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Taiwan





Taiwan

Tiffany Huang¹ and Jun Chen²

A. Legislation and rules

A.1 Legislation

The Commercial Arbitration Act in Taiwan was first promulgated on 20 January 1961. It was amended in 1982 and in 1986 and subsequently renamed the Arbitration Law in 1998. Thereafter, the law was further amended in 2002, 2009 and 2015. The Arbitration Law, which contains eight chapters (namely, Arbitration Agreement, Constitution of Arbitral Tribunal, Arbitral Proceedings, Enforcement of Arbitral Awards, Revocation of Arbitral Awards, Settlement and Mediation, Foreign Awards, and Additional Provisions), embodies the fundamental principles of international arbitration. Pursuant to Article 1 of the Arbitration Law, arbitrable matters are not limited to commercial disputes, and parties may enter into an arbitration agreement to arbitrate any disputes that may be resolved by settlement.

There are existing laws that provide for compulsory arbitration mechanisms, under which a party may refer a dispute to arbitration even if it has not entered into an arbitration agreement with the counterparty. For instance, Article 166(1) of the Securities and Exchange Act provides that any dispute arising between the Stock Exchange and securities firms, or between securities firms themselves, must be resolved by arbitration, even in the absence of an explicit arbitration agreement. If a party to a dispute files a legal action in violation of this provision, the other party may petition the court to dismiss the action as provided for under Article 167.

¹ Tiffany Huang is the principal and the responsible partner of the Energy, Environment and Infrastructure Group in Baker McKenzie's Taipei office.

² Jun Chen is an associate of the Energy, Environment and Infrastructure Group in Baker McKenzie's Taipei office.

Article 85-1 of the Government Procurement Law, which took effect on February 2002, also provides for arbitration as an alternative dispute resolution mechanism. The provision gives contractors working under construction procurement contracts with government agencies a right to arbitrate disputes when mediation fails. The construction industry, however, found it unsatisfactory and lobbied against this mechanism. Accordingly, some legislators have proposed an amendment to Article 27 of the Construction Industry Act. The bill was not passed because concerns were raised that a compulsory arbitration mechanism would deprive government agencies of their right to refer to litigation, which is protected under Article 16 of the Constitution Law in Taiwan.

On 2 December 2016, save for arbitration awards outside the territory of Republic of China (Taiwan), the amendment to Article 47 of the Arbitration Act further included arbitration awards made inside the territory in accordance with foreign laws as “foreign arbitration awards,” which, after recognition by domestic courts, can be enforced in Taiwan. This echoes the trend of international arbitration and Article 3 of the New York Convention, which provides: “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon,” even though the Republic of China (Taiwan) is not a contracting state of the New York Convention.

A.1.1 Developments across the Taiwan Strait

Due to political sensitivity between Taiwan and People’s Republic of China (the PRC), the Act Governing Relations Between the People of the Taiwan Area and the Mainland Area (the “Relations Act”) was enacted in 1992. The PRC is referred to in the Relations Act as the “Mainland Area,” and arbitral awards in the PRC may be recognized and enforced in Taiwan, provided that the PRC arbitral award is not contrary to the public order or good morals of Taiwan. An arbitral award in Taiwan will be recognized and enforceable in the PRC on a reciprocal basis.



The Act Governing Relations with Hong Kong and Macau, promulgated in 1997, stipulates that the Arbitration Law will apply, *mutatis mutandis*, to the validity, petition for court recognition, and suspension of compulsory execution proceedings for arbitral awards made in Hong Kong or Macau. Since the promulgation of this Act, Taiwan courts in general recognize arbitral awards made in Hong Kong, but there have also been cases where Taiwan courts have dismissed the petition to recognize arbitral awards (due to, for example, defects in service of notice).

After the Relations Act was enacted, the PRC issued a rule in 1998 stipulating the recognition and enforcement of Taiwan arbitral awards in the PRC. According to relevant court cases, an arbitral award made by CIETAC (South China Sub-Commission) was recognized in Taiwan. Nevertheless, a Taiwan court refused to recognize one arbitral award made by CIETAC (Shanghai Sub-Commission) on the basis of inadequate service of notice.

On 29 June 2010, Taiwan and the PRC concluded the Economic Cooperation Framework Agreement (ECFA). Under the ECFA, Taiwan and the PRC agreed, among other things, to commence comprehensive negotiations on several critical issues, including dispute resolution procedures, within six months of the ECFA becoming effective. Consensus was eventually reached in August 2012 in the form of the Cross-Strait Bilateral Investment Protection Agreement, which provides five dispute resolution mechanisms between the investor and the governmental agencies: (1) negotiation between the parties; (2) mediation by direct authority of governmental agencies; (3) mediation by the Economic Cooperation Commission formed under the ECFA; (4) mediation under the procedural rules of mediation institutions recognized by the Taiwan and PRC governments, such as the Chinese Arbitration Association, Taipei (the CAA) and CIETAC; and (5) administrative or civil litigation.

A.2 Institutions, rules and infrastructure

There are four arbitration associations registered in Taiwan: (1) the CAA; (2) the Taiwan Construction Arbitration Association; (3) the Chinese Construction Industry Arbitration Association; and (4) the Labor Dispute Arbitration Association of the Republic of China.

The CAA is the oldest and most active arbitration association in Taiwan. It administers a range of disputes, such as construction, maritime, securities, international trade, intellectual property rights, insurance, cross-strait disputes and information technology. Disputes involving construction and infrastructure projects represent a substantial percentage of cases administered by the CAA. The Arbitration Rules of the CAA are based on the ICC Rules and the Arbitration Act in Taiwan. The CAA currently does not administer arbitration proceedings under the rules of foreign arbitration institutions.

B. Cases

B.1 Definition of an effective arbitration agreement

Under the Arbitration Act, an arbitration agreement must be in writing. An oral agreement between the parties is not sufficient and will be deemed void. An agreement to arbitrate reached by way of exchanging fax messages, telegrams, letters or any other similar means can be treated as an arbitration agreement in writing.

The parties may determine the rules governing the arbitral proceedings, the arbitration venue and the language of arbitration. The Arbitration Act authorizes the arbitral tribunal to rule on its own jurisdiction and competence, on the existence or validity of the arbitration agreement, and on irregularities in the proceedings.

The Arbitration Act expressly stipulates that the validity of an arbitration clause that forms a part of a principal contract may be determined separately from the rest of such contract. An arbitration clause remains in force and effect after the contract is deemed null,



void, revoked, rescinded or terminated under this principle of severability.

If one of the parties to an arbitration agreement commences litigation in contravention of such an agreement, the court shall, upon the application of the adverse party, stay the legal proceedings and order the plaintiff to submit the dispute to arbitration within a specified period of time, unless the defendant proceeds to respond to the legal action. The Supreme Court in Taiwan passed a resolution on 13 May 2003, ruling that even if an arbitration clause requires the arbitration venue to be outside the territory of Taiwan, the defendant is still entitled to raise this procedural objection.

Arbitral awards can be annulled if there is no effective arbitration agreement between the parties. In some countries, if an arbitration clause provides an option to arbitrate or litigate, such clause is ineffective, meaning that an effective clause must refer to arbitration as the sole dispute resolution mechanism. The Supreme Court in Taiwan, however, opined that where the parties had agreed that the dispute can be solved by either arbitration or litigation, the agreement would grant an option to the parties to choose between the two methods.³ In addition, as soon as one party chooses one method over the other, the other party must be bound by this choice. Consequently, after a party initiates litigation, the respondent may not raise a procedural objection that the dispute must be resolved by arbitration, and vice versa.

The courts in Taiwan have ruled that where an arbitration clause is silent on matters such as the arbitral institution, the governing law or the venue, it remains an effective and enforceable arbitration agreement.⁴ Where an arbitration clause provides that the dispute must be determined by arbitration administered by an international

³ See, eg, Taiwan Supreme Court, Judgment 96-Tai-Shang-Zhi No. 1491 (5 July 2007) and Ruling 96-Tai-Shang-Zhi No. 2246 (11 June 2007).

⁴ See, eg, Taiwan Supreme Court, the Judgment 93-Tai-Shang-Zhi No. 2008 (30 September 2004) and Ruling 87-Tai-Shang-Zhi No. 324 (12 June 1998).

arbitral institution that in fact does not exist, such clause is still effective on the basis that the parties only failed to reach agreement on the arbitration rules and procedures. After one party to such an agreement has referred the dispute to arbitration, it may then refer to the Arbitration Act to fill in the missing part of the clause.

B.2 Enforcement of foreign arbitral awards

Although Taiwan is not a contracting state of the New York Convention, it still follows the spirit thereof. Enforcement of foreign arbitral awards in Taiwan is governed by the Arbitration Act and involves an application to the court in Taiwan for recognition. As the recognition is non-litigious, open hearings and oral arguments are normally required except in exceptional circumstances (such as disputes in relation to family matters).

Article 49(1) of the Arbitration Act provides that a court shall dismiss an application for recognizing a foreign arbitral award if the place or state where the arbitral award was made does not recognize Taiwanese arbitral awards on a reciprocal basis. However, as this is not a compulsory clause, the courts in Taiwan gave a liberal interpretation to the term “reciprocity.” The Supreme Court in Taiwan has held that even though the foreign jurisdiction where the arbitral award was made does not recognize and enforce arbitral awards made in Taiwan, the court, instead of dismissing the application may still decide to recognize and enforce such foreign award at its discretion for the purpose of enhancing international judicial cooperation.⁵

If a party applies to the court for recognition of a foreign arbitral award concerning any of the following circumstances, the respondent may request that the court dismiss the application within 20 days from the date of receipt of the notice of the application:

The arbitration agreement is invalid as a result of the incapacity of a party according to the law chosen by the parties to govern the arbitration agreement.

⁵ See, eg, Taiwan Supreme Court, Ruling 75-Tai-Kang-Zhi No. 335 (7 August 1986).



The arbitration agreement is void according to the law chosen to govern the agreement or, in the absence of choice of law, the law of the country where the arbitral award was made.

A party was not given proper notice either of the appointment of an arbitrator or of any other matter required in the arbitral proceedings, or any other situations that give rise to lack of due process.

The arbitral award is not relevant to the subject matter of the dispute covered by the arbitration agreement or exceeds the scope of the arbitration agreement, unless the inconsistent part can be severed from, and cannot affect the remainder of, the arbitral award.

The composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of an arbitration agreement, the law of the place of the arbitration.

The arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.

The courts in Taiwan have recognized and enforced various foreign arbitral awards made in a number of US states and countries such as the United Kingdom, France, Switzerland, Finland, Russia, South Korea, Japan, Hong Kong, Singapore, South Africa and Vietnam, as well as those made in accordance with arbitration rules such as the AAA Rules, ICC Rules, UNCITRAL Rules, the arbitration regulations of the London Metal Exchange, the International Cotton Association, the Singapore Commodity Exchange and so on. Nevertheless, there are still some foreign arbitral awards rendered in countries with substantial commercial interests with Taiwan that have not yet been through this test of the recognition procedure. This uncertainty is one of the reasons contracting parties are reluctant to choose a foreign country as the venue of arbitration.

B.3 Special rules for an arbitral award rendered in China

Due to historical facts between Taiwan and China, Article 74 of the Relations Act provides that only the content of the “performance” (ie,

making payments or taking certain actions) in the court decisions and arbitral awards rendered in Mainland China may be enforceable through an application for a writ of execution from a Taiwanese court. The court in Taiwan will examine whether or not the decisions or awards rendered in Mainland China are contrary to the public order or good morals in Taiwan.

A current case in the Taiwan Supreme Court⁶ emphasized that, unlike the court decisions and arbitral awards rendered in Hong Kong or Macau, which were governed by the Laws and Regulations Regarding Hong Kong & Macao Affairs, or in the rest of the world, which were governed by the Civil Procedure Law under the principle of reciprocity, decisions and awards rendered in Mainland China could not be automatically recognized by the court and the enforcement department in Taiwan. Even if the decisions or awards in relation to a “performance” were recognized by a writ of execution issued by the Taiwanese court, the writ will only allow enforcement in Taiwan rather than creating any effect of *res judicata*. This is a special practice that only applies to judgments and tribunal awards rendered in Mainland China.

C. Trends and observations

In the past 10 years, we have seen a trend of non-litigation dispute resolution mechanisms being applied in Taiwan. This occurred in various aspects, including: (a) the court’s open attitude to recognizing the effectiveness of arbitration agreements and foreign arbitral awards; (b) legislation that encourages industries to use arbitration or mediation as a dispute resolution mechanism, rather than litigation (such as the Government Procurement Law and Act for Promotion of Private Participation in Infrastructure Projects); and (c) various types of alternative dispute resolution mechanisms that have grown significantly in Taiwan, especially in the fields of labor and financial disputes. We consider that this trend will continue in the foreseeable future.

⁶ Taiwan Supreme Court, Judgment 104-Tai-Shang-Zhi No. 33 (8 January 2015).