

Arbitration in Taiwan: Recent Developments

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I. Introduction

Taiwan has a glorious experience in its economic development. Through several decades of effort, Taiwan has grown into a developed economy that neatly integrated into the global economy. From 1952 to 2009, Taiwan achieved a GDP growth for more than 200 times – the GDP was USD 1.711 billion in 1952 and became USD 377 billion in 2009.¹

Today, Taiwan plays a crucial role in international economic activities. According to WTO's latest statistics, Taiwan ranked the 17th in terms of total value of commodity exported.² When focusing only on the global ICT supply chain, Taiwan has an even more significant contribution. Taiwanese firms supply a variety of products and services including cover foundry, mask ROM, IC packaging, IC testing, electrodeposited copper foil, optical discs.³ Bloomberg Businessweek once praised the importance of Taiwan in a cover story “Why Taiwan Matters”. It stated: “the global economy couldn't function without it”.⁴ Fifth years have passed since that evaluation, and Taiwan's position only becomes more crucial over time. Take Apple's product as an example, if one has an iPhone or other apple's product, there is a high probability that it is produced in Taiwan or by a Taiwanese firm.⁵

Behind Taiwan's outstanding economic growth, were the subtle but sturdy support provided by Chinese Arbitration Association, Taipei (the “CAA”) with its efficient and

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¹ Council for Economic Planning and Development, Taiwan, “Economic Development of Taiwan”, 5 (Council for Economic Planning and Development, 2010), available at <https://ws.ndc.gov.tw/Download.ashx?u=LzAwMS9hZG1pbmlzdHJhdG9yLzEwL3JlbGZpbGUvNTYwNy83MzQvMDAxNDc5MC5wZGY%3D&n=RWNvbm9taWMgRGV2ZWxvcG1lbnQsIFFuTy5DLiAoVGFpd2FuKS5wZGY%3D&icon=.pdf>.

² International Trade Centre, <https://www.intracen.org/itc/market-info-tools/statistics-export-country-product/>

³ Council for Economic Planning and Development, above fn note 1, at 5-6.

⁴ Bloomberg Businessweek, “Why Taiwan Matters”, May 16, 2005, available at <https://www.bloomberg.com/news/articles/2005-05-15/why-taiwan-matters>

⁵ See e.g. Nelson Yeh, “Taiwan manufacturing: More than just Apple”, EAST SPRING INVESTMENTS, Nov. 5, 2018, <https://www.eastspring.com/insights/taiwan-manufacturing-more-than-just-apple>.

effective dispute resolution services. This article will explore the development of arbitration in Taiwan and the indispensable role played by the CAA in that respect. It will then address some crucial milestones in the CAA's work and its future plan.

II. Arbitration in Taiwan and CAA

A. *Arbitration Law*

As a response to the growing demand for efficient settlement of international trade, investment and other types of disputes, Taiwan enacted “Ordinance for Commercial Arbitration” in 1961. This legislation provided a basic procedural framework for arbitrations seated in Taiwan, and introduced modern arbitration into the jurisdiction. Several revisions have taken places. The most notable revision so far was in the 1998, when the ordinance received a total renovation and was transformed into “The Arbitration Law” (“**The Law**”) which governs arbitration seated in Taiwan today.⁶

The Law incorporates the essence of the New York Convention and UNICTRAL Model Law 1985. Parties’ autonomy to agree on applicable procedures and rules, including constitution of the tribunal and challenges to members of arbitrators, was explicitly affirmed in the Law. Other important principles such as that the parties must have sufficient opportunity to present their case were incorporated. The grounds for refusing to recognize and enforce arbitral awards were limited to those under the Model Law and the New York Convention.⁷

Moreover, under the Law, courts are empowered to provide various assistance to arbitral proceedings, such as granting interim measures, appointing arbitrators, deciding on challenge to arbitrators. In practice, the court in Taiwan is generally supportive.⁸ And the court rarely grants a request for setting aside or refusing to recognize and enforce arbitral awards.⁹

The Law, together with the court’s supportive attitude, offers a stable and efficient framework for arbitration in Taiwan. As a result, Taiwanese parties are willing to

⁶ See generally, Nigel N. T. Li & Angela Lin, “Taiwan”, in “*Asia Arbitration Handbook*” (Moser and Choong eds., OUP, 2011), paras.6.09.

⁷ *Id.*, paras. 6.82-91.

⁸ Marianne Chao, “Taiwan Arbitration”, in “*Arbitration in Hong Kong: A Practical Guide*” (Ma et. al., eds, 4th ed., Sweet & Maxwell, 2014), paras. 25.013-17.

⁹ Li & Lin, above fn 6, paras. 6.204-206

choose arbitration as the method for dispute resolution, especially for cases involving complex legal, technical issues, foreign elements or large amount in dispute. The statistics of CAA demonstrate that the construction sector is still the most frequent user of arbitration, followed by international trade and financial sectors.¹⁰

However, some significant divergences from the model law or arbitration legislations of other major arbitration-friendly jurisdictions still exist in the current version of the Law and in practice. For example, Article 47 of the Law defines a “foreign arbitral award” as an award made outside the territory of Taiwan, or, an award made within Taiwan’s territory but was made in accordance with foreign laws. The court has consistently interpreted the term “foreign laws” here to include “foreign arbitration laws”, “rules of arbitration of foreign arbitral institutions and international organizations”. Such interpretation, allegedly based on a contextual interpretation that informs Article 47 with Article 48, has caused problems in practice.¹¹ In Taipei District Court Civil Judgment No. 88 Zhong-Su-Zi 8, the losing party in the party in an arbitration conducted pursuant to ICC rules of arbitration, seated in Taipei Taiwan, attempted to set aside the arbitral award. The court held that because the arbitration proceeding at issue was conducted in accordance with rules of arbitration of a foreign arbitral institution, notwithstanding that the seat of arbitration was in Taiwan, the award was a foreign arbitral award under Article 47 of the Law. As a result, the court lacked authority to set aside the arbitral and thus the only applicable remedy for the plaintiff under the Law, was to request the court to refuse recognition of the award.¹² The court’s interpretation of Article 47 leads to an undesirable, even unreasonable consequence that arbitral award in this situation could be immune from the set-aside proceeding entirely.

Another issue that stems from insufficient legislative awareness combining with the court’s lack of understanding of arbitration is whether arbitral awards made under *ad hoc* arbitration are enforceable as their institutional counter parts. Court decisions such as Taiwan High Court Civil Ruling No. 98 Kang-Zi 2017 once opined that *ad hoc* arbitration did not enjoy the same legal status as institutional arbitration under the Law. An arbitral award made under an *ad hoc* arbitration was not entitled to the enforcement

¹⁰ CAA’s internal statistics.

¹¹ Article 48 provides, in relevant part: “To obtain recognition of a foreign arbitral award, an application shall be submitted to the court and accompanied by the following documents:3. The full text of the foreign arbitration law and regulation, the rules of the foreign arbitration institution or the rules of the international arbitration institution which applied to the foreign arbitral award.”

¹² See also Taipei District Court 108 Zhong-Su-Zi No. 3 Civil Judgment for similar opinions.

mechanism for institutional arbitrations. This misunderstanding was partially clarified in the Supreme Court Civil Judgment No. 103 Tai-Kang-Zi 236 but some uncertainties remain.

Legislative efforts that rectify misunderstandings or undesirable results demonstrated above, therefore, are needed. The CAA thus once again has taken the lead to initiate the latest amendment to the Law. This Task force aims at modernizing the arbitration regime, and to make Taiwan a Model Law jurisdiction. Section IV of this article will address the details.

*B. The CAA*¹³

When it comes to the development of Taiwanese arbitration, any discussion will be incomplete without the CAA. The CAA was established as the first private quasi-judicial entity in 1955. For the past 65 years, the CAA has been assisting Taiwanese economic development through provision of high-quality dispute resolution services. These services include arbitration, mediation, training and education, as well as other promotional activities.

For arbitration services, apart from case administration services for CAA arbitrations, logistic support is also available for *ad hoc* arbitrations or arbitrations administered by other arbitral institutions. As the most reputable arbitral institution in Taiwan, the bulk of Taiwanese arbitrations are administered by the CAA. Among these cases, approximately 10-20% are foreign-related.

Over the years, the CAA has gained ample experience and has developed a case management practice that ensures efficiency and quality of the arbitral proceedings. It is considered by parties from Taiwan and abroad as a trustworthy and competent arbitral institution. To better serve the parties demanding for international commercial arbitration, the CAA keeps refining its rules, case management techniques and facilities. The most significant two are the adoption of CAA Guidelines on Case Management Conference and the establishment of the CAA International Arbitration Centre (“CAAI”). The former represents the CAA’s effort to bridge the gap between domestic and international arbitration in Taiwan. The latter is part of the CAA-CAAI dual-track

¹³ CAA English Website, <http://en.arbitration.org.tw/>

system of arbitration (see section III below).

While the parties to an arbitration are free to appoint co-arbitrators outside CAA's list of arbitrators, in most cases the arbitral tribunal is still formed by arbitrators on the list. Currently, there are more than 900 arbitrators on the CAA's list that have diverse backgrounds, including lawyers, academics, architects and other professionals.

Mediation services is another strength of the CAA. After the establishing of its mediation center in 2003, the CAA became the only private institution that provides a full spectrum of alternative dispute resolution in Taiwan. Before the establishment of the CAA Mediation Center, mediation was not considered to require professional skills and generally lacked identifiable methodology. The CAA Mediation Center changed that misconception/perception by introducing the idea and methodology of facilitative mediation into Taiwan. All mediators registered at CAA Mediation Center must receive two-staged training which enables the mediators to effectively conduct mediation following the facilitative approach. Such professionalism and the facilitative approach distinguish the center from all other forms of mediation, such as town mediation and court mediation in Taiwan.

Beside services related directly to resolving certain disputes, CAA also provides training and education for ADR. As part of the cooperation between the CAA and the court, the CAA offers arbitration and mediation training to judges. The purpose of these training courses is to enhance the judicial system's understanding and awareness to the ADRs, so as to ensure the quality of judicial decision making relating to ADRs. Besides, under the Law, the CAA, among the arbitral institutions, is mandated to provide training for non-legal professionals who wish to become an arbitrator.

Through the provision of high-quality case management services, education and training to lawyers, arbitrators, judges and the general public, the CAA facilitates the development of arbitration in Taiwan.

III. The Establishment of CAAI¹⁴

Responding to the growing demand for international dispute resolution services in

¹⁴ Website of CAAI: <http://www.caa-arbitration.org/>; May Tai, Helen Tang, "Rebecca Soquier, Taiwan's CAA adopts new international arbitration rule", Herbert Smith Freehills Arbitration Notes, 17 August, 2017, <https://hsfnotes.com/arbitration/2017/08/17/taiwans-cao-adopts-new-international-arbitration-rule/>.

greater China as well as the Asia-Pacific region, the CAAI was established in Hong Kong as a not-for-profit company limited by guarantee since 2018. The CAAI specialises in international commercial arbitrations seated outside Taiwan, as well as bilingual arbitrations in Mandarin Chinese and English. For that purpose, the CAAI has its own set of arbitration rules reflecting the state-of-art standard and a diverse pool of experienced arbitrators.

Structurally, CAAI Secretariat is responsible for administering arbitration cases, while the CAAI Court of Arbitration oversees the compliance of CAAI rules and deciding on certain procedural issues. Moreover, endeavouring to ensure efficacy of arbitral awards, impartiality and integrity of the proceeding, CAAI adopts the CAAI Code of Ethics for Arbitrators and Parties in 2019 (“**CAAI Code of Ethics**”) as well as other guiding documents. The Code of Ethics not only envisages behavioral norms for the arbitrators, but also covers rules governing the parties and their representatives. The Code of Ethics grants the CAAI Court of Arbitration power and responsibility to monitor the arbitrator’s conducts, while providing the arbitral tribunal necessary tools in regulating the parties’ misbehaviors. Other guiding documents, such as CAAI Guidelines on Case Management Conference (“**CMC Guideline**”), are supplementary in nature but nevertheless offer good guidance to the parties and the tribunal on how to efficiently and effectively conduct the arbitration.

The CAAI’s capability to administer arbitration cases was tested in the CAAI’s first arbitration case in 2019, less than one year from the CAAI’s establishment. This case was between a Taiwanese and a foreign party. The case involved an application for emergency arbitrator proceeding as well as complex governing law issues. CAAI Secretariat working closely with the Court of Arbitration to ensure the smooth proceeding. With the Secretariat’s assistance, CAAI Court of Arbitration made the appointment of emergency arbitrator within 48 hours from the application. After two hearings and two rounds of submissions, the emergency arbitrator made the determination on the 16 day from the application (with parties’ agreement to extend the deadline). This case demonstrated the efficacy and efficiency of CAAI Arbitration.

IV. Amendment to Taiwan’s Law

To further improve and internationalise Taiwan’s arbitration law and practice, a

CAA task force has been deliberating and drafting amendments to Taiwan’s Arbitration Law (“Draft Amendment”) since March 2018. This task force consists of ten members with expertise and experience in diverse civil law and common law jurisdictions, including its co-convenors (Prof. Fuldien Li and Nigel N.T. Li), together with external reviewer (Prof. Chang-fa Lo).

CAA’s Draft Amendment is essentially a new legislation with 70 articles which adopts the Model Law (UNCITRAL Model Law on International Arbitration 1985 with Amendments as Adopted in 2006), aligns with international best practices, as well as addresses other issues in the interpretation or application of the current Taiwan Arbitration Law. It is premised on a unitary or singular system, differentiating between arbitrations seated in and outside Taiwan only in specified circumstances.

The Draft Amendment adopts the Model Law’s structure and provisions, with modifications tailored for Taiwan or intended to alleviate certain controversies arising from the Model Law.

- For example, Article 13 of the Model Law empowers the arbitral tribunal to decide on challenge to arbitrator unless the challenged arbitrator withdraws or the other party agrees to the challenge. However, the Draft Amendment (Article 20) distinguishes between institutional and non-institutional arbitrations, entrusting the administering arbitral institutions to decide on arbitrator challenges in institutional arbitrations while leaving the judiciary to decide for non-institutional arbitrations.
- Another example is Article 28(2) of the Model Law concerning the law applicable to the substance of dispute in the absence of the parties’ choice of law, which authorises the arbitral tribunal to “apply the law determined by the conflict of laws rules which it considers appropriate”. By contrast, the Draft Amendment (Article 47) enables the arbitral tribunal to apply the substantive law that it considers appropriate.
- Chapter 4 of the Draft Amendment adopts all the provisions concerning interim measures and preliminary orders in Chapter IVA of the Model Law, and expressly extends them to emergency arbitrators.

On the other hand, the Draft Amendment retains certain features of the current

Taiwan Arbitration Law because of their distinctiveness or effectiveness.

- The first example is the stringent time limits for award-making: six months from the arbitral tribunal's constitution, extendable by another three months (Article 21 of current law; Draft Amendment Article 48).
- The second example is the prescribed lists of arbitrator qualifications and disqualifications (Articles 6 to 8 of current law; Draft Amendment Articles 12 to 14).
- The third example is the conversion of mediated settlement agreement into arbitral award where the parties to an institutional arbitration agree to appoint a mediator who is also a qualified arbitrator (Article 45 of current law; Draft Amendment Articles 60 and 61).

Furthermore, the Draft Amendment seeks to enhance the autonomy of arbitral institutions in determining arbitration fees and costs, as well as in regulating ethics, expedited and emergency arbitration procedures, training and listing of arbitrators, etc. Other additional provisions serve specific interests such as arbitrability of disputes and confidentiality of arbitration.

Public consultation commenced in November 2020, while the presentation of the Draft Amendment to Taiwan's Legislative Yuan and Executive Yuan for deliberation and finalisation is scheduled for mid-2021. CAA's Draft Amendment will enable Taiwan to become a Model Law jurisdiction and thereby overcome persisting misconceptions arising from Taiwan's inability to accede to the New York Convention. It will contribute to making arbitration more accessible, adaptable and affordable, as well as more effective, efficient and enforceable, regardless of whether the arbitration is seated in or outside Taiwan.

V. 2020 Taiwan Arbitration Week

In recent years, holding large scale arbitration promotion events like "arbitration week" has been a prevalent practice among various jurisdictions such as Hong Kong, Paris and New York. Learning from other jurisdictions successful experience, and taking the advantage of Taiwan's relatively well management of the pandemic, the CAA and Taiwan Bar Association ("TBA"), decided to launch the "Taiwan Arbitration Week" in 2020. As the largest promotion event for Taiwanese arbitration community so

far, the Arbitration Week initiative aimed at strengthening and enlarging the existing network of arbitration community. Considering the advantages of arbitration, including procedural flexibility and efficiency became more salient for international transaction under the pandemic, the event also purports to promote the awareness of arbitration to legal and business sectors.

Responding to the initiative, various other institutions, such as CIArb, Taiwan Construction Law Association and law firms, together with CAA and TBA held a series of knowledge events in three major cities of Taiwan. From lectures on drafting arbitration agreement, to workshops on dispute resolution involving wind-power industry and fintech arbitration, these events covered the needs of different types of audiences and received positive feedback. This event represents another important step for Taiwanese arbitration community to promote using of arbitration to solve commercial disputes, and to bring domestic arbitral practice in line with international standards.

VI. Conclusion

Walking through six decades, Taiwan's legal regime has evolved into a modern, pro-arbitration one. Nowadays the major laws and regulations that governs Taiwanese arbitration largely reflect the essence of the Model Law, and the court has been and continues to be supportive to the arbitral proceedings, whether it is considered domestic or foreign related. Accompanying these legislative and judicial efforts is the vigorous arbitration community consists of lawyers, scholars, arbitrators and other professionals. It was an honor for the CAA to be part of the process. However, the time has come that Taiwan must once again move forward. The establishment of CAAI by CAA and the continuous working on the amendment of the Arbitration Law, proves that the Taiwan arbitration community will continually aim to make Taiwan a true model law jurisdiction, connecting the international and domestic arbitration community by bringing in more international elements and bringing out the best of Taiwan's arbitral practices.