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Cautious Optimism for Arbitration Reform in Taiwan

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1. Introduction

The Chinese have a reputation for preferring out-of-court settlement of disputes,[1] and, among the various alternatives to civil litigation, arbitration is one of the means for resolving civil and commercial disputes in Taiwan.

This chapter will first introduce the legal system and arbitration history of Taiwan. Attention will then be drawn to current features of arbitration in Taiwan. More importantly, the Supreme Court has recently transformed the recognition and enforcement of judgments and arbitral awards made in the Mainland. It has developed a theory separating *ji pan li* from *zhi xing li* in China-related cases. Simply put, a judgment or arbitral award made in the Mainland will not give rise to res judicata (*ji pan li*) under the Supreme Court's theory of separation. The Supreme Court had applied the same theory of separation to foreign arbitral awards. But, fortunately, the legislative body (the Legislative Yuan) recently passed an amendment to the Taiwanese Arbitration Act to recognise res judicata (*ji pan li*) and the enforceability of a foreign award. The downside of the Supreme Court's opinion has therefore been cured by the legislature of Taiwan.

2. Background

2.1. Legislative and Regulatory Framework

Taiwan is a civil law country whose legal system is influenced by the laws of other civil law jurisdictions (such as Germany, Japan and France).[2]

The origin of contemporary arbitration is usually traced to two regulations under the name of *Kung duan* (public determination), which were promulgated by the Chinese government in 1913.[3]

Kung duan was a process where a decision maker, typically a senior member of the local gentry or the head of a clan, heard statements from disputants and made a binding decision to resolve the dispute. The decision-maker need not invoke any official law to support his or her decision, nor did he or she rely on official law to ensure compliance by the parties. The decision-maker's authority lay in his privileged status within the social hierarchy. The parties, when their dispute was referred to *Kung duan*, were deemed to have implicitly pledged their obedience to the result of the process. *Kung duan* does not acquire its legitimacy from the consent of the parties.

Kung duan was thus distinctive from western arbitration. The decision maker's power of *Kung duan* lay not in the historical fact that the parties made an agreement to bestow him with such power, but rather from his particular position within the social hierarchy. *Kung duan* resembled arbitration only in the sense that a private individual makes a binding decision to resolve a dispute, but *Kung duan* was more a result of delegation to the local gentry or family senior of judicial authority by the state rather than an institutional design to promote party autonomy.

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

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1 See Nigel NT Li, 'Dispute Resolution' in Mitchell A Silk (ed), Taiwan Trade & Investment Law (Hong Kong, Oxford University Press, 1994) 645– 84.

2 See, for example, Hungdah Chiu and Jyh-Pin Fa, 'Taiwan's Legal System And Legal Profession' (1994) 5 Maryland Series in Contemporary Asian Studies 1 ('Chinese law as implemented and practiced in Taiwan today …contains remnants of imperial Chinese law … while also borrowing heavily and adopting principles and concepts from civil law jurisdiction (such as Germany and Japan) as well as the United States').

3 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).

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 their personal status within the family.

The *Min Shih Kung duan Jan Xing Tiao Li* (A Provisional Statute for Arbitration of Civil Disputes) was promulgated in 1935, and it provides that all present and future civil matters to be settled by the parties could be resolved by arbitration.[4]

It was not until 1961 that a proto-typical arbitration regime akin to the Western concept of arbitration was formed. The 1961 Ordinance for Commercial Arbitration incorporated the fundamental principles of modern-day arbitration. At the time, as suggested by the title, arbitration belonged solely to the commercial world.

The 1961 statute, however, failed to follow 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 by the legislature to incorporate international standards into the domestic regime. The result was the 1982 amendment to the Statute for Commercial Arbitration. The 1982 amendment borrowed directly from the New York Convention to provide a legal basis for recognising and enforcing foreign arbitral awards, and the grounds for refusing to recognise a foreign award. The drafters, however, failed to remove those grounds already in the statute that were not permissible under the New York Convention.

The next critical wave of Western impact came from the UNCITRAL Model Law, resulting in the Arbitration Act of 1998. It was then that the fundamental principle of party autonomy finally received a central place in the arbitration regime, and the Western concept Cautious Optimism for Arbitration Reform in Taiwan 69 of arbitration took root in Taiwan. Although the Arbitration Act of 1998 was largely patterned after the Model Law, it was not a facsimile of it. For instance, the Arbitration Act classifies arbitration as either 'foreign' or 'domestic', like the New York Convention, while the Model Law sees arbitration as either 'international' or 'domestic'. An arbitral award rendered outside Taiwan or rendered pursuant to foreign laws within Taiwan is defined as a 'foreign arbitral award' under the Arbitration Act.[5]

2.2. Institutional Framework

Institutional arbitration in Taiwan may be conducted by international arbitration centres such as the International Chamber of Commerce (ICC), or by local arbitration institutions such as the Chinese Arbitration Association, Taipei (the CAA).[6] A local arbitration institution under the Arbitration Act should be approved by the competent authority and legally registered.[7] Since its inception in 1955, the CAA has handled numerous cases, mostly construction, securities and international trade disputes. The CAA has promulgated its own 'Enforcement Rules' for arbitration. In a typical year, the CAA receives approximately 150 to 200 requests for arbitration. With its own permanent facilities and a full-time support staff, the CAA is capable of accommodating major international arbitration.

The CAA plays a role akin to that of many arbitration centres, providing administrative support without interfering with the function of the arbitral tribunal. The CAA does not appoint arbitrators unless it is specifically authorized by the parties or required by the law to do so, and the appointment will be made by a Nomination Committee (consisting of Directors of the CAA and representatives from either academia or industry) to ensure impartiality. The CAA keeps a roster of arbitrators, but the parties to a CAA arbitration have the option of appointing someone not on the roster.

Although there are no reliable statistics, ad hoc arbitration is considered rare in Taiwan, since the common perception of this type of arbitration is that the proceeding is relatively burdensome to the parties.

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4 Provisional Statute for Civil Arbitration, para 1.

5 See Art 47 of the Arbitration Act.

6 Formerly known as the Commercial Arbitration Association of the Republic of China, the CAA is one of the local arbitration centres in Taiwan. Its current name was adopted in 1996, in response to the passage of the Arbitration Act, which allows arbitration of disputes that may be settled in accordance with the law. To provide the public with fast and affordable alternative dispute resolution services, the Association has established a mediation centre and a dispute review board. See the website of the CAA: www.arbitration.org.tw/caa01.php.

7 See Art 3(1) of the Rules on Arbitration Institutions, Mediation Procedures and Fees.

According to the Arbitration Act, a person who possesses any of the following qualifications may be an arbitrator:[8]

1. One who has been a judge or public prosecutor.
2. One who has practised for more than five years as a lawyer, accountant, architect, engineer or in any other commerce-related profession.
3. One who has been an arbitrator of a domestic or foreign arbitration institution.
4. One who has taught as an assistant professor or a higher position in a domestic or foreign university or college certified or recognised by the Ministry of Education.
5. One who has been a specialist in a particular field or profession and has practised for more than five years.

An arbitrator must pass an arbitration institution's examination and be registered with the institution.[9] Foreigners are permitted to conduct arbitration in Taiwan, for which they are required to obtain a work visa. But in reality, most foreign arbitration practitioners work in Taiwan without a work visa. Foreign arbitrators in Taiwan are required to pay tax for the arbitrators' fees that they receive, and the arbitration institution will deduct the tax payable from the arbitrators' fees.

2.3. Judicial Framework

In Taiwan, there are three different courts with different jurisdiction: the civil court, the criminal court and the administrative court. The courts are divided into three levels and three instances, the district court, the court of appeals (High Court), and the Supreme Court, in ascending order. The Intellectual Property Court (IPC), established in July 2008, is dedicated to hearing intellectual property-related civil, criminal and administrative cases. Above the jurisdictional courts is the Constitutional Court, whose function is to interpret the Constitution and unify interpretation of laws and regulations. The Constitutional Court consists of 15 Grand Justices, and its interpretation has binding effect over the nation.

Supreme Court rulings that are thought by the Supreme Court to have great value in the development of jurisprudence are selected as precedents. Further, the Supreme Court from time to time passes resolutions to resolve legal issues commonly seen in court cases. Precedents and resolutions have binding force upon lower courts, while other court judgments do not.

An ad hoc arbitration award carries the risk of not being recognised and enforced by the Taiwanese courts. The Supreme Court in a 2014 case defined institutional arbitration as a proceeding in which the arbitral tribunal is constituted under an arbitration institution's management and supervision, and in which the procedural rules of the arbitration institution are observed.[10] On the other hand, the Court characterised ad hoc arbitration as a proceeding in which the arbitrators and their selection method were not agreed or in which natural persons were selected as arbitrators by the parties.[11] Though the Court indicated that institutional and ad hoc arbitrations are recognised and the parties' agreement to either proceeding was valid,[12] the Court emphasised that

> if the parties select as the arbitrator an arbitration institution or group which is not registered and recognised in Taiwan, it should be deemed an arbitration agreement in which the arbitrator has not been selected, according to Paragraph 2, Article 5 [of the Arbitration Act]. This kind of arbitration is not institutional arbitration under the Arbitration Act.[13]

The Court further found the arbitral award produced through ad hoc arbitration would not constitute res judicata insofar as it was sought to confirm the same as a final court judgment.

The Supreme Court's opinion was that if the parties chose an arbitration institution not registered in Taiwan, the arbitration would not be institutional. However, such definition of institutional is misleading

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8 See Art 6 of the Arbitration Act.

9 See Art 19 of the Rules on Arbitration Institutions, Mediation Procedures and Fees.

10 Supreme Court Civil Decree 103 Tai-Kang-Tzi No 236 (2014).

11 ibid.

12 In Supreme Court Civil Decree 103 Tai-Kang-Tzi No 236 (2014), the disputed arbitration clause indicated that the parties chose UNCITRAL Rule as the arbitration procedural rule, and if the parties failed to select one arbitrator to resolve the dispute, the ICC should be resorted to.

13 See n 8.

and not consistent with the international trend. According to the prevailing international practice, ad hoc arbitration is arbitration that is not administered by an institution.[14] In light of the classic definition of institutional arbitration, whether the institution is registered in or recognised by the local territory is irrelevant. Further, whether or not the parties agree to select an arbitration institution to appoint the arbitrator cannot be a determining factor. The Supreme Court seemed to be suggesting that though ad hoc and institutional arbitrations are valid under Taiwanese law, the former would not lead to res judicata and the enforcement of a non-institutional arbitral award may be barred by an objection suit raised by the opposing party.[15]

In fact, the Taiwanese High Court had already ruled that an ad hoc arbitration award should not be enforceable like a final and definitive court judgment.[16] We may thus conclude that the Supreme Court was merely reiterating the courts' position regarding recognition and enforceability of an ad hoc arbitration award. While the validity of an agreement on ad hoc arbitration is upheld in Taiwan, whether an arbitral award made by a foreign ad hoc arbitral tribunal will be recognised and enforced in Taiwan is still an unsettled issue.

The foregoing may be contrasted with the position in relation to the recognition and enforcement of foreign judgments in Taiwan. A final and irrevocable foreign court judgment or decree can be recognised and enforced by a court judgment in Taiwan. Pursuant to Article 402 of Taiwan's Code of Civil Procedure, a final and binding judgment rendered by a foreign court shall be recognised, unless one of the following circumstances applies:

1. The foreign court lacked jurisdiction pursuant to Taiwanese laws.
2. A default judgment was rendered against the defendant, except where the notice or summons for initiation of action had been legally served within a reasonable time in the foreign country or had been served through judicial assistance provided under Taiwanese law.
3. The content of the judgment or the litigation procedure are contrary to the public order or morality of Taiwan.
4. There exists no mutual recognition between the foreign country and Taiwan (ie, Taiwanese judgments are not reciprocally recognised by the courts of the foreign country).

Taiwanese courts would generally apply the principle of international comity in discerning whether reciprocal recognition exists.[17] Existence of diplomatic ties is not an absolute factor when determining reciprocal recognition.[18]

3. Reform

3.1. Legislative and Regulatory Initiatives

In 1998 the Taiwanese Arbitration Act was passed by the legislature, replacing its 1961 predecessor.[19] Many provisions in the 1998 Arbitration Act were influenced by the Model Law.[20] The drafters of the 1998 Arbitration Act proposed to bring Taiwan's arbitration regime in line with international standards.

The features of the 1998 Arbitration Act that bear the imprint of the Model Law are as follows:

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[14] See, for example, Gary Born, International Arbitration : Law and Practice (Wolters Kluwer Law International, 2012) para 27-9; Margaret L Moses, The Principles and Practice of International Commercial Arbitration (Cambridge, Cambridge University Press, 2008) 9–

[15] Under Art 14 of the Taiwanese Compulsory Execution Law, before the close of compulsory execution process, the party may bring an objection suit based on a substantive ground to the execution court.

[16] See, for example, Taiwan High Court Civil Decree 99 Fei-Kang-Tzi No 122 (2010).

[17] See, for example, Supreme Court Judgments 93 Tai-Shang-Tzi No 1943 (2004) and 100 Tai-Shang-Tzi No 2029 (2011).

[18] See, for example, Taiwan High Court Civil Judgment 95 Shan-Gong-(1)-Tzi No 36 (2006).

[19] ROC Arbitration Law, effective as of 24 December 1998. A few provisions of the Arbitration Law were amended in July 2002.

[20] See generally Hong-lin Yu, 'The Taiwanese Arbitration Act 1998' (1998) 15(4) Journal of International Arbitration 107– 25; Catherine Li, 'The New Arbitration Act of Taiwan—Up to an International Level?' (1999) 16 (3) Journal of International Arbitration 127– 38; CV Chen, 'Party Autonomy and the New Arbitration Act of Taiwan, the Republic of China' (2002) 1 C AA Arbitration Journal 1 – 3 6; and David W Su,' International Commercial Arbitration and the ROC Arbitration Act' (2002) 1 C AA Arbitration Journal 103 – 12.

1. The validity of an arbitration agreement will not be affected by the validity of the other terms of the contract.
2. The parties may agree on the place of arbitration, the arbitration procedure and the language used in the arbitration procedure.
3. The arbitral tribunal may rule on its own jurisdiction. A plea that the arbitral tribunal does not have jurisdiction should be made before making substantive representations on the dispute of the subject matter covered by the arbitral agreement.
4. The restrictions on recognition of foreign arbitral awards are relaxed.

3.2. Judicial Initiatives

The Taiwanese courts have been cautious when asked to set aside an arbitral award made in Taiwan. According to the Judicial Yuan's statistics, only two out of 26 domestic awards were annulled by the district courts in 2014.[21] 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.[22] According to a 1992 Supreme Court judgment, an award will not be set aside even though the tribunal misapplied the law.[23] In a 1984 case where the plaintiff of an annulment action challenged an award for not stating the reasons Cautious Optimism for Arbitration Reform in Taiwan 73 for the award, the Supreme Court rejected the challenge by suggesting that so long as there was any reason stated in the award, this requirement of reasons will be deemed to be fulfilled, regardless of whether the reasons are adequate or even consistent with one another.[24] This prudent approach suggests that the courts do not unduly interfere with arbitration conducted in Taiwan.

The Constitutional Court of the Judicial Yuan declared in Interpretation No 591:

> In order to promote the development of the arbitration system, the State should render necessary assistance and supervision … Under the UNCITRAL Model Law on International Commercial Arbitration as adopted and recommended by the United Nations in 1985, when it is a matter of the recourse to a court for setting aside an arbitral award, except where 'the award is in conflict with the public policy of a State' and thus concerns a substantive matter, all other grounds are considered material procedural defects … The foregoing provisions are intended to preserve the autonomy and independence of the arbitration system and to facilitate swift resolution of disputes, making it hard for the judiciary to conduct a general review of the substantive issues of an arbitral award.[25] The Supreme Court also pointed out that the disputants should not appeal their cases to the courts or have the courts retry their cases, meaning the courts should not review the substantive issues determined by the arbitral awards.[26]

3.3. Other Factors

In addition to the CAA, there are four other arbitration institutions: the Taiwan Construction Arbitration Association (TCAA),[27] the Chinese Estate Arbitration Association (CEAA),[28] the Chinese Construction Industry Arbitration Association (CCIAA),[29] and the Chinese Real Estate Arbitration Association

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[21] Among these two district court judgments, one was later confirmed by the Supreme Court; while the other one was reversed by the High Court, and is currently appealing to the Supreme Court. See the Judicial Yuan's Year Statistics: www.judicial.gov.tw/juds/goa/goa02.htm.

[22] See, for example, Shih-Lin District Court Judgment 83 Jung-Su-Tzi No 1 (1994), and Supreme Court Judgment 99 Tai-Shang-Tzi No 1007 (2010).

[23] Supreme Court Judgment 81 Tai-Shang-Tzi No 2196 (1992), Taiwan High Court Judgment 86 Jung-Shang-Tzi No 400 (1997), and Supreme Court Judgment 93 Tai-Shang-Tzi No 1690 (2004).

[24] Supreme Court Judgment 73 Tai-Shang-Tzi No 61 (1984), Supreme Court Judgment 97 Tai-Shang-Tzi No 2477 (2008), and Supreme Court Judgment 99 Tai-Shang-Tzi No 1788 (2010).

[25] See the official website of the Constitutional Court of the Judicial Yuan, Interpretation No 591: www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=591. Emphasis added.

[26] See, eg, Supreme Court Judgment 100 Tai-Shang-Tzi No 671 (2011) and Supreme Court Judgment 102 Tai-Shang-Tzi No 683 (2013).

[27] The official website of the TCAA is: www.tcaa.org.tw.

[28] The official website of the CEAA is: www.creaa-wks.org.tw/homeweb/index.php.

[29] The official website of the CCIAA is: www.cciaa.org.tw/Default.aspx.

(CREAA).[30] Each arbitral institution operates independently and engages in healthy competition with one another. Unlike the CAA, which handles all kinds of arbitration cases, the TCAA and the CCIAA specialise in construction disputes, while the CEAA and the CREAA handle real property disputes.

An arbitral award made in Taiwan while under the administration of a foreign arbitration institution will be considered a foreign award under the Arbitration Act, since such award may be an award made in the territory of the ROC in accordance with the laws of a foreign country.[31]

3.4. What Drives Reform?

3.4.1. Legislative, Judicial and Institutional Elements

3.4.1.1. A Real Efficient and Time-saving Arbitration Process

Under the 1998 Arbitration Act, unless agreed otherwise by the parties, arbitration proceedings must conclude and an award be made within six months of the formation of the arbitral tribunal, subject to an optional extension of three months by the tribunal.[32] The legislative intent of Article 21 is to make arbitration an efficient and speedy process.[33] The tribunal's failure to observe this deadline will not jeopardise the legality of the ultimate award. But a party is permitted to forego arbitration and commence or resume litigation after the deadline, and the arbitration will be deemed terminated once either party commences or resumes litigation.[34]

It may therefore be fair to conclude that arbitration in Taiwan, as compared with regional arbitration in other jurisdictions, is a more efficient and time-saving process, which fulfils parties' expectations of a swift resolution mechanism.

3.4.1.2. Less Costly

The considerable cost of modern arbitration has drawn criticism from commentators.[35] The ICC is commonly recognised as a comparatively more expensive arbitration centre among the world's arbitration institutions.[36]

Arbitration institutions in Taiwan like the CAA charge a fee which covers both the Arbitrators' remuneration and their own administrative work. The fee scheme is regulated by the government and based on an ad valorem system, calculated in accordance with a sliding scale based on the amount in dispute. The scale starts from a fixed sum of 3,000 New Taiwan Dollars (approximately US$ 88 at the current rate of exchange) when the amount in dispute is under 60,000 New Taiwan Dollars (approximately US$ 1,765 at the current rate of exchange) to 0.5 per cent of any amount exceeding 9,600,000 New Taiwan Dollars (approximately US$ 282,353 at the current rate of exchange).[37] 40 to 60 per cent 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 institution's 'out-of-pocket' expenses will be reimbursed by the parties. The claimant must pay the arbitration fee, along with a modest 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 by the parties, it is not common practice for arbitral tribunals in Taiwan to award attorney's fees to the winning party. Generally speaking, CAA arbitration is much less expensive than ICC arbitration.

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30 The official website of the CREAA is: www.creaa-wks.org.tw/homeweb/index.php.

31 Art 47 of the Arbitration Act.

32 Art 21 of the Arbitration Act states the 'arbitral tribunal shall render an arbitral award within six months of commencement of the arbitration,' and 'the arbitral tribunal may extend this period by an additional three months if the circumstances so require.'

33 See Ministry of Justice Letter Fa-Lu-Juei-Tzi No 0930017621(2004).

34 See Art 21(3) of the Arbitration Act.

35 See, for example, Jennifer Brown, 'New ICC rules of arbitration aim to cut costs and time', Legal Feeds, 23 September 2013, available online: www.canadianlawyermag.com/legalfeeds/467/new-icc-rules-of-arbitrationaim-to-cut-costs-and-time.html.

36 See Louis Flannery and Benjamin Garel, 'Arbitration costs compared: the sequel', Global Arbitration Review, 15 January 2013, 4 ('This explains why the ICC is amongst the more expensive institutions.'), available online: www.noexperiencenecessarybook.com/VxpX9/arbitration-costs-compared-the-sequel-international-arbitration.html.

37 See, for example, Arts 25 and 28 of the Rules on Arbitration Institutions, Mediation Procedures and Fees.

To enhance the quality of arbitration, when an arbitration proceeding is concluded, the CAA asks the parties and counsels to complete a questionnaire to evaluate the expertise, impartiality and professionalism of the arbitrators.[38]

3.4.1.3. The Concepts of *ji pan li* and zhi xing li

The concept of *ji pan li* is similar to the principle of res judicata.[39] In common law, res judicata is defined as 'a final judgment on the merits of an action precluding the parties … from re-litigating issues that were or could have been raised in that action.'[40] In Taiwan, the basis of *ji pan li* can be found in Article 400 of the Taiwanese Code of Civil Procedure, which reads: 'Except as otherwise provided, res judicata exists as to a claim adjudicated in a final judgment with binding effect.' Also, Paragraph 1, Article 37 of the 1998 Arbitration Act reads: 'The award shall, insofar as relevant, be binding on the parties and have the same force as a final judgment of a court.' A domestic court judgment and a domestic arbitral award thus have binding force on the parties.

On the other hand, *zhi xing li* means enforceability. It is generally considered that a definitive and final judgment is enforceable.[41] Since a domestic arbitral award has the same binding force as a domestic court judgment, it can be enforced in Taiwan.[42]

3.4.1.4. The Supreme Court's Theory of Separating *ji pan li* from *zhi xing li* in China-related Cases

The Act Governing Relations between the People of the Taiwan Area and the Mainland Area (AGR) applies to the enforcement of court judgments made in the Mainland. Article 74 of the AGR reads:

> To the extent that an irrevocable civil ruling or judgment, or arbitral award rendered in the Mainland Area is not contrary to the public order or morality of the Taiwan Area, an application may be fi led with a court for a ruling to recognize it. Where any ruling or judgment, or award recognised by a court's ruling as referred to in the preceding paragraph requires performance, it may serve as a writ of execution. The preceding two paragraphs shall be applicable only when the civil ruling or judgment, or arbitral award rendered in the Taiwan Area is eligible for a ruling from a court of the Mainland Area to recognize it, or when it may serve as a writ of execution in the Mainland Area.

It can be deduced from this article that a final and definitive judgment rendered in the Mainland Chinese area will have both res judicata (*ji pan li*) and enforceability (*zhi xing li*) if the judgment is not in violation of the public order or morality of Taiwan.

However, in a 2007 case, the Supreme Court rendered a judgment distinguishing *zhi xing li* and *ji pan li* in respect of Mainland judgments.[43] In that case, an international delivery company (the appellant) delivered the goods of a Chinese export company (the respondent) to Iraq according to the delivery contract. After the delivery, the appellant was accused of violating the contract, and the respondent sued the appellant in Shanghai. After winning the case in Shanghai courts, the respondent sought judgment enforcement from a Taiwanese court. The appellant countered that there was no violation of contract, and the respondent was abusing Article 74 of the AGR. The Supreme Court found that Article 74 of the AGR merely provides that Mainland judgments can be enforced. The Article does not specify (in contrast to Paragraph 1, Article 37 of the 1998 Arbitration Act)[44] that Mainland judgments shall have the same binding effect as judgments rendered in Taiwan. Further, the Supreme Court opined that Mainland judgments are not like those made in foreign countries, Hong Kong or Macau, which would automatically be recognised without the Taiwanese court's approval. The Supreme Court thus concluded that Mainland judgments, after approval by a Taiwanese court, would only be enforceable

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38 See the CAA's official website: www.arbitration.org.tw/caa02.php.

39 See Tiffany Hung and Amber Hsu, 'Taiwan' in Baker and McKenzie (eds), The Baker & McKenzie International Arbitration Yearbook 2014-2015 (New York, Juris, 2014) 325.

40 Allen v McCurry 449 US 90 (1980).

41 Supreme Court Precedent 22 Kan-Tzi No 598 (1933). Art 4(1)(1) of the Compulsory Execution Law also provides a final and definitive judgment is a ground for enforcement.

42 See Art 4(1)(6) of the Taiwanese Compulsory Execution Law.

43 Supreme Court Judgment 96 Tai-Shang-Tzi No 2531 (2007).

44 See also Art 42 of the Laws and Regulations Regarding Hong Kong and Macao Affairs.

(*zhi xing li*) without being res judicata (*ji pan li*). The judgment leads to the result that the appellant could lodge a debtor objection suit in the Taiwan court to challenge the Mainland judgment.[45]

Though many commentators disagreed with the opinion in Supreme Court Judgment 96 Tai-Shang-Tzi No 2531 (2007),[46] the courts subsequently subscribed to the Supreme Court's theory of separating *ji pan li* from *zhi xing li* in Mainland judgment recognition cases.[47]

Under Article 74 of the AGR, a Mainland arbitral award is treated as a Mainland judgment. Therefore, given that the Supreme Court has interpreted Article 74 to mean a Mainland judgment is without res judicata, one can anticipate that a Mainland arbitral award will receive the same treatment from the Taiwan courts.

In 2015, the Supreme Court, for the first time after Judgment 96 Tai-Shang-Tzi No 2531 (2007), had a chance to deal with the recognition and enforcement of a Mainland arbitral award. The respondent was a Shenzhen law fi rm. After it obtained a favourable arbitral award from the South China International Economic and Trade Arbitration Commission (SCIETAC) in a case regarding the payment of legal fees by a Taiwanese company, it sought to enforce the arbitral award in Taiwan. The appellant Taiwanese company lodged an objection suit. It argued that the arbitral award did not have res judicata and many clauses in the contract between the parties violated the public order of Taiwan. The Supreme Court, repeating its logic in interpreting Article 74 of the AGR, opined that AGR was unlike the Laws and Regulations Regarding Hong Kong and Macao Affairs (LRR), under which the binding force of an arbitral award made in Hong Kong or Macau is subject to the rules in the 1998 Arbitration Act.[48] The Supreme Court concluded that the AGR was intended to distinguish a Mainland arbitral award from awards made in other countries in light of the special relationship between the Mainland and Taiwan areas. The Supreme Court consequently only accorded enforceability to the Mainland arbitral award.[49]

On Supreme Court Judgment 104 Tai-Shang-Tzi No 33 (2015), one commentator observed:

> The result for the foreseeable future is that when faced with the increasingly common situation of a potential dispute with Taiwanese business partners in China whose assets are in Taiwan, practitioners should choose dispute resolution in an appropriate third jurisdiction or possibly in Taiwan itself if there is any possibility that the judgment or arbitral award must be enforced [in Taiwan].[50]

The structural approach applied by Supreme Court Judgment in 104 Tai-Shang-Tzi No 33 (2015) and Supreme Court Judgment 96 Tai-Shang-Tzi No 2531 (2007) is consistent. In both cases, the Supreme Court compared Article 74 of the AGR with Article 42 of the LRR. Article 42 of the LRR reads:

(1) In determining the conditions for the validity, jurisdiction, and enforceability of civil judgments made in Hong Kong or Macau, Article 402 of the Code of Civil Procedure and Paragraph 1, Article 4 of the Compulsory Execution Law shall apply mutatis mutandis.

(2) Article 30 through Article 34 of the Commercial Arbitration Act shall apply to the validity, petition for court recognition, and suspension of execution proceedings in cases involving civil arbitral awards made in Hong Kong or Macau.

The LRR explicitly specifies that the articles bestowing res judicata and enforceability on domestic court judgments and foreign arbitral awards under the Code of Civil Procedure and Arbitration Act can be applied to judgments and arbitral awards from Hong Kong and Macau. Since the Supreme Court found that the AGR lacks provisions similar to the LRR, the legislative intent must have been to limit the effect

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45 n 13.

46 See, for example, Chang Wen-Yu, 'The Recognition of Mainland Area's Judgments: A Comment on the Supreme Court Judgments 96 Tai-Shang-Zi No 2531 (2007) and 97 Tai-Shang-Zi No 236 (2008)' (2010) 178 The Taiwan Law Review 246– 57 ; Hung Guo-Chan, 'A Beautiful Mistake: Whether the Judgment Made in Mainland Area has Res Judicata ? To Opine the Supreme Court Judgments 96 Tai-Shang-Zi No 2531 (2007)' (2009) 167 The Taiwan Law Review 186 – 203.

47 See, for example, Supreme Court Judgment 97 Tai-Shang-Tzi No 236 (2008).

48 Supreme Court Judgment 104 Tai-Shang-Tzi No 33 (2015).

49 ibid.

50 Chen Hui-ling, 'Enforcement of Chinese judgments and arbitral awards in Taiwan: the res judicata problem', Winkler Partners, 6 June 2015, available online: www.winklerpartners.com/?p=6218.

of a Mainland judgment or arbitral award.[51] This interpretation of the Supreme Court shows clearly that a judgment or arbitral award made in Hong Kong or Macau is different from one made in the Mainland.

We can call the theory applied by the Supreme Court to distinguish between *ji pan li* and *zhi xing li* in Mainland-related cases the theory of separation.

3.4.2. Top-down versus Bottom-up Reform

CAA has played an important role for proposing amendments to the Arbitration Act. The 1998 Arbitration Act was originated from the efforts by CAA, and CAA also formed a group to propose amendments to the Arbitration Act in 2012. It may therefore fairly conclude that the reform force of arbitration law in Taiwan comes from the arbitration professionals, rather than the government.

3.4.3. Special Considerations

Taiwan is a civil law country where statutory law weighs more than case law. Taiwanese courts make decisions in accordance with the statutes and stare decisis is not observed. Since some of the courts interpret statutes literally, their decisions may deviate from the general principles or practices followed in common law jurisdictions.

Although litigation is still the most popular means of dispute resolution in Taiwan, alternative dispute resolution (ADR) mechanisms such as negotiation, mediation and arbitration have gained currency in recent years. The judiciary and legislature have encouraged ADR in place of litigation. For example, Article 403 of the Code of Civil Procedure was amended in 1999 and 2007 to direct more cases to mandatory mediation. Many construction contracts and government procurement contracts now contain an arbitration agreement to allow the parties to resolve disputes through arbitration.

4. The Future

4.1. Legislative, Judicial and Institutional Reform

As explained above, the 1998 Arbitration Act does not classify arbitration as 'international' or 'domestic' as the UNCITRAL Model Law does. It classifies arbitration as 'foreign' or 'domestic', like the New York Convention.[52]

The Arbitration Act's definition of a foreign award has spurred debate. The point of contention is 'an award made in the territory of the ROC in accordance with the laws of a foreign country.' 'Laws' in that definition could refer either to the substantive law applied by the tribunal to make the award or the procedural rules governing the arbitration proceedings.[53] The first interpretation appears to be at odds with the international practice of determining the situs of an international arbitration case 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 UNCITRAL, rather than by sovereign states, and it is not clear whether an ICC award made in Taiwan or an CAA arbitration award rendered in accordance with the UNCITRAL Rules is a 'domestic' or 'foreign' award under the Arbitration Act.

Due to political reasons, Taiwan is not a signatory to the New York Convention. Nonetheless, the grounds for refusing recognition of a foreign arbitral award under the Arbitration Act are in general identical to those under Article V of the New York Convention. Taiwanese courts follow international standards and practice in determining an application for recognition and enforcement of a foreign arbitral award.

An application for recognition of a foreign arbitral award will be rejected by a Taiwanese court if (a) recognition or enforcement of the arbitral award would be contrary to the public order or morality of Taiwan or (b) the dispute is not one which may be resolved by arbitration under Taiwanese law.[54]

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[51] Though in theory a judgment or arbitral award made in the Mainland is still enforceable under the AGR even though there is no res judicata, in practice a defendant can object based on substantive arguments under Taiwanese law if the right holder seeks enforcement of a final confirmed court judgment or arbitral award. In the end, the effect of recognising the enforceability of a court judgment or arbitral award made in the mainland area will be severely diminished.

[52] Art 47 of the Arbitration Act.

[53] Yu (n 24) 113 – 14.

[54] Under Art 1 of the Arbitration Act, any present or future dispute which 'may be settled by the parties in

The court may also issue a dismissal order with respect to an application for recognition of a foreign arbitral award if the country where the arbitral award was made or whose laws govern the arbitral award does not recognise the arbitral awards of Taiwan.[55]

The opposing party may request that the court reject an application for recognition of a foreign arbitral 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 by the parties 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;[56]
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.[57]

A 1986 Supreme Court decree indicates that the court's discretion should be exercised cautiously, so that the reciprocity requirement will not become a barrier for enforcement of foreign arbitral awards in Taiwan.[58] The decree reminded Taiwanese 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 a Taiwanese court may recognise an award made in that country. It appears that the reciprocity threshold is not difficult to meet. It has been held that the reciprocity requirement under Article 49 of the Arbitration Act does not specifically require the state where the award is made to first recognise Taiwanese arbitral awards. A party may argue that the requirement of reciprocity is considered to have been met when the arbitration law of the subject state does not clearly reject the recognition of Taiwanese awards.

Before 2014, major jurisdictions whose awards have been recognised by Taiwanese courts include Mainland China, Hong Kong, the United States (including New York and California), the United Kingdom, Korea, France, Switzerland, Japan and Vietnam.

In 2014 the Supreme Court handed down a civil decree declaring that:

> Even a foreign arbitral award may have enforceability (*zhi xing li*) after being approved by a court decree; such enforceability is based on Paragraph 1(6), Article 4 of the Compulsory Execution Law,[59] and is different from a domestic arbitral award, which has the same effect as a court judgment as explicitly specified in the Taiwanese Arbitration Act.

The Supreme Court therefore concluded that a final and definitive foreign arbitral award would not have res judicata (*ji pan li*) and would not prohibit a party from lodging the same issue in the court.[60]

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accordance with the law' is arbitrable. This definition would encompass almost all disputes of a civil nature, whether involving torts, contracts, or quasi-contracts. The validity of IP rights, nonetheless, is an exception as discussed below.

55 Art 49(1) of the Arbitration Act.

56 Whether there is 'lack of due process' should be determined according to the procedural rules agreed on by both parties or the applicable procedural laws in each case. See Tai-Chung District Court Decree 96 Kang-Tzi No 94 (2007).

57 Art 50 of the Arbitration Act.

58 Supreme Court Civil Decree 75 Tai-Kang-Tzi No 335 (1986).

59 Art 4(1)(6) of the Compulsory Execution Law reads: 'Enforcement can be carried out based on the following: other laws that grant the enforcement.'

60 Supreme Court Civil Decree 103 Tai-Kang-Tzi No 850 (2014).

The plaintiff in that case was a Taiwanese company, and the defendant was a Dutch company. The plaintiff brought a suit before the Taiwan Taipei District Court to claim damage caused by a violation of a stock sale contract. Under the disputed contract, the parties should resolve any disputes arising under the contract via arbitration in Singapore.[61] The parties had tried to resolve the same issues through arbitration administered by the Singapore International Arbitration Centre (SIAC). The defendant received a favourable arbitral award and the plaintiff's counterclaim was rejected by the arbitral tribunal.[62] The defendant invoked the arbitration clause to argue that the courts in Taiwan did not have jurisdiction owing to the arbitration clause, and since the same issue had been decided by the SIAC arbitral tribunal, the case should be dismissed based on res judicata (*ji pan li*). The Taipei District Court ruled in favour of the defendant.[63] The Taiwan High Court quashed the Taipei District Court Decree.[64] The Supreme Court upheld the decision of the Taiwan High Court.[65] The Supreme Court ruling was thus final and confirmed with the result that the Singapore award could not be used to counter the debtor objection suit.

The Supreme Court's position on whether a foreign arbitral award has both res judicata and enforceability is untenable. The Supreme Court's understanding of the Taiwanese Arbitration Act is strictly literal and without any justifiable reason. Although before 2 December 2015, Chapter VII of the 1998 Arbitration Act (entitled 'Foreign Arbitral Awards') did not have a provision like Paragraph 1, Article 37,[66] reference should be made to Chapter IV of the same Act (entitled the 'Enforcement of Arbitral Awards'). That accords to an arbitral award the same effect as a court judgment. It does not justify the conclusion that only a 'domestic arbitral award' enjoys res judicata under Paragraph 1, Article 37. Chapter VII expressly excludes applicability to domestic awards, while Chapter IV does not so expressly exclude and should therefore be understood as applying to all arbitral awards.

More importantly, there is no reason for the Taiwanese legislators to distinguish res judicata of a domestic arbitral award from that of a foreign award. The New York Convention,[67] UNCITRAL Model Law[68] and international practice all encourage enforcement and recognition of foreign arbitral awards. As a member of the global community, there is no justifiable reason to discriminate against foreign arbitral awards.

The Legislative Yuan was alarmed by the Supreme Court decision and, grasping the gravity of the potential repercussions, moved quickly to mend the Supreme Court's misstep.

On 13 November 2015, the Legislature amended Paragraph 2, Article 47. The amendment took effect from 2 December 2015. The new provision states: 'After recognition by a court ruling, a foreign arbitral award shall be binding on the parties like a final judgment of a court and shall be enforceable' (emphasis added).

In making the amendment, the Legislature opined that, with respect to the recognition of foreign arbitration awards, the Judiciary should accept res judicata as a basic inviolable premise. The parties and the courts of Taiwan should respect the legal relationship formed or confirmed by foreign arbitral awards. The Legislature also referred to the New York Convention, especially Article 3. That provision states that 'each contracting state shall recognize arbitral awards as binding and enforce them.' The Legislature found the original Paragraph 2, Article 47 of the 1998 Arbitration Act was nebulous, because

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61 The arbitration clause in that case reads: 'All disputes, differences or controversies arising out of or in connection with this Agreement that cannot amicably be solved by the Parties shall be submitted to arbitration in Singapore, to a panel of three (3) arbitrators (one chosen by Purchaser, one chosen by Seller and the third chosen by the original two arbitrators). The Arbitration rules of the Singapore International Arbitration Center (SIAC Rules) shall be applied. The arbitration shall be conducted in English. The arbitral award shall be final and legally binding upon the Parties. This Agreement and the documents to be entered into pursuant to it, save as expressly referred to therein shall be governed by and construed in accordance with the laws of Singapore.'

62 See Taiwan Taipei District Court Civil Decree 99 Chung-Su-Tzi No 357 (2010).

63 ibid.

64 Taiwan High Court Civil Decree 102 Kan-Gan-1-Tzi No 13 (2013).

65 Supreme Court Civil Decree 103 Tai-Kang-Tzi No 850 (2014).

66 Para 1, Art 37 of the Arbitration Act reads: 'The award shall, insofar as relevant, be binding on the parties and have the same force as a final judgment of a court. '

67 Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 UST 2517, TIAS No 6997, 330 UNTS 38.

68 UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985).

it stipulated only that a foreign arbitral award could be enforceable, and neglected to specify the binding force of the foreign award. Thus, the Legislature amended the article for consistency with Article 37 of the 1998 Arbitration Act.

4.2. Enhancing Competitiveness, Independence and Professionalism

In Taiwan, there are very few professionals who work solely as arbitrators. Most arbitrators have a professional career outside arbitration.

5. Conclusion

Taiwan is not a signatory to the New York Convention. However, this fact has not dissuaded Taiwan from its long-time commitment to respecting international practices. Taiwanese courts have shown a similar respect for international arbitration practice. The grounds for denying recognition of a foreign award under the Arbitration Act are identical to those under Article V of the New York Convention. Taiwan's courts generally follow international standards and practice in hearing an application for recognition and enforcement of a foreign award.

Although influenced by continental and common law, Taiwan is a civil law country and many civil law theories shape the understanding of laws locally. Separating *ji pan li* from *zhi xing li* is one example. Out of political sensitivity, the Supreme Court first applied the theory in Mainland China-related cases. It next applied the theory to foreign arbitral awards for logical consistency. But once set on this course, the Supreme Court became unable to promote the international arbitration practice of encouraging enforcement, including recognition, of foreign arbitral awards.

Since the Supreme Court stripped foreign arbitral awards of res judicata, whenever a party seeks enforcement of a foreign arbitral award in Taiwan, the opposing party can fi le an objection suit to suspend the enforcement procedure, and the court will examine the substantive issue confirmed by the arbitral award. One of the consequences of the Supreme Court's decision has been that, to circumvent recognition and enforcement issues pertaining to foreign arbitral awards in Taiwan, the parties have had to give serious consideration to Taiwanese arbitration.

Fortunately, the Legislative Yuan decisively stepped in to fi x the conundrum, amending Paragraph 2, Article 47 of the Arbitration Act. The new law recognises that a foreign arbitral award has binding force just like a final judgment and shall be enforceable. The amendment demonstrates again the Taiwanese legislature's dedication to aligning Taiwanese arbitration practice with that of the international arbitration community. Nonetheless, the issue remains with an arbitral award rendered in Mainland China.