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Paradigm of Reciprocity and Comity – Taiwanese Court's Recognition and Enforcement of Foreign Arbitral Awards

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I. Reciprocity and Comity Principles Applicable in Recognizing Foreign Judgments in Taiwan

According to subparagraph 4, paragraph 1, article 402 of Taiwan's Code of Civil Procedure ("CCP"), a foreign court judgment will be recognized unless "there exists no mutual recognition between the foreign country and Taiwan."[2] A literal reading of the subparagraph yields no clues about the definition and scope of "recognition" in "mutual recognition."

Article 402 was enacted in 1935 and amended in 2003. Before the amendment, subparagraph 4, paragraph 1, article 402 made "international mutual recognition" between foreign countries and Taiwan the prerequisite for recognizing foreign court judgments. The Former Judicial Administrative Branch issued an opinion in 1979 stating that "international mutual recognition" means the foreign court needs to recognize Taiwan's court judgments before a Taiwanese court can recognize the foreign court's judgment.[3] The grounds for recognition suggested by the Former Judicial Administrative Branch include laws or regulations, customs, treaties, and court judgments recognizing the other country's judgment; whether diplomatic relations exist between the two is inconsequential.[4]

The 2003 amendment to subparagraph 4, paragraph 1, article 402 of the CCP deleted the word "international." The legislative intent behind the deletion states: "'[N]o international recognition between the foreign country and Taiwan' under the subparagraph refers to judicial recognition, not recognition in international law or international politics. The amendment deletes 'international' to preclude misunderstanding."[5]

The Supreme Court concurs with the legislative intent. In Civil Judgment 97 Tai-Shen-Zi No. 109, 2008, it wrote:[6]

> International mutual recognition as stipulated under Article 402 does not mean the foreign country needs to have mutual national or governmental recognition with Taiwan in international law. It refers to reciprocity in mutual recognition of judgments between the courts. If the foreign country did not explicitly refuse to recognize our country's court judgment, we should adopt a broad view and recognize the effect of such foreign country's judgment on the basis of reciprocity.

Applying the principles of reciprocity and comity, the Supreme Court even pointed out that besides the fact of the foreign court's recognizing Taiwan's judgments, if we can reasonably expect the foreign court to recognize Taiwanese courts' judgments in the future, the prequisite of "mutual recognition" in article 402 of the CCP can be deemed to have been met.[7]

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2 Paragraph 1, article 402 of the Code of Civil Procedure reads: "A final and binding judgment rendered by a foreign court shall be recognized, except in case of any of the following circumstances: 1. Where the foreign court lacks jurisdiction pursuant to the R.O.C. laws; 2. Where a default judgment is rendered against the losing defendant, except in the case where the notice or summons of the initiation of action had been legally served in a reasonable time in the foreign country or had been served through judicial assistance provided under the R.O.C. laws; 3. Where the performance ordered by such judgment or its litigation procedure is contrary to R.O.C. public policy or morals; 4. Where there exists no mutual recognition between the foreign country and the R.O.C."

3 Former Judicial Administrative Branch Taiwan Letter 68 Min-Zi No. 05906 (1979).

4 Id.

5 Legislative intent of amendment to Article 402, dated February 7, 2003.

6 Taiwan Supreme Court Civil Judgment 93 Tai-Shen-Zi No. 1943 (2004).

7 Id.

In a 2008 case, the Supreme Court concluded that subparagraph 4, paragraph 1, article 402 of the CCP could not be invoked to deny recognition in that case because despite not having official diplomatic ties with Taiwan, the United States has enacted the Taiwan Relations Act,[8] maintaining a substantial relationship with Taiwan, and California courts have recognized Taiwanese judgments.[9]

We may therefore conclude from the above court judgments that after the

2003 amendment to article 402 of the CCP, Taiwanese courts broadly interpret the mutual recognition clause under article 402 of the CCP and rigorously apply the exception clause, rarely denying recognition of foreign judgments on the basis of subparagraph 4.

II. From Recognizing Foreign Judgments to Foreign Arbitral Awards

Although Taiwan is not a signatory to the New York Convention,[10] the grounds for denying recognition of a foreign award under Taiwan's Arbitration Act are identical to those under article V of the New York Convention. [11] Taiwanese courts generally 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 award will be rejected by a Taiwanese court only if:

1. the recognition or enforcement of the arbitral award would be contrary to the public order or contemporary morals of Taiwan; or
2. the dispute is not one which may be resolved by arbitration under Taiwanese laws.[12]

Further, the opposing party to the recognition proceedings 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.[13]

In addition to the mandatory grounds for dismissal and grounds to apply for not recognizing a foreign arbitral award, paragraph 2, article 49 of the Arbitration Act stipulates the following: "The court may issue a dismissal order with respect to an application for recognition of a foreign arbitral award if the country where the arbitral award is made or whose laws govern the arbitral award does not recognize arbitral awards of the Republic of China [emphasis added]." Eschewing the term "mutual recognition" used in article 402 of the CCP, the Arbitration Act states that when the foreign country has a record of

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8 Taiwan Relations Act, Pub.L.96-8, Apr. 10, 1979.
9 Taiwan Supreme Court Civil Judgment 97 Tai-Shen-Zi No. 109 (2008).
10 Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.
11 See e.g., Judicial Yuan Letter (79) Tin-Min-3-Zi No. 0821 (1990).
12 Para. 1, article 49 of the Arbitration Act.
13 Article 50 of the Arbitration Act.

refusing to recognize Taiwanese arbitral awards, Taiwan's courts may decide not to recognize awards from the foreign country.

The legislature may have chosen the word "may" under Paragraph 2, article 49 of the Arbitration Act to bestow discretionary power upon the bench. The Supreme Court in a 1986 precedent amplified:

> The reciprocity principle [under the Arbitration Act] does not require the foreign country where the foreign arbitral award was made to recognize Taiwanese arbitral awards first for our court to recognize the foreign arbitral award. Otherwise, we would deviate from the spirit of comity and obstruct international judicial cooperation. This can be further evidenced by the wording of the law providing when the foreign country where an award was made has refused to recognize Taiwanese arbitral awards, Taiwanese courts "may" instead of "should" dismiss the application to recognize such foreign award.[14] [Emphasis added.]

The Taiwan High Court later in a 2000 civil ruling cites the 1986 precedent, holding the same view.[15] In a 2005 case, one of the parties argued that since Japanese courts have no record of recognizing Taiwanese arbitral awards, and Taiwan is not a signatory to the New York Convention, meaning Japanese courts would not recognize Taiwanese arbitral awards, the Taiwanese court should refuse to recognize the Japanese arbitral award. The High Court did not adopt the party's contention, and, citing article 402 of the CCP, Supreme Court Civil Judgment 93 Tai-Shen-Zi No. 1943 (2004), and Supreme Court Precedent 75 Tai-Kan-Zi No. 335 (1986), concluded that as long as the foreign country does not explicitly refuse to recognize Taiwanese arbitral awards, Taiwanese courts should observe reciprocity to broadly recognize the foreign arbitral award.[16]

The courts reliably maintain the view regarding reciprocity and comity in recognizing foreign arbitral awards. In another 2015 case, the losing party in the first 2015 case tried to build its case on the same argument that Taiwan is not a signatory to the New York Convention, but the Taoyuan District Court and the High Court both referred to Taiwan High Court Civil Ruling 94 Kan- Zi No. 433 (2005) to reject the party's assertion.[17]

III. Two Recent Court Cases Adopting Principles of Reciprocity and Comity in Recognizing Foreign Arbitral Awards

A. A 2017 Decision Recognizing a Czech Republic Arbitral Award

For a distribution agreement dispute between itself and a Taiwanese company named High Chao International ("High Chao"), Teva Czech Industries s.r.o ("Teva") filed for arbitration in the Czech Republic in accordance with the distribution agreement to claim for damages. The arbitral tribunal awarded Teva the claimed compensation in full and Teva brought the suit to recognize and enforce the Czech arbitral award in Taiwan owing to High Chao's failure to perform the award.[18]

The Taiwan Shilin District Court granted Teva's recognition application,[19] and the appellate court[20] and the Taiwan High Court[21] upheld the grant ruling.[22]

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14 Supreme Court Precedent 75 Tai-Kan-Zi No. 335 (1986).
15 Taiwan High Court Civil Ruling 89 Kan-Gan-(1)-Zi No. 9 (2000).
16 Taiwan High Court Civil Ruling 94 Kan-Zi No. 433 (2005).
17 See Taiwan Taoyuan District Court Civil Ruling 103 Kan-Gan-Zi No.1 (2014) and Taiwan Civil Ruling 104 Fei-Kan-Zi No. 12 (2015).
18 See Taiwan Shilin District Court Civil Ruling 105 Chun-Shu-Zi No. 1 (2016).
19 Id.
20 Taiwan Shilin District Court Civil Ruling 106 Kan-Zi No. 29 (2017).
21 Taiwan High Court Civil Ruling 106 Fei-Kan-Zi No. 116 (2017).
22 The recognition of foreign arbitral award suit is not a typical suit. At the first instance a sole judge in the district court will preside. The losing party may appeal to a collegial panel consisting of three judges in the district court. The losing party may appeal again to the High Court, and the High Court's ruling will be final and binding.

High Chao's assertions included: (1) Taiwan has no diplomatic ties with the Czech Republic; (2) Taiwan is not a signatory to the New York Convention; (3) Czech courts have never recognized Taiwanese arbitral awards; (4) there is a lack of evidence showing the Czech Republic can be reasonably expected to recognize Taiwanese arbitral awards; and (5) Supreme Court Precedent 75 Tai-Kan-Zi No. 335 (1986) and Supreme Court Civil Judgment 93 Tai-Shen- Zi No. 1943 (2004) were rather dated, and Taiwan's status internationally is totally different today, therefore the conclusions in those cases should not be applicable.[23]

The High Court did not adopt High Chao's arguments. In addition to citing Supreme Court Precedent 75 Tai-Kan-Zi No. 335 (1986) and finding it still applicable, the High Court also pointed to Section 120 of the Czech Republic's Act Governing Private International Law, which reads: "Arbitration judgements issued in a foreign country will be recognised and enforced in the Czech Republic as Czech arbitration judgements, if reciprocity is guaranteed. Reciprocity is also considered to have been guaranteed, if the foreign state generally declares that foreign judgements are enforceable under the condition of reciprocity."[24] Citing Sections 120 and 121,[25] the High Court opined that the Czech Republic could be fairly expected to observe the reciprocity principle to recognize and enforce Taiwanese arbitral awards.[26]

In fact, this was not the first time the High Court referred to the Czech Republic's adherence to the reciprocity principle as stated in its private international law to conclude there is ample evidence to reasonably expect the Czech Republic would recognize and enforce Taiwanese arbitral awards. The Taiwan High Court in Civil Ruling 104 Fei-Kan-Zi No. 124 (2015) already pointed out since Section 120 of the Czech Private International Law is similar to Paragraph 2, Article 49 of the Taiwanese Arbitration Act, both incorporating the principle of reciprocity, the court can reasonably expect the Czech Republic will recognize and enforce Taiwanese arbitral awards in the future.[27]

B. A 2017 Decision Recognizing a U.S. Arbitral Award

In 2014, Clientron Corp. ("Clientron"), a Taiwanese company, brought a contractual claim against Devon IT, Inc. ("Devon"), a Pennsylvania company, via arbitration in accordance with their arbitral agreement before the Chinese Arbitration Association ("CAA"), the largest arbitration institution in Taiwan. [28] The CAA rendered an award in favor of Clientron, and Clientron sought to enforce the award in the United States.[29] Judge Baylson of the U.S. District for the Eastern District of Pennsylvania made a memorandum on August 8, 2014 ("Memorandum"), stating that since Taiwan is not a signatory to the New York Convention, the United States is not required to enforce the Taiwanese award.

Judge Baylson must have forgotten that the United States and Taiwan signed the Treaty of Friendship, Commerce and Navigation ("FCN Treaty") in 1946, which provides that arbitral awards should be mutually recognized by the courts of both countries.[30] He also overlooked the Taiwan Relations Act, enacted by the U.S. Congress in 1979 to reconfirm the validity and applicability of the 1946 Treaty

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23 See Taiwan High Court Civil Ruling 106 Fei-Kan-Zi No. 116 (2017).

24 Section 120, Czech Republic Law No. 91/2012 Coll. on Private International Law. Cited from Taiwan High Court Civil Ruling 106 Fei-Kan-Zi No. 116 (2017).

25 Section 121 of Czech Republic Law No. 91/2012 Coll. on Private International Law reads: "Recognition or enforcement of a foreign arbitral award shall be refused if the foreign arbitral award a) is not under the law of the State where it was issued, final or enforceable, b) was abolished in the state in which it was issued or under whose law was issued, c) is vitiated by a defect which is the reason for cancellation of the award of the Czech court , or d) contrary to public policy." Cited from Taiwan High Court Civil Ruling 106 Fei-Kan-Zi No. 116 (2017). [Do you want to cite from the offical translation provided by the Czech authorities?]

26 Taiwan High Court Civil Ruling 106 Fei-Kan-Zi No. 116 (2017).

27 See also, Taiwan Taipei District Court Civil Ruling 103 Chun-Ren-Zi 1 (2014) and Taipei District Court Civil Ruling 104 Kun-Zi 172 (2015).

28 The Chinese Arbitration Association, Taipei; http://en.arbitration.org.tw, last visited January 14, 2019.

29 See Clientron Corp. v. Devon IT, Inc., 125 F.Supp.3d 521, 522 (2015).

30 Para. 4, article VI of the FCN Treaty between the United States and Taiwan,

between the United States and Taiwan.[31] And surely the purpose of the New York Convention is not to invalidate the FCN Treaty between Taiwan and United States.[32],[33]

At the same time, Devon filed a suit with the Taiwan Shilin District Court seeking to revoke the CAA arbitral award, and on January 12, 2015, the district court handed down a ruling to dismiss Devon's suit.[34] As Devon did not appeal against the ruling, the ruling became confirmed and final. Meanwhile, after the Memorandum, both Clientron and Devon filed cross-motions for a summary judgment on Clientron's petition to confirm the arbitration award under Pennsylvania's Uniform Foreign Money Judgment Recognition Act ("UFMJRA") in the U.S. Federal District Court, and in August 2015, Judge Baylson granted Clientron's petition while denying Devon's.[35] In his order, Judge Baylson cited the principle of comity and found the U.S. court should defer to the Taiwan Shilin District Court's judgment refusing to overturn the CAA arbitral award, which is final and binding because of Devon's failure to appeal.[36]

Not surprisingly, the Memorandum became inimical to the enforcement of U.S. arbitral awards in Taiwan. In 2016, when a Hong Kong party tried to apply for recognizing a U.S. arbitral award before the New Taipei City District Court, the opposing party, a Taiwanese company, invoked the Memorandum and argued that since the U.S. court declined to recognize a Taiwanese judgment because Taiwan is not a signatory to the New York Convention, by paragraph 2, article 49 of Taiwan's Arbitration Act, Taiwanese courts should follow the reciprocity principle and refuse to recognize U.S. arbitral awards.[37] The New Taipei City District Court in the first ruling and appellate ruling opined that the opposing party had failed to submit sufficient evidence showing the U.S. court explicitly refused to enforce Taiwanese arbitral awards.[38]

While the Taiwan High Court dismissed the opposing party's further appeal in 2017, its fact-finding and reasoning slightly differed from the prior two rulings of the New Taipei City District Court.[39] The High Court first stated that the reciprocity principle under Paragraph 2, Article 49 of Taiwan's Arbitration Act does not require the country where the foreign arbitral award was made to recognize Taiwanese arbitral awards before Taiwanese courts may recognize foreign arbitral awards.[40] The High Court further wrote: "Even if the arbitration law applied by the United States does not recognize R.O.C. arbitral awards, Taiwanese courts can still recognize U.S. arbitral awards based on the reciprocity principle."[41]

Meanwhile, the Taipei District Court ruled to grant another application for recognizing a U.S. arbitral award.[42] A reasonable conclusion to be drawn from these decisions is that the Memorandum has not driven Taiwanese courts to cite the reciprocity principle to deny recognition or enforcement of U.S. arbitral awards.

IV. Conclusion: Necessary Comity?

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31 Taiwan Relations Act, Pub. L. No. 96-8, Preamble, 22 U.S.C. 3301 et seq. (1979), available at: https://www.ait.org.tw/our-relationship/policy-history/key-u-s-foreignpolicy-documents-region/taiwan-relations-act/, last visited January 14, 2019.

32 See John F. Coyle, The Treaty of Friendship, Commerce and Navigation in the Modern Era, 51 Colum. J. Transnat'L L. 302, 331-2 (2013).

33 See Jeffrey Chien-Fei Li and Joyce Wei-Jen Chen, Commentary: US District Court Got It Wrong on Enforcement of Arbitral Awards, 21 Disp. Resol. Mag. 37 (2014-2015).

34 Taiwan Shilin District Court Civil Ruling 102 Chun-Su-Zi No. 1 (2013).

35 Clientron Corp. v. Devon IT, Inc., 125 F.Supp.3d 521 (2015).

36 Id., at 525-6.

37 See Taiwan New Taipei City Civil Rulings 105 Chun-Shu-Zi No. 2 (2016) and 106 Kan-Zi No. 24 (2017) (appellate court of 105 Chun-Shu-Zi No. 2 [2016]).

38 Id.

39 Taiwan High Court Civil Ruling 106 Fei-Kan-Zi 79 (2017).

40 Paragraph 5.3 of Taiwan High Court Civil Ruling 106 Fei-Kan-Zi 79 (2017).

41 Id.

42 Taipei Court Civil Ruling 106 Shen-Zi No. 203 (2017).

Paragraph 2, article 49 of the Taiwanese Arbitration Act incorporates the principle of reciprocity, and in a 1986 precedent the Taiwan Supreme Court honored the "spirit of comity,"[43] opining that the Arbitration Act does not require the courts to recognize a foreign country's arbitral award only after such country has recognized Taiwanese arbitral awards.

From time to time, when reviewing an application for recognizing a foreign arbitral award, the Taiwanese court would cite Supreme Court Civil Judgment 93 Tai-Shen-Zi No. 1943 (2004), a case concerning recognition of a foreign court judgment, to reiterate the standard that if the Taiwanese court can reasonably expect the foreign court to recognize Taiwan's court judgments in the future, the reciprocity principle may be deemed fulfilled.

The two cases in 2015 and 2017 recognizing Czech arbitral awards prove the judicial practice remains consistent.[44] Taiwan's courts referred to the fact that Czech law featured a reciprocity principle similar to Paragraph 2, Article 49 of the Taiwanese Arbitration Act to conclude the Czech Republic could be reasonably expected to recognize and enforce Taiwanese arbitral awards in the future, and therefore granted the application to recognize and enforce the Czech arbitral awards.

Before the U.S. District Court handed down the Memorandum in 2014, indicating that the U.S. Federal Court would not recognize and enforce a Taiwanese arbitral award because Taiwan is not a signatory to the New York Convention, Taiwan's courts would in principle recognize and enforce U.S. arbitral awards.[45] After the Memorandum, in the 2017 case, the opposing party cited the Memorandum and the reciprocity principle under paragraph 2, article 49 of the Taiwanese Arbitration Act to thwart the recognition and enforcement of a U.S. arbitral award.[46] However, U.S. arbitral awards are still enforceable in Taiwan either because the U.S. District Court finally granted a summary judgment to enforce a Taiwanese arbitral award, or as the High Court pointed out: even if U.S. courts do not recognize Taiwanese arbitral awards, Taiwanese courts will still recognize U.S. arbitral awards based on the reciprocity principle.[47]

The 2017 case in which the Taiwanese court recognized a U.S. arbitral award represents a high-water mark in the Taiwanese judiciary's commitment to reciprocity and comity. Taiwan's courts are willing to not only be the first to recognize a foreign country's arbitral award – even when such country has refused to recognize Taiwan's awards – but also recognize a foreign award in honor of reciprocity or comity.

Owing to complex political reasons, Taiwan is not a signatory to the New York Convention. As Wu Kuang-ming, a local commentator, has observed, only by aligning Taiwan's judicial practice and legislation with the international social norms will Taiwan start to overcome the hurdles from not signing the New York Convention.[48] Not being a signatory has not stopped Taiwan from becoming a paradigm for following the comity principle to actively recognize foreign arbitral awards. By adopting a liberal view of the reciprocity principle both in legislation and court cases, Taiwan is showing the world the necessary comity to deal with the recognition and enforcement of arbitral awards.

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43 Supreme Court Precedent 75 Tai-Kan-Zi No. 335 (1986).

44 See Taiwan High Court Civil Ruling 104 Fei-Kan-Zi No. 124 (2015) and Taiwan High Court Civil Ruling 106 Fei-Kan-Zi No. 116 (2017).

45 See e.g., Taiwan High Court Taichung Branch Civil Ruling 89 Kun-Zi No. 81 (2000); Taichung District Court Civil Ruling 91 Chun-Xhen-Zi No. 1 (2002); Taichung District Court Civil Ruling 95 Chun-Ren-Zi No. 1 (2006); Taoyuan District Court Civil Ruling 95 Chun-Shen-Zi No. 8 (2006); Taipei District Court Civil Ruling 95 Chun-Xhen-Zi No. 8 (2006).

46 See Taiwan High Court Civil Ruling 106 Fei-Kan-Zi 79 (2017).

47 Id.

48 Wu Kuang-Ming, The Arbitration of Commercial Dispute 212 (1999) (In Chinese).