

Arbitration Agreement in Taiwan Arbitration Regulations in a Comparative Perspective

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ABSTRACT

As far as arbitration agreement is concerned, it is suggested that the Taiwan Arbitration Act¹ (as last amended on 2 December 2015, formerly named the Commercial Arbitration Act, came into force on 24 December 1998, after the reform of the arbitration law in Taiwan.) is trying to meet the needs of further development of Taiwanese arbitration, particularly international commercial arbitration. Article 1, Article 2 and Article 3 of the Taiwan Arbitration Act set out some criterion on adjudicating the validity of an arbitration agreement. This thesis try to make a comparative study of the Taiwanese arbitration system with other arbitration systems from arbitration agreement perspectives and hope possibly to improve Taiwan Arbitration Law. Proceeding an arbitration should

be based on a valid agreement to arbitrate. This comparative study focuses on the issue relating to arbitration agreement.

Key words: Arbitration Agreement; Commercial Arbitration; Comparative Law; Taiwan Arbitration Act

1. INTRODUCTION

Before 1960 international commercial arbitration in Taiwan did not grow quickly. The promulgation of Commercial Arbitration Act and rapid economic growth led Taiwan into a new historical era. Continuous improvement of the world trade economy and legal system greatly promoted the development of international arbitration in Taiwan. This was accomplished by means of domestic legislation, by Taiwan's accession to international arbitration agreements, and by the gradual reform in practice by "The Chinese Arbitration Association, Taipei" (The CAA) in Taiwan. For the historical reasons, legislation in Taiwan on the whole is under the influence of the civil law system. However, the arbitration law now in Taiwan is still under the influence of the civil law system strongly even though the specific chapter of international arbitration while in the area of international trade it follows the common law

system in many aspects.

Taiwanese arbitration system consists of a separate arbitration act, relevant provisions for arbitration in other separate laws, regulations and rules. In addition, Taiwan signed few bilateral agreements on investment protection and judicial assistance which also contained provisions on arbitration. In the first place, the principal piece of legislation is the (Taiwan) Arbitration Act (TAA), which unified the previously conflicting regulations governing arbitration in Taiwan. As the new arbitration code in Taiwan, the Taiwan Arbitration Act (2015) is a milestone in the fields of arbitration in Taiwan. However, various legal circles in Taiwan, particularly those engaged in arbitration practice, have many different opinions and recommendations on how this law could be improved. It is clear that the Arbitration Act of Taiwan (2015) is although modified. Furthermore, the implementation of the Arbitration Act (2015) on Dec. 2, 2015 marked a fundamental change in the system of Taiwanese arbitration. It established basic requirements for the validity of arbitration agreements and the conduct of arbitrations and dealt with other matters relating to both domestic and international disputes.

Unfortunately, although the UNCITRAL (United Nations Commission on International Trade Law) Model Law has had an important impact on Taiwanese arbitration legislation, Taiwan still has not planned to adopt it as its own national arbitration law at the moment. It is noted that the UNCITRAL Model Law on International Commercial Arbitration, which has not been directly adopted in Taiwan, served as a guide in the course of drafting the Taiwan Arbitration Act (2015). While the underlying principles contained in the UNCITRAL Model Law have been largely absorbed by the Taiwanese law, it is noted that there are still some differences between the UNCITRAL Model Law and the Taiwanese law in respect of validity of arbitration agreement, ad hoc arbitration, the powers of the arbitral tribunal, etc.

But it is so interesting to note that the United Kingdom also rejects the adoption of the Model Law. "In general terms it was rejected because it was felt that England, unlike many countries (e.g. Australia, Bulgaria,

Canada, Cyprus, Nigeria, Scotland etc.) had a developed and comprehensive system of arbitration laws and thus had no need for such a package." Eventually, after ten years of drafting and discussion, the controversial issue has been settled. "The UNCITRAL Model Law was one of the principle inspirations of the English Arbitration Act (1996), and both the shape and the language of the two instruments are in important respects the same."

2. DISCUSSION

2.1 Arbitration Agreement - the fundamental Stone of Arbitration

"The agreement to arbitrate is the foundation stone of international commercial arbitration." If there is to be a valid arbitration, there must first be a valid agreement to arbitrate. This significant position of arbitration agreement is based on two functions. First of all, the arbitration agreement serves to evidence the consent of the parties to submit to arbitration. This element of consent is essential. That is not only because the arbitral proceedings are an expression of the will of the parties, but also because the valid arbitration agreement ousts the court jurisdiction. Afterwards, the second function of arbitration agreement is to provide jurisdiction on arbitral tribunal. This is recognized both by national laws and by international treaties. For example, under "the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", so called New York Convention, recognition and enforcement of an arbitral award may be refused if the parties to the arbitration agreement were under some incapacity, or if the agreement was not valid under its own governing law. The same provision can be found in the UNCITRAL Model Law.

In terms of the importance of the arbitration agreement, the Taiwan Arbitration Act (2015) contain significant sections relating to arbitration agreement which is worthy to discuss.

2.2 Validity of Arbitration Agreement

Based on the party autonomy principle, the Taiwan Arbitration Act (2015) provides the consent of parties

to arbitration is the requirement of arbitration agreement, in Article 1 and 2 which define a valid arbitration agreement shall meet all of the following requirements:

- the arbitration agreement shall be in writing, including any written documents, instruments, correspondences, facsimiles, telegraphs or other similar types of communications between the parties;
- the parties can only enter into an arbitration agreement in respect of a dispute that can be settled by the parties pursuant to the law, designating one or an odd number of arbitrators as the arbitral tribunal for the dispute; and
- the arbitration agreement shall relate to a specific legal relationship and the dispute arising therefrom.

Apart from the requirement that the arbitration agreement must be in writing if it is to be within the Taiwan Arbitration Act (2015), no other formality is required. In particular, an arbitration agreement need not be signed or stamped; and unless the arbitration agreement otherwise provides, no compromise or terms of reference need to be drawn up to vest the arbitrators with jurisdiction over a particular dispute. The scope of the matters referred to the arbitrator may be established by any means which sufficiently clearly indicate an intention that they are to be within the scope of the reference.

Besides the Taiwan Arbitration Act (2015) discussed above, it is worthy to consider the international standards of a valid arbitration agreement. Under international practice, an arbitration agreement is valid if the parties show their intention to arbitrate. That is to say, the importance of the arbitration agreement is that it shows that the parties have consented to resolve their disputes by arbitration. Furthermore, the effect of conventions on arbitration, whether international or regional, has been to establish what is usually required for a valid arbitration agreement.

As far as formal validity of arbitration agreement is concerned, the UNCITRAL Model Law Article 7(2) provides that

“The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams

or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.”

The UNCITRAL Model Law intends to align the requirements for a valid agreement to arbitrate to Article II of the New York Convention (1958) which also requires that the agreement be in writing. In doing so, Article 7(2) gives a broad interpretation of Article II (2) of the New York Convention which states: “The term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.”

Regarding the consents requirement of arbitration agreement, there are four positive requirements of a valid arbitration agreement, laid down in Article II. 1 of the New York Convention:

- The agreement is in writing;
- It deals with existing or future disputes;
- These disputes arise in respect of a defined legal relationship, whether contractual or not; and
- They concern a subject-matter capable of settlement by arbitration.

These four requirements are also being found in the UNCITRAL Model Law. Thus, the international standards of a valid arbitration agreement are clear and efficient. There are no further requirements apart from writing form and parties' intention to arbitrate.

3. ARBITRATION AGREEMENT IN THE TAIWAN ARBITRATION ACT (2015)

3.1 Formal Validity of Arbitration Agreement

The Taiwan Arbitration Act (2015) Article 1 provides as follow:

- “Parties to a dispute arising at present or in the future may enter into an arbitration agreement desig-

nating a single arbitrator or an odd number of arbitrators to constitute an arbitral tribunal to determine the dispute. (I)

The dispute referred to in the preceding paragraph is limited to those which may be settled in accordance with the law. (II)

The arbitration agreement shall be in writing. (III)
Written documents, documentary instruments, correspondence, facsimiles, telegrams or any other similar types of communications between the parties evincing prima facie arbitration agreement shall be deemed to establish an arbitration agreement. (IV)"

This article recognizes writing as the valid form of arbitration agreement and rejects oral agreement as a valid arbitration agreement. Nevertheless, it goes further to define writing broadly and exactly. Furthermore, the signature requirement of arbitration agreement is regarded as too rigid to enforce. Therefore, is not accepted in the new modification of Taiwan Arbitration Act (2015)

It is widely accepted that an arbitration agreement must be in writing. Thus, like Taiwan Arbitration Act (2015) and other like English Arbitration Act (1996) recognize the writing form. The main differences between these two are the definition of writing.

Unlike English Arbitration Act (1996)², Taiwan Arbitration Act (2015) does not define writing exactly. Generally, Article 1 clarifies arbitration agreements as two categories. The first one is "arbitration clauses stipulated in the contract". The other one is "agreement of submission to arbitration that is concluded in other written forms". The word other written forms not only is ambiguous but also leaves a lot of space to interpretation of law. The arbitration experience and legislation in force now in Taiwan have evidenced that it is practical and reasonable to define writing broadly and exactly similar to English Arbitration Act (1996).

On the other hand, another rigid criterion on adjudicating the validity of an arbitration agreement set out by Article 1 is strict requirement of consent of parties. As noted above, the arbitration agreement must be in writing although there is no need for them to be signed.

This is on the ground of the broad explanation of writing in the Act.

Furthermore, to be signed is also an obstacle of enabling the party who fails to sign on an arbitration agreement to bind upon the arbitration agreement. In the terms of arbitration practice, the judicial interpretation on the implementation of the Arbitration law has changed. It has established the doctrine that an arbitration agreement may be binding upon the assignee if the assignor transfers its right to the assignee.

3.2 Substantial Validity of Arbitration Agreement - the Specific Requirements for a Valid Arbitration Agreement under Taiwan Arbitration Act (2015)

As mentioned above, most of countries' arbitration laws provide the party's consent to arbitration is the essential element of arbitration agreement. If the parties are free to choose arbitration, the arbitration agreement is valid. However, the Taiwan Arbitration Act (2015) provides specific requirements of the consents of an arbitration agreement in Article 1 and Article 2 which provides as follow:

An arbitration agreement shall contain the following particulars:

- 1) An expression of intention to apply for arbitration;
- 2) A designated arbitration commission³;
- 3) Matters for arbitration⁴; and
- 4) Respect of a legal relationship or a dispute thereto⁵.

In particular, parties should be certain to indicate the number of arbitrators to constitute an arbitral tribunal to determine the dispute under the Taiwan Arbitration Act (2015). If an arbitration agreement contains no provisions or unclear provisions concerning the matters for arbitration or the constitution of an arbitral tribunal, the parties may reach a supplementary agreement to identify these matters. If no such supplementary agreement can be reached, the arbitration agreement may be deemed null and void (invalid). There are two significant problems involved from these provisions.

Firstly, it is well known that ad hoc arbitration is non-permissive under this clause. Indeed, practitioners and theoreticians in Taiwan argue about whether Tai-

wan should have ad hoc arbitration while this provision means ad hoc arbitration could not be recognized in Taiwan.

Secondly, so far as the validity of an arbitration agreement is concerned, an arbitration agreement between parties shall be null and void under the circumstance that the parties fail to specify number of arbitrators of arbitration commission. It is said that under the rigid Taiwan Arbitration Act (2015), an ambiguous arbitration agreement may be interpreted as null and void.

This rigid requirement is recognized by the arbitration and judicial practice in Taiwan. There are some examples of judicial interpretation concerning on how to adjudicate the validity of the arbitration agreement. Reply on several Issues Relating to Adjudication of the Validity of Arbitration Agreements, which stipulates that in the circumstance the parties named only arbitration as an Alternative Dispute Resolution (ADR) rather than the concrete constitution of arbitral tribunal, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void.

The picture of Taiwan arbitration system emerges with unhappiness of parties now. It is nonsense to require the parties to specify particular building of arbitral tribunal within they conducted the contract. The simple words Arbitration somewhere or even only Arbitration the word itself evidence the parties' intent to arbitrate. It is uncontroversial that the party's real intent to arbitrate is the central point of arbitration agreement. That is what arbitration agreement is in spirit not in shape. Furthermore, the judicial interpretation which suggests the parties may reach a supplementary agreement is another kind of rubbish. It is difficult for two parties who involve in a dispute, like a divorcing couple, to sit and calm down side by side or face to face in one table. How to make them to agree and reach an agreement?

However, in the arbitration practice in Taiwan the Supreme Court suggests that the court may take a more liberal way to construe the validity of an arbitration agreement.

4. CONCLUSION

It is quite clear now that Article 1 and 2 of Taiwan Arbitration Act (2015) on conditions for an arbitration agreement may be not flexible and should be revised. According to the current arbitration practice in Taiwan, it is easier and smoother to revise Taiwan Arbitration Act (2015) with particular practice of relevant judicial interpretations of the Supreme Court.

For substantial requirements, emphasis should be placed on the real intent of the parties for arbitration and enforcement of an arbitration agreement. As to the formal requirements of written agreements, with the advent of electronic contracts, interpretation of the term written shall definitely come into question; in that event, it will be helpful to reference to another arbitration systems, for example the English Arbitration Act (1996). In particular, it is important to bear in mind the flexibility if legislation is to keep up with the rapid development in new high technology of telecommunication.

It is said that the Supreme Court of Taiwan is currently trying to interpret and regulate the unresolved parts of the arbitration law, particularly the issue how to determine the validity of an arbitration agreement if it contains some sorts of defective or ambiguous provisions. In addition, it seems that the issue how to adjudicate the binding force of an arbitration agreement upon a non-signatory need also to take into consideration. It is expected that a pro-arbitration law by courts will be much appreciated by the parties who want to arbitrate their dispute and help them to re-establish the confidence in arbitration.

ENDNOTES

- ¹ 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 newly 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.

- ² English Arbitration Act (1996) subsection 5(6) provides that anything is in writing which is recorded by any means. This undoubtedly includes "typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form"
- ³ "... designating a single arbitrator or an odd number of arbitrators to constitute an arbitral tribunal ..." Art. 1 (I)
- ⁴ "The dispute ... is limited to those which may be settled in accordance with the law." Art. 1 (II)
- ⁵ TAA Article 2: "No arbitration agreement shall be valid unless it was entered in respect of a legal relationship or a dispute thereto."

APPENDIX:
THE ARBITRATION LAW of ROC
CHAPTER I
Arbitration Agreement

Article 1

- 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 in the preceding paragraph is limited to those which may be settled in accordance with the law.
- The arbitration agreement shall be in writing.
- Written documents, documentary instruments, correspondence, facsimiles, telegrams or any other similar types of communications between the parties evincing prima facie arbitration agreement shall be deemed to establish an arbitration agreement.

Article 2

- No arbitration agreement shall be valid unless it was entered in respect of a legal relationship or a dispute thereto.

Article 3

- The validity of an arbitration clause which forms part of a principal contract between the parties may be determined separately from the rest of the principal contract. A decision that the contract is nullified, invalid, revoked, rescinded or terminated shall not affect the validity of the arbitration clause.

Article 4

- In the event that one of the parties to an arbitration agreement commences a legal action 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.