to code a small number of interviews. She added that coding is more an intellectual exercise, as it allows the researcher to communicate and connect with the data to facilitate the comprehension of the emerging phenomena and to generate the relevant theory (Basit, 2003).

Due to the small sample of interviews, the researcher chose to use a manual coding technique for the data analysis. It allows the researcher to be familiar with the data. As the coding or the research analysis continues throughout the research study period, it enables the researcher to communicate with the data and to make sense of them. It also enables the researcher to choose the codes, categories or theme in order to explain a phenomenon (Basit, 2003). Tables 4.6 and 4.7 show the example of codes and categories. A basic process of coding usually follows an ideal and streamlined scheme as shown in figure 4.6.

Codes

Text	Code
The main dispute that I dealt with comes through the court system because the courts basically advise parties to go to mediation	System encouragement
It creates a mentality where people first try to choose mediation because they know that will be encouraged to do so by the court; they will be criticised if they don't.	Judge encouragement
More on the pressure now from the court through the CPR	CPR
Only through more and more awareness and more and more encouragement from the judges.	Judge encouragement
It's normally financial dispute during the recession because that is the most difficult area.	Finance
People just don't get paid	Finance
Money and cash flow are what I suspect is the cause of dispute.	Finance
The parties are the problem, not the mediation	Behaviour
I think it is really on people's mindset; they don't have confidence or they have weakness of something which is just the wrong way to look at it.	People's mindset
Parties want somebody who can control the process of mediation	Mediation process - Weakness
The parties have unrealistic expectations	Awareness - parties
Parties wanted to be told what to do	Awareness - parties
I do sometimes find that the legal advisors try to lead the mediation session a little bit more than what it should be	Awareness – Legal advisor
People are scared to make their own decision	Awareness
People don't want to spend the money, people don't actually want to settle voluntarily	Attitude

Table 4.6 Examples of codes

Categories

Categories	Codes
Legal support	System encouragement
	Judge encouragement
	CPR
Negative perception - People	Behaviour
	Awareness - Parties
	Attitude
	People's mindset
Negative perception – Legal advisors	Attitude
	Awareness
Dispute	Finance

Table 4.7 Examples of categories

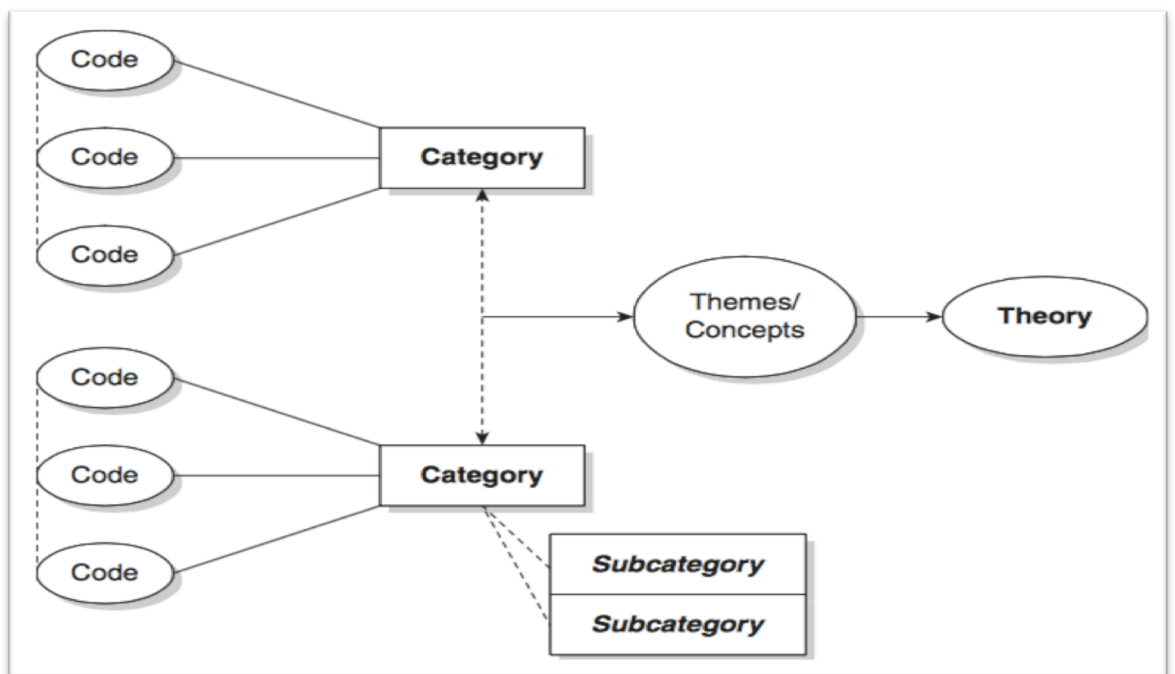


Figure 4.6. Streamlined codes, category models for qualitative inquiry
(Source: Soldana, 2013)

Open coding

The first step of the analysis was to conduct open coding. Open coding is a process of identifying, analysing and categorising the raw data (Collis & Hussey, 2009). In this process, the researcher conducts line-by-line data coding and all analysis are incidents not themes, keeping questions in mind: what is this data a study of? What category does this incident indicate? What is actually happening in the data? What is the main concern being faced by participants? What accounts for the continual resolving of this concern? The main goal in this stage is to code for concepts, not description (Glaser, 1978; 1998).

In this process, the data is broken down and the individual elements of information labelled, making the data more easily recognisable and less complicated to manage (Bryman, 2007). The codes are generated freely with respect to the research questions. The decision to code an idea from the interview sessions depends on its relevance towards the interview question and the research questions. For example, during the interview session, participants were asked about the appropriate background for a construction mediator. In response to this question, some of the participants mentioned:

“You should be able to mediate almost everything. I would say it is important to understand a bit about the subject matter”. Participant 03.

“The mediators need to have a knowledge of the subject matter... and also need to have an understanding of the legal process. You do not need to be an expert...” Participant 07.

This statement was coded under the label of ‘Skills’.

Open coding involves several steps. The information was broken down and the individual elements were labelled with a code. This was done so that it was easy to manage and recognise the data. These codes were then organised into a pattern of concepts and categories, together with their properties. This was done by classifying the different elements into distinct concepts and then grouping similar concepts into categories and sub-categories. The properties were those characteristics and

attributes by which the concepts and categories can be recognised (Collis & Hussey, 2009).

Axial coding

After open coding was done, the next step was to look for relationships between categories of the data that emerged from open coding (Saunders et al., 2012). In axial coding, the connection is made between the categories and their sub-categories. The relationships between the categories are tested with data through the *coding paradigm*, which involves '*conditions, actions/ interactions and consequences*' (Struss & Corbain, 1998, p.128).

The *coding paradigm* is a process which helps in systematic analysis of the data, so as to enhance integration between structure and process (Struss & Corbain, 1998). The element on 'conditions' in this process focuses on aspects of the data dealing with situations or circumstances in which a phenomenon under investigation is embedded. The 'action/interactions' component in this process is about the 'strategic or routine responses made by individuals or groups to issues, problems, happenings or events that arise under those conditions'. Consequences in this process are simply the outcomes of actions and interactions (Struss & Corbin, 1998, p.128).

What can be seen behind the idea of axial coding is to re-assemble the data broken up during open coding in a more meaningful and logical way. According to Collis and Hussey (2009) axial coding is a process of connecting categories and sub-categories on a more conceptual level. It is restructuring the data and developing various patterns with the intention of revealing links and relationships. This process includes the development of the properties of concepts and the categories of concepts and linking them at the dimensional level. At this stage, the researcher had constructed smaller theories about the relationship that might exist within the data and which needed to be verified (Collis & Hussey, 2009). The approach explored and explained the development of mediation in the UK construction industry by identifying several different factors.

Selective coding

After the categories have been identified through axial coding, the identified categories were then looked at again, in order to observe and try to make sense of them. Selective coding is a process of selecting the core category and systematically relating it to other categories (Collis & Hussey, 2009). It aims at defining a central category that the researcher tries to link to all of the properties of the categories that have been established previously (Thietart et al., 2001). This means, all the categories are then reconnected to a core category. This was done by recognising and developing the relationship between the principal categories that have emerged from this grounded approach (Saunders et al., 2012). This process enables themes to be generated, which can then be grounded by referring to the original data (Collis & Hussey, 2009).

Memo writing

As coding proceeded, the ideas about the analysis were captured in memos. Memos are important in grounded theory, as they provide some discussion points or illustrate some ideas behind the categories (Glaser & Struss, 1967). Memo writing is a crucial step, as it relates to the data coding and the first draft of the completed analysis (Glaser, 1978). It also becomes a directive for further coding or to collect data (Glaser & Struss, 1967). These are means by which the outcomes from the analysis, at every stage of the process, are recorded, tracked and developed as more information is introduced and data is coded and explored (Glaser & Struss, 1967). Consequently, memo writing is required to commence at the onset of analysis (Corbin & Struss, 2008) and may cover issues such as ideas developed during the coding process, concept development and elaboration, identification of categories and the relationship between them and integrating the emerging story from the data analysis process. Therefore it is useful to write memos in any attempt at generating theory. The researcher should rearrange the memos in writing up the theory (Glaser & Struss, 1967).

Writing theory

At this stage, the researcher possesses coded data, a series of memos and a theory. The discussions set out in the memos provide the description behind the categories, which become the major themes of the theory. To start writing the theory, it is first necessary to organise the memos for each category, which is easily accomplished since the memos have been written about categories. In this process, the researcher can return to the coded data if necessary to validate a suggested point, pinpoint data behind a hypothesis or gaps in the theory and provide illustrations (Glaser & Struss, 1967).

4.7 Quality of research

The quality of any research is dependent on the research design. As mentioned in the research design section of this chapter (section 4.2.5), the design was qualitative. Two factors which were important to consider, in designing a study, analysing results and judging the quality of the study are validity and reliability (Golafshani, 2003; Patton, 2002). Therefore, it is important to ensure that the instrument that is used to measure a particular concept is indeed accurately measuring the relevant variables (Sakaran, 2002). In qualitative research, the instrument is the researcher (Golafshani, 2003; Patton, 2002).

In other words, the purpose of reliability is to test how consistently an instrument measures the concept it claims it is measuring. On the other hand, validity tests how well an instrument that is developed measures the particular concept it is supposed to measure (Sakaran, 2002). Hence, validity and reliability are concerned with whether the instrument measures the correct concept and reliability is concerned with stability and consistency in measurement (Sakaran, 2002). In the research several steps were taken in order to ensure that the validity and reliability of the data and findings from the research would be at acceptable levels. Some key questions were taken into consideration (shown in Table 4.8) suggested by Shipman (1988) (as cited in Berkeley, 2004) regarding the quality of research for the study:

- *Is the topic of investigation important?*
- *If the investigation were to be repeated by different researchers using the same methods, would the same results be obtained?*
- *Does the evidence reflect the reality under investigation?*
- *Do the results apply beyond the specific situation investigated?*
- *Has sufficient detail been provided on the way the evidence was produced for the credibility of the research to be assessed?*

Table 4.8 Key questions to establish reliability and validity (source: Berkeley, 2004, p.30-31).

Reliability

The reliability of the research can be explained with reference to the key question suggested by Shipman (1988) (as cited in Berkeley, 2004).

“If the investigation were to be repeated by different researchers using the same methods, would the same results be obtained (Berkeley, 2004, p.31)?”

If the research is applied again and again to the same phenomenon, the same results should be produced (Berkeley, 2004). The concept of reliability is concerned with the question of whether the findings of the research are repeatable (Bryman, 2008; Collis & Hussey, 2009). Therefore, if another piece of research followed exactly the same procedure, as described in an earlier piece of research, the new research should arrive at the same findings and conclusions. The lack of standardisation in research interviews may lead to concerns about reliability, as to whether the alternative researcher (the next researcher who is doing similar research) would reveal similar information (Saunders et al., 2012).

There are three steps to identify reliability in qualitative research (Kirk & Miller, 1986, p. 41-42);

- *The degree to which a measurement, given repeatedly, remains the same.*
- *The stability of a measurement over time*
- *The similarity of measurement within a given time period.*

A concern with reliability is that the findings are not necessarily intended to be repeatable, since they reflect reality at the time they were collected, in a situation which may be subject to change (Marshall & Rossman, 1999). Therefore, an attempt to ensure that the research could be replicated by other researchers would not be realistic or feasible without undermining the strength of this type of research (Saunders et al., 2012). To ensure reliability within qualitative research, examination of trustworthiness is crucial (Golafshani, 2003). The terms *trustworthiness* and *authenticity* have been suggested in place of reliability and validity for qualitative research (Guba & Lincoln, 1994). Trustworthiness consists of four criteria, which can be parallel to the equivalent criteria in qualitative research (Bryman, 2008). Therefore, the research referred to the following criteria (Table 4.9) to ensure the reliability.

<p><i>Credibility</i>: Refers to the degree of similarities between the participants' descriptions and the researcher's depiction and interpretations (Marshall & Rossman, 2006). This issue refers to the ability of the researcher to be able to demonstrate that the research was designed in a manner that accurately identified and described the phenomenon to be investigated (Remenyi et al., 1998).</p> <p><i>Transferability</i>: Requires a researcher to convince the readers that the findings will be useful to others in similar situations with similar research questions. These data can be used to elaborate and illustrate the research questions and will strengthen the result (Marshall & Rossman, 2006).</p> <p><i>Dependability</i>: A researcher attempts to justify that the instrument is consistent, to be used across different contexts for the changing conditions in the phenomena (Guba & Lincoln, 1994).</p> <p><i>Confirmability</i>: This relates to whether or not the findings could be confirmed by others. If the findings are transparent to others, then it may increase the strength of the assertions (Remenyi et al., 1998). The researcher attempted to maximise the conformability by ensuring that all data collected, processed, condensed and represented are explained and documented, so that it can be a reference for other researchers doing similar research on other occasions.</p>

Table 4.9: The four criteria of trustworthiness (Bryman, 2008)

For this research, the participants had different professional backgrounds (ranging from construction professional to legal specialist) and held different views about the construction mediation concept. The majority of the participants were trained in the United Kingdom, using a facilitative mediation approach (RICS, 2013), whilst others were trained in the United States, using a different type of mediation style (evaluative). One of the research criteria was to select the participants with at least 5 years of experience in mediating construction dispute. From these factors it may be difficult to obtain the same or similar results by another researcher on a different occasion, as the sampling procedure will not be the same. Therefore, there may be some variation in the results.

Nevertheless, reliability in this research was achieved through research protocols and procedure (Collis & Hussey, 2009). In that respect, all the interviews were recorded and transcribed. All the data were organised for analysis. The analysis was done by coding processes through the systematic step by step procedure outlined by Gill and Johnson (2002). All the data obtained from the research will be retained as a reference for any future research. Saunders et al. (2012) suggested the use of the following approach to ensure the retention of reliability: keeping notes relating to the design of the research, explaining the reasons underpinning the choice of strategy and methods, as well as to retain the research data collected. The records can be used by other researchers as a reference, helping them to understand the processes that were used in the research and to enable them to reuse the collected data.

Apart from maintaining the research protocols and procedure, the researcher has ensured that this research follows the criteria on trustworthiness and authenticity, as was suggested by Guba and Lincoln, (1994) to achieve research reliability.

Validity

Validity is the extent to which the findings accurately reflect the phenomena under study (Collis & Hussey, 2009). It is concerned with the extent to which research findings accurately represent what is happening in a situation. In other words, it is concerned with whether the data collected represent a true picture of what is being studied (Bryman, 2008). It ensures that there is no alternative explanation of a posited causal relationship. The validity of the research can be explained with reference to the key question suggested by Shipman (1988) (as cited in Berkeley, 2004).

“Does the evidence reflect the reality under investigation?”
(Berkeley, 2004, p.31)

Validity is the extent to which the findings accurately reflect the phenomena under study (Collis & Hussey, 2009). In simpler terms, it refers to whether the research evidence is true or valid and whether it is adequate. Even if research evidence is objective and reliable, it may still have questionable validity (Berkeley, 2004). According to Creswell (2009), the issues of reliability and generalisability play only a minor role in qualitative research. However, validity plays a major role and it is used to determine whether the findings are accurate from the standpoint of the researcher, the participant and/or the reader (Creswell, 2009).

According to Brinberg and McGrath (1985), validity cannot be fully assured by any method and technique. For this current research, it was difficult to attain validity, as it was focused on the grounded theory research approach, using semi-structured interviews, as the main means of data collection. According to Gomm et al., (2000), grounded theory research often results in a high degree of ecological validity, allowing the conclusion that the research findings accurately represent the real world setting. Therefore, the research methods and settings of the research were designed in order to investigate and explore the real life situation.

Validity within qualitative research can be achieved when there is a flexible and responsive interaction between, in this particular case, the interviewer and participants which allows meanings to be probed, topics to be covered from a variety of angles and questions to be made clear to participants (Saunders et al., 2012).

According to Whittmore et al., (2001) there are some validating techniques which can be employed during the data collection stage, such as making explicit data collection decisions, prolonging engagement or demonstrating saturation. Maxwell (2005) pointed out that well designed research methods can help to reduce the risk of threats to validity.

The use of semi-structured interviews was the appropriate method for data collection for this research, as the participants were selected based on their experience in handling construction disputes. The researcher may determine the validity of the research by asking the same questions to a number of participants (Creswell, 2009). The interviews were carried out until the data reaches saturation. Once the data is saturated, and nothing new is being offered from participants, three further interviews were carried out in order to ensure data saturation was present.

Apart from maintaining a well-designed research method incorporating flexible and responsive interaction between the researcher and the research participants, making explicit data collection decisions and prolonging engagement or demonstrating saturation of the research data. By employing these protocols the researcher has ensured that this research follows the criteria on trustworthiness and authenticity, as suggested by Guba and Lincoln (1994), so reducing the risk of threats to validity.

4.8 Summary

The objective of this chapter was to describe the appropriate methodology employed in the research. In addition, it summarised the instrument used to address the research problem, which helps to explore theory on construction mediation. Table 4.10 shows the summary of the appropriate research process for this study.

Appropriate philosophy	Interpretive paradigm
Research approach	Inductive
Research strategy	Grounded theory
Research design	Qualitative research design
Data collection technique	Semi-structured interviews

Table 4.10. Methodology used in the research.

The limited literature about construction mediation in the UK had yielded only limited background information for the research. From there, no hypotheses were generated. The interpretive paradigm was selected to help in structuring the whole process of the research. In order to generate any theories, the research has to undergo an inductive research approach in order to explore the data collected and to formulate the theory.

The main concern here was to generate theory from data collected inductively through a series of interviews. Thus grounded research helped to capture the overall mediation phenomenon in a construction environment through the qualitative research design. The qualitative design helped the researcher ‘get close to the data’ by interacting with experts (mediators). In order to interact with such experts, the researcher had designed a semi-structured interview to allow some discussion, in order to reveal and understand the ‘what’ and ‘how’ questions and to place more emphasis on exploring the ‘why’ about construction mediation.

During the interviews, ethical consideration was one of the most important elements. Before conducting the interview, the researcher had applied for formal ethical clearance. Having received ethical approval from the University of Manchester, the researcher started conducting the interviews. The selection of the

participants was based on the professional backgrounds of the accredited mediators and their experience of handling construction disputes. The sampling was done using theoretical sampling, during which the researcher continued to collect data until the point of saturation was achieved. The data were analysed using grounded theory analysis through manual coding techniques and the findings will be elaborated in chapter 5.

To ensure the quality of the research, aspects relating to research sampling, validity and reliability were taken into account. The sampling procedure, together with the mediators' criteria and the interpretive research philosophy, helped in validating the research.

Chapter 5 - Results

5.1 Introduction

This chapter presents the main findings of the research. The chapter has been organised and classified into five sections, each containing different subsections. The first section explains and describes the interview dimension of the research. The nature of data analysis will be presented in every section of the chapter. The second section explores the most suitable mediation process for construction disputes in the UK. It also includes a description of the investigation of the main core of construction disputes. The third section explores the preferred background of the mediator, in dealing with a construction dispute. The fourth section investigates the legal involvement towards disputes in the construction industry. The fifth section explores and discusses the barriers which impede the use of mediation in the UK construction industry. The purpose of sections 1, 2 and 3 is to obtain an overall idea of the mediation phenomenon in the UK, especially in the construction industry. The data presented in the chapter has been extracted from the research interviews. There are also some references to support the theory.

5.2 The research interviews

The goal of this section is to explain and describes the interview dimension of the research. For the research, all the data were obtained through semi-structured interviews. The interview questions were designed to include the entire requirement needed for the research. The participants, who were selected based on their years of experience in handling construction disputes, came from different backgrounds. This diversity was of great benefit as the participants responded, based on their experience with respect to their professional backgrounds and thereby gives an easy approach to understanding the whole idea about the research. Sixteen interviews were conducted; however, the data had reached saturation point by the thirteenth interview. Another three interviews were conducted as a check to make sure that the data had reached theoretical saturation.

The results were presented in four categories: the mode of mediation for handling a construction dispute; mediator’s background; legal encouragement and barriers to construction mediation in the UK. All the data used to present the result were based on the analysis of data from the research interviews. Some theories from the literature were also included to strengthen the results. As was stated in chapter 4, the research focuses on the manual coding technique to identify the relationships between the categories. As the research is using a grounded theory approach, it is predicted there will be significant relationships between the data. As a result, it will be of benefit, as a sound theory should result from such data.

5.2.1 Profile of participants

There are a number of approved mediation providers in the UK, such as the Chartered Institute of Arbitration (CI Arb), the Centre for Effective Dispute Resolution (CEDR) and the Alternative Dispute Resolution Group (ADR Group). These bodies provide a list of their accredited mediators, together with their profiles. Such helpful information made it easy to select mediators as research participants. The selected participants were chosen from among accredited mediators in the UK with at least five years of practical experience. Table 5.1 shows the summary of the selected participants, according to their professional background, gender and location.

Participant	Background	Gender	Location
Participant 01	Quantity Surveyor/Education	Male	North West
Participant 02	Quantity Surveyor	Male	North West
Participant 03	Solicitor/Education	Male	Yorkshire
Participant 04	Barrister/Education	Male	North West
Participant 05	Barrister	Male	Midlands

Participant 06	Barrister	Male	Greater London
Participant 07	Arbitrator/Education	Male	Greater London
Participant 08	Quantity Surveyor	Male	Yorkshire
Participant 09	Solicitor	Female	North East
Participant 10	Civil Engineer	Male	North West
Participant 11	Solicitor	Male	Greater London
Participant 12	Barrister	Female	Greater London
Participant 13	Barrister	Female	Greater London
Participant 14	Solicitor	Male	North West
Participant 15	Solicitor	Male	North West
Participant 16	Solicitor	Male	North East

Table 5.1. List of selected participants, location, gender and professional background.

The participants' backgrounds varied by specific professional area, education and legal practice. For this reason it was very useful to conduct interviews with them, in order to understand the structure of the mediation process, terminology, current dispute trends and difficulties, as seen through the lens of their vast experience.

The reason for including gender classification in the research was due to the fact that, during the interviews, the researcher noticed variation in terms of male and female participants' responses to the research questions. However, the number of female mediators who participated in the research is low and there is not enough evidence to support the variation in responding to the research questions, in terms of gender differences. However, the overall variation will be explained in the discussion chapter (Chapter 6). Location was included to see if there are regional differences or

trends in mediation practice or in mediation cases. However, the trend remained consistent, other than that there are a large number of construction mediators based in the Greater London area. The interviews were conducted with each participant individually, either by phone or face-to-face at their own office.

5.2.2 Summary

The objective of this section was to describe the interview dimension of the research. In addition, it summarised the instrument used to address the research problem and to explore the theory on construction mediation. Due to limited existing literature on the topic, a qualitative research design was chosen to investigate and explore the ‘what’, ‘how’ and ‘why’ questions about the research topic. The questions produced sufficient information to generate theories regarding the trends in the industry. In order to strengthen the research design, semi-structured interviews were chosen to explore the participant’s views and perceptions towards mediation; especially aspects which influence the development of the construction mediation process (influences, drivers and barriers of the construction mediation).

5.3 Mode of mediation for construction disputes

5.3.1 Introduction

Mediation is an effective tool for tackling a wide range of issues. It involves the role of a neutral third party (the mediator) who is trained to assist parties to come to a settlement (RICS, 2013). The mediator is specially trained to a nationally accredited standard, and unlike arbitrators or judges, has no power to impose a settlement on the parties (Treacy, 1995). The purpose of the section is to explore the mode of mediation used in the UK for dealing with construction disputes and to understand the views from the mediators about the appropriate mediation process that should be used and practiced to resolve a construction dispute.

There are some aspects included in order to explore the appropriate mediation process to resolve construction disputes in the UK. The main aspects include investigating the type of construction dispute, the number of parties involved (in general) and the nature of the dispute. This is an important proviso, as there was a strong connection between ‘the issue’ and ‘how to deal with the issue’. After the investigation of those issues was completed, then it was easier to explore the appropriate mediation process to deal with the construction dispute. The main process of mediation used in the UK is, according to Gould (1999), facilitative mediation.

5.3.2 The main construction dispute

One of the interview questions was to know the appropriate mode of mediation for resolving construction disputes. The researcher wanted to know ‘*what the main issue is*’ and ‘*how to resolve the main issue*’. Therefore the first step was to investigate the main type of dispute in the construction industry. The question used to address the main construction dispute was as follows:

Have you noticed a change in construction disputes and what are the common causes of such disputes?

During the interview, nearly all participants indicated that there have been no variations in construction disputes. When the question was asked, the majority of the participants commented that disputes have stayed fairly consistent, even during the recession period. According to participant 16, *“A construction dispute always follows the same pattern and it may vary when the economy is buoyant and there is a lot of work around”*.

When the participants were asked about the issues of the main disputes which happened in the construction industry, the responses were varied; from payment provision, variation order, significant changes in the activity of work during the construction project period and technical issues, which lead to conflict regarding the project’s commencement. However, the majority of the participants expressed the belief that the most significant issues during the recession were to do with the financial aspect of construction.

The overall response to this question (cited above) was very positive. When the whole interview data were analysed, the first set of analyses examined the main dispute in the construction industry, which indicated that the main root of construction disputes basically originated from financial problems. So in this case, strong evidence indicating a financial element was the main source of construction disputes in the UK.

When the question about the number of parties involved was asked, some of the participants commented that in a construction dispute, generally there are many parties involved. This finding supports the result of McCartney and Dain (2010), who stated that the construction industry may be the largest single user of mediation. The reason was simply because there are many parties involved in a particular construction project and the nature of construction projects vary from one project to another.

Cheung (2010) describes the matter of disputes in the construction industry as a very complex issue. According to Harmon (2003), complex disputes arise from the intricacy and magnitude of the work at construction sites, involving many contracting parties, poorly prepared and/or executed contract documents, inadequate planning, financial issues, and communication problems. Furthermore, according to Gould (1999), facilitative mediation was the main mediation process used in the UK. As stated earlier, there is strong evidence indicating that the main cause of construction disputes was financial issues.

When the subjects of *facilitative mediation approaches* (Gould, 1999) and the *complexity of construction dispute* (Cheung 2010), were combined, one question arose: ‘Can facilitative mediation be applied to resolve complex construction disputes?’ The next section explores the most appropriate mediation process to resolve complex construction disputes.

5.3.3 Mode of mediation

Before exploring the appropriate mode of mediation for dealing with a construction dispute, the researcher tried to relate the idea of the existing theory in resolving any general dispute. From the literature, it appears there are several ways in which mediation can be carried out. In the UK, the Advisory Conciliation and Arbitration Service (ACAS) described the mediation process as ranging between directive and facilitative approaches (ACAS; Ridley-Duff & Bennett, 2011). In directive mediation, the independent third party can make non-binding recommendations; however, the parties may or may not accept them. In facilitative mediation on the other hand, the independent third party will focus on encouraging the parties to find their own solution to the issue (Ridley-Duff & Bennett, 2011). The alternative dispute resolution (ADR) provider in the UK suggests that commercial mediators should use a combination of facilitative and evaluative approaches (RICS 2013). The *Centre for Effective Dispute Resolution (CEDR)*, on the other hand, promotes a style closer to the facilitative mediation model (Gould et al., 2010). According to Gould (1999), facilitative mediation was most widely used in the UK. The ideas from the above theories were used in exploring the appropriate mode of mediation for construction disputes in the UK.

The above theory on mode of mediation underpinned a common commercial mediation process. How about when dealing with a construction dispute in the UK? As mentioned earlier, the main source of construction disputes in the UK construction industry was the financial factor. In order to explore the appropriate mode of mediation, the participants were asked about the main dispute in the UK and how they deal with it. Table 5.2, shows the list of questions that were used to explore the effective mode of mediation for construction disputes in the UK. The first question refers to the main question and the other two are the supporting questions. The purpose of asking the additional two questions was to explore views about the appropriate mode of mediation.

- In your opinion what is the most effective way of resolving a construction dispute?
- What is your view about mediation and its processes?
- In the UK, the most popular mode of mediation is facilitative. But in the construction industry is facilitative mediation favourable or evaluative?

Table 5.2 Research interview questions referring to appropriate mode of mediation.

The analysis of data for this section was not complicated as the participants were responding to the same questions. When the interview data was analysed, strong evidence indicated that the appropriate mediation process to resolve complex construction disputes in the UK was the facilitative mediation model. Therefore the finding is in agreement with the findings of McCartney and Dain (2010), who stated that the construction industry may be the largest single user of mediation, and facilitative mediation is the main mediation process used (Gould, 1999). Additionally, the findings of the study seem to be consistent with the mediation training bodies. For example, the Royal Institute of Chartered Surveyors (RICS) and the Chartered Institute of Arbitration (CI Arb) in the UK are focused mainly towards the facilitative mediation model (RICS, 2013).

Facilitative mediation

The overall responses to the interview questions were positive. What is interesting in this finding is that the majority of the participants referred to the facilitative mediation mode in describing the appropriate mediation process for resolving construction disputes: the mediator will facilitate the mediation process. The results of the study show that the most important aspect in the facilitative mediation process was that the mediator acts as a neutral facilitator: they were not a judge, arbitrator or adjudicator to present the idea of settlement.

From the finding it was found that, in facilitative mediation, the mediator would structure the process by helping the parties to reach an agreed resolution. An explanation for that was that the mediator gave the parties the opportunity to decide on the outcome. The majority of the participants commented that they would use their mediation skills to create a communication between the parties, or a dialogue, to help the parties to negotiate a solution based on available information and understanding. When the participants were asked to expand further, they indicated that the mediator will help the parties to look for common ground and to help to facilitate progress towards a settlement. Therefore, in this case the mediator tries their best to mediate the legal advisors out of the process, as the important element is to hear the decision from the concerned parties, without the influence of their legal advisors. According to the interview results, most of the participants commented that the facilitative mediator tries to help the parties find their own solution to a dispute. This means that the mediator will try to make the parties focus on the issues and create a balanced settlement.

5.3.4 Summary

The findings from the research indicated that there are several causes for construction disputes. However, the main source of construction dispute in the UK, especially during the recession period, was to do with financial issues. The subsidiary sources of disputes were variation order, significant changes in the activity of work during the construction project period and technical issues. The answer for this question helps in the exploration of the mediation process used in the UK. Although it was suggested that the mediators should use a combination of

facilitative and evaluative approaches in dealing with any construction dispute, the interview results show that all the participants in the research had chosen facilitative mediation as the most appropriate process to deal with construction disputes in the UK. The results from this section were carried forward to explore the barriers to the spread of mediation in the UK.

5.4 Mediator's background

5.4.1 Introduction

This section focuses on the professional background of the mediator to determine the attributes and criteria to select a suitable mediator to deal with construction disputes. Before going straight to the main question (as shown on table 5.3) some minor factors (for example the mediator's views towards mediation) needed to be addressed, as this will show each mediator's level of knowledge; whether it was more towards specific expertise or oriented towards mediating skills themselves.

There were some other elements that needed to be explored in this section, other than the mediators' views towards mediation. These elements were crucial in exploring whether the background was seen as a 'contribution to the mediation success' or 'a reason why mediation fails'. After the investigation of those issues had been completed, then it was easier to explore the mediator's appropriate background for mediating construction disputes.

5.4.2 The mediator's professional background

To gain a deeper understanding about the effectiveness or the importance of a specific background in the mediation process, the researcher designed several interview questions as shown in table 5.3.

- a) Is it necessary for a mediator to have a construction background or a legal background?
- b) What are the reasons you became a mediator?
- c) What is your view about mediation and its processes?

Table 5.3 Research interview questions referring to the mediator's professional background

In this section, two additional questions were added to explore the views on how the participants described mediation, based on their knowledge and experience with respect to their different professional backgrounds.

Before exploring the appropriate mediator's background, the mediation phenomenon need to be investigated first. The mediation phenomenon used in the study refers to the mediator's definition of the mediation terminology, as it creates a big impact on the exploration of the appropriate mediator's background, as there was a crucial connection between '*by how people help*' and '*with how people help*'. As mentioned earlier, facilitative mediation was the mediation process of choice; however 'is it necessary for a mediator to have the subject specific background?' Will it be an advantage towards achieving a speedy settlement or a reason for ineffective mediation?

Before jumping straight to the mediator's appropriate professional background each participant was asked about their views on how they describe mediation and its process. This indirectly, to some extent, can disclose the appropriate professional background for a mediator through the explanations of the participants; are the participants referring to the process or focusing on the dispute? What was found was that most of the participants focused on the process, by referring to 'rebuilding the relationship', 'not to take account of what the disputing

party says they want or the positional stand’ and ‘focusing on exploring the common ground between the parties’.

According to the interview results, some of the participants expressed the belief that mediation is one of the most powerful techniques and the best dispute resolving mechanism. Strong evidence from the results shows that mediation allows the parties to preserve or to rebuild the relationship, which might be shattered. When the research participants were asked to explain further about this issue, they described the mediation process as flexible; the party was not taking a ‘positional stand’ in relation to the dispute, the cost is less, the time to resolve the issue is less and by its nature there is a compromise. Some of the participants commented that traditional litigation was a wasteful process in terms of resources and emotions, as the disputing parties will not have enough involvement in the case and the process was too expensive.

One interesting finding was that some of the participants believed mediation was one of the most powerful ways of resolving disputes, where people had control over the process, rather than a decision being imposed on them. This finding corroborates the ideas of Gould (2009), who found out that people were aware that mediation was an effective method for dealing with problems. It was one of the most cost effective dispute resolution mechanisms among other ADR techniques (Gould, 2009). The finding also supports Ahmed (2012), who found that mediation was the most preferred of all ADR techniques.

One of the participants expressed his opinion as follows:

*“I found that the process is beneficial. I thought I find it useful compared with traditional forms of dispute resolution, arbitration or litigation”
(Participant 16)*

In response to question c (Table 5.3), most of the participants indicated that in mediation, the parties would compromise with each other and resolve the dispute themselves, with the assistance of the mediator. In this case, the mediator will use his or her skills to create some sort of communication between the parties, or a dialogue, and thereby try to break the deadlock, as failure to do so may ruin the positive atmosphere of mediation in resolving the dispute. It can be seen that from

the responses the mediator will structure the mediation process by putting significant effort into focusing on the issues and assisting the disputing parties to reach the best solution. This gives the parties the opportunity to make their own decisions, without the intervention of a third party (ie. the mediator). This also means that the mediator gives the parties high priorities to decide the settlement agreements, based on available information and mutual understanding, without the influence of their legal advisors. Another response to this question was that the mediator will let the parties decide the settlement, unlike other forms of dispute resolution techniques in which a third party will make the decision of a settlement for the parties.

One of the participants shared her experience as follows:

“I will advise my client not to go to the court and spend huge amounts of money, paying for something in order for someone (the judge) to decide the case” (Participant 12).

From the interview results, there were a lot of responses received. By reviewing the participants’ views on mediation, especially the subject of professional background, the majority of the participants believed that the background of the mediator was not important in mediation; however, having excellent mediating skills was crucial. A small number of those interviewed believed that the mediators should have a legal background to understand the theory behind the mediation. Some of the participants expressed the belief that it will be an advantage for the mediator to have a subject specific background (for example quantity surveyor or civil engineer). In that respect, the results of this section were divided into three categories and will be elaborated as follows:

- A.** Skills in managing the mediation process
- B.** The advantage of a subject specific background
- C.** The disadvantage of a subject specific background

A. Skills in managing the mediation process

Mediation is a process of resolving disputes by the third party and facilitative mediation is the appropriate dispute resolution technique in resolving construction disputes. From the literature, it can be concluded that the benefits of mediation are that the process is: voluntary, flexible, confidential, informal, fast and economical (Ahmed, 2012). At present, there are many accredited mediators consisting of legal personnel and others with professional 'subject specific' backgrounds. According to Gould (2009), the majority of the mediators in the UK are legally qualified; however, few of them are among the construction professionals.

An interesting finding is that one of the participants describes mediation as a mixture between dispute resolution, counselling and negotiation. This finding supports the idea of Ahmed (2012), who mentioned that mediation can do more than just facilitate negotiation. Relating to these two ideas, the majority of participants commented that mediation is about helping the disputing parties to reach a settlement. A small number of those interviewed commented that mediation was like creating a better way of communication between the disputing parties, in order to find the parties' common ground and balanced views, which could lead to an acceptable resolution. The research findings support the idea of Richbell (2008), who mentioned that the mediator is there to help the parties explore the strengths and weaknesses of the case and to facilitate the parties themselves in reaching their most constructive and fairest agreement.

According to Richbell (2008), a mediator is a neutral third party who manages the process of mediation efficiently by helping the disputing parties to reach an acceptable and realistic settlement. The primary role of the mediator is to facilitate dialogue and to create effective communication between the parties in a structured, constructive way, in a private and confidential setting (Richbell, 2008). Some of the participants commented that the mediator is not an independent legal advisor. Therefore it was important to select a mediator who would be able to shape the structure of the mediation process, in order to facilitate the exchange of valuable information among all parties (Bates & Holt, 2011).

According to one participant;

“They don’t need a mediator who is an expert because they’ll become like a judge or an arbitrator or adjudicator” (Participant 15)

The majority of those who responded believe that best mediator could be judged from their mediating skills. The finding may be explained by the idea that, no matter what background the mediator had, the most important element was having excellent mediating skills. In this respect, to be an expert on a specific subject doesn’t mean that the mediator is a good performer. However, according to Genn (2005), mediators with excellent skills, and some knowledge in the subject-area of the dispute, will produce the highest levels of satisfaction. This idea was supported by Bates and Holt (2011) and Cheung et al. (2002), who suggested it is essential for the mediator to have some related technical knowledge and prior experience.

All the participants pointed out that it was not really important to have subject specific expertise on the issues, as the mediator will not provide any legal advice. Mediation is not compulsory by law; however, the alternative dispute resolution process is at the heart of today’s civil justice system (Donohoe, 2006). During the mediation process the mediator will not give any legal advice and will not impose any decisions (RICS, 2013).

Referring to the previous section, the process of mediation in the UK construction industry was focused on facilitative mediation. Therefore, both the skills and how to manage the structure of mediation were important (Bates & Holt, 2011). One of the participants pointed out that the mediator should be able to mediate almost everything; therefore, mediating skills are particularly important, especially in getting the disputing parties together. The reason behind this view was because, at the end of the day as mediation progresses, the more things will come out that the mediator may or may not be aware of. One of the participants expressed his opinion as follows:

“The greatest weakness in litigation, arbitration or adjudication is too much of the parties’ energy is focused on the procedure and the rules and not enough energy is focused on the reasons for the dispute. The more procedure you have, the more focus is on the procedure and so mediation should have as few procedures as possible. I said to a client “You should spend 90% of your time wondering why you had an agreement and 10% of your time thinking about process” (Participant 4)

From the response above, the participant is indicating that the benefits of flexibility were important in mediation, as most energy should be focused on the issues. This shows that mediation skills were crucial in mediating any disputes, especially construction related disputes in the UK. From the interview results, there was no evidence showing that specific professional background was the reason why a mediation process was not effective or the reason it may form a barrier to the spread of mediation in the UK construction industry. When the data were looked at more closely, the most striking result that emerged was the need for a mediator in the construction industry to have excellent communication and mediating skills.

Therefore, one can conclude that it is important for a mediator to have an excellent set of mediating skills, in order to be able to create communication between the parties and build a mediation atmosphere that is practical and informative. By achieving this, the mediator will cause the mediation process to be effective. Looking at this aspect closely reveals there is strong evidence that the levels and standards of mediation skills may be reasons why a mediation process fails or acts as a barrier to the development of mediation in the UK construction industry. Further exploration of mediation skills will be elaborated in Section 5.6 (Barriers to construction mediation in the UK).

B. The advantage of a subject specific background

During the interviews it was found out that there are some factors that can be regarded as an advantage for a mediator who has a subject specific background. Existing literature agrees it may be helpful if a mediator has related technical knowledge (Bates & Holt, 2011; Cheung et al., 2002). Some of the participants commented that it may be useful for the mediator to have subject specific expertise, because that will enable them to understand the area of dispute more easily. Therefore, based on those comments, it will be helpful to have a mediator with some knowledge of the specific area he or she is involved in, as they would be familiar with the terminology, jargon, acronyms and concepts involved.

One of the participants expressed their opinion as follows:

“It is a big discussion part. I think personally that I am better than a non-construction background mediator in construction disputes because I understand the argument.” (Participant 08)

As a result, based on the findings from the interviews, it was not essential but it would be useful for the mediator to have a construction background, depending on the dispute itself. Some of the participants commented that if the mediator has the specific professional background (for example quantity surveyors), they may have the construction knowledge and they may also know some basic legal aspects about the construction and the contracts.

From the above participant’s comments, having a construction professional’s background (civil engineer, project manager, architect or quality surveyor) is an advantage, as the parties may not have to explain, in full detail to the mediator in-charge, all the terminology used in construction drawings, specifications, quotations and the contract, as the mediator will be familiar with the situation’s context. Hence, it will be easier for the mediator to find common ground and put significant effort into making the parties in dispute focus on the underlying issues. It will be easier for the mediators to understand the parties’ respective positions and should enable the mediator to move along complex issues, to reality test the settlement and to ensure the smooth running of the process.

With the knowledge the mediator has, the settlement can, at least in theory, be achieved in a short time period. This will eventually save time, costs and retain the relationship between the parties; also the project will be expected to be completed on time, based on the new settlement agreement.

C. The disadvantage of a subject specific background

From the study, the majority of the participants did not agree about the potential benefits of, or even the need for, having a subject specific background to mediate construction disputes. From the interview data, it was found that mediation ability was regarded as a key skill in managing disputes. All accredited mediators, irrespective of their professional background and expertise, should be able to mediate all kinds of disputes.

Interview results showed there were some benefits of having subject specific expertise as the background. However, with a subject specific background, does that mean the mediator will be a good mediator on that specific subject and knows the actual theory of mediation? According to one participant, there has been a big debate about this issue. Some of the participants pointed out that a mediator without a legal background will not fully understand the theory behind the mediation and therefore the mediation environment may not be optimal. The participants were referring to a new court ruling published recently, which was important to the mediation process, the disputing parties and their legal advisors. One of the participants commented that the mediator may not be aware of the new rules and, if they were, they may not have fully understood the theory behind them.

Most of the participants also commented on the negative aspect of having a subject specific background. For example: *“the mediator has the construction related knowledge; they were familiar with the terminology and the jargons in construction activity and therefore the disputing parties will take this opportunity to focus on winning the case”*. To support this statement, one of the participants explained that the dynamic between the mediator and the parties may change, as the disputing parties will spend all the time trying to convince the mediator that they were right, rather than focusing on the disputed issues. If the mediators are not careful their expert backgrounds can cause them to start giving comments or views

about the settlement before the parties were ready to recognise the potential solutions for themselves. This was an example of an inappropriate facilitative approach going against the facilitative mediation description. From the interview results it was indicated that the mediator should not give any comments regarding the settlement but try to make the disputing parties focus on the issues and negotiate the settlement on their own, without third party interference.

5.4.3 Summary

From the interviews all the participants gave a unanimous response that a specific professional background was not important in mediating a construction dispute. The mediator, by using his or her mediating skills, will help the parties to focus on the main issues, as they are not the arbitrator or the judge; mediators are therefore not individuals who could decide the settlement or give any advice regarding the settlement.

The positive aspect of having a subject specific background was that parties are likely to reach an accepted agreement faster, as the mediator knows the terminology used in the construction industry and will be able to run an agreement reality test. The negative aspect of having a subject specific background is that the dynamic between the parties and the mediator will almost certainly change. The parties will concentrate on convincing the mediator that they are right. If the mediator is not careful, they may give a view about the dispute and give advice concerning the settlement agreement.

Another finding revealed how important it was to have good mediating skills. The mediator's background will not be seen as a negative element contributing to why mediation fails; nor is it likely to act as a barrier impeding the use of mediation in the UK construction industry. However, inappropriate or inept mediating skills may be one of the reasons why a mediation process fails. The next section explains the legal encouragements towards the mediation uptake in the construction industry.

5.5 Legal encouragements

5.5.1 Introduction

This section describes legal encouragement for mediation to be used in the construction industry in the UK. By referring to the research findings, it can be seen that the majority of the participants were talking about the same element: the basic mediation terminology in answering the interview questions.

The legal system in the UK has made a great effort in encouraging and promoting mediation as a dispute resolving mechanism. To describe the legal encouragement, the whole process needs to be seen from all angles. In this respect, the matter is divided into three sections: the encouragement, the sceptical view of mediation and the issue of imposing mandatory mediation. The research indicated a great deal of support and interest in the use of mediation shared by the highly experienced participants during the research interviews. The study exposed several aspects that prevent the spread or growth in popularity of mediation in the construction industry.

5.5.2 The encouragements

Knowledge about mediation and resolving disputes is an important issue. There are varieties of non-court based techniques in resolving disputes, and mediation is one of them (Gould, 2010). There has been some good work done by the government in promoting mediation as a dispute resolution mechanism, in preference to litigation, in this country (Genn, 2005). This has been strengthened by the introduction of civil procedure rules (CPR) (Broadbent, 2009).

Courts have given full support for the use of mediation as a dispute resolving technique. There has been some encouragement and promotion from the courts for using alternative dispute resolution (ADR) techniques in resolving disputes. One example of action was by introducing the civil procedure rules (CPR) in 1999. According to these rules, the court will advise the use of mediation in resolving disputes, and any party who refuses to mediate, without any valid reasons, may face a heavy cost sanction. This approach shows that the court was concerned with the increase in the number of issues brought to court for settlement.

However, is this new approach enough to encourage people to use mediation? In order to understand and explain the level of encouragement, there were some elements which needed to be explored. Hence, the interview questions were designed in such a way that they would cover all elements needed to answer the question. Table 5.4 shows the research interview questions specially designed to look into this area of encouragement for mediation.

- To what extent will the legal system continue to encourage mediation?
- Are there any ways the government can improve mediation processes?
- The sceptical view of mediation, after the introduction of CPR, is that people may delay the case from proceeding and cause prejudice for the other party to withdraw or settle the case. Based on your personal experience, can you comment on this?
- Is it appropriate to impose mandatory mediation in the situation, as it applies to the construction industry?

Table 5.4 Research interview questions

During the interviews, all of the participants were referring to the basic terminology of mediation in answering the interview questions. Hence the analysis for this section is simple. By looking at the transcripts and listening to the interview recordings, the researcher can easily picture the whole concept. In order to describe the whole phenomenon about legal encouragement, this section was grouped into three categories:

- Encouragement
- Views towards mediation
- Mandatory mediation

A. Encouragement

This section is concerned with the level of encouragement and ways which can improve the uptake of mediation as a dispute resolution mechanism. Table 5.5 presents examples of participants' responses from the research interviews, in order to highlight the key ideas and concepts, which are important, in order to explain the main questions.

Levels of encouragement
I think the legal system will encourage even more people to go to mediation.
More increasing, more encouragement in mediation especially with the recently changed claim limit.
I think to a great extent because of two reasons. First of all the legal system would like parties to use the judge as a last resort. The second reason is the judge knows people get good result through mediation. So they will encourage people to look for mediation.

Table 5.5 Examples of participants' responses to highlight the levels of encouragement actioned by the court.

According to the interview findings, some of the participants commented that the number of mediation cases in the past few years has increased. When looking into this finding, relating to the past few years, the increased number of cases may be attributed to two possible main reasons: there have been a great number of disputes and the parties have been aware of the benefits of mediation or the court order. There has been a study conducted by Gould (2009) stating that the public was aware that mediation was an effective method of resolving differences. To support this, most of the participants mentioned that mediation was becoming more popular; more people are now familiar with mediation because of the pressure coming from the court through the civil procedure rules (CPR.) As a result, more people were familiar with

the mediation process; the lawyers were becoming more tuned into it and the judges may ask people to turn to mediation as a dispute resolution mechanism. Therefore, when the finding is closely examined, it seems to suggest there is a possibility that more people use mediation, more lawyers will be involved in it and more people will talk to each other about it.

Referring to the Civil Procedure Rules (CPR), before escalating the case people shall try mediation first. One of the participants explained that it creates a mentality where people first try to choose mediation, because they know they will be encouraged to do so by the court; if they don't choose that option they will be criticised. Another participant commented that the system, in promoting mediation to the public, is designed to act like a 'filter', to prevent disputes going to court. More mediation provision is the first option, allowing mediation to act as a filter in the early stages of any dispute; the great advantage of mediation was that the involved parties have the power to make their own decisions.

The findings reveal that the attitudes or the cultures of the people in dispute sometimes hinder the effectiveness of the whole mediation process. Some participants commented that the court cannot control the attitudes of people towards mediation. A possible explanation for this might be that the court can only request people to mediate their issues; however the court cannot make the people accept mediation of their differences, nor can it focus their attention on mediation in order to come to a settlement.

The participants commented that the encouragement given by the courts includes the recently changed claim limits that have expanded the area for mediation. Interestingly, when the question was asked, the responses were positive and the participants explained that the court has been publicising mediation to a great extent for two reasons; first of all the legal system would like parties to use the judge only as a last resort. The second reason is that the judge knows people get better results through mediation. There has been a great effort by the court in encouraging and promoting mediation as a dispute resolution process.

Table 5.6 shows some recommendations from the interviews to improve the uptake of mediation. The main point made about improving mediation is to do it through education. Most of the participants suggested that the awareness and the encouragement from the judges should be continued, not in terms of education, as in training, but maybe via communication. So raising awareness of the mediation process in various professions should help. Another approach was through high profile people. Judges have made some judgments recently that mediation should be what people are doing, what people in dispute should take advantage of. These observations may help to change the public’s attitude towards the mediation process.

To improve the uptake of mediation
They need to do more education
Through education but not in terms of training, it is in terms of communication. So raising awareness of it in various professions I think will help.
Only through more awareness and more encouragement from the judges

Table 5.6 Examples of participants’ responses referring to ways of improving mediation uptake

B. The sceptical view of mediation

The sceptical view of mediation, formed after the introduction of CPR, was that people might see mediation as a tactical approach for a party to delay the case and cause prejudice to the other party to withdraw or settle the case (Bondy et al., 2005). Table 5.7 shows some raw data from the interviews in order to highlight the participants’ views of mediation, with respect to the introduction of civil procedure rules (CPR).

Views of mediation
It can be used as a tactical device
Mediation is a fairly quick process; it is not going to hold things up.
They were looking at it in a wrong way. Mediation is not an expensive process; does not require an enormous amount of preparation in fact at putting the document together and things like that. It can be done quite gently

Table 5.7 Participants’ views towards mediation.

To regard mediation as a tactical approach was not appropriate. When this subject was asked, all the participants replied and explained by referring to the basic terminology of mediation: it is a quick and economical way of dealing with disputes and it is not going to hold things up. However, some participants indicated that there was some possibility of a fishing expedition. The possibility of this, according to the participants, was that some of the parties came to the mediation proceedings to know the strength of the case so that they can prepare themselves if the issue were to be brought to court.

When this subject was raised, the researcher found strong evidence that having good mediation skills is really important, rather than having a specific professional background. This view was justified by the participants, who explained that a ‘fishing expedition’ can be sensed and tackled by the mediator, as the mediator is there to monitor the process. Therefore, by using their skills, the mediator can detect any tactic or games playing, thus ensuring the good quality of the mediation process continues.

C. Mandatory mediation

According to participant 06, there has been some mandatory mediation carried out in other categories of conflict, especially in family disputes. Is it appropriate to impose mandatory mediation in the situation as it applies to the construction industry? Table 5.8 shows some raw data taken from the interview transcripts, in order to highlight the views about imposing mandatory mediation for construction disputes.

Referring to the research findings, the participants referred to the mediation terminology in order to answer the question about mandatory mediation. What can be found from the findings and from the literature is that mediation is both voluntary and consensual; this means it provides an environment where both parties agree to mediate the issues and agree to abide by any settlement achieved. Participants commented that the costs of some construction disputes were expensive, so making it difficult for mediation to become mandatory.

To impose mandatory mediation for construction disputes
Mediation is an agreement to agree
The whole fundamental concept of mediation is it's consensual
People will just get into the emotions and it will be a waste of time if people are forced into it; a waste of time!
You can make it mandatory but you cannot guarantee success.

Table 5.8 Participants' views about imposing mandatory mediation for construction disputes

When the question about making mediation a mandatory process was posed, most of the participants expressed dissatisfaction and commented that quality and success will not be guaranteed if mediation is made a mandatory process. Some of the participants indicated that if people were forced to participate, it would be a waste of time. According to one of the participants:

“They will turn up, tick the box and say they have done it and still don’t want a settlement”.

As mentioned earlier, it is the attitudes of the people that are important. One of the participants mentions that:

“They may come to the mediation process but they may not fully get involved with it”.

This finding supports the point made by ACAS (2013): “Forcing people to use mediation could be counterproductive”.

5.5.3 Summary

Looking at the research findings, there has been a good approach by the government in promoting mediation as a dispute resolution mechanism. The courts have tried to increase people’s awareness by advising and giving encouragement to choose mediation as the primary option for resolving disputes. Mediation was viewed as a filter to any dispute entering the court and has been described as common sense, as it creates a mentality for people to use mediation. There will be some new legislation about mediation as now there has been some debate about making mediation mandatory. When talking about mandatory mediation, the participants responded to the question with voluntary terminology. Mandatory mediation may well cause the parties to not cooperate fully and so not get involved in the process. Therefore, the quality and success of the mediation process cannot be guaranteed. The study exposed several aspects about the behaviour of people towards mediation (for example the ‘fishing expedition’) which influence the uptake or choice of mediation in resolving construction disputes. The results from this section are carried forward in order to explore the barriers which impede the use of mediation to settle construction disputes in the UK.

5.6 Barriers to construction mediation in the UK

5.6.1 Introduction

Construction disputes are often quite complex (Cheung 2010), as they involve multiple parties. How do the public, who are involved in the construction industry, settle construction disputes? There is a variety of dispute solving mechanisms available nowadays, but do they take into account financial and time aspects? According to the research findings, mediation is one of the best techniques for solving construction disputes. According to Gould (1999), some people are already aware of the effectiveness of mediation. The question is ‘what stops people from mediating their issues?’ What are the factors that prevent the spread of mediation, especially in the UK construction industry?

This section discusses some factors which act as barriers to the development and adoption of construction mediation, and some methods that can be used to reduce or eliminate those barriers. As mentioned earlier, the main purpose of the research is to gain an in-depth understanding of the barriers to the effective spread of mediation use in the UK construction industry. Unfortunately, there is only limited literature and research in the subject of mediation and dispute resolution, especially related to construction disputes. Therefore, it has been concluded that the most effective way to conduct research in this area is by employing a qualitative analysis research design and by using grounded theory as the research approach. In designing the interview questions, factors from mediating construction workplace disputes, which may be useful and have an impact upon the mediation of such disputes, were included.

From the interview findings there was a wealth of data that may assist in the development of a new theory about the barriers to the spread of mediation in the construction industry. From the data obtained, the results were divided into two parts: namely barriers arising from the public and barriers arising from legal advisors. The results are elaborated as follows.

5.6.2 The study

In order to explore the barriers which impede the use of mediation in the UK construction industry, there were many steps that were used to ensure the consistency, validity and reliability of the findings, as discussed in chapter 4. To gain a deeper understanding of, and to be able to elaborate more on, the barriers which impede the spread of construction mediation in the UK, there were various elements that should be known prior to the research. Among those elements are the type of mediation process, the appropriate mediator background, the main core of the construction dispute and the government's involvement in the adoption and implementation of construction mediation. All these elements have been explored and elaborated in the previous sections. Table 5.9 below shows the summary of the explored elements based on the participants' responses.

Elements explored	Participants' responses
Source of construction dispute (Section 5.3)	Financial problems
Mode of mediation (section 5.3)	Facilitative mediation
The subject specific background for the mediator (section 5.4)	Not important. To have good mediating skills is crucial.

Table 5.9: Summary of the explored elements

The elements above (Table 5.9) produce a firm foundation for the exploration of barriers which are impeding the use of mediation to settle construction disputes. The main study was to identify and explore the barriers which impeded the use of mediation in resolving construction disputes. Semi-structured interview questions were designed to suit the main criteria of the study. For this section, the interview questions formulated to find out the barriers to the spread of mediation in the UK construction industry were divided into 3 components: supporting questions, part 1,

the main questions and supporting questions, part 2. The questions may be seen in tables 5.10 and 5.11 and 5.12

A. Supporting questions, part 1

The supporting questions, part 1 of the interview questions, were used to explore the problems in relation to construction mediation. The questions acted as introductory questions for this section, which comprises of the participants' experiences of the process of mediating construction disputes. These questions indirectly explore what stops people from using mediation as a dispute resolution technique. Thus the barriers can be assessed from the findings. The interview questions were tabulated in table 5.10.

Supporting questions, part 1:

- Why do you think people choose mediation?
- In the instance where mediation is not effective, could you identify some reasons or causes?
- Why do some parties wish to resolve their dispute through binding process (such as arbitration or adjudication)
- What are some common problems/difficulties you encountered in mediating construction disputes?

Table 5.10 Supporting questions, part 1

When this subject was raised, the responses varied from one participant to another. Based on the findings, it appears that people would choose to resolve their disputes through mediation for two valid reasons: having awareness of the process and being court driven. Many of the participants commented that most people involved in disputes are aware of the benefits and the practicality offered by mediation. The findings relate to the study by Ahmed (2012), that mediation is the most preferred dispute mechanism of all the ADR techniques. This conclusion was also supported by Gould (2009), who noted that people are aware of the effectiveness of mediation.

Most of the participants commented that the parties involved in the construction industry were happy to solve their disputes through mediation, as they know they will get a good result based on their own needs, without the influence of the mediator or legal advisors; all within an affordable cost range and in a short time scale. Some of the participants also outlined that judges know the benefits of mediation and will advise the parties to mediate their issues before dragging the case to court. This advice showed that the court is trying to create a good mediation mentality among the disputing parties. Furthermore, any party which fails to give valid reasons why mediation is not a good practice may face costly sanctions.

However, by referring to the participants' responses on this subject, it would appear that some people who are involved in disputes were not aware of the existence of mediation. They did not understand the mediation terminology, or the further benefits of mediation. As mentioned earlier, construction disputes are often quite complicated (please refer to section 5.3.2). Due to this, certain participants mentioned that some people may think that the dispute can only be solved by a legally binding process or litigation.

It can be seen from the findings, that mediation is one of, if not the, most effective methods of dispute resolution. However, if the dispute needs a decision to be imposed, then mediation may not be an appropriate technique. Some of the participants highlighted that mediation is a process which is focused on establishing mutual agreements between the parties; so in the '*decision making nature*' dispute, mediation may not be appropriate, as it does not fit the criteria. Another factor revealed from the research findings is that when the dispute was too complex, the parties were angry and did not want to move away from their entrenched positions. They may not see the benefit of mediation because of their anger.

Therefore it can be concluded that, based on this finding, the factors which trigger the ineffectiveness of mediation were due to a number of causes: the attitudes of the people, financial issues, the mediator's skills and levels of awareness. These points will be elaborated further in section 5.5.3.

B. The main questions

The main questions were used to explore and to ask each participant a direct question about ‘what are the barriers to construction mediation based on the participant’s experience?’ This is to compare and contrast with the supporting question, part 1 (table 5.10) and the factors shown in table 5.9. As mentioned earlier the supporting questions, part 1 (table 5.10) acted as introductory questions which were comprised of the elements based on the participants’ experiences of the process of mediating construction disputes. The supporting questions, part 1 also helped in exploring the problems which stop people from using construction mediation and thus the barriers can be assessed from the participants’ responses. The factors shown in table 5.8 are the summary of some explored elements on the main source of construction disputes, the main mediation process practiced in dealing with construction disputes and the appropriate professional background of the mediator; all of which are related to the formation of barriers to construction mediation.

<p><u>The main questions:</u></p> <p>Barriers to the mediation’s development</p> <ul style="list-style-type: none">• Can you identify, based on your experience, some barriers in the development of mediation?• In what ways do you think these barriers can be overcome?• Can you comment on the perception among the legal advisors towards mediation?

Table 5.11 The main questions

In order to answer the questions in table 5.11, a careful data analysis was conducted to explore and to identify the themes or patterns within the data, which may allow the conclusion that certain issues were the barriers to construction mediation. The results are as follows:

One of the participants described mediation as a process based on forming mutual agreements between the parties. The presence of the mediator is to assist the parties in reaching an agreement according to the parties understanding of the issues and their needs. Neither the mediator nor the legal advisors will influence the parties in making decisions about the settlement. However, other participants commented that the disputing parties often misinterpreted the motives of the mediator. They thought that the mediation process is a branch or variation of legal process, where the mediators were there to suggest or impose a solution. As mentioned in table 5.8, the mode of the mediation process in the UK was focused on the facilitative mediation model; the mediator may not give any advice prior to the settlement or predict who is wrong or right. By looking at the research findings the misinterpretation shows that the level of awareness was still not satisfactory; that the people did not really understand the terminology and the practicality of mediation. According to the mediators' responses, some other factors which acted as barriers impeding the use of mediation for construction disputes were due to the attitudes of the people involved. This finding will be elaborated further in section 5.6.3.

Another important issue that was mentioned during the interviews was the role of the legal advisors, as they play a big part in the first step of going to partake in a mediation process. Legal advisors are important as they are the first people that the disputing parties might turn to when seeking some advice about a dispute. Referring to the interview findings, the legal advisors were divided into two categories. The first group was the legal advisors who have a good understanding of the mediation terminology and the process. This means that the legal advisors are happy with the process and would advise their client to mediate their issues. However, another group of legal advisors might not understand what mediation is all about and therefore may not consider mediation as the best option. Some participants said the legal advisors always wanted to win. When the participants were asked to explained further about this issue, they indicated that the lawyers always take the 'positional stand' (please refer to section 5.6.3.2, figure 5.2) and are keen on running a case through conventional methods like litigation or arbitration.

Another issue that emerged was the mediator's skills. There are several mediators currently practicing with different professional backgrounds. It was understood that the professional background was not a key issue why mediation becomes ineffective, as the most important aspect is mediation skills. Many mediators are unable to gain sufficient 'hands-on' experience, as the number of cases is limited.

The participants were accredited mediators who have different professional backgrounds and have substantial experience in mediation. Based on their experience the most important aspect contributing to barriers to the mediation process was the level of awareness about mediation, possessed by the disputing parties and their legal advisors. There are several ways in which the barriers can be overcome; the participants' option of choice was to increase the public's awareness of mediation and its benefits.

C. Supporting questions, part 2

Supporting questions, part 2:

In your experience have the following factors ever been a barrier in construction mediation?

- Manipulation
- Lack of trust
- Lack of awareness
- Lack of mediator's experience
- Lack of available time
- Parties' company/ corporate procedures

Table 5.12 Supporting questions, part 2

The supporting questions, part 2 as shown in table 5.12, were extracted from other mediation sources, specifically workplace and commercial mediation; areas which were thought to have a high level of relevancy towards construction mediation, especially regarding the attitudes of the disputants. To obtain some responses to this subject and to distinguish the possibilities, questions based on closed ended questions were used (which can be answered with a simple 'yes' or 'no'). The questions provided a quantitative view of the feedback from the participants. The results can be seen in Figure 5.1. These data represent the percentage of participants who replied, or agreed, that the factors presented in table 5.11 may contribute to a barrier which impeded the spread of construction mediation in the UK.

These questions were designed to support the main question (as shown in table 5.11). Based on the chart, the results indicated that strong evidence was found, when 100% of the participants agreed that the main factor causing a barrier to use and acceptance of mediation was the lack of awareness of the public. Interestingly, 86% of the participant agreed that the parties' company or corporate procedures are the factor which prevents the people from mediating the dispute. An explanation given by the participants for this is that there was no one who can make a big decision on the mediation settlement. If they were to make or accept a decision it may negatively affect their career, so it is perhaps safer to be sued in court than lose your job. It was apparent from figure 5.1 that 70 % of the participants agreed that manipulation and the lack of trust are the barriers in the construction mediation. 57 % of the participant agreed that lack of mediator's experience and lack of available time and also lack of trust are major barriers in construction mediation. The next section aims to elaborate the barriers to construction mediation.

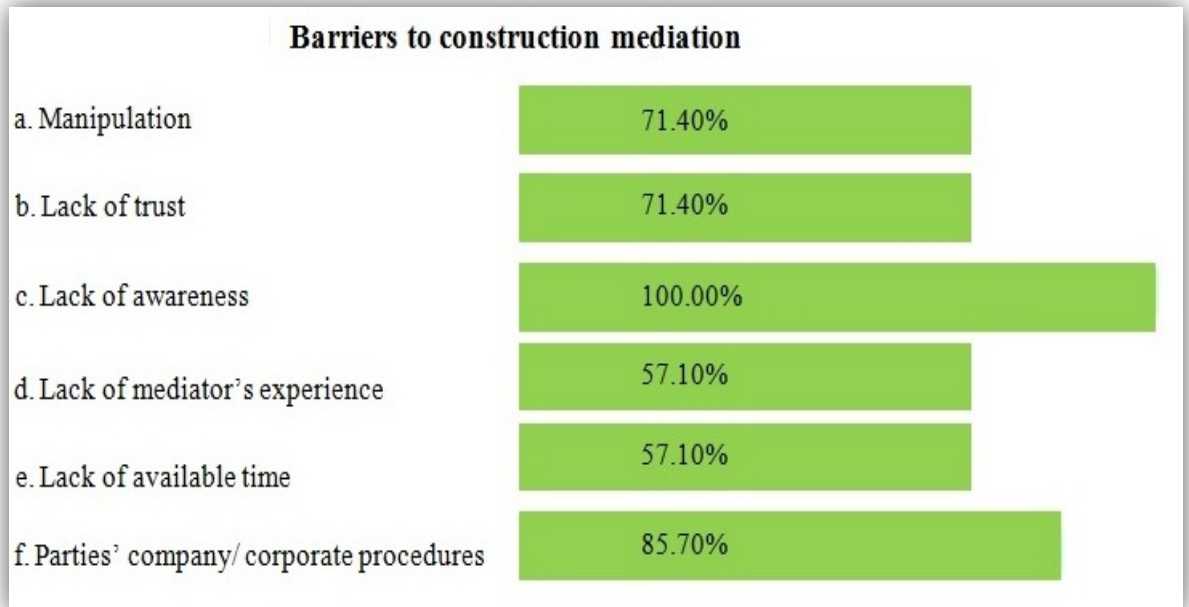


Figure 5.1 Barriers to construction mediation

5.6.3 Barriers to construction mediation in the UK

The overall response to the questions on barriers to the spread of mediation was positive. From the research findings, there was a wealth of data from responses that assisted in the development of a new theory regarding the barriers to the spread of mediation in the construction industry. Table 5.13 shows some raw data to highlight the key ideas and concepts about such barriers. The data obtained from the interviews shows that the participants had answered the research questions and thus, for this section, there were two themes that emerged from the data analysis. These themes were labelled as *'barriers arising from the public'* and *'barriers arising from the legal advisors'*. These two themes were used to answer the research questions.

Barriers which impeded the use of mediation
I think it is really in the people's mind set.
People regard mediation as a sign of weakness
I can only think of the two barriers. One is ignorance; people just don't know about mediation and how to use it and the other is usually the lawyer who is keen on running a case through conventional methods like litigation or arbitration.
In construction the main barrier is the fact that it is not in the majority of contracts.
Some of the people are aware of mediation, as a dispute resolving technique and they think it is a legal form of resolving disputes

Table 5.13 Participants' key ideas and concepts about the barriers to mediation.

5.6.3.1 Barriers arising from the public

Knowledge of mediation and resolving disputes are important issues, particularly in the UK construction industry. Varieties of non-court-based techniques exist for the purpose of resolving construction disputes, of which mediation is one such option. The research findings indicate significant support and interest in the use of this particular technique. The research exposed a number of barriers preventing the use of mediation in solving construction disputes.

One of the participants expressed his opinion about resolving disputes in the construction industry, "*I suppose 'don't get down to the dispute in the first place'; that's the best way*". The responses demonstrate that proper management in terms of dispute avoidance is the best method, based on the age-old principle that '*prevention is better than cure*'. Other participants commented that any issues that arise should always be resolved through negotiation. If that fails, a third party should be used to assist the process; that is mediation. Mediation involves a private, voluntary and non-

binding resolution whereby a neutral third party facilitates the disputing parties in reaching an agreement (Cheung et al., 2002). Dispute avoidance is important in the construction industry. According to Cheung (1999), dispute avoidance approaches may avoid the increase of disputable issues and preserve the parties' relationship. This will enable them to re-focus on the project's goals (Cheung, 1999). However, the issue of dispute avoidance is not the main concern of this research, as the investigation is only focused on mediation as a dispute resolution technique.

The non-binding solution triggers a negative mind set among the public, according to the participants. What can be seen from the findings is that, with the often complex nature of construction disputes, the public who are directly or indirectly involved in a construction project, would prefer to choose other, non-court resolving mechanisms to solve the issues. The reason for this orientation is basically that they prefer 'to be told what to do' rather than finding themselves expected 'to decide on the settlement'. The explanation given by the participants is that people would prefer any dispute resolution process that could award a binding solution, rather than becoming involved in the confidential nature of the dispute resolution process.

From the research interviews, it was found that many disputing parties still remain unaware of mediation, including its process, benefits and practicality. Mediation is not a new phenomenon in the UK construction industry; indeed, it has been used to resolve disputes for several decades (RICS, 2013). Consequently, the researcher has conducted the study using open-ended questions to investigate the potential barriers which prevent the public from using mediation to resolve construction disputes. Issues for consideration are the potential methods for overcoming these barriers: the mode of mediation used in the UK construction industry; the government involvement in promoting mediation; and its comment on the perception of legal advisors in relation to mediation. During the interviews, participants confidently described each barrier, based on their personal experiences.

The barriers, which impeded the spread of construction mediation in the UK, were grouped into six categories.

- 1) Lack of social awareness. It describes the how and why of the low adoption of mediation in the construction industry
- 2) Disputatious culture. It refers to the attitudes of the people involved in the dispute towards mediation
- 3) Insufficient planning and preparation. It concerns the awareness of mediation's benefits and strategies
- 4) Process barriers. It explains misjudgements during the process of the mediation proceedings
- 5) Lack of security and trust. It explains the reason why disputants hesitate to mediate
- 6) The introduction of adjudication. This is one of the challenges for mediation in resolving disputes

However, by looking back at the research findings, most of the participants indicated that the most important barriers found were the lack of awareness of, and knowledge about, mediation; specifically, how mediation could work, where to apply it and the benefits to the people and their legal advisors. The elaboration of the categories is presented below.

1) Lack of social awareness

The first category was concerned with the lack of social awareness of people involved in the disputes. It helps to describe the *'how and why'* of the low adoption of mediation in the construction industry. Based on the research findings, the low adoption of mediation in the construction industry means that significant effort is required to increase public awareness of the process by encouraging and promoting it as an alternative approach in resolving the disputes. Some of the participants commented that, depending on the nature of the dispute, mediation was found to be suited to solve construction disputes. This is because, in construction projects, there are usually many parties involved (for example professional experts, surveyors, sub-contractors; even local and county councils). Therefore, it will be easy to organise with mediation, as it can staged in a location which is able to provide separate rooms

to accommodate all the parties and the mediation process can presume normally. However, there are still certain barriers preventing people from using mediation.

One of the main barriers identified from the research findings was that there was 'not enough knowledge and understanding about the mediation of construction disputes'. What is interesting from this finding is that the judgement of 'not enough knowledge and understanding about mediation' not only applies to the people involved in the construction project, but to their legal advisors as well. What can be seen is that some of the participants indicated that some of the legal advisors are not fully aware of, nor do they understand about, the mediation terminology. The public was still reluctant to get involved, although mediation offers a cheaper and quicker path to dispute resolution. The public are currently not convinced of the benefits of mediation and its practicality, as mediation is a consensual process.

From the research findings, it can be seen that some of the people (especially the disputing parties) involved with construction disputes are aware of the mediation process. However, somewhat confusingly, they do not seem to be aware of the purpose of mediation; they do not understand the basic terminology and, when they do, they do not really understand the process and its practicality. Some of the disputing parties, according to the research participants, consider mediation as a form of legal practice with numerous procedures to be followed; or believe mediation will be expensive or time-consuming before a settlement can be reached.

In addition, results show that some disputing parties have little awareness and knowledge of the mediation process, including how and why it should be used. According to the participants, the disputing parties do not recognise mediation as an effective means of dispute resolution. However, when they know that mediation offers a non-binding agreement, they believe it has a weaker status and that only limited numbers of disputes are suited to construction mediation. When the participants were asked to expand further, they indicated that the disputing parties believe their current disputed issues are inappropriate for mediation. From this statement, it can be seen that the general, and apparently widespread, lack of understanding will influence how mediation can be utilised to resolve any construction dispute.

Apart from the 'level of awareness' issue, another factor which may provoke awareness of mediation within the construction industry was that of the 'mediation and construction contract'. From the interviews, it was clear that there was a need to increase awareness of mediation, especially among those involved in construction. An example given by the participants states those parties should be encouraged to talk openly with each other rather than hiding behind their lawyers. However, how do they know of the availability of mediation as a dispute resolution mechanism to solve construction disputes?

When this subject was raised some of the participants commented that mediation has not been mentioned or listed as an option in the dispute resolving clauses section of the majority of existing construction contracts. If it had or was being included in the construction contract, people may have known about the existence of mediation as a method for dealing with construction disputes. Traditionally, either arbitration or adjudication is listed in the dispute resolving clauses section of most existing construction contracts. It was clear that if either mediation or adjudication is not stated in the contract as a dispute resolving mechanism, the parties have the right to opt for adjudication under the Housing Grants, Construction and Regeneration Act 1996 (Gould & Linneman, 2008). More explanation about the introduction to adjudication will be provided later (in section 5.6.3.1 part F) in this section.

2) Disputatious culture

The second category of barriers refers to the issue of disputatious culture. During the interview, participants indicated that the perceived disputatious culture is based on their personal experiences. The basic facts of mediation are: it is voluntary, flexible and can promise the high possibility of settlement (Cheung et al., 2002) and it is not a form of legal practice (Donohoe, 2006). The goal of mediation is to settle the dispute before it escalates. In most cases, mediation cannot occur unless all parties agree to enter the process. However, some problems act as a barrier to the development of mediation and to the success of the mediation process, especially in the construction industry.

As mentioned previously, mediation is not new; however, due to the lack of awareness, it may be perceived as such. One of the participants mentioned that mediation is actually based on common sense. However, there is limited recognition of mediation as an effective means of resolving a dispute, perhaps because in dispute situations, common sense may be in short supply.

Some of the participants suggested that there are some people, especially those involved in the construction industry, who are reluctant to accept or use mediation, as they may fear that it might, in some way, harm their own reputation. Therefore a large degree of education is still required out there. The terminology of mediation denotes that it is not concerned with winning or losing; rather, it provides good communication in reaching an agreement to resolve the dispute. In order to elaborate further about the attitude of the people involved in the dispute towards mediation, this category was further divided into three sub-categories:

- Unwilling to settle voluntarily
- No flexibility
- Unrealistic expectations

Unwilling to settle voluntarily

During the interviews, some participants indicated that the problem usually arises when the disputing parties have reached a stalemate, with each side believing they are right. In these cases, the parties have become too entrenched in their positions and there is no margin for movement on either side. Most parties are reluctant to compromise in order to reach a settlement. Due to this disputatious culture, some conflicting parties do not actually want to settle the disputed issues voluntarily. They feel that mediation will not achieve their objectives and they do not believe the other side is acting in good faith. This finding supports Cheung (1999), who indicated that mediation will not achieve the desired outcome if neither side has a genuine desire to resolve the dispute. Thus, the negative mind-set triggers the ineffectiveness of mediation.

One of the common problems in mediating the dispute, according to the participants, was dealing with angry parties. The reason for this is because mediation will not be successful when dealing with someone who is antagonised. Some of the participants commented that the angry parties are unable to compromise, as they cannot see beyond their vexation. This may become personal and may reach the point when they do not want to be seen as weak and they just want to win. Another issue being raised during the interviews is that the party is simply incapable of settling, even if they want to; they just cannot. This is especially true for people who work in a hierarchical organisation; they will not take the risk of settling for fear of becoming a scapegoat. That is the reason why sometimes there will be nobody prepared to make a decision. One of the participants commented that it is dangerous to say, "Ok I will pay this"; it will be preferable, and is perhaps safer, to be sued rather than losing one's job. As pointed out above (Cheung,1999), mediation is inappropriate when one party does not want to reach a settlement.

The data revealed that the parties come to mediation because of a strong judicial recommendation, with an associated risk of cost sanctions against the party refusing to mediate. The system can coerce somebody to attend the mediation meeting; however, the system cannot force the parties to engage with the process.

An interesting fact from the research findings is that some disputing parties during the mediation meeting do not want to settle voluntarily; it does not suit them. Some parties may say, "We'll just go but we won't really participate". This is the mind-set of some people who consider engaging with mediation as a sign of weakness. Mediation is not possible without the participation of all parties and will cease if one party walks out, which they are free to do at any time. However, in the vast majority of disputes, the parties 'voluntarily' decide to agree to a resolution before the dispute reaches the stage at which the resolution will be determined by external forces.

No Flexibility

Flexibility is one of the benefits offered by mediation. When referring to flexibility, the researcher does not mean being able to choose the mediation procedure or tailor the process, but rather flexibility in terms of negotiating a settlement. In this case, the majority of participants indicated that some parties are unwilling to be flexible or to take into consideration the other party's perspective. The reason for this is because of the absence of strategy in negotiating the settlement. This can be detrimental as the opposing party may propose unreasonable offers.

In other words, the participants explained that during the bargaining session, the parties might not achieve everything they want. However, mediation tries to encourage an agreed solution; it will not always work and the negative side of mediation is that it does not guarantee a settlement. Even if mediation does not end in a settlement, it can act as a catalyst to settlement after the event. There is evidence to suggest that many cases that do not settle on the day do so shortly after.

Unrealistic expectations

The biggest problem during the settlement negotiation, according to the research, is that the disputing parties have unrealistic expectations. Mediation is about establishing understanding between the disputing parties towards negotiating a settlement. The unrealistic expectations occur when the parties are unable to compromise between themselves. According to one of the participants, the disputing parties may not get 100% of what they want. As been mentioned earlier, the best that they can expect is around 80% of the claim. There is no flexibility in choosing a settlement route and there may be unequal bargaining positions. According to Bondy et al., (2005), the flexibility in mediation does not guarantee fairness or a just outcome.

3) Insufficient planning and preparation

The third category of the barriers, which impede the use of mediation in resolving construction disputes, refers to insufficient planning and preparation, particularly regarding awareness of mediation relating to its benefits and strategies. If the involved parties agree to use mediation as a dispute resolution mechanism, there are several aspects that need to be explored. They should be aware of the mediation process and its potential benefits, and also the issue that is brought to the meeting. From there, they can plan strategies in terms of what they want to achieve, what offer they can make and its limitation. They should not come empty-handed to the meeting. The absence of strategy can be detrimental to them as the whole process is controlled by the parties, and is not in the hands of the mediator. Consequently, this category is further divided into two subcategories: not being fully prepared and having different agendas.

Not being fully prepared

Among the comments from the participants is that some parties do not prepare for mediation. They come to the mediation session without knowing the issue, so have no clear idea of what to get out of it and how they going to achieve the settlement agreements. This however can be explained: without preparation there will be an absence of strategy during the negotiation phase, as they don't know what they can and cannot offer. Some of the participants experienced that sometimes a completely unreasonable offer was made by the disputing parties in an attempt to resolve the dispute.

Some of the participants also commented that there are times when the disputing parties do not appear to know, or do not actually know, what the issue is; the situation then becomes so complicated that the lines become blurred between who is wrong and who is right. Consequently, the parties may consider adjudication or arbitration just to establish the legal standpoints. However, in some cases, the disputing parties came to the mediation meeting because it was recommended by the court. The goal of mediation is to settle the dispute before it escalates, but the disputing parties may not be aware of the details of the issue in dispute.

Different agendas

As mentioned previously, the goal of mediation is to reach a mutually agreed settlement. People will agree to mediate in order to find out what the argument would be from the other side, should they go to court. In such cases, parties may regard mediation as nothing more than a ‘fishing expedition’.

Some of the participants shared that, based on their experiences, there are some parties who attended the mediation session just to find out about the argument. They wanted to know the facts, so that they can defend themselves in court at a later date. The participants commented that the disputing parties are misinterpreting the motives. Some people will choose mediation because they feel that they ought to; they are not in a position to settle, as they don’t really know whether or not the case is a good one.

Some parties come to the mediation session as a result of a court order, rather than a willingness to cooperate. They know that mediation will not work (for them) so they may attend solely to evaluate the strength of the case in order to prepare and defend themselves if the issues are brought to court. In other cases, according to the participants, a party may attempt to delay the hearing, perhaps because of commercial interests. One of the participants suggested the following regarding this issue:

“They want to play with the food but they don’t want to eat it.”

This however makes the other side untrusting of the game playing or manipulation by the other party. Some participants expressed the belief that people have become tired with mediation, as it is all about playing games. Sometimes the disputing parties use mediation for tactical reasons, rather than to settle the dispute (Bondy et al., 2005). From the research findings it can be said that, in mediation, parties may not win or lose the case and there is no guarantee that they will reach a settlement. Due to this ‘lots of play’ scenario, as described by one of the participants, people are reluctant to come to mediation.

4) Process barriers

The fourth category refers to the process barriers, which explain misjudgements during the mediation proceedings. According to the interview findings, mediation is a useful tool if it is used correctly. That was the response from one of the mediators participating in the research. The problems associated with the process barriers are concerned directly with the disputants' degree of awareness. The mediation process is fine. Although the process of mediation can be modified or tailored to suit parties' needs, it is still being monitored by a qualified mediator. However, the problem is with the external factors, which shape the process of mediation; for example the impediment of ignorance, there being no one present with sufficient authority to make decisions and the matter of general misconceptions.

Ignorance

Before the session, the mediator will provide information on the amount and types of documentation required for the meeting, and advise who should attend (Fenn, 2010). In a typical mediation session, the 'highest-level decision makers', legal advisors and anyone affected directly or influenced by the issues, should be present at the bargaining table during the mediation meeting. The problems arise in line with the degree of awareness. A small number of those interviewed mentioned that the disputing parties treat mediation like a trial and send the mediators a large number of files associated with the dispute. A typical mediation will last for one day. This demonstrates the simplicity, flexibility and practicality of the approach. Sending the mediators a large number of files will just make it complicated. In some cases the involved parties may treat mediation lightly by not having all the necessary information. This issue creates a challenge as there is an absence of the needed critical information.

No one to make decisions

During the mediation session, the decision maker is the key player, as they will decide whether to say 'yes' or 'no' to the deal being offered. However, some participants indicated that to decide on the settlement deal is a problem to certain people. When the participants were asked to elaborate further on this issue, they indicated that some people, especially the decision makers, are scared to make a

commercial decision. The reason, according to the participants, is that the disputing parties (or the decision maker) don't know whether, if they make a decision, there will be negative repercussions in the future. That is why some disputing parties want the decisions to be made by somebody else, perhaps by turning to adjudication or arbitration. In some cases, the decision maker does not have the appropriate authority to settle.

Misconception

As mentioned previously, the disputing parties perceive mediation as akin to a court trial. The researcher asked participants a question regarding the mode of mediation. They indicated clearly that, in the UK, facilitative mediation is used to resolve construction disputes (Section 5.3, mode of mediation). The mediator's role is to assist the parties in reaching a settlement and the parties are in control of the whole session. The parties sometimes misjudge the statements.

In facilitative mediation, the neutral third party (a mediator) structures a process to assist the parties in reaching a mutually agreeable resolution (Fenn, 2010). A facilitative mediator will not suggest any solution about the settlement. When this subject was raised, it was found that facilitative mediation is more effective than other dispute resolution techniques as it helps the parties to find a solution, rather than saying "I think you should do this". However, the parties may come to a wrong conclusion. Some people do not understand the process; they regard the mediator as a decision maker. Most of the times they want to know what the mediator thinks about the issue or the settlement. They want the mediator to tell them who is or are right and to make a decision on the settlement.

What is interesting in this finding is that some parties want to know their actual legal position. When participants were asked to expand further they indicated that the parties want to know whether they are 'right' or 'wrong' and to find out their options. This indicates clearly that the misconception begins when the parties are not engaged fully with the process. Their legal representatives or other representatives do not know the nature of mediation, so they do not want to compromise and negotiate. Such a mind-set brings about a deadlock.

5) Lack of security and trust

Security and trust explains why parties hesitate to mediate a construction dispute. Settling a complex construction dispute requires a commitment from every participant in the process. Therefore, selecting the right mediator is crucial (Bates & Holt, 2011). A lack of knowledge and experience in this area may ruin the entire process.

From the interviews it was concluded that some parties hesitate to mediate a dispute because they do not trust the impartial third party (mediator). The role of a mediator is to assist the parties in reaching a settlement. As has been mentioned earlier, the main feature of being a mediator is being able to practice and manage the case using their mediating skills. In other words, the accredited mediator should, in theory, be able to mediate all kinds of disputes in any industry. To attain the required skills, they need to practice; however, there are insufficient cases available for all mediators to obtain the necessary skills and gain experience.

In selecting a good mediator, one should focus on qualifications, experience and the number of mediation cases in which they have been involved (Bates & Holt, 2011). Some of the participants commented that there are many new mediators who are unable to find any cases, as they are new to the field and thus lack the required skills; thereby raising a secondary question of how newly trained mediators enter the field. Consequently, the disputing parties begin to question their credibility when it comes to mediating their issues.

6) The introduction of adjudication

The final category of the barriers, which impeded the use of mediation in resolving construction disputes, was the introduction of adjudication. This category becomes a challenge in resolving disputes. As mentioned earlier, most construction contracts do not include mediation as an option for resolving disputes. Adjudication will be on top of the list. This occurs because parties have the right to opt for adjudication under the Housing Grants, Construction and Regeneration Act (1996). In Part 2 of the Housing Grants, Construction and Regeneration Act (1996), a party to a construction contract is unilaterally given the right to refer a dispute under the contract to adjudication (Gould & Linneman, 2008).

According to Richbell, (2008), adjudication is a form of time-limited fast-track arbitration. The adjudicator is usually a specialist in the area being disputed and will offer an opinion and make a binding decision. The dispute will be resolved within 28 days (Richbell, 2008). By looking at this terminology, the people know that when they go to adjudication (or arbitration or litigation), they will definitely get a resolution. It is quite common for other methods of resolving disputes to be chosen over mediation. So why don't they mediate? The nature of disputes, as well as the disputatious culture of the disputing parties, means they are more concerned with who is right and who is wrong. The binding agreement and decision forced onto the parties are the big advantages as, according to some participants, the disputing parties like to be told what to do. This contradicts the main goal and basic principle of mediation. Although the aims are the same, that is to resolve disputes, mediation is conducted in a more harmonious environment, while adjudication is more adversarial.

Themes	Categories	Sub- categories
Barriers	Lack of social awareness	-
	Disputatious culture	Unwilling to settle voluntarily
		No flexibility
		Unrealistic expectations
	Insufficient planning and preparation	Not fully prepared
		Different agendas
	Process barriers	Ignorance
		No one to make a decision
		Misconceptions
	Lack of security and trust	-
The introduction of adjudication	-	

Table 5.14. The summary of the barriers arising from the public

5.6.3.2 Barriers arising from the legal advisors

The explanation about the barriers to construction mediation, arising from the public, has been described. How about the barriers arising from the legal advisors? Before going further it is important to ask ‘do the legal advisors know that the dispute can be mediated or not?’ Based on the research interviews, a small number of participants commented that lawyers are trained to litigate. Of course they are aware of the basic terminology of mediation, but their training is different from the training received by mediators. In this context it is important to try to identify ‘what is the relationship between legal advisors and the barriers to the spread of mediation in the UK construction industry?’

Referring to the interview findings, one of the main reasons why mediation was not used in construction industry disputes was the negative attitudes held by legal advisors. When the subject ‘perception among the legal advisors towards mediation’ was raised, there was a range of comments from the participants. The study exposed a number of barriers preventing the widespread implementation of mediation across the construction industry. A major trend noted upon analysis of the findings is the fact that there are several factors which appear to give negative feedback towards mediation in the construction industry: ignorance, personal agendas and conventional methods of resolution.

A. Ignorance

The term ignorance in this context includes confusion about the term, not knowing what mediation is or can be, a lack of awareness of the possibilities of what mediation can do and its practicality. According to the research participants, many legal advisors have little or no exposure to mediation and therefore lacked appropriate experience. During the mediation meeting, the legal advisor is sometimes there with the disputing parties. There was a time when the legal advisors tried to lead a little bit more than they should. Such behaviour can create a problem in mediating the disputes.

B. Personal agendas

Some lawyers somehow create a distance between the clients. According to the research participants, any communication or negotiation will be left to the lawyers and the lawyers will talk to each other. They may have their own agendas and the parties will grow further apart. What happens in mediation is that the parties will come back to each other. The biggest problem for the mediator is to mediate the lawyers out of the mediation in order to prevent them from trying to lead the session.

One of the participants commented that what the lawyers do is 'positional' (very narrow). When the participants were asked to explain further about this, the participant explained the 'positional' concept with the PIN diagram (which is shown in figure 5.2). The participants indicated that the lawyers always take positional stands in the pleading, in what they do for their client. By referring to the PIN diagram (figure 5.2), the positional stance is to take account what the disputing party says they want. The lawyers are doing the best they can for their client, and they put the case in the best way for the client.

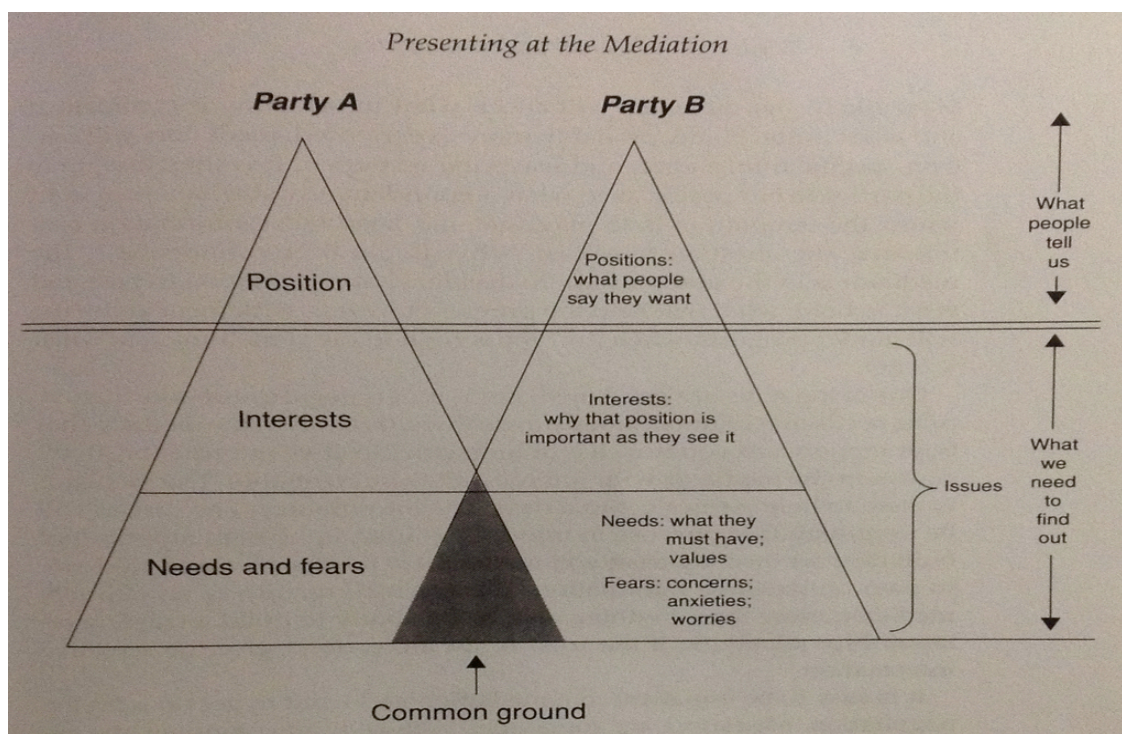


Figure 5.2: PIN Diagram (Richbell, 2008 p. 75)

The PIN diagram is a well-known diagram, which is used in mediator training courses. The diagram comprises of three levels: needs and fears, interest and position. The top level is the position level. In the position level, what the disputing parties claim is what the people see above their position. Two parties (or more) with two different positions are incompatible and hence the dispute arises. The interest level is the exploring stage. At this stage, the most important aspect is exploring the expectations of the disputing parties. This includes what is important for them and what they want to achieve. The needs and fear level is at the bottom of the PIN diagram. In this level, the most important aspect is to explore what the disputing parties need, in order to be able to achieve a settlement of their dispute and to establish common ground between the disputing parties. Once the common ground is established, the foundations for settlement can be cast (Richbell, 2008).

C. Conventional methods of resolution

From the interview findings, it was evident that some lawyers are not in favour of mediation, although the government has been strongly advising people to mediate through civil procedure rules. A study of mediation in England and Wales stated that some of the legal advisors were often resistant to mediation (Clark, 2009). One reason for such reluctance is that the dispute can get resolved really quickly and they will not get the fees they expected to make. Another reason given during the interviews was that lawyers are keen on running a case through conventional methods like litigation or arbitration. By running mediation, they will not get the same fees as they would get through arbitration or litigation; hence the latter options are likely to be preferred.

Themes	Categories
Legal advisors	Ignorance
	Personal agendas
	Conventional methods of resolution

Table 5.15. Summary of the barriers arising from the legal advisors

5.6.4 Recommendations on how to eliminate the aforementioned barriers to construction mediation

One of the main questions (as shown in table 5.10) was asking the way the barriers can be overcome. From the interview results, there was a wealth of data with recommendations on how to eliminate the aforementioned barriers to construction mediation. There were several ways suggested by the participants: through encouragement and promotion and events, giving sufficient information and examining the quality assurance.

The government has made great efforts to promote mediation, especially in the construction industry. There has been a concerted effort to push disputants away from the court (Broadbent, 2009). One of the participants commented that the system has raised the claim limit from £5k to £15k, so more cases should now go to mediation. This not only prioritises mediation for resolving disputes, but also acts as a filter for disputes before they go to court. The court has given its full support to mediation by encouraging parties to opt for this approach in settling any disputed issues. This has been strengthened by the introduction of the Civil Procedure Rules (CPR) in 1999 (Broadbent, 2009). One of the participants mentioned a new reform (Jackson Reform) that came into force in April 2013. Such policies have been formulated to increase government efforts to create awareness of mediation. The real agenda was to reduce the cost of running the court service by ensuring the parties were channelled down the route of negotiation and other ADR processes (Broadbent, 2009). This approach has created a mentality for the public to try mediation before going to court.

As been mentioned earlier, one of the main barriers to the adoption of mediation is a lack of awareness and knowledge of mediation. According to the interview results, some of the participants expressed the belief that one of the most effective ways to increase awareness is through education. The public needs to be educated about mediation, focusing particularly on its background, benefits (pre, during and post mediation meeting) and practicality. When referring to education in this context, the researcher does not mean education in terms of mediation training but in terms of creating basic public awareness. The public needs to understand mediation, especially in relation to the complex construction environment and its

economic perspectives. According to the participants, the costs of adjudication, arbitration and litigation are constantly increasing. Therefore, there should be an understanding about cost management; the key to the most economical route is through mediation.

When the subject of ‘mediation education’ was raised, the majority of participants commented that the education is not confined to the construction industry, but also covers all major sectors. The most important aspect is to educate the legal advisors, because when people (especially those who are involved in construction projects) were in dispute, they will seek advice from their legal representatives. When the legal advisors become more aware of mediation, understand its process and know its benefits, it is predictable they will recommend it more readily to their clients. Another suggestion from some participants is to revise the contract in order to include mediation in the dispute-resolving clauses section. When people look at the contract, they will know that mediation is an option in resolving the disputes.

Consequently, the results about the recommendation from the participants were analysed and divided into three categories: encouragement, promotion and events; information; and quality assurance.

A. Encouragement promotion and events (conferences, workshops, seminars, mediation demonstration)

According to the participants, local mediation groups and professional bodies in the UK have played a significant role in promoting mediation through the organisation of certain events. In promoting mediation, everyone plays a big role in ensuring its development. The promotion and events include seminars, conferences, workshops and mediation demonstrations aimed at the public, legal advisors, project managers, architects, and local and overseas university students. Furthermore, the government has given strong support to mediation. The primary aim of organising promotion events has been to increase public awareness of mediation, and for information about the process to be delivered by experienced, trained mediators, especially in the construction industry.

The response from the participants also indicated that the encouragement from the commercial people can be done by promoting mediation in various ways, for example through advertisements, on TV, radio, books, leaflets, brochures, electronic social media or the Internet. High profile individuals can offer encouragement. For example, numerous judges have recently commented that mediation should be the preferred approach to dispute resolution. Encouragement from lawyers was also crucial, albeit less likely according to the participants, as people will look to them for advice. During the interview, one of the participants mentioned that a judge in Ireland describes mediation as ‘common sense’. So, if high profile people, such as judges or government ministers, start promoting the use of mediation, people may well begin to change their attitudes towards it.

B. Information

According to Stokoe (2012), “mediators often failed to explain mediation in ways that were attractive to clients, who wanted someone to be on their side, rather than impartial to their problem”. Good communication, as stressed by the research participants, is essential between the mediator and the disputing parties prior to the mediation session. This can be achieved by explaining what mediation is designed to do and achieve, as well as by giving the disputing parties sufficient information about the entire process. This will take slightly longer than the normal mediation process procedures but it is important and will help to improve the mediation process in resolving the dispute.

C. Quality assurance

During the research interviews some of the participants indicated that many others wanted to be involved in mediation and eventually train to become mediators. Even though there is a great need for mediation, there is not sufficient work for the ‘would be’ mediators. As a result, the mediators will gain less experience and, according to some participants, they may not be very skilled and will not be trusted by the people involved in the disputes who are counting on their good offices.

Standards are set by the mediation-providing organisations for their members. However, in this situation there should be some kind of accreditation to ensure the quality of service (skills and competencies). Training ever more mediators is a bad thing, according to the participants. As one participant commented, mediators have varying qualities, but currently there is no regulation relating to quality or standards.

Themes	Categories
Factors to remove/reduce the barriers	Encouragement, promotion and events
	Information
	Quality assurance

Table 5.16 Factors that can be used to eliminate the aforementioned barriers to construction mediation

5.6.5 Summary

In this section, the researcher presented the findings and results of the semi-structured interviews conducted for the research, which were focused on the barriers to the development of mediation in the UK construction industry. The interviews also yielded information about some factors that can be used to eliminate the aforementioned barriers to the spread and adoption of construction mediation. The interviews revealed certain new issues and theories, some of which have been found in existing literature, but not regarding construction mediation in the UK. Different concepts were discussed during these interviews and various barriers to effective construction mediation were found. These included a lack of social awareness towards mediation (especially the benefits and its practicality), disputatious culture, process barrier, insufficient planning, security and the introduction of adjudication.

If the dispute is not resolved quickly, it will escalate and can cause project delays, lead to claims, destroy business relationships and require court proceedings for its resolution (Cheung et al., 2002). Theoretically, the disputing parties should agree to use mediation as a dispute resolution mechanism. How can the parties be made to agree to mediate? The most important aspect is through education.

There were some ways, suggested by the research participants, which are being implemented to improve mediation in the UK construction industry, such as through encouragement, promotion and events, making ample information about mediation readily available and establishing quality assurance. To remove or reduce the barriers requires significant effort. The process could take time, especially when dealing with members of a disputatious culture.

The government's involvement in mediation was also discussed, whereby it has given its full support to promoting mediation, especially in dealing with construction disputes. Finally, the chapter identified and compiled various dimensions that influence the development of construction mediation.

5.7 Conclusion

Chapter 5 elaborates the results based on the interviews as well as presenting answers to the research questions. The chapter was divided into five sections. The first section summarised the appropriate research analysis to address the research problem and to explore the theory of construction mediation. As the research is using a grounded theory approach, the researcher focused on the manual coding methodology to identify the interrelationship between the categories.

The second section explored the appropriate mediation process for dealing with construction disputes in the UK. Based on the relatively sparse literature it was suggested that the mediators should use a combination of facilitative and evaluative mediation processes. However, it was well known that construction disputes are often complex and the results from the interviews showed that the main cause of construction disputes involves financial issues. By taking the financial issues as the main backbone for this section, the interviews showed participants in the research had chosen the facilitative mediation process as the most appropriate dispute solving option. The reason is that the facilitative mediators will try to make the parties focus on the relevant issues and create a balanced settlement.

The third section explored the appropriate professional background a mediator needed in order to settle a construction dispute. Mediation is not a form of legal practice and therefore it will never provide professional or legal advice about the dispute. The main element needed by the neutral third party mediator is to have

good mediating skills, as the most important aspect of the role is to create communication; mediation was described as a mixture of counselling, negotiation and dispute resolution.

The fourth section explained the legal encouragement towards construction mediation. There has been a good approach by the government in promoting mediation as a dispute resolution mechanism. Mediation was also regarded as 'common sense', since it creates a mentality for the people to use mediation before going on to court, with all that involves. In this respect mediation is viewed as a filter to any dispute attempting to enter the court. Judges have tried to increase people's awareness by advising and giving encouragement in taking mediation as an option for resolving disputes. As a result more people should now be familiar with mediation.

The final section explored the main barriers which prevent the use of mediation in resolving construction disputes; as well as investigating some factors which can be used to eliminate or reduce the barriers in construction disputes. Different concepts were discussed during these interviews and various barriers were revealed. These include the barriers to construction mediation arising from the public and the barriers caused intentionally or otherwise by the legal advisors. The barriers arising from the public were then further analysed and divided into several sub-categories: lack of social awareness, disputatious culture, process barrier, insufficient planning, security and the introduction of adjudication. The barriers arising from the legal advisors' conduct were then elaborated and divided into several sub-categories: ignorance, personal agendas and the conventional method of resolution.

There are some ways suggested by the participants that can improve the quality of mediation in the UK construction industry, such as through encouragement, promotion and events; giving ample information and quality assurance. To remove or reduce the barriers requires significant effort. The process could take time, especially when dealing with those who value a disputatious culture. The evaluation of the findings will fill the gap identified in the literature and provides direction to other researchers aiming to develop an understanding of mediation, or any other ADR techniques, in the UK. The findings will also be of benefit to practitioners and academics within the country and the wider region.

Chapter 6 - Discussion

6.1 Introduction

The purpose of this chapter is to collate the findings of the research and to answer the research questions of the study, as presented on page 21 (above) and page 194 (below). The data presented in this chapter have been solely and fully taken from the research interviews. Existing theories about the research topic were used to support the research findings, in order to strengthen the discussion of the research.

The chapter has been organised and classified into six sections, each containing different subsections. The first section concentrates on the underlying theory of the conducted research and the associated research questions, while new information is presented regarding the barriers to construction mediation, mandatory mediation, the appropriate professional background of the mediator and the appropriate mediation process for use with construction disputes. The second section explains the recommendations of the study. The third section explores the limitations of the study in relation to the research. The fourth section suggests potential research avenues for the future, based on the theory, recommendations and the limitations of the current research. The fifth section discusses the contribution of this work to existing knowledge, while the final section is the summary of this chapter.

6.2 The theory

Despite the presence of research in the area of the development of mediation, there are still many challenges which hinder the successful application of mediation, especially in the construction industry. Most studies in the field of mediation have only focused on the process, disputes in the construction industry and the benefits and practicality of mediation. There is still a gap in research, as the development of mediation has not been examined in great detail. Very little was found in the literature on the question of what stops people from mediating a dispute. The study set out with the aim of assessing the importance of finding the barriers to mediation, in an attempt to evaluate the development of that particular dispute resolving process.

From the review of the literature, it became evident that further investigation to explore the possible barriers to mediation in the UK construction industry was necessary, to improve the quality of mediation proceeding process and making the public aware and understand that mediation is one of the appropriate technique in resolving construction dispute. The gap in the literature mainly concerned the drawbacks of the barriers which hindered the application of mediation in the UK construction industry. This was the factor which informed the research questions of this project. The main research findings are chapter specific and are summarised in Chapter 5. The section will synthesise the research findings in order to answer the questions of the study. The research questions are shown in Table 6.1. In order to investigate the identified gap in knowledge, semi-structured interviews were carried out with sixteen qualified and experienced mediators from different professional backgrounds. Based on the answers provided, several topics of importance were identified, such as the barriers to construction mediation, imposing mandatory mediation to resolve construction disputes, the professional backgrounds of appropriate, successful mediators and the mediation process as used in construction disputes.

- How do parties adopt the mediation approach to solve disputes and why?
- What are the limits of mediation in resolving construction disputes?
- Can today's mediation process still be used for tomorrow's (future) construction industry's disputes?
- What are the barriers to the widespread use of construction mediation?
- Should mandatory mediation be introduced in the construction industry and what will the potential implications be?

Table 6.1: The research questions.

6.2.1 How do parties adopt the mediation approach to solve disputes and why?

This section evaluates and identifies how the disputing parties were made aware of the existence of mediation as a dispute resolution mechanism, and the level of understanding towards mediation possessed by the public. Attention is paid, in particular, to the disputing parties in terms of the practicality of the process of mediation and its benefits. In order to obtain a better understanding of how people adopt the mediation approach, one of the questions asked during the interviews was: *'What is the most appropriate approach in resolving construction disputes?'* Perhaps surprisingly, there was no clear answer to the question about the most appropriate approach, as the available dispute resolution techniques have different methods and benefits for resolving a construction dispute, depending on the form and nature of that dispute. However, most of the interview participants commented that negotiation is the most effective way of resolving a construction dispute and, if that approach fails, mediation is always available. The term negotiation is generally understood to mean as a voluntary and non-binding process of resolving a dispute through actual contact and communication (Gould et al. 1999). If a dispute or disputes are not settled through negotiation, the disputing parties may choose to seek assistance from a neutral third party ie. a mediator (Cheung, 1999). From the participants' responses in this study, mediation was found to be the most popular dispute resolution mechanism after negotiation.

From the research finding, it was found that the public and the disputing parties in particular, were aware of the presence of mediation as one of the available resolution mechanisms for resolving construction disputes. It was also found from the research interviews that the legal advisors are also aware of mediation and are known to recommend their clients to choose mediation as a dispute resolution technique. The majority of the research participants felt that most of the awareness regarding mediation was coming from the government through the legal system, as a result of the introduction of the Civil Procedure Rules (CPR). As seen from the literature (see section 2.4.4), any parties who refuse to mediate their dispute without a valid reason, may face a cost sanction (Donohoe, 2006; Genn, 2005; Nigel, 2009). Referring to the CPR Part 6.7, Service of Documents (Ministry of Justice), all lawyers are required to explain the process of mediation to their clients and invite

them to use mediation on a voluntary basis, whilst pointing out that if any parties unreasonably fail to engage in mediation, they may be liable to a cost order issued by the court.

Looking at the finding, it shows a good sign of positive awareness of mediation to the public, particularly the disputing parties. The researcher also expected the result to show a positive awareness by looking at the level of initiatives offered by the government and several private sectors in promoting mediation as one of the more effective and less costly dispute resolution mechanisms. These factors may explain why more disputing parties want to adopt mediation as a dispute resolution mechanism in the UK. This finding is also consistent with Genn's (2005) work, who wrote that there had been a good job done by the government in promoting mediation as a dispute resolution mechanism. The findings from the research also corroborated those from the study by McCartney and Dain (2010) who also confirmed the theory that the construction industry is the largest single user of mediation, because it is effective and offers benefits to the parties involved. This shows that the disputing parties in the UK's construction industry were aware of the availability of mediation as an alternative dispute resolution technique, as compared to other industrial and business sectors. Therefore what is important in this section is to note awareness towards mediation.

However, that awareness is not in depth. A number of the research participants mentioned that some of the disputing parties know mediation on its own, but do not know its practical aspects and the benefits it offers. The worst part of such a misunderstanding was that some disputing parties thought mediation was yet another legal procedure. The discussion on this issue will be further elaborated in section 6.2.2. Another surprising element revealed by the research interviews was about people's behaviour; some parties still prefer other 'binding resolution' techniques, such as arbitration, adjudication or even litigation in resolving issues, due to the complexity of the dispute itself. The participants explained that there are two reasons for this: the first reason is that there may be some disputes that need a decision from a judge; the second reason is that nowadays people prefer someone else to make a decision for them. The discussion on this part will also be further elaborated in section 6.2.2.

6.2.2 What are the limits of mediation in resolving construction disputes?

This section examines evidence to determine the limit of the usefulness of mediation in resolving construction disputes. There are several questions that were asked during the interview sessions:

- What is your view about mediation and its processes?
- In the instance where mediation is not effective, could you identify some reasons or causes?
- What are some common problems/difficulties you encountered in mediating construction disputes?
- Why do some parties wish to resolve their dispute through a binding process (such as arbitration or adjudication)?

The reason why the questions listed above were asked was because the researcher wanted to know, in depth, what were the perceptions of the mediators towards mediation. In reviewing the literature, very little information was found on people's perceptions about mediation *per se* or its development. As Fenn et al. (1997) pointed out that there was only limited theory in the field of construction disputes. When the research findings were closely examined and analysed, there were several factors which arose from the research interview, which were not revealed in the literature. The explanations came from the research participants through their vast experience in mediating disputes. The explanations of the limits of mediation will be explained later in this section.

It was found that the lack of awareness of mediation, and particularly its benefits, is a major limitation to its employment (see section 5.6.2). The results from the research finding were corroborated with some of the information found in the literature, which shows that the lack of awareness is the problem. For example, Bucklow (2010) found that the reason for the slow growth of mediation is due to the lack of confidence in the process and a lack of understanding of what it involves; of what it can, and cannot, do. Therefore, there must be reasons for these problems, although much effort has been made to promote and encourage the use of mediation in resolving disputes. This study has focussed on the issue of resolving construction

disputes, unlike previous studies (for example by Bucklow, 2010), which focussed on general mediation.

Cheung (1999) has identified that a construction dispute is often complex due to its nature. One of the reasons for that complexity, as explained by Cakmak and Cakmak (2014), is that construction usually involves a lot of parties, many or all with different views. For that reason, the disputing parties may think that the complex nature of a construction dispute, combined with the many parties with their different views, will prevent mediation from being able to settle their construction dispute. This shows that the public still do not know or understand mediation's potential benefits as a dispute resolution technique. One of the participants explained that mediation is a process which is used to settle the dispute or, if the dispute cannot be settled, the issues can be narrowed down and the disputing parties can still re-mediate their dispute. However, if there is no agreement, or if someone comes to the mediation without the intention of settling the dispute, then it cannot be settled and the mediation process will fail.

The limitations of mediation are due to the lack of awareness of mediation in the UK's construction industry, which can be explained in term of six factors which arose from the interviews:

- a) Negative perceptions
- b) People's attitudes
- c) Awareness
- d) Other agendas
- e) The decision on a settlement agreement
- f) The influence of the mediator

- a) Negative perceptions

The findings from the research interviews show that one of the limits of mediation arises initially from people's perceptions. Referring to the research finding, people (especially the disputing parties) tend to see mediation in the wrong way. An example of this is the belief that mediation could not be used to solve a construction dispute. As a result, this has created a negative perception of mediation,

which makes people distrust the procedure and become apprehensive about the practicality and benefits offered by mediation in resolving issues.

b) People's attitudes

Another limiting factor is the influence of people who, through their anger and / or lack of willingness to compromise, can eventually affect the applied approach. There are similarities between the people's attitudes in this study and those described by Diekman et al. (1994) and Szasz et al. (2011) who pointed out that the human emotions of anger and distress were significant problems when trying to resolve the disputes. It is possible, therefore, that the disputing parties come to mediation in the wrong frame of mind. One of the participants stated that when the parties are angry, it appears that they cannot think beyond that anger. They may not compromise and eventually affect the whole mediation process in resolving the construction dispute.

c) Awareness

Section 6.2.1, discussed the awareness of the public towards mediation. However, based on the research findings, the majority of the participants mentioned that some of the disputing parties do not understand its benefits, or how the process works. The disputing parties know the term 'mediation' as a form of dispute resolution technique; however, some of the disputing parties may believe that mediation is a legal procedure. When the participants were asked to elaborate on this, they indicated that knowing about mediation as a dispute resolution mechanism alone is not enough to ensure a smooth mediation process. One of the examples given by the participants was about the documentation needed for the mediation process. This consists of five to ten pages which give a summary of the case, a brief history of the dispute, the people involved, key issues in the dispute, details of claims, details of desired or potential settlement and suggestions that may help in achieving a settlement (Richbell, 2008). However, the disputing parties gave files of information about the project or the disputes. Most of the documentation provided by the disputing parties is not important for the facilitation of mediation proceedings. Another issue which crops up is that some of the required information, for whatever reason, is not present in the documents.

Apart from that, the disputing parties often want someone else to decide on the settlement. Additionally, people want to be told that they are right, or even if they are not right, they want to be told by somebody who is right. Furthermore, people sometimes want to know their actual legal standing. Thus, these findings suggest that the disputing parties do not understand the true meaning of mediation; neither the procedure nor the process.

d) Other agendas

From the research interviews, it emerged that the disputing parties might regard mediation as a 'tactical approach'. Although this is rare, disputing parties may think that the reason for going to mediation is not genuine. This finding further supports the idea of Bondy et al., (2005) who stated that the sceptical view of mediation, after the introduction of the CPR, was that people might see mediation as a tactical approach for a party to delay the case and cause the other party to withdraw or settle. Based on the interviews conducted, it emerged that there was some possibility of a 'fishing expedition' during the mediation session; that is because some disputing parties were not ready to solve their problem. They were being sceptical and did not know what the real issue was. Poor communication between the disputing parties could be one of the possible reasons to explain this ignorance. For that reason, those involved came to the negotiating table solely to find out more information and to prepare themselves in the event of the problem being brought to court.

e) The decision on a settlement agreement

Another interesting finding obtained from the research study is that there is often no one with the authority to decide on the settlement agreements (see section 5.6.3). When the participants were asked to elaborate on this, they indicated that the disputing parties might have difficulty in making a commercial decision. Moreover, those parties and or their spokespersons are afraid that if they make a decision now, they are not sure that the decision they have made will be good in the future. Sometimes, according to the research participants, deciding on a settlement may influence or affect the careers of the disputing party. The participants further explained that, in certain circumstances, it is preferable to be sued by the opposing

party in the dispute, rather than agree to a settlement that might potentially make them lose their jobs.

f) The influence of the mediator

One of the factors influencing the success of mediation is the mediator. They may have trained and qualified as a mediator, but they may not have the required level of skills or experience. An inexperienced mediator may, quite unwittingly, further complicate the mediation proceedings. As for example, they may not detect or notice any tactical approach used by the disputing parties and thus affecting the quality mediation proceeding in achieving the settlement.

6.2.3 Can today's mediation process still be used for future's construction industry disputes?

The research question is used as a means to measure the versatility of the mediation approach as a dispute resolving mechanism. After a general review of the research findings, it seems that there is a strong relationship between the research question and several elements, such as the complexity of construction disputes, the dispute direction, the skills of the mediator and the type of mediation. The study also revealed that the main source of construction dispute in the UK construction industry was financial factors. Please see section 5.3.2 for further explanation about the main source of construction disputes.

The question is demanding to know whether mediation is the best way to settle a construction dispute. Mediation tries to encourage an agreed solution. From the research findings, it can be confirmed that mediation can still be used for resolving future's construction dispute. It may not always work, and a negative aspect of mediation is that it does not guarantee a settlement. However, even if mediation does not end in a settlement, it can act as a catalyst towards a settlement after the event, as it tries to narrow down the issues. According to one of the research participants, although some mediation cases were not settled on the day, agreement may still be reached shortly after. Apart from that, the benefit of mediation is that it creates a mind-set that there are some approaches that can be used to solve a dispute without going to court, and mediation is one of them. In a way, mediation also causes the public to think in a 'correct' frame of mind, that it is not always appropriate to go

to court as the trials are expensive, time consuming, inflexible and are not confidential (Cheung, 1999).

From the literature, the properties of mediation are (see section 2.4.3.3 and 2.5) flexibility, cost effectiveness and non-threatening proceeding features (Qu & Cheung, 2010). One of the main ideas of mediation is that the process involves trying to reach a mutual understanding between the disputing parties. According to Gould et al. (2010), the largest number of successful mediations usually occurs in the early stages of litigation. The researchers also added that, in the vast majority of cases, mediation was undertaken on the parties' own volition. Of the successful mediations only 22% were undertaken as a result of the court's suggestion or as a result of an order from the court (Gould et al. 2010). This suggests that, at least in part, the incentives to consider mediation provided by the CPR are effective; and that those advising the parties in construction disputes now routinely consider mediation to try and bring about a resolution of their dispute.

If all the discussion is focused on present and past construction issues, it could be asked whether mediation will still be valid for resolving construction disputes in the future. Indeed, mediation can always be used to settle future construction disputes if the awareness and the promotion of the use of mediation to the public were improved. This issue can be further elaborated in terms of the following factors which arose from the interviews:

- The management of personal attitudes
- The nature of construction disputes
- Facilitative mediation

The management of personal attitudes

As discussed in Chapter 5 and Section 6.2.2, negative personal attitudes such as anger or unwillingness to compromise, can cause problems in the mediation process. People with such negative attitudes might not be aware of the importance of mediation: i.e. how it works, its benefits and its practicality. If such attitudes are always there and not properly managed, this can affect the mediation's outcome and, of course, with the complexity of construction disputes, may not work for effective

future mediation proceedings. Therefore managing the personal (negative) attitudes of the disputants is particularly important.

The nature of construction disputes

This study found that not all problems can be settled by mediation. Whether mediation can be used, or not, depends on the nature of the dispute itself. One research participant said that if a construction dispute needs a decision from other external parties, or requires the approval of a judge, then mediation cannot be used to resolve the dispute. Therefore, it is reasonable to conclude that, depending on the nature of the dispute, the mediation process can still be employed to resolve future construction disputes, provided the disputing parties were committed to settle the dispute and able to manage their personal (negative) attitudes.

Facilitative mediation

The research study found that the terminology of mediation was explained, based on the participants' experiences. For example, one of the participants defined mediation as a mixture of counselling and negotiation (see Chapter 5). Another participant indicated that mediation is nothing more than creating positive communication between the disputing parties. One of the main ideas of mediation is that the mediation process involves a mutual understanding between the disputing parties (Fenn, 2010). Therefore, in order to have an understanding of the dispute, it is important to create and maintain positive communication between the parties in order to negotiate the settlement; supported by help from the mediator to guide the process. When these factors were implemented in a mediation process, the complicated issues, which occur in the construction industry, can be solved.

What is known from the literature is that there are several approaches to carrying out the mediation process. The different types of mediation processes have been explained in Chapter 2. In the UK, the Advisory Conciliation and Arbitration Service (ACAS) described the mediation process as varying between directive and facilitative (ACAS, 2005; Ridley-Duff & Bennett, 2011). The alternative dispute resolution (ADR) provider in the UK suggests that commercial mediators should use a combination of facilitative and evaluative approaches (RICS, 2013). The *Centre for Effective Dispute Resolution (CEDR)*, on the other hand, promotes a style closer to

the facilitative mediation (Gould et al., 2010). These theories underpin a common commercial mediation process; however, not much information is available for situations involving a construction dispute in the UK. During the research interviews, one of the questions was about the most appropriate type of mediation for use in construction disputes. All the participants felt facilitative mediation was the most appropriate mode of mediation for resolving complex disputes in the UK construction industry.

The notion that facilitative mediation is the main mediation mode of practice in the UK was also reported by Gould (1999). In facilitative mediation, the mediator plays an important role in guiding the mediation process by referring to ACAS (2013). The mediator will help the disputing parties to narrow down the issues, to agree on the settlement procedure and to settle the dispute. The mediator will use positive communication in a sense that the mediator will focus on making the parties negotiate the settlement based on common ground and without offering any solution or recommendation about the settlement. This is done so that the whole mediation proceeding is unbiased, and the dynamic will not change from settling the dispute to focusing on who is right and who is wrong. The second reason for this model is that mediation training in the UK is based on the facilitative mediation process. Therefore, all professional mediators in the UK will practise facilitative mediation (Fenn, 2010; RICS, 2013).

Surprisingly, during the research interviews, one of the participants mentioned that the mediator would try their best to mediate the legal advisors out of the mediation process. The participant explained and elaborated further that some of the legal advisors often lead the mediation process, rather than the disputing parties. It is important to keep the mediation process flowing smoothly so that the disputing parties can focus on the issues, create a balanced settlement, negotiate the settlement and come to an agreement based on their understanding and common ground. The involved parties need to be able to do this without the influence of the other external parties and without any help from the legal advisors. Therefore, if a proper facilitative mediation procedure were employed, together with well managed personal attitudes, mediation can always be used in resolving future construction disputes.

6.2.4 What are the barriers to the widespread use of construction mediation?

The main aim of the research study was to investigate the barriers which impede the use of mediation in resolving construction disputes. In investigating the barriers to mediation, it was important to examine whether the source of the barriers which occur are due to the process being conducted in accordance with the selected mediator or whether it is because the mediators have less background knowledge in construction projects. It was difficult to predict the barriers which impeded the use of mediation in resolving construction disputes.

Regarding the mediation process, section 6.2.3 has discussed the suitability of facilitative mediation for resolving problems in the construction industry. In an effort to evaluate how appropriate the background of the mediator is, one of the interview questions was: 'Is it necessary for a mediator to have a construction or a legal background?' All the participants commented that the most important quality for a mediator to have was excellent mediating skills. At the beginning of the mediating proceedings, the mediator needs skills such as bargaining or negotiating. In the middle of the mediation process (the private sessions) and during the final negotiation, good mediators need to be able to notice and understand the tactics used by the disputing parties in order to maintain and facilitate the smooth running of the mediation session. (Please see Chapter 5).

Based on the research findings, it can be concluded that the personal attitudes of the disputing parties were a factor which could become a barrier able to impede the use of mediation (see section 5.6.3.1 and section 6.2.2). All of the participants in this study pointed out that some personal attitudes are a real problem during the mediation proceedings. The personal attitudes in this context are, in the main, being angry or not wanting to compromise. One participant pointed out that if a person is angry, they cannot think beyond their anger and therefore, cannot negotiate the settlement agreement. This would further complicate the problem, and it is therefore highly unlikely the mediation will be successful. Cheung et al., (2007) similarly found that adversarial attitudes were identified as one of the major challenges in the building sector. Another reason which initiates the barriers to settlement by mediation was the complex nature of the construction dispute itself.

Participants were asked what they perceived to be barriers in mediation, either via hearsay or personal experience. There was general consensus on the main barriers as encountered by the participants during their careers. All of the participants answered all the interview questions and provided explanations, based on their personal experience, on how these issues acting as barriers affected the spread of mediation for resolving disputes. These barriers were divided into two parts: barriers arising from the public, and barriers arising from legal advisors. Some of the disputing parties know mediation as a dispute resolving mechanism, but they do not know the true meaning of what mediation is and what the benefits are. Some of the disputing parties think mediation is part of the legal procedure. From the interview results it was found that some of the legal advisors do not understand how the mediation process is supposed to work. Legal advisors are keen to solve the dispute in a conventional way, through arbitration or litigation. It clearly shows that there are legal advisors who are less aware than others of the importance of mediation. Referring to CPR, legal advisors must advise their clients to try to resolve the dispute through mediation.

6.2.5 Should mandatory mediation be introduced in the construction industry and what will the potential implications be?

One of the questions during the interview sessions was about the suitability of imposing mandatory mediation in the construction industry, especially when having in mind that one of the hallmarks of mediation is that it is voluntary. Based on the research finding, the participants considered that mandatory mediation should not be introduced in the construction industry. One of the potential implications is that the number of successful cases using mandatory mediation would be lowered, relative to cases in a voluntary framework.

It was noticed that during the interviews all the participants used mediation terminology in order to answer the interview question about mandatory mediation. The fundamental basis for the concept of mediation is that it is consensual; it provides an environment where both parties agree to mediate their issues and reach an agreement on a settlement. According to one of the interviewees, the costs dealing with construction disputes can be very high, which is a significant barrier to making the process mandatory. One participant in the research interview commented that

while the system can get the disputants to attend the mediation proceeding, it cannot always get the disputants to fully engage with the mediation process itself. The findings corroborate the idea of ACAS (2013), who stated that forcing people to use mediation could be counterproductive.

As has been mentioned in section 6.2.2, there are similarities between people's attitudes in this study and those described by Diekmann et al., (1994) and Szasz et al., (2011) who pointed out that human emotions of anger and distress were often significant problems in construction disputes. The results of this current study indicate that human attitudes are one of the factors hindering the spread of construction mediation in the UK. As stated in Chapter 5, if mediation is to be made mandatory, it could potentially increase the pressure on all parties involved and have a negative impact on the quality of mediation proceedings.

Although mediation is a voluntary technique, however with the current construction environment, why can't it possible to make mediation a mandatory approach in resolving construction dispute? The reason was, according to the literature, some countries in the European Union, and also in the case of family dispute, have introduced mandatory implementation of mediation to settle the dispute (Gould, 2010). There must be some reason why it should be implemented, and why it shouldn't be, in construction industry. One of the reasons to introduce mandatory implementation of mediation is that mediation creates a positive awareness; however, the complicated dispute makes it difficult to enforce mediation as a mandatory dispute resolution process in the UK's construction industry.

It was concluded from the research finding (see section 5.5) that mediation should not be made mandatory in the construction industry. However, the principle advantage of imposing mediation as a mandatory approach would be to change some of the sceptical views of disputing parties. According to the research findings, one such example is when any disputing party suggests or proposes mediation as a dispute resolution and the other disputing party challenges the suggestion, because to suggest resolving the dispute through mediation is taken as a sign of weakness. If mediation is mandatory, the party who is proposing mediation will not be seen as weak, but it will be clear that they are following court orders or referring to a mandatory contract. Based on this scenario, it can be suggested that imposing

mediation could be used to increase awareness, especially towards its benefits and practicality, while removing some of its negative aspects. The research findings suggest that imposing mandatory mediation would inevitably increase the number of construction disputes mediated. Therefore, it can be assumed that imposing mediation as a mandatory procedure can be a useful approach for promoting such a dispute resolution process to the public. However, this whole idea conflicts with one of the characteristics of the current concept and understanding of mediation: that it is voluntary (Fenn, 2009). Hence it could be hypothesised that imposing mandatory mediation could also affect the quality of the mediation proceedings and potentially lower the possibility of success of the method.

On the contrary, other participants commented that mandatory mediation should not be implemented in the construction industry, due additional problems that can arise because of the nature of the disputes. There is a little evidence from the research carried out in this study to support the use of mandatory mediation, especially when taking into account the following:

- If mediation is set to be a mandatory process in resolving construction disputes, will the court provide the mediator at the court's expense?
- If the parties are forced to mediate, what is their commitment to the process?

Based on these results and suggestions, it would be appropriate to further investigate the potential suitability of imposing mandatory mediation for the resolution of disputes in the UK's construction industry.

6.3 Recommendations

The findings of the research can benefit not only the mediator but also the relevant authority in charge of the mediation. The findings and recommendations from this research can be used to establish an understanding of the current status of mediation in the UK construction industry, for the mediator and any relevant authority, in order to improve or develop their own mediation systems. Furthermore, the findings provide information on the key barriers encountered in mediation. The research will increase the awareness of the issues that need to be considered, in order to develop mediation to become more effective in resolving disputes in the UK's construction industry.

The results of the study indicate that there are some procedures and systems that can be used to eliminate the barriers which are impeding the use of mediation in resolving construction disputes. During the research interviews, the researcher asked participants their opinions on how to eliminate the aforementioned barriers to construction mediation. The results from the research interviews revealed that the recommendations from the participants could be divided into three categories (see section 5.6.4 for more details):

- Encouragement, promotion and events
The first category was about focusing on ensuring that mediation continues to be used as the preferred approach to resolving disputes, while also promoting the benefits and practicality of mediation use by organising events which include the promotion of mediation through seminars, workshops, conferences and mediation demonstrations.
- Information
The second category was about sharing information and establishing good communication between the mediator and the disputing parties, prior to the mediation session.
- Quality assurance
The final category was quality assurance, which focused on the mediator's quality, skills and competencies.

Finally, based on the suggestions of the participants, the elements were then divided into 3 groups; the disputing parties, the mediation process and the mediator.

The disputing parties

The study found that most of the participants mentioned poor personal behaviour such as anger, ego, and lack of willingness to compromise as the reasons why people do not choose mediation as a dispute resolution mechanism (see section 6.2.2). According to John (2000), mediation is not a new phenomenon; it has, in fact, been present in the UK's dispute resolution industry for several decades. Nevertheless, some individuals are still not aware of its existence. Due to the main focus when dealing with disputes being on arbitration and litigation, mediation was ignored and the associated benefits and the practicality are not being realised. People do not want to change their stand of not negotiating the issues; they wish to be handed a decision from a third party (see section 5.6.3.1).

There is a need to break down this barrier by following carefully planned strategies which include training and awareness programmes, seminars or talks before the commencement of projects. These kinds of sensitisation programmes can be considered as an introduction to dispute resolution techniques. They are for clients, legal advisors, company staff who are directly or indirectly involved with the project and other personnel, and such information should be delivered by experienced mediators or project managers. In these programmes the following aspects should be discussed:

- Introduction of the main personnel and their role
- Explanation of the construction contracts
- Issues of payment provision
- Overview of main problems to be expected on a construction site
- Ways of dealing with problems
- Explanation of the role of negotiation and ADR techniques

These programmes tackle the lack of understanding of construction mediation that can have a negative impact on the adoption or the quality of mediation itself. Therefore, the awareness and acceptance of mediation by the wider society should also be fostered.

The mediation process

A lack of understanding of the mission and the vision of mediation has a negative effect on its adoption. The evidence from the study suggested that there should be a strategy or plans to reduce this lack of awareness and knowledge about mediation among the public. Construction disputes are complex; therefore mediating construction disputes for a whole day can only produce or build up pressure on the parties, which in turn has negative repercussions on the whole process.

Although the data from the interviews is not enough to support this, further work needs to be done to establish a suitable framework for managing mediation proceedings to improve their quality. The study suggested that the duration of mediation proceedings per day should be strictly limited to a few hours only. This would give the disputing parties more time to think about a good settlement agreement, without imposing unnecessary time constraints on them.

Another factor to take into account is the absence of the main person, or someone with the authority to act as the decision-maker. It was suggested that the mediator should have a letter from the court saying that the main person or the decision-maker must be present during the mediation proceeding. It is recommended that further study be undertaken to investigate or evaluate the appropriateness of sending a letter from the court to the decision-maker and imposing cost sanctions on the absentee during mediation proceedings.

The mediator

One of the main factors affecting the quality of mediation proceeding is the skill of the mediator. According to Stokoe (2012), there are several ways of training as a mediator, from a professional development course or in-house courses to year-long postgraduate degrees. However, there is no nationally-recognised qualification or accreditation (Stokoe, 2012). Reviewing the interview results, it was found that mediators who only complete mediator training do not have sufficient skills and cannot promote a good mediation programme. There is a need for an intervention which utilises different kinds of approaches.

If the mediators who are not well-trained or qualified provide an inappropriate mediation service for the disputing parties, the benefits of mediation such as effectiveness, time and cost will not be successfully transferred to the parties. Thus, the parties may well feel dissatisfied with the service provided.

Although there are some existing standards, these are only set by the mediation provider exclusively for their members. According to one of the participants, it is not a good idea to train more mediators. To control and avoid this issue in the future, it has been suggested that there is a need for certain criteria that define a mediator's qualifications and ensure their competence. It was also suggested that there should be some kind of accreditation to ensure appropriate standards, such as those relating to the quality of service skills and competencies. This could be achieved by increasing the number of training hours and introducing some milestones before someone can become an accredited mediator.

The research focused on investigating the barriers to the use of mediation in the UK's construction industry; therefore, less effort was put into research focused on mediation training. With the findings regarding the training of mediators being insufficient to support the offered suggestions, further research on this matter is recommended. It is important, however, that training should include the following elements. A prospective should:

1. Attend several hours of training and exams, before receiving their mediation training certificate.
2. Work as a co-mediator on a specified number of cases and become a trainee mediator.
3. Have an experienced mediator as a co-mediator or mentor for a number of cases, until judged competent, in order to become an accredited mediator.

The programme may require time as well as resources. Another suggestion from the research participants was that there should be an independent body appointed to monitor the performance of mediators.

6.4 Limitations

Although the research met its aims, there were some difficulties and limitations encountered. The limitations should be taken into consideration as they may inevitably affect the results of this research. It is the responsibility of the researcher to use any available approaches in order to provide a good quality study. Those limitations can be kept to a minimum if there is sufficient manpower, financial support and time.

The research represents a first attempt to investigate the barriers which are impeding the use of mediation in the UK's construction industry; very little literature or research on the related field was available. As a result, it was a challenge to design the research interview questions. To understand the actual definition of mediation and how the process works, certain steps were taken, such as attending training courses on alternative dispute resolution (and in particular on mediation), as well as conferences and symposiums for familiarising trainee mediators with the dispute resolution mechanism. Some information from the existing literature on mediating workplace disputes and commercial disputes, was also taken. The external information helped in designing the interview questions.

One of the problems faced by the researcher was the duration of the research interviews. Initially, this was planned to be about an hour. However, that duration was not convenient for some of the research participants due to their lack of available free time; 60 minutes was just too long. To take this constraint into account, the questions were redesigned in order to fit within a 30 minute interview session. The redesigning of the interview questions was a challenging task as the researcher had to include all important aspects in a time-frame that was reduced by 50% in comparison to what was originally planned. Therefore, some of the original interview questions were removed, which may have affected the overall resolution of the research. However, the research participants in this study were some of the country's leading mediators and they managed to answer, and give explanations to, the interview questions based on their vast experience within the limited time, and without encountering any obvious difficulties.

Recruiting some of the participants imposed its own problems. By looking on the list of mediators found on several UK mediation provider websites, there were several mediators with different backgrounds who had more than five years experience in mediating construction disputes. However, it was difficult to recruit such qualified participants as some of these mediators were not available during the research interview period. The research was then publicised by advertising through LinkedIn, to allow for those interested in participating to come forward. The researcher used several sampling strategies in order to attract more participants and to achieve the effectiveness of theoretical sampling (Struss & Corbain, 1998). The main aim of this approach was to ensure that the samples included mediators of all backgrounds and professions, in an attempt to portray a comprehensive picture of the phenomenon under study, and to enhance the range of views assessed. However, the data reached saturation on the thirteenth interview; the researcher then added another three interviews to ensure the data were fully saturated.

6.4.1 Identifying and avoiding bias in research

Bias can occur in the planning, data collection, analysis, and publication phases of research (Pannucci & Wilkins, 2010). It is difficult to overcome or to control for this when actively involved in the process of data gathering; however it is important to acknowledge the fact that bias can creep in (Bell, 1999). In general there are three types of bias: pre-trial bias, during-trial bias and after-trial bias. Pre-trial bias might appear during the sampling process and the selection of the study design phase. During-trial bias might occur during the interview process (interviewer bias). Finally, after-trial bias can occur at the data analysis phase and is therefore also known as data analysis bias (Pannucci & Wilkins, 2010).

The researcher tried to reduce bias by applying several techniques. In this research, the sources of bias may come from the data collection methods and data analysis. According to Pannucci and Wilkins, (2010), standardised protocols for data collection, including training of study personnel and having different examiners to measure the study, can minimise any bias effect. For this research, due to limited resources, financial and time constraints, it was difficult to follow the procedure recommended by Pannucci and Wilkins (2010) to minimize the bias effect. However, the bias was kept to a minimum, as the researcher had discussed the interview

questions with experts such as the research supervisor, selected mediators and arbitrators, as well as lawyers.

Another potential source bias in this research is what is known as interview bias, which refers to a systematic difference between how information is recorded and how it is then interpreted by the researcher; the objective versus subjective dichotomy. It is recognised that the role of the researcher in this study could be one potential limitation of the study. Being new to this area, the difficulties he encountered in accessing the data could be a potential hindrance in carrying out research in this area. The whole interviews for this research were recorded and transcribed. The participants were some of the UK's leading mediators, with years of experience, who gave a comprehensive and in-depth view of mediation through the prism of that vast experience. Therefore, it is arguable that the researcher's rather limited level of experience was more than adequately counterbalanced by the participants much greater level of experience, hence reducing the chance of any bias effect (especially data analysis bias) influencing the research results. Further research initiatives were strongly suggested to further validate the study's findings.

6.5 Further research

Specific limitations emerged from the transcription and the analysis stage of the research. These elements emerged and contributed to the analysis of the findings, while some of them were new aspects that require further research. With the main focus of the research being the barriers to the use of mediation, these new elements were not within the scope of the current study. Furthermore, because of the time, financial and manpower restrictions, these elements could not be included in the research. The elements which emerged during the mentioned process are:

- Further research on the current topic,
- The mediator (Does gender affect the quality of mediation?),
- The professional background of the mediator.

6.5.1 Present research

The research is based on a grounded theory research approach. The methodology involved reviewing the literature and then forming some research questions to generate theories and guidelines without the hypotheses. The research has indicated several barriers, as explained in the results section (see chapter 5 and section 6.2.3), which prevented or impeded the use of mediation in the UK construction industry. Therefore, with the current status of the research, it is suggested that further investigation should be carried out to test and validate these barriers. This may include investigating the framework of managing mediation proceedings and the suitability of sending letters to, and imposing cost sanctions on, the absentees, as stated in section 6.3. It is suggested that future research should use a mixed method research methodology, with a larger sample size in order to gather new information and to validate the research.

6.5.2 The mediator (Does gender affect the quality of mediation?)

The participants in this research were mediators from different professional backgrounds and with varied experiences in mediating construction disputes. Among the sixteen participants there were three female mediators who were taking part in the study. During the interviews, data transcription and the analysis of the data, the researcher realised there was some variation in the explanations of mediation cases between the male and female mediators. This finding is inconclusive, as there were only three females participating in the research and therefore the research finding could not be supported. However, during the interview sessions, the researcher realised that there were differences between male and female mediators in their way of explaining mediation knowledge, and in their experience and negotiation style. For example, the researcher realised that the ‘typical’ female mediator tries to understand the questions (or issues) and focuses on communication skills. On the other hand, the ‘typical’ male mediator focuses on the settlement. These findings are inconclusive, as there were only three female mediators, out of sixteen, who were taking part in the study. As such, it would be advisable to undertake further research in order to investigate whether the gender of the mediator affects the quality of mediation in resolving construction disputes.

6.5.3 Differences based on the background of the mediator

As mentioned earlier, the participants in this study involved mediators from different backgrounds and with varied experience in mediating construction disputes. During the interview sessions, at the stage of reading the data transcription and the stage of data analysis, it was realised that there was variation in the way in which barristers, solicitors and mediators from professional construction backgrounds explained the mediation cases. The responses and explanations from experts coming from professional backgrounds indicated that the style of executing facilitative mediation was different between them. Although their experience and their explanations in the area of mediation knowledge were relatively similar, the elements of emotions, negotiation style and the presentation of the cases were different. In future investigations, it might be advisable to focus on investigating the details and quality of mediation with respect to the professional background of the mediator. Additionally, having a larger sample size of participants with a range of mediating skills may also be of benefit for such studies. As such, further studies on this area are recommended in order to further examine these observations.

6.6 Contribution to knowledge

The researcher found that the core problem, regarding the use of mediation as a dispute resolution process, is to do with the level of understanding of mediation in resolving construction disputes; a level which is still a problem among the public and their legal advisors. This problem underpins the lack of awareness of mediation and lack of interest in using mediation to resolve those disputes. The researcher has found out that the attitudes and behaviour of the public, especially those involved in the construction industry, have shaped the development of mediation in the UK construction industry.

This research has provided a significant contribution to knowledge in the field of mediation in the UK construction industry at two different levels: theoretical and practical.

Theoretical contribution

The study has contributed to the body of knowledge on mediating construction disputes in the UK. There has been limited specific research on the development of mediation in the UK construction industry. There was a lack of information on the factors which prevent people from using mediation to resolve construction disputes or to illuminate why such construction disputes were not resolved by mediation. Semi-structured interviews with a sample of leading mediators in the UK were used to reveal some of the factors which prevent people from using mediation. The research has provided a theoretical contribution which addresses some of the gaps identified in the literature. Furthermore, this research responds to the call from Fenn et al., (1997) for more research on conflict and dispute in the construction industry.

The research has made available new insights into what the barriers are which impede the use of mediation in the UK. It has found that there was a lack of awareness of mediation as one of the available dispute resolution technique and it has pointed out that the lack of interest in mediation, from people involved in the construction industry, is one of the main barriers to its use. Apart from identifying the barriers which prevent the disputing parties from mediating the dispute, the study has also explored factors which have shaped the mediation system. These include the financial issues that initiate disputes in the construction industry, the question of whether facilitative mediation is the appropriate mediation process for resolving construction disputes, the possibility that having excellent mediating skills is more important than the professional background of the mediator and finally, ‘why it is inappropriate to impose mandatory mediation for construction disputes?’

From the research study, the identified barriers were discussed and some suggested methods were also presented for removing or minimising those barriers. Furthermore, by identifying the barriers, precautionary procedures could be taken with the aim of achieving good communication between the disputing parties, and therefore, improve the quality of the mediation process and the quality of the contributions of the mediators. The research can also contribute to studies about conflict and dispute resolution by providing an in-depth understanding of mediation in terms of its development in the UK construction industry.

Contribution to practice

The conclusion of the research revealed that the core of all challenges is the lack of understanding of the Alternative Dispute Resolution mechanism (ADR), especially in mediation. The study has also contributed to the practice of mediation in three specific ways. Firstly, it has identified the barriers which are impeding the use of mediation in the UK construction industry. Secondly, remedial strategies were presented that were designed to improve the mediation process. Thirdly, it has suggested topics for new research in mediation especially in the UK construction industry.

The findings were developed based on the research interviews and analysis, as a result of recommendations from the participants in the research. Moreover, the research covered the topic of personal traits such as the attitudes, behaviour and cultural aspects of the participants, which had been largely neglected in existing research. The research facilitates a better understanding of mediation within the educational and the practical disciplines, especially in the construction industry.

In terms of practical discipline, the research outcome can be used to improve the process of mediating construction disputes in the UK. For instance, this research provides the mediators with in-depth information about mediation and offers insights into mediation proceedings. These, in turn, could enable mediators to generate precautionary procedures or novel ways as required by their cases, while also improving the mediation proceedings' framework in relation to construction disputes.

This research has identified and assessed negative factors which can affect the use of mediation in resolving construction disputes. One outcome is the design of a standard mediation proceeding framework and a mediators' training scheme that should be set to attain certain standards. It is also suggested that there should be some appropriate qualifications for mediators to work towards, especially in the construction industry. Furthermore, there should be mandatory checks on the professional competence of mediators at regular intervals. Finally, there should be a proper body to monitor mediation performance. However, further studies need to be

done on these topics. Such initiatives can improve and provide sustainable benefits in the long term for the mediation proceedings.

6.7 Summary

This chapter has elaborated on the results of the interviews used to answer the research questions. This was then carried forward to produce recommendations on the research and to point out limitations encountered during the research. Based on the discussion, some elements were carried forward as suggestions for further research and to explain their contribution to knowledge.

The chapter was divided into five sections. The first section elaborated on the theory that was used from the findings of the research interview. There were several ways in which the disputing parties were aware of mediation. With reference to the research findings, mediation remains the most popular dispute resolution mechanism after negotiation. Thus, in general, it can be said that a section of the public, and especially the disputing parties, knows about the availability of mediation as a dispute resolution mechanism. There is also awareness of the part the legal system can play, with the introduction of the Civil Procedure Rules (CPR) in 1999. It was found that facilitative mediation is the most appropriate mode of mediation for resolving construction disputes.

However some people do not understand how the mediation process works or the potential benefits it offers. For example, mediation is seen as a formal legal procedure by a part of the public, which it is not. There are several factors which can influence the limitations of the applied approach, such as the mind-set of the people involved, the behaviour of the disputing parties and of the mediator. The findings have shown that in general the types of dispute that usually occur in the construction industry are due to financial issues. After the research findings were analysed, the barriers to the spread of construction mediation in the UK were divided into two parts: barriers arising from the public, and barriers arising from legal advisors. Therefore, with a well-managed attitude towards mediation and well-organised promotion of mediation awareness, it was seen that mediation can be used in mediating construction disputes in the future.

There has been some debate about imposing mandatory mediation, although only little evidence was found in the research to support its use. Mediation is essentially voluntary, but the cost of construction disputes is, in general, prohibitively high. It is arguable that making mediation mandatory is, in practice, unrealistic.

The second section explored the most appropriate recommendations based on the results. The research made several recommendations for the development of mediation in the construction industry. These included encouragement, promotion and educational events directed at portraying mediation as ‘one of the effective dispute resolution techniques’; by providing information prior to the mediation session and by introducing quality assurance for the mediator. These initiatives would be of benefit not only to the mediator but also to the relevant authority in charge of the mediation and thus it can be claimed that the findings and suggestions of this research can help to improve the quality of the mediation proceedings.

Furthermore, the study found that poor personal attitudes and behaviour were reasons why people do not choose mediation as a dispute resolution mechanism. It was also the lack of understanding of mediation as an effective dispute resolution technique, the absence of the decision-maker and the lack of relevant skills on the part of the mediator, which were having a negative effect on the adoption of mediation to resolve disputes. There is a need to break down these barriers by providing appropriate strategies and plans which include sensitising programmes, seminars or talks before the commencement of each project. It is also necessary to establish a suitable framework for the mediation process, set the obligation for the decision-maker to be present during the mediation process and to establish a professional training scheme for the mediators.

The third section explored the limitations associated with the research. The study was limited in several ways: for example in the literature review with the limited amount of relevant literature that was available, in the application of the appropriate methodology, in designing the interview questions and in the sampling of subjects. These issues had a negative impact in the design of the interview questions. The availability of the participants was also problematic, as some of the mediators were not available during the research interview period. During the interview

sessions, there was some bias about data presentation and interpretation, despite the availability and re-examination of the interview recordings. These limitations can be kept to a minimum if there is sufficient manpower, financial support and time.

The fourth section explored the idea of future research which can be done in association with the current research. During the transcription and the analysis stage of this current study new elements emerged that, given additional time and resources, could be further investigated and be of benefit in exploring and evaluating the quality of mediation in the UK construction industry. Because of the restrictions of time, finances and manpower, these elements could not be included in this research (to validate the research findings, to evaluate the differences in mediation style with respect to the gender of the mediator and to evaluate the style of mediation with respect to the professional background of the mediator). However, it would be advisable that further investigations should be carried out to test and validate the findings relating to the three issues listed immediately above in brackets. For example, this study found that there was some variation in the way of giving explanations and answering interview questions based on the gender and background of the participant. Therefore, further research should be carried out in evaluating the quality of mediating disputes and the style of executing facilitative mediation with respect to the gender of the mediator and the mediator's professional background.

The final section looked into the contribution the research has made to knowledge of the main topic. The research presented empirical evidence on the development of mediation, as there is little published research in the literature on the barriers which impede the use of mediation in resolving disputes. The novelty of the research is based on the development of a theory presenting several factors which prevent or stop people from using mediation in resolving disputes in the UK construction industry. The research provides the mediators with in-depth information about mediation in terms of its development in the UK construction industry and makes a contribution to conflict and dispute resolution studies. This offers insights into the mediation proceedings which could enable mediators to generate and design a standard mediation proceedings' framework, as well as a mediators' training scheme, which will need to meet certain standards.

Chapter 7 - Conclusions

7.1 Introduction

The research was designed to investigate the development of mediation by exploring barriers which impede the use of mediation in the UK construction industry. This chapter is divided into two sections: section one is focused on reviewing the research aim and the research questions. The second section presents a summary of the chapters. The aim of the research has been achieved and all the research questions were answered accordingly, based on the information contained within the research findings.

7.2 Review of the research aim and research questions

7.2.1 Research aim

Mediation has been used widely in the construction industry (Gould, 2009; McCartney & Dain, 2010) as one of the available dispute resolution mechanisms; however, the development of mediation has been overlooked. From the review of the literature, the construction sector in 2012 contributed more than £80 billion to the country and providing millions of jobs (Rhodes, 2014). Information from research regarding dispute resolution is crucial in order to resolve construction disputes and to maintain both economic equilibrium and socio-economic status. The government has tried to promote the use of mediation in this country. Among the initiatives was the introduction of Civil Procedure Rules (CPR).

Existing literature has focused mainly on the quantity of mediation, together with the process and benefits of mediation. There has been little discussion on the development of mediation, especially in the construction industry. The gaps in the literature were found basically to relate to factors which prevent people from mediating construction disputes. The lack of empirical evidence on dispute resolution and mediation added to the puzzle. These gaps were one of the factors which motivated the researcher and informed the present research study. Therefore, the main aim of the research was to investigate the development of mediation. The main focus was to identify the barriers which impede the use, or the spread, of mediation

in the UK construction industry. Referring to the research findings, it was evident that the research has achieved its aim by identifying the barriers and what assists their formation. The findings also included recommendations and produced a contribution to mediation practitioners, mediation providers and to the public in general.

7.2.2 Research questions addressed

- **How do parties adopt the mediation approach to solve disputes and why?**

There are several approaches available and suitable to resolve construction disputes such as negotiation, mediation, adjudication, arbitration and litigation (Fenn, 2010). From the research finding, it was found that the public and the disputing parties in particular, were aware of the presence of mediation as one of the available resolution mechanisms for resolving construction disputes. It was also found from the research interviews that the legal advisors are also aware of mediation and are known to recommend their clients to choose mediation as a dispute resolution technique. The majority of the research participants felt that most of the awareness was coming from the government, through the legal system, via the introduction of Civil Procedure Rules (CPR). More surprisingly, the option of mediation is now being included as part of the construction contract. Therefore, the public (especially the disputing parties) is aware of the availability of mediation as a dispute resolution mechanism. According to the research findings, mediation remained the most popular dispute resolution mechanism after negotiation.

- **What are the limits of mediation in resolving construction disputes?**

In summary, mediation is a process which is used to resolve construction disputes. In the mediation process, the disputing parties make decisions without any help from the mediator. The mediator is there to make sure the mediation proceedings run smoothly. If the people understand the terms, the benefits and the practicality of mediation, this knowledge can speed up the process of dispute resolution. It was found that mediation is one of the best and most popular models among other alternative dispute resolution techniques.

The findings from the research interview show that the limits of mediation arises initially from a range of causes: people's negative perceptions, people's attitudes, insufficient awareness of and knowledge about mediation, disputing parties who think that mediation is a 'tactical approach' and use it as a 'fishing expedition', decision makers without enough authority to decide on a settlement and an inexperienced mediator whose performance may complicate the mediation proceedings further. An example of this is the relatively common belief that mediation is not capable of being used to solve a construction dispute. This shows that people see mediation in a wrong way and may well come to mediation in the wrong frame of mind. If these limitations can be overcome, mediation can always be used to settle the disputes.

- **Can today's mediation process still be used for future's construction industry's dispute?**

Results showed that all of the participants felt facilitative mediation was the appropriate mode of mediation in resolving construction disputes, both for today and tomorrow. In facilitative mediation the mediator will try to create positive communication in a sense that the mediator will focus on encouraging the parties to negotiate a settlement, based on common ground. The facilitative mediator will not offer a solution or any recommendation towards a settlement. As was mentioned earlier, personal attitudes and awareness are the main problems getting in the way of an effective mediation process. It can be concluded that, based on the research findings, there have been no variations in construction disputes, as such disputes stay fairly consistent, even during periods of economic recession. Therefore with a well-managed attitude towards mediation and well-organised promotion for mediation awareness, it is hoped the process will always produce a satisfactory outcome from the mediation proceeding. Hence, mediation can always be used in mediating future construction disputes, as it is a procedure which narrows down the issues, establishes positive communication between the disputing parties and helps the parties involved to decide on an agreement resulting from a balanced negotiation.

- **What are the barriers to the spread of construction mediation?**

The findings indicated that, in general, the types of disputes that usually occurred in the construction industry were due to financial issues. All the research participants mentioned and agreed that financial problems are the root cause of disputes in the construction industry.

Apart from the source of the dispute, the quality of mediation was also examined closely. The quality of mediation in this respect is to do with the process of mediation, and the mediator's background, as it is very important to know whether the source of any barriers that occur are due to the process of mediation *per se* or the mediator having inadequate knowledge about the construction project background. Results indicated facilitative mediation was more effective than other mediation processes. From the point of mediators, the professional background of a dispute was not important. However, skills and experience were vital aspects in choosing a good mediator. Following data analysis the barriers to the spread of construction mediation in the UK were divided into two parts: barriers arising from the public (to do with the attitudes and behaviour of the disputing parties) and barriers arising from legal advisors (sources of problems relate to a surfeit of mediators, and the low levels of mediation awareness among the legal advisors). One of the surprising elements from the interview referred to the lack of understanding of the mediation process amongst legal advisors. The main cause of barrier formation is a reflection of people's negative attitudes, combined with their ignorance.

- **Should mandatory mediation be introduced in the construction industry and what will the potential implications be?**

One of the characteristics of mediation is that it is voluntary. The research found that all participants referred to basic mediation theory in order to answer the interview question about mandatory mediation. The sceptical view about mediation is that suggesting or proposed to mediate the issue is seen as a sign of weakness. One of the principal advantages of imposing mediation as a mandatory approach is that any person who proposes mediation will not be seen as weak but that their choice was guided by the contract or the regulations. A small number of the participants suggested that mandatory mediation should be imposed, as with family disputes. The

mediation process for family disputes often leads to positive results. However, according to research interviews, the costs of dealing with construction disputes are usually high, which makes it difficult to enforce mandatory mediation. When people are forced to mediate the dispute it is unlikely to be effective, as they do not want to take part in the whole process. According to ACAS (2013), forcing people to use mediation could be counterproductive. Therefore, there was little evidence from the research carried out to support the use of mandatory mediation.

7.3 Conclusion

7.3.1 Literature review

The chapter explains the methods for searching the literature and critically analysing the literature located and reviewed. The processes for searching the literature were made easy using the search database (e.g., UoM library catalogues, Emerald, Science Direct or Google Scholar). Several concepts were then derived from the research title and the main aims, to narrow down the amount of literature and the area for the search. The first concept search was on the construction industry. In this concept the focus was put on explaining and exploring the general theory about the construction industry in the UK. This includes the general construction industry's economy, construction problems and disputes. The second concept was on alternative dispute resolution techniques. In this concept, the theory about the general alternative dispute resolution techniques was explained and explored. The third concept was on mediation. This concept involves exploring and explaining the existing literature on construction mediation in the UK. The fourth concept is on development of mediation. The main focus is to explore and explain the development of mediation in the UK, especially in the construction industry, as well as examining the controversial issue of mandatory mediation. It was found that there was only a small number of sources relevant to construction mediation. As a result several gaps in the research were identified and five research questions were designed.

7.3.2 Mediation

This chapter focuses on the implementation of mediation to resolve disputes in the UK's construction industry. It explained and explored the development of that process. There have been several studies done which examined construction mediation. However the focus was more on the quantity of mediation, rather than its quality. The present research is focused on the quality of mediation through investigating the barriers which impeded the use of mediation in the UK construction industry. In this chapter, the characteristics, mode of mediation and the process of mediation were presented. The theory on development of mediation and the issue of mandatory mediation were also explained. By reviewing and analysing the literature on construction mediation, some questions arose. Relevant literature is limited, as is research that has been done on the development of mediation in the construction industry. There has been little discussion about this issue and most importantly, some of the theoretical explanations about the development of mediation in the construction industry were not documented. As the background information was not enough to provide a clear picture of the development of mediation, especially in the UK construction industry, several questions arose.

7.3.3 Research methodology

The objective of the chapter was to describe the appropriate methodology employed in the research, which helped to explore theory on construction mediation. One of the limitations of the research is dealing with the limited background information related to the research. As already noted there were gaps in the research, thus no hypotheses were generated. The aim was to generate a theory and to fill any gaps in the literature. Looking at the research philosophy, the interpretive paradigm was ideal as it helps in structuring the whole process of the research. According to the interpretive paradigm, the research approach was inductive as it was aimed to explore the collected data, based on qualitative research (Saunders et al., 2012).

Grounded theory was adopted as the research strategy, as it helped to capture the overall mediation phenomenon in a construction environment, through qualitative research design. The qualitative design helped the researcher to 'get close to the data' by interacting with experts (mediators). The mediators were chosen based on their

professional backgrounds and years of experience in resolving construction disputes. Therefore, the researcher used semi-structured interviews to allow participants to elaborate and expand further on the topic of construction mediation. The theoretical sampling was employed for the research, during which data collection was continued until it reached saturation point.

7.3.4 Research findings (Results)

The chapter presents the results based on the data of the semi-structured interviews. The data was analysed using manual coding analysis (open coding, axial coding and selective coding) and several categories were formed. As the coding process proceeded, memo writing was used to explain and illustrate some ideas behind the categories. In writing up the theory, the memos were organised according to the categories and the categories were then interpreted and elaborated to generate the theory.

From the results it was found that the facilitative approach is the most appropriate mode of mediation for dealing with construction disputes. It was stated in the literature that construction disputes were, and still are, very complicated issues (Cheung, 1999). On investigating the causes of construction disputes, the study found that financial issues are the main reason for such disputes. As the mode of mediation is facilitative, the mediator will never give professional or legal advice about the dispute. The research found that mediation skills are the most important asset the mediator can bring to the mediating process, particularly when handling a complicated dispute. Furthermore, the research suggested that there is a strong connection between positive communication, counselling and negotiation in mediating any dispute.

In exploring the barriers, which impeded the use of mediation, different concepts were discussed during the interviews and, as a result, various barriers were revealed. The barriers were grouped into two categories: barriers arising from the public and barriers arising from legal advisors. The barriers arising from the public were: lack of social awareness, disputatious culture, process problems, insufficient planning, security and the introduction of adjudication. The barriers arising from legal advisors were: ignorance, personal agendas and adherence to the conventional

methods of resolution. From the research study, it can be concluded that lack of awareness of, and the negative attitudes towards, mediation were the main concerns which impede the wide use of mediation in resolving construction disputes. In this section several recommendations on how to reduce or eliminate the aforementioned barriers to construction mediation, which were suggested by the participants, were presented.

7.3.5 Discussion

The purpose of the chapter was to analyse the results based on existing findings and answering the research questions. The research was designed to determine the development of mediation by exploring and investigating the barriers which impede the wide use of mediation in the UK's construction industry.

The results obtained from the research were elaborated and focused on explaining the quality of mediation proceedings in the mediation of construction disputes. Moreover, appropriate recommendations were presented and explained. For example, it is suggested that a strict qualification imposing some sets of standards and monitoring the mediator's performance in order to improve the mediator's skills, should be set up as a priority. The evidence from the study suggested that increasing awareness, and proper mediation process management, could be the best recommendation. The potential limitation was to do with the minimal amount of relevant available literature sources, which made the designing of interview questions difficult. The other limitation was to do with the researcher. Although the interviews were recorded, there were some potential biases through the data presentation and data interpretations.

Looking at the results and the limitations, it was recommended that further research should be carried out. The investigation shows that the new ideas from the study need to be validated. Further research on mediator skills, based on the gender prospectus, and aspects of the professional background of the mediator, are recommended. As it was found that the way of expression on the elements of emotions, negotiation style and the presentation of the cases were different between the research participants, although their experience and their explanations in the area of mediation knowledge were relatively similar. Therefore it would be advisable to

undertake further research to examine these observations. The findings also suggest that, in general, the new ideas may provide some new guidelines or rules for the mediation organisations and/or the mediators. Overall new ideas emerged from the research study that can be used to improve mediation quality.

7.4 Summary

The research contributes to knowledge about the development of mediation in the UK's construction industry through the investigation of the possible barriers which impede the wide use of mediation as a dispute resolving mechanism. The study narrowed the gap in the literature by offering several new ideas on mediation and provided some suggestions for further research in order to address the gap in literature.

This final chapter presented an overview of the research aims and research questions and a summary of the thesis chapters. The summary of the findings was also provided. It is therefore hoped that this research study will make an initial contribution to the field and guide additional and further research into mediation in the UK's construction industry.

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Appendix 01 - E-mail (01) to Interviewee

Dear Sir/Madam,

I am writing to you in the hope that you could assist me. I am doing a research on 'The development of Mediation in UK Construction Industry' at the University of Manchester.

I'll be conducting interviews for this research. Would you be in agreement to participate in the interview? Please advice if this would be of interest.

Thanks

Mohammad Aminuddin Abdullah
University of Manchester

Appendix 02 - E-mail (02) to Interviewee

Dear Sir/Madam,

Thank you for your interest and assistance to this research.

Enclosed please find the cover letter, information sheet, and consent form for the study. The participant will be asked to read and sign the consent form. I will collect the consent form on the day of the interview.

I will be contacting you for an appointment. Thank you for your cooperation and your time.

Sincerely,

Mohammad Aminuddin Abdullah

PhD Research student

University of Manchester

Appendix 03 - Cover letter

Name of participant

Office Address

Date

Dear Sir/Madam,

Conducting a PhD Research Entitled ‘The development of Mediation (ADR) in UK construction industry’

I write to you as a Doctoral candidate at the School of Mechanical, Aerospace and Civil Engineering (MACE), The University of Manchester. I am conducting a study entitled ‘**The development of Mediation (ADR) in UK construction industry**’. My study is supervised by Dr Peter Fenn. The main aim of this study is to investigate the development of mediation (barriers to the adoption of mediation) in UK construction industry.

Participants will be asked to do a recorded individual interview, either face to face or via telephone as preferred. A set of questions regarding the research topic will be asked. The interview will take about one hour.

The data collection process will be minimally disruptive to the participants’ working hours. All data will be stored under secure conditions. Names of participants will remain anonymous. Participation in the study is voluntary. Participants can withdraw from the study at any time without prejudice. Data already collected from a participant who withdraws would not be used for the research.

This study has been cleared in accordance with the ethical review guidelines and processes of The University of Manchester. You are free to discuss this study with the supervisor of the project (contactable on: +44 (0) 161 306 4233 or email: peter.fenn@manchester.ac.uk).

Yours faithfully,

Mohammad Aminuddin Abdullah

PhD Student
University of Manchester
E-mail:
mohammadaminuddin.hjabdullah@
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Tel: 07517230982

Dr Peter Fenn
Senior Lecturer
University of Manchester
E-mail: peter.fenn@manchester.ac.uk

Tel: +44 (0) 161 306 4233

Appendix 04 - Participant Information Sheet

Title of Research: The development of Mediation (ADR) in UK construction industry

Participant Information Sheet

You are being invited to take part in a research study. Before you decide it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Please ask if there is anything that is not clear or if you would like more information. Take time to decide whether or not you wish to take part. Thank you for reading this.

Who will conduct the research?

Mohammad Aminuddin Abdullah
PhD Student
D6, Floor F, Pariser Building,
School of Mechanical, Aerospace and Civil Engineering,
The University of Manchester,
M60 1QD
Manchester

Title of the Research

The development of Mediation (ADR) in UK construction industry

What is the aim of the research?

The main aim of this study is to investigate the development of mediation (barriers to the adoption of mediation) in UK construction industry.

Why have I been chosen?

The parties are selected based on their capabilities of handling cases/projects and their experiences of dealing with disputes in the construction industry. There may be about 30 participants (depending on data concentration).

What would I be asked to do if I took part?

I would like to invite you to participate in an interview on the development of mediation (ADR) in UK construction industry. The interview will be audio recorded and will be transcribed word by word. The data will not be used for any purpose other than this study.

The interview will be conducted during the participant's free time. The study will be arranged thoughtfully to limit any disruption to the participants working activity. There will be no intrusive investigation as the study is not seeking any sensitive information.

What happens to the data collected?

All data will be treated confidentially and no participants will be identified in the data analysis or in the thesis, report, publication, presentation emanating from the study. Nobody except the researcher and the supervisor will be able to access the data without the researcher's permission and no individual name will be encoded on the data documents.

The data collected in the study will be stored in a locked filing cabinet in the researcher's office in the School of Mechanical, Aerospace and Civil Engineering (MACE), University of Manchester for the required 5 years after its conclusion. All data files on the researcher's computer will be password-protected. Names and ID coded data will be kept in separate locations.

How is confidentiality maintained?

All comments and responses will be treated confidentially and the participant's information will not be identified in the data analysis or in the thesis, reports, publications, or presentations emanating from the study. All the data from the interviews will be kept securely and can only be accessed by the researcher and the supervisors.

Assurance will be given to the participants regarding confidentiality and anonymity and participants particular contributors to the study are anonymous, and the pseudonyms all be used. Protocols relating to the private and confidentiality will be maintained throughout the study.

What happens if I do not want to take part or if I change my mind?

Your participation in this project is voluntary. You can withdraw from participation at any time during the project without comment or prejudice. If you withdraw your consent, your decision to participate will in no way impact upon your current or future relationship with The University of Manchester.

If you withdraw your consent after the data has been transcribed, it will be impossible to remove the data from the data set, as the information will be anonymised before the data is transcribed. However, your participation will be kept confidential. The protocols concerning confidentiality will be maintained throughout the study. The individual name will not be encoded on the data documents and will not be identified in the data analysis or in the thesis, report, publication and presentation emanating from the study.

Will I be paid for participating in the research?

The participants will not receive reimbursement of expenses or any other incentives or benefits for taking part in this research.

What is the duration of the research?

The interview will take around 60 – 90 minutes

Where will the research be conducted?

University of Manchester

Will the outcomes of the research be published?

The outcomes of the research will be use in written reports, publications and conference presentation. The participants will be assured that they will be able to view the findings of the research.

Contact for further information

Dr Peter Fenn
Senior Lecturer
B13, Pariser Building,
School of Mechanical, Aerospace and Civil Engineering,
The University of Manchester,
M60 1QD
Manchester

What if something goes wrong?

If there are any issues regarding this research that you would prefer not to discuss with members of the research team, please contact the research practice and Governance Co-ordinator by writing;

The Research Practice and Governance Co-ordinator,
Christie Building,
University of Manchester,
Oxford Road, Manchester,
M13 9PL

Email; Research-Governance@manchester.ac.uk
Tel: 01612757583 or 2758093

Appendix 05 - Research Interviewee Consent Form

Project Title: "The development of Mediation (ADR) in UK construction industry"

CONSENT FORM

If you are happy to participate please complete and sign the consent form below

**Please
Initial
Box**

1. I confirm that I have read the attached information sheet on the above project and have had the opportunity to consider the information and ask questions and had these answered satisfactorily.

2. I understand that my participation in the study is voluntary and that I am free to withdraw at any time without giving a reason.

3. I understand that the interviews will be audio-recorded.

4. I agree to the use of anonymous quotes.

I agree to take part in the above project

Name of participant

Date

Signature

Name of person taking consent

Date

Signature

Appendix 06 - Semi-structured Interview Question

Title: The development of mediation (ADR) in UK construction industry

1. Introduction

- a) Gender?
- b) How long have you been mediating construction dispute?
- c) What is your background?
- d) What are the reasons you became a mediator?

2. Mediation

- a) In your opinion, what is the most effective way of resolving construction dispute?
- b) What is your view about mediation and its processes?
- c) The UK has been experiencing a recession for the past few years. Have you noticed a change in construction dispute and what are the common causes of such dispute?
- d) As you said there is an/a (Refer Q.2c; increase / decrease/ fairly consistence) in construction dispute. Does that mean there is an/a (increase / decrease/ a change) in Mediation uptake?

3. Mediation

- a) Why do you think people choose mediation?
- b) In the instances where mediation is not effective, could you identify some reasons or causes?
 - i. (If timing of mediation is not mentioned) Is the timing to mediate a crucial factor?
- c) As you said something (ref 2.e). Why do some parties wish to resolve their dispute through binding process (such as arbitration or adjudication)?
- d) What are some common problems/difficulties you encountered in mediating construction disputes?

4. Mediators

- a) Is it necessary for a mediator to have a construction background or a legal background?

5. Barriers for mediation's development

- a) Can you identify based on your experience, some barriers in the development of mediation?
- b) In what ways do you think these barriers can be overcome?
- c) Can you comment on the perception among the legal advisors towards mediation?

6. **Closed ended questions.** In your experience have the following factors ever been a barrier in construction mediation? (Yes/No answer)

- i. Manipulation (outside influences, fear, intimidation)
Yes/No
- ii. Lack of trust
Yes/No
- iii. Lack of awareness
Yes/No
- iv. Lack of mediators experience
Yes/No
- v. Lack of available time
Yes/No
- vi. Parties Company/ corporate procedures.
Yes/No

7. Support from the legal system

a) The court has been giving a full support of mediation by encouraging parties to opt for mediation to settle any disputed issues. This is been strengthen by the introduction of Civil Procedure Rules (CPR) in 1999, that any party who refuse to mediate may face a heavy cost sanction.

i. To what extent will the legal system continue to encourage mediation?

ii. Are there ways the government can improve mediation processes?

8. The sceptical view of mediation after the introduction of CPR is that people may see mediation as a tactical approach for a high profile party to delay the case and cause prejudice for the other party to withdraw or settle the case. It sounded like a strategy in construction industry, based on your personal experience, can you comment on this?

9. Construction projects are usually bounded with a contract. Based on the contract, there is a stator right to go to adjudication or arbitration if any disputes arise before going to court. Is it appropriate to impose mandatory mediation in situation it applies to construction industry?

10. Concluding question

a) How do you foresee the future of mediation?

Appendix 07 - Semi-structured Interview Transcript (Sample)

Duration 25min

Title: The development of mediation (ADR) in UK construction industry

1. Introduction

a) Gender? **Male**

b) How long have you been mediating construction dispute?

10 years, on and off

c) What is your background?

Lawyer – Solicitor

d) What are the reasons you became a mediator?

Because I was a litigator; because I was increasingly frustrated... very frustrated for my client that litigation was two-dimensional. They don't get; they don't give enough involvement for the client and it was too expensive and there are better ways of resolving dispute.

2. Mediation

a) In your opinion, what is the most effective way of resolving construction dispute?

Mediation; after the parties have tried to solve about themselves. So first sort it out yourself; that is, through negotiation between the parties. Secondly, why mediation? Because everything else takes too long, too expensive and frustrating.

b) What is your view about mediation and its processes?

Very successful; I have mediated more dispute than almost everyone in the country and I have seen a greater success; more than 90%.

- c) The UK has been experiencing a recession for the past few years. Have you noticed a change in construction disputes and what are the common causes of such dispute?

NO

- d) As you said there is an/a (Refer Q.2c; increase / decrease/ fairly consistence) in construction dispute. Does that mean there is an/a (increase / decrease/ a change) in Mediation uptake?

I've seen a change in the kind of dispute, probably an increase in a number of disputes that are mediated...

I don't know whether that has to do with the recession or it might just have to do with the fact that more people know about mediation as they become aware of it; they will use it more, that's why I'm cautious in my respond.

3. Mediation

- a) Why do you think people choose mediation?

Because when they discover and understand what they can do for them, they realise that there is no negativities..

There is only positive that came out of mediation.

- b) In the instances where mediation is not effective, could you identify some reasons or causes?

(If timing of mediation is not mentioned) Is the timing to mediate a crucial factor?

Sometimes people don't want to settle; they are, they want to play with the food but they don't want to eat. Some people feel they can't because something happens and they need to get more information. There was a different reason. Just because mediation ended with the settlement on a day does not mean it is over. You can keep the mediation open and sometimes... I have been involved for some days or some weeks, trying to help.

- c) As you said something (ref 2.e). Why do some parties wish to resolve their dispute through binding process (such as arbitration or adjudication)?

Everyone has a choice what form of dispute resolution he or she will use. So some people like litigation, some people have a contract that says they have to go to arbitration or adjudication. There are a lot of different of influence and I think it is important to always have tool kits, which has different tools in the tool kits, and mediation is one of the tools for resolving dispute.

- d) What are some common problems/difficulties you encountered in mediating construction disputes?

Dealing with bad behaviour.

4. Mediators

- a) Is it necessary for a mediator to have a construction background or a legal background?

No. Neither. It is important for a mediator to have mediation skills; that's my believe...

Some people think you need to have construction background; I disagree. I think the people that participate in mediation; the parties and their lawyers are the experts on construction. They don't need a mediator who is an expert because they'll become like a judge or an arbitrator or adjudicator. What they want from the mediator is the mediation skills; how to find balance between everyone's view and find the resolution.

5. Barriers for mediation's development

- a) Can you identify based on your experience, some barriers in the development of mediation?

I think I must give you a general answer. Two barriers are; I can only think of the two barriers...

One is ignorant, people just don't know about mediation and how to use it and the other is usually lawyers who are more keen on running a case through conventional methods like litigation or arbitration and sometimes that is because they are worriers, they just want to fight, they don't want to lose the case and they can make money out of running

cases. The barriers; the general barrier is ignorance and not using the process effectively.

b) In what ways do you think these barriers can be overcome?

By means of education and dealing with bad behaviour.

c) Can you comment on the perception among the legal advisors towards mediation?

There are some lawyers, I think any lawyers know about mediation and they use it; it will generally had a good opinion. I also often meet lawyers who are using mediation for the first time. I took a phone call for a complicated and complex personal injury claim, but I could see from a question that was being asked that they don't really know about mediation.

They didn't know how to do it, they didn't know whether they would need one day or two days, they didn't know it would manage the difficult evidence, they didn't know how much paper to send me, they don't really know about the arrangement so I have to spend more time on the one than I should help them with all those questions and when they talk to other solicitors; where they told me who they were, I knew the other solicitor know about mediation and how to use it.

6. **Closed ended questions.** In your experience have the following factors ever been a barrier in construction mediation? (Yes/No answer)

- | | | |
|--|---|------------|
| I. Manipulation (outside influences, fear, intimidation) | - | No |
| II. Lack of trust | - | Yes |
| III. Lack of awareness | - | Yes |
| IV. Lack of mediators experience | - | No |
| V. Lack of available time | - | No |
| VI. Parties Company/ corporate procedures. | - | No |

7. Support from the legal system

a) The court has been giving a full support of mediation by encouraging parties to opt for mediation to settle any disputed issues. This is been strengthen by the introduction of Civil Procedure Rules (CPR) in 1999, that any party who refuse to mediate may face a heavy cost sanction.

I. To what extent will the legal system continue to encourage mediation?

I think to a great extend because the two reasons. First of all the legal system would like parties to use judges as a last resort. So you should try to sort things out yourself if you really can't then you use a judge, because you get judges for a very good value in this country. You know you paid maybe three separate fees and then you can have a high court judge for as long as you like and do not cost anything more.

The second reason is Judge know people get good result through mediation. So they want to encourage people to look up for mediation.

II. Are there ways the government can improve mediation processes?

Only through more and more awareness and more and more encouragement from the judges.

8. The sceptical view of mediation after the introduction of CPR is that people may see mediation as a tactical approach for a high profile party to delay the case and cause prejudice for the other party to withdraw or settle the case. It sounded like a strategy in construction industry, based on your personal experience, can you comment on this?

I think that it's probably rubbish. You know people couldn't; It is often quicker to go through mediation and get that organise; have a go trying to resolve; to go to litigation or arbitral process that's a lot longer. Mediation; I got called often saying, "are you free to do a mediation next week". It shows that people can arrange mediation at a short notice. So it does not have to be and should not be delaying tactic. It should be something, which is speeding up the process or getting the parties and their lawyers in a same space or same room.

Fishing exhibition?

Well, that's possible. I have done over 500 mediations and I would say I have experienced less than 10 times the fingers on my hand when I thought that somebody was there and did not want to settle but they just fishing exhibition or playing a game.

9. Construction projects are usually bounded with a contract. Based on the contract, there is a stator right to go to adjudication or arbitration if any disputes arise before going to court. Is it appropriate to impose mandatory mediation in situation it applies to construction industry?

I'm not a fan of mandatory mediation because you can make it mandatory, but you cannot guarantee success and you can say you must go and mediate. Then all right, you mediate but you don't want to settle if so and I try and I think that box and we moved on. It is important to have a culture of people wanting to try and resolve through mediation. Through this way better than being told by the judge you must go and do it.

10. Concluding question

- a) How do you foresee the future of mediation?

I think it will continue to grow..., it will continue to be successful, t relies on good mediators and it relies on parties wanting to use the process and to exploit all opportunities that it can offer