ADR System in Taiwan

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Definition and Kinds of ADR

In Taiwan, legally there is no clear definition for ADR under any laws or legal precedent rendered by any courts, i.e. there is no legally binding definition for so-called alternative dispute resolution. However, the general term of ADR in Taiwan roughly means that any civil dispute between private sectors (parties) can be resolved with legally enforceable/binding effect. Normally the ADR may refer to arbitration and mediation and we do have laws such as Arbitration Law, Civil Procedure Code and Government Procurement Law etc. to govern arbitration and mediation (reconciliation).

1. Definition of Arbitration

As for the definition of arbitration, according to the Article 1 of the Arbitration Law, parties to a dispute arising at present or in the future may enter into an arbitration agreement designating a single arbitrator or an odd number of arbitrators to constitute an arbitral tribunal to determine the dispute. The dispute referred to above is limited to those that may be settled in accordance with the law and the arbitration agreement shall be in writing. Further, written documents, documentary instruments, correspondence, facsimiles, telegrams or any other similar types of communications between the parties evidencing prima facie arbitration agreement shall be deemed to establish an arbitration agreement. Also according to the Article 2, no arbitration agreement shall be valid unless it was entered in respect of a legal relationship or a dispute thereto.

2. Definition of Mediation

With respect to the mediation in Taiwan, we have two kinds of mediation: in-court and out-of court.

(a). In-Court Mediation

In accordance with the Article 403 of the Code of Civil Procedure, before instituting legal action with the court, there are several items required to "compulsory

mediation"(reconciliation) by the court. This is in-court mediation which refers disputes between employer and employee, real estate and superficiary, partner and partner, partner and sleeping partner, real estate owners for boundaries, co-owners of real estate, landlord and tenant for rental, disputes of road accident and medical cure, property dispute among spouse, relatives, and any other property dispute under the amount of NT$100,000. In addition, under the Article 404 of the Code of Civil Procedure, a party to an action not coming within the meaning of provisions of the proceeding article may also apply for mediation before instituting legal proceedings.

(b). Out-of Court Mediation

The out-of court mediation is mechanism to provide a third party who tries to resolve the civil dispute between the parties. In this regard, we may roughly categorize two different types of out-of court mediation. One is out-of court mediation with enforceability and the other one is generally referred as mediation but without enforceability. The former specifically provided by individual law such as the Arbitration Law and the Government Procurement Law. The nature of such mediation is an enforceable settlement if it is successful. If not, the dispute survives and either party can further bring legal action against the other party. The latter seriously is not a mediation with legal meaning.

(i) Out-of Court Mediation with Enforceability

According to the Article 45 of the Arbitration Law, in the absence of any arbitration agreement to the contrary, the parties may choose to submit their dispute to mediation and jointly appoint an arbitrator to conduct the mediation. Upon the successful conclusion of the mediation between the parties, the arbitrator shall record the results of the mediation in a mediated agreement. Practically, the arbitrator normally will try to convince two parties in the arbitration to settle with each other at the very beginning of the arbitration proceedings.

Further, under the Article 74 of the Government Procurement Law, for any dispute between a government agency and a supplier arising out of the invitation to tender, the evaluation of tender, and the award of contract, a protest or complaint may be filed in accordance with this law. However, if any dispute with respect to the performance of the contract fails to be settled by government agency and supplier, the supplier may file mediation with the Complaint Review Board for Government Procurement under "the Procurement and Public Construction

Committee" (under Cabinet). This said government agency should not refuse to such mediation.

(ii) Out-of Court Mediation without Enforceability

The other one refers to generally mentioned "mediation" by ordinary people but which has no legal enforceability. The nature of such broadly mentioned mediation is only a civil settlement between two parties even if it is concluded successfully and the party still has to bring this settlement agreement to the court for enforcement(please see the ADR organization below). If not, goes without saying the dispute survives and either party can bring legal action against the other party.

Actual Situation

1. ADR Organizations

In Taiwan, the most commonly used arbitration association is the Arbitration Association of the Republic of China. There is another one named Chunghwa Construction Arbitration Association which was recently established at the end of August 2002. As for the mediations, the Complaint Review Board for Government Procurement of the Procurement and Public Construction Committee (under Cabinet) is mediation organization and the court also serve this function under certain circumstances. On the other hand, broadly speaking, there are two commonly referred private organizations handle dispute: Net Consumer Association, Taiwan and Science & Technology Law Center under Institute for Information Industry. Also, there is a Secure Online Shopping Association, which can handle the consumer's dispute with its member, but so far no case has been resolved.

2. Number of Cases / Types of Disputes for Arbitration & Mediation

Since 1993 the number of arbitration cases handled by the Arbitration Association of the Republic of China has increased drastically. It has more than 100 cases accepted and disposed of each year in Taipei. In addition, it has other 2 branches in the middle and south of Taiwan. So the number of arbitration cases totally has reached 200 each year in the past 3 to 4 years. The type and business of cases accepted and disposed of are categorized as 80%~90% for construction industry and 10%~20% for maritime affairs, security, contract dispute, etc.

The number of mediation cases accepted and disposed of by the Net Consumer

Association, Taiwan is around 20. They are all disputes with regard to the consumer protection on the Internet. The most common user of this ADR services is mainly categorized into 3 lines of business: real estate broker, ISP telecom and travel agency; the rest includes information and electronics, communications and transportation, banking and financial service, insurance, security maintenance and convenient store and so on.

Actual Administration – Process to Resolution

As long as there exists an arbitration agreement between the two parties, it could not be possible to transfer the case from the arbitration to the mediation. However, practically it did take place that the mediation was transferred to the arbitration when two parties failed to settle each other during the mediation but agreed to accept arbitration at the same time. In this case, the members of panel certainly are different.

Relationship with the Court Procedure

1. Mediation First System

As mentioned earlier, in accordance with the Article 403 of the Code of Civil Procedure, before instituting legal action with the court, there are several items required to "compulsory mediation"(Mediation First System) by the court. This is in-court mediation which refers disputes between employer and employee, real estate and superficiary, partner and partner, partner and sleeping partner, real estate owners for boundaries, co-owners of real estate, landlord and tenant for rental, disputes of road accident and medical cure, property dispute among spouse, relatives, and any other property dispute under the amount of NT$100,000. In addition, under the Article 404 of the Code of Civil Procedure, a party to an action not coming within the meaning of provisions of the proceeding article may also apply for mediation before instituting legal proceedings.

2. Referral to Mediation

Normally, the court will not refer the matter to arbitration or mediation (private sector or not). However, according to the Article 420-1 of the Code of Civil Procedure, the court in the first instance (most cases is the district court) may refer the case to mediation upon agreed by both parties. In this case, the court will suspend such litigation proceeding. And then the litigation will end if the mediation concludes. If not, the court will continue the litigation proceeding.

3. Referral to Arbitration

On the other hand, under the Article 4 of the Arbitration Law, in the event that one of the parties to an arbitration agreement commences a legal action (i.e. not going through arbitration proceeding) contrary to the arbitration agreement, the court may, upon application by the adverse party, suspend the legal action and order the plaintiff to submit to arbitration within a specified time, unless the defendant proceeds to respond to the legal action. If a plaintiff fails to submit to arbitration within the specified time period prescribed in the preceding paragraph, the court shall dismiss the legal action. After the suspension mentioned in the first paragraph of this Article, the legal action shall be deemed to have been withdrawn at the time an arbitral award is made.

4. Cooperating in the Examination

There is no court supervision; however, there is some sort of cooperation between the arbitration organization and the court, according to the Arbitration Law § 28, the arbitral tribunal, if necessary, may request assistance from a court or other agencies in the conduct of the arbitral proceedings. A requested court may exercise its investigation powers in the same manner and to the same extent as permitted in a legal action. And it may cooperate in the examination of evidence, in the provision of information or the like.

5. Handling of Extinctive Prescription (Statute of Limitations)

Basically, arbitral award is required to be made. Just like once a case is instituted with the court, the judgment should be rendered in any event. However, in the event that arbitration ends in failure, how is the issue of extinctive prescription handled? According to the Article 129 of the Civil Code in Taiwan, extinctive prescription is interrupted by and of the following causes:

(1). A demand（for the satisfaction of the claim）;

(2). An acknowledgment（of the claim）;

(3). An action（brought for the satisfaction of the claim）.

The following are equivalent to bringing an action:

(1). The issuance of an order for payment in a hortatory process;

(2). Filing an application for mediation or submitting an application for arbitration

(3). …..

Further, under the Article 133 of the Civil Code, in the case of interruption of

extinctive prescription by filing an application for mediation or submitting an application for arbitration, if the application for mediation is withdrawn or dismissed or the mediation fails to be concluded; or the application for arbitration is withdrawn or an arbitral award fails to be rendered by the arbitral tribunal; the prescription is deemed not to have been interrupted.

In case of mediation, the party should consider bringing a civil legal action to resolve the dispute. The issue of extinctive prescription (similar to the statute of limitations) will not be handled i.e. the statute of limitations still continues and won't be interrupted. This is because that, like above-mentioned, extinctive prescription can be interrupted by a demand. However, according to the Article 130 of the Civil Code in Taiwan, in the case of interruption by the making of a demand, if within six months an action in Court has not been brought for the satisfaction of the claim, the prescription is deemed not to have been interrupted.

6. Enforcement of the Arbitration Award

According to the Article 37 of the Arbitration Law, the award shall, insofar as relevant, be binding on the parties and have the same force as a final judgment of a court.

An award may not be enforceable unless a competent court has, on application of a concerned party, granted an enforcement order. However, the arbitral award may be enforced without having an enforcement order granted by a competent court if the contending parties so agree in writing and the arbitral award concerns any of the following subject matters:

1. Payment of a specified sum of money or certain amount of fungible things or valuable securities;
2. Delivery of a specified movable property.

The previous paragraph is binding not only on the parties but also on the following persons with respect to the arbitration:

1. Successors of the parties after the commencement of the arbitration, or those who have taken possession of the contested property for a party or its successors.
2. Any entity, on whose behalf a party enters into an arbitration proceeding; the successors of said entity after the commencement of arbitration; and, those who have taken possession of the contested property for said entity or its successors.

7. Enforcement of the Mediation

(a). In-Court Mediation

According to the Article 416 of the Code of Civil Procedure, mediation made in-court as above-mentioned has the same legal force as a compromise made before a court. And according to the Article 380 of the Code of Civil Procedure, a compromise concluded before the court shall have the same effect as an irrevocable judgment. Thus, the mediation made in-court shall have the same effect as an irrevocable judgment.

(b). Out-of Court Mediation

According to the Article 45 of the Arbitration Law, a mediated agreement under the proceeding aforesaid has the same force and effect as that of an arbitral settlement agreement. However, the terms of the mediated agreement can be enforced only after the court has granted an application for enforcement by a party and issued an enforcement order(Note that this is only an expedited proceeding rather than general litigation).

In addition, under the Article 85-1 of the Government Procurement Law, the provision of mediation in the Code of Civil Procedure shall apply mutatis mutandis to the procedure and legal effect of the mediation handled by the Complaint Review Board for Government Procurement under the Procurement and Public Construction Committee. In other words, mediation concluded for a dispute between a government agency and a supplier arising out of the invitation to tender, the evaluation of tender, and the award of contract has the same legal effect as in-court mediation as above mentioned.

Besides, the other generally mentioned "mediation" by ordinary people made out-of court has no legal enforceability. It is only a normal agreed agreement entered into by both parties without any compulsory enforceability so if later on one party fails to perform, the other party still has to bring a legal action against the other party in a lawsuit for enforcement.

Selection and Training of Arbitrators and Mediators

According to the Article 6 of the Arbitration Law, to act as an arbitrator, a person must possess legal or other professional knowledge or experience, a reputation for integrity

and impartiality, and any of the following qualifications:

1. Service as a judge or public prosecutor;
2. Practice for more than five years as a lawyer, accountant, architect, mechanic or in any other commerce-related profession;
3. Act as an arbitrator of a domestic or foreign arbitration institution;
4. Teaching as an assistant professor or higher post in a domestic or foreign college certified or recognized by the Ministry of Education; and
5. Specialist in a particular field or profession and has practiced for more than five years.

According to the Article 7 of the Arbitration Law, on the contrary, a person falling into any of the following categories shall not be an arbitrator:

1.Convicted of a criminal offenses for corruption or malfeasance;
2.Convicted of any offenses other than those in the preceding category and sentenced to sere a prison term of one tear or more;
3.Disfranchised;
4.Bankrupt;
5.Interdicted; or;
6.A minor.

The “committee for qualification review of arbitrators” in this Association takes charge of reviewing and deciding a candidate’s qualification and then later should be approved by the board directors meeting; then the candidate can be registered in the list of arbitrators. A copy of the list will be sent to the Ministry of Justice to keep the record. However, registration and being listed in this Association are not required or compulsory procedure and the party may also appoint a candidate who is not in the list but qualified as the above-mentioned qualification.