AN EXAMINATION OF THE CONSTITUTIONALITY OF MANDATORY ARBITRATION IN TAIWAN

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ABSTRACT

This paper examines the constitutionality of mandatory arbitration under specific Taiwanese legislation. By mandatory arbitration the parties to a dispute that is of civil or commercial nature is deprived of the right of procedural option protected under Taiwan's Constitution. Such restriction on people's fundamental right requires a justifiable cause. To satisfy the constitutionality review the specific statute providing for mandatory arbitration must pass the tests under the doctrine of proportionality; mandatory arbitration must serve public interest; it must be a necessary and most appropriate means to achieve such public interest; mandatory arbitration shall not destroy the core value of the right to litigate, such as fair and equitable treatment in any dispute resolution procedure.

This paper finds arbitration under the LMDSA neither mandatory nor unconstitutional, as the type of disputes that is subject to mandatory arbitration is essentially a bargaining or negotiating process of employment terms or conditions, which is not capable of being adjudicated by litigation. The LMDSA does

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not deprive the parties' right of procedural option as they are not allowed to litigate such dispute in the first place. In addition, the award itself is not final and binding. Mandatory arbitration under the GPA is constitutional as far as private suppliers are concerned; the GPA does not compel a private party to arbitration without an arbitration agreement; it is within the private party's discretion to resort to mediation, arbitration or litigation so there is no restriction on his right of procedural option. Only the public entity is bound to arbitrate disputes under a construction contract. Since public entities are not invested with the protection of fundamental rights, mandatory arbitration under the GPA is not unconstitutional in this aspect. Mandatory arbitration under the SEA fails to meet the doctrine of proportionality as the public interest pursued by mandatory arbitration for securities transaction disputes could equally be achieved by litigation in state courts with expert assistance. It is neither necessary nor most appropriate. This paper finds it not constitutional. An amendment to the relevant provisions of the SEA should be carried out to correct such unconstitutionality.

KEYWORDS: *mandatory arbitration, Labor-Management Dispute Settlement Act (LMDSA), Government Procurement Act (GPA), Security and Exchange Act (SEA), right of procedural option, doctrine of proportionality, public interest*