

ICLG to: International Arbitration 2013

Chapter 14: Taiwan

Angela Y. Lin, Jeffrey Li *

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Taiwan?

Under the Taiwan Arbitration Act (hereinafter "Arbitration Act"), an arbitration agreement must be in writing and entered into in respect of a legal relationship or a dispute over a legal relationship. Disputes that may be referred to arbitration are limited to those which may be settled in accordance with the law.

The term "in writing" is defined broadly, and an arbitration agreement can be inferred from any document, instrument or certificate, letter, telex, telegram, or other similar types of communication between the parties.

1.2 What other elements ought to be incorporated in an arbitration agreement?

The Arbitration Act does not require any additional elements in an arbitration agreement, but it is common to specify the following elements in an arbitration agreement:

1. Place of arbitration.
2. Arbitration Institution. Although *ad hoc* arbitration is uncommon in Taiwan, several foreign *ad hoc* arbitral awards were recognised by Taiwanese courts. However, a decree rendered by the Taiwan High Court 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, which has sparked considerable debate. Since it may be debatable whether Taiwanese courts recognise *ad hoc* arbitral awards, it would be safer to adopt institutional arbitration in Taiwan.
3. Language of the arbitration proceedings.
4. Composition method of the arbitral tribunal.
5. Scope of the arbitration agreement.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Taiwan courts are generally supportive of arbitration because it lightens court caseloads, especially for complicated cases that rely heavily on professional knowledge. Additionally, the principle of separability is adopted through Article 3 of the Arbitration Act, which provides that the validity of an arbitration clause must be determined independently of the contract as a whole.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Taiwan?

The Arbitration Act was enacted in 1998 to supersede the 1961 Ordinance for Commercial Arbitration. The Arbitration Act mainly follows the 1985 UNCITRAL Model Law, as well as British, US, German, and Japanese legislation.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The Arbitration Act governs both domestic and international arbitration seated in Taiwan.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law?

Are there significant differences between the two?

The Arbitration Act was drafted based on the UNCITRAL Model Law with a few notable exceptions, which include:

- 1) Instead of dividing arbitration into "international" and "domestic", the Arbitration Act separates arbitration by "foreign" and "domestic". An arbitral award that is issued outside of ROC (Taiwan) territory or issued pursuant to foreign laws within the territory of the ROC is defined as a "foreign arbitral award" under the Arbitration Act.
- 2) The time limit for a party to appoint an arbitrator is reduced from 30 days under the UNCITRAL Model Law, to 14 days under the Arbitration Act.
- 3) While the UNCITRAL Model Law does not set a time-limit for the issuance of an arbitral award, the Arbitration Act requires the award to be made within 6 months from the composition of the tribunal, or no later than 9 months, if an extension is deemed necessary by the tribunal.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Taiwan?

Instead of dividing arbitration into "international" and "domestic", the Arbitration Act separates arbitration by "foreign" and "domestic". The mandatory rules governing domestic arbitration will also apply to international arbitration seated in Taiwan.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Taiwan? What is the general approach used in determining whether or not a dispute is "arbitrable"?

As the civil/commercial distinction which defined the scope of arbitrability under the 1961 ordinance was abandoned by the Arbitration Act, the current approach is to include, within the purview of arbitration, any present or future dispute which "may be settled by the parties in accordance with the law". This definition would encompass almost all disputes of a civil nature, whether involving torts, contracts, or quasi-contracts.

Nonetheless, certain subject matters may not be arbitrable due to their nature. For antitrust and unfair competition issues, although an arbitrator may not replace the competent authorities in granting statutory approval, he or she may rule on the legality of a transaction under the Fair Trade Act. In Taiwan, only the government can grant or revoke patent and trade mark rights. Whether such grant or revocation is lawfully obtained in accordance with the Taiwan Patent Act or Trademark Act can only be reviewed by the governmental authority in charge, currently the Intellectual Property Office under the Ministry of Economic Affairs, and ultimately by the Intellectual Property Court. An arbitrator does not have the authority to make a declaratory award regarding the validity of a patent or a trade mark. However, a claim for damages or permanent injunction based on a patent or trade mark right may be resolved by arbitration, since Taiwan law permits the parties to settle this category of disputes. Copyrights, in contrast, are not granted by any government agency, and a copyright will vest upon the creation of a copyrightable work. The existence or validity of a copyright is therefore arbitrable.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

The Arbitration Act adheres to the *competence-competence* principle. Under Article 22 of the Taiwan Arbitration Act, which is modelled after Article 16(1) and 16(2) of the UNCITRAL Model

Law, an objection as to the scope of the arbitral tribunal's authority shall be determined by the arbitral tribunal.

3.3 What is the approach of the national courts in Taiwan towards a party who commences court proceedings in apparent breach of 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 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.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Under the Arbitration Act, a party may apply to a court to set aside the arbitral award whenever the composition of the arbitral tribunal or the arbitral proceedings is contrary to the arbitration agreement or the law. Lack of jurisdiction is therefore a ground to set aside an arbitration award. Reviewing of the jurisdiction issue by the court would focus on whether the jurisdiction decision in the award is consistent with the arbitration agreement or the law.

3.5 Under what, if any, circumstances does the national law of Taiwan allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The issue is not addressed in the Arbitration Act. According to Article 19 of the Arbitration Act, the arbitral tribunal may apply the Code of Civil Procedure *mutatis mutandis* to arbitration proceedings. Under the Code of Civil Procedure, a third party who is legally interested in an action between two parties may, for the purpose of supporting one of them, intervene in the action while it is pending. However, a third party's intervention may violate the principle of party autonomy and the arbitration agreement.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Taiwan and what is the typical length of such periods? Do the national courts of Taiwan consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The Arbitration Act does not set forth requirements on a time-limit for a party to initiate the arbitration. Unless otherwise agreed to by the parties, the arbitral tribunal shall, within ten days upon receipt of notice of the [final arbitrator] appointment, determine the place of arbitration, as well as the time and date for the hearing, and shall notify the parties. Unless otherwise agreed to by the parties, the arbitral tribunal is required to render an award within six months of the composition of the tribunal. This time limit may be extended for three months under the tribunal's discretion.

3.7 What is the effect in Taiwan of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

This is not applicable.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

While the Arbitration Act is not explicit on how the applicable substantive law should be determined, the Taiwan Statute for the Application of Laws to Civil Cases Involving Foreign Elements, Article 20, allows the parties to choose the substantive law they want to apply. Absent an express choice, the law of the country with the most significant relationship to the transaction applies.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The Taiwan Application of Laws to Civil Cases Involving Foreign Elements Act provides that if the parties intend to circumvent the mandatory or forbidden laws of Taiwan through choice of law, the circumvented laws shall still be applicable. Furthermore, if the public order or contemporary morale of Taiwan is defied, the application of the foreign law will be prohibited.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The Arbitration Act lacks an explicit basis for determining the governing law applicable to an arbitration agreement in international arbitration. Failing the parties' agreement on the procedural law, since an arbitration agreement is in nature a contract between the parties, the tribunal is likely to apply *mutatis mutandis* Article 20 of the Taiwan Statute for the Application of Laws to Civil Cases Involving Foreign Elements to determine the validity of the arbitration agreement.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties to an arbitration agreement may agree either upon a) a sole arbitrator, or b) an odd number of arbitrators under the Arbitration Act.

Under Article 7 of the Arbitration Act, a person falling into any of the following categories shall not be an arbitrator:

1. Convicted of a criminal offence for corruption or malfeasance.
2. Convicted of any offence other than those in the preceding category and sentenced to serve a prison term of one year or more.
3. Disfranchised by law.
4. Bankrupt.
5. Interdicted.
6. A minor.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties cannot agree on a method for appointing arbitrators, each party shall appoint one arbitrator, and the appointed arbitrators shall then jointly designate a third arbitrator to be the chair. The arbitral tribunal shall notify the parties in writing of the final appointment.

Where an arbitration is to be conducted by a sole arbitrator and the parties fail to agree on an arbitrator within 30 days upon the receipt of the written request to appoint by any party, the appointment shall be made by a court pursuant to the application of any party. If the parties have agreed that the arbitration shall be administered by an arbitration institution, then the arbitrator shall be appointed by that institution. Where there are numerous people in any party,

and they are unable to agree on the appointment of an arbitrator, the appointment shall be made by a majority vote. In the event of a tie, the appointment shall be made by drawing lots.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

If a party fails to appoint its arbitrator within 14 days of receipt of the other party's notice, the other party may apply to the arbitration institution administering the case or the court to make the appointment. Furthermore, the court may, upon a party's application, appoint an arbitrator if (a) the two party-appointed arbitrators fail to appoint a third arbitrator within 30 days, or (b) the arbitration agreement requires the arbitration to be conducted by a sole arbitrator and the parties fail to agree upon the candidate within 30 days of a party's receipt of the other party's notice for selecting the sole arbitrator.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Taiwan?

Article 15 of the Arbitration Act requires arbitrators to be independent, impartial and to uphold the principle of confidentiality in conducting the arbitration. An arbitrator is obligated to disclose any facts that could create a justifiable concern over his or her independence or impartiality. Under Article 16, a party may apply to withdraw an arbitrator for a violation of Article 15, and by Article 17, the tribunal shall rule on such a challenge within ten days.

Should the arbitrator being challenged sit on the tribunal and participate in deciding the challenge? The court opinions diverge. In Judgment 96-Tai-Shang-Tzu No. 1845 (2007), the Supreme Court held that an arbitrator who is challenged should not participate in deciding the challenge. On the other hand, in Judgment 95-Jong-Shang-Gan-1 No. 61 (2006), the Taiwan High Court held that the challenged arbitrator should be allowed to participate in deciding his/her qualification based on the reason that the challenge procedure provided in Article 17 of the Arbitration Act was modelled after Paragraphs 2 and 3, Article 13 of the UNCITRAL Model Law, whose purpose is to give the tribunal a chance for self-examination before the challenge is reviewed by the court.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in Taiwan? If so, do those laws or rules apply to all arbitral proceedings sited in Taiwan?

The Arbitration Act, mirroring Article 19 of the UNCITRAL Model Law, allows the parties to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Absent a party agreement, the Arbitration Act provides a set of default rules that are designed to prevent deadlock and streamline the arbitration process.

6.2 In arbitration proceedings conducted in Taiwan, are there any particular procedural steps that are required by law?

Although the Arbitration Act provides a set of default rules regarding the arbitration procedure, most of the process itself can be altered upon the agreement of the parties. The only requirement is stated in Article 18, which requires the claimant to provide written notification of when the dispute is to be submitted to arbitration to the respondent.

6.3 Are there any rules that govern the conduct of an arbitration hearing?

The Arbitration Act provides, subject to the agreement of the parties, that the arbitral tribunal shall decide the manner in which to conduct the arbitral proceedings. The tribunal is given broad discretion to ensure that each party is given an opportunity to present its case.

6.4 What powers and duties does the national law of Taiwan impose upon arbitrators?

Unless otherwise agreed to by the parties, the arbitral tribunal has the power to:

- 1) determine the place of arbitration;
 - 2) select the time and date of the hearing;
 - 3) request certain documents relating to the arbitration to be translated;
 - 4) summon witnesses or expert witnesses to appear for questioning, and in the event that a witness fails to appear, the tribunal may apply for a court order to compel the witness to appear;
 - 5) request assistance from a court or other agencies in the conduct of the arbitral proceedings;
 - 6) direct the arbitration proceeding;
 - 7) render an arbitral award; and
 - 8) correct any clerical, computational, or typographical errors in the award.
-

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Taiwan and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Taiwan?

Pursuant to a ruling of the Taiwan Ministry of Justice, the Arbitration Act does not require that a party's attorney-in-fact in an arbitration proceedings be a lawyer licensed to practice in Taiwan, and a tribunal or an arbitration institution does not need to check whether a party's attorney-in-fact is a lawyer licensed to practice in Taiwan. There remains one unsettled issue, i.e., whether a foreign lawyer's representation of a client in Taiwan arbitration proceedings constitutes legal practice and is subject to local Bar rules. However, such concern does not exist for a foreign lawyer acting as an arbitrator in Taiwan arbitration proceedings.

6.6 To what extent are there laws or rules in Taiwan providing for arbitrator immunity?

Neither the Arbitration Act nor the Arbitration Rules of the Arbitration Association of the Republic of China ("ROCAA" or "CAA") set forth provisions regarding arbitrator immunity. An arbitrator's request for or reception of bribes carries criminal liability under the Taiwan Criminal Code.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

A party is not allowed to appeal to the courts from a procedural decision of the tribunal.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in Taiwan permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Under Article 19 of the Arbitration Act, which gives the arbitral tribunal broad procedural power, interim measures may be issued by the tribunal. However, the courts have yet to make a ruling to determine whether interim measures issued by an arbitral tribunal are equivalent to a final binding award. The CAA arbitration rules also provide that the arbitral tribunal may take any interim measures, agreed upon by the parties, related to the subject matter of the dispute and for the purposes of conserving perishable goods.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Parties to an arbitration agreement may apply for interim relief with a Taiwan court. The Taiwan Code of Civil Procedure provides two forms of interim relief: provisional attachment; and

provisional injunction. The former is to secure the enforcement of a monetary claim, while the latter is to preserve the *status quo* or to secure the enforcement of a non-monetary claim.

Under Article 39 of the Arbitration Act, if a party seeks provisional relief with the court prior to submitting the dispute to arbitration, the court, at the request of the respondent, shall order the applicant to submit a dispute to arbitration within a certain time-frame.

If a party to a foreign seated arbitration applies to a Taiwanese court for interim relief, the court will review the case following the Taiwan Code of Civil Procedure. If the tribunal of a foreign seated arbitration grants either provisional attachment or provisional injunction and requests Taiwan courts' assistance in enforcing the order, the Taiwan courts have a legal basis for providing such assistance under Article 28 of the Arbitration Act.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The courts will apply the same criteria under the Code of Civil Procedure to determine whether to grant an application for a provisional attachment or a provisional injunction. Neither a provisional attachment nor a provisional injunction may be granted unless impossibility or extreme difficulty in satisfying the claim by future compulsory execution can be shown.

7.4 Under what circumstances will a national court of Taiwan issue an anti-suit injunction in aid of an arbitration?

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 plaintiff's failure to comply with such an order would result in dismissal of its suit.

7.5 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

Yes it does.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in Taiwan?

There are no strict rules of evidence governing arbitral proceedings. The arbitral tribunal is given broad discretion to admit any evidence which it deems relevant to the arbitration, unless the evidence is protected by privilege.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?

The tribunal enjoys wide discretion in the manner of fact-finding, therefore an arbitrator trained in a common law jurisdiction may direct a discovery process which is not available under the Taiwan Code of Civil Procedure. Article 24 of the CAA Arbitration Rules provides that a party shall submit statements of facts and arguments, and the relevant evidence to the tribunal. Each party shall also respond and answer to the arguments and evidence presented by the other party. For most arbitration where the tribunal does not direct a discovery, the practice is voluntary disclosure followed by requests for documents by the tribunal or the parties.

There is no standalone stage for specific requests for documents. Although the parties are allowed to request the other party to produce specific documents at any time during the arbitration proceedings, the tribunal usually rejects the requests if the requests are made at a late stage or if granting such requests may delay the arbitration.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

In order to facilitate the arbitration, Article 28 of the Arbitration Act authorises the tribunal to request assistance from the court or other governmental agencies.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal or is cross-examination allowed?

For local arbitration, witnesses commonly submit evidence orally, but written witness statements are admissible. For international arbitration, witnesses are usually required to provide written witness statements and the statements are exchanged before the hearing. More than one round of witness statement exchange is common for large-scale cases; statements can be filed concurrently or sequentially, subject to the tribunal's direction. The tribunal may not ask a witness to testify under oath, therefore a dishonest witness before the tribunal would not be subject to the penalty of perjury even if he or she gives false testimony. In practice, the parties usually bring the witnesses to the hearing at the request of the tribunal.

8.5 What is the scope of the privilege rules under the law of Taiwan? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Although there are no provisions in the Arbitration Act that deal with claims of privilege, Article 307 of the Taiwan Code of Civil Procedure entitles a lawyer to refuse to testify on matters that may be harmful to the client.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of Taiwan that the Award contain reasons or that the arbitrators sign every page?

Taiwan courts recognise final, interim, or partial arbitral awards. Article 33 of the Arbitration Act requires arbitral awards to contain the following:

1. Names and residence or domicile of the individual parties.
2. Names and domiciles or residences of the statutory agents or representatives, if any, of the parties.
3. Names, nationalities and residences or domiciles of the interpreters, if any.
4. The main text of the decision.
5. The relevant facts and reasons for the arbitral award, **unless** the parties have agreed that no reasons shall be stated.
6. The date and place of the arbitral award.

Additionally, the original copy of the award must be signed by the arbitrators. If an arbitrator refuses or is unable to sign the award, the arbitrators who sign the award must state the reason for the missing signature.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in Taiwan?

To prevent any gross violations of procedural justice during the arbitration proceedings, Articles 38 and 40 of the Arbitration Act enumerate eleven grounds for a party to commence a civil action

for annulment of arbitral awards. A party may apply for the court to set aside an arbitral award when:

- (a) 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.
- (b) The reasons for the arbitral award were not stated where such statement is required, unless the omission has been corrected by the arbitral tribunal.
- (c) The arbitral award directs a party to act contrary to the law.
- (d) 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.
- (e) 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.
- (f) The composition of the arbitral tribunal or the arbitral proceedings violate the arbitration agreement or the law.
- (g) An arbitrator fails to fulfil the duty of disclosure prescribed in 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.
- (h) An arbitrator violates any duty during the arbitration and such violation carries criminal liability.
- (i) A party or its representative has committed a criminal offence in relation to the arbitration.
- (j) Evidence or contents of any translation upon which the arbitration award is based were forged or fraudulently altered or contain any other misrepresentations.
- (k) 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 items (h) to (j) are limited to instances where final conviction has been rendered or the criminal proceeding may not commence or continue for reasons other than insufficient evidence. The foregoing item (f) concerning circumstances contravening the arbitration agreement and items (g) to (k) are limited to circumstances sufficient to affect the arbitral award. The court does not otherwise have the power to set aside or remit an arbitral award for errors of fact or law on the face of the award, or for appeals on the law or on the merits.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

No, they cannot.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, they cannot.

10.4 What is the procedure for appealing an arbitral award in Taiwan?

This is not applicable.

11 Enforcement of an Award

11.1 Has Taiwan signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Although Taiwan is not a signatory to the New York Convention, the grounds for refusing recognition of a foreign award under the Arbitration Act are identical to those under Article V of the New York Convention.

11.2 Has Taiwan signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Taiwan signed the ICSID Convention in 1966 and ratified it in 1968, but withdrew from the IMF and the ICSID Convention in 1980.

11.3 What is the approach of the national courts in Taiwan towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

For domestic arbitral awards, a party may apply to Taiwan courts for an enforcement order. The court shall reject an application for enforcement under any of the following circumstances:

- 1) the arbitral award concerns a dispute not contemplated by the terms of the arbitration agreement, or exceeds 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;
- 2) the reasons for the arbitral award were not stated, as required, unless the omission was corrected by the arbitral tribunal; or
- 3) the arbitral award directs a party to act contrary to the law.

Foreign arbitral awards are enforceable after being recognised by a decree of an ROC court. 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". Generally, Taiwan courts follow international standards and practice in determining an application for recognition and enforcement of a foreign award.

An application for recognition of a foreign award will be rejected by a Taiwan court:

- 1) Where the recognition or enforcement of the arbitral award is contrary to the public order or good morals of the Republic of China.
- 2) Where the dispute is not arbitrable under the laws of the Republic of China.

The opposing party to the recognition proceeding may request that the court reject an application for recognition 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;
- 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.

Although reciprocity is not a requirement for recognising or enforcing a foreign arbitral award, Article 49(2) of the Arbitration Act allows a Taiwan court to dismiss an application for recognition of a foreign arbitral award, if the country where the arbitral award was made or whose arbitration acts are applied to the arbitration does not recognise arbitral awards made in Taiwan. The court has discretion in such cases either to deny or permit the enforcement of the foreign arbitral award. A Supreme Court decree made 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. The decree reminds ROC judges that the reciprocity condition is not to be construed as requiring the foreign country in question to recognise an award made in Taiwan before an ROC court may recognise an award made in that country.

11.4 What is the effect of an arbitration award in terms of *res judicata* in Taiwan? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Between the parties to an arbitration, an arbitral award has the same legal effect as a final and irreversible court judgment. If the losing party does not comply with the award voluntarily, the prevailing party may apply for a compulsory execution of the award by an ROC court.

11.5 What is the standard for refusing enforcement of an arbitration award on the grounds of public policy?

If the recognition of a foreign arbitral award is contrary to the public order or good morals of the ROC, a court shall dismiss party application. It is generally considered that if the arbitral award is inconsistent with general principle of laws of ROC, the public order may be deemed violated.

12 Confidentiality

12.1 Are arbitral proceedings sited in Taiwan confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Confidentiality is essential to the arbitral proceedings. Under Articles 23 of the Arbitration Act, the arbitral proceedings are not to be made public unless the parties agree otherwise. Under Article 32, the deliberations of the arbitral award shall not be made public. Additionally, under Article 6 of the CAA Arbitration Rules, the arbitrators and administrators of the CAA shall keep all matters confidential unless otherwise agreed upon by the parties.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Unless otherwise agreed to by the parties, the information disclosed during an arbitral proceeding may not be referred to in subsequent proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

To ensure enforceability, the local arbitral tribunal usually awards a remedy or relief that could have been ordered by the court. The most common remedy is for damages, while declaratory

awards and specific performance are also available.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Under Taiwan law, simple interest on the principal sum awarded from the date of the award until the date of actual payment is commonly granted. In the absence of the parties' agreement or the applicable law provision on the interest rate, the statutory interest rate of 5 per cent *per annum* will be used.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Most of the costs that are incurred in arbitration are legal fees and arbitrator fees. The allocation of the arbitration fee shall be stated in the main text of the arbitral award. The general principle is that the successful party is awarded costs, unless otherwise agreed by the parties. The decision on costs is usually part of the award. Such decision is not subject to appeal.

In contrast, unless specifically agreed by the parties, it is not a common practice for arbitral tribunals to award attorneys' fees to the winning party. However, the parties may specify in their arbitration agreement to award attorneys' fees to the winning party.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Whether an award is subject to tax will depend on whether the payment granted in the award constitutes as income and so is subject to the Income Tax Law.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of Taiwan? Are contingency fees legal under the law of Taiwan? Are there any "professional" funders active in the market, either for litigation or arbitration?

Though contingent fees are not prohibited for civil matters, funding claims are rarely seen in arbitration.

14 Investor State Arbitrations

14.1 Has Taiwan signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Taiwan signed the ICSID Convention in 1966 and ratified it in 1968, but withdrew from the IMF and the ICSID Convention in 1980.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is Taiwan party to?

Taiwan has entered into 29 BITs. All of these treaties include arbitration as a dispute resolution option for disputes between contracting parties and investors. However, Taiwan is not a party to any multilateral investment treaties.

14.3 Does Taiwan have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Taiwan BITs contain a number of protective measures for foreign investments. All Taiwan BITs contain articles that give investors certain protection from expropriation and most of Taiwan's BITs contain national treatment and most favoured national treatment clauses.

14.4 What is the approach of the national courts in Taiwan towards the defence of state immunity regarding jurisdiction and execution?

Generally speaking, Taiwan courts recognise the commercial activity exception to the general rule of sovereign or state immunity. Exceptions to this general rule exist where courts may have a different interpretation and definition of "commercial activities".

15 General**15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in Taiwan (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?**

See above questions.

15.2 What, if any, recent steps have institutions in Taiwan taken to address current issues in arbitration (such as time and costs)?

The ROCAA publicises periodicals inviting practitioners and scholars to discuss issues in arbitration.

***Angela Y. Lin**

Lee and Li, Attorneys-at-Law
7F, 201 Tun Hua N. Road Taipei
Taiwan 10508, R.O.C.
Tel: +886 2 2715 3300
Fax: +886 2 2713 3966
Email: angelalin@leeandli.com
URL: www.leeandli.com

Angela Lin's forte lies in construction litigation, arbitration and mediation, and she is active in local and international arbitration societies.

Chambers Asia 2010:

"Angela Lin (Lin Yao) is a well-known construction and project lawyer who is feted for her disputes work in these sectors."

"Angela Lin (Lin Yao) is described a "good negotiator", primarily in the construction and projects sector."
Chambers Asia 2009:

"Angela Lin (Lin Yao) is a stalwart presence for construction, project and contract disputes, as well as government procurement."

Chambers Asia 2008:

"Peers say: 'She is a great courtroom litigator, with a maturing, strategic approach.' Her experience on public procurement and mediation distinguishes her practice."

***Jeffrey Li**

Lee and Li, Attorneys-at-Law
7F, 201 Tun Hua N. Road Taipei
Taiwan 10508, R.O.C.
Tel: +886 2 2715 3300
Fax: +886 2 2713 3966
Email: jefferyli@leeandli.com
URL: www.leeandli.com

Former attorney of Lee and Li, Attorneys-at-Law.
Harvard Law School, L.L.M.
Graduate Institute of Law, National Taiwan University (Taipei), L.L.M.
Department of Law, School of Law, Soochow University (Taipei), L.L.B.

Firm Notice:

Lee and Li now is the largest law firm in Taiwan. With expertise covering all professional areas and building on the foundations laid down over decades, the firm has been steadfast in its commitment to the quality of services to clients and the country.

Lee and Li exists to care, serve, and excel. To achieve sustainable operations, we bring together distinguished professionals, create a platform for sharing experience, prize innovation and value teamwork.

Lee and Li is a full-service law firm and understands the need to diversify and specialise. In response to the rapid developments in trade and technology, and to satisfy the needs of our clients, we have expanded our practice areas. The resourcefulness and performance of Lee and Li have long been recognised and relied on by our clients.