

## Chapter 13

### ARBITRATION IN TAIWAN, THE REPUBLIC OF CHINA

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#### I. INTRODUCTION

Liberalization and internationalization are two guiding principles in this wave of legal reform in the Republic of China ("Taiwan" or "ROC"). The government seeks to establish a modern and transparent legal framework to facilitate cross-border economic activities with minimum interference to the parties' freedom in structuring their business relationships.<sup>1</sup> After being isolated from the formal legal framework of the international community for a long time, Taiwan successfully entered the World Trade Organization ("WTO") in 2002 as an independent customs territory, and stands ready to adhere to the international disciplines enforced by the WTO.

To be sure, respect for a free market economy and party autonomy alone is inadequate; effective mechanisms must be in place to deal with a situation where a business relationship, however ideally structured at its inception, goes awry. Hence dispute resolution is one of the priorities on the government's reform agenda.<sup>2</sup> The Chinese have a long-established preference for out-of-court settlement of disputes,<sup>3</sup> and of the various alternatives to civil litigation, arbitration is one of the most conventional yet modern means for resolving civil and commercial disputes in Taiwan. In 1998, the new ROC Arbitration Act (the "Arbitration Act") was passed by the legislature, replacing its predecessor, which was enacted in 1961.<sup>4</sup> Many provisions in the Arbitration Act are influenced by the Model Law promulgated by the United Nations Commission on International Trade Law ("UNCITRAL Model Law").<sup>5</sup> The drafters of the Arbitration Act proposed to align Taiwan's arbitration regime with international standards. Although the Arbitration Act is not without ambiguities, it should have a positive influence on the development of arbitration in Taiwan.

The upheavals in world economy in the last decade and the attendant disputes have brought the need for a modern and transparent resolution mechanism to the forefront. Against such background,

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<sup>1</sup> In July, 1999, Taiwan's Judicial Yuan, the highest judicial authority in the Republic of China, convened a much-awaited National Judicial Reform Forum, to which important members of the legal community were invited to deliberate over some fundamental measures to revamp Taiwan's judicial system. Resolutions passed in the Forum imbedded many features of the common law judicial process into the judicial system of this civil law country.

<sup>2</sup> For a discussion of the various dispute resolution mechanisms under ROC law see Nigel N.T. Li, *Dispute Resolution, in TAIWAN TRADE & INVESTMENT LAW* 645-684 (Mitchell A. Silk ed., 1994).

<sup>3</sup> For a discussion of the conventional wisdom about Asian culture and dispute resolution see Veronica Taylor and Michael Pryles, *The Cultures of Dispute Resolution in Asia*, in *DISPUTE RESOLUTION IN ASIA 1* (Michael Pryles ed., 1997).

<sup>4</sup> ROC Arbitration Act, effective as of December 24, 1998. A few provisions of the Arbitration Act were amended in July 2002 and December 2009.

<sup>5</sup> See generally Nigel N.T. Li & Chiang, *Overview of Draft of New Arbitration Law in R.O.C.*, 48 *Commercial Arbitration* 1 (1997); Hong-Lin Yu, *The Taiwanese Arbitration Act 1998*, 15 *J. Int'l Arbitration* 107 (1998); Li, *The New Arbitration Law of Taiwan—Up to an International Level?* 16 *J. Int'l Arbitration* 127 (1999); C.V. Chen, *Party Autonomy and the New Arbitration Law of Taiwan, the Republic of China*, 1 *ROCAA Arbitration J* 1 (2002) and David W. Su, *International Commercial Arbitration and the ROC Arbitration Law*, 1 *ROCAA Arbitration J* 103 (2002).

arbitration has emerged as the preferred means to resolve cross-border business disputes owing to its efficiency, flexibility, and party autonomy. This Chapter discusses arbitration in Taiwan, with a particular emphasis on the strategic issues an international firm must consider when selecting Taiwan as the site of international commercial arbitration. In addition to describing the legal framework for enforcing arbitration agreements and awards in Taiwan, the following discussions introduce Taiwan's cultural and political environment for dispute resolution, analyze the advantages and pitfalls of doing an international commercial arbitration in Taiwan, and offer some views about how arbitration is likely to develop in the future.

### **A. Taiwan's Legal and Dispute Resolution Tradition**

Most scholars in Taiwan trace the origin of arbitration to two sets of *Kung Duan* regulations promulgated by the Chinese government in 1913.<sup>6</sup> As the Chinese have long preferred out-of-court dispute settlement, it is not surprising that they traditionally utilized *Kung Duan* (public determination), a process akin to the Western idea of arbitration, to resolve disputes among members of a family or society. *Kung Duan* was a process where a decision maker, usually a senior member of the local gentry or the head of a clan, heard the statements from the disputants and made a binding decision to resolve the dispute. The decision maker need not invoke any official law to support his decision, nor did he rely on official law to ensure compliance by the parties. The decision maker's authority lied in his privileged status within the social hierarchy, and the parties, when their dispute was referred to *Kung Duan*, were deemed to have implicitly pledged their deference to the result of the process.

Despite the immediate similarities, there is a fundamental difference between *Kung Duan* and the Western idea of arbitration. Western arbitration is based on the consent of the parties; a disputant will not be compelled to arbitrate unless he agrees to submit the dispute to arbitration. An arbitral tribunal's jurisdiction is conferred by the agreement of the parties; judicial enforcement of an arbitral award is not essentially different from enforcing a contract that is bound by such award. Arbitration therefore derives its normative legitimacy from the spirit of *laissez faire*. *Kung Duan*, in contrast, does not acquire its legitimacy from the consent of the parties. The decision maker's power lies not in the historical fact that the parties made an agreement to bestow such power upon him, but rather from his particular position within the social hierarchy. *Kung Duan* resembles arbitration only in the sense that a private individual makes a binding decision to resolve a dispute; but at its root *Kung Duan* was more a result of delegation of judicial authority to the local gentry or family senior by the state rather than an institutional design to promote party autonomy.

It is illuminating to observe how the traditional idea of *Kung Duan* was gradually transformed into the modern idea of arbitration. *Kung Duan* in imperial China was essentially a delegation of political authority. The local gentry or the head of a clan conducted *Kung Duan* in the family shrine, applying his power without the consent of the disputants. The subject matters of the disputes were often issues arising out of the failure of certain individuals to comply with a code of conduct commensurate with his personal status within the family. When the Republic of China promulgated its Temporary Statute for Civil Arbitration in 1935, all present or future civil matters that could be settled by the parties could also be resolved by arbitration.<sup>7</sup> Since family issues were not a subject suitable for private settlement, this statute signaled a break with the tradition of *Kung Duan*, wherein family matters accounted for the majority of cases.

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<sup>6</sup> SHANG SHIH KUNG DUAN CHU JANG CHENG (Charter of Business Arbitration Center) and SHANG SHIH KUNG DUAN CHU BAN SHIH SEE JER (Enforcement Rules of Business Arbitration Center).

<sup>7</sup> Temporary Statute for Civil Arbitration, § 1 and § 2.

Apparently, because of Western influence, the ROC passed the Statute for Commercial Arbitration in 1961, the title of which suggests that arbitration belonged to the commercial world. The 1961 statute, however, failed to anticipate the growth of international commercial arbitration. As Taiwan's economic and political environment continued to evolve during the 1970s and 1980s, there was a perceived need to incorporate international standards into the domestic regime. The result was the 1982 amendment to the Statute for Commercial Arbitration, in which provisions, copied directly from the New York Convention, were added to provide a legal basis for recognizing and enforcing foreign arbitral awards. The drafters of the 1982 amendment acknowledged the influence of the New York Convention and inserted into the 1982 amendment the grounds for refusing to recognize a foreign award from the New York Convention. The drafters, however, failed to remove those grounds already in the statute that were not permissible under the New York Convention.

The next wave of Western impact came from the UNCITRAL Model Law, resulting in the Arbitration Act of 1998. The fundamental principle of party autonomy was finally given a central place in the arbitration regime, and the Western idea of arbitration has taken root in the Republic of China.

The tradition discussed so far has shaped how people think about arbitration and dispute resolution in general. There was, for example, a strong psychological tendency to subsume arbitration with litigation, even among members of the legal profession. Arbitration is often perceived as a process done "under the shadow" of litigation, rather than a distinct domain in parallel with litigation. This traditional view is clearly not conducive to the formation of a modern regime of arbitration. Fortunately, the situation is beginning to change in Taiwan. Rapid economic development, coupled with political liberalization, has brought about a change in the attitude toward law and legal process. Law is no longer considered merely a secondary source of social order to be applied only when other social norms fail. Compliance with contractual obligations has become an essential part of business ethics. Increasing internationalization helps promote the awareness that a set of fair and neutral rules for resolving disputes is one of the preconditions for international business to flourish. Litigation, once a sign of disgrace and fundamental breakdown in social relationships, has become commonplace in the world of commerce. The new Arbitration Act is a deliberate effort to establish a legal framework in accordance with international standards, as discussed below.

## **II. ARBITRATION PRACTICE IN TAIWAN**

### **A. Arbitration Institutions**

Institutional arbitration in Taiwan may be conducted by international arbitration centers, such as the International Chamber of Commerce ("ICC"), or by the Arbitration Association of the Republic of China (also known as the "Chinese Arbitration Association, Taipei;" "ROCAA"). Formerly known as the Commercial Arbitration Association of the Republic of China, the ROCAA is one of the local arbitration centers in Taiwan. The ROCAA has 510 members and is run by a Board of Directors consisting of 31 Directors. Since its inception in 1955, the ROCAA has conducted numerous cases, most of which are construction, securities, and international trade disputes. The ROCAA has promulgated its own "Enforcement Rules" for arbitration. In a typical year, the ROCAA receives approximately 150 to 200 Requests for Arbitration, and the number is growing every year. With its own permanent facilities and a full-time supporting staff over 20, the ROCAA is capable of accommodating major international arbitration cases.

The ROCAA plays a role akin to that of many arbitration centers, providing administrative support without interfering with the function of the arbitral tribunal. It does not appoint arbitrators unless it is specifically authorized by the parties to do so, and when it is authorized, the appointment will be made by a Nomination Committee consisting of Directors of the ROCAA and representatives from either

academia or industry to ensure impartiality. The ROCAA keeps a roster of arbitrators, but the parties to an ROCAA arbitration case have the option of appointing someone not on the roster. A number of non-Taiwanese arbitrators are on the ROCAA roster of arbitrators.

## **B. Ad Hoc Arbitration**

*Ad hoc* arbitration in Taiwan may be conducted by following the procedure agreed upon by the parties, subject to the provisions of the Arbitration Act. The parties may, for example, agree to proceed with arbitration in accordance with the UNCITRAL Rules of Arbitration. ROC courts may, upon the application of one of the parties or the arbitral tribunal, assist the arbitration by appointing arbitrators or investigating evidence. Without reliable statistics, *ad hoc* arbitration is considered rare in Taiwan, since the common perception of this type of arbitration is that it is very likely to develop into an impasse whenever the parties fail to anticipate each and every issue that could arise during the entire arbitration process.

Although *ad hoc* arbitration is uncommon in Taiwan, several foreign *ad hoc* arbitral awards were recognized by Taiwanese courts. For instance, Decree 86-Jong-Shang-Tzu No. 2 of the Kaohsiung District Court, issued in 1997, recognized an award made by a sole arbitrator, Mr. Louis Haillard, in Geneva, Switzerland; Decree 87-Jong-Shang-Tzu No. 1 of the Taichung District Court, issued in 1998, recognized an award made by a Hong Kong arbitrator, Mr. Allister George Inglis; and Decree 87-Shang-Tzu No. 83 of the Tainan District Court, issued in 1998, recognized an award made by a Hong Kong arbitrator, Mr. Philip Yang.<sup>8</sup> Despite the above court decrees recognizing *ad hoc* arbitral awards, Decree 99-Fei-Kan-Tze No. 122 of the Taiwan High Court, issued in 2010, indicated that only institutional arbitration has the same legal effect as a final judgment and refused to grant enforcement for *ad hoc* arbitration. The opinion underlying the decree is that the Taiwan Arbitration Act does not recognize *ad hoc* arbitration, which has sparked considerable debate.

## **III. THE LEGAL FRAMEWORK FOR INTERNATIONAL ARBITRATION IN TAIWAN**

### **A. Applicable Laws**

Before the Arbitration Act went into effect on December 24, 1998, arbitration in Taiwan was governed by the Statute for Commercial Arbitration. This statute was promulgated in 1961, when arbitration was only beginning in Taiwan. As suggested by its title, only “commercial” disputes could be resolved by arbitration,<sup>9</sup> although “commerce” in this context was never clearly defined.<sup>10</sup> Most of the provisions of the 1961 statute were drafted with only domestic arbitration in mind, and it became increasingly clear as Taiwan’s economy grew that the statute’s failure to accommodate international arbitration had seriously impaired its utility. The statute was amended twice in 1982 and again in 1986,

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<sup>8</sup> See Chen Xi-Jia, *Tan Tao Wuo Kuo Fa Yuan Kuan Yu Fei Ji Guo Jong Tsai Pan Duan De Tsai Pan—Taiwan Kao Dun Fa Yuan 99 Nian Duo Fei Kan Tzu Di 122 Hao Ming Shi Tsai Ding Ji Chi Kuo Nan De Yin Shang (Discussion on Taiwanese Court’s Judgment on Ad Hoc Arbitration—Decree 99-Fei-Kan-Tzu No. 122 by Taiwan High Court and Its Possible Impact)*, 93 *Arbitration Quarterly*, 26-34 (September 30, 2011).

<sup>9</sup> It is interesting to note that the MIN SHIH KUNG DUAN JAN HSING TIAO LI (A Provisional Statute for Arbitration of Civil Disputes), a statute promulgated in 1921, allowed arbitration of both civil and commercial disputes. Apparently the authors of the Statute for Commercial Arbitration had a more restrictive view about arbitrability. The reason for this development could have been the growing awareness of the difference between modern arbitration and ancient Kung Duan.

<sup>10</sup> Taiwan’s legal system belongs to the Civil Law tradition of continental Europe, where statutory law, not court precedents, is the major source of legal authority. Although conceptually, there is a distinction between civil and commercial issues, Taiwan has not enacted a separate commercial code other than its Civil Code. Since civil and commercial cases are governed by the same set of rules (there are separate statutes dealing with specific subject matters such as the maritime law), there is no clear definition about what constitutes a “commercial” issue.

mainly to add provisions about the recognition and enforcement of foreign arbitral awards, which were defined as awards made outside the territory of the Republic of China.<sup>11</sup> This piecemeal approach proved to be inadequate for coping with the numerous uncertainties created by a statute enacted nearly 40 years ago. Finally, in 1995, a group of experts drafted the Arbitration Act and submitted it to the ROC Ministry of Justice for consideration. The final bill that the Ministry presented to the legislature was largely based on the draft prepared in 1995, and the legislature passed the Arbitration Act in 1998. In the following paragraphs we discuss the principal provisions of the 1998 Arbitration Act.

There have been two minor modifications to the 1998 Arbitration Act. One was made in 2002, on Articles 8, 54, and 56. The other was made in 2009, where Articles 7 and 56 were modified.

## **B. The Role of Courts**

Since arbitration can ease the burden on the courts by lightening court caseloads, especially for complex cases that rely on professional knowledge such as construction, securities, and commercial cases involving foreign elements, arbitration is generally supported by ROC courts. In practice, users of arbitration mainly come from the construction industry in Taiwan. Settlement of disputes arising from large-scale construction projects demands expertise in construction and law, and an arbitral tribunal consisting of arbitrators from the two areas is considered better suited to resolve such disputes.

## **C. Form and Scope of Arbitration Agreements**

According to the Arbitration Act, an arbitration agreement made pursuant to the law<sup>12</sup> must be in writing.<sup>13</sup> Such formality was also required under the prior Statute for Commercial Arbitration, albeit a clear definition of "in writing" was not available. A highly controversial resolution by judges of the ROC Supreme Court in 1978 indicated that since an ocean bill of lading is signed by the carrier or shipmaster alone, an arbitration clause therein could not be enforced against a holder of such bill of lading.<sup>14</sup> This type of rigid interpretation of the "writing" requirement is no longer permissible under Article 1(4) of the Arbitration Act, which provides that an arbitration agreement shall be deemed having been legally formed if an agreement to arbitrate may be inferred from any document, instrument or certificate, letter, telefax, telegram or other similar types of communication between the parties. The critical condition is anything in writing which could justify an inference of an agreement to arbitrate. The reference to "any other similar types of communication" provides the flexibility to include new forms of communication made possible by technological development.

Article 3 of the Arbitration Act adopts the "separability" principle by providing that the validity of an arbitration clause must be determined independently and shall not be affected by the invalidity, revocation, rescission or termination of the main contract containing such clause. This provision merely codified a rule long recognized by arbitration practice in Taiwan, and it mirrors Article 16(1) of the UNCITRAL Model Law.

To enforce an arbitration agreement, Article 4 of the Arbitration Act provides that if a party files a lawsuit in breach of an arbitration agreement, the court shall, upon the request of the other party to the arbitration agreement, stay the litigation and order the plaintiff to commence arbitration. The other

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<sup>11</sup> Statute for Commercial Arbitration § 30(1).

<sup>12</sup> Although there is no explicit basis in the Arbitration Act for the parties to an international contract to choose a governing law for their arbitration agreement, they should be able to do so, since party autonomy is a principle under the ROC choice of law rules for international contracts, and there is no reason to treat an international arbitration agreement otherwise. See the ROC Statute for the Application of Laws to Civil Cases Involving Foreign Elements § 20. If the parties to an international contract choose a law other than the ROC Arbitration Act to govern their arbitration agreement, such a choice should be honored by an arbitral tribunal or an ROC court.

<sup>13</sup> Arbitration Act § 1(3).

<sup>14</sup> Minutes of the Fourth Meeting in 1978 of Civil Chambers of the Supreme Court.

party's right to enforce the arbitration agreement would be forfeited, however, if it engages in any debate on the merits of the case before the court. The plaintiff's failure to comply with such an order would result in dismissal of its suit. Unlike the prior Statute for Commercial Arbitration, which requires an outright dismissal of the plaintiff's suit, the Arbitration Act's two-step process avoids the harsh result when a subsequent arbitration proceeding fails to produce an award and the plaintiff's claims are barred by the statute of limitations, since a procedural dismissal by the court does not stop the statute of limitations from running.

A lingering uncertainty under the Statute for Commercial Arbitration was whether ROC courts would enforce an agreement to arbitrate outside Taiwan in accordance with rules promulgated by foreign institutions such as the ICC. A few court opinions construed all references to an arbitration agreement in the Statute for Commercial Arbitration as referring only to arbitration in Taiwan in accordance with the Statute for Commercial Arbitration.<sup>15</sup> The impact of this narrow interpretation was apparent: an agreement to arbitrate overseas or in accordance with international rules such as an ICC arbitration case could be readily disregarded by a party who reneges on his promise and commences litigation in an ROC court, since an ROC court, faced with such litigation, would not be able to invoke provisions in the Statute of Commercial Arbitration to decline to hear such litigation. This parochial view was severely criticized by commentators until judges of the ROC Supreme Court passed a resolution in 1992 suggesting that relevant provisions in the Statute for Commercial Arbitration may be applied *mutatis mutandis* to arbitration agreements "involving foreign elements."<sup>16</sup> Though unsatisfactory, this interpretation offered a temporary solution to problem of finding a legal basis to enforce agreements to arbitrate a dispute outside Taiwan or in accordance with international rules. The Supreme Court's 1992 resolution reflected a trend of liberalization in the judicial attitude toward international commercial arbitration. With the advent of the Arbitration Act, the narrow interpretation is no longer a barrier to enforcing agreements to arbitrate overseas or in accordance with international rules.

#### **D. Arbitrability of Claims**

The civil-commercial distinction that defined the scope of arbitrability under the 1961 statute was abandoned by the 1998 Arbitration Act. The current approach is to include within the purview of arbitration any present or future dispute which "can be settled by the parties in accordance with law." This definition would encompass almost all disputes of civil or commercial nature, whether sounding in tort, contract, or quasi-contract, except those arising out of domestic relations (known as family law and the law of succession under the ROC Civil Code). Commercial disputes, the majority of which can be settled by the parties, are arbitrable. Since Article 1(2) of the Arbitration Act does not make a distinction between domestic and foreign laws when it refers to settlement "in accordance with law," a cause of action based on the laws of a foreign country is arbitrable, so long as the parties are permitted by the foreign law to settle the dispute.<sup>17</sup> The categories of claims which may not be resolved by arbitration are as follows:

##### *1. Validity of Intellectual Property Rights*

Of the various forms of rights on proprietary information, patent and trademark rights in Taiwan can be granted or revoked only by the government. Whether such grant or revocation is lawfully procured in accordance with the ROC Patent Law or Trademark Law can only be reviewed by the governmental authority in charge, currently the Intellectual Property Office under the Ministry of Economic Affairs, and,

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<sup>15</sup> See Li, *supra* note 2, at 654-656.

<sup>16</sup> Minutes of the Third Meeting in 1992 of Civil Chambers of the Supreme Court, 34-8 Judicial Yuan Gazette (Si-Fa-Yuan Kung-Bao), 86-9 (Aug. 1992).

<sup>17</sup> Once the tribunal applies foreign law, the award could be interpreted as a "foreign" arbitral award under the Arbitration Act. See the discussions in the Section on enforcement of foreign arbitral awards below.

ultimately, by an administrative court. An arbitrator does not have the authority to make a declaratory award regarding the validity of a patent or a trademark. Copyrights, in contrast, are not granted by any official act, and a copyright will vest upon the creation of the copyrightable work. The existence or validity of a copyright is therefore arbitrable, but the award will be binding only upon the parties to the arbitration. Likewise, the existence or validity of a trade secret protected under the ROC Trade Secrets Act is arbitrable, since the right to a trade secret arises when the statutory requirements are met, and the parties to a trade secret dispute are allowed to settle their dispute.

The issue of validity is distinct from the issue of remedy. Although the validity of a patent or trademark right is not suitable subject matter for arbitration, a claim for damages or a permanent injunction based on a patent or trademark right can be resolved by arbitration, since ROC law permits the parties to settle this category of disputes.

## *2. Antitrust and Unfair Competition*

The ROC Fair Trade Act is a comprehensive statute addressing issues ordinarily dealt with in western jurisdictions under the rubrics of antitrust law and the law of unfair competition. Private parties injured by violations of the Fair Trade Act may seek damages up to three times the actual damages. These claims may be settled and are thus arbitrable. The Fair Trade Commission is the administrative authority charged with the responsibility of enforcing the Fair Trade Act, and it has statutory authority to approve certain types of behaviour subject to the scrutiny of the Fair Trade Act, such as a cartel among competitors. Although an arbitrator may not replace the Fair Trade Commission in granting statutory approval, he or she may rule on the legality of a transaction under the Fair Trade Act.

## *3. Consumer Protection*

Claims under the ROC Consumer Protection Act, including strict product liability and treble-damages claims for injuries caused by willful misconduct of business operators, are subject to settlement by the parties and therefore may be resolved by arbitration. An arbitrator may apply the provisions of the Consumer Protection Act and declare a standard-form contract invalid due to the gross unfairness of its terms. The critical issue for a merchant wishing to arbitrate its disputes with consumers is to ensure that the consumers have indeed given consent to the arbitration agreement. Besides adding an arbitration clause in the fine print of a standard-form contract, the merchant should take proper measures to allow a consumer an adequate chance to read and consent to arbitrate future disputes.

## *4. Securities Regulation*

Article 166 of the ROC Securities and Exchange Act (the SEA) provides that parties to any dispute arising out of transactions of securities in accordance with the SEA may agree to submit their dispute to arbitration. The SEA prohibits fraudulent behaviour in connection with the issuance or trading of securities, and the injured parties may file a civil suit against those responsible. Such civil actions are akin to a tortious action under the ROC Civil Code and may be settled by arbitration. Moreover, Article 166 provides that disputes between securities firms and the securities exchange or between two or more securities firms must be settled by arbitration, regardless of whether the parties agree to arbitrate.

## *5. Employment Claims*

Employment is one of the 'typical contracts' under the ROC Civil Code, and the claims thereunder may be settled by the parties. In addition to the provisions in the Civil Code, Taiwan has a special statute entitled the Labor Standards Act. The Labor Standards Act purports to set forth the minimum standards of employment and this protection may not be waived by the employee. Notwithstanding its strong tenor of public policy, employment disputes, including whether termination of an employment contract is wrongful, may be resolved by arbitration, as long as the arbitration agreement is freely entered into by the employee. If arbitration is the preferred mode of dispute resolution, it would be advisable for an employer to sign a separate arbitration agreement with its employees rather than using a standard-form contract containing

an arbitration clause. In addition, the ROC Statute for Handling Labor Dispute has several provisions concerning the referral of a labour dispute to arbitration. According to Article 25(4) of the Statute for Handling Labor Disputes, the competent authority may ex officio refer a serious labour dispute to arbitration. This type of arbitration is very rare, however.

## **E. Selection of and Challenge to Arbitrators**

### *1. The Selection of Arbitrators*

Most arbitration cases in Taiwan are heard by a three-arbitrator tribunal rather than a sole arbitrator. This phenomenon has something to do with the parties' lack of confidence in allowing one individual to make an irreversible decision without the benefit or constraint of having to consult with other arbitrators.<sup>18</sup> The fear of the arbitrator's tendency to "split the baby" is very real; and the parties usually would not agree to submit their dispute to arbitration unless they are certain that at least one arbitrator will be acceptable to them.

The parties to an arbitration case have wide latitude in prescribing the procedure for selecting arbitrators. If the procedure is not pre-determined by the parties or by the rules of the arbitration institution in question, the provisions of the Arbitration Act shall apply. Article 9(1) of the Arbitration Act provides that in case the arbitration agreement fails to prescribe the arbitrator(s) and/or the procedure for appointing arbitrator(s), each party shall appoint one arbitrator, and the two arbitrators thus appointed shall jointly appoint a third arbitrator, who will serve as the chair of the tribunal.

In a number of situations, an ROC court may assist the parties in the formation of the arbitral tribunal. When a party fails to appoint an arbitrator after being given fourteen-days notice by the other party to do so, the other party may request that the arbitration institution or the court appoint such arbitrator.<sup>19</sup> If the arbitration agreement requires an arbitration institution to appoint an arbitrator and that institution fails to appoint an arbitrator after being given fourteen-days notice to do so, the appointment may be made by the court upon either party's application.<sup>20</sup> Moreover, the court may, upon a party's application, appoint an arbitrator if (1) the two party-appointed arbitrators fail to appoint a third arbitrator within thirty days or (2) the arbitration agreement requires the arbitration to be conducted by a sole arbitrator and the parties fail to agree upon the candidate within thirty days of a party's receipt of the other party's notice for selecting the sole arbitrator.<sup>21</sup> If, however, either of the foregoing two situations arises in the context of an institutional arbitration case, the appointment will be made by the arbitration institution rather than by a court.<sup>22</sup>

An individual, according to Article 6 of the Arbitration Act, may be an arbitrator if he or she is a "reputable and fair person" possessing legal or other professional knowledge or experience, and has one of the following qualifications: (1) having been a qualified judge or public prosecutor; (2) having practiced for more than five years in the professions of law, accounting, architecture, technician or other business-related professions; (3) having acted as an arbitrator in a domestic or foreign institutional arbitration proceeding; (4) having been an assistant professor or held a higher position for more than five years in domestic or foreign colleges or universities recognized by the ROC government; or (5) having

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<sup>18</sup> According to Arbitration Act § 1(1), arbitration may be heard by either a sole arbitrator or an odd number of arbitrators. Judgment 96-Tai-Shang-Tzu No. 1845 of the Supreme Court, Taiwan, ROC: 2007 stated that under Arbitration Act § 1(1), except for a sole arbitrator, a tribunal must be composed of an odd number of arbitrators. Such notion has induced debates from scholars.

<sup>19</sup> Arbitration Act § 12(1).

<sup>20</sup> Arbitration Act § 12(2).

<sup>21</sup> Arbitration Act §§ 9(2)–(3).

<sup>22</sup> Arbitration Act § 9(4).

expert knowledge or techniques in a special field and worked in that field for more than five years.<sup>23</sup> In addition to the foregoing qualifications, Article 8 of the Arbitration Act originally imposed an obligation on the arbitrators to attend “training and lectures.” This unique requirement, purporting to ensure the quality of arbitration in Taiwan, has generated intense debate.<sup>24</sup> Many commentators argue that this requirement is inconsistent with arbitration’s emphasis on party autonomy and overlooks the essential difference between a judge and an arbitrator. If enforced literally, this requirement could prevent a top-notch international arbitrator from presiding over arbitration proceedings administered by arbitration institutions in Taiwan, simply because he or she is not able to undergo “training or lectures” in Taiwan. To resolve this issue, Taiwan’s legislature amended Article 8 in 2002, providing exemptions from the training obligation to those who are qualified judges or public prosecutors, who have practiced law as an attorney for more than three years, who have been full-time professors of major subjects in law schools for specific periods of time, and those who had been registered as arbitrators before the Arbitration Act came into effect and participated in actual arbitration cases as arbitrators. In any event, all the statutory qualifications discussed above apply only to an arbitration proceeding conducted in Taiwan pursuant to the Arbitration Act. They do not affect ICC or other international arbitration, even if the site of the arbitration is in Taiwan.

### 2. Availability of Qualified Arbitrators

The ROCAA keeps a roster of qualified arbitrators, but the parties are free to appoint an arbitrator who is not on the ROCAA roster. Although the parties may find suitable candidates in Taiwan, they may also appoint an arbitrator from overseas. Top-notch international arbitrators may and do preside over ROCAA arbitration cases. For example, the arbitral tribunal in the 1997 case of *Spie Batignolles v. Ret-Ser* consisted of three arbitrators from the United States and Hong Kong.<sup>25</sup>

### 3. Challenge to Arbitrators

Unlike its predecessor, the Arbitration Act explicitly stipulates an arbitrator’s obligation to disclose any fact which could create a justifiable concern over his independence or impartiality.<sup>26</sup> The disclosure requirement, however, had been implemented by the ROCAA even before the Arbitration Act became effective. A party to arbitration may challenge an arbitrator in situations enumerated in Article 16(1) of the Arbitration Act. The grounds for challenge are extensive, including any fact which could create a “justifiable concern” over the arbitrator’s independence or impartiality. This sweeping prohibition appears to confuse the matters an arbitrator should disclose with the grounds for challenging an arbitrator, and is susceptible to be abused by a party intending to stall. The tribunal must rule on a challenge within ten days, and if any party disagrees with the tribunal’s ruling, that party may file an application with an ROC court for review of the ruling within 14 days.<sup>27</sup> Challenge of a sole arbitrator should be made by an application to an ROC court.<sup>28</sup>

When the tribunal rules on a challenge against the qualification of an arbitrator, should the tribunal include the arbitrator being challenged? The opinions are divergent in Taiwan. Critics who oppose the arbitrator’s involvement in deciding his/her qualification argue that the ROC Code of Civil Procedure should apply to arbitration when there is no provision in the Arbitration Act or no parties’ agreement to rely on, and point to Paragraph 2, Article 35 of the Code of Civil Procedure, reading: “The judge who is

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<sup>23</sup> Arbitration Act § 7 enumerates several categories of individuals who may not act as an arbitrator, including persons who have committed particular criminal offenses.

<sup>24</sup> See, e.g., K.C. Fan, *Chung Tsai Ting Ji Tsu Ji (Formation of Arbitral Tribunal)*, in JUNG TSAI FA HSIN LUN (NEW COMMENTARIES ON THE ARBITRATION ACT) 124-128 (Yang Tsung-Sen, et al. authors, 1999).

<sup>25</sup> Case 85-Shang-Jung-Lin-Sheng-Ai-Tzu-50, ROCAA, 1996.

<sup>26</sup> Arbitration Act §15(2).

<sup>27</sup> Arbitration Act §17.

<sup>28</sup> Arbitration Act §17(6).

challenged cannot participate in the formation of the aforementioned decree." Their opinion coincides with two Supreme Court judgments. In Judgment 96-Tai-Shang-Tzu No. 1845 (2007), the Supreme Court, citing Paragraph 1 of Article 15 of the Arbitration Act, which requires arbitrators to be independent and fair in handling arbitral affairs, found an arbitrator who is challenged should not participate in making the decision on the challenge. In that case, the chief arbitrator, who was challenged in the case, had chosen to recuse himself, and the other two arbitrators found the challenge groundless and dismissed it in their decision. The party filing the challenge did not further file a petition with the court against such decision. But the Supreme Court found the decision by the two arbitrators defective on the grounds that "an arbitral tribunal comprising an even number of arbitrators is illegal." In Judgment 97-Tai-Shang-Tzu No. 2094 (2008), issued by the Supreme Court, two arbitrators of the tribunal had been challenged, and the challenge was dismissed by the District Court. The Supreme Court found that under such circumstances, Paragraph 6, Article 17 of the Arbitration Act, reading "a challenge against a sole arbitrator should be filed with a court," should apply.

On the other hand, commentators who believe the challenged arbitrator should be allowed to participate in deciding his/her qualification seem to have a more compelling argument. According to Paragraph 1, Article 17 of the Arbitration Act, the decision on a challenge should be made within ten days by *the tribunal*. If it does not refer to the tribunal including the arbitrator in dispute, it is impossible for the decision to be made within ten days.<sup>29</sup> The procedure to initiate the composition of a new tribunal was not given in the said article; but formation of a tribunal following the procedures in Articles 9 to 11 of the Arbitration Act will certainly take more than ten days; how to decide the remuneration for the second tribunal is left unaddressed in the Arbitration Act.<sup>30</sup> Furthermore, the challenge procedure in Article 17 of the Arbitration Act was modeled after Paragraphs 2 and 3, Article 13 of the UNCITRAL Model Law, whose purpose was to give the tribunal a chance of self-examination before the challenge is reviewed by the court. Consequently, the tribunal should mean the tribunal including the arbitrator being challenged.<sup>31</sup> In the Discussion on Civil Matters by the Taiwan High Court in year 2011(No. 65), the Taiwan High Court resolved that the tribunal should mean the tribunal including the arbitrator being challenged. In addition to the above reasons, the Resolution pointed out that the tribunal may rule on the challenge of the tribunal's lack of jurisdiction under Article 30 of the Arbitration Act; by the same logic, the challenged arbitrator should be allowed to participate in deciding his/her qualification. Moreover, if the challenged arbitrator is not allowed to sit in the tribunal and rule on the challenge, the decision will be made by the chief arbitrator and the arbitrator appointed by the party raising the challenge, which may over protect that party.

## F. Place and Language of Arbitration

Although the Arbitration Act contains a few provisions on how the arbitration proceedings may be conducted,<sup>32</sup> those provisions are meant to apply only when the parties have not agreed otherwise.<sup>33</sup> Parties to an international arbitration proceeding, for example, may agree upon the language of the

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<sup>29</sup> Judgment 95-Jong-Shang-Gan-1 No. 61, Taiwan High Court, ROC: 2006.

<sup>30</sup> See Wu Kuan-Lu, *Jong Tsai Jen Ji Hui Bi* (Challenge to Arbitrators), 14:9 Lawyers' National 75, 83 (September 15, 2010).

<sup>31</sup> See Shen Kuang-Lin, *Jong Tsai Jen Hui Bi Jen Yi Ji Chu Li Chen Shui Yu Jong Tsai Pan Duan Ji Che Shaw*, (Resolution Concerning the Challenge to Arbitrators and Nullification of Arbitration Awards, 86 Arbitration Quarterly 59 (August 2008).

<sup>32</sup> Arbitration Act §§ 18–36.

<sup>33</sup> Arbitration Act § 19.

arbitration and use interpreters where necessary.<sup>34</sup> Hearings may be conducted in any place deemed suitable by the tribunal, including a place outside Taiwan.

### **G. Conduct of Proceedings**

Arbitration will formally commence when the respondent receives a notice of the Request for Arbitration.<sup>35</sup> Article 22 of the Arbitration Act adopts the principle of *Kompetenz-Kompetenz* by providing that any dispute about the jurisdiction of the tribunal shall be decided by the tribunal itself. Article 23 requires the tribunal to give each party an opportunity to fully state its case and conduct an investigation in accordance with the parties' pleadings. It is not clear, however, whether this right to "arbitral due process" may be waived by the parties, but a tribunal should bear this due process requirement in mind in deciding whether or how to investigate any evidence submitted by the parties, since failure to adhere to this requirement is a ground for setting aside an award.

Once the arbitral tribunal is formed, the parties should not have any *ex parte* communication with any of the arbitrators. Arbitrators are subject to criminal penalties if they demand or take bribes or receive other illegal benefits from the parties.<sup>36</sup> It is unclear under the Arbitration Act whether the tribunal may attempt to conduct mediation before making an award. In practice, an arbitral tribunal will make at least a symbolic effort to suggest that the parties settle their dispute.<sup>37</sup>

The tribunal enjoys wide discretion in the manner of fact-finding, so an arbitrator trained in a common law jurisdiction may direct a discovery process, which is not provided for under ROC law. For cases involving technical issues, the tribunal may appoint an expert to testify or give written opinions. Cross-examination of witnesses is commonly done in ROCAA arbitration. The tribunal may not ask a witness to testify under oath, so a dishonest witness before the tribunal would not be subject to the penalty of perjury even if he gives false testimony. In practice, the parties usually bring the witnesses to the hearing at the request of the tribunal. To facilitate the arbitration, Article 28 authorizes the tribunal to request assistance from the court or other governmental agencies. This statutory authority is particularly useful in the investigation of evidence by an arbitrator, who does not have the power to compel production of evidence.

### **H. Issuance and Correction of the Arbitral Award**

#### *1. Issuance of the Arbitral Award*

Unless agreed otherwise by the parties, the arbitration proceedings must conclude and an award must be made within six months of the formation of the arbitral tribunal, subject to an optional extension of three months by the tribunal.<sup>38</sup> The tribunal's failure to observe this deadline will not jeopardize the ultimate award, but a party is permitted to forgo arbitration and commence or resume litigation after this period of time.<sup>39</sup> Although the Arbitration Act has no provision authorizing the tribunal to make a default award, it is commonly accepted that a default award is permissible if a party is duly served with the process but fails to appear without any justification.<sup>40</sup>

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<sup>34</sup> Arbitration Act § 25.

<sup>35</sup> Arbitration Act § 18(2).

<sup>36</sup> ROC Criminal Code §121(1).

<sup>37</sup> If the parties indeed reach a settlement, the tribunal may prepare a settlement, which is equivalent to an arbitral award according to Article 44(2) of the Arbitration Act.

<sup>38</sup> Arbitration Act § 21(1).

<sup>39</sup> The arbitration will be deemed as being terminated once either party commences or reinstates litigation. *See* Article 21(3) of the Arbitration Act.

<sup>40</sup> *See* Article 26 of the CAA Arbitration Rules.

## 2. Correction of the Arbitral Award

According to Article 35 of the Arbitration Act, the arbitral tribunal may correct, on its own initiative or upon request, any clerical, computational or typographic errors or any other similar obvious mistakes in the award and shall provide written notification of the correction to the parties as well as the court. The foregoing is likewise applicable to any discrepancy between a certified copy of the arbitral award and the original version thereof.

### I. Other Key Features

#### 1. Choice of Law

The Arbitration Act has no specific provisions about the choice of law in arbitral proceedings, so the tribunal in an international arbitration case may apply either the choice of law rules under ROC law or a set of rules deemed appropriate by the tribunal. The tribunal may apply national laws of relevant countries, but it is not clear whether it may apply *lex mercatoria*. Although drafters of the Arbitration Act received their inspiration from the UNCITRAL Model Law, in the Arbitration Act there is no provision similar to Article 28(4) of the Model Law, which requires, in all cases, the tribunal to decide in accordance with the terms of the contract and to take into account the usages of the trade applicable to the transaction. Since the existence and content of *lex mercatoria* are still subject to debate,<sup>41</sup> the tribunal should be cautious about basing its decision solely on this controversial body of rules, unless it is authorized by the parties to perform the role of an *amiable compositeur*. The Arbitration Act adopts the “separability” doctrine, so the arbitration agreement may be governed by a law different from that governing the substance of the dispute.

#### 2. Amiable Compositeur

Before the Arbitration Act was enacted, there was a debate about whether, under ROC law, an arbitrator may act as an *amiable compositeur*. One school of thought highlighted the difference between a judge, who must make a decision in accordance with law, and an arbitrator, who may make an award in accordance with “equitable principles.” The other theory emphasized an arbitrator’s duty to abide by the law and argued that the discretion to apply some ill-defined “equitable” principles would in fact reinforce the misconception of arbitration as merely a way of making compromises without regard to the underlying merits of the case. A few Supreme Court opinions annulled an arbitral award for the tribunal’s application of equitable principles in disregard of the applicable law chosen by the parties.<sup>42</sup>

Although the term “equity” is not explicitly used in ROC law, there is a counterpart to this notion under the ROC Civil Code. Article 1 of the Civil Code provides that where there is no explicit provision applicable to a specific situation, customs shall be applied; and where there are no applicable customs, “general principles of law” shall be applied. The concept of general principles of law can be interpreted to encompass many rules which could be defined as equitable principles under those jurisdictions acknowledging such principles. One alternative to applying equitable principles in an arbitration case, therefore, is to invoke Article 1 of the Civil Code, so that an attack on not applying the rules of law may be avoided. This alternative may not be the best solution, however, since the general principles of law may be applied only when there is no Code provision or custom applicable to the case.

Under the Arbitration Act, the tribunal may act as an *amiable compositeur* and apply principles based on general notions of equity, fairness or justice to make an award if the parties explicitly agree that it may do so.<sup>43</sup> If the parties confer the authority upon the tribunal to apply equitable principles, the tribunal

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<sup>41</sup> See generally Craig, Park & Paulsson, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 603-641 (1990).

<sup>42</sup> Judgment 85-Tai-Shang-Tzu-2289 of the Supreme Court, ROC: 1996; and Judgment 97-Tai-Shang-Tzu-2094 of the Supreme Court, ROC: 2008.

<sup>43</sup> Arbitration Act § 31.

may fashion rules in accordance with its conception of fairness, without being constrained by the letters of the contract or a particular regime of law. The tribunal may also consider foreign law or *lex mercatoria* when formulating equitable principles.

### 3. *Interim Measures*

Parties seeking provisional relief have several options. After the formation of the arbitral tribunal, they may request that the tribunal order the opposing party to refrain from taking certain actions which could result in irreparable harm to the requesting party. Although the tribunal has no power to hold the violating party in contempt, such violation could result in the tribunal's drawing a negative inference on the merits of the case. At the request of one party, the tribunal may also make an interim award to preserve the *status quo*, and this interim award is enforceable just like a final award. Moreover, a party to an arbitration agreement may apply for provisional relief from an ROC court, both before and after the filing of the Request for Arbitration. Provisional relief under ROC law includes provisional attachment, which is seizure of the debtor's assets to secure the enforcement of a monetary claim, and provisional injunction, which requires one to act or refrain from acting in a specific manner to preserve the *status quo* or secure the enforcement of a non-monetary claim.<sup>44</sup> If a party to an arbitration agreement enforces a provisional attachment or provisional injunction order before commencing the arbitration, Article 39 of the Arbitration Act provides that the other party may request that the court order the applicant of such relief to commence arbitration within a specified period of time. If the order is not complied with, the relief will be revoked by the court.

### 4. *Costs*

Institutional arbitration in Taiwan is mostly conducted by the ROCAA, and the ROCAA charges a fee which covers both the arbitrators' remuneration and its own administrative work. The fee is based on an *ad valorem* system, calculated in accordance with a sliding scale based on the amount in dispute, starting from a fixed sum of 3,000 New Taiwan Dollars (approximately US\$100 at the current rate of exchange) when the amount in dispute is under 60,000 New Taiwan Dollars (approximately US\$2,000 at the current rate of exchange) to 0.5 percent of the amount exceeding 9,600,000 New Taiwan Dollars (approximately US\$320,000 at the current rate of exchange). Forty to sixty percent of the fee will be paid to the arbitrators as their compensation, regardless of how much time they spend in performing their duties. In addition, the Association's out-of-pocket expenses will be reimbursed by the parties. The claimant must advance the arbitration fee, along with a reasonable deposit for administrative expenses, when filing its Request for Arbitration. All the foregoing fees should be borne by the losing party, and the tribunal will make a ruling on how the arbitration fee should be borne in the final award. Unless specifically agreed to by the parties, it is not a common practice for arbitral tribunals in Taiwan to award attorney's fees to the winning party. Generally speaking, ROCAA arbitration will be less expensive than ICC arbitration conducted in Taiwan, since the ICC has no permanent facilities for conducting arbitration in Taiwan.

### 5. *Logistics*

The ROCAA is a well-established arbitration center capable of handling international cases. An international arbitration case between a Taiwanese party and a French party involving a dispute of approximately US\$120,000,000 was filed with the ROCAA in 1996, one of the largest international arbitration cases the ROCAA has ever conducted.<sup>45</sup> Three arbitrators from overseas formed the tribunal. The ROCAA has hearing rooms and supporting equipment to accommodate the particular needs of international cases. Simultaneous interpretation and other services are available for a reasonable cost. With foreign parties, the ROCAA uses English in its communications, and there is no extra charge for administering international cases. At the request of the parties or the tribunal, the ROCAA will make

<sup>44</sup> Code of Civil Procedure §§ 522-538.

<sup>45</sup> *Spie Batignolles v. Ret-Ser.* Case 85-Shang-Jung-Lin-Sheng-Ai-Tzu-50, ROCAA, 1996.

special arrangements to facilitate the arbitration, such as setting up a videoconference for interviewing an overseas witness who is unable to physically give his testimony in Taiwan. If necessary, the ROCAA may even arrange for a hearing in another country. The ROCAA has devoted significant resources to define itself as a capable international arbitration center, and publishes a journal in English.

#### *6. Neutrality*

One of the questions frequently asked by foreign parties is whether the ROCAA is a friendly forum to foreign parties when administering the arbitration. The fear about domestic arbitration centers' tendencies to favor local parties is often unfounded, and the ROCAA has a good reputation in this respect. The ROCAA is keen to promote itself as a center for international arbitration and is unlikely to jeopardize its reputation by favoring local parties. Indeed, the case that made the ROCAA the focus of international attention in 1993, *Matra v. Department of Rapid Transit Systems*, is an ROCAA arbitration case in which a French firm obtained an award of more than one billion New Taiwan Dollars (approximately US\$33,330,000 at the current rate of exchange) from an ROC governmental agency.<sup>46</sup> It is worth noting that the three arbitrators constituting the tribunal in the *Matra* case were all ROC nationals. Foreign parties should, therefore, be assured that they will not be treated unfairly in a ROCAA arbitration case.

### **IV. ENFORCEMENT OF ARBITRAL AWARDS**

#### **A. General Structure of Enforcement**

According to Article 37(1) of the Arbitration Act, an arbitral award is equivalent to a final and irreversible court judgment. To enforce an arbitral award, the claimant must file a petition with an ROC court for an enforcement decree. The court will reject an enforcement application only under the following three situations:

- The arbitral award concerns a dispute not within the scope of the arbitration agreement, or exceeding the scope of the arbitration agreement, unless the offending portion of the award may be severed and the severance will not affect the remainder of the award;
- The reasons for the arbitral award were not stated where such statement is required, unless the omission has been corrected by the arbitral tribunal; or
- The arbitral award directs a party to act contrary to the law.<sup>47</sup>

The court considering an enforcement petition will not revisit the merits of the case and will confine its review to whether there is any statutory ground for rejecting the enforcement.

#### **B. Enforcement and Setting Aside of Domestic Awards**

##### *1. Annulment of Arbitral Awards*

Between the parties to an arbitration proceeding, an arbitral award has the same legal effect as a final and irreversible court judgment.<sup>48</sup> If the losing party does not comply with the award voluntarily, the prevailing party may apply for compulsory execution of the award by an ROC court. To remedy the situation where there are gross violations of procedural justice, Articles 38 and 40 of the Arbitration Act enumerate eleven grounds for a party to commence a civil action for annulment of the award. They are:

1. The arbitral award concerns a dispute not within the scope of the arbitration agreement, or exceeding the scope of the arbitration agreement, unless the offending portion of the award may be severed and the severance will not affect the remainder of the award;

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<sup>46</sup> Although the award was once annulled by the Taipei District Court, the respondent's attempt to have the court set aside this award has been finally rejected by the court. Judgment 89-Tai-Shang-Tzu-2677 of the Supreme Court, ROC: 2000.

<sup>47</sup> Arbitration Act § 38.

<sup>48</sup> Arbitration Act § 37(1).

2. The reasons for the arbitral award were not stated where such statement is required, unless the omission has been corrected by the arbitral tribunal;
3. The arbitral award directs a party to act contrary to the law;
4. The arbitration agreement is not duly formed, is invalid or has yet to come into effect or has become invalid prior to the conclusion of the arbitral proceedings;
5. The arbitral tribunal fails to give a party an opportunity to present its case prior to the conclusion of the arbitral proceedings, or if any party is not lawfully represented in the arbitral proceedings;
6. The composition of the arbitral tribunal or the arbitral proceedings violate the arbitration agreement or the law;
7. An arbitrator fails to fulfill the duty of disclosure prescribed in Paragraph 2 of Article 15 of the Arbitration Act and appears to be biased or has been challenged but continues to participate, unless that the challenge has been dismissed by the court;
8. An arbitrator violates any duty during the arbitration and such violation carries criminal liability;
9. A party or its representative has committed a criminal offense in relation to the arbitration;
10. Evidence or contents of any translation upon which the arbitration award is based were forged or fraudulently altered or contain any other misrepresentations; and
11. A civil or criminal judgment or an administrative ruling upon which the arbitration award is based has been reversed or materially altered by a subsequent judgment or administrative ruling.

The foregoing eighth to tenth grounds are limited to instances where a final conviction has been rendered or where the criminal proceeding may not commence or continue for reasons other than insufficient evidence.<sup>49</sup> In cases where the plaintiff of the annulment action alleges the seventh to eleventh grounds enumerated above, the award will not be annulled unless the violation materially affects the result of the award. Likewise, if the plaintiff alleges violation of the arbitration agreement in cases involving the sixth ground, the court will not set aside the award unless it is proved that such violation materially affects the result of the award.<sup>50</sup>

Under ROC law, an annulment action is treated as civil litigation, wherein the losing party may appeal the decision to an appellate court. Article 41(1) of the Arbitration Act provides that the court of the place where the award was made will have non-exclusive jurisdiction to hear an annulment action. An important procedural requirement is that, with limited exceptions, an annulment action has to be brought within thirty days of receipt of the written award.<sup>51</sup> If an annulment action is duly commenced and the plaintiff thereof is willing to post an adequate bond to secure the ultimate enforcement of the award, a court may enter a decree to suspend the enforcement of the award.

In 2011, 40 claims to annul arbitral awards were filed with district courts, among which only six were granted by district court judges.<sup>52</sup> The cardinal principle is that the court will not revisit the merits of a dispute and will confine its review to whether there is any statutory ground for setting aside the award.<sup>53</sup> According to a 1992 Supreme Court judgment, an award will not be set aside even if the tribunal has misapplied the law.<sup>54</sup> In a 1984 case, the Supreme Court rejected an annulment action where the plaintiff challenged the reasoning for the award. The Court explained that regardless of whether the reasons are

<sup>49</sup> Arbitration Act § 40(2).

<sup>50</sup> Arbitration Act § 40(3).

<sup>51</sup> Arbitration Act § 41(2).

<sup>52</sup> Judicial Statistics Yearbook 2011, Judicial Yuan: <http://www.judicial.gov.tw/juds/index1.htm>, last visited on October 15, 2012.

<sup>53</sup> See, e.g., 83-Jung-Su-Tzu No. 1 of Shih Lin Branch of Taipei District Court, Taiwan, ROC:1994, and Judgment 99-Tai-Shang-Tzu No. 1007, Supreme Court, Taiwan ROC: 2010.

<sup>54</sup> Judgment 81-Tai-Shang-Tzu No. 2196 of the Supreme Court, Taiwan, ROC: 1992, Judgment 86-Jung-Shang-Tzu No. 400 of the Taiwan High Court, Taiwan, ROC: 1997, and Judgment 93-Tai-Shang-Tzu No. 1690 of the Supreme Court, Taiwan, ROC: 2004.

adequate or even consistent with one another, as long as reasons are given, the award should be considered to be reasoned. The Supreme Court maintained the same point of view in its more recent cases.<sup>55</sup> This prudent approach suggests that ROC courts will not unduly interfere with an arbitration proceeding conducted in Taiwan.

Once an arbitral award has been set aside by a final judgment of a court, a party may bring the dispute to the court unless the parties have agreed otherwise.<sup>56</sup>

### **C. Enforcement of Foreign Arbitral Awards**

Chapter Seven of the Arbitration Act prescribes the procedure for enforcing a foreign arbitral award. According to Article 47, a foreign arbitral award is an award made "outside the territory of the Republic of China" or made within the territory of the Republic of China "in accordance with the laws of a foreign country." A foreign arbitral award is enforceable after being recognized by a decree of an ROC court.

The Arbitration Act's definition of a foreign award has produced debates about its proper interpretation. The question lies in the reference to "an award made in the territory of the Republic of China in accordance with the laws of a foreign country." The term "laws" could refer to either the substantive law applied by the tribunal in making the award or the procedural rules governing the arbitration proceedings.<sup>57</sup> The first interpretation appears to be at odds with the international practice of determining the *situs* of an international arbitration without regard to the substantive law applied by the tribunal. The second interpretation is also problematic since most procedural rules of arbitration are promulgated by private institutions, such as the ICC or the UNCITRAL, rather than by sovereign States, and it is unclear whether an ICC award made in Taiwan or an ROCAA arbitration proceeding conducted in accordance with UNCITRAL Rules is a "domestic" or "foreign" award or proceeding under the Arbitration Act.

An application for recognition of a foreign award will be rejected by an ROC court if:

1. The recognition or enforcement of the arbitral award is contrary to the public order or contemporary morals of the Republic of China; or
2. The dispute is not one which may be resolved by arbitration under the laws of the Republic of China.<sup>58</sup>

The opposing party to an enforcement proceeding may request that the court reject an application for enforcement of a foreign award if:

1. 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;
2. The arbitration agreement is null and void according to the law chosen to govern the arbitration agreement or, in the absence of choice of law, the law of the country where the arbitral award was made;
3. A party is not given proper notice of the appointment of an arbitrator or of any other matter required in the arbitral proceedings, or any other situations which give rise to lack of due process;
4. The arbitral award is not relevant to the subject matter of the dispute covered by the arbitral agreement or exceeds the scope of the arbitration agreement, unless the offending portion can be severed from and will not affect the remainder of the arbitral award;

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<sup>55</sup> Judgment 97-Tai-Shang-Tzu No. 2477 of the Supreme Court, Taiwan, ROC: 2008 and Judgment 99-Tai-Shang-Tzu No. 1788 of the Supreme Court, Taiwan, ROC: 2010.

<sup>56</sup> Arbitration Act § 43.

<sup>57</sup> See Yu, *supra* note 5, at 113-114.

<sup>58</sup> Arbitration Act § 49(1).

5. The composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, failing specific agreement thereon, the law of the place of the arbitration; or
6. The arbitral award is not yet binding upon the parties or has been suspended or annulled by a competent court.<sup>59</sup>

Although reciprocity is not a requirement for recognizing or enforcing a foreign arbitral award, Article 49(2) of the Arbitration Act allows an ROC court to dismiss an application for recognition of a foreign arbitral award if the country where the arbitral award was made or whose arbitration laws are applied to the arbitration does not recognize arbitral awards made in Taiwan. The court has discretion in such cases to either deny or permit the enforcement of the foreign arbitral award. The former Statute for Commercial Arbitration contained a similar provision.<sup>60</sup>

A decree made by the ROC Supreme Court in 1986 indicates that the court's discretion should be exercised cautiously, so that the reciprocity requirement will not become a barrier to the enforcement of foreign arbitral awards in Taiwan.<sup>61</sup> The decree reminds ROC judges that the reciprocity condition is not to be construed as requiring the foreign country in question to recognize an award made in Taiwan before an ROC court may recognize an award made in that country. Such a parochial attitude, according to the decree, would contradict the spirit of comity and international cooperation.

Awards made in the United States, the United Kingdom, Korea, France, Hong Kong, Switzerland, Vietnam, Japan, Finland, Russia, China and Singapore have been recognized by ROC courts in the past.<sup>62</sup> Recognition and enforcement of arbitral awards made in the People's Republic of China are governed by the Statute Governing the Relations between Taiwan Residents and Mainland Residents. The statute imposes a reciprocity requirement, providing that an award made in the PRC will be recognized or enforced in Taiwan only if the PRC offers the same treatment to awards made in Taiwan and the PRC award in question does not contravene the public order or contemporary morals of the ROC.<sup>63</sup> In May 1998, the PRC promulgated a set of guidelines for the recognition of judgments made by ROC courts, according to which arbitral awards made in Taiwan may be recognized or enforced under certain conditions. Awards made in Hong Kong or Macao are governed by the Statute Governing Relations with Hong Kong and Macao. According to this Statute, the conditions for recognizing or enforcing foreign awards shall be applied to the recognition or enforcement of arbitral awards made in Hong Kong and Macau.<sup>64</sup>

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<sup>59</sup> Arbitration Act § 50.

<sup>60</sup> Statute for Commercial Arbitration § 32(2).

<sup>61</sup> Decree 75-Tai-Kang-Tzu No. 335, Supreme Court, Taiwan, ROC 1986.

<sup>62</sup> *See, e.g.*, Decree 76-Jong-Tzu No.8 of the Taipei District Court, Taiwan, ROC 1987, for recognition of an award made in the United States; Decree 81-Jong-Sheng-Tzu No. 1 of the Taipei District Court, Taiwan, ROC 1992 and Decree 82-Jong-Bei-Tzu No. 13 of the Taipei District Court, Taiwan, ROC 1994, for recognition of an award made in the United Kingdom; Decree 75-Jong-Tzu No. 5 of the Taipei District Court, ROC 1986, for recognition of an award made in Korea. See also Decree 85-Jong-Jih-Tze No. 4 of the Taipei District Court for an example of recognizing an award made in France; Decree 87-Jong-Shang-Tzu No. 3 of the Taipei District Court for an examples of recognizing an award made in Hong Kong; Decree 90-Kang-Tzu No. 3935 of the Taiwan High Court for an example of recognizing an award made in Switzerland; and Decree 92-Kang-Tzu No. 687 of the Taiwan High Court Kaohsiung Division for an example of recognizing an award made in Vietnam. Decree 93-Jong-Sheng-Tzu No. 16 of the Taipei District Court, ROC 2004, for recognition for recognition of an award made in Japan; Decree 97-Jong-Ren-Tzu No. 1, of Hsinchu District Court, ROC 2008 for recognition of an award made in Finland; Decree 97-Jong-Ren-Tzu No. 1 of Chunghwa District Court, ROC 2008 for recognition of an award made in Russia; Decree 97-Jong-Ren-Tzu No. 1 of Taoyuan District Court, ROC 2008 for an example of recognition of an award made in China; Decree 100-Jong-Ren-Tzu No. 1 of Chunghwa District Court, ROC 2011 for recognition of an award made in Singapore.

<sup>63</sup> Statute Governing Relations Between Taiwan Residents and Mainland Residents § 74.

<sup>64</sup> Statute Governing Relations with Hong Kong and Macau § 42(2).

## V. CONCLUSION: THE FUTURE OF INTERNATIONAL ARBITRATION IN TAIWAN

Taiwan's membership in the World Trade Organization is part of the island republic's efforts to fully integrate with the international community. Arbitration plays a strategic role in Taiwan's mission to comply with international standards because most countries are not likely to recognize a judgment made by an ROC court. Unless Taiwan adopts a liberal arbitration regime, foreign companies will be hesitant to conduct business with Taiwanese companies since the prospect of suing or being sued in an ROC court would add a significant degree of risk to their transactions.<sup>65</sup> International arbitration provides a neutral forum for dispute resolution, and the parties' agreement to arbitrate will be enforced by ROC courts in accordance with the Arbitration Act. In recent years, the ROC government has launched a large-scale program to aggressively improve and expand the infrastructure of the island, including transportation, petrochemicals, power plants, telecommunications, and environmental protection. Foreign participation is essential for the success of these projects, and arbitration has been frequently chosen as the mechanism to resolve disputes arising therefrom. Arbitration is therefore expected to assume a more important role in the future.

However, there are some countervailing forces looming ahead. One persistent problem is the lack of confidence in the integrity of the arbitration process. Many government agencies, for example, still hold the erroneous view that arbitration is but another form of mediation, with the tribunal making a decision based on compromises rather than the law. In the aftermath of the *Matra* case, for example, an influential voice in Taiwan advised the government agencies against including any arbitration clause in their contracts, so that the government would not face an exorbitant award which is not based on black letter law.<sup>66</sup> This psychological barrier is not the public sector's exclusive domain; many private firms are also reluctant to agree to arbitrate, fearing that the tribunal may disregard their duties to abide by the law and make an unreasonable award for some ulterior reasons rather than the law. The *Kung Duan* tradition did not exist in a social vacuum; it was buttressed by a complicated web of personal relationships which are no longer true in the modern Taiwanese society.

The fact that government agencies, in their capacity as the owners of many projects, are frequently defending themselves in arbitration or litigation also has an impact on the development of arbitration in Taiwan. Fearing that they may be charged with favoritism, government officials usually adopt a very rigid approach in their dealings with contractors. This rigid approach is often the cause of many disputes. The officials' attitude is understandable: under ROC law, a government official or an officer in a government-owned enterprise may be charged with corruption if he "seeks benefits" for a contractor. If a dispute arises, a government agency has very little flexibility to settle the dispute with a contractor, since all payments by the government are subject to review by an independent audit department. The audit department rarely authorizes a payment in dispute unless the payment is compelled by a final court judgment. An arbitral award is equivalent to a final court judgment in terms of legal effects, but unlike a final court judgment, the award is made by private individuals rather than a branch of the government. Seen in this light, arbitration is a less preferred means of settling disputes.

The unique political culture in Taiwan has also contributed to the development of competing mechanisms for resolving disputes. Many foreign contractors today attempt to resolve their disputes with government agencies or government-owned enterprises through the conciliation procedure under the

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<sup>65</sup> The parties may, of course, include a choice-of-forum clause in their contract, providing that any and all disputes must be exclusively settled by a foreign court. This provision, however, will not necessarily be enforced by an ROC court, since the prevailing view is that this provision will be enforced only if the judgment made by the chosen foreign court would be recognized or enforced by an ROC court. Reciprocity is one of the requirements for an ROC court to recognize or enforce a foreign judgment, and this requirement is seldom met in practice. See ROC Code of Civil Procedure § 402.

<sup>66</sup> See Yu, *supra* note 5, at 107.

Government Procurement Law. Although not legally binding, a recommendation made by a conciliation panel of the Public Construction Commission of the Executive Yuan (the cabinet) may be more acceptable to a government agency, often simply because it is made under the auspices of another government agency.

Despite all the foregoing hurdles, formation of a liberal arbitration environment is still critical to realizing Taiwan's aspiration of becoming the regional economic center of the Greater China Area. The trend of globalization will lead to competition among national legal systems, and the development of modern technology will increasingly blur the lines between domestic and foreign regimes. It is therefore imperative for Taiwan, a political entity isolated from the formal treaty network of the international community, to foster a favorable environment for international arbitration, so that it is not undermined by its unique political situation. A lot of work needs to be done, and the most urgent task for the government is to promote public awareness of the nature and function of arbitration. The Arbitration Act is merely the first step toward this continuing endeavor.