Guest editorial

This special edition of *International Journal of Law in the Built Environment* is both timely and apt, building upon the work already carried out by Agapiou and Clark (2015) in the Scottish context, and as a direct response to the expansion and development and expansion of court-shadowed/connected construction mediation provisions across a number of jurisdictions in addition to the growing body of research (Brooker and Wilkinson, 2010), which has examined the influences of the connection with formal civil justice systems, court-connected mediators' practices and that ways that key players approach mediation processes within a number of construction industry contexts.

A body of literature in the construction mediation field of course exists in many other jurisdictions, including England and Wales, Scotland, the USA, South Africa, Turkey and Australia. The bulk of research seeking to explore the views and experiences of key actors relative to mediation is also often concerned with the legal profession rather than clients or other players in the dispute resolution game. Nevertheless, recent surveys of Lawyers & their Clients in Scotland has confirmed mediation a suitable forum for such disputes; the opinion being it can be effective in all types of construction disputes irrespective of the relationships involved (Agapiou and Clark, 2015). To what extent do all Stakeholders within the Construction Sphere share this opinion? What are the drivers towards the adoption of mediation? What are the barriers to change within the Construction Context? The papers within the Special Edition endeavour among other things, to identify key policy issues relative to construction mediation's development, in addition to painting a picture of Construction Participants' current interaction with the process.

The first three papers within the Special Edition provide useful insights into the attitudes and experience of key players relative to mediation, encompassing lawyers, the mediators themselves, as well as industrial stakeholders. The fourth paper explores the notion of neutrality in the mediation process, juxtaposed against polarising and paradoxical opinions of the legitimacy of mediator intervention and party autonomy. The fifth, and our final, paper considers the current trends, in a quest to identify research gaps and future a research agenda, and to determine whether academic research is compatible and dealing with the challenges facing mediation development in the construction sphere.

In our first paper, Trushell *et al.* (2016) survey the attitudes and experiences of construction mediators in Scotland. Hitherto, much of the research in the Scottish context has focused almost exclusively on construction lawyers' interaction with mediation, while no single study has adequately captured the attitudes and experiences of mediators themselves, their predilection for the process, their views on its benefits and the optimal regulatory and statutory environment required for mediation's further promulgation as the most effective means of dispute resolution within the construction arena. The authors found that mediators believe that process is a successful dispute resolution process because it is quick, cheap, flexible, creative, confidential, non-confrontational and applicable to almost all disputes. The findings also revealed that a successful outcome depends on the skills of a good mediator, thorough preparation by all participants, the presence of key decision-makers, the parties' willingness to compromise and the mediator's judicious application of pressure to settle.

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The mediators surveyed also believe that clients' negative perceptions of mediation are a bigger barrier than lawyers' perceptions.

Interestingly, the findings of Gregory-Steven and Frame's research, in the second paper, lend credence to this thesis, albeit based on evidence from South of the Border. Based on case study, interview and survey analysis, our second paper identified a limited detailed awareness of mediation within the construction sphere due to a lack of detailed knowledge among contractors, sub-contracting firms and construction professionals, and a lack of emphasis from construction contracts. The study also revealed that that the low-up take of mediation within the construction arena is due to the strong support for adjudication, lack of trust that the other party will act faithfully and the dispute will be compromised, and misconceptions that mediation is inappropriate or is not capable of solving the dispute. The author highlighted the need for lawyers – as "Gate Keepers" – to engage with the move away from adjudication as the primary dispute method and encourage the use of mediation as the first step in the resolution of disputes.

The move towards mediation in England and Wales was as a direct result of Lord Woolf's recommendations to reform the legal system were implemented by the Civil Procedure Act 1997 and the Civil Procedure Rules 1999. The key overriding objective was set out in Rule 1.1 as "enabling the court to deal with cases justly". Parties are obliged to achieve this objective by clearly setting out the issues in dispute, identifying key documents, and, in particular, attempting to avoid litigation by settling the dispute. On the basis that mediation can apply to any dispute between parties and thus serves a wide ranging application, it has been necessary to adopt different styles or categories which treat the meditative process very differently. In this regard, there are four primary categories of mediation which offer distinctly different approaches to the mediation process and potential outcome for the parties: facilitative, evaluative, transformative and narrative. While it may be argued that all disputants are transformed to some extent in all mediations, it is the Facilitative Model that is by far the *modus operandi* within the construction context.

In our third paper, Wall *et al.* used a qualitative approach involving semi-structured interviews to establish whether the different attributes that a lawyer and construction specialist may use when performing their duties as a mediator, and (if any) their previous professional backgrounds had any influence on their behaviour as a mediator. The findings of the study confirmed that experiences acquired by individuals when working in different disciplines within the construction industry strongly influences the way they think and behave as mediators when mediating disputes. In terms of style, it seems that lawyer mediators favoured an evaluative style to increase the prospects of achieving a settlement in an attempt to reduce the risk of the dispute escalating into litigation, whereas non-lawyer mediators favoured a facilitative style and were of the opinion that the evaluative model should be avoided due to the risk of impinging on the parties' ability to self-determine their own dispute, which is the principle underpinning a successful settlement in mediation. There were also differences of opinion noted between the lawyer-mediators and non-lawyer-mediators in terms of ability and skill to manage conflict and to more effectively mediate construction disputes.

Whereas, lawyer-mediator claimed to be more adept at managing conflict, given greater levels of experience in working in adversarial environments, non-lawyer mediators reported that their commercial experience in the construction industry

facilitated the development of a deeper sense of empathy with parties, and a greater understanding of the development and fallout following a dispute.

In the fourth paper, Chalkley and Green explore the appropriate role and approach of mediators and investigates whether mediator neutrality and party autonomy should prevail over mediators' obligations to remain neutral where non-intervention would result in unfair settlements. The findings of this theoretical, meta-analysis indicate that mediator neutrality has no consistent or comprehensible meaning and is not capable of coherent application. It also seems, in the view of Shakley and Green, that the requirements for mediator neutrality can encourage covert influencing tactics by mediators which itself threatens party autonomy. The authors also conclude that mediator intervention ensures:

- ethical and moral implementation of justice;
- removal of epistemological implications of subjective fairness; and
- compensation for lack of pure procedural justice in the mediation process.

In addition, that party autonomy requires mediators to intervene ensuring:

- parties adequately informed of the law; and
- equal balance of power.

Our final paper, by Artan-Ilter *et al.*, provides a state of the art of research contributions in construction mediation field to establish whether existing scholarship is compatible with a future scenario envisioning a wider adoption and more systemized use of mediation in the construction arena, and to develop a research road-map based on key challenges facing mediation. Based upon a meta-classification framework analysis of research in the field, the study reveals that much of the construction mediation research in the past decade has focused on perceptions of professionals on mediation, the dynamics of the mediation process and mediator tactics. The paper highlights that while writings include important contributions regarding many aspects of construction mediation, the scholarship lacks a holistic agenda to overcome the key challenges to the widespread use of mediation in the construction sphere. The authors propose that academic community should re-focus and re-direct its efforts towards a research agenda that encompasses court-connected mediation, mediation in public projects, project mediation, documentation of case studies of mediation applications and use of IT in the mediation process.

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