

The Common Problems and Suggested Solutions of Mediation in the Construction Industry in Hong Kong

Hon Chi Yi, Ludwig FHKIS,
 FRICS, AAIQS, RPS(QS),
 MCI Arb. AHKI Arb, Accredited
 Mediator (HKIAC)¹

Abstract

Mediation is one of the most common means to resolve disputes in the Hong Kong Construction Industry. However, every means has its advantages and problems. There are commonly around 50 problems as found in the text books, journals and through advice by the experienced mediators. Among them, some experienced and practiced mediators selected seven most common problems and surely these problems have their respective suggestion solutions, either in prevention or in dealing with them.

Keywords

Mediation, mediator, positions, interests, prepare to agree, trust, creativity, emotions

Introduction

Mediation is one of the common techniques for resolving disputes arisen in Hong Kong's construction industry. There is a provision within the contract signed between parties in Hong Kong that governs the means of resolving disputes. Under clause 35 - Arbitration, of the commonly adopted Conditions of Contract currently used in Hong Kong², it stipulates that, *"Provided that always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Main Contractor,such dispute or difference shall be and is hereby referred to the arbitration."* Compulsory arbitration for any dispute was the case under the contract if the contract was signed adopting the Standard Form of Building Contract 1999 (SFBC 1999), which is the current case.

However, an updated Conditions of Contract was recently launched in Hong Kong in mid 2005 (SFBC 2005), which tentatively supersedes the SFBC 1999. Under clause 41 - Settlement of disputes³, it stipulates that, *"...If the dispute is not resolved by the Designated Representatives within 28 days of the dispute being referred to them by the Architect,either party may give a notice to the other party, by special delivery, to refer the dispute to mediation....."* Hence, under the new standard form of building contract, negotiation, by the Designated Representatives, is the first resort of resolving disputes. If the disputes cannot be resolved within 28 days of the dispute being referred to the parties by the Architect, mediation becomes the compulsory means for dispute resolution.

In short, negotiation and mediation comes before arbitration, under the updated SFBC 2005 contract, for resolving any disputes that may arise. As a result, we can foresee, with the adoption of the SFBC 2005, more disputes are likely to be resolved by mediation in Hong Kong's construction industry in the near future.

Good outlook of the construction industry indicates that massive and large scale projects, as well as large amounts of medium and small scales projects have been commencing and are anticipated to be launched in Hong Kong for the next decade. The more projects are launched, the more likely mediation will be adopted in resolving disputes. As a result, it is of high possibility that mediation shall be frequently adopted in Hong Kong's construction industry in the future. Hence, it is worthwhile to have a close look at it so as to explore the common problems and proposed solutions of mediation.

In this paper, the author is trying to investigate the most common problems of mediation in Hong Kong's construction industry and then suggests solutions to these problems, firstly by referring to literatures and then by questionnaires, telephone and in person interviews.

Common Problems Of Mediation In Hong Kong's Construction Industry

Some of the common problems of mediation in Hong Kong's construction industry are highlighted below:

Focus On

- (i) Known facts only and ignoring the unknown facts⁴:
- (ii) Positions but not interests⁵
- (iii) Past but not future⁶
- (iv) Wrongly discussed issues⁷
- (v) Fact orientated⁸

In Hong Kong's construction industry, parties shall not, thus, focus on who is contractually correct or wrong (positions) but shall focus on the remedies - usually monetary remedies (interests).

In construction industry, whether it is a design fault (fact) of a pile by the engineer may lead to huge consequences, however, adopting other justified extension of time reason in the Conditions, e.g. force majeure⁹ (act of God), may

work better to resolve the disputes.¹⁰

Mediation as a Start

- (i) Mediator has not enough preparation¹¹
- (ii) Wrong parties present / Too many or too few participants¹²
- (iii) Wrong location of meeting
- (iv) Without a framework for the mediation
- (v) No trust
- (vi) Involuntary participation

In Hong Kong's construction industry, especially in the public sector, the attendees for the mediation, on behalf of the Hong Kong Special Administrative Region, are usually just employees, like an architect or a quantity surveyor. They are neither the decision makers nor people voluntarily participating in the mediation.

- (vii) Too formal in the process

The Parties

- (i) Talk too much / too less
- (ii) Unrealistic optimistic¹³

Some of the construction disputes in Hong Kong may not be suitable to resolve easily through mediation and may be more appropriate to use other dispute resolution means, e.g. arbitration.

- (iii) Attacks, destructive, accusation

Mediator's Acts

- (i) No trust and confidence in mediator¹⁴
- (ii) Mediators act as observer
- (iii) Cannot promote constructive communication¹⁵
- (iv) Cannot facilitate negotiation and problem solving¹⁶
The parties may adopt different approaches to negotiation, and in all cases mediators can contribute towards making it more constructive and efficient.¹⁷
- (v) Being too directive¹⁸
- (vi) Too narrow minded¹⁹
Too narrow minded mediators prevent the generation of creative options and lateral thinking²⁰ among the parties.
- (vii) Ineffective listening²¹
Effective listening involves more than hearing spoken words: it involves properly understanding the meaning of the messages.²²
- (viii) Too many / less joint meeting / caucus
- (ix) Not aware of body language²³
Body language refers to all aspects of bodily appearance and movement which convey messages to observers.²⁴

- (x) Not neutral / Impartial²⁵
- (xi) Slow drafting of the settlement²⁶
- (xii) Enforceability of the settlement agreement
- (xiii) Not dealing with emotions

Mediation allows emotions to be expressed, acknowledged and validated.²⁷

- (xiv) No patience
In some mediation cases, they take a considerable period of time before settlement and it is quite common in construction disputes in Hong Kong. Parties may become discouraged and disappointed²⁸ if the mediator cannot show patience to the parties.
- (xv) Losing control of the process
- (xvi) Moving too quickly into solutions²⁹
- (xvii) Invent the solutions

The parties may not wholeheartedly implement the settlement so that the settlement shall not be a long-lasting one as they have not participated in the shaping of the solutions³⁰.

- (xviii) Conflicts of interests
- (xix) Threat / Putting pressure to discuss / settle

Some believe that mediators are in a unique position to impose pressure on the parties with the object of pushing them into a settlement.³¹ While the others consider mediators should not take ultimatums or lockout threats too seriously especially in the early stages of the negotiations.³² Under some circumstances, pressure from the mediator may initiate induction of mediator's own interests in a settlement.³³ There are also concerns that mediator's pressure may affect the disputants' long-term relationships, that it may affect the future acceptability of that mediator.³⁴ This may also jeopardize the reputation of the mediator.

- (xx) Failing to recognize futility³⁵
Some disputes are so complex and inappropriate, like contractual issues under the contracts of Hong Kong's construction industry, which mediation may not be the best means to resolve.
- (xxi) Lack of efficient communication skills³⁶

Suggested Solutions To The Common Problems

Every problem has solution. The following are some suggested solutions to the common problems as highlighted.

Focus On

- (i) Unknown facts, as well as known facts
Kagel and Kelly³⁷ claimed that identifying the heart of the

matter (i.e. the unknown facts) will lead to discussion of a specific past event. This can be reached by having full and appropriate discussion and communications of the facts and issues of disputes so as to define the unknown facts, for detail dialogue.

(ii) Interests but not positions

Mediator should lead the parties to focus on interests, i.e. the respective needs, concerns, desires and priorities at the underlying of the parties' hearts so that win/win solutions can optimistically be reached. In general, in the disputes of Hong Kong's construction industry, monetary remedies (interests) are one of the main desires that the parties should focus on but not who is contractually right or wrong (position).

(iii) Future but not past

Boulle and Nestic³⁸ claimed that there is no limitation on future matters which the parties can refer to and agree on. In Hong Kong's construction industry, most of the reasons for disputes are breach of contract. Through mediation, the mediator should let the parties focus on the present and the future - the remedies, though experiencing breach of contract in the past. In this way, it allows the parties to re-negotiate the whole agreement, irrespective of how the dispute over the breach is solved, or even whether or not it is resolved.³⁹

(iv) Correct discussed issues

Issues raised by the parties during the joint meeting and caucus are also significant and shall filter so as to form the backbones - the correct discussed issues - to discuss.

(v) Solutions orientated

Let the parties focus on the solution (solution orientated) by encouraging them to brainstorm and attempting to find options to resolve the dispute, in lieu of looking at the facts (fact orientated). For instance, for the construction industry in Hong Kong, there are many clauses under the conditions of contract. For monetary claims, not one of them is relating to monetary compensation and appropriate choice of clause is one of the solution orientated means, irrespective of what the real "fact" lies beneath.

Mediation as a Start

(i) Mediator's well prepared

For preparation, the mediator should communicate with the parties before the real process, in gathering useful information. He should also prepare for the process, including reading through all the relevant information regarding the disputes submitted and expressed by the parties. Further, he should plan the process of mediation in a reasonable flow, so as to let the parties communicate without hindrance. Some written notes, agenda, timetable may assist the mediator in reminding himself the process in

case of lose track.

(ii) Parties presence

Appropriate and optimum number of parties shall be invited to attend the mediation. In construction industry disputes, generally the directors, general or project managers, quantity surveyors, etc. of the company, assisted by the legal advisor may be the common optimum presence parties.

As suggested by Newton and Ho⁴⁰, mediator may ask some useful questions before the mediation to assist the selection of appropriate parties, like "who will be attending and in what capacity?", "do you have authority to settle the dispute?"

(iii) Location of meeting

A comfortable, quiet and suitably decorated location of meeting should be selected for mediation. Enough rooms for joint meetings and caucuses are also important.

In Hong Kong, there are many high-quality venues for rent at reasonable prices, e.g. the Hong Kong International Arbitration Centre.

(iv) A framework for the mediation

There are many suggested steps, which can form the framework for parties' effective communication.

Procedures suggested by Newton and Ho⁴¹ are as follows:

(a) Introductory phase

- Opening statement; and
- Formulation of ground rules.

(b) Understanding phase

- Opening presentation by the parties;
- Summarizing by the mediator;
- Questions by the mediator;
- Identifying common interests / grounds;
- Identifying needs and objectives; and
- Caucus and joint meetings.

(c) Negotiation phase

- Identify and explore options;
- Creative problem solving;
- Transfer identifying needs into options; and
- Raising doubts.

(d) Agreement phase

- Summarize terms of the offers;
- Writing the agreement; and
- Signed the Agreement.

(v) Trust building

Newton and Ho⁴² has suggested a series of means for trust building as follows:

- (a) Use of the listening skills;
 - (b) Keep to your commitments;
 - (c) Meet the parties separately before the mediation;
 - (d) Deal with emotional and intangible issues as relevant;
 - (e) Use caucus appropriately;
 - (f) Remain neutral;
 - (g) Promise and keep confidentiality in caucus;
 - (h) Do not be judgmental or impose your own values;
 - (i) Be compassionate towards the parties and their problems;
 - (j) Focus on the parties' needs and objectives; and
 - (k) Ask a party questions about what interests them (family, work, hobbies, sport).
- (vi) Voluntary participation
Before the commencement of the mediation, the mediator should make sure the parties present are all voluntary. Under the latest conditions of contract⁴³, the parties should go for negotiation and then mediation for resolving the disputes and both parties must be aware of this obligation when signing the contract. This may assist in the ascertaining voluntary will of the parties.
- (vii) Flexibility in the process
The mediator may be suitably flexible in the process so as to maintain a smooth flow.

The Parties

- (i) Effective communications
Let one party talk first, keeping the approximate time this party spends and allows the other party to have the similar length of time later. No interruption is allowed when the other party is talking can also help.
- (ii) Realistic optimistic⁴⁴
After he has heard a full explanation of the disputing issues from the parties, he may stress a point of stating, in everyone's presence, that he had seen such similar disputes resolved on many prior occasions. For example, he can cite 70% to 80% of disputes which resort to mediation are settled in Hong Kong's construction industry in the past years⁴⁵.
- (iii) Minimize attacks, destructive, accusation
Mediator can try to ask questions, like "what would you feel if the other party said this similar statement to you?" Trying to let the party put on the other party's shoes may be useful for minimizing the attacks, etc.

Mediator's Acts

A mediator should be properly trained so as to perform

successfully. The following are some of the main criteria:

- (i) Trust and Confidence in Mediator
Boulle and Nestic⁴⁶ claimed that surveys of practicing mediators have found that they regard the building of this trust relationship as their most important task. They have suggested the following ways to build up the trust, through:
 - (a) showing concern and respect;
 - (b) affirming the mediator's experience and credentials;
 - (c) explaining and validating the mediation process;
 - (d) good listening skills and understanding of the parties;
 - (e) sound interpersonal skills, impartiality and even-handed conduct of the process; and
 - (f) empathy and bonding during the separate meetings.
 This may supplement what we have discussed under Para. 3.2(v) above.
- (ii) Mediator participates
The mediator can participate actively in the mediation process by asking sensible questions, showing compliment to the parties, valuing the parties, thanks the parties, acknowledging their feelings, reframing the negative languages⁴⁷, summarizing what the parties said, encouraging fruitful communications, etc.
- (iii) Promoting constructive communication⁴⁸
Mediators intervene directly in the face of poor communication exchanges between themselves. Further, mediators can, in the caucus, advise and coach the parties on effective communication techniques.
- (iv) Facilitate negotiation and problem solving⁴⁹
Mediators need to guide the parties and their legal advisors in the techniques of negotiation, and may need to point out counterproductive behaviour or proposals.⁵⁰ They may also require diverting the parties to problem solving direction but not positional claims.
- (v) Not too Directive
Mediators should recognize the underlying premises that mediation allows for party self-determination on matters of content.⁵¹ Thus, they should better, but at all time under their control, let the parties communicate freely and constructively. Inappropriate interruptions are discouraged.
- (vi) Brainstorming
Mediators should encourage each party to propose settlement options, however unrealistic they might be, without any evaluation allowed from the others.⁵² Brainstorming allows parties' creative imagination and wide number of conceivable ways of dealing with the problematic disputes. However, all the options created shall undergo reconciliation whether or not they meet the needs and interests of the parties later on.

(vii) Effective and active listening⁵³

The content of active listening denotes that good listening is not just a passive exercise.⁵⁴ Mediators must be physically attentive, concentrate on encouraging the speaker, display an attitude of interest and concern, be non-judgmental, not be preoccupied with responding, and not be distracted by non-relevant matters. The three broad categories of skills in active listening, as proposed by Boule and Nesic are as follows: (a) Attending skills; (b) Following skills; and (c) Reflecting skills.

They have further suggested other elements of active listening: (a) being physically and mentally prepared; (b) trying to comprehend the speaker's frame of reference; (c) looking for patterns, organization and themes in the speaker's messages; (d) avoiding emotional responses and moralizing; and (e) being aware of one's own frame of reference.

(viii) Appropriate joint meeting / caucus

Various disputes require different appropriate number of joint meetings and caucus and it is up to the experienced mediator to decide on the optimum numbers.

(ix) Acknowledgement of body language⁵⁵

Body language refers to all aspects of bodily appearance and movement which convey messages to observers.⁵⁶ Mediators need to read the clothing, physique, posture, body movements, hand gestures, facial expressions and eye motions of the parties.

Mediators also need to be attentive to their own body languages, which can reveal bias, impatience or boredom.

(x) Neutral / Impartial⁵⁷

Mediators should refrain from imposing his preferences on the parties without resorting to sitting on their own hands.

(xi) Prompt drafting of the settlement

Assure agreements reached on discrete issues within a dispute are immediately recorded in writing.⁵⁸ This prevents the parties from changing their mind or creating new disputes on the newly agreed terms.

(xii) Enforceability of the settlement agreement

Presence lawyers may assist. If lawyers are not present, the mediator can write up an agreement or summary of the agreement and make it subject to preparation of a formal agreement by the lawyers after the mediation.⁵⁹

(xiii) Dealing with emotions

Mediator should show sympathy, understanding and concern on the parties' emotions. In this way, parties may feel the mediator is walking side by side with them and this helps resolution.

(xiv) Patience

Mediators may show patience with appropriate eye contacts, nodding, attentive listening, etc.

(xv) Having control of the process

With adequate preparation, allows flexibility, and based on mediator's experience, he may not easily lose control of the process. Some reminding notes, agenda, timetable, etc. may also be useful.

(xvi) Moving into solutions

Mediators must assure that the underlying needs and interests of the parties have been gone through and discussed in details before attempting to reach the settlement agreement. They also should address the emotional significance⁶⁰ before moving into solutions or options.

(xvii) Invent the solutions

Do not pressure the parties to reach agreement - let them arrive at their agreement.⁶¹ Parties' involvement with determining the outcome increases the likelihood that they will reach settlement since most people are more likely to accept their own ideas than someone (the mediator) else's.⁶²

(xviii) Conflicts of interests

Mediator must declare no conflict of interests and some previous contacts, etc., so as to show impartiality to the parties.

(xix) Pressure to discuss / settle

Appropriate pressure on the parties for discussion and settlement is necessary. This may include warning of adjourning the mediation, reminding the parties that it would be a waste of time if the process stops here since they have already achieved plenty and are close to settlement.

(xx) Recognize futility⁶³

Where an impasse cannot be broken, a mediator may be able to help the parties most by recognizing that it is futile to continue. Shapiro⁶⁴ refers to one such case, where the mediator terminated the mediation, whereupon the dispute settled within a few hours thereafter. He cites another case, where the parties were surprised by the mediator's refusal to continue, and changed their intransigent positions.

(xxi) Efficient communication skills⁶⁵

Mediators should know where, when and how to use some of the most common communication skills as follows, so as to enhance the mediation process: (a) empathizing; (b) using humour; and (c) using silence.

Findings

In order to find out the most common problems and suggested

solution for the mediation in Hong Kong's construction industry, I have sent out a total of 49 questionnaires to accredited mediators or chartered arbitrators under the Hong Kong International Arbitration Centre (HKIAC). The questionnaire contains the above about 40 common problems and seeks advice on the important extent of the common problems and asking for provision of suggested solutions. I also seek advice on "criteria for a successful mediator". A total of eight questionnaires were returned (accounting approximately for 16%), including one telephone and one in person interview.

Response and Summary of the Questionnaires

The following are the results:

- A - denotes James Longbottom⁶⁶ (Longbottom);
- B - denotes Sunny Yeung⁶⁷ (Yeung);
- C - denotes Dean Lewis⁶⁸ (Lewis);
- D - denotes Raymond Leung⁶⁹ (Leung);
- E - denotes Colin Lee⁷⁰ (Lee);
- F - denotes Andrzej Cierpicki⁷¹ (Cierpicki);
- G - denotes Louise Popplewell⁷² (Popplewell); and
- H - denotes Daniel Lam⁷³ (Lam).

Common Problems	A	B	C	D	E	F	G	H	Total Scores	Av. Scores
(1) Focus at										
1.1 Only on known matters; ignore unknown matter	1	3	5	1	4	1	3	4	22	2.75
1.2 Positions but not interests	1	5	2	2	5	5	5	5	30	3.75
1.3 The past / now; ignore future	1	3	3	4	5	3	4	4	27	3.375
1.4 Wrong discussed issues	1	3	5	3	5	3	3	4	27	3.375
1.5 Facts only but not relationship	1	2	3	3	5	4	3	5	26	3.25
(2) At Start										
2.1 Mediator inadequate preparation	3	2	2	2	5	2	1	5	22	2.75
2.2A Wrong parties presence	4	1	3	5	5	4	2	4	28	3.5
2.2B Too many attendees	4	1	3	2	2.5	4	2	4	22.5	2.8125
2.3 Wrong location of meeting	3	1	5	2	5	2	1	2	21	2.625
2.4 No framework for discussion	1	1	2	3	5	2	2	4	20	2.5
2.5 Parties have no trust to each other, or to mediator	1	2	3	3	5	3	3	3	23	2.875
2.6 Involuntary participation	1	3	3	4	4	2	4	3	24	3
2.7 Too formal	1	2	5	4	4	2	3	3	24	3
2.8 Mediator's dress code / gestures	1	1	5	5	5	1	1	3	22	2.75
(3) The Parties										
3.1A Talk too much	4	2	5	5	4	2	2	3	27	3.375
3.1B Talk too less	4	2	5	5	2	2	2	3	25	3.125
3.2 Too optimistic	3	1	3	5	3	4	4	1	24	3
3.3 Attacks / Accusations	4	3	3	4	3	2	3	2	24	3
3.4 Not prepare to agree	3	4	4	4	4	4	4	5	32	4.0
3.5 No authority	4	2	4	5	5	1	2	4	27	3.375
(4) Mediator's Act										
4.1 No confidence	3	1	3	1	5	2	2	4	21	2.625
4.2A As observer	1	1	4	5	5	2	2	5	25	3.125
4.2B Talk too much	1	3	4	5	4	2	2	5	26	3.25
4.3 Not assist in constructive communications	1	3	2	3	3	1	1	4	18	2.25
4.4 Not negotiate and problem solving	1	3	2	3	5	2	2	5	23	2.875
4.5 Too direct the parties	4	2	5	5	5	3	3	3	30	3.75
4.6 Not creative enough	3	3	4	5	5	3	3	4	30	3.75
4.7 Hearing but not listening	3	3	4	5	5	2	1	4	27	3.375
4.8 Too little / many joint meeting / caucus	1	2	4	5	4	3	3	3	25	3.125
4.9 No / too many body languages	4	3	5	4	4	2	1	4	27	3.375
4.10 Not neutral	1	1	5	5	5	2	2	4	25	3.125
4.11 No patience	4	2	5	5	5	2	1	5	29	3.625
4.12 Too slow in drafting the Agreement	1	2	5	5	4	1	1	4	23	2.875
4.13 Agreements without consensus, unrealistic	1	1	5	5	5	2	1	5	25	3.125
4.14 Ignoring emotions	2	3	5	5	5	3	1	5	29	3.625
4.15 Losing control of the process	1	2	3	5	5	2	4	5	27	3.375
4.16 Moving too quickly to the solutions	1	3	4	1	4	3	3	4	23	2.875
4.17 Too many private session without explanations	2	2	5	5	5	1	2	4	26	3.25
4.18 Solutions suggested by the Mediator	1	1	5	5	2	4	1	3	22	2.75
4.19 Conflicts of interests and not declares	1	1	5	5	5	1	1	5	24	3
4.20 Threat to discuss / agree, etc.	1	1	5	4	3	2	1	4	21	2.625

The Most Common Problems and their Suggested Solutions

In defining the "most common problems", I come to a decision for those problems with an average score of equal or more than 3.5. From the replies, it divulges that, among the about 40 common problems revealed from the literatures, the seven most common problems of mediation in Hong Kong's construction industry, as in the eyes of the mediation practitioners, are as follows:

- (i) Parties focus at positions but not interests (Average Score = 3.75);
- (ii) At start, wrong parties are presence (Average Score = 3.5);
- (iii) Parties not prepare to agree (Average Score = 4.0);
- (iv) Mediators direct the parties (Average Score = 3.75);
- (v) Mediators do not have enough creativity (Average Score = 3.75);
- (vi) Mediators have no patience (Average Score = 3.625); and
- (vii) Mediators ignoring emotions (Average Score = 3.625).

All these, as commented by the practitioners, should be addressed seriously and attentively so as to make the mediation a successful one.

From the replies, not all the responses included the "suggested solution" part. From the limited resources received, suggested solutions to the most common problems of mediation in Hong Kong's construction industry so described above are as follows:

- (i) Parties focus at positions but not interests
Yeung suggested that there is requirement for development / training on ability to analyze and spotting the issues (interests) on the mediator.
However, Leung did not think this problem is vital since "real" interests of the parties may not be so "real" when up to the point of agreement. He cited an example in his experience that a party had an expressed interest to agree, in the beginning of the mediation, at HK\$600,000.00. The mediation was settled eventually at the amount of HK\$100,000.00, without any additional terms. Hence, he believed that it is not so a big problem if interests of the parties have not been focused on.
Lee advised that positions should be appreciated but interests should definitely be focused on, always, by the mediator. Cierpicki said that it is a common problem for the parties, i.e. looking for "win" (But he did not provide any suggested solution). Popplewell suggested that the mediator better prepares the parties beforehand to focus on interests, but not positions in the beginning of the mediation.

To conclude, I agree with Cierpicki that this is a common

problem and also agree with Yeung that there is a requirement for development / training on ability to analyze and spotting the issues (interests) on the mediator. Positions should be valued but the interests should always be focused by the mediator. Adequate preparation beforehand can also help.

- (ii) At start, wrong parties are present
Yeung advised that this is relatively easy to fix - as a matter of improving the procedural skills and improving with experience. Leung mentioned that it is vital that the parties' presence in the mediation must be a decision maker and able to create and agree options. He / she must have the full authority with proof, e.g. memorandum from the Company. The only way to solve this problem is to find an appropriate person to attend the mediation from the beginning. Otherwise, let the attended party (without authority) to ask back the company's decision maker to decide for certain crucial points is also feasible.
Lee also agreed that it is fundamental to have the parties' presence having authority to make decisions and the mediator should check this in the beginning. Cierpicki suggested that too many attendees is a common problem as is having someone to close to the issue and thereby carrying emotional baggage (but without any suggested solution).
To conclude, Cierpicki was correct to comment that this is one of the most common problems. I agree with Leung that the best way to solve this problem is to find the appropriate persons to attend the mediation from the beginning, by the mediator's experience.
- (iii) Parties not prepare to agree
Yeung advised that it is a requirement to educate the parties and improvement of interpersonal skills of the mediator. Leung suggested that the parties may change at a later stage of the mediation after going through the options exploration stage. Lee claimed that it is very important for the parties to have the will to settle at the beginning (but no suggested solution). Popplewell commented that better preparation by mediator beforehand may help.
To conclude, this is the most problematic issue among the seven most common problems (average score = 4). Hence, in the eyes of the practitioners, this is the most common problematic issue, if happens, in their experience. To prevent, better preparation by the mediator, educate the parties and carry on properly the procedural rules may help.
- iv) Mediators direct the parties
Yeung mentioned that it is for the mediator to improve the interpersonal skills. Leung said that he would "indirectly lead" the parties by casting questions strategically in lieu of obvious direct statements. This helps the parties to follow the procedures of the mediation. Lee just declared that

this is very important (but without any suggested solutions). Popplewell suggested that the solution lies in the character and training of the mediator.

To conclude, it really depends on the character and interpersonal skills of the mediator to (strategically) or not to direct the parties. Sometimes, tactical directing the parties may be helpful for the settlement.

(v) Mediators do not have enough creativity

Yeung had the same comments as (iv) above. Leung said that creativity is one of the most important personal skills that a successful mediator should possess. This can learn from experience and is a kind of art that can learn through interpersonal communications and contacts. Lee claimed that it is a big problem if the mediator is lack of creativity (without suggested solution). Popplewell had the same comments as (iv) above.

To conclude, the mediator must be creative and this can be attained through interpersonal skills improvement and personal development, i.e. learn from daily life!

(vi) Mediators have no patience

Yeung had the same comments as (iv) above. Leung suggested that listen carefully and showing attentive action, etc. is a kind of art to show patience to the parties.

To conclude, patience can be achieved through interpersonal training and by acting listen carefully and attentively. It is a kind of art.

(vii) Mediators ignoring emotions

Yeung had the same comments as (iv) above. Leung mentioned that it is very common that there are emotions during the mediation. It is the mediator's role to control the atmosphere and the emotions of the parties. This includes suggesting a break, transferring to other issues first, etc. Lee said that emotions should be addressed and parties need to have an opportunity to express their feelings and it is unwise to go too fast by ignoring the emotions (without suggested solutions).

To conclude, emotions should be addressed during the mediation by let them to express their feelings. However, the mediator should have the final control on the atmosphere in order not to let it go too far.

Criteria for a Successful Mediator

The suggested criteria by respective practitioners are listed as follows:

Mediation Practitioners	Suggested Criteria
Yeung	(1) Procedural Skills (2) Interpersonal Skills

	(3) Psychological and Human Behaviour (4) Analytical Mind : Spotting the Issues (5) Ability to Identify Options / Opportunity for Settlement
Leung	(1) May not need exact Technical Background as the disputes (2) Skills to chair a meeting (3) Facilitate the parties (4) Negotiation Skills (5) Psychological Knowledge
Lee	(1) Background relate to the mediating issues is important (2) Experience as for the works, as a mediator and as a maturity (3) 100% essential for technical skills, e.g. Quantum matters => QS, Legal matter => lawyer (4) Patience (5) Creativity (6) Manner to conduct the mediation
Cierpicki	(1) Good listening skills (2) Neutral and impartial (3) Ability to maintain confidentiality (4) Mature and knowledgeable (5) Facilitative rather than directive (6) Good background experience of subject matter in dispute (although not essential) (7) Creativity (8) Focus on parties' interests in lieu of positions
Popplewell	(1) Knowledge of system of industry practice (2) Good mediator training (3) Take sufficient time to work through the process

Conclusion

No dispute resolution technique is perfect and all of them have both pros and cons. Mediation has its own limitations.

I have first highlighted the common problems, which come out approximately 40 of them in total, and proposed the suggested solutions for adopting mediation in Hong Kong's construction industry through literatures research.

Then, I, from the analysis of the questionnaires, telephone and in person interviews, tried to reveal the most common problems together with suggested solutions of mediation in Hong Kong's construction industry as well as trying to evaluate the criteria for mediation to be more successful.

A successful mediator shall not fall in the traps of the approximately 40 common problems as cited above. Among them, the seven most common problems in the eyes of the mediation practitioners, are, namely in descending order of importance:

- 1.1 Parties not prepare to agree;
- 1.2 Parties focus at positions but not interests;
- 1.3 Mediators direct the parties;
- 1.4 Mediators do not have enough creativity;
- 1.5 Mediators do not have patience;
- 1.6 Mediators ignoring emotions; and
- 1.7 At start, wrong parties are presence.

Undeniably, it is expected that "if the parties were not preparing to agree" in the mediation, it surely makes the mediation process a real difficult one. Thus, it expectedly comes as the most common problem among the approximate 40 ones. However, unexpectedly, "mediator not assists in constructive communications" becomes the least importance or the least common problem in the eyes of the mediation practitioners. Maybe they believe, if the parties are ready and willing to agree during the mediation, constructive and effective communications shall be automatically carried out among the parties, without any necessary assistance by the mediator.

A mediator should utilize the suggested solutions for the above problems as detailed above so as to minimize the most common problems to be arisen.

To conclude, in order to attempt a successful mediation in Hong Kong's construction industry, the mediator should try to make sure he / she possesses those skills and criteria as listed above.

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Footnotes

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