

MEDIATION MECHANISM FOR CONSTRUCTION DISPUTE RESOLUTION IN TAIWAN

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ABSTRACT: Mediation has long been praised as one of effective dispute resolution methods in the area of construction law. Article 85-1 of the Taiwan Government Procurement Act was amended and promulgated by presidential decree on July 4, 2007. The second paragraph of the Article elaborates explicitly, "In the event that the application for mediation referred to in the preceding paragraph is made by the supplier, the agency may not object to such application." Beyond that, if an unsuccessful mediation of a construction dispute is due to the agency's disagreeing with the proposal or resolution for mediation proposed by the Complaint Review Board for Government Procurement ("CRBGP"), the agency may not object to the arbitration filed by the supplier. It undoubtedly reinforces the importance of the mediation-arbitration procedure. Accordingly, this paper elaborates on the mediation mechanism in Taiwan in the framework of construction disputes first. After that, dispute resolution of a local public work case is provided to demonstrate the practice of construction mediation in Taiwan. Lastly, this study proposes suggestions on applying mediation to ease similar subsequent cases.

Keywords: Construction, Dispute Resolution, Mediation-Arbitration Method

1. INTRODUCTION

Mediation mechanism is not only good for resolving disputes of general affairs of our society, but it is also well run in the construction field. In Chinese society, mediation mechanism has long been relied to resolve every kind of disputes. The origin of Chinese mediation can be tracked back to Western Zhou Dynasty around three thousand years ago. It is well operated in Chinese society until now. Wigmore mentioned in "A Panorama of the World's Legal Systems" [1], sixteen historic and modern legal systems in the world. These systems include Egyptian, Mesopotamian, Chinese, Hindu, Hebrew, Greek, maritime, Roman, Celtic, Germanic, canon, Japanese, Islam, Slavic, Romanesque, and Anglican. Among them, the common law system and the civil law system are two of dominant legal systems today. Traditional Chinese legal system is among them. Anyhow, Chinese began to adopt its law system mainly from Europe along with its indigenous tradition since the beginning of the nineteenth century. Though Taiwan somewhat inherits Chinese legal system, its contemporary civil system has little relation to traditional Chinese laws. On the other hand, the spirit of Chinese mediation mechanism is well kept in Taiwan for dispute resolution.

The alternative dispute resolution (ADR) is widely discussed recently, especially on the dispute board (DB). In order to refresh our memory of the importance of mediation mechanism and share local practice with others, the objective of this article is to introduce the

contemporary mediation mechanism for construction dispute resolution in Taiwan. It presents the dispute resolution applying in Taiwan first followed by the practice of construction mediation. A local mediation case is provided as an example at the end. We hope this non-binding mediation mechanism would merit the consent of both disputants and avoid further lengthy procedures, such as arbitration and litigation, to settle the disputes.

2. DISPUTE RESOLUTION IN TAIWAN

Construction projects persist characteristics of time consuming, mass funding and complexity. Due to the nature of construction project complexity, many disputes would arise during the life cycle of projects. Construction disputes can be resolved mainly through amicable conciliation, mediations and litigation. However, these alternative dispute resolution terms are not defined explicitly in related laws or regulations in Taiwan as ones by International finance corporation (IFC) of World Bank Group and the National Alternative Dispute Resolution Advisory Council in Australia (NADRAC). IFC delineates, "Mediation is a procedure in which the parties wish to settle a dispute amicably with the assistance of one or more mediators that help the parties reach an agreement." [2] NADRAC describes both mediation and conciliation as follows, "Mediation is a purely facilitative process, whereas 'conciliation' may comprise a mixture of different processes including facilitation and advice.

NADRAC considers that the term 'mediation' should be used where the practitioner has no advisory role on the content of the dispute and the term 'conciliation' where the practitioner does have such a role." [3] In Taiwan, the distinction between conciliation and mediation is that mediation would invite a third party to assist in settling the disputes. On the other hand, the dispute is left to be settled by conciliators of both parties themselves. However, more and more, the overlapped area of mediation and conciliation are increased.

Judicial Yuan declared that annual conciliation amount, which handled by a district court only, reached as high as NTD 330 millions in 2007 [4]. From that statement, we may see the magnitude of conciliation in Taiwan. Conciliation assists to save tremendous legal costs and public resources locally. According to a U.S.A. survey of 142 major companies for one fiscal year (1992), it estimated that alternate dispute resolution procedures saved them more than \$100 million in legal costs, counting mediations and arbitrations as a block for their consideration [5].

The description of each instrument on private work and public work nowadays in Taiwan is elaborated below separately.

2.1 Amiable Conciliation

Amiable conciliation is the chief dispute resolution method which requires the meeting of mind of contract parties and/or the third party. It may arise at any stage of dispute settlement procedure, even in the litigation procedure. Anyhow, claim of right must be exercised before the completion of the extinctive prescription. Article 125 of Taiwan Civil Code states, "Unless shorter periods are provided by the act, a claim is extinguished by prescription if it is not exercised within fifteen years." [6] The cost of such method is near none if the cost of time spent is not calculated. Some conciliation cases may even end up with inviting an independent fair third party to act as lubricant of the procedure, which we may re-classify them into mediation cases. It is also the first round to settle any dispute by negotiation between disputants.

Due to its nature of secret, most statistic of conciliation result is not disclosed to public. However, the settlement rate may be much higher than our expectation. In a local case, the flooding case of Aere Typhoon, 99% of 19,000 claims were solved through the conciliation procedure within two years. [7] The high rate of settlement may contribute to Chinese culture which disputants are usually treated as troublemakers in the society.

Traditionally, the conciliation procedure is used only in private sector in the past. It is now getting more popular in public work. Particularly, its non-binding recommendation offers involved parties to make decisions at will that copes with culture and the spirit of contract. It makes the result of settlement in private construction sound well. However, public agencies are still hesitated to apply the procedure if there is no legal authorization. Public officials usually worry about being investigated and charged with corruption, so they rather go for arbitration or litigation for not making their own decisions.

2.2 Mediation

Mediation is a procedure of assisted negotiations in Taiwan. Disputants of mediation have complete privacy and right to make their own final decision. Any party does not appear at the meditation without due course on the date of meditation, the meditation shall be presumed to have not been completed. The meditation procedures may not be open, unless otherwise agreed to by those directly involved. The attendants or participants of a mediation meeting, and/or the persons who have handled the mediation affairs should keep confidential the incidents being mediated. Particularly, concessions or statements presented during mediation procedure cannot be used in any court or arbitration proceedings later. Private mediation, public mediation, mediation by arbitration association, court sponsored mediation, dissatisfaction, dissatisfaction complaint or protest, complaint review board, and dispute board are options available to resolve construction disputes in Taiwan.

A mediator is a neutral third party who has no jurisdiction. Sometimes, the court sponsored mediation procedures may also be assumed willingly in the court. The mediator may help to identify the disputed issues and alternatives and make an effort to reach an agreement. However, the mediator shall be fair and not give the disputants any legal recommendation. The age of most of mediators in Taiwan is over 50 (47.59% over age of 60 and 35.60% between age of 50 and 60). In 2009, one mediator served every 10 thousand citizens and every mediator handled 32.2 cases [8].

There is no time constraint on the mediation. The procedure is not lengthy; normally, it will take less than one month. Whether mediation findings are binding or not, it is not by itself. It's binding only when the original copies of the written agreement of mediation have been sent to the court for review and approved.

Since mediation has no compulsory power on disputants, except those subject to an existing contractual agreement and court mediation, disputants may choose to agree or disagree the mediation findings at will. The statistic of Taiwan Ministry of Interior shows that 72% construction disputes is settled through mediation during the period of 1993 and 2009 [9]. A random access study showed an 80% success rate for mediation in U.S.A. Then, tracking the 20% that did not seem to have succeeded for an additional two years, 41 percent of the cases in which mediation cases did not appear to have been successful were settled out of court [10].

2.3 Arbitration

The arbitration procedure involves one or more neutral third parties, the arbitrators, to determine the dispute within six months. No matter how complicate the case is, the period can only be extended to nine months. For the sake of efficiency, the arbitrator(s) may render final and binding decisions. Starting from the case of Matra Co. versus Department of Rapid Transit Systems (DORTS) in 1993, arbitration has been extensively used in the Taiwan construction industry for disputes involving private and public construction projects in past years. However,

public agencies are getting less interest in applying the arbitration method due to their concern of fairness.

Parties to arbitration may adopt conciliation to settle their dispute before the issuance of an arbitral award. In addition, the parties may still choose to submit their disputes to mediation without arbitration agreement. The successful settlement agreement between the parties has the same force and effect as that of an arbitral award. However, the terms of the settlement agreement may be enforced only after the court has granted an application by a party for enforcement and issued an enforcement order. If an arbitration agreement includes waiver of such procedure, the terms of the settlement agreement may be enforced directly.

2.4 Litigation

In Taiwan, the "three level and three-instance" system is the fundamental arrangement. District courts and their branches, which hear civil and criminal cases in the first instance; high courts and their branches at the intermediate level, which hear appeals against judgments of district courts and their branches; and the Supreme Court at the highest appellate level, which reviews judgments by lower courts for compliance with pertinent laws or regulations. In generally, issues of fact are decided at trials of both the first and the second instances while trials of the third instance involve only issues of law itself.

The construction litigation frequently encompasses criminal charges, administrative punishment and civil trials against employees, contractors, subcontractors, professional engineers, architects, and officials. Sometimes, it will involve other tortfeasors as well. According to the rules of Civil Procedure, judges may hold court mediation or court conciliation procedure before or during litigation procedure formally. It may result a binding agreement on disputants.

The following table, Table 1, shows the comparison of fee schedule among arbitration, mediation, and court acceptance fee in Taiwan [11].

Table 1. Comparisons of Fee Schedule among Arbitration, Mediation, and Court Acceptance Fee in Taiwan (in New Taiwan Dollars)

Amount of Claim or Counter-Claim (in million)	Arbitration Fee	Mediation Fee	Court Acceptance Fee (total of 3 instances)
1	36,600	5,000	43,600
10	152,600	50,000	400,000
100	602,600	500,000	3,568,000
1000	5,102,600	5,000,000	31,288,000

3. MEDIATION IN TAIWAN

Public mediation, mediation by arbitration association, court sponsored mediation, dissatisfaction complaint, and

by complaint review board are alternatives of construction mediation available in contemporary Taiwan. They are elaborated on the following sections one by one.

3.1 Institutional Mediation

Two types of mediation persist in contemporary Taiwan. Non-institutional mediation is a mediation in which the selected neutral third party mediator is not a member of an institutional mediation board. On the other hand, institutional mediation, a mediation in which the selected neutral third party mediator is a member of an institutional mediation board, is more popular locally. These mediators may assist to solve almost every kind of disputes, including construction disputes and justice mediation.

3.1.1 Public Mediation

In Taiwan, most of counties, townships, cities and districts offer public mediation at no cost of disputants. Others may offer mediation service at trivial cost of disputed parties too. For example, for a local city mediation committee, the city government would provide a free mediation and consulting service. Mediators of such institutional mediation boards normally are suggested by city mayors and are appointed by the commissioner of the County. Most of them have been acted as conciliators or heads of neighborhood. Since these mediators are neighbors of disputants, complainants seldom question their fairness. This advantage helps involved parties to reach a mutual agreement.

3.1.2 Mediation by Arbitration Association

Other than public mediation, Article 50 of the rules on arbitration institution, mediation procedures and fees set by The Arbitration Association of the Republic of China, states that "For mediation regarding property disputes, the mediation fee shall be determined according to the amount or price of the subject matter pursuant to the following standard:

1. Where the amount or price of the subject matter is NT\$600,000 or less, the mediation fee shall be NT\$3,000; and
2. Where the amount or price of the subject matter is greater than NT\$600,000, the mediation fee for the amount exceeding NT\$600,000 shall be 0.5%."

In general, the mediation fee shall be equally shared by the participated parties if no agreement between parties in advance. In case, a disputant withdraws an application for mediation or the consent to mediation, he/she shall pay the full amount of the mediation fee himself/herself.

3.1.3 Court Sponsored Mediation

Article 406-1 of Taiwan Code of Civil Procedure elaborates, "A summary court judge shall conduct the mediation proceeding with help of one to three mediators appointed by the judge." The mediation proceeding shall be conducted in a courtroom or, where necessary, at another appropriate place. Article 406 of foresaid procedure also rules the eleven real estate related matters shall be subject to mediation by the court before the relevant action is initiated. Moreover, an action pending

in the court of first instance may, with the consent of both parties, be referred to mediation. The litigation proceeding shall be stayed. Where a successful mediation is reached, the action is concluded accordingly. Where the mediation fails, the litigation proceeding shall resume accordingly. In cases of a successful mediation after the action was referred to mediation in accordance with the provision of the first paragraph, the plaintiff may move for the return of one half of the court costs paid within

three months from the day of the successful mediation. Beyond the consideration of mediation fee, we also find that institution mediation agreement may resolve construction disputes efficiently the same as other ADR instruments, such as arbitration awards or court judgments. The following table, Table 2, shows statistic of Taiwan Court mediation in the period of 2000 and 2009.

Table 2. Statistic of Court Sponsored Mediation (Nov. 2010)

Year	Cases closed						Percentage of Mediation	
	Total	Mediation		Dismissed	Withdrawn	Other	(1)	(2)
		Sustained	Not sustained					
2000	45 273	4 981	34 013	92	5 410	777	12.77	11.00
2001	48 942	6 274	35 586	92	6 011	979	14.99	12.82
2002	60 870	9 088	41 317	98	8 258	2 109	18.03	14.93
2003	70 596	11 200	45 856	128	9 726	3 686	19.63	15.86
2004	53 881	10 611	32 231	177	6 592	4 270	24.77	19.69
2005	52 096	12 351	25 892	211	7 542	6 100	32.30	23.71
2006	65 476	18 763	25 320	141	9 713	11 539	42.56	28.66
2007	80 505	24 320	32 301	350	11 841	11 693	42.95	30.21
2008	78 260	24 457	29 031	411	11 549	12 812	45.72	31.25
2009	81 265	28 562	29 919	342	11 403	11 039	48.84	35.15

Note:

- (1) The ratio of the number of successful mediation cases to the number of successful and unsuccessful mediation cases.
- (2) The ratio of the number of successful mediation cases to the number of terminated mediation cases.

3.1.4 Dispute Board

In the U.S. and Canada, DRBs have been used extensively with much success. The statistic shows that no disputes requiring hearings were brought to the DRB for 58% of the projects. In addition, the success rate of the DRB process is 98.7%. These projects were completed without going for subsequent dispute resolution methods [12]. In Australia, DRB is getting more popular both in the field of civil and justice mediations. For civil mediations, a 73% agreement rate was achieved for voluntary mediations and each file was open for an average of 19 days in 2008. For criminal mediations, the turnaround time is 53 days [13]. Nevertheless, the concept of Dispute Review Board (DRB), Dispute Adjudication Board (DAB), Combined Dispute Board (CDB), and Dispute Board (DB) are being introduced into Taiwan one by one in this decade. They have not widely accepted by Taiwan construction industry. Instead, DRB has been applied in the public sector mostly. Yet, the Chinese Arbitration Association (CAA) announced its DRB rules in 2009 and has been put great effort to promote government agencies and contractors to resolve disputes through the its DRB procedure. The local DRB procedure will be elaborated on the next section together with the Complaint Review Board for Government Procurement (CRBGP).

3.2 Public Work Mediation in Taiwan

The new era of public work DB in Taiwan commenced in August of 1999 by the Public Commission of Construction (PCC) of Executive Yuan. After that, Article of 85-1 of Government Procurement Act, which specifies the mediation-arbitration procedure, is promulgated in July of 2007. The subparagraph (2) of article 23 indicates, "In the event that the application for mediation referred to in the preceding paragraph is made by the supplier, the entity may not object to such application. In the event that the unsuccessful mediation of construction work due to the entity does not agree with proposal or resolution for mediation proposed by CRBGP, the entity may not object to the arbitration filed by the supplier." Moreover, the provisions of mediation of the Code of Civil Procedures shall apply mutatis mutandis to the procedure and effect of the mediation by CRBGP, unless otherwise provided in this Act. It certainly enhances and speeds up legal consequence of the mediation procedure.

Comparing to most of other DRB worldwide, CRBGP's extraordinary mandatory mediation-arbitration mechanism, which forces the entity to join mediation and arbitration if it does not agree with proposal or resolution for mediation proposed by CRBGP, relieves social grievance effectively. The mechanism may somewhat

conflict with the spirit of mediation since it obligates the public agency to join mediation involuntarily. Moreover, some public agencies always insist on their own opinion by rejecting all mediation decisions. The following Table 3 compares CRBGP mediation with arbitration and court adjudication.

Table 3. Comparisons of CRBGP mediation with arbitration and court adjudication in Taiwan

Type		Characteristic
CRBGP mediation		<ol style="list-style-type: none"> 1. Agencies can not object to supplier's mediation application. 2. Mediators or advisory committee members are designated by government. 3. A mediated agreement has the same force and effect as that of a final and irrevocable judgment. 4. The terms of CRBGP mediated agreement are enforced
Others	Code of Civil Procedures	A final and irrevocable court judgment can be enforced without a court enforcement order.
	Arbitration	<ol style="list-style-type: none"> 1. The validity of an arbitral award is same as a final and irrevocable court judgment. 2. Though an arbitral award is valid and final, it may be revoked under certain circumstances, and its terms need a court enforcement order to enforce.

3.2.1 Dissatisfaction Complaint

“Regulations Governing the Complaint Review for Government Procurement” are prescribed pursuant to Paragraph 5 of Article 80 of the Government Procurement Act. A supplier may file a written complaint with the CRBGP or CRBGP of PCC after filing a protest to the procurement agency, within fifteen days from the date following the date of receipt of the disposition on the protest. The following Table 4 shows statistic of Complaint Review for government procurement in Taiwan [14].

Table 4. Statistic of CRBGP in Taiwan (May 27, 1999 ~ Sep. 9, 2000)

Substantial completed	Sustained	33 cases	33.3%
	Partial Sustained	11 cases	11.1%
	Not sustained	55 cases	55.6%
Dismissed / Withdrawn	191 cases		
Under Processing	85 cases		
Total	375 cases		

3.2.2 Mediation Procedure

After the promulgation of Government Procurement Law, a dispute resolution system was proposed, which was amended once later, to resolve government procurement disputes. “Regulations Governing the Mediation for Dispute Regarding the Performance of the Contract for Government Procurement” are prescribed pursuant to Paragraph 4 of Article 85-1 of the Government Procurement Act. These Regulations handle aforesaid complaints and mediation cases efficiently. Application for mediation shall be made to the CRBGP or the municipal or county/city governments in connection with dispute regarding performance of procurement contract of governments. The review of substantive issues shall be conducted only in respect of mediation which cannot be rejected on procedural grounds. The following Table 5 illustrates statistic of mediation for government procurement in Taiwan [15].

Table 5. Statistic of Mediation for Government Procurement in Taiwan (May 27, 1999 ~ Sep. 9, 2000)

Substantial completed	Sustained	112 cases	58%
	Partial Sustained	70 cases	36.3%
	Not sustained	11 cases	5.7%
Dismissed / Withdrawn	35 cases		
Under Processing	181 cases		
Total	409 cases		

4. CASE STUDY

In order to provide construction cost escalation for all material cost changes and cover contractors' actual added cost of increased material costs. The Public Construction Commission of the Executive Yuan had outlined procedures for handling construction price adjustments for all government construction contracts to compensate losses of contractors from material price escalation. City and County Governments followed its procedures to draft their contract terms accordingly. The rationality of the payment adjustments based on the increasing/decreasing rate of the construction cost index (CCI). The indices are published by the Directorate of Budget, Accounting and Statistics.

4.1 Facts

A private construction corporation (hereinafter referred to as “Contractor”) had a construction contract with one of departments of Taipei City Government (hereinafter referred to as “Owner”). The contractor built a new building structure for the owner.

The Article 1 of their contract and the first part of Article 76 of the Supplementary Instructions to Bidders elaborated as follows, “The construction payment that shall be adjusted by cost indices calculated as follows.

- A. Concrete, rebar, and steel plates for structural, on bills of quantity and unit price breakdown sheets, are identified as specific items. The payment of the specific items would be ‘escalated’ according to the change of their respective cost index.
- B. The payment of the other general items would be ‘adjusted’, increased or decreased, only if the change of the overall construction cost index which excluding specific items is over 2.5%.
- C. If these relevant regulations of Taipei City Government were amended later, then the new regulations would govern.

During the period between July and October 2008, the cost index of concrete for the guide wall structure changed from 119.52 to 118.92. The decreased rate of the specific index is 0.50%. The cost index of rebar for the guide wall structure also changed from 212.15 to 132.16. The decreased rate of the specific index is 37.70%. Due these subsequent changes of CCI, the owner calculated and deducted the contractor’s construction payment when the respective cost index of specific items dropped down. However, the contractor insisted that owner could only escalate payment for the specific item, not to deduct the payment even if the cost indices dropped. The contractor claimed that owner has no legal standing to reduce any construction payment of the specific items and file a mediation application to the CRBGP of Taipei City Government after failure of their negotiation.

4.2 Issues

Whether the contract terms for construction escalation satisfactorily adjusts the losses and gains of contractors from material price increases or decreases? Specifically, do terms pursuant to Article 1 of the contract and the first part of Article 76 of the Supplementary Instructions to Bidders be drafted fairly to adjust payment amount?

4.3 Reasoning

The contractor contended the first part of Article 76 of the Supplementary Instructions to Bidders explicitly elaborated, the payment of the specific items would only be ‘increased’, not ‘decrease’ if the cost indices changed. Because the construction payment of the specific items would not be decreased, so the contractor lowered the price to win the bidding.

However, the owner indicated that “Regulation on adjustment calculation of construction procurement cost index” published by Taipei City Government” was appended into the tendering document. The regulation explained that increase of material price would be absorbed by the government. On the other hand, all decrease of material price shall be deducted from the payment. It was common construction practice. The Article 76 of the supplementary instructions to bidders just omitted the word “decreased” in error, and the word was included in all other owner’s contracts.

Moreover, the foresaid regulation on adjustment calculation was amended on January 5, 2009. The updated regulation indicated the payment of all construction items would be adjusted, increased or decreased, whenever the change of the overall

construction cost index was over 2.5%. Pursuant to Article 76 of the Supplementary Instructions to Bidders, the new regulations would govern if relevant regulations of Taipei City Government were amended. Therefore, before January 5, 2009, the payment of the specific items would be ‘adjusted’, increased or decreased, if the change of the overall construction cost index is over 0%. After January 5, 2009, the payment of the specific items would be ‘adjusted’, increased or decreased, if the change of the overall construction cost index is over 2.5%.

4.4 Conclusion

After considering rights of both parties and completeness, fairness and equitableness, the mediators recommended to revise Article 76 of the Supplementary Instructions to Bidders to be:

“The construction payment that shall be adjusted by cost indices calculated as follows.

- A. Concrete, rebar, and steel plates for structural, on bills of quantity and unit price breakdown sheets, are identified as specific items. The payment of the specific items would be ‘increased’ accordingly if the change of their respective cost index were over 0%. The payment of the foresaid items would be ‘decreased’ accordingly if the change of their respective cost index were over 2.5%.
- B. The payment of the other general items would be ‘adjusted’, increased or decreased, only if the change of the overall construction cost index which excluding specific items is over 2.5%.
- C. If these relevant regulations of Taipei City Government were amended later, then the new regulations would govern.

In addition, the payment deduction, NTD 276,928, shall be returned to the contractor, and the contractor shall bear with the mediation fee, NTD 50,000.

Finally, both parties agreed on the revision of the article 76, the mediation finding was sustained. It took a little over five months to settle this case.

5. CONCLUSIONS

Mediation mechanism facilitates to settle the construction dispute as soon as possible to enhance efficiency and decrease the unnecessary lawsuits. It was merged into Chinese culture long time ago, and the contemporary mechanism is well operated locally. Comparing to other countries, Taiwan has limited ADR methods to utilize. In order to enhance the mechanism, dispute board is introduced into Taiwan by Public Construction Commission. From the statistic, we know dispute cases settled by PCC keep growing after the promulgation of the mediation-arbitration procedure. However, the effective of binding mediation-arbitration method and dispute board still under deep discussion in local construction industry. We hope an optimized dispute resolution mechanism will be development soon to offer a fair playground for domestic and international contractors.

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