New Phase for Cross-strait Dispute: Cross-strait BIA


The most obvious benefit of the Cross-strait BIA is to provide Taiwanese investors with institutionalized protection of their investment rights, and to allow authorities on both sides handle matters in accordance with the agreement. In other words, if and when a dispute arises, according to the Cross-Strait BIA, the parties may consent to select arbitration institutions on either side of The Strait, e.g. Chinese Arbitration Association or Taipei (CAA), to commence the arbitration process by impartial professional arbitrators, and the final arbitral awards may be filed with the courts on either side of the parties for enforcement.

CAA is the largest and leading arbitration service institution in Taiwan, with 3 offices in Taiwan and liaison offices in China. Since 2010, it has held symposiums and forums for the new development of Cross-Strait dispute resolution in China and Taiwan. In the future, CAA will continue to provide high quality service to assist Taiwanese business in Taiwan and China.

New Arbitration principle regarding Public Construction Services Contracts: PCC Values the Public Construction Arbitration

The Chinese Arbitration Association, Taipei (CAA) held its series of speech which addressed the recent development of public construction arbitration in Taiwan on June 28 and July 22, 2012 respectively. The two speakers were Dr. Jenn-Chuan Chern, chairman of the Public Construction Commission (PCC) and Dr. Chun-Ching Chen, vice chairman of PCC. More than 250 participants attended the speech.

Since Dr. Chern and Dr. Chen took office, in order to facilitate fair and impartial resolution to disputes between public agencies and contractors, PCC has supplemented new arbitration measures regarding public works and construction services contracts.
1. Introduction

The law relating to granting interim measures - remedies/orders - by the arbitral tribunal is one of the most challenging topics in arbitration. Countries do not approach the subject uniformly and the individual country’s policy and domestic legal thinking have much influence on the law in this area. There are practical benefits in granting the power to award provisional relief, normally reserved to the state, to the private arbitral tribunal. However, there are also counter-arguments of a theoretical nature as well as practical adverse consequences that may impinge on the propriety and efficacy of the arbitration.

In Taiwan, the Arbitration Act does neither grant nor deny the arbitral tribunal the powers to award interim measures. The Chinese Arbitration Association, Taipei Arbitration Rules (‘the CAA Arbitration Rules’), under Article 36 of Interim Measures, stipulate that the arbitral tribunal can do so provided parties agree to such power of the arbitral tribunal.

CAA launched Financial Dispute Arbitration Rules

Each year, a vast number of international business transactions take place in Taiwan, and many of these involve international financial institutions. Since Taiwan and China signed Memorandum of Understanding of financial institutions, Cross-Strait business transaction has been growing at ever increasing rates. And if and when a dispute arises, in order to avoid long litigation procedures or damaging business relationships, mediation and arbitration will provide fair and effective procedures to resolve disputed transactions.

Granting interim measures by the arbitral tribunal: a short overview from an English, Belgian, and Italian perspective

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In Taiwan, the Arbitration Act does neither grant nor deny the arbitral tribunal the powers to award interim measures. The Chinese Arbitration Association, Taipei Arbitration Rules (‘the CAA Arbitration Rules’), under Article 36 of Interim Measures, stipulate that the arbitral tribunal can do so provided parties agree to such power of the arbitral tribunal. In Italy, the Civil Procedure Code expressly prohibits such power of the arbitral tribunal.1 In England and Wales or Northern Ireland, under the Arbitration Act 1996, and in Belgium, under the Judicial Code (Article 1696 of Code judiciaire) 2, the arbitral tribunal is given the power to grant interim remedies, although differences remain between the two countries.

This article will look at the approach of English
law \(^1\) to interim measures with references to the approach taken in Italy and Belgium. The purpose of this short article is to shed some light on the future development of arbitration in Taiwan.

2. Freedom of contract

As in many other areas of law, the motto of freedom of contract forms much the basis of English arbitration law. Through an arbitration agreement, parties can stipulate the arbitral tribunal’s powers including the power to make interim remedies/orders. Parties are also free to limit the scope of the tribunal’s power to make interim measures. Without an agreement of the parties, the tribunal has only the limited powers to grant interim measures set out in section 38 of the Arbitration Act 1996. Under Belgian law, the arbitral tribunal has a more general default power to grant interim measures.\(^4\) By contrast, the Italian Civil Procedure Code takes an extreme approach at the other end whereby the power to grant interim orders is expressly prohibited. As said before, the Taiwan Arbitration Act does neither expressly grant nor prohibit such powers to be exercised by the tribunal. In fact, the CAA Arbitration Rules hint that such a power may be freely stipulated by the parties. Nevertheless, the CAA Arbitration Rules cannot be read as conferring a general power to the arbitral tribunal to grant interim measures.

Can parties who stipulate that the arbitral tribunal has the power to make interim orders apply to the courts for interim measures? In England and Wales or Northern Ireland, a party to the arbitration agreement may apply to the court for interim measures if the tribunal has no power or is unable for the time being to act effectively. Under Belgian law, a party is entitled to apply to the courts for interim measures unless parties waive their rights to do so.

3. What are the interim measures that can be granted by the arbitral tribunal?

In England and Wales or Northern Ireland, a broad range of interim measures can be sought from the arbitral tribunal include order to provide security for costs, order to make interim payment on account of costs, order of detention of relevant property, and a freezing order to maintain the status quo (an order for the non-disposal of assets). In Belgium, the tribunal can award interim orders except the attachment order, which remains the courts’ prerogative.

4. How are the measures enforced?

In England and Wales or Northern Ireland, if a party fails to comply with the arbitral interim order, the tribunal may then issue a peremptory order setting a final time and date for compliance. If the party fails to comply with the peremptory order, the order can be enforced by the court such as compelling the production of documents or the attendance of a witness. The arbitral tribunal may also order various sanctions including an award dismissing the claim or counterclaim. In Belgium, if a party were to choose not to voluntarily comply with the arbitral tribunal’s interim order, the party seeking enforcement would have to apply for the exequatur (a formal authorisation of enforcement) of the order. This can delay the proceedings.

The question arises here is why should parties agree to the arbitral tribunal having a general power to grant interim orders if the courts can also do so and ultimately it is for the courts to enforce arbitral tribunal’s orders. The answer is that parties may wish to limit the involvement of the courts in their disputes as much as possible and prefer to have also interim measures applications decided, at least in the first place, by the arbitral tribunal. When the arbitral proceedings are already under way, it may be more efficient for the arbitral tribunal to decide an application for interim measures if all the evidence is already before the tribunal. Furthermore, once an arbitral tribunal has awarded interim measures, it may not be necessary to resort to the courts in all circumstances as the other party may comply with the order. And even if resort to the courts is ultimately necessary, the fact that the arbitral tribunal has already issued an interim order may speed up court procedures and result in a decision which reflects that of the tribunal.

5. How can the measures be enforced outside the jurisdiction?

In an international arbitration, assets and evidence at which the interim measures aim may be situated outside the jurisdiction of the seat of the arbitration. In these cases, the fate of successfully enforcing these measures will depend on whether the courts of the country where the assets and evidence are will lend their aid to the arbitral tribunal. It will also depend on whether the foreign jurisdiction in which the order is to be enforced considers the arbitral interim order as an award or a procedural order.

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\(^1\) Article 818 of the Civil Procedure Code.
\(^2\) CEPANI rules also confirm this power. See http://www.cepani.be/EN/
\(^3\) The Arbitration Act 1996 only applies to England and Wales or Northern Ireland. The Arbitration (Scotland) Act 2010 applies in Scotland.
6. Anti-suit injunction

Can an arbitral tribunal issue an order to stay other proceedings within and outside the jurisdiction? For arbitration proceedings in England and Wales or Northern Ireland, such an anti-suit injunction to stay proceedings in the courts within the EU countries is not available to the national courts but is still probably available to an arbitral tribunal if the parties have expressly conferred this power on it. In any event, both the English courts and arbitral tribunals sitting in England and Wales or Northern Ireland have, or can be given, the power to issue anti-suit injunctions if proceedings are being brought in a jurisdiction outside the EU countries ie Taiwan. Again, whether such an injunction will be enforced successfully will depend on the attitude of the foreign courts.

7. Can arbitral interim orders be enforced against a third party?

The nature of the power to grant interim measures in England and Wales or Northern Ireland is based on freedom of contract, hence these remedies can only be enforced against parties privy to the arbitration agreement. This is the same in Belgium. However, an order to preserve assets will ultimately need to be served on a bank or other financial institutions where a party has assets, and the arbitral tribunal has no power to compel the bank or other financial institutions to comply with its order. Unless the banks or other financial institutions agree to be bound by the arbitral orders, an effective freezing order will need to be sought by a court.

8. What is the tribunal’s liability for exercising the power to make interim measures?

One of the concerns for resisting arbitral interim measures is that these can impose enormous financial burdens on the parties against whom the measures are to be enforced and this without the benefits of a full adjudication of the merits of the dispute. Interim remedies/orders can be negligently granted or refused by the arbitral tribunal, and parties can suffer enormous damages as a result. In England and Wales or Northern Ireland, an arbitrator is only liable for an act or omission shown to have been done in bad faith. In Belgium, an arbitrator cannot be held liable for making a decision or making a decision based on a mistake of the law, unless there is a fraud or gross negligence equivalent to fraud. In Italy, where, however, there is no power to award interim measures, the liability of arbitrators is much wider and encompasses cases in which the arbitrators may have been only negligent. Whether widening the scope of the legal liability for the arbitrator will increase the quality of the decision is a debatable question. However, the arbitrator’s liability can be strategically used to increase the likelihood of parties agreeing to stipulate the arbitral tribunal’s power to grant interim orders.

9. Conclusion

As Taiwan is developing its arbitration and expanding its legal services by taking a more international approach as well as taking advantage of economic integration in the greater China area, developing a legislative model for the arbitral tribunal’s interim measures provides a window opportunity for Taiwan to upgrade its arbitration services. How far can the English motto of freedom of contract be planted into Taiwan’s judicial soil will surely be an interesting focus.