THE VOLUNTARINESS OF DISPUTANTS IN CONSTRUCTION MEDIATION

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Mediation has been promoted to resolve construction disputes due to much-heralded time and cost advantages. Formal introduction was affected in early 20’s after several successful pro bono mediation pilots. In Hong Kong, immense promotional efforts have been directed to make mediation the mainstream mechanism for alternative dispute resolution. Despite promotional efforts, a disheartening decline in use of mediation was noted after an initial surge. For wider adoption, there has been an ongoing debate on before disputing parties resorting other forms of dispute resolution, whether courts should compel them to attempt mediation. This study examines pillars of successful mediation and seeks to reveal the root causes of Hong Kong’s sluggish uptake of construction. Review of literature informed key mediation attributes and manifestations of voluntariness in construction dispute mediation. Scale rating by construction professionals was employed to establish mediation attribute importance ranking as well as representativeness of manifestation of voluntary participation. "The exchange of critical information is effective" and "The disputant considers the mediator trustworthy" were ranked as the two most important mediation attributes, suggesting the importance of having a conducive environment for genuine communication. It is therefore proposed that voluntary participation is a necessary condition to create a collegial atmosphere. “Working cooperatively with the mediator” and “Preparing settlement options before attending the mediation” were the top two ranked manifestations of voluntary participation. Most research on mediation mainly focus on the advantages of mediation. Findings of this study raise the caveat when disputants are asked to attempt mediation that erodes voluntary participation.

Keywords: Construction management, Voluntary mediation, Alternative dispute resolution, Conflict.

1 INTRODUCTION
Before the release of the 2005 Standard Form of Building Contract (SFBC), arbitration was the sole contractual dispute resolution method. Mediation was introduced in the 2005 SFBC, which is the most used building contract for private developments. It was expected that the majority of disputes could be settled through mediation, given its time and cost advantages. However, the statistics of mediation cases in Hong Kong do not suggest an encouraging tendency. On the mediation reports submitted with the Court of First Instance, the settlement rate has stabilized at around 47% from 2011 to 2020, yet the number of mediation cases fluctuated during these ten years and underwent a notable decline after 2019 (The Hong Kong Judiciary 2020). One possible reason for stagnant use may be relayed to the underlying assumption of mediation. More specifically, construction contracting parties are typically not on equal ground, whereas voluntary participation is the key characteristic of mediation. The situation becomes more acute when parties are
contractually bound to mediate, or court-annexed mediation is adopted (Hilmer 2013, Leung 2014, Cheung 2016, Meggitt 2018). The aim of the research is to discover if voluntariness is one of the prerequisites of mediation success and to explore the voluntariness structure from the perspective of disputants.

2 VOLUNTARY MEDIATION OF CONSTRUCTION DISPUTES

Mediation is a form of assisted negotiation (Cheung 2016). In Hong Kong, it is often regarded that imposing an involuntary process on a party would primarily detract from the spirit of mediation. This section discusses the current forms of mediation used in the construction industry of Hong Kong. An overview of the elements of voluntary participation is summarized.

2.1 The HKIAC Mediation Rule

The Hong Kong International Arbitration Centre (HKIAC) is Hong Kong's premier provider of dispute resolution services which has arranged a series of dispute resolution activities. In practice, the HKIAC's rules are the most commonly used in Hong Kong's dispute resolution forums. Failure to respond to a mediation request within 14 days is considered a refusal to mediate, according to the HKIAC mediation rule. As a result, mediation can only take place if all parties agree to participate. Thus, the design of mediation is based on voluntary participation (Katz 1993).

Many time delays may be avoided if disputants voluntarily engaged. There would then be no issue of being forced to mediate, and parties would be much more willing to contribute meaningfully, especially if good faith behavior was expected. Furthermore, in voluntary mediation, the parties are free to exit at any time.

2.2 Contractual Use of Mediation

It is now almost a standard dispute resolution process design to include mediation as an intermediate step between the contract administrator's decision and arbitration in construction contracts. Mediation as an intermediate step between the decision of contract administrator and arbitration in construction contracts is now almost included in every standard dispute resolution procedure design. According to 2005 SFBC, when a dispute emerges, it must be notified to the appointed contract administrator, who will settle it. If either party is dissatisfied with the decision, they have 28 days to refer the case to mediation. For public works projects in Hong Kong, the New Engineering Contract (NEC) has been used more regularly in recent years. The 2017 NEC4 Dispute Resolution Service Contract (DRSC) provides three dispute resolution options (W1, W2, and W3), as well as Z-clauses that give bespoke additional contract terms, to accommodate specific local dispute resolution requirements. W1 and W2 of the NEC4 use adjudication as the primary form of dispute resolution, W3 uses dispute avoidance, and mediation can be added to the Z-clauses as a means of resolving construction dispute. Because voluntary participation is maintained, this contractual use of mediation differs from compelled usage. Moreover, the validity of mediation clause remains critical. In essence, alternative dispute resolution clause in general should be specific enough with objective criteria so that compliance or otherwise can be assessed. For example, the model and rules to be applied should be specified in a mediation clause. Furthermore, to design an enforceable mediation clause for construction contracts, a precise time range for its implementation, the nominating body, and the bare minimum of involvement are necessary components.
2.3 Court Encouraged Mediation

Construction disputes that reach the Hong Kong High Court are encouraged to explore mediation before resorting to court litigation, refer to Hong Kong High Court Practice Direction 6.1. The Respondent must respond to the Applicant in writing within 14 days of receiving the Mediation Notice. Despite the fact that he has the legal authority to decline to mediate, he also needs to justify why mediation is not suitable for the dispute. The way to encourage an attempt at mediation is the imposition of cost sanctions when a party refuses to attempt for no reason. Conversely, when a party (1) has participated in mediation to the minimum standard of expected participation consented prior by parties or as assessed by the court, or (2) has a reasonable reason for nonparticipation, he shall not be subjected to any adverse costs order. Therefore, if the afore-mentioned rules are followed, the parties can still claim that they have some autonomy in choosing whether or not to mediate. Regardless PD 6.1 went into effect in 2009, the number of construction dispute mediation referrals has not grown much, as reported in Section 2.2. This could be explained by parties having the final say to conduct mediation. Mediation has largely retained its voluntary nature.

2.4 Court-annexed Mediation

The question of whether courts should force disputing parties to undertake mediation is still being debated (Hilmer 2013, Leung 2014, Cheung 2016, Meggitt 2018). In Australia, Canada and Singapore, courts are connected to mediation programs, several jurisdictions are keen to adopt compulsory ADR. The most direct approach to compel a mediation attempt is through court-annexed mediation. However, abusive use of imposition is possible. In this respect, the Working Party of the Hong Kong Civil Justice Reform (CJR) suggested court-annexed mediation in its interim report in 2000, but the concept was ultimately rejected in the 2004 Final Report. As a result, court-annexed mediation was not implemented (Hilmer 2013, Cheung 2016, Meggitt 2018). Regardless of the nature of the dispute, statutory use means that it will be automatically referred to mediation. The notable unwarranted consequence is that parties may only take the mediation outwardly (Leung 2014). Parties that are compelled to mediate may not participate in good faith, resulting in additional expenditures and undermining confidentiality when the dispute is finally tried litigation (Meggitt 2018). The voluntariness of mediation is compromised by court-annexed mediation. Compelling disputants to participate would exacerbate the situation and make mediation less likely to succeed (Cheung 2016). It has also been suggested that while the rule of law and justice are important, commercial utility takes precedence (Hilmer 2013).

3 THE PILLARS OF SUCCESSFUL MEDIATION

Despite an initial boost in mediation use after the Civil Justice Reform Act went into force, in 2009 in Hong Kong, a declining trend is observed. Examining the intention to mediate may reveal the underlying causes for construction mediation's low adoption. The removal of the pillars would likely lower the interest in mediation. Furthermore, this study investigates the role of voluntary participation in facilitating mediation settlement. Some academics also concluded that voluntary participation is an element of the "magic of mediation" which contributes to higher satisfaction, settlement rates, and adherence to settlement agreements (Shack 2003, Wissler 2004). Meanwhile, if reluctant parties are forced to participate in mediation, the expected consequence is making the mediation perfunctory (Smith 1998).

The study's target respondents are Hong Kong construction professionals with experience in construction dispute mediation. In total, received 212 valid responses after deleted samples below five years of construction industry working experience and 53.55% of the respondents had worked in the construction industry for more than 20 years.
The relative importance rankings of the successful mediation prerequisites in construction dispute mediation are developed from of the preceding deliberations and empirical data analysis shown in Table 1. The mean score is the calculated average value of responses for each manifestation. The higher the mean score, the more critical the prerequisite is in deriving successful mediation. At the same time, the standard deviation of each item is lower than the average score, indicating a low degree of dispersion. Relative rankings were shown in the descending order of mean scores in Table 1. The items “The exchange of critical information is effective”, “The disputant considers the mediator trustworthy”, and “The disputant has agreed to mediate in the main contract” are the top three ranked. This can be viewed as having the highest potency in measuring prerequisites of successful mediation. In addition, the standard deviation of each item is lower than the average score, indicating a low degree of dispersion.

Table 1. The Descriptive Analysis of prerequisites of successful mediation.

<table>
<thead>
<tr>
<th>Items</th>
<th>Mean</th>
<th>SD</th>
<th>Ranking</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The exchange of critical information is effective.</td>
<td>5.14</td>
<td>1.44</td>
<td>1</td>
</tr>
<tr>
<td>2. The disputant considers the mediator trustworthy.</td>
<td>5.00</td>
<td>1.34</td>
<td>2</td>
</tr>
<tr>
<td>3. The disputant has agreed to mediate in the main contract.</td>
<td>4.94</td>
<td>1.24</td>
<td>3</td>
</tr>
<tr>
<td>4. The mediation is administered by a reputable dispute resolution.</td>
<td>4.87</td>
<td>1.30</td>
<td>4</td>
</tr>
<tr>
<td>5. The representative of the disputant has sufficient authority to settle the dispute.</td>
<td>4.86</td>
<td>1.52</td>
<td>5</td>
</tr>
<tr>
<td>6. The disputant is willing to sign a memorandum of settlement at the final meeting of the mediation.</td>
<td>4.85</td>
<td>1.40</td>
<td>6</td>
</tr>
<tr>
<td>7. The disputant fully understands the mediation process.</td>
<td>4.53</td>
<td>1.26</td>
<td>7</td>
</tr>
<tr>
<td>8. The disputant can evaluate the strengths and weaknesses of the different mechanisms of dispute resolution.</td>
<td>4.42</td>
<td>1.42</td>
<td>8</td>
</tr>
<tr>
<td>9. The dispute to be mediated does not involve multiple interlinked issues.</td>
<td>4.19</td>
<td>1.48</td>
<td>9</td>
</tr>
<tr>
<td>10. The disputant is not emphasizing winning the case.</td>
<td>4.18</td>
<td>1.60</td>
<td>10</td>
</tr>
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</table>

4 VOLUNTARINESS FOR CONSTRUCTION MEDIATION

Voluntary mediation means parties choose to participate at their own will and can freely make decisions. Participation should not be forced, and settlement is not influenced by either an internal or external party to the dispute (Moore 2014). The importance of voluntary participation and agreement to mediate is demonstrated by the prominence of self-determination in many mediation standards (Hedeen 2005).

Nevertheless, a consensus among mediators remains elusive. Welsh (2001) observed that many speak of "self-determination" have varied interpretations of the concept. From Bell's "dialogue of solidarities" perspective for studying voluntary participation, it is necessary to recognize that individuals are entangled in tying with interest, sentimental fondness, and normative commitment (Petritzka and Bell 2000).

Three innate demands are identified by self-determination theory (SDT): competence, relatedness, and autonomy, which could help identify voluntary participation in construction dispute mediation (Ryan and Deci 2000). Competence refers to the capabilities to understand possible results and effectiveness for the decision (Harter 1978). Relatedness is based on the instinct to interact with others, considering whether the decision would give rise to the opportunity to interact with others (Baumeister and Leary 1995). Autonomy refers to whether the motivation is from the heart and whether the behavior is self-decision and not influenced by others (Deci and Vansteenkiste 2004). Apart from Self-determination theory, planned behavior theory, social exchange theory could also be used to research mediation participation willingness (Ntayi et al. 2010, Al-Swidí et al. 2014, Wu et al. 2014).

The literature on voluntary negotiation is growing, but there has yet to be a definition of voluntariness that encapsulates the central idea of participation at one's own will in construction.
dispute mediation. The state of research on voluntary negotiation is expanding, yet there has been not a definition of voluntariness that encapsulates the core concept of voluntary participation in construction dispute mediation. Voluntariness is a multidimensional concept that spans multiple domains. Voluntariness measurement statements were developed based on the literature review. With the evaluations provided by the respondents, their relative importance rankings were calculated and presented in descending order in Table 2. The higher the ranking, the more representative is the item in manifesting voluntary participation. Besides, the standard deviation of each item is lower than the average score, indicating a low degree of dispersion.

Table 2. Manifestations of voluntariness in Construction Dispute Mediation.

<table>
<thead>
<tr>
<th>Items</th>
<th>Mean</th>
<th>SD</th>
<th>Ranking</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Working cooperatively with the mediator.</td>
<td>5.23</td>
<td>1.17</td>
<td>1</td>
</tr>
<tr>
<td>2. Preparing settlement options before attending the mediation.</td>
<td>5.07</td>
<td>1.35</td>
<td>2</td>
</tr>
<tr>
<td>3. Revealing one’s real concern.</td>
<td>5.03</td>
<td>1.28</td>
<td>3</td>
</tr>
<tr>
<td>4. Conforming strictly with the rules of mediation.</td>
<td>5.01</td>
<td>1.24</td>
<td>4</td>
</tr>
<tr>
<td>5. Empowering a representative to sign settlement agreements on the spot.</td>
<td>4.95</td>
<td>1.48</td>
<td>5</td>
</tr>
<tr>
<td>6. Showing respect to the positions of the counterpart.</td>
<td>4.88</td>
<td>1.40</td>
<td>6</td>
</tr>
<tr>
<td>7. Responding positively to proposals from the counterpart.</td>
<td>4.81</td>
<td>1.33</td>
<td>7</td>
</tr>
<tr>
<td>8. Initiating the use of mediation to resolve the dispute.</td>
<td>4.77</td>
<td>1.21</td>
<td>8</td>
</tr>
</tbody>
</table>

5 DISCUSSION

This study demonstrates that the exchange of critical information is effective; the disputant considers the mediator trustworthy; and the disputant has agreed to mediate in the main contract, the top three likely to lead to successful mediation. Reflecting the voluntariness is an essential element of construction mediation in another light. With reference to Table 1, the top-ranked items have elements of voluntary participation. The top-ranked is about effective communication that is not possible with compulsory participation. The third-ranked item is about an agreement to mediate has been stipulated in the main contract. The second and fourth-ranked items are related to the credibility of the mediator and administrative unit. It is imperative for disputants to have faith in the mediator and the system that the principle of voluntary participation will be strictly followed. In general, it can be said that voluntary participation is an essential prerequisite of successful mediation.

The next part of the study is about the ways participants are exhibiting their voluntariness to mediate. There are four items (out of eight) having a mean score above five (on a scale of 1 to 7). Quite related to the findings as mentioned above on prerequisites, item 3, “revealing one’s real concern” is linked to effective communication. Item 1, “working cooperatively with the mediator” and item 4, “conforming strictly with the rules of mediation” are linked to trust in the mediator and the system. This can be explained that if a disputant is voluntarily participating in a mediation, they will trust the mediator and abide by the mediation rule. The second-ranked item “preparing settlement option before attending the mediation” is quite understandable as it is hard to expect an unwilling participant will spend time to prepare for the mediation.

The study's findings highlight the significance of having respected and trustworthy mediation services in engendering voluntary participation.

6 CONCLUSION

Contractual use is the typical way to incorporate mediation in dispute resolution clauses. In essence, voluntary participation is believed to be the divine concept of mediation proceedings. To this end, the court-encouraged or court-annexed approach has not been widely adopted because
voluntary participation would be undermined. This study has accomplished two objectives. First, whether voluntary participation is among the key success pillars of mediation is tested. The responses from construction professionals in Hong Kong confirmed so. Second, the manifestations of voluntary participation were evaluated. It was also found that bringing settlement options and cooperating with the mediator are reliable indications of willing disputants. This study is a timely reminder of the design principle of the mediation process. While certain incentivization is needed to promote attempt of mediation, special care should be exercised not to depart from the principle of voluntary participation. This study also laid the foundation for further study if voluntary participation can be expected.

References


