

INVESTIGATION OF CRITICAL FACTORS AFFECTING SUCCESSFUL MEDIATION: KOREAN MEDIATION USERS' PERSPECTIVES

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Mediation has been the most favourable tool amongst Alternative Dispute Resolution (ADR) methods resulting in high effectiveness of time and cost for the procedure of dispute resolution, together with maintenance of the relationship amongst parties. However, in spite of the advantages, mediation in South Korea has still been shown to be in the early stage of its development. To identify the fundamental problems of the models in Korea, this study analyses the parties' perspectives toward the current mediation models through evaluation methods of their satisfaction degree. As a result, this research reveals three main problems in the current models; long procedure, involuntary nature and non-facilitative processes.

Keywords: mediation, satisfaction degree, South Korea, statistical analysis.

INTRODUCTION

Mediation has been widely recognized as the most beneficial and popular non-binding technique because of the great advantages such as flexibility, privacy, speedy procedure, inexpensive cost, inventive solution and maintenance of business relationship. Due to its effectiveness in dispute resolution many advanced countries such as the UK and the USA have adopted mediation and have performed the service to the public effectively and efficiently.

Since 1990 Korea, like the other countries, has encouraged the use of mediation in most sectors through the courts and relevant ministries. However, the method has been the least popular tool among ADR methods and is still immature in its development as showing poor application and settlement rates every year.

For example, according to Supreme Court of Korea, whole court-mediation institutes have shown poor mediation application rates at an average of 1.3% of total civil cases for 10 years since 1990. During the same period, a major means of settlement have been compulsory mediation at over 40% of whole mediation cases, whilst rates of voluntary agreements are only average 36.4%.

The similar phenomenon can be also found within non-court mediation institutes which are subject-matter mediation committees in administrative institutes such as 6 big city halls and 8 provincial institutes. Generally, the institutes have shown worse results of application and settlement rates compared to those of court mediation. As a good example, construction-related mediation has been more significantly noticed as the worst part; it is investigated that none of actual results of mediation within

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International Contract dispute Mediation Committee and Local Construction Dispute Mediation Committee were recorded between 1990 and 2002. Also, in Central Construction Dispute Mediation Committee, the most popular mediation institutes, mediation is only one third of application of arbitration, with settlement rates averaging 25% between 1996 and 2002 (Yoon 2003).

With respect to the occurrence, it is strongly believed that mediation systems have not successfully transferred the advantages to parties in Korea. To discern the fundamental obstacles with the current systems, the research examines how the models in reality contribute beneficial advantages to Korean parties in the mediation process through the investigation of parties' satisfaction degree.

Mediation Principles in Korea

Mediation can be defined as a process in which an *impartial* third party facilitates other parties to reach a *voluntary* agreement (Brunet 2001; Mackie 2000; Moore 2003) in *confidential* conditions (Goldberg 1992; Palmer 1998). The process generally follows *facilitative mediation model* which means that mediators only assist parties without offering any personal opinions on dispute details or evaluating what went wrong between parties.

Due to the principles of the model, parties can gain great advantages from the mediation process and they are encouraged to be more proactive in reaching a voluntary agreement without external influences (Fischer 1993; Moore 2003; Taichert 2006). In addition, the process can be more effective by saving time and cost together with maintenance of business relationships compared to other ADR processes due to the non-evaluative method (Folberg 1984; MacDonald 2004; Quick 1992; Willis 1999).

However, in the case of Korea, the models are based on *evaluative model* in which mediators tend to be facilitators but also assistants of parties' decision-making on a basis of checked-facts. Because of the characteristics, those beneficial results seems not to appear in the mediation systems as there has been a gap between theoretical and practical approaches.

First of all, the system tends to show involuntary process. Mediators in the system have empowerment to application or agreement. In the case of court mediation, litigation cases are usually remitted to mediation by judges' decisions and disputants are automatically involved in mediation irrespective of their wishes. In addition, agreements are based on compulsory settlement. Judges conclude disputes when they consider that cases should be settled although the parties' decisions are differing from theirs (clause 7 Act 3 from the Korean Civil Law). Furthermore, mediators in non-court mediation committees have the power to make a majority decision, when voluntary agreement fails (clauses 72 and 73 of the Construction Industrial Law).

Second, the process is largely dependent on evaluation-based mediation rather than facilitative processes. It is mostly undertaken on the basis of fact-check and evaluation and examination. Whether or not to go to court mediation; an agreement by a majority decision from the committees or mediators can be a critical issue. The disputants will then only consider whether to agree the prepared plans and announce acceptance to the committee within 15 days (clauses 8-3 and 10-2 in the Korean Civil Law, The Construction Industrial Law, from clauses 65 to 78).

Third, there are only some conditions for confidentiality of mediation within court-annexed mediation law. In respect of court-annexed mediation systems, there are

restrictions for security of the mediation process and related information. Where mediation procedure and mediators' opinions are disclosed, there must be a charge fine of £150. (clause 4505 from Korean Law of Court-annexed mediation)

Furthermore, when participants of mediation reveal confidential matters of the other parties, there is a potential penal sentence of two years or a fine of £500. However, the other mediation committees under the administrative organizations have not presented any clauses for obligations or guidance notes of confidentiality. Confidentiality has not been completely covered in all mediation systems as only associated court-mediation law guarantees parties' privacies/secrets in mediation in courts.

Fourth, the system of selecting mediators is still based on the conventional appointment methods without any criteria, resulting in doubts on the mediators' impartiality. In courts, mediation can be undertaken mainly by judges, while non-court mediation organizations consist of mainly high ranking civil officials from the government bodies. The relevant regulations show ambiguous clauses only in court-mediation; 'mediators can be selected from people who are impartial'(JRTIK 1995). Moreover, current regulation shows no compulsory rules for mediation training. In this situation, bias or distrust for impartiality can exist due to external influences such as higher authorities, which appoint mediators.

Fifth, inconsistent regulations in each organization may discourage speedier and cheaper procedures including in check-facts and evaluation procedure. Due to this, timing in mediation processes can be various as they rely on each committee; construction and subcontract mediation within 60 days, the environmental mediation and court annexed mediation process within 90 days. During the periods, approximately 20 days are taken for evaluation; on requests to specialists or certain organizations, processes require a time for submission of appraisal, diagnosis and examination, and even produce mediation plan to disputants.

Moreover, costs are also variable depending on organizations. There are current mediation fees with different institutes; construction mediation costs £25 for any cases in non-court mediation services, whilst in courts £50 (where a case is below £500), £450~£4,500 (£5,000~£50,000), £4,000~£40,000 (£ 50,000~£500,000). Furthermore, the applicants should pay extra costs for appraisal, diagnosis and examination of the cases (clause 79: Korean Construction Industrial Law).

RESEARCH OBJECTIVES AND METHODOLOGY

Bearing in mind poor support for the fundamental principles within the systems, it is questionable whether mediation users are satisfied with the mediation service. The research objectives are to evaluate whether current mediation models in reality offer any advantages of mediation to parties. In particular, the main focus of the study is to identify the problems in the system and the needs of Korean mediation users.

For this research, the standard mediation models from the UK and the USA have been applied to evaluate the current Korean status. Figure 1 shows the *flow* between theoretical and practical approaches. The mediation principles are generally transferred to mediation users through the mediation process as service at the final stage, including supportive regulations and mediators' skills in mediation organizations. Thus, it is considered that the satisfaction degree of parties reflects the transferring degree of the principles within the system.

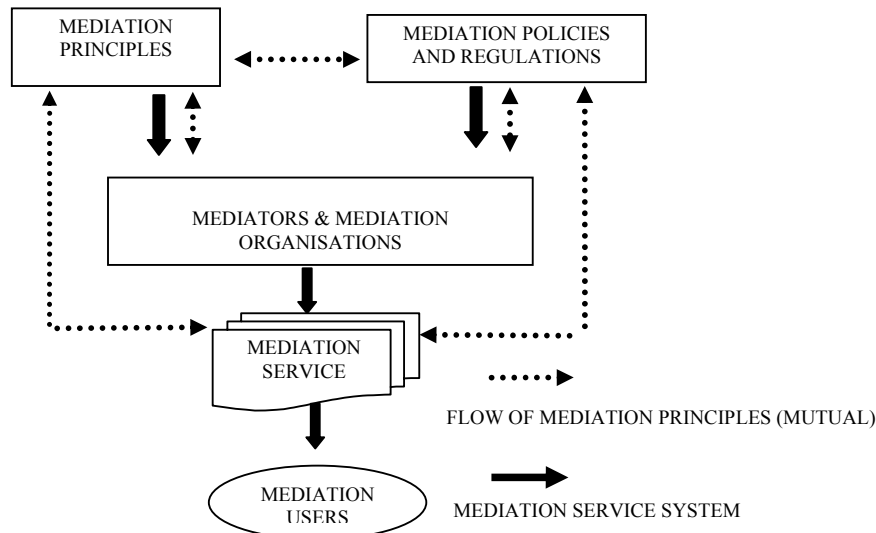


Figure 1: Flow of mediation principles to practice

To evaluate parties’ satisfaction degree, six factors as the most critical principles of mediation were selected; voluntary agreements, facilitative process, impartiality, confidentiality, time and cost effectiveness, and preservation of relationship. Those are considered not only principles of mediation but also mediation beneficial results. As can be seen in Table 1, the questions are;

Table 1 : Measurement of satisfaction factors within mediation principles

Measurement of Satisfaction factors	Questions
Voluntary	Question 1: Do you think that mediators enforce you to reach the settlement during the mediation process? Question 2: Did you reach voluntary agreement?
Facilitative	Question 3: Do you think that the atmosphere in mediation process is good? Question 4: Do you think that the mediators do not suggest any recommendations (opinions)?
Confidentiality	Question 5: Do you believe that your wish has been reflected to the agreement?
Impartiality	Question 6: Do you believe that mediation process is confidential?
Cost	Question 7: Do you trust that mediators have capability to mediate impartially?
Time	Question 8: Do you think that it is a cheap procedure?
Whole satisfaction	Question 9: Do you think that it is a speedy procedure to reach settlements? Question 10: Are you satisfied overall?
Relationship	Question 11: Do you normally maintain business relationship with the other parties involved in the disputes after settlement? Question 12: Do you wish to maintain another relationship with them in the future? Question 13: Would you like to utilize mediation in the future?

Prior to the evaluation related to the principles, the parties’ perspectives on ADR methods have been investigated to comprehend the general view and a position of mediation. To discern peoples’ preferences of resolution methods and the selection of ADR methods, the items have been classified into five representative ways; negotiation, mediation, arbitration, litigation and other.

Next to the evaluations, some additional perspectives have been asked to investigate the parties’ concepts about future mediation utilization. The main points are related whether mediation can be used as an effective future-focused dispute resolution method to Korean parties.

Sample Size

To investigate parties' perspectives toward mediation for approximately 72,600 Korean construction companies, the samples were chosen from the ranking 250th on the basis of the construction capability from the websites of Construction Association of Korea (CAK). Moreover, questionnaires have been randomly distributed to those companies by posts.

The sampling processes were undertaken through two surveys to collect sufficient data; in first survey, 96 questionnaires were selected. For second survey, same questionnaires have been also randomly sent to 154 construction companies in same method.

Overall, total responses were 114 (45.6%). From the first survey, whole 43 of 96 questionnaires have been collected (44.7%). Correspondingly, the second showed similar results on response rate at illustrating 46.1% of whole responses (71 companies).

Measurement

The criteria are based on several critical principles of mediation as stated above. Furthermore, the satisfaction of mediation is designed with Yes or No questions and 5 point scales. The satisfaction degrees are divided into 5 points; 1=Strongly Disagree (or Never Satisfied), 2= Disagree (or Not Satisfied), 3=Do Not Know, 4= Agree (or Satisfied), 5= Strongly Agree (or Very Satisfied). Moreover, the *Mean* (average rate) and one-sample test has applied the assumed satisfactory point 3, which is a minimum of the positive satisfaction.

All measurements were undertaken with SPSS statistic software programmes 13.0. The collected data will be analysed with *Means, Frequencies, One-Sample Statistics test, and Correlation analysis*. The three former methods will illustrate necessary parts to change within the system while correlation analysis shows factors' correlation. For the case of correlation analysis, *Pearson correlation analysis* has been used.

RESULTS AND FINDINGS

Generally, mediation in Korea is considered as an unpopular ignored method as the companies show a tendency to utilize negotiation and arbitration more than the other dispute resolution means. Among the total 114 responses from the industry (45.6%) from whole, only 20 reported as mediation users (17 % of whole respondents). From the first survey, eight companies (18.6%) out of all the respondents have been involved in mediation. Similar to the previous survey, 12 (16.9 %) companies from the second survey responded experience with mediation. These results show that utilization of mediation is still an unfamiliar tool for dispute resolution in the industry.

Furthermore, the unpopularity of mediation can be seen from the preference orders in Table 2. Overall among the whole four methods, negotiation is the most preferred method of choice, at 69.6%. On the other hand, mediation was the least popular at 2.6 % in the section as parties select this as a fourth preferred tool.

Table 2 : Parties' preference on ADR Methods

Which method would you like to use for your disputes?	As 1 st method	2 nd method	3 rd method	4 th method
Negotiation	80(69.6%)	28(24.3%)	7(6.1%)	1(0.9%)

Mediation	3(2.6%)	14(12.2%)	31(27.0%)	66 (57.4%)
Arbitration	22(19.1%)	46(40.0%)	37(32.2%)	9 (7.8%)
Litigation	10(8.7%)	27(23.5%)	40(34.8%)	39 (33.9%)
Total	115(100.0%)	115(100.0%)	115(100.0%)	115(100.0%)

To make matters worse, mediation shows a tendency to be selected as the last resolution method where parties cannot resolve disputes with the other three; Mediation shows 57.4% preference as 4th method. Arbitration and litigation are regarded as more familiar and popular resolution methods than mediation; the result for arbitration shows it to be the next preferred method as 40% of parties chose this as the second best tool. In addition, similar result can be found in the popularity of litigation within third place. This figure presents that most Korean construction companies have relatively low concerns toward mediation.

Time-consuming, involuntary and non-facilitative process

Most mediation principles have not appeared within the Korean mediation system. Except *Cost* and *Confidentiality* issues, the other principles such as *Voluntary* nature, *Facilitative* process, *Impartiality*, and *Time* effectiveness have not been interpreted successfully as parties show overall dissatisfactions. In particular, the 3 principles requiring urgent improvement from the research are; time-consuming systems and involuntary and non-facilitative process.

As can be seen from the outcome in Table 3, the most satisfied items are *Cost* and *Confidentiality*. 90% of parties agreed mediation process is an inexpensive process with satisfaction degree at 3.20. Moreover, there is a high positive indication of trust on confidentiality. 85% of whole respondents believed that the mediation process is confidential presenting satisfaction degree of 3.05. For these reasons, it is believed that mediation have been provided only through the governmental agencies which establish public trust on parties and offer cheaper costs for the process.

On the other hand, *Time* is a considerable issue, as it is the lowest satisfaction at average 1.80 in evaluation of satisfaction degree. Similar to this result, 95% of parties disagreed that the mediation process is speedy. It is believed that an evaluation focused process influences time negatively, depending on time-consuming checking of facts and succeeding evaluations/appraisals.

Additionally, the subsequent crucial issues for dissatisfaction resulted from the absence of *Voluntary* nature in the process; enforcement degree toward settlement (4.00), and voluntary agreements (2.25). More than 85% of parties agreed that mediators tend to force them to reach settlements and only 5% felt they reach the agreement in a voluntary process. This result indicates that the mediation process is more likely to be enforceable and compulsory to parties, corresponding to the characteristics of current mediation systems.

Table 3: Results of satisfaction degree within mediation principles

Principles	Questions	Degree of Satisfaction					One-Sample Statistics (Mean)	Rank
		Strongly Agree		Strongly Disagree				
		1	2	3	4	5		
Voluntary	Q1. Mediators' Enforcement	-	-	3 (15.0 %)	14 (70.0 %)	3 (15.0 %)	4.00	9
	Q2. Reaching voluntary agreement	4 (20.0 %)	8 (40.0 %)	7 (35.0%)	1 (5.0 %)	-	2.25	5
Facilitative	Q3. Good atmosphere	3 (15.0%)	10 (50.0 %)	7 (35.0%)	-	-	2.20	6
	Q4. Facilitative mediators	6 (30.0 %)	7 (35.0 %)	5 (25.0%)	2 (10.0 %)	-	2.15	7
	Q5. Reflection of opinion	1 (5.0 %)	8 (40.0 %)	10 (50.0 %)	1 (5.0 %)	-	2.15	7
Confidentiality	Q6. Confidential mediation process	-	3 (15.0 %)	13 (65%)	4 (20.0 %)	-	3.05	2
Impartiality	Q7. Impartial mediators	6 (30.0 %)	3 (15.0 %)	11 (55.0 %)	-	-	2.30	4
Cost	Q8. Cheaper process	-	2 (10.0 %)	12 (60.0 %)	6 (30.0%)	-	3.20	1
Time	Q9. Speedy procedure	5 (25.0 %)	14 (70.0 %)	1 (5.0 %)	-	-	1.80	10
Whole satisfaction	Q10. Overall Satisfaction	3 (15.0 %)	6 (30.0 %)	9 (45.0 %)	2 (10.0%)	-	2.40	3

Furthermore, as far as *Facilitative* factors are concerned, parties tend to show the similar aspects with voluntary factors; reflection of parties' opinion (2.15), facilitative procedure by mediators (2.15), mediation process atmosphere (2.20). Just more than half of them feel that their opinions were reflected to the agreements. Also, only 35% of parties agree that mediators were facilitative. Moreover, they feel the mediation atmosphere is not good as 65% of mediation users consider.

Interestingly, among the three problems, the two factors between *Voluntary* and *Facilitative* principles reveal strong links. As can be seen from Table 4, significant correlation (r) between dissatisfied factors between voluntary agreement and facilitative mediators noticeably presents a correlation at 0.704. The parties tend to consider the less facilitative process mediators promote, the less voluntary agreement parties have.

In addition, there is a significant correlation between enforcement mediators and reflection of opinions during the process as showing at -0.754. Parties believe that their opinions tend not to be reflected sufficiently where there is more enforcement by mediators.

Table 4: Significant correlation (*r*) between dissatisfied factors

Factors	EM ¹	VA ²	MPA ³	FM ⁴	ORS ⁵	CF ⁶	IP ⁷	CT ⁸	TM ⁹	WS ¹⁰
EM ¹	1	-.330	-.538 (*)	-.379	-.754 (**)	.155	-.103	.000	-.358	-.124
VA ²	-.330	1	.445 (*)	.704 (**)	.104	-.537 (*)	-.085	-.503 (*)	.237	.000
MPA ³	-.538 (*)	.445 (*)	1	.490 (*)	.447 (*)	-.150	.083	-.221	.549 (*)	.341
FM ⁴	-.379	.704 (**)	.490 (*)	1	.182	-.365	.015	-.312	.367	.057
ORS ⁵	-.754 (**)	.104	.447 (*)	.182	1	.216	-.058	.046	.216	.169
CF ⁶	.155	-.537 (*)	-.150	-.365	.216	1	.167	.113	.033	-.046
IP ⁷	-.103	-.085	.083	.015	-.058	.167	1	.000	.110	-.153
CT ⁸	.000	-.503 (*)	-.221	-.312	.046	.113	.000	1	-.196	.045
TM ⁹	-.358	.237	.549 (*)	.367	.216	.033	.110	-.196	1	.747 (**)
WS ¹⁰	-.124	.000	.341	.057	.169	-.046	-.153	.045	.747 (**)	1

(Significant correlation (*r*); the more | *r* | is close to 1, the stronger mutual relation exists between factors.)
 0.8 ≤ |*r*|; strong correlation, 0.6 ≤ |*r*| < 0.8; fair correlation,
 0.4 ≤ |*r*| < 0.6; little correlation, |*r*| < 0.4; no correlation.

- 1: Enforcements of Mediators
- 2: Voluntary agreement
- 3: Mediation Process Atmosphere
- 4: Facilitative Mediators
- 5: Reflection of your opinions during the process
- 6: Confidentiality
- 7: Impartiality
- 8: Cost
- 9: Time
- 10: Whole satisfaction

On the other hand, *Time* factor, mostly-required to improve within the system does not show any strong correlation with the other factors, except ‘mediation process atmosphere’ at 0.549 and whole satisfaction degree at 0.747. This indicates that parties tend to feel the mediation atmosphere is good where the process is speedier. Longer and sufficient time for the process is generally considered as an essential factor which leads to both a satisfactory outcome and good process atmosphere. Nevertheless, the long process in Korea can result in adversarial atmosphere with high dissatisfactory degree.

Vicious circle of mediation

It is considered that the poor service of mediation has brought about less satisfaction which causes further poorer application for mediation continuously. From Table 5, mediation does not seem to be a relation-focused process in Korea. After a mediation process, only 30% of parties want to maintain business with the other parties who are involved in the disputes. What is more, only 3 respondents (15% of whole respondents) wish to continue future relationship.

Table 5: Perspectives of parties on business relationship and utilization of mediation

Principles	Questions	Perspectives of parties No		
		Yes	No	Do not know
Relationship	Q11. Maintain relationship after settlement	6 (30.0 %)	12 (60.0 %)	2 (10.0 %)
	Q 12. Maintain future relationship	3 (15.0 %)	9 (45.0 %)	8 (40.0 %)
	Q13. Re-use mediation	3 (15.0 %)	13 (65.0 %)	4 (20.0 %)

With respect to parties' potential perspectives toward mediation utility, it is required to focus on the answers about 'would you like to re-use mediation in the future?'. Among 20 respondents (17.5%) who have experience of the mediation process, only 15% of companies (3 out of 20 mediation users) wished to utilize mediation in the future; 13 (65.0%) responded 'No' and four said 'I do not know.' (20 %). This shows that little potential intent to reuse mediation in the future.

CONCLUSION

Mediation users in Korea generally showed less concerns to utilize and low intention to re-use mediation for the future. The fundamental reason for those circumstances is considered due to the mediation system. It shows failure in transferring most mediation principles to parties with low satisfaction except factors for cost and confidentiality.

Particularly, among the problems in the system, three critical needs of parties have been identified. First, timing of mediation process was the most urgent issue to review. Most parties tend not to be satisfied due to long procedure of mediation. Second, high dissatisfaction degree has been also revealed in involuntary nature; high tendency of mediators' enforcement, and failing in voluntary agreements. Third, non-facilitative characteristics of the process have negatively affected a majority of parties' perspectives toward mediation, resulting in tendencies to feel uncomfortable atmosphere with evaluative mediators who do not reflect their opinions to settlement.

Those three factors have been detected in certain correlations within the parties' satisfaction. Especially, voluntary and facilitative factors have been found in a strong correlation, while time factor is only associated with mediation process atmosphere from facilitative factor.

FUTURE WORK

To advance the models of mediation in South Korea, it is strongly believed that facilitative mediation model should be applied to improve insufficient points in the system so that parties can be satisfied with the service; such as time, facilitative process and voluntary agreement, etc.

For the research, the mediation model in the UK has been chosen to investigate the appropriateness of applying it to the model of Korea. The UK is one of mediation-advanced countries showing successful settlement results with high satisfaction through facilitative mediation. The critical parts of the future research will be the investigation of successful factors for the UK mediation models, detection of the differences between the UK and Korea and the study for the appropriateness to apply those factors to the models of Korea. In particular, the three obstructions with the system in Korea will be critically focused to direct its improvements.

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