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Will Taiwan Become a Model Law Jurisdiction?

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Although Taiwan's legislative and judicial practices already conform to the spirit of the New York Convention ("**Convention**") and the Model Law, it appears that non-Taiwanese parties nevertheless remain hesitant to arbitrate in Taiwan. The necessity of becoming a Model Law jurisdiction arises from Taiwan's inability to accede to the New York Convention. Hence an institutional initiative for legislative overhaul has arrived at an opportune moment.

Since March 2018, a dedicated task force of the Chinese Arbitration Association, Taipei ("**CAA**") has been working on the CAA Draft Amendment to Taiwan's Arbitration Law ("**Draft Amendment**"). Following a series of consultation hearings in November 2020, March and May 2021, CAA is progressing towards presenting the Draft Amendment to the Legislative Yuan and Executive Yuan of Taiwan.

The dual-purpose of the Draft Amendment is to adopt the Model Law (including the 2006 amendments), with modifications tailored for Taiwan to alleviate certain controversies arising from the Model Law's interpretation or application as discussed below. It also retains the distinctive provisions of Taiwan's Arbitration Law, with amendments addressing certain problems of current practices or accommodating future developments which are presented below. Using the Model Law's order of provisions, the 70 articles in the Draft Amendment merge and harmonise the Model Law with Taiwan's Arbitration Law.

Amendment Highlights

As the Draft Amendment is in Chinese only, the author will highlight as a member of the CAA task force, selected provisions which stimulated and even stifled deliberations within the task force or during public consultation. These salient points will hopefully elicit further discussions in the international community and suggestions for improvement.

Unitary approach

First and foremost, should Taiwan adopt the Model Law as a uniform regime, or confine the Model Law to international or non-domestic arbitrations? The choice between unitary, dualist or hybrid approaches inevitably raises the question of how to distinguish between international and domestic

arbitrations. The New York Convention's territoriality-based distinction between foreign and domestic awards contrasts with the Model Law's substantive distinction between international and domestic arbitrations. Premised on a unitary adoption of the Model Law, Article 63 of the Draft Amendment defines "foreign" awards as awards made outside Taiwan. It differentiates between arbitrations seated in and outside Taiwan, only in the context of annulment of awards made in Taiwan in contrast to non-enforcement of awards made outside Taiwan.

Challenges

Second, instead of empowering the arbitral tribunal to decide on challenges in the absence of the parties' agreed procedures (Model Law Article 13(2)), Article 20 of the Draft Amendment entrusts the administering institutions to determine such challenges in institutional arbitrations while leaving the national courts to decide in *ad hoc* arbitrations. Similar to the Model Law approach, the challenging party may request judicial review of the institutional decision rejecting the challenge. This aligns with the prevalent institutional practice of engaging a neutral decision-maker for arbitrator challenges which eases the complexities and controversies arising from arbitrators deciding on challenges by themselves or their peers, thereby preserving the impartiality and legitimacy of arbitration.

One remaining question is whether, in the interests of avoiding litigation, it would be more appropriate for a designated appointing authority to determine arbitrator challenges in *ad hoc* arbitrations. Another question is whether judicial decisions on arbitrator challenges "*shall be subject to no appeal*" – a contention which also applies to judicial decisions on challenges to arbitral jurisdiction (Model Law Article 16 adopted by Draft Amendment Article 23) (see also discussion in an earlier post).

Applicable law

Third, Article 28(2) of the Model Law requires the arbitral tribunal to "*apply the law determined by the conflict of laws rules which it considers applicable*" in the absence of the parties' agreement on the law applicable to the substance of the dispute. By contrast, Article 47 of the Draft Amendment allows the arbitral tribunal to directly apply "*the law or rules of law which it determines to be appropriate*". This adopts the approach in Article 35(1) of UNCITRAL Arbitration Rules which is also the prevalent institutional practice, albeit extending to "*rules of law*" and effectively placing arbitrators and parties on equal footing in deciding the applicable law.

According to the author's survey of 115 arbitration laws and rules in 2015, 92% of the surveyed institutions adopt a direct approach to choice of law, with 56% preferring "*rules of law*" over the other two variations of the direct approach. Given the gap-filling purpose of arbitrators' choice in the absence of the parties' choice, it is understandable that some would prefer less arbitral discretion in terms of choice of law.

Interim measures

Fourth, the Draft Amendment (Articles 24 to 34) adopts the entire Model Law provisions on interim measures and preliminary orders, and even extends to emergency arbitrations. This enables emergency arbitrators who are appointed before constitution of the arbitral tribunal to grant preliminary orders, as well as interim measures which are capable of judicial recognition and enforcement. Such proactive and pro-arbitration approach is likely to enhance Taiwan's attractiveness as a seat, particularly in light of the findings in the ICC Commission Report on Emergency Arbitrator Proceedings that, out of the 45 surveyed national laws, only Hong Kong, Singapore and New Zealand expressly provide for enforcement of emergency arbitrator's orders. However, such a giant leap requires concerted efforts over time in educating and instilling public confidence in using these unfamiliar mechanisms in Taiwan.

Arbitrator qualifications

Fifth, the Draft Amendment retains the qualifications and disqualifications of arbitrators as prescribed in Articles 6 to 8 of Taiwan's Arbitration Law. From a Taiwanese perspective, restrictions on who can act as arbitrators preserve and promote public confidence in arbitration. From a non-Taiwanese perspective, however, such restrictions appear conservative and restrictive of party autonomy. Hence Article 12 of the Draft Amendment expressly allows the parties to agree on arbitrator qualifications which could be less or more stringent than the statutory qualifications.

Time limits

Sixth, to maintain the tradition and aspiration of swift arbitrations in Taiwan while accommodating complex and lengthy international arbitrations, Article 48 of the Draft Amendment retains the current time limits for award-making provided in Article 21 of Taiwan's Arbitration Law (*i.e.*, six months from constitution of the arbitral tribunal which is extendable by additional three months). At the same time, it enables the parties to agree on a different award-making period, additional extension of time, and suspension of time limitation. Furthermore, an extension of three months is available upon arbitrator replacement which results in repetition of hearings, unless the parties agree otherwise (Article 22 of the Draft Amendment).

Annulment

Seventh, notwithstanding the tremendous efforts to harmonise the grounds for annulment of Taiwanese (*i.e.*, domestic) awards and non-enforcement of non-Taiwanese (*i.e.*, foreign) awards, as well as to assimilate the wording of the exhaustive grounds in Article 34 of the Model Law, Article 56 of the Draft Amendment still retains the lengthy annulment grounds provided in Articles 38 and 40 of Taiwan's Arbitration Law which include: i) a party is not lawfully represented in arbitral proceedings; ii) the reasons for the award are not stated as required; iii) an award directs a party to act contrary to the law; and iv) a party or any representative has committed a criminal offence in relation to the arbitration. These grounds in fact fall within, or overlap with, due process or public policy grounds, and are "*limited to the extent sufficient to affect the award*". Furthermore, the Draft Amendment explicitly restricts merits review in annulment proceedings, which contrasts with the limited appeal on questions of law allowed by other jurisdictions.

Law applicable to arbitration agreement

Eighth, the law applicable to the arbitration agreement in the absence of the parties' express choice of law, remains a fundamental question without a certain or clear answer, as confirmed by Maxi Scherer's keynote speech on "*The Proper Law of the Arbitration Agreement: A Comparative Law Perspective*" (and reported in a previous post). The main competing default or backup choices are the law governing the contract and the law of the seat.

Article 7 of the Draft Amendment specifies the law of the seat as the law applicable to the arbitration agreement in the absence of the parties' agreed choice of law. This conforms with the choice of law rule in Article V(1)(a) of the Convention concerning the invalidity of an arbitration agreement as a ground for non-enforcement of an award. Additionally and importantly, the Draft Amendment applies the choice of law rule in Article V(1)(a) of the Convention to all issues concerning the arbitration agreement (except for capacity and arbitrability), as well as to all judicial determinations of the law applicable to arbitration agreement (whether pre-award or post-award). This will facilitate judicial consistency and predictability, at least in Taiwan.

Confidentiality

Ninth, confidentiality is another area which lacks international consensus. According to the 2020 survey of 198 jurisdictions and 293 institutions by Hong-Lin Yu (another member of the CAA task force), 25% of the surveyed jurisdictions adopt the duty of confidentiality while 49% of the surveyed institutions also offer various degrees of such duty, thereby demonstrating the trend in favour of more detailed provisions for confidentiality.

Article 6 of the Draft Amendment provides for privacy and imposes the duty of confidentiality on arbitrators, arbitral institutions, and "*third parties other than the parties*" concerning any information obtained by participating in arbitral proceedings, subject to the parties' agreement and requirements by law. The omission of parties is deliberate yet debatable. Should the parties also be subject to the duty to confidentiality in line with other jurisdictions, or would an opt-in approach be more appropriate for the parties?

Reflections

The Draft Amendment is ambitious yet cautious in ensuring that, on the one hand, any modifications to the Model Law will not preclude Taiwan from becoming a Model Law jurisdiction and, on the other hand, the adoption of the Model Law by Taiwan for both international and domestic arbitrations will be appropriate and acceptable.

Looking ahead, the tension between the unitary (maximalist) and dualist (minimalist) approaches will persist, especially within Taiwan. Further, it is observed that there are cultural clashes between Taiwan's civil law tradition and the Model Law's common law orientation. There are also foreseeable linguistic barriers in the bilingual process of legislative drafting in Chinese and English. Together, they make balancing public and private interests while harmonising national

and international practices more challenging yet fulfilling. We cannot accommodate all demands, but we can achieve consensus through the common interests in promoting and preserving the legitimacy and efficacy of arbitration.

When individual, institutional, national and international interests align, aspirations and missions will be accomplished. Once achieved, Taiwan will become a Model Law jurisdiction.

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