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### Commercial Litigation, Arbitration, and the Enforcement of Foreign Judgments and Arbitral Awards in the Republic of China

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lidity in the ROC is similar to that of any other international treaties or agreements.

## V. CONCLUSION

In the last four decades, the ROC government has established the foundation of a modern legal system in the ROC and has planted the seeds for its future growth. While the ROC's economic growth is well-known, its legal development has been ignored by Westerners.

There is a common impression that the ROC does not have a sophisticated modern legal system. This is untrue; without a modern legal system, the ROC would have been unable to reach its present level of economic development. A United States businessman operating in the ROC would not be able to adequately protect his rights under this system.

# Commercial Litigation, Arbitration, and the Enforcement of Foreign Judgments and Arbitral Awards in the Republic of China

K. C. FAN\*

## I. INTRODUCTION

Businesspersons are usually optimistic when negotiating commercial contracts. They tend to pay more attention to the potential economic gain of a transaction and often give little thought to preparing possible solutions to potential problems. Lawyers, on the other hand, tend to approach the matter more conservatively. Consequently, lawyers are more concerned with finding legally viable positions which afford the greatest protection to their client in the event that a dispute arises. Regardless of the style in approaching commercial contracts, disputes will often arise over the interpretation of a contract. If the parties cannot settle the dispute by themselves, either through mediation or conciliation, the last method for settlement will be some form of litigation or arbitration or both.

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As a result of the Republic of China's ("ROC") rapid increase in trade, commercial disputes, particularly those regarding international trading practices, have greatly increased in recent years. Consequently, companies planning business relations with the ROC should be familiar with the ROC's legal system, particularly with respect to domestic litigation and arbitration. This article addresses the ROC's legal system as it pertains to commercial litigation, commercial arbitration, enforcement of foreign judgments, and enforcement of foreign arbitration awards.

## II. COMMERCIAL LITIGATION

The ROC has an extensive civil law system for handling commercial disputes. A survey of the nuances of the ROC's legal system and its remedies leads to a greater understanding of litigation as a mechanism for resolving these disputes.

### A. Legal System

A review of the structure of the court system is necessary to an understanding of how that system operates. Jurisdictional issues play a large part in commercial litigation, therefore, a review of these issues is also helpful.

#### 1. Structural Elements

Under article 2 of the Law Governing the Organization of Courts ("LGOC"),<sup>1</sup> the courts are divided into three categories: the District Court, the High Court, and the Supreme Court. The District Court is a court of the first instance;<sup>2</sup> the High Court hears cases on appeal from the District Court;<sup>3</sup> and the Supreme Court hears cases on appeal from the High Court.<sup>4</sup> The District Court and the High Court decide issues of both fact and law. The Supreme Court deals exclusively with issues of law.<sup>5</sup> All decisions may be appealed to the High Court, but only those cases where the amount in dispute exceeds NT \$300,000 can be appealed to the Supreme Court.<sup>6</sup>

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1. LAW OF ORGANIZATION OF THE COURT [L. ORG. CT.] (ROC). This law underwent several amendments after it was first promulgated in 1932. The most recent amendment was on June 29, 1980.

2. *Id.* art. 10.

3. *Id.* art. 17; CODE OF CIVIL PROCEDURE [C. CIV. PROC.] art. 437 (ROC).

4. L. ORG. CT. art. 22 (ROC); C. CIV. PROC. art. 464 (ROC).

5. C. CIV. PROC. art. 464 (ROC).

6. *Id.* art. 463.

The ROC has adopted a civil law system; cases are consequently tried before professional judges without juries. In the District Court, there is generally one judge who hears and decides each case. However, more serious cases may be decided by as many as three judges sitting in council.<sup>7</sup>

The court collects court fees from the litigants for each appeal based on the amount in controversy. In commercial litigation, the plaintiff is charged a fee of 1% of the amount in controversy, measured at the time the lawsuit is filed.<sup>8</sup> For appeals, the appellant's fee rate is 1.5%.<sup>9</sup> Article 78 of the Code of Civil Procedure ("CCP") states that, "[t]he costs of an action shall be borne by the party defeated." Consequently, the winning party may recover all court fees from the losing party at the conclusion of the litigation. A lawyer's retainer fee, however, is not considered to be a recoverable court fee. Attorney fees are only recoverable if there is a contractual provision to that effect. In addition, if a plaintiff does not have a domicile or office in the ROC, upon the defendant's request, the court may order the plaintiff to place a certain amount of money as a bond with the court to ensure that the defendant's court fees can be recovered if he wins the case.<sup>10</sup>

## 2. Jurisdictional Issues

Jurisdiction is essential in commercial litigation and it is highly dependent on the facts of each case. There are several jurisdictional rules. Under the Rule of Defendant's Domicile, the court located in the area of the defendant's domicile or residence has jurisdiction in cases brought against the defendant.<sup>11</sup> The Rule of Cause of Action provides that where there is a default on a contract, the court located

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7. L. ORG. CT. art. 3 (ROC). In practice, cases where the amount in dispute exceeds NT \$1 million are considered to be more serious than those involving lesser amounts.

8. LAW GOVERNING COURT FEES FOR CIVIL LITIGATION art. 2 (ROC).

9. *Id.* art. 18.

10. C. CIV. PROC. art. 96 (ROC). In practice, the bond can range from 3% to 5% of the value of the subject matter.

11. *Id.* art. 1. "A civil action is subject to the jurisdiction of the court at the place where the defendant has his domicile." *Id.* Article 2 states that:

[a]n action against a public juristic person is subject to the jurisdiction of the court at the place where the office of such juristic person is located.

An action against a private juristic person or any corporate body which may be made a party to the action is subject to the jurisdiction of the court at the place where the head office or the principal business establishment of such juristic person or corporate body is located.

*Id.* art. 2.

where the default occurred has jurisdiction.<sup>12</sup> If the cause of action is a tort, then the court located where the tort occurred has jurisdiction.<sup>13</sup> Finally, the Rule of Location of Subject Matter states that in a dispute regarding immovable property, jurisdiction will lie where the property is situated.<sup>14</sup>

The parties can avoid jurisdictional disputes by including a choice of forum provision in the contract. Article 24 of the CCP provides that: "The parties may, by agreement, [choose] the competent court of first instance, provided that the cause of action arises from a definite legal relation. The agreement referred to in the preceding paragraph shall be proved by a document."<sup>15</sup> In a commercial agreement, therefore, the parties may include a "choice of forum clause" designating that a certain court shall have sole and exclusive jurisdiction over any disputes arising out of the contract.

Courts liberally honor and enforce choice of forum clauses. For example, if both parties to a contract signed and performed it in the ROC, are nationals, and have domiciles in the ROC, they may include a contract clause granting a foreign court exclusive jurisdiction over any disputes and which, in effect, excludes the jurisdiction of ROC courts. Further, the ROC Supreme Court has held that forum selection clauses are valid as long as the foreign court accepts jurisdiction and its judgments are recognized and enforced by ROC courts.<sup>16</sup>

A United States business entity can include a choice of forum clause in an agreement with its counterpart in Taipei and vest jurisdiction of any disputes exclusively in a United States court. However, a problem may arise if the contracting parties choose an ROC court instead of a United States court, and the United States court does not uphold the choice of forum agreement. This situation may be unfair to the ROC party because he believed that the choice of forum agreement would be valid as agreed upon and bilaterally enforced.

There are two related points which deserve attention. First, article 24 of the CCP does not apply to actions where exclusive jurisdiction is provided for in the CCP.<sup>17</sup> For example, article 10 provides, "[j]urisdiction over an action concerning real rights to immovables, or concerning the partition or boundaries of immovables, shall be exclu-

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12. *Id.* art. 12.

13. *Id.* art. 15.

14. *Id.* art. 10.

15. *Id.* art. 24.

16. Civil Judgment of the Supreme Court, T'ai K'ang No. 96 (1975).

17. C. CIV. PROC. art. 26 (ROC).

sively exercised by the court at the place where such immovables are situated.”<sup>18</sup> In a case covered by this article, the choice of forum agreement may be deemed invalid. Second, the ROC Supreme Court has held that a choice of forum clause in a bill of lading is not binding because such a clause has not been agreed to by the consignee or the holder of the bill of lading.<sup>19</sup>

If neither party is an ROC national and the subject matter of the cause of action has a connection with the ROC, the parties may still agree to vest jurisdiction in the ROC courts. ROC courts will enforce this choice of forum agreement.<sup>20</sup> Additionally, an ROC court may act to protect a citizen against perceived unfairness in a choice of forum agreement.

Jurisdiction may be a critical issue in any commercial litigation. Although choice of forum clauses are generally enforceable, problems may arise, especially if the dispute involves immovable property or if one party has not freely contracted for the arrangement.

### *B. Remedies*

Several remedies are available to parties involved in commercial litigation. Depending upon the circumstances of the case, the remedies of provisional attachment, ex parte proceedings, or provisional execution may be available.

#### 1. Provisional Attachment

A Chinese saying reflects the ROC practice with regard to provisional attachments. Roughly translated it says, “When a debtor becomes nothing, he becomes a king!” When a debtor has disposed of his property, there is little that creditors or a court can do to him. Consequently, it is advisable that a creditor who finds that a debtor is unable to honor a payment immediately trace the debtor’s property and apply to the court for attachment of assets.

The CCP states: “With a view to safe-guarding the compulsory execution of a money claim or of a claim convertible to a money claim, the creditor may apply for provisional seizure. The application above provided may also be made with regard to a claim not yet due for performance.”<sup>21</sup> Under this article, a creditor may apply to a

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18. *Id.* art. 10.

19. Civil Judgment of the Supreme Court, T'ai K'ang No. 96 (1975).

20. Civil Judgment of the Supreme Court, T'ai Shang No. 1618 (1981).

21. C. CIV. PROC. art. 518 (ROC).

court for seizure of a debtor's property, even prior to a lawsuit. In practice, the court will request the creditor to post a bond equal to one-third of the claim amount as security for damages that may be sustained by the debtor as a result of the seizure.<sup>22</sup> The debtor may pay the full amount of the claim as security to stay the order of attachment or to withdraw the attachment.<sup>23</sup> Although it may seem wise for a creditor to obtain a provisional attachment against a debtor to protect his rights, if the attachment is later proven to be improper, the creditor may be liable for damages sustained by the debtor because of the attachment.<sup>24</sup>

## 2. Judgment Ex Parte

Article 385 of the CCP provides:

If, on the date fixed for oral proceedings, one of the parties fails to appear, the court may, on the application of the party present, permit him to proceed with his argument alone and render a judgment *ex parte* thereon; and, if the absent party fails to appear after a second summon[s], the court may *ex officio* render a judgment *ex parte*.

If the oral proceedings or investigation of evidence was carried on in a previous session or if the non-appearing party made statement[s] in his preparatory memorandum submitted, the court shall, in giving a judgment as referred to in the preceding paragraph, take these into consideration; and, investigate, if necessary, the evidence tendered previously by the non-appearing party.<sup>25</sup>

Article 386 of the CCP supplements article 385 as follows:

Under the following circumstances, the court shall, by a ruling, dismiss the application mentioned in the preceding article and postpone the date for oral proceedings:

1. If the non-appearing party has not been duly summoned within a reasonable period of time;
2. If there is reason to believe that the non-appearance of the party is due to force majeure or other unavoidable accidents;
3. If the appearing party cannot give necessary proof of the fact which the court ought to investigate *ex officio*;
4. If the statement made, facts alleged, or evidences tendered by the appearing party have not been notified to the other party

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22. *Id.* art. 526.

23. *Id.* arts. 527, 530.

24. *Id.* art. 531.

25. *Id.* art. 385.

within a reasonable period of time.<sup>26</sup>

From the above articles, two points deserve special attention. First, under article 386 of the Code of Civil Procedure, even if a party fails to appear, a judgment *ex parte* may nevertheless be denied. Second, for a judgment *ex parte*, the court shall consider the arguments made and the evidence tendered by the non-appearing party. Thus, an *ex parte* judgment does not necessarily disadvantage the non-appearing party. In this sense, a judgment *ex parte* is different from a default judgment in the United States legal system.

### 3. Provisional Execution

A creditor who obtains a final judgment may apply to the court to enforce the judgment. A creditor may also apply for the execution of a nonfinal judgment where a provisional execution is granted in the judgment. A creditor can obtain a court order for a provisional execution in one of two ways. Under article 389 of the CCP,<sup>27</sup> the court shall declare, *ex officio*, a provisional execution on the judgment when it renders a judgment ordering the payment of a negotiable instrument or a judgment based on the defendant's acceptance of liability. The second method, available specifically for commercial litigation, allows the plaintiff to apply to the court for a provisional execution.

To effect the provisional execution of a judgment, a plaintiff must furnish security of approximately one-third of the value of the judgment. In order to avoid provisional execution, the defendant may furnish security in the amount of the full value of the judgment.<sup>28</sup>

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26. *Id.* art. 386.

27. *Id.* art. 389. Article 389 states that

[t]he Court shall, *ex officio*, declare provisional execution on the judgment in any of the following cases:

1. A judgment based upon the defendant's acceptance of liabilities;
2. A judgment ordering the performance of an obligation of maintenance, if such obligation has become due for six months immediately prior to the commencement of the action or in the course of its proceedings;
3. A judgment against the defendant in any of the actions specified in Article 402, paragraph 2;
4. A judgment ordering the performance of an obligation on a negotiable instrument;
5. A judgment ordering the payment of a sum of money or an amount of value not exceeding one hundred yuan.

28. If, in an action relating to property rights, the plaintiff has explained to the belief of the court that, unless provisional execution of the judgment be declared before it becomes irrevocable, damages might be caused to him, for which it would be very difficult to make recompensation, or which would be hard to be calculated, the court shall declare the judgment provisionally executable, when applied for by him.

If the plaintiff, in applying for declaration of provisional execution, has men-



The plaintiff who receives a provisional execution on a non-final judgment benefits greatly. A provisional execution can deal a preemptive blow to the defendant through execution of his property prior to litigation becoming final. Therefore, a prudent plaintiff should obtain a provisional execution.

### III. COMMERCIAL ARBITRATION

Two major sources of law cover the topic of commercial arbitration in the ROC. The first, the Commercial Arbitration Act ("CAA"), was promulgated on January 20, 1961 and amended on June 11, 1982 and December 26, 1986. The second source of law is the Regulations Governing the Organization of Commercial Arbitration Association and Arbitration Fees, last amended on July 4, 1988.

The Chinese, reputed to be reluctant litigators, are even more hesitant to arbitrate. This hesitancy stems from their unfamiliarity with the concept of arbitration. However, as Chinese businessmen become more aware of the advantages of arbitration, they may increasingly submit their disputes to arbitration.

#### A. Commercial Arbitration Procedures in the Republic of China

An arbitration agreement is contractual in nature. Mutual consent and a writing are requisite elements.<sup>29</sup> For example, the ROC Supreme Court has held that a bill of lading containing an arbitration provision, but signed by only one party does not constitute a binding

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tioned that he may furnish security in advance, the court shall fix a reasonable amount of security to be furnished and declare the judgment to be provisionally executable upon the furnishing of it, even though no such explanations as referred to in the preceding paragraph have been made.

*Id.* art. 390.

If the defendant has explained to the belief of the court that irreparable damages might be caused to him by reason of provisional execution, the court shall, in any of the cases mentioned in Article 389, declare, on application, that the judgment shall not be provisionally executed, or, in the cases mentioned in the preceding article, dismiss the plaintiff's application for provisional execution.

*Id.* art. 391.

The court may declare that, unless the plaintiff furnishes security in advance, no provisional execution will be permitted, or may allow the defendant to furnish security in advance or to deposit the object under claim so as to avoid provisional execution.

*Id.* art. 392.

Article 393 of the CCP provides that, "[a]ll applications relating to provisional execution shall be made before the conclusion of oral proceedings. The decision relating to provisional execution shall be given the main text of the judgment." *Id.* art. 393.

29. COMMERCIAL ARBITRATION ACT [COM. ARB. ACT] art. 1 (ROC).

arbitration agreement because no mutual consent can be shown.<sup>30</sup>

An arbitration agreement will be invalid unless the parties enter into it in conformance with certain fixed legal relationships or the parties base it on a dispute arising out of such relationships.<sup>31</sup> A common form of agreement is a provision found in a contract that states, "[a]ll disputes arising in relation to this contract shall (or may) be referred to arbitration for determination."

The arbitration agreement can also include the applicable arbitration rules. In principle, the parties can select any arbitration rules to govern their agreement. An arbitration agreement need not specify the place of arbitration, however, such a provision is useful. If the place of arbitration is not specified, the arbitrator shall determine the place.<sup>32</sup>

### 1. Appointment of Arbitrators

The parties may choose the number of arbitrators. The only requirement is that there be an odd number.<sup>33</sup> If the parties have not specified the number of arbitrators, or the procedure for choosing them, the CAA controls. The Act states that each party shall choose one arbitrator, and the arbitrators so chosen shall choose a third arbitrator.<sup>34</sup> The three arbitrators then sit in council to decide the case. In the event that the parties cannot agree on a third arbitrator, they may ask the court to appoint the third arbitrator.<sup>35</sup> After a party has chosen its arbitrator, it may demand that the other party name an arbitrator within seven days of receipt of the demand. If the other party fails to name an arbitrator within the appointed time, the party initiating the demand can petition the court to designate the arbitrator.<sup>36</sup> Each party is entitled to petition the court to reject a designated arbitrator for reasons such as bias, incompetency, or bankruptcy.<sup>37</sup>

Unless the parties have agreed otherwise, the arbitrators shall designate the location and date of the hearing within ten days of being notified of the controversy. The award shall be made within three months, although, if necessary, this period may be extended for an

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30. Civil Judgment of the Supreme Court, T'ai Shang No. 3762 (1978).

31. COM. ARB. ACT art. 2 (ROC).

32. *Id.* art. 12.

33. *Id.* art. 1.

34. *Id.* art. 21.

35. *Id.* art. 4.

36. *Id.* art. 9.

37. *Id.* art. 11.

additional three months.<sup>38</sup> A person may act as an arbitrator if he has specialized knowledge of the law or a particular industry and is reputed for his trustworthiness and impartiality.<sup>39</sup>

## 2. Hearing Procedures

Parties may appoint a lawyer or other representative to appear on their behalf before the arbitration panel.<sup>40</sup> The arbitrators conduct inquiries, hear contentions of both parties and make whatever investigations are necessary.<sup>41</sup> The arbitrators may also request a court of competent jurisdiction to render assistance, including the collection of pertinent evidence.<sup>42</sup>

## 3. Award

The arbitration award must be in writing and rendered by a majority of the arbitrators. The decision must be made within ten days after the hearing. The award must be signed by the arbitrators and contain, among other things, the facts of the controversy, the substance of the award, and the reasoning behind the decision.<sup>43</sup> The arbitrator is responsible for delivering authenticated copies of the award to the parties or forwarding the award to a court of competent authority for service on the parties.<sup>44</sup>

### *B. Effect of an Arbitration Award*

The parties to an arbitration agreement may settle their dispute prior to the rendering of an award. The arbitrator shall make a written record of such a settlement. The settlement has the same effect as an arbitration award. Like an arbitration award, enforcement of the settlement by a court requires a court order of execution.<sup>45</sup>

An award rendered by an arbitrator has the same legal effect as an affirmed judgment of a judicial court. In principle, the award cannot be executed unless a competent court has, on application of the party concerned, granted an execution order. However, provided that the parties so agree in writing, the following awards can be executed

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38. *Id.* art. 12.

39. *Id.* art. 5.

40. *Id.* art. 14.

41. *Id.* art. 13.

42. *Id.* art. 16.

43. *Id.* arts. 18, 19.

44. *Id.* art. 20.

45. *Id.* art. 28.

by a competent court without an execution order: 1) the payment of a specified sum of money, fungible items, or valuable securities; and 2) the delivery of a specified movable property.

Article 22 of the CAA sets out three situations in which a court is prohibited from issuing an execution order pursuant to an arbitration award. First, where the award does not relate to arbitrable subject matter under the terms of the arbitration agreement. Second, where the award is not signed by the arbitrators, or the award does not set forth the reasons for the award. Finally, where the award commands a party to perform an act prohibited by law.<sup>46</sup>

Under certain circumstances, a lawsuit can annul an arbitration award.<sup>47</sup>

### *C. Problems in Gaining Acceptance of Arbitration*

Although arbitration use is increasing at the international level, the evolution of arbitration in the ROC is slow. One concern is the availability of arbitrators. Chambers of Commerce and Industrial Associations may jointly establish and organize arbitration associations to register arbitrators.<sup>48</sup> Currently, the Commercial Arbitration Association of the Republic of China is the only arbitration body that

46. *Id.* art. 22.

47. *Id.* art. 23.

Article 23 of the CAA enumerates ten grounds for annulling an arbitration award:

1. if there exists any of the circumstances stated in Clauses I, II and III of [article 22];
2. if the agreement of arbitration was null and void, or if it has become invalidated before the rendering of the award;
3. if the arbitrator or arbitrators failed to cause one of the parties or both parties to present its or their contentions, or one of the parties or both parties were not lawfully represented in the arbitration proceedings;
4. if the participation of any arbitrator in the arbitration proceedings was in violation of the stipulations of the agreement of arbitration or law;
5. if there was participation by a rejected arbitrator in the arbitration proceedings, unless the plea of rejection has been denied by the court;
6. if any participating arbitrator has been convicted of a criminal offense of violating his duty of arbitration . . . ;
7. if the agent of one of the parties, or the other party, or its agent, has committed a punishable criminal offense in respect of the arbitration, which had an ill effect upon its outcome . . . ;
8. if any of the evidentiary documents, upon which arbitration was based, was adjudged to have been forged or fraudulently altered . . . ;
9. if any of the witnesses, expert witnesses, or interpreters has been convicted of perjury in respect to any of the evidentiary documents, certificates of expert evidence, or interpretations, upon which the arbitration was based . . . ;
10. if the criminal or civil judgment, or other order, or administrative decision, upon which the arbitration was based, has been reversed or modified by a subsequent judgment, . . . or by a subsequent administrative decision.

48. *Id.* art. 5.

exists in the ROC. Founded in Taipei in 1955, the Association remained inactive until four years ago. The Association currently has over 170 registered arbitrators and many major commercial disputes have been referred to the Association for arbitration.

The filing of a separate lawsuit to evade arbitration is another concern. Generally, if a party to an arbitration agreement institutes a lawsuit contrary to the agreement, the other party may petition the court in which the lawsuit is brought for an order staying the proceedings and for dismissal of the lawsuit.<sup>49</sup> ROC courts will not uphold the agreement if the agreement provides for arbitration by a foreign arbitration body in a foreign country. The Supreme Court has held that such an agreement cannot be recognized as the type of agreement mentioned in article 3 of the CAA and therefore, does not have force to stay the proceedings.<sup>50</sup> The business community has criticized this decision. Some believe that the jurists were too conservative and unable to address the needs of international trade. More recently, two lower court decisions have held that a foreign arbitration agreement is the type of agreement covered by article 3 of the CAA, and that such an agreement does have the force to stay proceedings.<sup>51</sup> These cases are presently on appeal.

#### IV. ENFORCEMENT OF FOREIGN JUDGMENTS IN THE ROC

A holder of a foreign judgment should not presume that the judgment will be enforceable in the ROC.<sup>52</sup> Generally, an ROC court will recognize and enforce a foreign judgment if it satisfies the requirements of jurisdiction, service of process, public order and good

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49. *Id.* art. 3.

50. Civil Judgment of the Supreme Court, T'ai Shang No. 3762 (1978).

51. Civil Judgment of the Taipei District Court, Kuo Mao Tze No. 002 (1989); Su Tze No. 3543 (1989).

52. C. CIV. PROC. art. 401 (ROC).

In any of the following cases an irrevocable judgment of a foreign court shall not be deemed to be valid:

1. If, according to the law of the Republic of China, the foreign court concerned has no jurisdiction over the case;
2. If the party defeated is a citizen of the Republic of China, who has not responded to the action, except where the summons or order necessary for the commencement of the action has been served on the party himself in that country, or served on him through the judicial assistance of the Republic of China;
3. If the judgment of the foreign court is considered to be incompatible with public order or good morals;
4. If the judgments given by the courts of [the Republic of China] are not reciprocally recognized by the foreign court concerned.

*Id.*

morals, and reciprocity. These conditions, as set forth in CCP article 401, are addressed below.

### *A. Conditions for Enforcing Foreign Judgments*

#### 1. Jurisdiction Requirement

Article 401, section 1 states that a foreign judgment is unenforceable if the foreign court rendering the judgment does not have jurisdiction over the case.<sup>53</sup> This requirement is not unique to the ROC. Contracting parties should consider ensuring jurisdiction during the course of negotiations, rather than at the time of a dispute.

#### 2. Proper Service Requirement

Section 2 states that a foreign judgment shall be invalid if the party defeated is a citizen of the ROC and if the party has not responded to the action and has not been properly served with the summons or order necessary for the commencement of the action. If the defeated party has been served with the summons or order in the country of the foreign court or if it has been served through the judicial assistance of the ROC, the service will be deemed proper.<sup>54</sup> The procedure for judicial assistance can be found in the Law Governing the Extension of Assistance to Foreign Courts ("LGA").<sup>55</sup> The LGA requires that the request for assistance go through diplomatic channels,<sup>56</sup> that the request set forth the name, nationality, domicile, residence, or place of business of the person to be served,<sup>57</sup> and that the documents to be sent include a certified Chinese translation.<sup>58</sup>

#### 3. Public Order and Good Moral Requirement

Section 3 states that the judgment of the foreign court is invalid if it is incompatible with the public order or good morals of the country. This ambiguous requirement appears to give a large amount of discretion to the courts to disregard a foreign judgment. There are apparently no reported cases where the courts have refused to enforce a foreign judgment on these grounds.

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53. *Id.*

54. *Id.*

55. LAW GOVERNING THE EXTENSION OF ASSISTANCE TO FOREIGN COURTS (ROC).

56. *Id.* art. 3.

57. *Id.* art. 5.

58. *Id.* art. 7.

#### 4. Reciprocity Requirement

Section 4 provides that judgments of foreign courts which do not recognize judgments by courts of the ROC will be deemed invalid. In practice, the Supreme Court has held that United States courts meet the requirement of reciprocity and are enforceable.<sup>59</sup> The United Kingdom and Hong Kong do not recognize and enforce ROC judgments; consequently, ROC courts have refused to recognize and enforce judgments from these countries.

##### *B. Procedure for Enforceability*

A party seeking to enforce a foreign judgment must file a lawsuit in a competent ROC court for permission to enforce the judgment.<sup>60</sup> Like an ordinary case of commercial litigation, the parties may also appeal the case to the Supreme Court. A party may not proceed with compulsory execution until the judgment approving the enforcement is final.

In summary, parties may have foreign judgments enforced in the ROC courts under appropriate circumstances meeting the prerequisites. Although the requirement for reciprocity may appear harsh, it is necessary in the current climate of international affairs. The requirement for order and good morals appears to be a discretionary provision, however, there is no indication that it has been used to deprive prevailing parties of their judgments.

#### V. ENFORCEMENT OF FOREIGN ARBITRAL AWARD

The ROC is not a party to the June 10, 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").<sup>61</sup> Before its June 1982 amendment, the CAA did not provide for the enforceability of foreign arbitration awards. Thus, foreign arbitration awards, with the exception of United States arbitration awards, are not enforceable in the ROC. However, a party to an arbitration may still submit the arbitration award rendered in its favor to the ROC courts as important evidence. In practice, the ROC court will give strong evidentiary weight to such an award, provided that the award is rendered in a fair manner and is not incompatible with the public order, good morals, or the

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59. Civil Judgment of the Supreme Court, T'ai Shang No. 3729 (1970).

60. LAW OF COMPULSORY EXECUTION art. 43 (ROC).

61. Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, T.I.A.S. No. 6997.

mandatory laws of the ROC.<sup>62</sup> For example, in *Wei Chieh Shipping Co. v. Hai Long Co.*, the Supreme Court held that the lower court improperly adopted a Hong Kong arbitration award as evidence.<sup>63</sup>

Another reason for the ROC's recognition of United States arbitration awards, is article VI of the Treaty of Friendship, Commerce and Navigation between the Republic of China and the United States of America. The treaty provides, "the award or decision of the arbitrators shall be accorded full faith and credit by the courts within the territories of the High Contracting Party in which it was rendered, provided the arbitration proceedings were conducted in good faith and in conformity with the agreement for arbitration."<sup>64</sup> Because of this treaty, there has never been a question as to the recognition and enforcement of United States arbitration awards in the ROC.

On June 11, 1982, the CAA was amended to include several articles governing the recognition and enforcement of foreign arbitral awards. Articles 30 through 34 govern the recognition and enforcement of foreign arbitral awards. These provisions have provided the courts with a major resource in adjudging applications seeking recognition and enforcement of foreign arbitral awards.

Any award originating outside the ROC is considered, by definition, to be a foreign award. Article 30 of the CAA states: "[F]oreign arbitral awards are rendered by any arbitral tribunals sitting outside of the territory of the Republic of China. Foreign arbitral awards, having been ruled by a court for their recognitions [sic], may be [enforced]."<sup>65</sup>

Under this provision, all arbitration awards made outside the ROC's territory are considered to be foreign arbitration awards. Therefore, the place of arbitration determines if it is a foreign arbitration, regardless of the nationalities of the parties or arbitrators and regardless of the law under which the arbitration was decided.

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62. In June 1979, the Ministry of Justice wrote a letter to the Ministry of Foreign Affairs, answering a question regarding the enforceability of a Greek commercial arbitration award. The letter indicated that in the absence of a mutual treaty, a party to an arbitration may submit the arbitration award rendered in its favor to the ROC court as evidence and the ROC court will consider this evidence in rendering a judgment.

63. Civil Judgment of the Supreme Court, 62 T'ai Shang Tze 875 (1973), *codified in 2 THE SUPREME COURT JUDGMENTS ON INTERNATIONAL TRADE AND MARITIME* 9.925.

64. Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-Republic of China, art. VI(4), 63 Stat. 1299, T.I.A.S. No. 1871, *reprinted in 6 BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949* 761, 767 (1971).

65. COM. ARB. ACT art. 3 (ROC).



*A. Conditions for the Recognition and Enforcement of Foreign  
Arbitral Awards*

In principle, the ROC courts recognize and enforce all foreign arbitral awards. An award will only be refused if the limited and specified statutory grounds discussed below are proven.

1. Reciprocity

A court may refuse to recognize foreign arbitral awards if the country where the arbitral award was made does not recognize the ROC's arbitral awards.<sup>66</sup> The CAA, as amended, adopts a more liberal and flexible position regarding reciprocity than does the Code of Civil Procedure. Under CCP article 401, a lack of reciprocity will result in an unenforceable foreign court judgment. Article 32 of the CAA states that if the country hosting the arbitration does not reciprocally acknowledge ROC arbitral awards, the court may deny the application for recognition. Under the CAA, a lack of reciprocity will not necessarily cause denial of the enforcement of a foreign award. Rather, the ROC court may consider the right of the ROC people to determine if the application for enforcement should be denied.<sup>67</sup>

2. Public Policy

Where an arbitral award contravenes the "compulsory" or "prohibitive" provisions of the ROC's laws or are contrary to public order or good morals, the court shall dismiss the application for recognition.<sup>68</sup> This provision is equivalent to Article V(2)(b) of the New York Convention, stating that the award to be recognized and enforced may be denied if it is contrary to the country's public policy.

Public policy is difficult to define. The following examples provide some reference. In a 1987 case, the High Court ruled that, even though an award seeking recognition contradicted the findings of a previous judgment made by an ROC court, recognition of the award would not contravene the "compulsory" or "prohibitive" provisions of the laws.<sup>69</sup>

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66. *Id.* art. 32.

67. *Explanation of the Amendments of the Commercial Arbitration Statute*, JUD. WEEKLY MAG., July, 1982, at 22.

68. COM. ARB. ACT art. 32(1)(2) (ROC).

69. Civil Judgment of the High Court, 76 Nien Kan Tzu 1546 (1987). The author disagrees with the holding of the court. In such a case, the arbitration award should be deemed violative of the public policy of the ROC and, therefore, should not be recognized.

The second example is a 1984 Supreme Court case holding that arbitral awards administered by the Commercial Arbitration Association of the ROC, and made under the Commercial Arbitration Act of the ROC in accordance with Article 19 of the Act, should supply reasons to support their decisions. However, a foreign arbitral award need not provide reasons unless required to do so by the law of the awarding country. If the arbitrators were not required to indicate the reasoning behind their decision, the foreign award is not contrary to any "compulsory" provisions of the law despite the fact that it lacks any supportive reasoning.<sup>70</sup> There is a trend in the ROC courts toward narrowing the scope and field of public policy in favor of recognizing and enforcing foreign arbitral awards.

### 3. Arbitrability

Where the subject matter of a case does not qualify for arbitration under the laws of the country where the arbitration occurred, the court shall dismiss the application.<sup>71</sup> This provision differs from article V(2)(a) of the New York Convention which allows the issue of arbitrability to be decided in accordance with the law of the country where the recognition and enforcement is sought. Accordingly, if recognition of an arbitral award made in the United States is sought in the ROC, the ROC court will look to the laws of the United States and not those of the ROC in deciding if the dispute can be settled by arbitration.

### 4. Invalid Arbitration Agreements and Awards

An adversarial party may petition the court for dismissal of an application for recognition of a foreign arbitral award within fourteen days of receiving notice of the application from the court. The grounds for petition include an arbitration not in accordance with the laws of the country where the arbitration was conducted or where the arbitral award has not yet become binding on the parties under the laws of the country where it was made. The party may similarly plead for dismissal if (1) the award has been set aside or suspended by a competent authority in the country where the arbitration took place, or (2) if the award was beyond the scope of the arbitration

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70. Civil Judgment of the Supreme Court, 73 Tai Kan Tze 234 (1984).

71. COM. ARB. ACT art. 32(3) (ROC).

agreement.<sup>72</sup> The court shall revoke its own ruling recognizing the foreign arbitral award if it has been vacated by a competent authority in the country where the award was made.<sup>73</sup> The party may also request a dismissal of the application for recognition if the agreement of arbitration upon which the award was based was void or became invalid before the rendering of the award.<sup>74</sup>

#### 5. Lack of Due Process, Partiality, or Corruption by the Arbitrators and Corruption, Fraud, or Undue Means by the Parties

ROC courts may refuse to enforce arbitration awards procured by methods contrary to general notions of fair play. For example, if a party is unable to present its contentions or is not lawfully represented at the arbitration proceedings, a court should dismiss the application for recognition of the award.<sup>75</sup> The court should similarly dismiss the application for recognition if a lawfully rejected arbitrator continues to participate in arbitration proceedings,<sup>76</sup> or if an arbitrator violates his or her duty in the particular arbitration, resulting in his or her criminal liability.<sup>77</sup> Likewise, if one of the parties, or their agent, has committed a punishable criminal offense relevant to the arbitration,<sup>78</sup> or if any of the evidence upon which the arbitration was based is adjudged to have been procured by fraudulent means,<sup>79</sup> the award may not be enforced. Finally, the court may refuse to enforce an award if the judgment, court order, or administrative decision upon which the arbitration was based has been reversed or modified by a later administrative decision.<sup>80</sup>

#### *B. Procedures and Documents Necessary to Apply for Recognition and Enforcement*

A party must comply with certain procedures in order to ensure the enforceability of a foreign arbitration award. Under article 31 of the CAA, the recognition of a foreign arbitral award shall be achieved

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72. *Id.* art. 33(1)-(3). The text of the above provision is almost identical to that of article V(c)-(e) of the New York Convention.

73. *Id.* art. 34.

74. *Id.* arts. 33(4), 23(2).

75. *Id.* art. 33.

76. *Id.* art. 23(5).

77. *Id.* art. 23(6).

78. *Id.* art. 23(7).

79. *Id.* art. 23(9).

80. *Id.* art. 23(10).

by submitting an application, together with the original or certified copy of the arbitration agreement and award, and a copy of the pertinent portions, if any, of the arbitration act or rule of the country of arbitration.<sup>81</sup> A copy written in Chinese should be submitted if the documents are in a foreign language.<sup>82</sup> Copies must be certified by an embassy, a consulate, or any other representative organization of the ROC. The petitioning party must supply the court with enough copies of the application for the court to serve the other parties.<sup>83</sup>

Once the ROC court recognizes an award, the prevailing party gains some measure of protection. The court may order the petitioner to post sufficient security and suspend enforcement of the award if a responding party applies to the country of arbitration for a set-aside or suspension of the award.<sup>84</sup> This process is, in essence, quite similar to the procedure articulated in article VI of the New York Convention. If a foreign arbitration award is set aside by a competent authority in the country of arbitration, the court issuing the recognition shall revoke its order.<sup>85</sup>

## VI. CONCLUSION

The Republic of China has evolved into a major participant in international trade. This article has discussed the primary mechanisms for resolving commercial disputes in the ROC because these disputes are a common feature of the worldwide trading system. Despite traditional Chinese reluctance to litigate or arbitrate commercial disputes, an elaborate framework to do so exists in the ROC. A legal infrastructure is currently in place that can handle most commercial controversies. Civil litigation in the ROC heavily depends upon jurisdictional issues. Attorneys advising clients engaged in trade with the ROC must be aware of these jurisdictional nuances when drafting commercial agreements. Commercial arbitration is less prevalent in the ROC than civil litigation, but it is gaining acceptance. A lack of arbitrators and the use of lawsuits to evade valid arbitration agreements has hindered the growth of arbitration as a dispute resolution mechanism. However, the number of trained arbitrators in the ROC

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81. *Id.* art. 31(1)-(3).

82. *Id.* art. 31.

83. *Id.*

84. *Id.* art. 34.

85. *Id.*

is growing and courts are becoming less reluctant to dismiss lawsuits that are filed when a contract contains a valid arbitration clause.

One of the more interesting issues to observe in the future is the enforceability of foreign judgments and arbitration awards. The ROC, like many other countries, has been insular in its treatment of foreign decisions, but appears to be making great strides toward enforcing foreign judgments and arbitral awards. The specter of isolationism, as well as protectionism, may always be present throughout the world. Certainly one indication of a nation's commitment to international trade is its respect for foreign legal systems. The current trends in the ROC reflect a growing tolerance of foreign laws and systems. The nationalities of the parties are becoming less important than the existence of valid contractual agreements and fair procedures to enforce these agreements.