

**Conference on Practical Approach to
Resolving Disputes in the Construction Industry - Mediation
By The Hon Mr Justice Fung
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I am honoured to be speaking to the construction industry about mediation. But seriously, I feel somewhat like a child telling the adults about the world, as apart from arbitration which had its origin in trade and diplomacy, much of alternative dispute resolution has evolved from the construction industry. You may be pleased to know that mediation which the construction industry has pioneered is now an integral part of our legal system. I shall also talk about some practical issues of mediation.

The construction industry is an important sector in the Hong Kong economy. Many projects are large in scale, complex in design and expansive in costs, susceptible to many variables such as human, weather, geographical and environmental factors, where disputes are bound to occur. The critical path of sequence of work dictates that disputes must be resolved early and quickly in order that completion is not delayed.

Litigation is *post factum* or even *post mortem*, laced with lengthy procedural steps and is not designed for the quick resolution of disputes. Above all, the process is stressful and the only predictable result is that it is costly.

Where cases are well borne out by the contemporaneous documents, the outcome may be straightforward and judgment can be entered summarily. But where there are conflicting oral testimonies, credibility must be tested by cross-examination in court. Judges usually direct juries in a criminal case: “some people look sincere and are convincing, but they may be lying; others may be

ineloquent and faulty in memory, but they may be telling the truth. You are there to decide who is telling the truth.” The process is much the same with a civil judge except he has to give reasons for his or her decision. You may be amazed to find out the surviving role of lies even in cases where there is video evidence, such as vehicle mounted cameras in road accidents or surveillance tapes of the personally injured. After all, a trial is not a scientific process, and that is why the outcome is sometimes unpredictable. And very often no one is completely satisfied at the end, especially when taxed costs are not recovered in full by the winning party. Further, there are substantial sunk costs to the system by wasteful attritions of the parties.

Hence, alternative dispute resolution such as mediation, expert evaluation, adjudication, med-arb, dispute resolution advisor (DRA) and dispute resolution board (DRB) have evolved to give expeditious resolution of construction disputes.

Mediation clauses were written in the contracts for the Airport Core Project and most of the disputes in the construction of the new airport were resolved by mediation. Mediation clauses have become standard terms in Government construction contracts. No doubt the value of the continuing relationship with the Government as employer is an important consideration.

International and local experience has shown that mediation is an effective and inexpensive means of dispute resolution. The statistics issued by the Works Bureau in 2002 showed that 45% of disputes in relation to the Airport Core Project were settled during or following mediation. Another 40% were settled by direct negotiation prior to mediation. In 2006, mediation was introduced in construction cases in the High Court.

Apart from construction cases, mediation has also been used in many other types of cases, and is now an integral part of the legal system in Hong Kong.

The first court annexed mediation scheme was introduced in the Family Court in 2000. It was a voluntary scheme but the take up rate was very high because the Judiciary had fully funded the costs.

The Judiciary set up the Mediation Coordinator's Office (MCO) which maintained a panel of mediators. The MCO conducted information sessions explaining to the parties the nature and effectiveness of mediation, and it also undertook to contact and involve the opposite party when approached by one party only. The pilot scheme on Family Mediation ran for 3 years. Settlement rate was 80%. It was assessed with the help of Hong Kong Polytechnic University, and the effectiveness and satisfaction was positively affirmed. The success of the scheme has grounded mediation firmly in the Hong Kong scene. Family mediation now continues as a user pays service.

In 2008, pilot schemes for mediation were introduced for company cases and also building management cases. The problems with management of multi-storey buildings such as water seepage or maintenance matters (e.g. giving access to tests and repairs) cannot be satisfactorily resolved except with the goodwill and cooperation of the neighbours. Mediation is conducive to preservation of relationship and is best suited to deal with such problems.

Some say our legal system, inherited from the English common law system, has the quality of a Rolls Royce service, but it may not meet the demand of the mass commuters.

In early 2000, a working party was set up to introduce reform in the civil procedures following the experience in other overseas jurisdictions such as New South Wales and England and Wales. The Civil Justice Reform (CJR)

culminated in the amendment of the High Court Rules and the District Court Rules in April 2009. The Rules stated the underlying objectives to increase the cost-effectiveness of the procedure and to ensure a case is dealt with as expeditiously as reasonably practicable, and also to facilitate the settlement of disputes. The Court has a duty to manage case, including setting a well planned and strict timetable, to encourage the parties to use alternative dispute resolution, and help them to settle the whole or part of the case.

Overseas experience has shown that even with the reform in civil procedures, the most effective way to saving costs is settling the whole or part of the case, so that the lengthy trial can be avoided or shortened.

Mediation was identified as the main form of alternative dispute resolution under CJR, and a new Practice Direction PD31 on Mediation was issued.

Legal aid was granted for mediation in legal proceedings. Unlike some overseas jurisdictions, Legal Aid was not cut upon implementation of CJR.

Under PD31, mediation is voluntary. Lawyers have the duty to explain what mediation is to their clients, and advise them to actively consider mediation. The Court cannot order any party to attempt mediation. But if any party refuses to attempt mediation as requested by the other, and has no reasonable explanation for it, he or she may face an adverse costs order.

Under the court rules, costs usually follow the event, i.e. the legal fees of the winning party are paid by the losing party. But the Court has a discretion to order otherwise, such as if the losing party makes an offer of settlement and the winning party refuses it but fails to beat it in the judgment. Likewise, unreasonable refusal to attempt mediation may attract an adverse costs order.

With the commencement of the Mediation Ordinance (Cap. 620) in January 2013, mediation has a proper statutory grounding in Hong Kong. Mediation

communication is confidential, and cannot be disclosed unless within the exceptions and with the leave of the Court.

The mindset of mediation is completely different from litigation: it is not about winning or losing, but finding a practical way to end the dispute, each with some give and take, in order to arrive at a result acceptable to all. Acrimonious words are spared and future relationship can be maintained.

The timing of mediation is also an important consideration. In money cases, the parties may seek to settle early in order to save the hassles of litigation. In the construction industry, there have been problems that the disputes surface too late, and in Hong Kong, DRA system has been developed for early detection and resolution of the disputes. I understand that an expert in the field will be speaking to you on the subject.

In other cases, experience has shown that rushing into mediation before more is found out may be detrimental to the resolution. There is no hard and fast rule. Hence, the Court will always try to find out whether the case or the parties are ready for mediation before it is attempted.

Preparation for mediation is essential. Each party should have an honest appraisal of their positions, and to ensure that the claims are not exaggerated or undervalued. Mediation often started with the joint sessions only after short telephone conversations with the mediators. In complicated cases, pre-meetings with the mediator especially beforehand are helpful in defining the issues and understanding the dynamics of the parties. The parties should enter mediation with the authority to enter into settlement.

Non-settlement at the mediation should not be viewed as end of the matter. Often, issues are narrowed and the length of the trial will be shortened. Parties have better appraisal of the respective positions and may adjust the sectioned

payment (i.e. offer for settlement backed by payment into Court). Court statistics show that about 1/3 more cases were settled within 6 months of the mediation. Sometimes a second attempt at mediation may still bring about success. Many conscientious mediators often do follow that up, and may offer capped fees to keep in the budget.

As a human process, the mediator's skill is the software to complement the hardware of the law and practice directions. The mediator is in a unique position of receiving confidential information from opposite parties. Many studies have confirmed that the mediator's personal attributes (such as communication skills and empathy for settling the disputes) are more important than his professional qualifications. Trust between the mediator and each party is essential. He must be impartial and be so perceived by the parties, especially when they are unrepresented. Once a party feels being rushed into something not completely comfortable with, that is detrimental to the rapport and trust. This is why I personally regard med-arb as adjudication with negotiations rather than mediation.

An experienced mediator can make a party face the reality, and may be more effective than negotiations by the parties themselves or by the solicitors whose duty is only to their clients.

After all, construction is a business, and business decisions must be made with the cost-benefit and proportionality analysis in order to be sustainable. Dispute resolution can be viewed as a project in itself, requiring the engagement of resources and manpower, and the earlier the settlement the better. Mediation costs are minimal when compared with litigation and arbitration. The correct choice is quite obvious.

In August 2012, Hong Kong Mediation Accreditation Association Limited (“HKMAAL”) was set up as the premier mediation accreditation body, responsible for setting the standards for training and accreditation of mediators in Hong Kong, and for handling complaints against its members. Its corporate members are the former major mediation accreditation bodies including the Hong Kong Institute of Architects, Hong Kong Institution of Engineers and Hong Kong Institute of Surveyors. Individual membership currently comprises nearly 2,000 of about 2,200 mediators in Hong Kong. HKMAAL’s mission is to progress towards a single mediation accreditation body in Hong Kong with standards comparable internationally.

With the further development and maturing of the mediation profession in Hong Kong, and public education as to the effectiveness in mediation, I am confident that mediation will have a bright future, in the construction industry and beyond.