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# JURISDICTION FOCUS
# Taiwan Arbitration Update

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This article provides an overview of recent developments in arbitration in Taiwan with regard to the right of parties to seek court-ordered interim measures, the validity of ad hoc arbitration and important decisions of the Taiwanese courts on both of these topics.

## Overview

Two important issues in particular have been the subject of recent court judgments in Taiwan: firstly, the right of a party to seek court-ordered interim measures in support of arbitration, and secondly, the validity of ad hoc arbitration. These issues need to be explored in order to understand the features of arbitration in Taiwan, along with relevant decisions of the courts.

## Court-ordered provisional measures

*The law applicable to a party's request for court-ordered provisional measures in arbitration*

In modern international arbitration, the arbitral tribunal commonly grants interim measures to the parties.[2] However, since Taiwanese law does not explicitly recognise the tribunal's power to issue interim orders, the Taiwanese courts regularly deal with parties' requests for provisional measures.

By virtue of art 39 of Taiwan's Arbitration Act 1998 as amended (the 1998 Act),[3] a party to an arbitration agreement may, prior to requesting commencement of the arbitration, apply to a Taiwanese court for a provisional injunction or attachment under the conservation provisions of Taiwan's Code of Civil Procedure 1929 as amended (CCP). [4]

Although the 1998 Act does not explicitly prohibit the arbitral tribunal from issuing an interim order, it does not expressly grant the tribunal such power either. There have so been no court decisions directly recognising or enforcing interim orders issued by tribunals.

This ambiguity raises an important issue: are courts in Taiwan entitled to grant provisional measures to the parties to an arbitration? The first paragraph of art 39 of the 1998 Act deals with petitions for interim measures made before the commencement of an arbitration. What about petitions made after the arbitration commences?

Article 28 of the 1998 Act allows the arbitral tribunal to request, if necessary, the court's assistance in order to proceed with the arbitration.[5] Further, under the CCP, a party may apply to the court for a provisional attachment to seize a debtor's assets, provided that it can demonstrate impossibility or extreme difficulty in satisfying monetary claims or claims exchangeable for monetary claims by compulsory execution in the future. The court may order the applicant to provide security for the

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2 See, for example, art 23.2 of the HKIAC Administered Arbitration Rules 2018, art 30.1 of the SIAC Arbitration Rules 2016, and art 26 of the CAAI Arbitration Rules 2017.

3 Editorial note: Or the Arbitration Law.of the Republic of China 1998. As amended up to 2 December 2015. This statute is based in part upon the original 1985 version of the UNCITRAL Model Law. The translations used in this article are those of the Chinese Arbitration Association, Taipei, which may be found at http://www.arbitration.org.tw/law01-en.php.

4 The third paragraph of art 39 of the 1998 Act reads: "If a party to an arbitration agreement applies to the court for a provisional seizure or disposition in accordance with the conservation provisions of the Code of Civil Procedure prior to submitting to arbitration, the court at the request of the respondent shall order the applicant to submit to arbitration by a certain time period. However, in the event that the applicant may also proceed by legal action in accordance with the law, the court may order the parties concerned to proceed with legal action."

5 The first paragraph of art 28 of the 1998 Act reads: "The arbitral tribunal, if necessary, may request assistance from a court or other agencies in the conduct of the arbitral proceedings."

provisional attachment, by virtue of arts 522–526 of the CCP. A party may also apply for a provisional injunction to prevent a debtor from committing a specific act, for the purpose of securing satisfactory compulsory execution of a non-monetary claim, by virtue of arts 532, 533 and 535 of the CCP. Apart from a provisional injunction and attachment, an 'injunction maintaining a temporary status quo' is another type of provisional measure stipulated by the CCP. Under art 538 of the CCP, where necessary for the purpose of preventing material harm or imminent danger or other similar situations, an application may be made for an injunction maintaining a temporary status quo with regard to the legal relationship in dispute.

Since the CCP may be applicable to an arbitration wherever the 1998 Act is silent,[6] the articles of the CCP discussed above may enable the court to issue interim orders even where the arbitration has begun.

**Review of relevant court decisions**

A number of court decisions concerning applications for arbitral provisional measures rendered by Taiwanese courts are discussed below. In all of them, the courts found that they had jurisdiction to review the applications. The possible bases for such a conclusion are arts 524, 533 and 538-4 of the CCP, which provide that the court having jurisdiction over the principal case, or the court at the place where the subjectmatter of the provisional attachment application is located, has jurisdiction over that application.

**(1) Issuance of provisional attachment**

In a 2002 case, a Taiwanese-based company, Wanchi Steel Industrial Co Ltd (Wanchi) and a Korean-based company, Doosan Heavy Industries & Construction (Doosan) had differences over the execution of certain contracts. Under their arbitration agreement, any dispute or disagreement in connection with the contract had to be resolved by arbitration under the auspices of the Korean Commercial Arbitration Board (KCAB). Before submitting the dispute to the KCAB, Wanchi applied for a provisional attachment from the Taipei District Court to seize Doosan's assets in Taiwan, pursuant to the first paragraph of art 39 of the 1998 Act.[7]

The Court confirmed that a foreign arbitration agreement was subject to the first paragraph of art 39 of the 1998 Act and granted Wanchi's request. However, since Wanchi subsequently refused to submit the dispute to the KCAB, it was ordered by the Court, at Doosan's request, to file for arbitration with the KCAB within 30 days of receiving the ruling.[8] This ruling was upheld by the Taiwan High Court.[9]

**(2) Issuance of provisional injunction**

A Marshall Islands-based company, Oxford Investments Limited Partnership (Oxford) and a Taiwan-based company, Formula Ten Corporation (Formula Ten) had a contractual dispute between them. Under their arbitration agreement, the dispute was to be submitted to the Singapore International Arbitration Centre (SIAC). Before the SIAC proceedings commenced (25 August 2016), Oxford applied for a provisional injunction from the Taipei District Court, on 18 January 2016. Before that Court, Formula Ten argued that because the agreed applicable law of the disputed contract was English law and the dispute was to be resolved by SIAC proceedings, the Taiwanese courts had no jurisdiction over this foreign case and Oxford's application for a provisional injunction should therefore be dismissed. Oxford's petition was granted by the Taipei District Court[10] but was then dismissed by both the Taiwan High Court[11] and the Supreme Court.[12]

Leaving aside the issue of whether Oxford's application for a provisional injunction should be granted, the High Court and the Supreme Court declared that they had jurisdiction over provisional matters,

6 Article 19 of the 1998 Act reads: "In the absence of an agreement on the procedural rules governing the arbitration, the arbitral tribunal shall apply this Law. Where this Law is silent, the arbitral tribunal may adopt the Code of Civil Procedure mutatis mutandis or other rules of procedure which it deems proper."
7 Taiwan High Court Ruling 91-Tsai-Kang-Zhi-93 (2002).
8 Taipei District Court Ruling 91-Chun-Shen-Zhi No 2 (2002).
9 High Court Ruling 91-Kang-Zhi-2919 (2002).
10 Taipei District Court Ruling 105-Chuan-Zhi-20 (2016).
11 High Court Ruling 106-Kang-Zhi-1734 (2017).
12 Supreme Court Ruling 106-Tai-Kang-830 (2017).

stating that the procedural issues should be governed by the local forum. The two courts affirmed that, under art 39 of the 1998 Act, an application for a provisional injunction based on a foreign arbitration agreement should be granted, so long as such application meets the requirements of the CCP. The courts reasoned that since a foreign arbitral award may be recognised and enforced in Taiwan, the parties to a foreign arbitration may also petition for a provisional injunction in Taiwan on the basis of the CCP.

In the event, however, Oxford's application did not meet the requirements of the CCP. Since the application for a provisional injunction could only be justified by the filing of a claim for non-monetary relief in accordance with art 532 of the CCP, and the courts held that Oxford's claim in the SIAC proceedings should be characterised as a request for a declaratory judgment confirming a disputed conciliation contract and monetary relief, Oxford's application was dismissed.

**(3) Issuance of injunction maintaining temporary status quo**

National Geographic Society (NGS), the publisher of the magazine National Geographic, licensed a Taiwanese publisher, Cross Strait Cultural Business Co (CSCB), to publish the magazine in Taiwan, Hong Kong, Macao and Singapore. Under the arbitration clause in the licensing contract, any dispute should be governed by New York State law and settled by arbitration referred to the American Arbitration Association, New York (AAA). A dispute arose between NGS and CSCB in 2012. NGS applied for an injunction order in Taiwan before commencement of the arbitration proceedings to require CSCB to submit its list of subscribers to NGS to avoid causing damage to Taiwan's subscribers and harming NGS's reputation.[13] The Taipei District Court dismissed NGS's application.[14] The Taiwan High Court reversed the District Court's ruling and granted the application.[15]

Citing arts 524 and 538-4 of the CCP, the High Court first opined that it had jurisdiction to review the application because the subject-matter of the application applied for was in Taiwan. It then invoked art 39 of the 1998 Act and art 538 of the CCP to grant NGS's application. The Supreme Court dismissed an appeal by CSCB and upheld the High Court's ruling.[16]

**Ad hoc arbitration**

**The law applicable to ad hoc arbitration**

Under art 1 of the 1998 Act, "designation of a registered arbitration institution" is not a required formality for an arbitration agreement. It may be reasonably inferred from the principle of party autonomy that parties are free to stipulate a non-institutional arbitration clause in their arbitration agreement under the 1998 Act. Further, the fourth paragraph of art 9 of the 1998 Act states:

> *"In situations referred to in the preceding two paragraphs of this Article, when the Parties have agreed that the arbitration shall be administered by an arbitration institution, the arbitrator shall be appointed by the arbitration inst*itution."

This provision shows that the legislature did not exclude ad hoc arbitration under art 9 of the 1998 Act. Further, if parties to a non-institutional arbitration are entitled to appoint their arbitrator(s) pursuant to the 1998 Act, it is reasonable to conclude that an ad hoc arbitration agreement is enforceable.

Under the Rules on Arbitration Institutions, Mediation Procedures and Fees 1999 (the Rules), all arbitral institutions must register with and apply to the competent authority for approval to be established. The Rules were jointly promulgated on 3 March 1999 by Taiwan's highest executive authority, the Executive Yuan, and its highest judicial authority, the Judicial Yuan, in accordance with the second paragraph of art 54 of the 1998 Act.[17] The Rules are therefore binding subsidiary legislation under the 1998 Act. In

13 CSCB stopped publishing National Geographic magazine after being requested to do so by NGS.
14 Taipei District Court Ruling 101-Chuan-Zhi-2371 (2012).
15 High Court Ruling 101-Kang-Zhi-1683 (2012).
16 Supreme Court Ruling 102-Tai-Kang-Zhi-512 (2013).
17 The second paragraph of art 54 of the 1998 Act reads: "Regulation(s) or guideline(s) of organization, establishment approval, revocation or repeal of approval, arbitrators' registration, cancellation of arbitrators' registration, arbitration fees, mediation procedures and fees of an arbitration institution shall be jointly provided by the Executive Yuan and the Judicial Yuan."

2010, High Court Ruling 99-Fei-Kung-Zhi-122 relied on the rules to deny the enforceability of an ad hoc arbitral award.[18]

However, the Rules and the second paragraph of art 54 of the 1998 Act govern only the management and registration of institutional arbitrations. There is no connection between whether to recognise ad hoc arbitration and how legally to set up an arbitral institution. Further, art 38 of the Rules states:

> *"The fees of an arbitration which is not handled by an arbitration institution may be collected, mutatis mutandis, in accordance with these Rules."*

Since the fees for an arbitration not handled by an arbitration institution may be legally collectable, there is no way that an arbitration not handled by an arbitration institution should be deemed null or voidable, otherwise parties to such noninstitutional proceedings would be obliged to pay the fees but would not receive an enforceable arbitral award in return.

In summary, no law or regulation prevents the parties to an arbitration agreement from constituting an ad hoc arbitral tribunal. According to all of the applicable laws cited above, ad hoc arbitration should be deemed a proper and legitimate alternative dispute resolution mechanism in Taiwan.

**Review of relevant court decisions**

Taiwan's judicial practice regarding the legitimacy and enforceability of ad hoc arbitration is changing. The following two cases are chosen to showcase the benchmark transition in the courts' views. Generally speaking, before 2014, the High Court had held that an ad hoc arbitration award should not be enforceable like a final and definitive court judgment. However, a ruling rendered by the Supreme Court on 27 March 2014 changed this outlook, and subsequently all lower courts have followed this ruling.

**(1) High Court Ruling 99-Fei-Kung-Zhi-122 (2010)**

A dispute arose over the reconstruction of National Taiwan University Hospital Bei-Hu Branch Medical Building between Jin Cheng-Fong Construction Inc (the Claimant) and National Taiwan University Hospital Bei-Hu Branch (the Respondent). The parties to the arbitration agreement simply agreed to arbitrate and no arbitral institution was designated in advance. After the dispute arose, since the Claimant and the Respondent did not agree on which arbitral institution should administer the arbitration, they submitted the dispute to an ad hoc arbitral tribunal (the Tribunal) composed of three arbitrators. The Tribunal rendered a final award on 19 May 2009, ordering the Claimant to pay the Respondent NTD 44,417,150 in compensation. The Respondent then applied to the Taipei District Court for enforcement of the award, pursuant to the first paragraph of art 37 of the 1998 Act.[19] [20]

The Claimant asserted, however, that while the award had been rendered by an ad hoc tribunal, it had not been issued by a registered arbitral institution. Thus, the award should be deemed in contravention of the second paragraph of art 54 of the 1998 Act as it was outside the purview of the first paragraph of art 37 of the Act.[21] The Taipei District Court agreed with this defence and refused to enforce the award.[22] The defence was then considered by the High Court.[23]

High Court Ruling 99-Fei-Kung-Zhi-122 (2010) stated that since an arbitral award should be binding on the parties and have the same force as a final court judgment, and to guarantee the credibility and correctness of the award, the process of rendering arbitral awards needed to be closely overseen by the State: according to the High Court, this was the subject-matter of art 54 of the 1998 Act. The second paragraph of art 54 of the Act and the Rules discussed above[24] both provide that, to establish an arbitral institution, the applicant must submit an application and certain certificates to the Ministry of the Interior. The application must then be further approved by the Ministry of Justice and the competent authorities. The High Court invoked the majority opinion of previous Supreme Court judgments and

18 See the case review below for discussion of this decision.
19 Taipei District Court Ruling 98-Shen-Zhong-Zhi-6 (2009).
20 The first paragraph of art 37 of the 1998 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."
21 For the text of this provision, see note 17 above.
22 Taipei District Court Ruling N98-Shen-Zhong-Zhi-6 (2009).
23 High Court Ruling 99-Fei-Kung-Zhi-122 (2010).
24 See arts 3(1) and 9 of the Rules.

rulings to hold that an arbitral award is enforceable only when it is rendered under the administration of a qualified arbitral institution.[25]

### (2) Supreme Court Ruling 103-Tai-Kung-Zhi-236 (2014)

Huang Ming-Quan (Huang) was a former partner of Ernst & Young Taiwan (EY). Huang and EY had a dispute over the amount of Huang's retirement pension. Under their arbitration agreement, the dispute should be settled by a sole arbitrator and, if the parties failed to agree on an arbitrator, the appointment was to be made by the International Chamber of Commerce. The arbitration was to be governed by the law of the place of arbitration (Taipei) and conducted under the UNCITRAL Arbitration Rules. The parties agreed that the language of the arbitration was to be Mandarin Chinese and that the applicable substantive law was Taiwanese law. Without appointing any arbitral institution to administer or supervise their arbitration case, the parties merely agreed to arbitrate.[26]

Huang requested EY to have the dispute arbitrated by a registered arbitral institution in Taiwan. However, EY insisted on the arbitration agreement and refused to have the dispute heard by any arbitral institution. Huang then disregarded the arbitration agreement and took the dispute to the Taipei District Court.[27]

In the proceedings before the Court, EY filed an application to stay the litigation proceedings under the first paragraph of art 4 of the 1998 Act.[28] It then asserted that the 1998 Act contained no explicit stipulation concerning ad hoc arbitration and that the arbitration agreement should therefore be deemed null and void. The Taipei District Court granted EY's application and dismissed Huang's objections.[29] Huang appealed to the High Court and then the Supreme Court, but both courts ruled against him.[30]

Supreme Court Ruling 103-Tai-Kung-236 (2014) endorsed the legitimacy of ad hoc arbitration and declared that both institutional arbitration and ad hoc arbitration are recognised by the 1998 Act.[31] This Supreme Court ruling has been cited and followed by the lower courts.[32]

### Evaluation

The conclusion of the Supreme Court ruling is encouraging, though the reason in the ruling misstated the true definition of 'ad hoc arbitration',[33] viz that ad hoc arbitration arises where the parties agree to arbitrate without designating any institution to administer their arbitration.[34] Nonetheless, the misunderstanding does not affect the fact that court opinions in Taiwan have swung toward the recognition of ad hoc arbitration.

### Conclusion

25 See, for example. Supreme Court Ruling 91-Tai-Kang-Zhi-634 (2002) and Supreme Court Judgment 92-Tai-Shen-Zhi-170 (2003).

26 Taipei District Court Ruling 102-Zhong-Su-Zhi-298 (2013); High Court Ruling 102-Kang-Zhi-922 (2013).

27 Ibid.

28 The first paragraph of art 4 of the 1998 Act reads: "In the event that one of the parties to an arbitration agreement commences a legal action contrary to the arbitration agreement, the court may, upon application by the adverse party, suspend the legal action and order the plaintiff to submit to arbitration within a specified time, unless the defendant proceeds to respond to the legal action."

29 Taipei District Court Ruling 102-Zhong-Su-Zhi-298 (2013).

30 High Court Ruling 102-Kang-Zhi-922 (2013) and Supreme Court Ruling 103-Tai-Kung-236 (2014).

31 Supreme Court Ruling 103-Tai-Kung-236 (2014).

32 Taipei District Court Ruling 106-Kung-Zhi-462 (2018).

33 Supreme Court Ruling 103-Tai-Kung-236 (2014) defines 'ad hoc arbitration' as: "Where the arbitrators are not appointed or the method of arbitrator appointment is not stipulated in an arbitration agreement, or where a natural person is appointed as an arbitrator or other method of appointing a natural person arbitrator is provided in an arbitration agreement, each party shall appoint its natural person arbitrator in accordance with Paragraphs 1, 2, and 3, Article 9 of the Arbitration Act to constitute an arbitral tribunal, or the natural persons arbitrators appointed or the natural person arbitrators appointed by the stipulated method shall constitute an arbitral tribunal. Such tribunal shall conduct the proceeding by the rules agreed upon and render an arbitral award accordingly. This is ad hoc arbitration."

34 See, for example, Gary B Born, International Arbitration: Law and Practice (2012, Wolters Kluwer Law International), para 27-9; Margaret L Moses, The Principles and Practice of International Commercial Arbitration (2008, Cambridge University Press), pp 9-10.

In addressing the uncertainties discussed above surrounding the application of Taiwan's arbitration legislation to courtordered provisional measures and to ad hoc arbitration, the courts of Taiwan have followed the internationally accepted approach of a presumption in favour of arbitration. In so doing, they have thus demonstrated that they are arbitrationfriendly.