



VERSITECH LTD.

The University Technology Transfer Company

**Consultancy Review on the Pilot Mediation
Scheme in Support of Property Owners
Affected by Compulsory Sale under the Land
(Compulsory Sale for Redevelopment)
Ordinance (Cap. 545)-**

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GLOSSARY

Abbreviations	Descriptions
CS	Compulsory Sale
CSLR	Compulsory Sale of Land for Redevelopment
DEVB	Development Bureau
HKU	The University of Hong Kong
JMHO	Joint Mediation Helpline Office
LCSRO	Land (Compulsory Sale for Redevelopment) Ordinance
PMS	Pilot Mediation Scheme
REDA	Real Estate Developers Association of Hong Kong
WAD	Withdrawal / Adjournment / Discontinuation

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1 SUMMARY OF FINDINGS

In response to the consultancy brief (Quot. Ref. PLB(Q) 13/2012) dated 21 December 2012, and the consultancy agreement dated 6 March 2013, this Final Report summarizes the findings of the consultancy review on the Pilot Mediation Scheme (PMS) in support of property owners affected by compulsory sale under the Land (Compulsory Sale for Redevelopment) Ordinance (LCSRO) (Cap. 545) (the “Study”), and makes recommendations on the way forward, including options of introducing improvement measures / revamping the scheme / termination of the scheme.

The period under the Study is from 27 January 2011 (since the operation of PMS) to 30 April 2013. Some references are also made to earlier periods for comparison purposes (since the operation of LCSRO on 7 June 1999).

The commencement date of the Study was 6 March 2013. The Inception Report was submitted on 28 March 2013 and accepted by the DEVB on 8 July 2013 after revisions. The Working Paper, evaluating the suitability of the scope of service under PMS, evaluating its effectiveness and identifying reasons for the success rate of PMS, was first submitted on 11 September 2013 and last on 23 June 2014, after several rounds of comments and revisions. This version (r3a) of the Final Report was submitted on 07 June 2014 and accepted by the Secretary for Development on 8 September 2014.

1.1 Summary of the qualitative analysis

Interviews with various stakeholders and review of related documents and studies suggest that:

1. Many minority owners might have the misconception that the PMS was established by the Government to assist them to achieve the highest acquisition price, which has never been the aim of the PMS.
2. Many minority owners do not fully understand the purpose of mediation, the role of the mediator and how mediation works.

3. A majority of the disputes arising from Compulsory Sale of Land for Redevelopment (CSLR) are not resolved through mediation services. Most acquisitions for redevelopment are voluntary market transactions. The number of disputes that ends up with the need for Compulsory Sale (CS) is small compared with all cases of acquisition for redevelopment. These CS cases are usually not about whether the minority owners are willing to sell their units but rather about the acquisition price for their units. One major problem facing the minority owners in a CS dispute is whether offer price by the majority owner is a fair price¹. This problem is mainly due to a lack of price information, especially when the number of transactions of similar old units is thin, and the dispute over price cannot be resolved with mediation. As a result, the number of CS disputes that has been successfully resolved by mediation is only a small fraction of all the CS disputes.

4. Minority owners may have little incentive to resolve CS disputes through mediation since:
 - a. There is no social incentive for the minority owner to maintain a long term harmonious relationship with the majority owner.

 - b. There is little financial incentive for the minority owner to resolve the CS dispute by mediation:
 - i. Almost all CSLR litigation cases did not result in cost orders against the minority owners irrespective of the outcome if they just acted as passive respondents during the Lands Tribunal hearings. Minority owners would reasonably expect that it will not cost them much if they do nothing and let the Lands Tribunal determine the reserve price for auction for them.

 - ii. Due to a lack of price information, minority owners would rather let the Lands Tribunal assess the reserve price than to reach an agreement through mediation since they would expect that the cost of the former is marginal and the outcome could be tested and confirmed in the market through auction.

¹ Some minority owners responded that they would like the Government to include free valuation service in the PMS.

- iii. When the property market is booming, there is expectation amongst minority owners that delay could result in a higher acquisition price. When the market is falling, minority owners may want to reach agreement quickly with the majority owners through informal means that are cheaper and quicker, such as negotiation.
5. Of all the CS cases that attempted to solve dispute with mediation, only a small proportion was done through the PMS (this is also consistent with the data from the quantitative analysis).
6. Compared to the mediation services provided by the market, mediation services provided by the PMS is much less flexible in terms of fee structure.
7. The PMS, with a fixed fee schedule which was determined by the Government in consultation with the Joint Mediation Helpline Office (and, with the change in the going rates of mediators in the market, now proves to be higher than the rate offered by some mediators in the open market), is in a disadvantaged position when competing with the private sector especially when the PMS mediation service is sometimes provided by the same pool of mediators in the open market.
8. One of the main reasons why the minority owners use the PMS services was the perceived impartiality and credibility of PMS. This is not straightly due to the fact that the PMS was funded by the Government. The Government-funded PMS aims to enhance public knowledge on mediation as an alternative dispute resolution mechanism to handle CS disputes prior to the Lands Tribunal hearings. The PMS, which is operated by the Joint Mediation Helpline Office, also supports the training of mediators on CS to handle these mediation cases and maintains a list of mediators trained on CS. The independence and impartiality of the mediation services provided by the Joint Mediation Helpline Office is more because of the neutrality of the Joint Mediation Helpline Office and the code of conduct of mediators who may also be professional members of the respective professional member organisations of the Joint Mediation Helpline Office and who are also guided by their respective professional codes of practice.

9. The majority owners have a strong financial incentive to reach agreement with the minority owners. Some of them are even willing to pay for the minority owner's share of the mediation costs². However, those interviewed have also expressed the view that mediation may not be an effective means of resolving CS disputes. In many cases, the majority owners' purpose of conducting mediation was to show the Lands Tribunal that they had done their best to resolve the disputes with the minority owners before applying for a CS order in accordance with the 2011 Practice Direction issued by the Lands Tribunal.
10. There is no shortage of qualified mediators for CS cases. The demand for CS related mediation service has been declining while there has been a significant increase in the number of qualified mediators who can provide mediation services for the CS disputants.
11. The education and publicity service of the PMS is considered important but it is difficult to make it cost effective as CSLR only affects a very small number of property owners. Mass media publicity is usually not cost effective.
12. The four supporting services under the PMS, viz., the administration of mediation requests and mediation cases; consultancy service for mediation requests and mediation cases; publicity and training of mediators on CS cases; and public education on mediation in CS cases, require very different expertise and experience. It is difficult, if not impossible, to have a single service provider which can be well versed in all the four aspects. It is not necessary to bundle all four PMS services together and award the PMS contract to one service provider. When the services are bundled together, there are only a limited number of service providers which have the capability to bid the PMS contract. In the third contract, the PMS services were divided into two contracts – (1) provision of administration and consultancy services and (2) provision of publicity and public education services. This resulted in awarding the two contracts

² REDA announced on 6 March 2011 that they would be willing to pay "the appropriate share of the mediator's fee under the PMS for those owners who are not eligible for Government assistance", if the majority owners are members of REDA. (<http://www.reda.hk/press-releases/pilot-mediation-scheme>). According to the PMS' statistics, there have been 5 cases where the majority owners voluntarily paid for the minority owners' share of mediation fee and application fee. Among them, there are 3 cases where the majority owners are REDA members, which suggest that there are non-REDA members who are also willing to pay for the minority owners' share of mediation costs.

separately to two service providers.

13. The service requirements of the four major tasks of the PMS are well specified in the contracts, but there are no explicit requirements on any quality control although the two service providers have delivered according to their service requirements.
14. The PMS was introduced after the lowering of the threshold for application for CS from 90% to 80% for three specified classes of lots which could induce a surge in the demand for mediation services that could not be met by the private sector. Also, the public had relatively little knowledge or confidence in using mediation to resolve the CS disputes at the time. Therefore, the Government's funding for the PMS at this early stage could be justified. However, after running the PMS for 3 years, the number of qualified mediators has increased substantially. In addition, there is also an institutional improvement in the use of mediation services after the enactment of the Mediation Ordinance and the Hong Kong Mediation Code. The information cost on the quality of the mediator and the mediation process has been significantly lowered. There is sufficient capacity in the open market to handle the demand for CS mediation services.
15. Lastly, the publicity and public education services under PMS are found to be inefficient, because CSLR is irrelevant to many people until their properties are being acquired. So it may not work by educating the mass public. It would be more appropriate to engage social service organizations with extensive and long term experience in outreaching work to owners of units in old buildings to provide the publicity and public education services.

1.2 Summary of the quantitative analysis

a. Utilization rate:

According to the data provided voluntarily by parties to CSLR cases,³ of all the CSLR application cases during the period 15 February 2011 – 31 March 2013 (based on information from Judiciary sources), there were 94 mediation attempts to resolve the disputes. Of the 94 mediations, only 12 (or 13%) were provided through the PMS. There were 37 cases (39%) cases with unknown (unreported) source of mediation provider. If these cases are excluded, the mediation services provided through PMS was 21%. This confirms the qualitative analysis that the rate of PMS utilization is low.

The data provided by JMHO showed that, up to 30 April 2013, there were 6 cases where the minority owners applied for reimbursement of mediation fees under the mediation fee subsidy scheme offered by the PMS; but there were only 2 approved cases.

b. Success rate

Of all the 94 mediation cases mentioned above, only 11 (12%) cases were successfully resolved by mediation and 2 were provided through the PMS (based on information from Judiciary sources). Since 12 of the 94 mediation cases were provided by the PMS, the PMS success rate was $2/12 = 17\%$. This success rate is higher than the average of 12%, although based on a small number of observations.

c. The number of qualified CS mediators

After running five training sessions through the PMS, there are now 225

³ It is to be noted that according to the statistics kept by JMHO, the number of cases handled under the PMS is higher than the number shown here. This is because some of the mediation cases reported to the Judiciary did not identify the source of mediation support and they might have actually been handled under the PMS.

trained mediators for compulsory sale mediation listed on the PMS website who are considered well qualified to mediate on CS cases. The demand for training courses for CS mediators is expected to decline, especially if the declining trend of the number of compulsory sale applications submitted to the Lands Tribunal continues.

The annual budget that the service providers of the PMS earmarked for training CS mediators was the largest when the PMS was first launched and decreased over time as more CS mediators have been trained as shown below

2011-12	HK\$300,000
2012-13	HK\$137,349
2013-14	HK\$31,933

Note: The diminishing budget is also indicative of a declining demand for training course for CS mediators.

2 RECOMMENDATIONS

PMS has served its historical mission to better inform and educate the public, in particular, the minority owners, on the availability of an alternative dispute resolution mechanism if faced with compulsory sale of their properties by the majority owners at a time when there was an upsurge of compulsory sale applications to the Lands Tribunal after the lowering of the compulsory sale application threshold from 90% ownership to 80% for three specified classes of lots.

Given the change in circumstances since the introduction of the PMS in 2011, if the Scheme is to be continued in its present form, it may not be the most beneficial to the affected minority owners and the society as a whole. We recommend the current PMS be revamped as follows:

Recommendation 1

Government funding for the provision of (1) administration, (2) consultancy services and (3) subsidy to eligible elderly minority owners of the PMS be discontinued

Recommendation 2

Government funding for training and accreditation of mediators of the PMS be discontinued.

Recommendation 3

Government funding for publicity and public education be continued and awarded to non-profit-making organizations on a competitive bid basis. The contract should be 2-3 years long and indicators be devised to monitor the performance of the service provider.

2.1 Justifications for Recommendation 1

- a. The PMS was introduced at a time when the costs of using mediation as a means of resolving conflicts between the minority and majority owners involved in compulsory sale applications were high. These costs reduce the potential of using mediation to reach a win-win agreement. This may potentially slow down the rate of redevelopment and thus not beneficial to the society as a whole. These costs include (1) information cost about the purpose, operational details and effectiveness of mediation and (2) the costs of finding a mediator acceptable to both parties (particularly the minority owners). The provision of (1) administration and (2) consultancy services under the PMS were aimed to lower these costs and had facilitated the use of mediation to resolve disputes between the minority and majority owners and thus facilitated redevelopment during the past few years. These costs have been lowered in recent years as a result of (1) the enactment of the Mediation Ordinance the process for which had enhanced public awareness and understanding of mediation and (2) increase in the number of qualified CS mediators trained to handle CS cases (currently 225). As a result, the need for the Government to continue funding (1) the administration and (2) consultancy services of the PMS has been greatly reduced.
- b. The PMS was introduced to promote mediation, which is one of the possible means of voluntary dispute resolution. However, the qualitative and quantitative findings do not suggest mediation to be a highly effective means of resolving CS disputes, amongst others. The reported mediation success rate for CS application cases, though based on limited data, was only 12%. The number of CS cases that were terminated due to withdrawal, adjournment or discontinuation (WAD) before hearing was more than double the number of successful mediation cases for a given period. This suggests that even after the filing of applications to the Lands Tribunal, various means, other than mediation, were successfully used to resolve the disputes leading to conclusion of the cases without the need for judgment from the Lands Tribunal.
- c. There is a lack of incentive, both financial and non-financial, for the minority owners to resolve their disputes with the majority owners using mediation. This is because there is no incentive for the minority owners

to consider the need to maintain a long term business or social relationship with the majority owner. The low risk of cost orders being handed down by the Lands Tribunal against the minority owners also means that resolving the dispute through the Lands Tribunal is not a cost burden for them. To some minority owners, judgment by the Lands Tribunal may even be a preferred option as they perceive that the Lands Tribunal can make a fair judgment on the reserve price, which can later be tested and confirmed in the market through auction.

- d. Notwithstanding that some minority owners do perceive the PMS to be capable of providing them with more independent mediation services, mediation service provided under the PMS only constitutes a small proportion of all mediation cases (13%-21% as indicated from the self-reporting statistics provided to the Judiciary by parties to CS cases). This suggests that, despite being financed by the Government, the PMS services are not as competitive as those offered by the market. The possible reasons for the relatively low utilization of the services offered by PMS are a lack of flexibility in terms of mediation fee scale. Furthermore, the Joint Mediation Helpline Office, which has been operating the administration and consultancy service for the PMS, will continue to provide the information on mediation service for compulsory sale cases and make the necessary referrals for engagement of qualified mediators in its own capacity as an umbrella organization comprising membership of the eight leading mediation service providers in Hong Kong.
- e. One of the purposes of the PMS is to provide assistance to the elderly minority owners. However, the number of affected elderly minority owners who applied for this service is small. There were only 6 applications and only 2 met the means test criteria and had been approved so far. It is noted that some majority owners, including known developers, are also prepared to and in fact found to have provided this subsidy to the minority owners, regardless of their age and means. As such, even if the Government is to cease this subsidy, the impact should be minimal.

2.2 Justifications for Recommendation 2

- a. There are a total of 225 mediators listed on the PMS website as of today. This is not a small number compared to the demand for CS mediation services. This pool of mediators is considered a reasonably large pool to handle compulsory sale cases, especially if the number of applications for CS order continues to decline.
- b. Should there be a surge in demand for CS mediators again, there will be courses offered by various organizations in the market to satisfy the need for more qualified CS mediators. There is no justifiable cause for the Government to subsidize the training of CS mediators and not the other types of mediators. These training courses are value-added programmes and therefore the training cost should be borne by the attendees themselves.

2.3 Justifications for Recommendation 3

- a. Publicity and education lowers the information costs, increases the transparency of the CSLR policy and allows minority owners to understand their rights. It enables the minority owners to make more informed decisions. With more informed minority owners, the number of disputes between minority owners and majority owners may be reduced and the time taken to resolve disputes can be shortened if the affected minority owners know their rights, are made aware of the courses of actions available to them and the potential outcomes. This may speed up the redevelopment process and in turn benefit the society as a whole. The minority owners are usually more informationally disadvantaged when compared with the majority owners. Government intervention as an information provider to address the imbalance can be justified
- b. In view of the nature of CSLR, it requires social network with the owners in old buildings and more proactive actions to identify and approach the potential minority owners.