

The Development of Evaluative Mediation in Hong Kong

Mr. LEUNG Hing Fung

Associate Professor, Department of Real Estate and Construction, University of Hong Kong
LLM, MAArbDR, LLB, B. Building, BSc (Building Studies)
FRICS, FHKIS, FCIArb, FHKIArb, Barrister-at-law,
General Accredited Mediator of HKMAAL, HKIAC, HKIS/HKIA Joint Panel
Arbitrator of HKIAC Panel, HKIA/HKIS Joint Panel

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The Development of Evaluative Mediation in Hong Kong

Objectives of this presentation:

- To set out the background and history in the development of mediation in Hong Kong
- To highlight the use of facilitative mediation as the major mediation model in Hong Kong
- To find out the impetus behind the development of evaluative mediation in Hong Kong
- To identify the possible issues in the development of evaluative mediation in Hong Kong

The background and history in the development of mediation in Hong Kong

- Dispute resolution Schemes involving mediation – introduced through 4 major means in Hong Kong historically
 - Government departments/bureaus
 - Provisions in standard forms of contracts
 - The court system
 - Mediation related institutions

The background and history in the development of mediation in Hong Kong

Government departments/bureaus:

- Earliest stage – conciliation offered by Labour Department – basically only offered administrative support for the parties to meet and negotiate - not exactly mediation as in its present form
- Nowadays: “The role of conciliation officer - The conciliation officer is a neutral intermediary who assists both parties to understand the problem and to have a frank dialogue so as to remove each other's differences and prevent the issue from deteriorating. He also endeavours to seek a settlement which is acceptable to both parties.” (from booklet on *Conciliation Service of the Labour Relations Division*)

The background and history in the development of mediation in Hong Kong

Government departments/bureaus:

- Position of conciliation officer compared with that of mediator:
 - “Mediation is a voluntary, non-binding, private dispute resolution process in which a neutral person, the mediator, helps the parties to reach their own negotiated agreement.” (from www.hkmaal.org.hk)
- No major difference from conciliation of Labour Department

The background and history in the development of mediation in Hong Kong

The Chief Executive's Policy Address 2017

“Enhanced Co-operation with the Mainland

55. The DoJ is also stepping up its overseas promotion of Hong Kong's international legal ***and dispute resolution services*** through co-operation with international organisations ...” (emphasis added)

The background and history in the development of mediation in Hong Kong

- The Chief Executives' Policy Address 2017

“Opportunities Arising from the Belt and Road Initiative

58. We are in discussion with the Central Authorities with the aim of entering into an agreement of Hong Kong's full participation in the Belt and Road Initiative with the National Development and Reform Commission (NDRC) by the end of this year. The agreement will cover various areas such as ... ***dispute resolution*** as well as the Guangdong-Hong Kong-Macao Bay Area development.”
(emphasis added)

The background and history in the development of mediation in Hong Kong

- The Chief Executives' Policy Address 2017

“Legal Services

114. The DoJ will implement various initiatives to consolidate Hong Kong's position as a centre for international legal and ***dispute resolution services*** in the Asia-Pacific region. ...

115. One of the DoJ's priorities is to step up efforts in proactively promoting Hong Kong as an international legal and ***dispute resolution services centre*** for the “Belt and Road” Initiative and the Bay Area, ...” (emphasis added)

The background and history in the development of mediation in Hong Kong

- The Chief Executives' Policy Address 2017

“Legal Services

116. To attract more international legal services and ***dispute resolution institutions*** to set up branches or offices in Hong Kong, the Government is rolling out the Legal Hub programme. ”

(emphasis added)

The background and history in the development of mediation in Hong Kong

- The Chief Executives' Policy Address 2017

“Talent Hub

138. With the rapid development of our country and in support of the Belt and Road Initiative and the Guangdong-Hong Kong-Macao Bay Area development, the demand for talent in such fields as ... , legal and ***dispute resolution services*** has surged significantly. The Government is committed to strengthening Hong Kong's position as a talent hub, nurturing talent for the local community and neighbouring places.” (emphasis added)

The background and history in the development of mediation in Hong Kong

Government departments/bureaus (some examples):

- Formation of the Secretary for Justice's Working Group on Mediation in 2008
- Setting up of Financial Dispute Resolution Centre in November 2011 under the initiative by the Financial Services and the Treasury Bureau.
- Formation of the Secretary for Justice's Steering Committee on Mediation in 2013
- Start of operation of Hong Kong Mediation Accreditation Association Limited (HKMAAL) on 2 April 2013 pursuant to the Report by the Secretary for Justice's Working Group on Mediation
- Mediation Ordinance was in force on 1 January 2013

The background and history in the development of mediation in Hong Kong

Provisions in standard forms of contracts:

Public sector:

- Mediation first appeared in the Government General Conditions of Contract in 1991 – a “Mediation then Arbitration” scheme
- 4 tier dispute resolution mechanism in the contract for Airport Core Programme Projects and other major public works contracts – Engineer decision, Mediation, Adjudication and Arbitration

Private sector:

- Mediation first appeared in the HKIA/HKIS/HKICM Standard Form of Building Contract in 2005 – also a “Mediation then Arbitration” scheme

The background and history in the development of mediation in Hong Kong

The Judiciary:

- The Chief Justice and the Secretary of Justice also have publicly promoted the use of mediation on many different occasions in recent years
- Leading to schemes of mediation introduced for different kinds of court cases
- Most notably the Civil Justice Reform in 2009 and the coming into force of Practice Direction 31 on mediation in 2010

The background and history in the development of mediation in Hong Kong

The Judiciary:

- Family mediation pilot schemes launched in May 2000 (extended to 31 July 2003) followed by the use of mediation pursuant to Practice Direction 15.10 issued by the Chief Justice
- There were other different pilot schemes followed: e.g. for building management cases and for compulsory sale cases in the Lands Tribunal and for cases of petition for winding up in the Court of First Instance

The background and history in the development of mediation in Hong Kong

Mediation related institutions

- Schemes conducted by institutions, e.g. those by HKIAC or the Judiciary:
 - Commercial Mediation Pilot Scheme
 - New Insurance Mediation Pilot Scheme
 - Lehman Brothers Mediation and Arbitration Scheme
 - Construction Mediation Scheme
 - Surveying Dispute Mediation and Arbitration Scheme (HKIAC-RICS)
 - Family mediation under Practice Direction 15.10 of the Judiciary
 - Mediation for building management cases under Direction Issued by the President of the Lands Tribunal [LTPD: BM No. 1/2009]

Facilitative model of mediation

Observations:

- Since the inception of mediation in Hong Kong, the model being promoted and used has been facilitative (interest-based)
- Other models such as settlement, evaluative and transformative are rarely talked about
- Reasons (speculated): international main stream, model adopted by most trainers, self-interest of mediators in early stage of development?

Facilitative model of mediation

Some examples showing the emphasis on facilitative mediation:

The Mediation Ordinance, Cap 620, Laws of Hong Kong:

“4. Meaning of mediation

(1) ... mediation is a structured process comprising one or more sessions in which one or more impartial individuals, ***without adjudicating a dispute or any aspect of it***, assist the parties to the dispute to do any or all of the following—

(a) identify the issues in dispute; (emphasis added)

Facilitative model of mediation

Some examples showing the emphasis on facilitative mediation:

In the Stage 2 mediation assessment of HKMAAL:

- “Refrained from advising” is an item to be assessed under “Skills and Behaviour (overall)” (See HKMAAL Form 1)

Facilitative model of mediation

Some examples showing the emphasis on facilitative mediation:

In Hong Kong Mediation Code, it is provided that:

“The Mediator will not:

- (a) give legal or other professional advice to any Party; or
- (b) impose a result on any Party; or
- (c) make decisions for any Party.”

Development of evaluative mediation

Under this main stream, there are many questions:

- Should the choice of mediation users be limited to facilitative mediation?
- Is there a market demand for the use of evaluative mediation?
- Are there disputes which would more appropriately be resolved through evaluative model instead of facilitative model?

Development of evaluative mediation

- Is “evaluative” a model, approach or style of mediation?
- Different experts have provided different answers.

Development of evaluative mediation

A Model?

- 4 models suggested, e.g. from *Mediation Principles Process Practice* by Laurence Boulle
- Settlement, facilitative, therapeutic and evaluative

Development of evaluative mediation

A Style?

- 3 styles suggested, e.g. Zena Zumeta, "Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation", <http://www.mediate.com/articles/zumeta.cfm#bio>

Development of evaluative mediation

A Style?

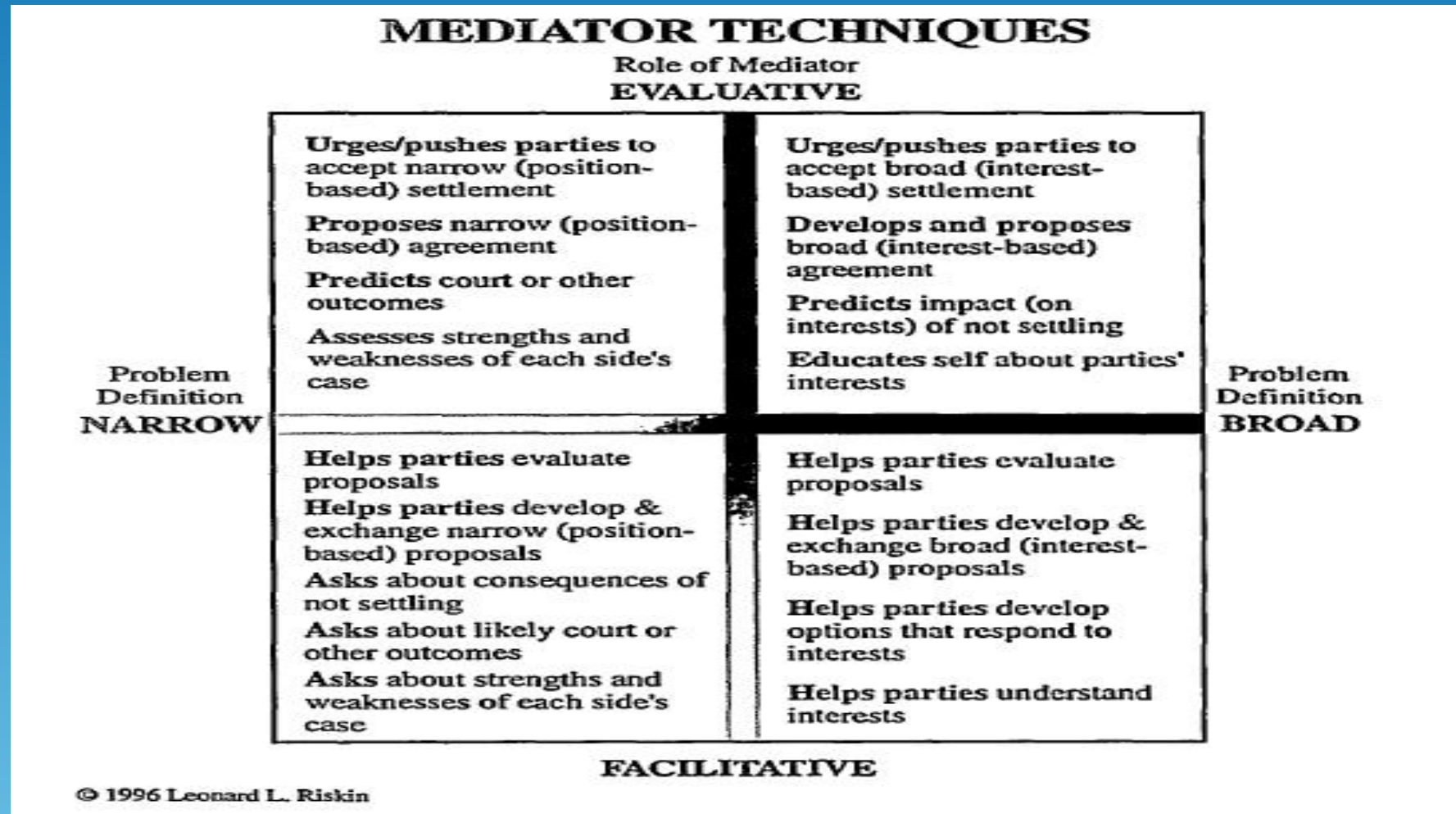
- Zena Zumeta, “Evaluative mediation is a process modeled on settlement conferences held by judges. An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge or jury would be likely to do.”

Development of evaluative mediation

An Approach?

- Department of Justice organized a workshop in May 2015 “IP Mediation Workshop - Evaluative Approach in Practice”
- Dr. Nadja Alexander described evaluative as being an approach instead of a model for mediation – agree

Development of evaluative mediation



Brian Jarrett, "Moving Beyond Brands: Integrating Approaches to Mediation", Alaska Mediation, Alaska Justice Forum, Fall 2012/Winter 2013

Table 1. Mediation Approaches

	Evaluative	Facilitative/ interest-based	Narrative	Transformative
Mediated interaction	Competition for most persuasive <i>legal position</i>	Conflict over competing <i>interests</i>	Conflicting <i>narratives</i>	Conflict as a <i>failure to recognize fellow humanity</i>
Brand type	Establish and apply <i>precedent</i>	Focus on <i>interests</i>	Deconstruct/ reconstruct <i>narratives</i>	Provide opportunities for mutual <i>empowerment and recognition</i>
Recommended practices	Provide parties with an <i>assessment</i>	Move parties from <i>positions to interests</i>	Uncover <i>dominant and subordinate narratives</i> and establish functional <i>shared narrative</i>	Encourage and reinforce instances of <i>empowerment and recognition</i>

Development of evaluative mediation

Dorcas Quek in her paper (ADR Conference 2012) "Facilitative vs Evaluative Mediation – Is There Necessarily a Dichotomy?" suggested, by reference to Riskin's articulation of evaluative behaviour, that there are 3 elements of evaluative mediation.

Development of evaluative mediation

Quek's 3 elements of evaluative mediation:

- Predictive behaviour – giving a view on what will happen in Court or other forums
- Directive behaviour – directing the parties towards certain outcomes or solutions
- Narrow problem definition - focusing merely on legal rights and positions, and neglecting underlying interests

Development of evaluative mediation

Quek's also suggested 2 issues of evaluative mediation:

- Neutrality of the mediator and;
- Parties' autonomy

Development of evaluative mediation

If evaluative is an approach or style instead of a model of mediation by itself, does it mean that the necessary nature of any evaluative mediation should be one of blended process, likely to be based on a facilitative model with some evaluation offered by the mediator?

Development of evaluative mediation

Awareness:

- The Department of Justice held a seminar titled “IP Mediation Seminar – Evaluative Approach in Practice” in May 2015
- Hong Kong Mediation Council held seminars titled “Mediation of Construction Dispute – A Step Closer to Evaluative Model” in October 2015 and “Evaluative Mediation – Are we ready to use it” in March 2016

Development of evaluative mediation

Welcome Address of Mr. Rimsky Yuen, SC
Secretary for Justice in “IP Mediation Seminar – Evaluative
Approach in Practice” :

“... the Working Group (on Intellectual Property Trading) highlighted the need to promote the use of mediation as a means to resolve IP disputes and also the desirability to explore the use of evaluative mediation in addition to facilitative mediation.”

Development of evaluative mediation

Welcome Address of Mr. Rimsky Yuen, SC
Secretary for Justice in “IP Mediation Seminar –
Evaluative Approach in Practice” :

“... we also see the potential and advantages of using evaluative mediation when the nature of the disputes call for an evaluation of the issues involved ...”

Development of evaluative mediation

Welcome Address of Mr. Rimsky Yuen, SC
Secretary for Justice in “IP Mediation Seminar –
Evaluative Approach in Practice” :

“In short, the promotion of evaluative mediation is to offer an additional option (on top of facilitative mediation) to the end-users in the IP field so that they can consider which type of mediation can best serve their needs.”

Development of evaluative mediation

Studies were carried out in 2015 and 2016 by students at Department of Real Estate and Construction, University of Hong Kong related to the use of evaluative mediation for construction disputes and disputes regarding compulsory sale in Hong Kong.

Development of evaluative mediation

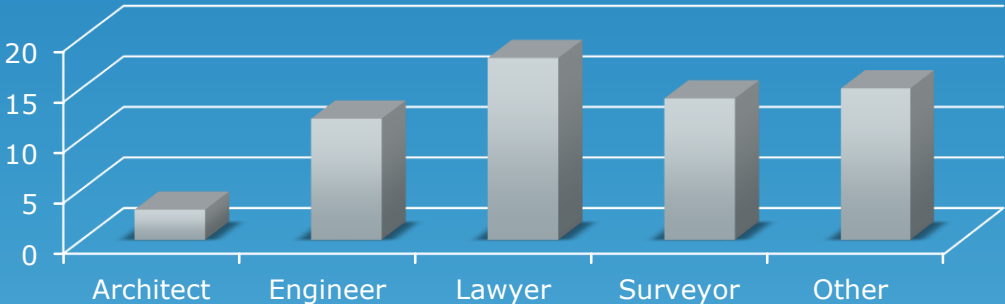
In the following slides, some data from one of the studies are shown.

Courtesy: Ms. Sammy Yip, BSc in Surveying

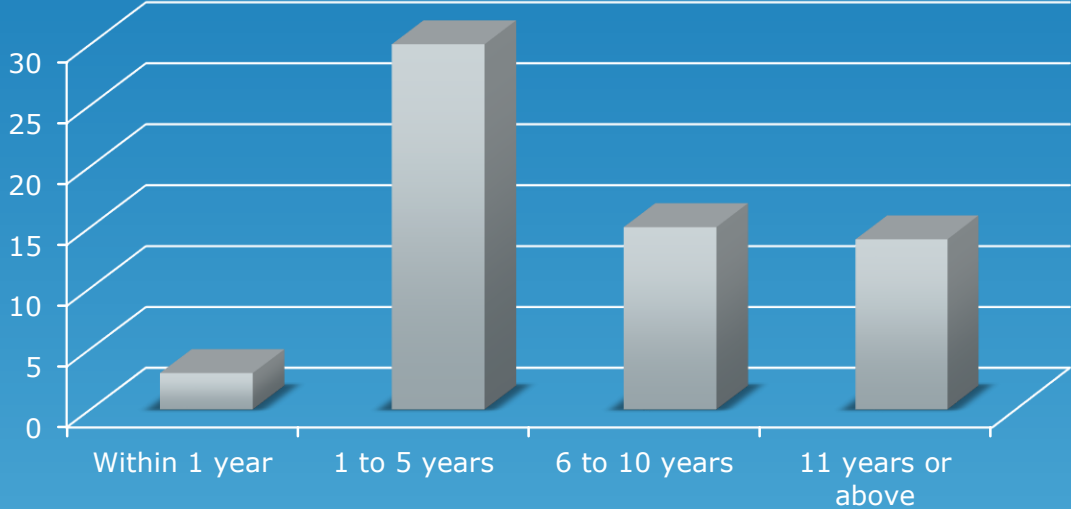
Development of evaluative mediation

○ Part 1: General Information

Q1. Major profession



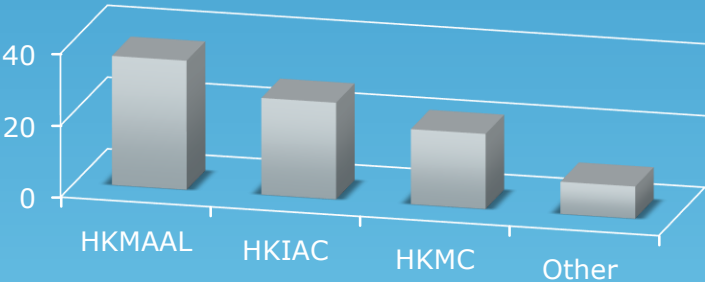
Q2. Years of accreditation



Q3. Types of training



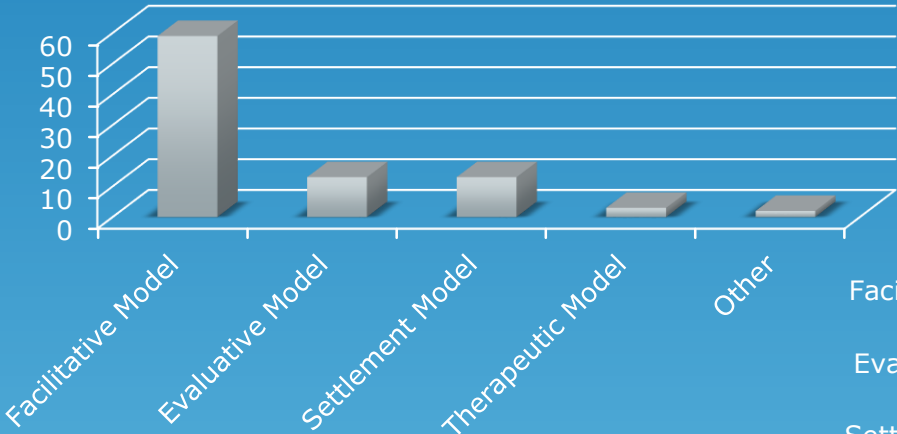
Q4. Organizations of accreditation



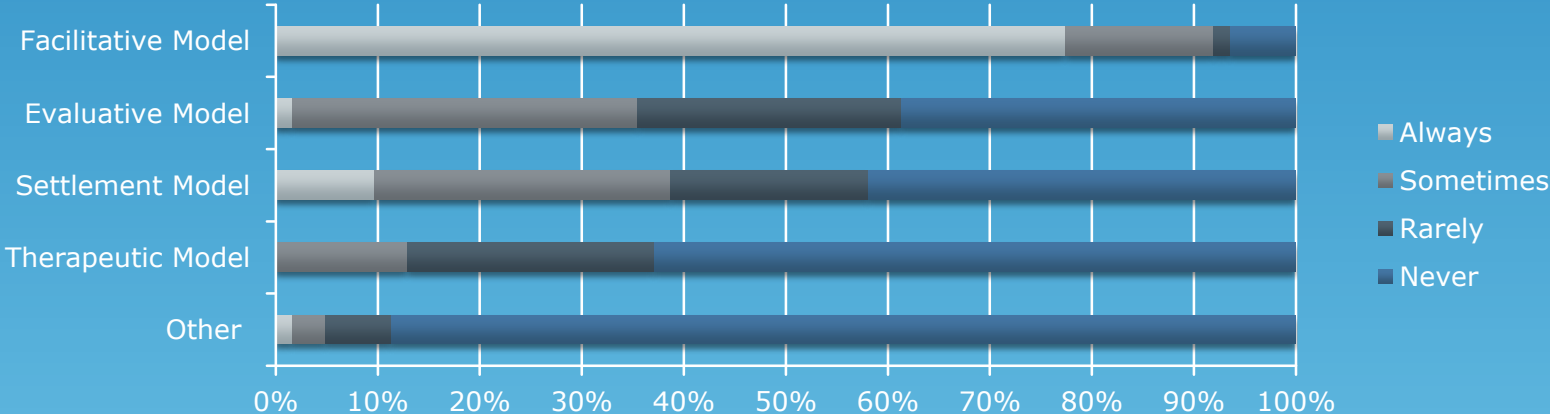
Development of evaluative mediation

- Part 2: Mediation experience in resolving all kinds of disputes

Q7. Mediation model(s) learnt



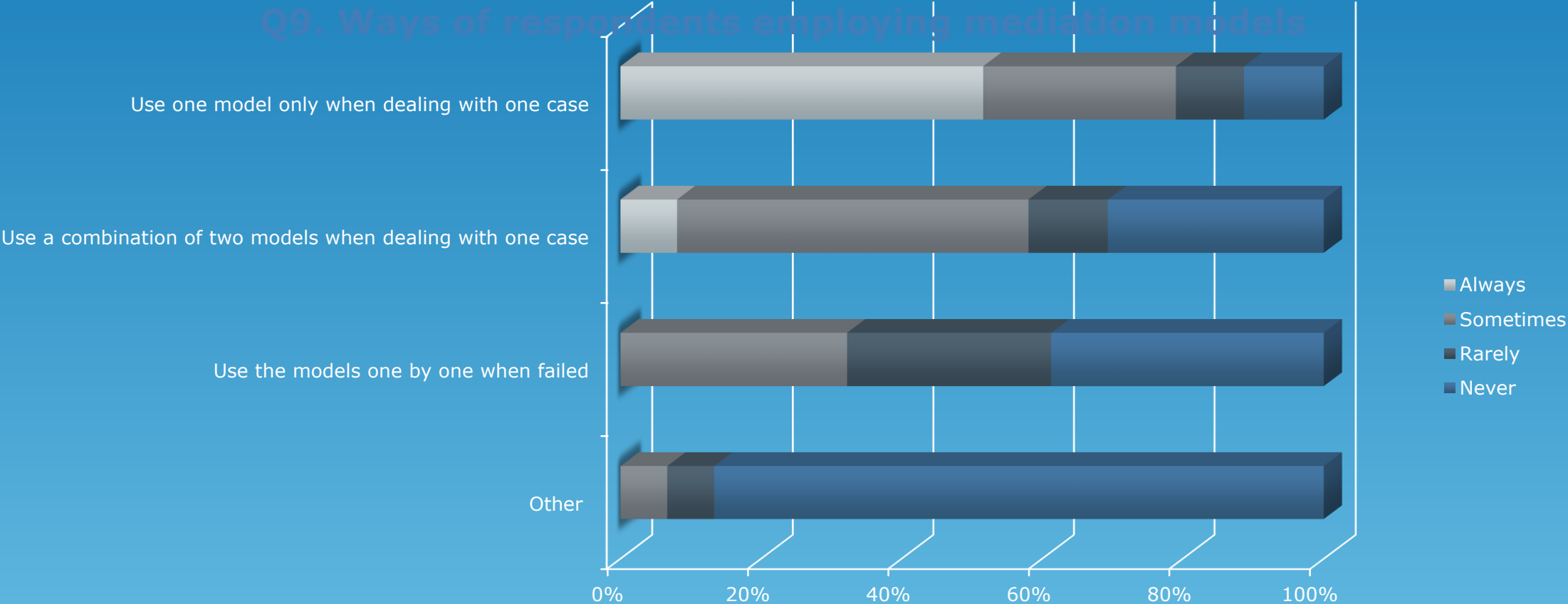
Q8. Frequency of applying different mediation models



Development of evaluative mediation

- Part 2: Mediation experience in resolving all kinds of disputes (cont'd)

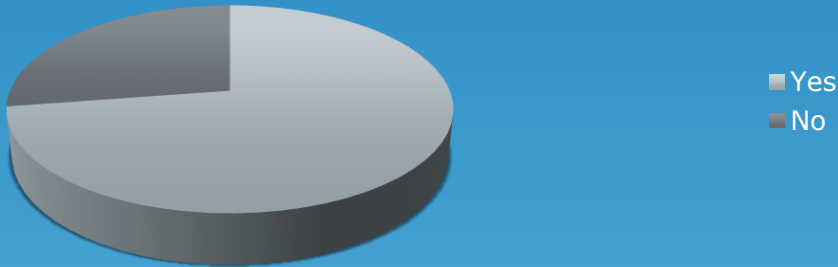
Q9. Ways of respondents employing mediation models



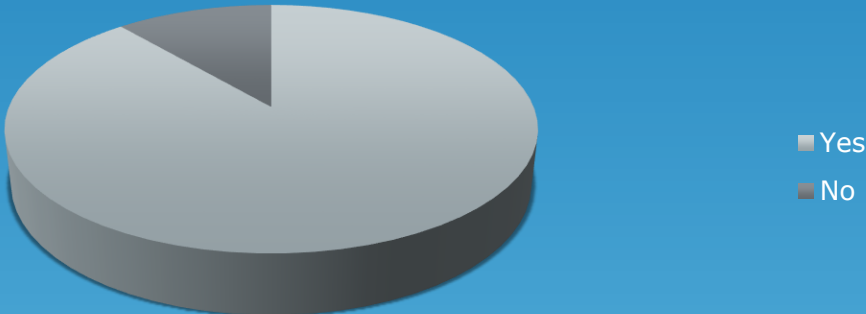
Development of evaluative mediation

- Part 4: Mediation experience in using facilitative model to resolve construction disputes

Q14. Experience in resolving construction disputes using Facilitative Model



Q15. View towards effectiveness of facilitative model

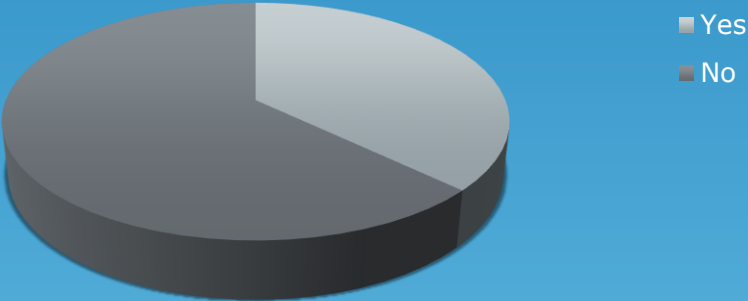


Q16. Reason(s) of possible ineffectiveness of facilitative model	Response	% of response
Mediators may not possess construction knowledge/experience to understand the case	25	40%
Both parties may provide detailed evidence by the experts and therefore unwilling to compromise	35	56%
Other	17	27%

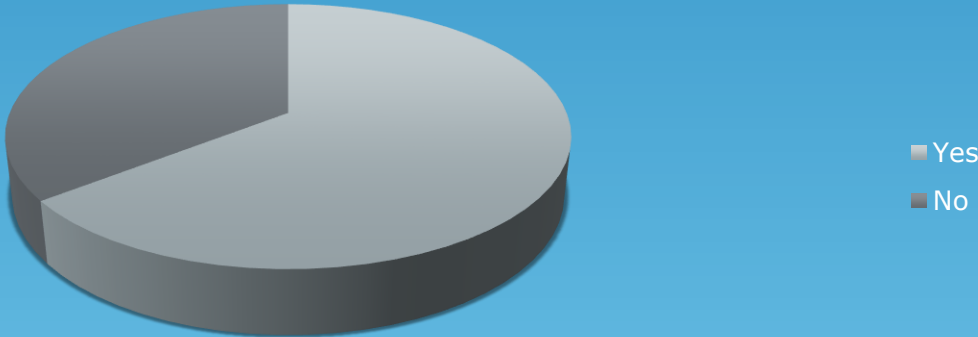
Development of evaluative mediation

- Part 5: Mediation experience in using evaluative model to resolve construction disputes

Q17. Experience in resolving construction disputes using Evaluative Model



Q18. View towards effectiveness of evaluative model



Development of evaluative mediation

- Is there a real need by users?
- Apparently yes

Possible issues in the development of evaluative mediation in Hong Kong

- Are there internationally accepted training approach and assessment standard for evaluative mediation?
- Professional Indemnity Insurance
 - Should there be any?
 - If so, should it be mandatory for all mediators?
 - Or should it be limited to certain kind of mediations?
 - Does it serve the purpose of public/users' interest?
- CPD requirements

Recent developments concerning evaluative mediation

Some recent developments:

- A special Committee on Evaluative Mediation was set up under the Steering Committee on Mediation of the Secretary for Justice in 2017
- A Working Group on Evaluative Mediation was set up within the Committee of Hong Kong Mediation Council in 2017
- The Royal Institution of Chartered Surveyors conducted a training course on evaluative mediation for accreditation of evaluative mediators in Hong Kong in October 2017

The End