

**Bond University**

## **DOCTORAL THESIS**

**Recognition and Enforcement of Foreign Arbitral Awards in the Republic of China.**

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**BOND UNIVERSITY  
SCHOOL OF LAW**

**RECOGNITION AND ENFORCEMENT OF  
FOREIGN ARBITRAL AWARDS IN THE  
REPUBLIC OF CHINA**

**A THESIS**

**SUBMITTED TO THE SCHOOL OF LAW**

**in partial fulfillment of the requirements for the degree of**

**DOCTOR OF LEGAL SCIENCE**

**SUPERVISOR: PROFESSOR MARY HISCOCK**

**STUDENT: CHEN-HUAN WU**

**SID: 11065485**

**April 2004**

# CERTIFICATION

This thesis is submitted to Bond University in partial fulfillment of the requirements for the Degree of Doctor of Legal Science.

This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

Signature:..... Date:.....

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Chen-huan Wu

April 2004, Taipei, Taiwan, ROC

## SUMMARY

This thesis not only seeks to demonstrate the requirements of and procedures for recognition and enforcement of foreign arbitral awards in the Republic of China (ROC), but also explores whether ROC's legislation and practices regarding recognition and enforcement of foreign arbitral awards comply with international 'best practice' standards as contained in the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (*New York Convention*) and the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law). Even though ROC's former legislation and practices did not conform to these standards, the present legislation and practices do comply with the *New York Convention* and the UNCITRAL Model Law.

Although ROC and the People's Republic of China (PRC) both insist on a 'one China' policy and each claims that it represents the whole of China, each has its own legal system. Nonetheless, ROC adopted the 'regional conflict of laws' theory based on the concept of 'one country, two regions' to deal with cases relating to recognition and enforcement arbitral awards rendered in PRC. In the context of that theory, this thesis explores the requirements of and procedures for recognition and enforcement of PRC arbitral awards in ROC, and

whether there are any deficiencies in this regard. The thesis concludes that the ROC legislation and practices regarding recognition and enforcement of PRC arbitral awards in ROC are consistent with the *New York Convention* and the UNCITRAL Model Law.

The government of PRC resumed the exercise of sovereignty over Hong Kong and Macao from 1 July 1997 and 20 December 1999 respectively. However, PRC adopted the principle of ‘one country, two systems’. PRC authorizes the Hong Kong Special Administrative Region (Hong Kong SAR) and the Macao Special Administrative Region (Macao SAR) to exercise a high degree of autonomy and to enjoy executive, legislative and independent judicial, including that of final adjudication. Thus, the ROC legislation deems that Hong Kong and Macao arbitral awards are foreign arbitral awards in ROC. So, the legislation and practices regarding recognition and enforcement of Hong Kong arbitral awards and Macao arbitral awards also are in conformity with the *New York Convention* and the UNCITRAL Model Law.

Moreover, the legislation and practices regarding recognition and enforcement of foreign, PRC, Hong Kong, and Macao arbitral awards go further than international standards set out by the *New York Convention* and the UNCITRAL Model Law. Applying for recognition or enforcement of a foreign,

PRC, Hong Kong, or Macao arbitral award, an original arbitration agreement or an original arbitral award can be substituted by an electronic format, which was made originally and can show the whole text as well as can be downloaded for examination. Furthermore, the courts of ROC construe the limitations regarding recognition or enforcement foreign, PRC, Hong Kong, or Macao arbitral awards narrowly. In addition, even though the ROC legislation regarding recognition and enforcement of foreign, Hong Kong, and Macao arbitral awards adopts the principle of reciprocity, the ROC Courts adopt the notion of comity.

The thesis clarifies recognition and enforcement of PRC arbitral awards in Hong Kong, and recognition and enforcement of Hong Kong arbitral awards in PRC as well. Hong Kong arbitral awards are enforceable in PRC, and PRC arbitral awards also are enforceable in Hong Kong in accordance with the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000* (PRC) and the *Arbitration (Amendment) Ordinance 2000* (Hong Kong SAR) respectively based on the principle of ‘one country, two systems’. Both the provisions of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000* (PRC) and the *Arbitration (Amendment) Ordinance 2000* (Hong Kong

SAR) comply with the international standards set out in the *New York Convention* and the UNCITRAL Model Law.



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# RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE REPUBLIC OF CHINA

## I. INTRODUCTION

### *A. Economic Development of ROC*

The economic success of the Republic of China (ROC) has been acclaimed as a model for other developing countries to follow. The economy of ROC has been transformed from one based on agriculture and light industry to one based on services and capital-intensive high-tech manufacturing.<sup>1</sup> The foreign exchange reserves of ROC on 31 August 2003 were US\$ 185.669 billion.<sup>2</sup> Export-oriented free enterprise has been the driving factor behind this extraordinary success.<sup>3</sup> The gross national product of ROC in 2002 is US\$ 289.27 billion.<sup>4</sup> The total exports amount and total imports amount of ROC in 2002 were US\$ 130.597 billion and US\$ 112.530

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<sup>1</sup> Council for Economic Planning and Development, Executive Yuan of ROC, 'About APROC: A Sound and Vigorous Economy Driven by Free Enterprise', The Council, Taipei, Taiwan, ROC, [http://www.aproc.gov.tw/links\\_el/3.html](http://www.aproc.gov.tw/links_el/3.html) at 1 March 2003 (Copy on file with author) [1].

<sup>2</sup> Central Bank of ROC, 'Foreign Exchange Reserves of the Republic of China on 31 August 2003', Central Bank of ROC, Taipei, Taiwan, ROC, <http://www.cbc.gov.tw/secretariat/release/m9209/920905.htm> at 5 September 2003 (Copy on file with author) [1].

<sup>3</sup> Council for Economic Planning and Development, Executive Yuan of ROC, above n 1.

<sup>4</sup> Department of Statistics under Ministry of Economic Affairs, ROC, *Domestic and Foreign Express Report of Economic Statistics Indicators*, The Department, Taipei, Taiwan, ROC, Number 236 (August 2003) 137-8.

billion respectively.<sup>5</sup> The foreign investments in ROC were US\$ 3,271, 747,000 in 2002.<sup>6</sup> The approved outward investment of ROC in 2002 is US\$ 3,370,046,000.<sup>7</sup> So, international trade and transnational commerce are very important to ROC. However, competition in the global economy is more intense. Global industrial chains have been reorganized. Countries compete for talent and funds. ROC is facing rigorous challenges.<sup>8</sup>

## ***B. Planning for Change in ROC***

To meet these rigorous challenges, the government of ROC launched an economic plan for developing ROC as an Asia-Pacific Regional Operations Centers (APROC Plan) in January 1995.<sup>9</sup> The APROC Plan proposed to establish six specialized operations centers. They are manufacturing center, sea transportation center, air transportation center, financial center, telecommunications center, and media center. For local and foreign companies alike, Taiwan's development as an Asia-Pacific regional operational center means that they can exploit Taiwan as a base for

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<sup>5</sup> Ibid 11-12.

<sup>6</sup> Ibid 91-2.

<sup>7</sup> Ibid 93-4.

<sup>8</sup> Council for Economic Planning and Development, Executive Yuan, ROC, *Challenge 2008: National Development Plan* (2002), The Council, Taipei, Taiwan, ROC, 2.

<sup>9</sup> Coordination and Service Office for Asia-Pacific Regional Operations Center, Council for Economic Planning and Development, Executive Yuan, ROC (ed), *Taiwan Opens Up: A Regional Business Center in the Making* (1998), The Council, Taipei, Taiwan, ROC, 2.

conducting their Asia-Pacific business activities.<sup>10</sup> In the five years since its implementation, the APROC Plan has generated many significant achievements. During this period, the domestic high-tech industry has made great progress. Taiwan has become the top supplier of information products in ten categories. Federal Express (FedEx) and United Parcel Service (UPS) have set up transshipment hubs in Taiwan and increased their numbers of weekly flights in Taiwan by 40%. The quality of telecommunication services has improved. Internet usages have become widespread and cheaply available. The cost of international long-distance calls has fallen by 66%. All of these improvements have created the conditions for the development of Taiwan as a logistics center.<sup>11</sup> In order to develop Taiwan into a logistics center where the economic and trade activities of all the countries of the world can be completed expeditiously and conveniently through this operations center, the government of ROC launched another economic plan in 1999 - 'Global Logistics Development Plan'.<sup>12</sup> In 2002,

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<sup>10</sup> Council for Economic Planning and Development, Executive Yuan, ROC, *The Plan for Developing Taiwan into an Asia-Pacific Regional Operations Center* (1997), The Council, Taipei, Taiwan, ROC, 3.

<sup>11</sup> Center for Economic Deregulation and Innovation, Council for Economic Planning and Development, Executive Yuan, ROC (ed), *Taiwan's Millennial Leap: Ready for the New Economy* (2000), The Council, Taipei, Taiwan, ROC, 6.

<sup>12</sup> Council for Economic Planning and Development, Executive Yuan, ROC, *Global Logistics Development Plan* (2000), The Council, Taipei, Taiwan, ROC, 3.



the government of ROC launched another plan - 'Challenge 2008 National Development Plan' with two sub-plans, 'International Innovation and Research and Development Base Plan' and 'Operations Headquarters Development Plan'.<sup>13</sup> The purpose of the 'International Innovation and Research and Development Base Plan' is to build Taiwan into a base for innovation and research and development in Asia.<sup>14</sup> The objective of the 'Operations Headquarters Development Plan' is to build Taiwan into an ideal location for the establishment of regional operations headquarters by domestic and multinational enterprises.<sup>15</sup>

### ***C. Resolution of Disputes Arising from International Trade and Transnational Commerce***

All of the plans mentioned above relate to international trade or transnational commerce. Thus, some civil disputes will occur between citizens, companies or governmental entities of ROC and foreign persons, foreign companies or foreign governmental entities under these plans.<sup>16</sup>

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<sup>13</sup> Council for Economic Planning and Development, Executive Yuan, ROC, *Challenge 2008: National Development Plan*, above n 8, 5.

<sup>14</sup> *Ibid* 23.

<sup>15</sup> *Ibid* 35.

<sup>16</sup> Disputes occurring from international trade or transnational commerce usually are commercial disputes, so the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) 'New York Convention' (see Appendix ) and the UNCITRAL Model Law on International Commercial Arbitration adopted by the UN Commission on International Trade Law on 21 June 1985

Arbitration is a speedy, economical, secret, and amicable method to resolve such disputes.<sup>17</sup>

Internationally, arbitration is supported by the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)* which has 134 members.<sup>18</sup> An arbitral award made in a contracting party to the *New York Convention* usually can be recognized and enforced in another member state.<sup>19</sup> However, ROC is not a contracting party to the *New York Convention*.<sup>20</sup> The *New York Convention* is open for accession to any state which is a member of the United Nations (UN), a member of any specialized agency of UN, a party to the Statute of the International Court of Justice, or any other state to which an invitation has

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(UNCITRAL Model Law) (see Appendix ) only deal with commercial disputes. Nonetheless, *Arbitration Act 1998* (ROC) not only deals with commercial disputes, but also deals with other kind of civil disputes. Thus, I use 'civil disputes' in this thesis. See *New York Convention* art 1(3), UNCITRAL Model Law art 1(1), *Arbitration Act 1998* (ROC) art 1 para 2.

<sup>17</sup> Born Gary B, *International Commercial Arbitration: Commentary and Materials* (2<sup>nd</sup> ed, 2001) 7-10; Redfern Alan and Hunter Martin, *Law and Practice of International Commercial Arbitration* (3rd, 1999) 23-30; Yang Chong-sen, 'Zhong Cai Zhi Ji Ben Guan Nian' [trans: 'The Fundamental Idea of Arbitration'], in Wang Chih-hsing (ed), *Zhong Cai Fa Hsin Lun* [trans: *New Theories on Arbitration Law*] (1999), Chung Huang Min Kuo Zhong Cai Hsieh Hui [trans: Arbitration Association of ROC], Taipei, Taiwan, ROC, 1-2, 11-15.

<sup>18</sup> There are 134 member states on 3 November 2003. See United Nations, 'United Nations Commission on International Trade Law (UNCITRAL): Status of Conventions and Model Laws', <http://www.uncitral.org/english/status/status-e.htm> at 23 November 2003 (Copy on file with author) [1, 12-18].

<sup>19</sup> *New York Convention* arts 1, 3, 5. See Appendix .

<sup>20</sup> United Nations, 'United Nations Commission on International Trade Law (UNCITRAL): Status of Conventions and Model Laws', <http://www.uncitral.org/english/status/status-e.htm> at 23 November 2003 (Copy on file with author) [1, 12-18].

been addressed by the General Assembly of UN.<sup>21</sup> ROC is not a member of UN, nor a member of any specialized agency of UN, nor a party to the Statute of International Court of Justice. Even though ROC has tried hard to be a member of UN in the past years, it has failed unfortunately.<sup>22</sup> Thus, the General Assembly of UN will not address an invitation to ROC to be a contracting party to the *New York Convention*. Moreover, there is only one treaty related to enforcing foreign arbitral awards between ROC and a foreign country, a bilateral agreement with the United States of America (USA).<sup>23</sup> Therefore, the requirements of and procedures for recognition and enforcement of foreign arbitral awards in ROC are in accordance with domestic law or with the treaty between ROC and USA.

However, in order to strengthen the system regarding recognition and enforcement of foreign arbitral awards in ROC, the *Commercial Arbitration (Amendment) Act 1982 (ROC)*<sup>24</sup> added some provisions regarding recognition and enforcement of foreign arbitral awards into it by reference to the *New*

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<sup>21</sup> *New York Convention* arts 8(1), 9(1).

<sup>22</sup> Government Information Office, ROC, 'Taiwan Deserves a Place in the United Nations', The Office, Taipei, Taiwan, ROC, <http://www.gio.gov.tw/taiwan-website/5-gp/inun/index.htm> at 29 March 2003 (Copy on file with author) [1].

<sup>23</sup> *Treaty of Friendship, Commerce and Navigation between the Republic of China and the United States of America*, 4 November 1946, 25 UNTS 69, art 6(4) (entered into force 30 November 1948) (*Treaty of Friendship between ROC and USA*).

<sup>24</sup> *Shang Wu Zhong Cai Tiao Li 1961* as amended by *Shang Wu Zhong Cai Tiao Li 1982* [trans: *Commercial Arbitration (Amendment) Act*] (ROC) (*Commercial Arbitration (Amendment) Act 1982*)

*York Convention*.<sup>25</sup> In addition, the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) was designed to serve as a model of domestic arbitration legislation, harmonizing and making more uniform the practice and procedure of international commercial arbitration, while freeing international arbitration from the domestic law of any given adopting state. The UNCITRAL Model Law parallels the existing law of USA to a large extent,<sup>26</sup> as well as that of many other countries.<sup>27</sup> The *Arbitration Act 1998* (ROC) took into account the UNCITRAL Model Law also.<sup>28</sup>

Consequently, this thesis will not only demonstrate the requirements of and procedures for recognition and enforcement of foreign arbitral awards in ROC, but also will explore whether the ROC legislation and practices regarding recognition and enforcement of foreign arbitral awards comply with international standards as laid down in the *New York Convention* and the UNCITRAL Model Law. To the extent that the ROC legislation and

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(ROC)).

<sup>25</sup> ROC, *Li Fa Yuan Gong Bao* [trans: *Legislative Yuan Gazette*] (ROC, *Legislative Yuan Gazette*), 71(41) (1982) 39-69.

<sup>26</sup> Brown L F (ed), *The International Arbitration Kit: A Compilation of Basic and Frequently Requested Documents* (4<sup>th</sup> ed, 1993) American Arbitration Association, New York, New York, USA, 127.

<sup>27</sup> United Nations, 'United Nations Commission on International Trade Law (UNCITRAL): Status of Conventions and Model Laws', <http://www.uncitral.org/english/status/status-e.htm> at 23 November 2003 (Copy on file with author) [1, 18].

practices regarding requirements of and procedures for recognition and enforcement of foreign arbitral awards do not conform to the *New York Convention* and to the UNCITRAL Model Law, suggested reforms to the relevant law and practice are put forward.

#### ***D. The Statehood of ROC and the One China Policy***

According to the generally accepted definition of ‘state’ under international law, ‘a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities’.<sup>29</sup> ROC, at least ROC on Taiwan, has defined territory including Taiwan Island, Penghu, Kinmen and Matsu.<sup>30</sup> ROC also has a permanent population that was 22,567,203 at the end of August 2003.<sup>31</sup> ROC is under control of its own government and maintains full diplomatic relations with 27 countries on 18 September 2003.<sup>32</sup> Thus, ROC, at least Taiwan, fulfills the

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<sup>28</sup> ROC, *Legislative Yuan Gazette*, 87(31) (1998) 265-323.

<sup>29</sup> *Rest. 3<sup>rd</sup> Restatement of the Foreign Relations Law of the United States* §201 and Comment a (1990).

<sup>30</sup> Mainland Affairs Council, Executive Yuan of ROC, *Parity, Peace and Win-Win: ROC Position on the “Special State-to-State Relationship”* (1999), The Council, Taipei, Taiwan, ROC, 1.

<sup>31</sup> Ministry of Interior, ROC, ‘Population Affairs’, The Ministry, Taipei, Taiwan, ROC, <http://www.moi.gov.tw/W3/stat/home.asp> at 18 September 2003 (Copy on file with author) [1].

<sup>32</sup> Ministry of Foreign Affairs, ROC, ‘The Nations that the Republic of China Maintains Formal Diplomatic Relations with’, The Ministry, Taipei, Taiwan, ROC, <http://www.mofa.gov.tw/newmofa/policy/nation-h.htm?FaqlD=15> at 18 September 2003 (Copy on file with author) [1-2].

requirements of a state under international law.<sup>33</sup> While the traditional definition under international law does not formally require the prerequisite of claiming statehood, nonetheless, an entity is not a state if it does not claim to be a state.<sup>34</sup> If ROC should claim statehood, it would in effect be purporting to secede from China.<sup>35</sup> ROC and the People's Republic of China (PRC) both insist on a 'one China' policy. Both the government of ROC and the government of PRC claim Taiwan as part of China. Other states either confirm or acquiesce in that claim.<sup>36</sup> Moreover, both the government of ROC and the government of PRC claim that it represents the whole of China. Neither the government of ROC nor the government of PRC recognizes that the other side stands for the whole of China. However, an entity that satisfies the requirements under the international law mentioned above is a state whether its statehood is formally recognized by other states or not.<sup>37</sup> In addition, a state is not required to accord formal recognition to any other state but is required to treat as a state an entity meeting the requirements of the

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<sup>33</sup> *Rest. 3<sup>rd</sup> Restatement of the Foreign Relations Law of the United States* §201 Comment *f* (1990).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* §201 Reporters' Note 8.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid* §202 Comment *b*.

definition of state under international law.<sup>38</sup> Even though the relations between ROC and PRC are not state-to-state *de jure*, the relations between ROC and PRC are state-to-state *de facto*.<sup>39</sup> Although an arbitral award rendered in one place is neither a domestic arbitral nor a foreign arbitral award *de jure* in the other place, an arbitral award rendered in one side is a foreign arbitral award *de facto* in the other side.

### ***E. Regional Conflict of Laws Theory***

ROC adopted the ‘regional conflict of laws’ theory based on the concept of ‘one country, two regions’ to enact the *PRC Relations Act 1992* (ROC)<sup>40</sup> which deals with cases relating to recognition and enforcement arbitral awards rendered in PRC.<sup>41</sup> PRC also adopted ‘regional conflict of laws’ theory based on the concept of ‘one country, two regions’ to promulgate the *Provision Regarding Recognition of ROC Civil Judgements* (PRC)<sup>42</sup> which also deals with cases relating recognition and enforcement arbitral awards

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<sup>38</sup> Ibid §202(1).

<sup>39</sup> Ibid §202 Reporters’ Note 1.

<sup>40</sup> *Taiwan Di Qu Yu Da Lu Di Qu Ren Min Guan Xi Tiao Li 1992* [trans: *The Relationship between People of Taiwan Region and People of Mainland China Region Act*] (ROC) (*PRC Relations Act 1992* (ROC)).

<sup>41</sup> ROC, *Legislative Yuan Gazette*, 81(51) (1992) 161, 183-94; *PRC Relations Act 1992* (ROC) art 74.

<sup>42</sup> *Zui Gao Ren Min Fa Yuan Guan Yu Ren Min Fa Yuan Ren Ke Taiwan Di Qu You Guan Fa Yuan Min Shi Pan Jue De Gui Ding 1998*[trans: *Provision of the Supreme People’s Court of PRC Regarding Recognition of Civil Judgements of the Court of Taiwan Region by the People’s Court of PRC*] (PRC) (*Provision Regarding Recognition of ROC Civil Judgements 1998* (PRC)).

rendered in ROC, even though it does not mention ROC explicitly.

Although ROC does not allow Mainland Chinese to invest in ROC, it allows Taiwanese to invest in PRC indirectly. In 1998, the approved Taiwanese indirect investment invested in Mainland China was US\$ 2,034,621,000 in total. The total approved Taiwanese indirect investment in Mainland China increased to US\$ 6,723,058,000 in 2002.<sup>43</sup> The commerce between ROC and PRC is prosperous. Civil disputes will occur between citizens, companies or governmental entities of ROC and citizens, companies or governmental entities of PRC owing to Taiwanese investing, travelling, and staying in Mainland China. Thus, this thesis also will explore the requirements of and procedures for recognition and enforcement of PRC arbitral awards in ROC and assess whether there is any deficiency in them. To that extent, solutions will be proposed.

## ***F. Position of Hong Kong and Macao***

Hong Kong and Macao are now part of the territory of PRC.

Theoretically, an arbitral award rendered in Hong Kong or Macao has the same effect as an arbitral award rendered in Mainland China. An arbitral

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<sup>43</sup> Above n 4, 95-6.



award rendered in Hong Kong or Macao should be a foreign arbitral award *de facto* in ROC also. Nonetheless, PRC established the Hong Kong Special Administrative Region (Hong Kong SAR) and the Macao Special Administrative Region (Macao SAR) upon its resumption of the exercise of sovereignty over Hong Kong<sup>44</sup> and Macao<sup>45</sup> respectively. PRC adopted the principle of ‘one country, two systems’. The socialist system and policies that are applied in Mainland China are not practised in Hong Kong SAR<sup>46</sup> and Macao SAR.<sup>47</sup> In addition, PRC authorises the Hong Kong SAR and the Macao SAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication.<sup>48</sup> Consequently, ROC enacted the *Hong Kong and Macao Relations Act 1997* (ROC)<sup>49</sup> to regulate and promote the relationship of economy, trade, culture and others between Taiwan and Hong Kong, Macao.<sup>50</sup>

An arbitral award rendered in Hong Kong or Macao is a foreign arbitral award

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<sup>44</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) preamble.

<sup>45</sup> *Basic Law of the Macao SAR of PRC 1993* (PRC) preamble.

<sup>46</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) preamble.

<sup>47</sup> *Basic Law of the Macao SAR of PRC 1993* (PRC) preamble.

<sup>48</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) art 2; *Basic Law of the Macao SAR of PRC 1993* (PRC) art 2.

<sup>49</sup> *Xiang Gang Ao Men Guan Xi Tiao Li 1997* [trans: *Hong Kong and Macao Relations Act*] (ROC) (*Hong Kong and Macao Relations Act 1997* (ROC)).

<sup>50</sup> ROC, *Legislative Yuan Gazette*, 86(7.1) (1997) 181-5; *Hong Kong and Macao Relations Act 1997* (ROC) art 1 para 1.

*de jure* under *Hong Kong and Macao Relations Act 1997* (ROC).<sup>51</sup> This thesis will demonstrate the ROC legislation and practices regarding recognition and enforcement of Hong Kong and Macao arbitral awards, as well as pointing out any improvement that needs to be made.

### ***G. The Relations between PRC and Hong Kong***

The government of PRC resumed sovereignty over Hong Kong from 1 July 1997. Theoretically, an arbitral award rendered in Hong Kong should have the same effect as an arbitral award rendered in Mainland China. However, PRC established a Hong Kong SAR. PRC adopted the principle of ‘one country, two systems’.<sup>52</sup> PRC authorises the Hong Kong SAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication.<sup>53</sup> Nonetheless, the Hong Kong SAR still is a local administrative region of PRC.<sup>54</sup> The central government of PRC is responsible for foreign affairs and defence of the Hong Kong SAR.<sup>55</sup> The relations between the central government of PRC and the government of the Hong Kong SAR are

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<sup>51</sup> ROC, *Legislative Yuan Gazette*, 86(7.1) (1997) 136; *Hong Kong and Macao Relations Act 1997* (ROC) art 42 para 2.

<sup>52</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) preamble.

<sup>53</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) art 2.

<sup>54</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) art 12.

<sup>55</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) art 13 para 1, art 14 para 1.

analogous to the relationship between the federal government and State governments of a federal state like USA and Australia. It is a federal state *de jure* which is one international person, but has different jurisdictions within it. Thus, whether an arbitral award rendered in Hong Kong can be recognized and enforced in PRC depends on PRC law, and whether an arbitral award made in PRC can be recognized and enforced in Hong Kong depends on Hong Kong law. Nonetheless, Hong Kong continues to be prosperous. The gross domestic product of Hong Kong in 2002 was US\$ 163 billion. Its total merchandise exports in 2002 were US\$ 200.1 billion and total merchandise imports were US\$ 207.6 billion. The total merchandise trade of Hong Kong in 2002 was US\$ 407.7 billion.<sup>56</sup> Thus, the commercial activities of Hong Kong are still busy.

Whether an arbitral award rendered in Hong Kong can be recognized and enforced in PRC and whether an arbitral award rendered in PRC can be recognized and enforced in Hong Kong concerns all of the people who are interested in the legal systems of PRC or Hong Kong and who have a trade relationship with PRC or Hong Kong. One further objective of this thesis is

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<sup>56</sup> Hong Kong Trade Development Council, 'Major Economic Indicators' (2002) *Economic & Trade Information on Hong Kong*, Hong Kong Trade Development Council, Hong Kong,

to clarify recognition and enforcement of PRC arbitral awards in Hong Kong and of Hong Kong arbitral awards in PRC.

## ***H. The Scope of this Thesis***

After this introduction (the first part), the second part of this thesis elaborates the scope of foreign arbitral awards, issues of jurisdiction and formalities regarding recognition and enforcement of foreign arbitral awards, and the grounds on which a foreign arbitral award may be refused recognition in ROC. It also explores whether the ROC legislation and practices regarding recognition and enforcement of foreign arbitral awards are consistent with the *New York Convention* and the UNCITRAL Model Law.

The third part of this thesis considers the scope of PRC arbitral awards based on the ‘regional conflict of laws’ theory under the legislation of ROC. It also considers issues of jurisdiction and formalities concerning the recognition and enforcement of PRC arbitral awards, and the reasons that PRC arbitral awards may be refused recognition in ROC.

The fourth part of this thesis examines the definition of Hong Kong and Macao arbitral awards based on the ‘regional conflict of laws’ theory under

the legislation of ROC, and the legislation and practices regarding recognition and enforcement of Hong Kong and Macao arbitral awards. It also examines whether the legislation and practices of ROC have any deficiency.

The fifth part of this thesis looks at the enforceability of Hong Kong arbitral awards in PRC and PRC arbitral awards in Hong Kong.

Consequently, the scope of this thesis includes a review of international arbitration law, the domestic arbitration law of ROC, and any law of ROC relating to recognition and enforcement of foreign arbitral awards or arbitral awards made in PRC, Hong Kong, or Macao. The scope of this thesis also includes any law of PRC and Hong Kong regarding recognition and enforcement of PRC arbitral awards in Hong Kong as well as any law of PRC concerning recognition and enforcement of Hong Kong arbitral awards in PRC. The particular area examines the domestic civil procedure law of ROC.

The English translations of Chinese names regarding Chinese persons, places, and laws in this thesis use the Pinyin romanisation system except where there are popularized translations. For readability, the names of laws and courts of ROC and PRC are translated by meanings in the text, but literal

translations are provided in footnotes. In addition, a short term is given in the text if an English translation of a Chinese name is too long.

The appendices include glossary of translated terms, the Arbitration Act of ROC, the *New York Convention*, the UNCITRAL Model Law, the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region of PRC, table of legislation, table of international conventions, table of cases, and bibliography.

The law is stated as on 1 September 2003.

## II. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN ROC

### *A. The Scope of Foreign Arbitral Award*

#### 1. History

ROC enacted the *Commercial Arbitration Act 1961* (ROC)<sup>57</sup>, the first arbitration statute of ROC, on 20 January 1961. There were 30 articles in the *Commercial Arbitration Act 1961* (ROC). There was no specific provision regulating foreign arbitral awards.<sup>58</sup> Therefore, the Taipei District Court (ROC)<sup>59</sup> overruled an application that was made to it in accordance with article 21 of the *Commercial Arbitration Act 1961* (ROC) for granting an order to enforce an arbitral award rendered in New York, USA.<sup>60</sup> The Court held that:

Only a domestic arbitral award could be applied to court for granting an order to enforce it in accordance with article 21 of the *Commercial Arbitration Act 1961* (ROC). Article 21 of the *Commercial Arbitration Act 1961* (ROC) could not apply to foreign

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<sup>57</sup> *Shang Wu Zhong Cai Tiao Li 1961* [trans: *Commercial Arbitration Act*] (ROC) (*Commercial Arbitration Act 1961* (ROC)).

<sup>58</sup> ROC, Zong Tong Fu Gong Bao [trans: *Presidential Office Gazette*] (*Presidential Office Gazette*), 1194 (1961) 1-3.

<sup>59</sup> Taiwan Taipei Di Fang Fa Yuan [trans: Taipei District Court] (ROC) (Taipei District Court (ROC)). In ROC, ordinary courts are divided into three instances or three levels according to *Fa Yuan Zhu Zhi Fa 1932* as amended by *Fa Yuan Zhu Zhi Fa 1989* [trans: *Court Organisation Act*] (ROC) (*Court Organisation (Amendment) Act 1989* (ROC)) art 1. The first instance is Di Fang Fa Yuan [trans: district court]. The second instance is Gao Deng Fa Yuan [trans: high court]. The third instance that is the highest court is Zui Gao Fa Yuan [trans: the Supreme Court].

<sup>60</sup> *Commercial Arbitration Act 1961* (ROC) art 21 provided that: 'An arbitral award rendered by arbitrators has the same effect as a final judgement between parties. However, it is required to apply to the competent court for granting an order to enforce it. Then, this arbitral award is

arbitral awards.<sup>61</sup>

However, some foreign arbitral awards were deemed domestic arbitral awards by ROC Courts. Orders to enforce these foreign arbitral awards were granted by ROC Courts according to article 21 of the *Commercial Arbitration Act 1961* (ROC).

In *Divers International Inc v Wonderful Plastics Industry Co Ltd*, the Taipei District Court (ROC) granted an order to enforce the arbitral award rendered by the Commercial Arbitration Tribunal of American Arbitration Association in accordance with article 21 of the *Commercial Arbitration Act 1961* (ROC).<sup>62</sup> The Taoyuan District Court (ROC)<sup>63</sup> also granted an order to enforce an arbitral award rendered by American Arbitration Association in New York, USA, pursuant to article 21 of the *Commercial Arbitration Act 1961* (ROC).<sup>64</sup>

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enforceable.’

<sup>61</sup> Decision of 1 July 1980, Taipei District Court, 1980 Zhong Zi Di 1 Hao Min Shi Cai Ding (ROC), rev'd on other grounds, Decision of 24 February 1981, Taiwan High Court, 1980 Kang Zi Di 1123 Hao Min Shi Cai Ding (ROC), aff'd, Decision of 11 June 1981, The Supreme Court, 1981 Tai Kang Zi Di 254 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *Guo Ji Shang Wu Zhong Cai* [trans: *International Commercial Arbitration*] (1990) vol 2, Chang Hung Chu Ban She [trans: Chang Hung Publishing], Taipei, Taiwan, ROC, 198-210. There are no English names of the parties in these decisions, so I cannot cite the case name.

<sup>62</sup> Decision of 29 September 1973 (*Divers International Inc v Wonderful Plastics Industry Co Ltd*), Taipei District Court, 1973 Zhong Zi Di 3 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 191-2.

<sup>63</sup> Taiwan Taoyuan Di Fang Fa Yuan [trans: Taoyuan District Court] (ROC) (Taoyuan District Court (ROC)).

<sup>64</sup> Decision of 30 June 1977, Taoyuan District Court, 1977 Sheng Zi Di 125 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 195-7. There are no English names of the parties in these decisions, so I cannot cite the case name.



Because there was no provision regulating whether foreign arbitral awards were recognizable and enforceable in ROC under the *Commercial Arbitration Act 1961* (ROC), ROC Courts had different opinions about whether a foreign arbitral award was recognizable and enforceable in ROC as mentioned above. The Executive Yuan of ROC added some provisions dealing with this difficulty to the Bill for the Commercial Arbitration (Amendment) Act 1982 (ROC) that was sent to the Legislative Yuan of ROC to pass on 22 January 1982.<sup>65</sup> The definition of the term of foreign arbitral award was stipulated in article 30(1) of the Bill for the Commercial Arbitration (Amendment) Act 1982 (ROC) stating that: ‘Arbitral awards rendered outside the territory of ROC are foreign arbitral awards.’<sup>66</sup> The Executive Yuan of ROC stated that the definition of the term of foreign arbitral award referred to article 1(1) of the *New York Convention*<sup>67</sup> in the Bill.<sup>68</sup> When the Committee of Judiciary and the Committee of Economy under the Legislative Yuan of ROC held a co-conference to review this Bill on 17 March 1982, Justice Minister Li Yuan-tsu also said that the definition of

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<sup>65</sup> Executive Yuan of ROC is the executive branch of ROC and Legislative Yuan of ROC is the legislative branch of ROC. See *Constitution of the Republic of China* arts 53, 62.

<sup>66</sup> ROC, *Legislative Yuan Gazette*, 71(41) (1982) 39-69.

<sup>67</sup> See Appendix .

<sup>68</sup> ROC, *Legislative Yuan Gazette*, 71(41) (1982) 61, 67, 69.

the term of foreign arbitral award referred to article 1(1) of the *New York Convention*.<sup>69</sup> Nonetheless, this Bill only included the first kind of foreign arbitral award stipulated in article 1(1) of the *New York Convention*, namely those arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. This Bill did not include the other sort of foreign arbitral award provided in article 1(1) of the *New York Convention*, namely those arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. The Legislative Yuan of ROC did not revise the definition of foreign arbitral award stated in this Bill, and passed it on 1 June 1982.<sup>70</sup> Then, President Chiang Ching-kuo promulgated the *Commercial Arbitration (Amendment) Act 1982* (ROC) on 11 June 1982.<sup>71</sup> It took effect from 13 June 1982.<sup>72</sup> As a result, there was only one kind of foreign arbitral award - arbitral award rendered outside the territory of ROC.<sup>73</sup> An arbitral award

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<sup>69</sup> ROC, *Legislative Yuan Gazette*, 71(60) (1982) 41-3.

<sup>70</sup> ROC, *Legislative Yuan Gazette*, 71(41) (1982) 39-78; ROC, *Legislative Yuan Gazette*, 71(44) (1982) 105-10.

<sup>71</sup> ROC, *Presidential Office Gazette*, 3993 (1982) 7-10.

<sup>72</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 36 provided that: 'This Act takes effect from the promulgated day.' However, *Zhong Yang Fa Gui Biao Zhun Fa 1970* [trans: *Standard Act of Central Governmental Acts and Regulations*] (ROC) (*Standard Act of Central Governmental Acts and Regulations 1970* (ROC)) art 13 states that: 'Act or regulation provides that it is applied from the promulgated day, it takes effect on the third day from the promulgated day.' Therefore, *Commercial Arbitration (Amendment) Act 1982* (ROC) took effect from 13 June 1982.

<sup>73</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 30 para 1.

that was not rendered outside the territory of ROC was not a foreign arbitral award, no matter what laws governed it.<sup>74</sup>

Moreover, in *Li Wei Enterprise Co Ltd v Wathne Ltd*, the Supreme Court of ROC<sup>75</sup> stated that:

Article 1 paragraph 1 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) provides: ‘Parties may enter into an arbitration agreement designating a single arbitrator or an odd number of arbitrators to arbitrate commercial disputes that are existing or occur in the future according to this Act.’ Thus, the term of arbitration agreement stated in article 27 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) has two elements. The first element of an arbitration agreement is to settle commercial disputes. The second element is parties entered into an arbitration agreement according to this Act. The reason is the validity and the process of relief of an arbitration agreement entered into according to this Act and the arbitral awards rendered pursuant to this Act are provided in this Act by specific provisions that are article 20 to article 27. They are different from the provisions related to foreign arbitral awards that are provided in article 30 to article 34 of this Act.<sup>76</sup>

In *Li Wei Enterprise Co Ltd v Wathne Ltd*, the Supreme Court of ROC inferred that a domestic arbitral award was an arbitral award which was rendered pursuant to the *Commercial Arbitration (Amendment) Act 1982* (ROC).<sup>77</sup> Therefore, an arbitral award that was rendered in the territory of ROC might be a domestic arbitral award or not. It depended upon what laws

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<sup>74</sup> Lin Juinn-yih, ‘Wai Guo Zhong Cai Pan Duan Zai Wo Guo Zhi Cheng Ren Yu Zhi Xing’ [trans: ‘Recognition and Enforcement of Foreign Arbitral Award in ROC’], in Qi Ji-Hua (ed), *Guo Ji Si Fa Li Lun Yu Shi Jian* [trans: *Theories and Practices on Conflict of Laws*] (1998) vol 1, Xue Lin Wen Hua Shi Ye You Xian Gong Si [trans: Xue Lin Cultural Enterprise Co, Ltd], Taipei, Taiwan, ROC, 269.

<sup>75</sup> Zui Gao Fa Yuan [trans: the Supreme Court] (ROC) (the Supreme Court of ROC).

<sup>76</sup> Decision of 23 October 1987 (*Li Wei Enterprise Co Ltd v Wathne Ltd*), the Supreme Court, 1987 Tai Kang Zi Di 401 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 19-21.

governed it. If it was rendered pursuant to the *Commercial Arbitration (Amendment) Act 1982* (ROC), it was a domestic arbitral award. If it was not rendered pursuant to the *Commercial Arbitration (Amendment) Act 1982* (ROC), it was not a domestic arbitral award.<sup>78</sup> Consequently, an arbitral award not rendered pursuant to the *Commercial Arbitration (Amendment) Act 1982* (ROC) within the territory of ROC is neither a domestic arbitral award, nor a foreign arbitral award. It was not recognizable, nor enforceable in ROC<sup>79</sup>

Thus, when the Ministry of Justice of ROC drafted the Bill for the Arbitration Act 1998 (ROC),<sup>80</sup> the Ministry added another kind of foreign arbitral award to the Bill, namely one that is rendered pursuant to foreign laws within the territory of ROC.<sup>81</sup> Then, the Executive Yuan of ROC revised this kind of foreign arbitral award into three categories when it reviewed the Bill drafted by the Ministry of Justice. The first is an arbitral award that is

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<sup>77</sup> Ibid.

<sup>78</sup> Lin Juinn-yih, 'Recognition and Enforcement of Foreign Arbitral Award in ROC' above 74, 269.

<sup>79</sup> ROC, *Legislative Yuan Gazette*, 86(53.2) (1997) 87; Lin Juinn-yih, 'Recognition and Enforcement of Foreign Arbitral Award in ROC' above 74, 269.

<sup>80</sup> The *Commercial Arbitration Act 1961*(ROC) was amended by *Zhong Cai Fa 1998* [trans: *Arbitration Act*] (ROC) (*Arbitration Act 1998* (ROC)). Not only the provisions but also the title of this Act was amended. Thus, the *Arbitration Act 1998* (ROC) is used instead of the *Commercial Arbitration Act 1961* as amended by the *Arbitration (Amendment) Act 1998* (ROC) in this thesis. See ROC, *Presidential Office Gazette*, 6224 (1998) 40-50.

<sup>81</sup> ROC, Ministry of Justice, *Shang Wu Zhong Cai Tiao Li Yen Jiu Xiu Zheng Shi Lu* [trans: *The Record of Studying to Amend Commercial Arbitration Act*] (1997), The Ministry, Taipei, Taiwan, ROC, 573, 630.

rendered according to foreign arbitration laws or foreign arbitration rules within the territory of ROC. The second is an arbitral award that is rendered pursuant to arbitration rules of foreign arbitral institutions within the territory of ROC. The third is an arbitral award that is rendered according to arbitration rules of International Organisations within the territory of ROC.<sup>82</sup>

When the Committee of Judiciary and the Committee of Economy under the Legislative Yuan of ROC held a co-conference to review this Bill, Legislator Lai Lai-kun suggested revising the definition of this kind of foreign arbitral award as ‘an arbitral award which is rendered not pursuant to this *Act* within the territory of the R.O.C’. However, Director of the Department of Legal Affairs under the Ministry of Justice, Mr. Lin Yun-hu, said that arbitration proceedings could be conducted in accordance with arbitration rules arranged by parties in his reply to the suggestion of Legislator Lai Lai-kun in the co-conference. He inferred that an arbitral award that was not rendered pursuant to this Bill might be a domestic arbitral award. He gave an example where two nationals of ROC concluded an arbitration agreement in which the parties designated arbitration rules other than the rules provided in

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<sup>82</sup> Ibid 649-51.

this Act. He inferred that the arbitral award rendered pursuant to these arbitration rules was a domestic arbitral award. He also said that the three categories of foreign arbitral awards that the Executive Yuan of ROC added to this Bill were permissible by foreign laws. He suggested adopting the definition of foreign arbitral award drafted by the Ministry of Justice. Consequently, the co-conference held by the Committee of Judiciary and the Committee of Economy under the Legislative Yuan of ROC restored the definition of foreign arbitral award drafted by the Ministry of Justice.<sup>83</sup> The Legislative Yuan of ROC did not revise the definition of foreign arbitral award that was amended by the co-conference held by the Committee of Judiciary and the Committee of Economy when it did the second reading and the third reading.<sup>84</sup> This Bill was passed by the Legislative Yuan of ROC on 29 May 1998.<sup>85</sup> Then, President Lee Teng-hui promulgated the *Arbitration Act 1998* (ROC) on 24 June 1998.<sup>86</sup> However, article 56 of the *Arbitration Act 1998* (ROC) provides that: ‘This Act applies from the date that is six months after the promulgated day.’ In addition, article 14 of the *Standard*

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<sup>83</sup> ROC, *Legislative Yuan Gazette*, 86(56.2) (1997) 14-16.

<sup>84</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 323-32.

<sup>85</sup> *Ibid* 3, 332.

<sup>86</sup> ROC, *Presidential Office Gazette*, 6224 (1998) 40-50.

*Act of Central Governmental Acts and Regulations 1970* (ROC) states that: ‘If statute or regulation provides that it applies from a specific date designated in that statute or regulation itself or by an administrative order, it takes effect from that specific date.’ Thus, the *Arbitration Act 1998* (ROC), the current provisions regarding recognition and enforcement of foreign arbitral awards of ROC, took effect from 24 December 1998.<sup>87</sup>

## **2. Current Law**

Article 47 paragraph 1 of the *Arbitration Act 1998* (ROC) provides that:

‘A foreign arbitral award is an arbitral award which is rendered outside the territory of ROC or rendered pursuant to foreign laws within the territory of ROC’. Therefore, there are two kinds of foreign arbitral awards under the current law of ROC. One is an arbitral award that is rendered outside the territory of ROC. The other is an arbitral award that is rendered pursuant to foreign laws within the territory of ROC. The situation under the *Commercial Arbitration (Amendment) Act 1982* (ROC) that an arbitral award can be neither a domestic arbitral award nor a foreign arbitral award will not

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<sup>87</sup> Article 8, 54, and 56 of the *Arbitration Act 1998* (ROC) was amended and promulgated on 10 July 2002. These provisions took effect from 12 July 2002. Nonetheless, these provisions relate to training of arbitrator, establishment of arbitration institution, and the effective date of these provisions. They do not relate to recognition and enforcement of foreign arbitral awards.

happen under the *Arbitration Act 1998* (ROC).

The first kind of foreign arbitral award that is rendered outside the territory of ROC is not difficult to distinguish. No matter what laws govern it, an arbitral award that is rendered outside the territory of ROC is a foreign arbitral award even though it is rendered in accordance with the *Arbitration Act 1998* (ROC). It does not matter whether it is an institutional arbitration or an ad hoc arbitration, any arbitral award that is rendered outside the territory of ROC is a foreign arbitral award.<sup>88</sup> Moreover, since the definition of the first kind of foreign arbitral award provided in article 47 paragraph 1 of the *Arbitration Act 1998* (ROC) is the same as the previous definition, decisions made by ROC Courts in accordance with that definition still are precedents.

In 1992, the Taipei District Court (ROC) ruled that an arbitral award rendered by a sole arbitrator who was designated by one party in London, as an ad hoc arbitration, was a foreign arbitral award in two decisions.<sup>89</sup> The

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<sup>88</sup> Arbitral awards rendered by arbitrators of institutional arbitration were provided as 'arbitral awards made by permanent arbitral bodies to which the parties have submitted' by *New York Convention* art 1(2). Arbitral awards rendered by arbitrators of ad hoc arbitration were provided as 'arbitral awards made by arbitrators appointed for each case' by *New York Convention* art 1(2).  
<sup>89</sup> Decision of 31 July 1992, Taipei District Court, 1992 Zhong Bei Zi Di 13 Hao Min Shi Cai Ding (ROC); Decision of 30 November 1992, Taipei District Court, 1992 Zhong Sheng Zi Di 1 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), *Shang Wu Zhong Cai Cai Pan Hui Bian* [trans: *Collection of Decisions Relating to Commercial Arbitration*] (1997), Secretariat of Judicial Yuan, Taipei, Taiwan, ROC, 1104-6. There is no parties' name in this



Taipei District Court (ROC) recognized these foreign arbitral awards in these two decisions.<sup>90</sup> One of these two decisions was appealed, but the Taiwan High Court (ROC)<sup>91</sup> affirmed this decision.<sup>92</sup> In 1995, the Taipei District Court (ROC) stated that an interim final award, a correction to interim final award and a final award rendered in London by three arbitrators of London Maritime Arbitrators' Association, an arbitral institution,<sup>93</sup> were foreign arbitral awards in another decision.<sup>94</sup> These foreign arbitral awards were also recognized by the Taipei District Court (ROC) in the same decision.<sup>95</sup> The Taipei District Court (ROC) also held that an arbitral award rendered in London by a sole arbitrator designated by the England High Court, an ad hoc arbitration, was a foreign arbitral award in 1993.<sup>96</sup> This foreign arbitral award was recognized by the Taipei District Court (ROC) in the same decision, too.<sup>97</sup>

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source, so I cannot cite the case name.

<sup>90</sup> Ibid.

<sup>91</sup> Taiwan Gao Deng Fa Yuan [trans: Taiwan High Court] (ROC) (Taiwan High Court (ROC)).

<sup>92</sup> Decision of 27 November 1992, Taiwan High Court, 1992 Kang Zi Di 1491 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1107-8. There is no parties' name in this source, so I cannot cite the case name.

<sup>93</sup> Brown L F (ed), above n 26, 389.

<sup>94</sup> Decision of 18 October 1995, Taipei District Court, 1994 Zhong Sheng Zi Di 21 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1142-3. There is no parties' name in this source, so I cannot cite the case name.

<sup>95</sup> Ibid.

<sup>96</sup> Decision of 30 May 1993, Taipei District Court, 1993 Zhong Zhi Zi Di 3 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1109-12. There is no parties' name in this source, so I cannot cite the case name.

<sup>97</sup> Ibid.

As to the second kind of foreign arbitral awards under article 47 paragraph 1 of the *Arbitration Act 1998* (ROC), namely arbitral awards rendered in the territory of ROC in accordance with foreign laws, there is no such kind of arbitral award seeking recognition in ROC until now.<sup>98</sup>

However, an applicant who applies to recognize a foreign arbitral award in ROC must submit the full text of the foreign arbitration law, the full text of the arbitration rules of the foreign arbitration institution, or the full text of the arbitration rules of the international organisation that was applied to the foreign arbitral award and their Chinese translations if they are not in Chinese.<sup>99</sup> It infers that this kind of foreign arbitral award can be divided into three categories. The definition regarding foreign arbitral awards rendered in the territory of ROC under the Bill for the Arbitration Act 1998 (ROC) that was sent to the Legislative Yuan of ROC to pass by the Executive Yuan of ROC also can be a reference.<sup>100</sup>

The first is an arbitral award rendered in accordance with foreign arbitration laws or foreign arbitration rules in the territory of ROC.<sup>101</sup> For

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<sup>98</sup> <http://www.judicial.gov.tw> visited 8 March 2004.

<sup>99</sup> *Arbitration Act 1998* (ROC) art 48 paras 1(3), 2.

<sup>100</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 309-10.

<sup>101</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 309-10.

instance, an arbitral award rendered pursuant to the *International Arbitration Act 1974* of Australia<sup>102</sup> in the territory of ROC is a foreign arbitral award under the *Arbitration Act 1998* (ROC). An arbitral award rendered according to chapter 1 of the *Federal Arbitration (Amendment) Act 1992* (USA)<sup>103</sup> in the territory of ROC also is a foreign arbitral award under the *Arbitration Act 1998* (ROC).

The second is an arbitral award rendered in the territory of ROC pursuant to the arbitration rules of foreign arbitral institutions.<sup>104</sup> For example, an arbitral award rendered in the territory of ROC according to the International Arbitration Rules of American Arbitration Association is a foreign arbitral award under the *Arbitration Act 1998* (ROC).

The third is an arbitral award rendered in the territory of ROC in accordance with the arbitration rules of International Organisations.<sup>105</sup> For instance, an arbitral award rendered in the territory of ROC according to the International Center for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings is a foreign arbitral award as well.<sup>106</sup>

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<sup>102</sup> *International Arbitration Act 1974* (Cth) ss 15-30.

<sup>103</sup> *Federal Arbitration Act 1925* (USA) as amended by *Federal Arbitration (Amendment) Act 1992* (USA) (*Federal Arbitration (Amendment) Act 1992* (USA)) ch 1; 9 U.S.C. §§ 1-16.

<sup>104</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 309-10.

<sup>105</sup> *Ibid.*

<sup>106</sup> The International Center for Settlement of Investment Disputes (ICSID) was established under

Furthermore, no matter whether the arbitral award is made by arbitrators appointed for each case, an ad hoc arbitration, or made by permanent arbitral bodies to which the parties have submitted, an institutional arbitration, an arbitral award that is rendered in the territory of ROC in accordance with foreign laws is a foreign arbitral award.

The definition of foreign arbitral award under article 47 paragraph 1 of the *Arbitration Act 1998* (ROC) not only complies with the definition of foreign arbitral award stipulated in article 1(1) of the *New York Convention*,<sup>107</sup> but also complies with the definition of arbitral award defined in article 1(2) of the *New York Convention*.<sup>108</sup>

USA acceded to the *New York Convention* on 30 September 1970.<sup>109</sup>

The *New York Convention* is enforced in USA in accordance with chapter 2 of the *Federal Arbitration (Amendment) Act 1970* (USA) that took effect on 29 December 1970.<sup>110</sup> However, an arbitral award arising out of a relationship

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the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* that came into force on 14 October 1966. ICSID is an autonomous international organisation, although it has close links with the World Bank. See International Center for Settlement of Investment Disputes, 'About ICSID' (1999) ICSID, International Center for Settlement of Investment Disputes, <<http://www.worldbank.org/icsid/about/main.htm>> (Copy on file with author) [1].

<sup>107</sup> See Appendix .

<sup>108</sup> See Appendix .

<sup>109</sup> Brown L F (ed), above n 26, 20.

<sup>110</sup> *Federal Arbitration Act 1925* as amended by *Federal Arbitration (Amendment) Act 1970* (USA) (*Federal Arbitration (Amendment) Act 1970* (USA)). See U.S.C.A. § 201 (West Supp. 1998).

which is entirely between citizens of USA is deemed not to fall under the *New York Convention* in USA, unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relations with one or more foreign states.<sup>111</sup>

In *Wilson v Lignotock USA, Inc*<sup>112</sup>, there was an employment dispute between the parties. Wilson was an American citizen. Lignotock USA, Incorporation, an American corporation maintained offices in Michigan, also was an American citizen according to section 202 of the *Federal Arbitration (Amendment) Act 1970* (USA).<sup>113</sup> Lignotock USA, Incorporation contended that the relationship between the parties was reasonably related to a European venue because the employment contract contemplated performance and enforcement abroad. Nevertheless, the United States (US) District Court for the Eastern District of Michigan disagreed with the contention of Lignotock USA, Incorporation. The court held that:

During the course of his employment, plaintiff [Wilson] made several trips to Europe for business purposes. However, these trips were not required under plaintiff's employment contract. To the contrary, the employment contract defines a single duty on the part of plaintiff to: '... build up a sales and marketing organisation for the distribution of Lignotock products and services in the metropolitan Detroit area...'

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<sup>111</sup> 9 U.S.C.A. § 202 (West Supp. 1998).

<sup>112</sup> *Wilson v Lignotock USA, Inc*, 709 F. Supp. 797 (E.D.Mich. 1989).

<sup>113</sup> 9 U.S.C. § 202 providing that: 'For the purpose of the section a corporation is a citizen of the United States if it incorporated or has its principal place of business in the United States'.

The contract clearly calls for performance within the United States. ... Plaintiff's sales market existed exclusively in the United States. Although it was plaintiff's duty to sell products manufactured abroad, all sales contracts generated by plaintiff were made in Michigan. The products sold by plaintiff were eventually installed in the United States in vehicles sold in the United States. Plaintiff's trips to Europe were incidental to the performance of plaintiff's contractual duty of selling Lignotock products to US automobile manufacturers. ... While the contract contemplates arbitration in Zurich, Switzerland, the arbitration provision of the employment contract unequivocally provides that enforcement of the arbitration award shall be pursuant to US law. ...the Court finds no reasonable relations between the commercial relationship existing between the litigants and Zurich, Switzerland, the proposed site of arbitration. Accordingly, this Court finds the employment contract is not subject to the Convention [*New York Convention*].<sup>114</sup>

In *Bergesen v Joseph Muller Corp*,<sup>115</sup> Bergesen was a Norwegian shipowner and Joseph Muller Corporation was a Swiss company. The parties entered into three charter parties. Each charter party contained an arbitration clause providing for arbitration in New York, and the Chairman of the American Arbitration Association was given authority to resolve disputes in connection with the appointment of arbitrators. A panel was selected through the offices of the American Arbitration Association to arbitrate disputes arising from two of these three charters. The panel rendered an arbitral award in New York in favor of Bergesen on 14 December 1978. Joseph Muller Corporation resisted enforcement of the arbitral award.

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<sup>114</sup> *Wilson v Lignotock USA Inc*, 709 F. Supp. 797, 799 (E.D.Mich. 1989).

<sup>115</sup> *Bergesen v Joseph Muller Corp*, 548 F. Supp. 650 (S.D.N.Y. 1982), *aff'd*, 710 F.2d 928 (2<sup>nd</sup> Cir. 1983).

Bergesen filed a petition in US District Court for the Southern District of New York to confirm the arbitral award on 10 December 1981. The Court confirmed the arbitral award and held that the *New York Convention* applied to arbitral award rendered in USA involving foreign interests.<sup>116</sup>

Joseph Muller Corporation appealed. Joseph Muller Corporation contended that the *New York Convention* did not cover enforcement of arbitral award made in the US because it was neither territorially a ‘foreign’ arbitral award nor an arbitral award ‘not considered as domestic’ within the meaning of the *New York Convention*.<sup>117</sup> US Court of Appeals for the Second Circuit affirmed the judgement of the lower Court.<sup>118</sup> The Court held that:

We adopt the view that awards ‘not considered as domestic’ denotes awards which are subject to the Convention [*New York Convention*] not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. ... Applying that purpose to this case involving two foreign entities leads to the conclusion that this award is not domestic.<sup>119</sup>

There is no provision in ROC similar to section 202 of the *Federal Arbitration (Amendment) Act 1970 (USA)*<sup>120</sup> providing that foreign arbitral awards shall have some reasonable relations with one or more foreign states

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<sup>116</sup> *Bergesen v Joseph Muller Corp*, 548 F. Supp. 650 (S.D.N.Y. 1982).

<sup>117</sup> *Bergesen v Joseph Muller Corp*, 710 F.2d 928, 930 (2<sup>nd</sup> Cir. 1983).

<sup>118</sup> *Bergesen v Joseph Muller Corp*, 710 F.2d 928, 934 (2<sup>nd</sup> Cir. 1983).

<sup>119</sup> *Bergesen v Joseph Muller Corp*, 710 F.2d 928, 932 (2<sup>nd</sup> Cir. 1983).

in the *Arbitration Act 1998* (ROC). Therefore, if a case whose facts are similar to *Wilson v Lignotock USA, Inc* occurs in ROC, the conclusion will be different from the conclusion of *Wilson v Lignotock USA, Inc*. If two citizens of ROC concluded an arbitration agreement stipulating that the arbitration site was Zurich, Switzerland, the arbitral award rendered in Zurich, Switzerland, outside the territory of ROC, would be a foreign arbitral award under article 47 paragraph 1 of the *Arbitration Act 1998* (ROC). Moreover, if a case whose facts are similar to *Bergesen v Joseph Muller Corp* happens in ROC, the conclusion would also be different from the conclusion of *Bergesen v Joseph Muller Corp*. If two foreigners concluded an arbitration agreement providing that the arbitration would be held in ROC according to the arbitration rules of a domestic arbitration institution, the arbitral award rendered by the domestic arbitration institution pursuant to its arbitration rules in ROC is not a foreign arbitral award because this arbitral award does not conform to the definition of foreign arbitral award stipulated in article 47 paragraph 1 of the *Arbitration Act 1998* (ROC).

Consequently, ROC legislation and practices in this regard had some

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<sup>120</sup> 9 U.S.C. § 202.



deficiencies in the past, but no longer.

### **3. *Arbitral Award Rendered in USA***

Article 6(4) of the *Treaty of Friendship, Commerce and Navigation between the Republic of China and the United States of America (Treaty of Friendship between ROC and USA)* states that:

In the case of any controversy susceptible of settlement by arbitration, which involves nationals, corporations or associations of both High Contracting Parties and is covered by a written agreement for arbitration, such agreement shall be accorded full faith and credit by the courts within the territories of each High Contracting Party, and the award or decision of arbitrators shall be accorded full faith and credit by the court 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>121</sup>

The President of USA terminated governmental relations between USA and ROC on 1 January 1979.<sup>122</sup> Nonetheless, the continuation in force of all treaties that were entered into by USA and ROC and were in force between them on 31 December 1978 was provided in the *Taiwan Relations Act 1979* (USA), unless and until they are terminated in accordance with law.<sup>123</sup> In addition, President William J. Clinton's Executive Order No. 13,014 of 15 August 1996 entitled 'Maintaining Unofficial Relations with the People on

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<sup>121</sup> *Treaty of Friendship, Commerce and Navigation between the Republic of China and the United States of America*, 4 November 1946, 25 UNTS 69, art 6(4) (entered into force 30 November 1948).

<sup>122</sup> *Taiwan Relations Act 1979* (USA), 22 U.S.C. § 3301(a).

<sup>123</sup> *Taiwan Relations Act 1979* (USA), 22 U.S.C. § 3303(c).

Taiwan' reaffirmed that agreements which were entered into by USA and ROC and were in force between them on 31 December 1978 shall continue in force and be performed in accordance with the *Taiwan Relations Act 1979* (USA) unless otherwise terminated or modified in accordance with law.<sup>124</sup>

Moreover, in a letter that the Ministry of Foreign Affairs of ROC sent to the Ministry of Justice of ROC on 13 April 1979, the Ministry of Foreign Affairs said that:

Including provisions relating to actions in any court, all treaties and international agreements entered into by ROC and USA and in force between them prior to terminating governmental relations between them shall continue in force. However, ... a treaty is terminated in accordance with the provision of the treaty in which the term of validity was provided unless the treaty is prolonged.<sup>125</sup>

The *Treaty of Friendship between ROC and USA* was in force on 31 December 1978.<sup>126</sup> There is no provision in which the term of validity was provided in this *Treaty*. Furthermore, this *Treaty* has not been terminated until now. Therefore, this *Treaty* is still in force at present.

Although article 141 of the *Constitution of the Republic of China* provides that 'The foreign policy of ROC shall ... respect treaties', there is no

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<sup>124</sup> Exec. Order No. 13,014, 44 F.R. 42,963, reprinted in 22 U.S.C.A. § 3301 (West Supp. 1998).

<sup>125</sup> Chiu Hung-dah (ed), *Xian Dai Guo Ji Fa Ji Ben Wen Jian* [trans: *Basic Documents to Contemporary International Law*] (5<sup>th</sup> ed, 1994) Shan Min Shu Ju Gu Fen You Xian Gong Si [trans: Shan Min Book Company Ltd, Taipei, Taiwan, ROC, 473.

<sup>126</sup> ROC, Ministry of Foreign Affairs, *Zhong Wai Tiao Yue Ji Bian Suo Yin: Xian Xing You Xiao Pien* [trans: *Index of Treaties between ROC and Foreign States: Valid at Present*] (1993), The Ministry, Taipei, Taiwan, ROC, 67.

provision providing the effect of treaties entered into by ROC and foreign States. There is no provision providing any applicable rule when treaty is in conflict with domestic law in the *Constitution of the Republic of China*, either. Nevertheless, the provisions of several acts provide that treaties shall be applied when they are in conflict with domestic law.<sup>127</sup> For example, article 1 of the *Extradition Act 1954* (ROC) states that: ‘Extradition shall be performed in accordance with treaties. If there is no treaty regulating extradition or no provision regulating particular affairs under treaty, the provisions of this *Act* shall be applied.’ There is no provision providing the effect of treaties entered into by ROC and foreign States in the *Arbitration Act 1998* (ROC). Nonetheless, the Supreme Court of ROC held that: ‘the effect of international agreement is superior to domestic law’ in a precedent.<sup>128</sup>

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<sup>127</sup> *Zheng Fu Cai Gou Fa 1998* [trans: *Government Procurement Act*] (ROC) (*Government Procurement Act 1998* (ROC)) art 17 para 1, art 43, art 44 para 1, art 105 para 1(4); *Wai Guo Fa Yuan Wei Tuo Shi Jian Xie Zhu Fa 1963* [trans: *Act of Assisting in Handling Cases Entrusted by Court of Foreign States*] (ROC) (*Act of Assisting in Handling Cases Entrusted by Court of Foreign States 1963* (ROC)) art 1; *Zhu Zuo Quan Fa 1928* as amended by *Zhu Zuo Quan Fa 1998* [trans: *Copyright Act*] (ROC) (*Copyright (Amendment) Act 1998* (ROC)) art 4; *Wai Guo Hu Zhao Qian Zheng Tiao Li 1999* as amended by *Wai Guo Hu Zhao Qian Zheng Tiao Li 2003* [trans: *Act of Foreigners Applying for Visas*] (ROC) (*(Amendment) Act of Foreigners Applying for Visas 2003* (ROC)) arts 2, 14; *Jun Shi Zheng Yong Fa 1937* [trans: *Military Appropriation Act*] (ROC) (*Military Appropriation Act 1937* (ROC)) art 11 para 2, art 14(3); *Fang Kong Fa 1937* as amended by *Fang Kong Fa 1948* [trans: *Antiaircraft Act*] (ROC) (*Antiaircraft Act 1948* (ROC)) art 3 para 2; *Guan Li Wai Hui Tiao Li 1949* as amended by *Guan Li Wai Hui Tiao Li 1986* [trans: *Regulating Foreign Currencies Act*] (ROC) (*Regulating Foreign Currencies (Amendment) Act 1986* (ROC)) art 4(1); *Yin Du Fa 1954* [trans: *Extradition Act*] (ROC) (*Extradition Act 1954* (ROC)) art 1; *Min Yong Hang Kong Fa 1953* as amended by *Min Yong Hang Kong Fa 2001* [trans: *Civil Aviation Act*] (ROC) (*Civil Aviation (Amendment) Act 2001* (ROC)) art 78 para 1.

<sup>128</sup> Criminal Judgement of the Supreme Court, 1934 Shang Zi Di 1074 Hao Xing Shi Pan Jue (ROC). See ROC, the Supreme Court, *Zui Gao Fa Yuan Pan Li Yao Zhi: 1927-1994* [trans: *Brief*

Therefore, if there is any special provision relating to arbitration in the *Treaty of Friendship between ROC and USA*, it is superior to the provisions of the *Arbitration Act 1998* (ROC).

In *Waterman Steamship Corporation v Gan Hua Enterprise Company*

*Ltd, et al*, the Kaohsiung District Court (ROC)<sup>129</sup> ruled that:

The arbitral award rendered in the territory of USA is deemed a domestic arbitral award in accordance with article 6 of the *Treaty of Friendship between ROC and USA*.<sup>130</sup>

In *Wathne Ltd v Li Wei Enterprise Co Ltd*, the Taipei District Court (ROC) also regarded the arbitral award rendered in New York, USA, as a domestic arbitral award due to the *Treaty of Friendship between ROC and USA*.<sup>131</sup>

A practitioner also said that:

An arbitral award rendered in the territory of USA is a domestic arbitral award practically. It does not need to apply for recognition and enforcement in accordance with the provisions relating to foreign arbitral award.<sup>132</sup>

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*of the Supreme Court's Precedent: 1927-1994*] (1997) vol 2, The Court, Taipei, Taiwan, ROC, 673. The cited source did not give the names of the parties. The names of the parties also cannot be discovered from any source. Thus, it is impossible to give this case a title.

<sup>129</sup> Taiwan Kaohsiung Di Feng Fa Yuan [trans: Kaohsiung District Court] (ROC) (Kaohsiung District Court (ROC)).

<sup>130</sup> Decision of 23 December 1982 (*Waterman Steamship Corporation v Gan Hua Enterprise Company Ltd, et al*), Kaohsiung District Court, 1982 Zhong Zi Di 1 Hao Fei Song Shi Jian Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 212-13.

<sup>131</sup> Decision of 30 June 1987 (*Wathne Ltd v Li Wei Enterprise Co Ltd*), Taipei District Court, 1986 Zhong Zi Di 8 Hao Min Shi Cai Ding (ROC). However, this decision was reversed by Decision of 30 November 1987 (*Wathne Ltd v Li Wei Enterprise Co Ltd*), Taiwan High Court, 1987 Kang Zi Di 1546 Hao Min Shi Cai Ding (ROC) and Decision of 8 April 1988 (*Wathne Ltd v Li Wei Enterprise Co Ltd*), The Supreme Court, 1988 Tai Kang Zi Di 130 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 286-96.

<sup>132</sup> Wu Su-hwa, 'Wai Guo Zhong Cai Pan Duan Cai Wo Guo Zhi Cheng Ren Yu Zhi Xing' (1983) 8

However, article 6(4) of the *Treaty of Friendship between ROC and USA* only provides that: ‘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’. It neither stipulates that: ‘the award of the arbitrators shall be accorded full faith and credit by the courts within the territories of each High Contracting Party’, nor states that: ‘the award of the arbitrators shall be accorded full faith and credit by the courts within the territories of the other High Contracting Party’. In addition, there is no provision stipulating that an arbitral award rendered in the territory of the High Contracting Party is regarded as a domestic arbitral award within the territory of the other High Contracting Party in this *Treaty*. Consequently, whether an arbitral award rendered in the territory of USA is a domestic arbitral award or a foreign arbitral award solely depends upon the *Arbitration Act 1998* (ROC). An arbitral award rendered in the territory of USA is an arbitral award rendered outside the territory of ROC. It is a foreign arbitral award according to article 47 paragraph 1 of the *Arbitration Act 1998* (ROC) undoubtedly.

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*Wan Kuo Fa Lu* 17 [trans: ‘Recognition and Enforcement of Foreign Arbitral Award in ROC’ in *Formosa Transnational Law Review*].

Most decisions of courts of ROC ruled that arbitral awards rendered in USA were foreign arbitral awards. For instance, in *North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*, both the Taiwan High Court (ROC) and the Supreme Court of ROC said that the arbitral award rendered in New York, USA, was a foreign arbitral award.<sup>133</sup> In *Good Planning & Trading Corp v Hui Qing Industrial Corp Ltd*, the Taipei District Court (ROC), the Taiwan High Court (ROC), and the Supreme Court of ROC all ruled that the arbitral award rendered in New York, USA, was a foreign arbitral award are also good illustrations.<sup>134</sup> Although these cases were made under the *Commercial Arbitration (Amendment) Act 1982* (ROC), they are still precedents since the definition of foreign arbitral awards under the *Commercial Arbitration (Amendment) Act 1982* (ROC) is included in

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<sup>133</sup> Decision of 28 December 1983 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), Taiwan High Court, 1983 Kang Zi Di 2252 Hao Min Shi Cai Ding (ROC); Decision of 18 May 1984 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), The Supreme Court, 1984 Tai Kang Zi Di 234 Hao Min Shi Cai Ding (ROC); Decision of 25 February 1984 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), Taiwan High Court, 1984 Kang Geng Yi Zi Di 26 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 229-46.

<sup>134</sup> Decision of 15 November 1983 (*Good Planning & Trading Corp v Hui Qing Industrial Corp Ltd*), Taipei District Court, 1983 Zhong Zi Di 3 Hao Min Shi Cai Ding (ROC); Decision of 27 December 1983 (*Good Planning & Trading Corp v Hui Qing Industrial Corp Ltd*), Taiwan High Court, 1983 Kang Zi Di 2924 Hao Min Shi Cai Ding (ROC); Decision of 28 June 1984 (*Good Planning & Trading Corp v Hui Qing Industrial Corp Ltd*), Taipei District Court, 1983 Zhong Geng Zi Di 11 Hao Min Shi Cai Ding (ROC); Decision of 7 August 1984 (*Good Planning & Trading Corp v Hui Qing Industrial Corp Ltd*), Taiwan High Court, 1984 Kang Zi Di 1798 Hao Min Shi Cai Ding (ROC); Decision of 12 September 1984 (*Good Planning & Trading Corp v Hui Qing Industrial Corp Ltd*), Taiwan High Court, 1984 Kang Zi Di 1798 Hao Min Shi Cai Ding (ROC); Decision of 26 October 1984 (*Good Planning & Trading Corp v Hui Qing Industrial Corp Ltd*), The Supreme Court, 1984 Tai Kang Zi Di 509 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih

*Arbitration Act 1998 (ROC)*. Moreover, in *Spelling Films International Inc v Archer Film Co Ltd*, the Taipei District Court and the Taiwan High Court both ruled that an arbitral award rendered in Los Angeles, California, USA is a foreign arbitral award under *Arbitration Act 1998 (ROC)*.<sup>135</sup>

Since the *Treaty of Friendship between ROC and USA* does not stipulate that an arbitral award rendered in the territory of one contracting party is regarded as a domestic arbitral award within the territory of the other contracting party, that an arbitral award rendered in USA is a foreign arbitral award under the *Arbitration Act 1998 (ROC)* is not inconsistent with the reciprocity principle stated in article 141 of the *Constitution of the Republic of China*.<sup>136</sup> In addition, there is no ROC arbitral award recognized or enforced in USA in accordance with the *Treaty of Friendship between ROC and USA* until now.<sup>137</sup> Thus, the practices of ROC courts also are not inconsistent with the reciprocity principle stated in article 141 of the *Constitution of the*

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(ed), *International Commercial Arbitration* vol 2, above n 61, 248-64.

<sup>135</sup> Decision of 21 October 1999 (*Spelling Films International Inc v Archer Film Co Ltd*), Taipei District Court, 1998 Zhong Sheng Zi Di 14 Hao Min Shi Cai Ding (ROC); Decision of 17 March 2000 (*Spelling Films International Inc v Archer Film Co Ltd*), Taiwan High Court (ROC), 1999 Kang Zi Di 4026 Hao Min Shi Cai Ding. <<http://www.judicial.gov.tw>> at 6 April 2003 (Copy on file with author). Also see Taiwan Gao Deng Fa Yuan, *Taiwan Gao Deng Fa Yuan Min Shi Cai Pan Shu Hui Bian: 2000* [trans: *Collection of Civil Judgements and Orders of Taiwan High Court: 2000*] (2000) vol 1, 756-61.

<sup>136</sup> *Constitution of the Republic of China* art 141 states that 'The foreign policy of ROC shall ... on the basis of the principles of equality and reciprocity....'

<sup>137</sup> <http://international.westlaw.com/signon/default.wl> visited 11 March 2004.

*Republic of China.*

#### **4. Arbitral Award Rendered in PRC**

Both Taiwan and Mainland China are part of the territory of ROC under the *Constitution of the Republic of China*<sup>138</sup> and the *Additional (Amendment) Articles 2000 of the Constitution of the Republic of China*.<sup>139</sup> Thus, an arbitral award rendered in Mainland China is not rendered outside the territory of ROC. It is not the first sort of foreign arbitral award under article 47 paragraph 1 of the *Arbitration Act 1998 (ROC)* which is rendered outside the territory of ROC.

Nevertheless, an arbitral award rendered in Mainland China was neither a foreign arbitral award nor a domestic arbitral award under the *PRC Relations (Amendment) Act 1997 (ROC)*<sup>140</sup> no matter what laws govern it.<sup>141</sup>

#### **5. Arbitral Award Rendered in Hong Kong or Macao**

Hong Kong and Macao are now part of the territory of PRC.

Theoretically, an arbitral award rendered in Hong Kong or Macao has the

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<sup>138</sup> *Constitution of the Republic of China* art 4.

<sup>139</sup> *Additional Articles 1991 of the Constitution of the Republic of China* as amended by *Additional (Amendment) Articles 2000 of the Constitution of the Republic of China (Additional (Amendment) Articles 2000 of the Constitution of the Republic of China)* preamble, art 1 para 2(2), art 4 para 5.

<sup>140</sup> *Taiwan Di Qu Yu Da Lu Di Qu Ren Min Guan Xi Tiao Li 1992* as amended by *Taiwan Di Qu Yu Da Lu Di Qu Ren Min Guan Xi Tiao Li 1997* [trans: *The Relationship between People of Taiwan Region and People of Mainland China Region Act*] (ROC) (*PRC Relations (Amendment) Act 1997 (ROC)*) art 74.

<sup>141</sup> See below Part A. It discusses thoroughly there.



same effect as an arbitral award rendered in Mainland China.

PRC adopted the principle of ‘one country, two systems’. The socialist system and policies that are applied in Mainland China are not practised in Hong Kong SAR<sup>142</sup> and Macao SAR.<sup>143</sup> Consequently, an arbitral award rendered in Hong Kong or Macao is neither a domestic arbitral award nor a foreign arbitral award under the *Hong Kong and Macao Relations Act 1997* (ROC). Under the *Hong Kong and Macao Relations Act 1997* (ROC),<sup>144</sup> arbitral awards rendered in Hong Kong and Macao are deemed foreign arbitral awards.<sup>145</sup>

## ***B. Jurisdiction and Formalities***

### ***1. Jurisdiction***

In order to apply for recognition of a foreign arbitral award in ROC, a petition must be submitted to the competent court.<sup>146</sup> Since this kind of matter is a non-litigious matter, the petition is submitted to the district court.<sup>147</sup> There is no provision regulating the jurisdiction for this kind of

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<sup>142</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) preamble.

<sup>143</sup> *Basic Law of the Macao SAR of PRC 1993* (PRC) preamble.

<sup>144</sup> *Hong Kong and Macao Relations Act 1997* (ROC) art 42 para 2.

<sup>145</sup> See below Part A. It discusses thoroughly there.

<sup>146</sup> *Arbitration Act 1998* (ROC) art 48 para 1.

<sup>147</sup> *Court Organisation (Amendment) Act 1989* (ROC) art 9(3) stipulates that: ‘Non-litigious case provided by Acts shall be handled by district courts.’

application in the *Arbitration Act 1998* (ROC). However, article 52 of the

*Arbitration Act 1998* (ROC) provides that:

The court in dealing with procedures of arbitration matters shall apply the provisions of *Non-litigious Matters Act* (ROC).<sup>148</sup> In addition to this *Act*, in the absence of any relevant provisions therein, it shall apply *mutatis mutandis* the provisions of *Civil Procedure Act* (ROC).<sup>149</sup>

There is no provision stipulating the jurisdiction for this kind of application in the *Non-litigious Matters (Amendment) Act 1999* (ROC),<sup>150</sup> either. Thus, the provisions stipulating the jurisdiction of civil litigation under the *Civil Procedure (Amendment) Act 1968* (ROC)<sup>151</sup> and the *Civil Procedure (Amendment) Act 2003* (ROC)<sup>152</sup> apply *mutatis mutandis*.

Nonetheless, if the petition is submitted to a court which is not competent, the court must, upon application of the petitioner or *ex officio*, transfer this petition to the competent court according to the *Arbitration Act 1998* (ROC)<sup>153</sup> and the *Civil Procedure (Amendment) Act 2003* (ROC).<sup>154</sup>

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<sup>148</sup> *Fei Song Shi Jian Fa* [trans: *Non-litigious Matters Act*] (ROC) (*Non-litigious Matters Act* (ROC)).

<sup>149</sup> *Min Shi Su Song Fa* [trans: *Civil Procedure Act*] (ROC) (*Civil Procedure Act* (ROC)).

<sup>150</sup> *Fei Song Shi Jian Fa 1964* as amended by *Fei Song Shi Jian Fa 1999* [trans: *Non-litigious Matters Act*] (ROC) (*Non-litigious Matters (Amendment) Act 1999* (ROC)).

<sup>151</sup> *Min Shi Su Song Fa 1930* as amended by *Min Shi Su Song Fa 1968* [trans: *Civil Procedure Act*] (ROC) (*Civil Procedure (Amendment) Act 1968* (ROC)) arts 3-17, 19-22, 24-7, 29-31.

<sup>152</sup> *Min Shi Su Song Fa 1930* as amended by *Min Shi Su Song Fa 2003* [trans: *Civil Procedure Act*] (ROC) (*Civil Procedure (Amendment) Act 2003* (ROC)) arts 1,2, 18, 23, 28.

<sup>153</sup> *Arbitration Act 1998* (ROC) art 52.

<sup>154</sup> *Civil Procedure (Amendment) Act 2003* (ROC) art 28 para 1

## **2. Formalities**

### **(a) Prescribed Formalities**

There is no provision setting out the information required in an application for granting an order of recognition of a foreign arbitral award, and that must be included in a petition under the *Arbitration Act 1998* (ROC). Consequently, this is regulated by the *Non-litigious Matters (Amendment) Act 1972* (ROC)<sup>155</sup>. The information required includes:

- (1) The full name, sex, age, occupation, and place of domicile or place of residence of the petitioner; in case the petitioner is an artificial person or other kind of entity, its name and the place of its office or the place of its business establishment.
- (2) If there is any representative of the petitioner, the full name, sex, age, occupation, and place of domicile or place of residence.
- (3) Allegations of the petition, the reason thereof, and the fact thereof.
- (4) The evidence to be used as proof or explanation.
- (5) The annexed documents and the number thereof.
- (6) The court to which the petitioner applies.

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<sup>155</sup> *Fei Song Shi Jian Fa 1964* as amended by *Fei Song Shi Jian Fa 1972* [trans: *Non-litigious Matters Act*] (ROC) (*Non-litigious Matters (Amendment) Act 1972* (ROC)) art 14.

(7) The date when the petition is made.<sup>156</sup>

The petition must be written in Chinese. However, foreign language must be noted when it is needed for reference.<sup>157</sup> In addition, the petitioner or his representative must sign his name on the petition. If the petitioner is unable to sign, he may request another person to write his name and impress his seal or fingerprint on the petition.<sup>158</sup> Moreover, copies of the petition must be made corresponding to the number of the respondents and submitted to the court. The court must deliver those copies to the respondents.<sup>159</sup>

The following documents must accompany the petition:

- (1) The original arbitral award or an authenticated copy thereof.
- (2) The original arbitration agreement or an authenticated copy thereof.
- (3) The full text of the foreign arbitration law, the full text of the arbitration rules of foreign arbitration institution, or the full text of the arbitration rules of international organisation that was applied to the foreign arbitral award.<sup>160</sup>

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<sup>156</sup> *Non-litigious Matters (Amendment) Act 1972* (ROC) art 14 para 1.

<sup>157</sup> *Court Organisation (Amendment) Act 1989* (ROC) art 99 provides that: 'The document used in litigation shall be written in Chinese. However, dialect or foreign language shall be noted when it is needed for reference.' Although a petition submitted by a petitioner to apply for recognition of a foreign arbitral award is not a document used in litigation, *Court Organisation (Amendment) Act 1989* (ROC) art 99 shall apply *mutatis mutandis*.

<sup>158</sup> *Non-litigious Matters (Amendment) Act 1972* (ROC) art 14 para 2.

<sup>159</sup> *Arbitration Act 1998* (ROC) art 48 para 4.

<sup>160</sup> *Arbitration Act 1998* (ROC) art 48 para 1

If these documents are in a foreign language, a Chinese translation must be submitted.<sup>161</sup>

An authenticated copy means a copy authenticated by an embassy, a consulate, a representative office, a mission, or a liaison office of ROC or another authorised organisation.<sup>162</sup> Authentication must be done in accordance with *Rule of Notary Affairs Handled by Consular Officials of ROC 2001* (ROC).<sup>163</sup> Authentication of a foreign arbitral award or arbitration agreement must be done by the consular officials of an embassy, a consulate, a representative office, a mission, or a liaison office of ROC or another authorised organisation that has jurisdiction of consular affairs over the region in which the document was made.<sup>164</sup> The jurisdiction regions of consular affairs of embassies, consulates, representative offices, missions, liaison offices and other authorised organisations were stipulated by the Ministry of Foreign Affairs of ROC.<sup>165</sup> Nonetheless, if a foreign arbitral award or an arbitration agreement is made in the neighboring jurisdiction

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<sup>161</sup> *Arbitration Act 1998* (ROC) art 48 para 2.

<sup>162</sup> *Arbitration Act 1998* (ROC) art 48 para 3.

<sup>163</sup> *Zhu Wai Ling Wu Ren Yuan Ban Li Gong Zheng Shi Wu Ban Fa 2001* [trans: *Rule of Notary Affairs Handled by Consular Officials of the Republic of China*] (ROC) (*Rule of Notary Affairs Handled by Consular Officials of ROC 2001* (ROC)).

<sup>164</sup> *Rule of Notary Affairs Handled by Consular Officials of ROC 2001* (ROC) art 2 para 1, art 3 para 1, and art 4 para 1(3).

<sup>165</sup> *Rule of Notary Affairs Handled by Consular Officials of ROC 2001* (ROC) art 3 para 1.

region of consular affairs, but which is in the same country, the consular officials of an embassy, a consulate, a representative office, a mission, or a liaison office of ROC or another authorised organisation may also authenticate the foreign arbitral award or arbitration agreement if there is no difficulty in examining it.<sup>166</sup>

To enhance e-commerce, ROC enacted and promulgated the *Electronic Signatures Act 2001* (ROC)<sup>167</sup> on 14 November 2001.<sup>168</sup> It took effect from 1 April 2002.<sup>169</sup> If it is required by law or regulation to submit an original document and this document was made in an electronic format which can show the whole text and can be downloaded for examination, this original document can be substituted by the electronic format, unless it is necessary to check the truth of the document or it is stipulated otherwise by law or regulation.<sup>170</sup> Since *Arbitration Act 1998* (ROC) does not stipulate otherwise, an original foreign arbitral award and an original arbitration agreement can be substituted by electronic format which was made originally

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<sup>166</sup> *Rule of Notary Affairs Handled by Consular Officials of ROC 2001* (ROC) art 4 para 2.

<sup>167</sup> *Tian Zi Qian Zhang Fa 2001* [trans; *Electronic Signatures Act*] (ROC) (*Electronic Signatures Act 2001* (ROC)) art 1 para 1.

<sup>168</sup> *Presidential Office Gazette* 6428 (2001).

<sup>169</sup> *Electronic Signatures Act 2001* (ROC) art 17, *Standard Act of Central Governmental Acts and Regulations 1970* (ROC) art 14, Executive Order No 0910080314 of the Executive Yuan of ROC on 16 January 2002.

<sup>170</sup> *Electronic Signatures Act 2001* (ROC) art 5 para 1.

and can show the whole text as well as can be downloaded for examination.

A foreign lawyer<sup>171</sup> obtaining permission from the Ministry of Justice of ROC and acceding to the bar association of the place where he set up his ROC office can practice legal affairs of the country or region where he got the qualification of a lawyer or international law adopted by the country or region where he got the qualification of a lawyer in ROC. But he cannot practice other kind of legal affairs in ROC.<sup>172</sup> Thus, a foreign lawyer cannot be a lawyer representing an applicant to apply for recognition or enforcement of a foreign arbitral award in ROC. Nonetheless, a foreign lawyer who is a ROC citizen can be a common representative representing an applicant to apply for recognition or enforcement of a foreign arbitral award in ROC even though the ROC Courts may prohibit him from acting as a common representative.<sup>173</sup>

***(b) Consequences of Failure to Comply with Formalities***

If the petition does not comply with the required formalities, the presiding judge must order the petitioner to make up the deficiencies within a

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<sup>171</sup> A foreign lawyer means a person gets qualification of a lawyer in a country or region other than ROC no matter what the nationality he has. See *Lu Shi Fa 1941* as amended by *Lu Shi Fa 1998* [trans: *Lawyer Act*] (ROC) (*Lawyer (Amendment) Act 1998* (ROC)) art 47bis.

<sup>172</sup> *Lawyer (Amendment) Act 1998* (ROC) art 47-2, art 47-7 para 1.

<sup>173</sup> *Arbitration Act 1998* (ROC) art 52; *Non-litigious Matters (Amendment) Act 1972* (ROC) art 7; *Civil Procedure (Amendment) Act 1968* (ROC) art 68 para 1.

fixed period.<sup>174</sup> And if the petitioner does not make up the deficiencies within the fixed period, the court must dismiss the petition.<sup>175</sup>

The petitioner must pre-pay the cost of proceedings.<sup>176</sup> If the petitioner does not pre-pay costs, the court may order the petitioner to pre-pay within a fixed period. And if the petitioner does not pre-pay costs within the fixed period, the court may dismiss the petition.<sup>177</sup>

In *Good Planning & Trading Corp v Hui Qing Industrial Corp Ltd*, Good Planning & Trading Corporation applied to the Taipei District Court (ROC) to recognize a foreign arbitral award in its favor.<sup>178</sup> The Court recognized the foreign arbitral award.<sup>179</sup> However, the Taiwan High Court (ROC) reversed the decision of the lower Court and remanded the application to it.<sup>180</sup> The Taiwan High Court (ROC) held that:

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<sup>174</sup> *Arbitration Act 1998* (ROC) art 52 and *Civil Procedure (Amendment) Act 1968* (ROC) art 121 para 1.

<sup>175</sup> *Arbitration Act 1998* (ROC) art 52 and *Civil Procedure (Amendment) Act 2003* (ROC) art 249 para 1(6).

<sup>176</sup> *Arbitration Act 1998* (ROC) art 52 and *Non-litigious Matters (Amendment) Act 1972* (ROC) art 102 para 1.

<sup>177</sup> *Arbitration Act 1998* (ROC) art 52 and *Non-litigious Matters (Amendment) Act 1972* (ROC) art 110 para 1.

<sup>178</sup> The head office of Hui Qing Industrial Corp Ltd was located in Taipei City that was part of the jurisdictional area of Taipei District Court. According to *Commercial Arbitration (Amendment) Act 1982* (ROC) art 35 whose provision is the same as *Arbitration Act 1998* (ROC) art 52 and *Civil Procedure (Amendment) Act 1968* (ROC) art 2 para 2, Taipei District Court was the venue of this case.

<sup>179</sup> Decision of 15 November 1983 (*Good Planning & Trading Corp v Hui Qing Industrial Corp Ltd*), Taipei District Court, 1983 Zhong Zi Di 3 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 248-9.

<sup>180</sup> Decision of 27 December 1983 (*Good Planning & Trading Corp v Hui Qing Industrial Corp Ltd*), Taiwan High Court, 1983 Kang Zi Di 2924 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih



Applying for recognition of foreign arbitral award in ROC, a petition shall be submitted to court. Moreover, copies of the petition shall be made corresponding to the number of the respondents and submitted to the court that must deliver those copies to the respondents. ... The petitioner did not submit copy of the petition that should be delivered to the respondent by the court. ... Therefore, the decision of the Taipei District Court (ROC) must be reversed and the application must be remanded to the Taipei District Court (ROC).<sup>181</sup>

*In All American Cotton Co Ltd v Jian Rong Textile Corp Ltd, All*

American Cotton Company Limited applied to the Changhua District Court (ROC)<sup>182</sup> to recognize a foreign arbitral award in its favor.<sup>183</sup> The Court recognized the foreign arbitral award.<sup>184</sup>

Jian Rong Textile Corporation Limited appealed to the Taichung Branch of the Taiwan High Court (ROC).<sup>185</sup> The Court reversed the decision of the lower Court and remanded the application to the lower Court.<sup>186</sup> It ruled that:

Applying for recognition of a foreign arbitral award, the petitioner must submit a

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(ed), *International Commercial Arbitration* vol 2, above n 61, 250-1.

<sup>181</sup> Ibid.

<sup>182</sup> Taiwan Changhua Di Fang Fa Yuan [trans: Changhua District Court] (ROC) (Changhua District Court (ROC)).

<sup>183</sup> The head office of Chien Jung Textile Corporation Ltd was located in Changhua County that was the jurisdictional area of Changhua District Court (ROC). According to *Commercial Arbitration (Amendment) Act 1982* (ROC) art 35 whose provision is the same as *Arbitration Act 1998* (ROC) art 52 and *Civil Procedure (Amendment) Act 1968* (ROC) art 2 para 2, Changhua District Court (ROC) was the venue of this case.

<sup>184</sup> Decision of 22 November 1985 (*All American Cotton Co Ltd v Jian Rong Textile Corp Ltd*), Changhua District Court, 1985 Sheng Zi Di 321 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 312-14.

<sup>185</sup> Taiwan Gao Deng Fa Yuan Taichung Fen Yuan [trans: Taichung Branch of Taiwan High Court] (ROC) (Taichung Branch of Taiwan High Court (ROC)).

<sup>186</sup> Decision of 4 August 1987 (*All American Cotton Co Ltd v Jian Rong Textile Corp Ltd*), Taichung Branch of Taiwan High Court, 1987 Guo Mao Kang Gen Er Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 330-1.

petition to the court. In addition, copies of the petition corresponding to the number of the respondents must be made and submitted to the court that must deliver those copies to the respondents pursuant to article 31 paragraph 3 of the *Commercial Arbitration (Amendment) Act 1982* (ROC).<sup>187</sup> Although the petitioner submitted copy of the petition, there is no file showing the appellant received this copy. It let the appellant have no opportunity to plead in the original instance. Furthermore, the court of the original instance did not give the appellant any opportunity to present at court and plead. The proceedings of the original instance are materially erroneous. For the purpose of protecting the grade interest of the appellant and maintaining the grade system of the courts, the decision of the court of the original instance must be reversed and remanded to the court of the original instance.<sup>188</sup>

This decision was affirmed by the Supreme Court of ROC.<sup>189</sup>

To the same effect, in *Hung Song International Corp Ltd v Pro-Abit Co*,

*B V*, the Taiwan High Court also concluded that:

Applying for recognition of a foreign arbitral award, the petitioner must submit a petition to the court. Moreover, copies of the petition corresponding to the number of the respondents must be made and submitted to the court that must deliver those copies to the respondents pursuant to article 31 paragraph 3 of the *Commercial Arbitration (Amendment) Act 1982* (ROC).<sup>190</sup> Although the petitioner submitted copy of the petition, there is no certificate of service showing the appellant received this copy. The court of the original instance did not deliver the copy of the petition apparently. It let the appellant have no opportunity to plead in the original instance. In addition, the court of the original instance did not give the appellant any opportunity to present at

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<sup>187</sup> The provision requiring the petitioner to submit copies of the petition corresponding to the number of respondents to the court that shall deliver those copies to the respondents was stipulated in *Commercial Arbitration (Amendment) Act 1982* (ROC) art 31 para 4. This decision said it was provided in *Commercial Arbitration (Amendment) Act 1982* (ROC) art 31 para 3 was not correct.

<sup>188</sup> Decision of 4 August 1987 (*All American Cotton Co Ltd v Jian Rong Textile Corp Ltd*), Taichung Branch of Taiwan High Court, 1987 Guo Mao Kang Gen Er Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 330-1.

<sup>189</sup> Decision of 15 October 1987 (*All American Cotton Co Ltd v Jian Rong Textile Corp Ltd*), the Supreme Court, 1987 Tai Kang Zi Di 388 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 331-3.

<sup>190</sup> The provision requiring the petitioner to submit copies of the petition corresponding to the number of respondents to the court that shall deliver those copies to the respondents was stipulated in *Commercial Arbitration (Amendment) Act 1982* (ROC) art 31 para 4. This decision said it was provided in *Commercial Arbitration (Amendment) Act 1982* (ROC) art 31 para 3 was not correct.

court and plead. The proceedings of the original instance are materially erroneous. For the purpose of protecting the grade interest of the appellant and maintaining the grade system of the courts, the decision of the court of the original instance must be reversed and remanded to the court of the original instance.<sup>191</sup>

However, in *Waterfaith Shipping Ltd v Nan Ho Steel Enterprise Corp Ltd*,

Waterfaith Shipping Limited applied to the Kaohsiung District Court (ROC)

to recognize a foreign arbitral award in its favor.<sup>192</sup> The Court recognized

the foreign arbitral award.<sup>193</sup>

Nan Ho Steel Enterprise Corporation Limited appealed to the Tainan

Branch of the Taiwan High Court (ROC).<sup>194</sup> It contended that:

The court of the original instance did not conform to article 31 paragraph 4 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) that requires the court to deliver the copy of the petition to the respondent. Thus, the decision of the court of the original instance was against the law.<sup>195</sup>

Nonetheless, the Tainan Branch of the Taiwan High Court (ROC) held

that:

The object of article 31 paragraph 4 of the *Commercial Arbitration (Amendment) Act*

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<sup>191</sup> Decision of 14 April 1997 (*Hung Song International Corp Ltd v Pro-Abit Co, B V*), Taiwan High Court, 1997 Kang Zi Di 609 Hao Min Shi Cai Ding (ROC). This case was found from the website of the Judicial Yuan of ROC <<http://www.judicial.gov.tw>> (Copy on file with author).

<sup>192</sup> The head office of Nan Ho Steel Enterprise Corp Ltd was located in Kaohsiung City that was part of the jurisdictional area of Kaohsiung District Court (ROC). According to *Commercial Arbitration (Amendment) Act 1982* (ROC) art 35 whose provision is the same as *Arbitration Act 1998* (ROC) art 52 and *Civil Procedure (Amendment) Act 1968* (ROC) art 2 para 2, Kaohsiung District Court (ROC) was the venue of this case.

<sup>193</sup> Decision of 26 February 1988 (*Waterfaith Shipping Ltd v Nan Ho Steel Enterprise Corp Ltd*), Kaohsiung District Court, 1987 Sheng Zi Di 916 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 376-8.

<sup>194</sup> Taiwan Gao Deng Fa Yuan Tainan Fen Yuan [trans: Tainan Branch of Taiwan High Court] (ROC) (Tainan Branch of Taiwan High Court (ROC)).

<sup>195</sup> Decision of 31 August 1988 (*Waterfaith Shipping Ltd v Nan Ho Steel Enterprise Corp Ltd*), Tainan Branch of Taiwan High Court, 1988 Kang Zi Di 289 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 379-84.

1982 (ROC) providing that copies of the petition must be made corresponding to the number of the respondents and submitted to the court that must deliver those copies to the respondents is to let the respondents know the petition and have an opportunity to plead. Although the court of the original instance did not deliver the copy of the petition to the appellant, it fixed a date ... and informed the appellant to present at the court to know the petition. In addition, the appellant applied to the court of the original instance for examination of the case file and exhibits. The appellant knew the content of the petition. Moreover, the appellant appealed. Consequently, even though the court of the original instance did not deliver the petition to the appellant, its decision is not against the law.<sup>196</sup>

These decisions mentioned above were made under the *Commercial Arbitration (Amendment) Act 1982* (ROC) requiring the petitioner to submit copies of the petition corresponding to the number of respondents to the court and requiring the court to deliver these copies to the respondents.<sup>197</sup> These provisions under the *Commercial Arbitration (Amendment) Act 1982* (ROC) are the same as the provisions under the *Arbitration Act 1998* (ROC).<sup>198</sup>

Consequently, these decisions discussed above are still precedents.

In *NV 'SCA' SA v Hsin Tai Textile Corp Ltd*, the Taiwan High Court held that:

Applying for recognizing a foreign arbitral award, the petitioner must submit a petition and the original arbitration agreement or an authenticated copy of the arbitration agreement in accordance with article 31 paragraph 1 sub-paragraph 2 of the *Commercial Arbitration (Amendment) Act 1982* (ROC). The petitioner only submitted

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<sup>196</sup> Decision of 31 August 1988 (*Waterfaith Shipping Ltd v Nan Ho Steel Enterprise Corp Ltd*), Tainan Branch of Taiwan High Court, 1988 Kang Zi Di 289 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 379-84.

<sup>197</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 31 para 4.

<sup>198</sup> *Arbitration Act 1998* (ROC) art 48 para 4.

the copy of the arbitration agreement and did not submit the original arbitration agreement or an authenticated copy. The application does not conform to the formalities. The court must order the petitioner to make up the deficiency.<sup>199</sup>

This decision was made under the *Commercial Arbitration (Amendment) Act 1982* (ROC) requiring the petitioner to submit the original arbitration agreement or an authenticated copy of the arbitration agreement to the court.<sup>200</sup> The *Arbitration Act 1998* (ROC) is in the same terms.<sup>201</sup>

Therefore, this decision is still a precedent.

In the 1993 Zhong Bei Zi Di 19 Hao decision, the Taipei District Court (ROC) held that:

Applying for recognizing a foreign arbitral award, the petitioner must submit a petition and the original arbitral award or an authenticated copy that was authenticated by an embassy, a consulate, or another kind of representative office of ROC located abroad in accordance with article 31 paragraph 1 sub-paragraph 1 and paragraph 3 of the *Commercial Arbitration (Amendment) Act 1982* (ROC). ... The petitioner submitted authenticated copy of interim final award and authenticated copy of correction to interim final award. ... The arbitration site was London, United Kingdom. However, the authenticated copy of interim final award and the authenticated copy of correction to interim final award were authenticated by the representative office of ROC located in Hong Kong. On 15 December 1993, this court notified the petitioner to submit the authenticated copies that were authenticated by the embassy, consulate, or other sort of representative office of ROC located in London, the arbitration site, within ten days. The petitioner received the notification on 18 December 1993. The petitioner has not yet made up the deficiency until now. This application does not comply with the formalities. It must be overruled.<sup>202</sup>

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<sup>199</sup> Decision of 15 July 1986 (*NV 'SCA' SA v Hsin Tai Textile Corp Ltd*), Taiwan High Court, 1986 Kang Zi Di 157 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 356-7.

<sup>200</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 31 para 1(2).

<sup>201</sup> *Arbitration Act 1998* (ROC) art 48 para 1(2).

<sup>202</sup> Decision of 27 January 1994, Taipei District Court, 1993 Zhong Bei Zi Di 19 Hao Min Shi Cai

This decision was made under *Commercial Arbitration (Amendment) Act 1982* (ROC) requiring the petitioner to submit a petition and the original arbitral award or an authenticated copy that was authenticated by an embassy, a consulate, or another kind of representative office of ROC located abroad to the court.<sup>203</sup> The *Arbitration Act 1998* (ROC) is almost in the same terms.<sup>204</sup>

In addition, an authenticated copy of an arbitral award must be authenticated by the consular officials of an embassy, a consulate, a representative office, a mission, or a liaison office of ROC or another authorised organisation that has jurisdiction of consular affairs over the region at that time according to *Rule of Embassies, Consulates and Offices of ROC Located Abroad Certifying Documents 1991* (ROC)<sup>205</sup>. This *Rule* was superseded by *Rule of Notary Affairs Handled by Consular Officials of ROC 2001* (ROC) on 23 April 2001, but provisions regarding authentication of a foreign arbitral award are almost the same.<sup>206</sup> Therefore, this decision mentioned above is still a precedent.

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Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1113-14. The cited source did not give the names of the parties. The names of the parties also cannot be discovered from any source. Thus, it is impossible to give this case a title.

<sup>203</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 31 paras 1(1), 3.

<sup>204</sup> The provision of *Commercial Arbitration (Amendment) Act 1982* (ROC) art 31 para 1(1) is the same as the provision of *Arbitration Act 1998* (ROC) art 48 para 1(1) and the provision of *Commercial Arbitration (Amendment) Act 1982* (ROC) art 31 para 3 is almost the same as the provision of *Arbitration Act 1998* (ROC) art 48 para 3.

<sup>205</sup> *Zhu Wai Guan Cu Wen Jian Zheng Min Ban Fa 1991* [trans: *Rule of Embassies, Consulates and Offices of ROC Located Abroad Certifying Documents*] (ROC) (*Rule of Embassies, Consulates and Offices of ROC Located Abroad Certifying Documents 1991* (ROC)) arts 1, 3-4, 29.

<sup>206</sup> Cf *Rule of Notary Affairs Handled by Consular Officials of ROC 2001* (ROC) art 2 para 1, art 3

In *NV 'SCA' SA v Hsin Tai Textile Corp Ltd*, the Taiwan High Court

(ROC) ruled that:

The agreement was notarized by a notary public in foreign country and authenticated by the representative of ROC located in Belgium. Referring to article 356 of the *Civil Procedure (Amendment) Act 1968* (ROC), it shall be presumed to be genuine. If the court of original instance thought the authentication of the representative of ROC located in Belgium had any doubt, it could ask the Ministry of Foreign Affairs to investigate whether the authentication was true or not. The court of original instance did not ask the Ministry of Foreign Affairs to investigate whether the authentication was true or not. ... It held that the petitioner should bring a suit to confirm the agreement and then apply for recognition of the foreign arbitral award. The decision of the court of original instance was not correct.<sup>207</sup>

This decision was appealed to the Supreme Court of ROC. The Supreme Court of ROC affirmed the decision of the lower Court.<sup>208</sup>

Although article 356 of the *Civil Procedure (Amendment) Act 1968*

(ROC) amended and promulgated on 9 February 2000 and took effect on 11

February 2000, the terms are almost the same.<sup>209</sup> Thus, these decisions

discussed above can also still be used.

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para 1, art 4 para 1(3), 2 with *Rule of Embassies, Consulates and Offices of ROC Located Abroad Certifying Documents 1991* (ROC) arts 1, 3-4, 29.

<sup>207</sup> Decision of 25 February 1988 (*NV 'SCA' SA v Hsin Tai Textile Corp Ltd*), Taiwan High Court, 1988 Kang Zi Di 297 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 372-3.

<sup>208</sup> Decision of 15 April 1988 (*NV 'SCA' SA v Hsin Tai Textile Corp Ltd*), the Supreme Court, 1988 Tai Kang Zi Di 135 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 374-5.

<sup>209</sup> *Min Shi Su Song Fa 1930* as amended by *Min Shi Su Song Fa 2000* [trans: *Civil Procedure Act*] (ROC) art 356 adds other organisations which also can authenticate foreign documents to *Civil Procedure (Amendment) Act 1968* (ROC) art 356.

### *(c) Comparison with Procedure for Domestic Arbitral Awards*

The *New York Convention* requires that a country shall not impose substantially more onerous conditions on the recognition or enforcement of foreign arbitral awards than it imposes on the recognition or enforcement of domestic arbitral awards.<sup>210</sup> Thus, it is necessary to compare the required formalities of recognition and enforcement of foreign arbitral awards with that of domestic arbitral awards.

A domestic arbitral award is enforceable after applying to the competent court for granting an enforcement order in accordance with the *Arbitration Act 1998* (ROC)<sup>211</sup> ordinarily.<sup>212</sup> The application must be made to the competent district court according to the *Court Organisation (Amendment) Act 1989* (ROC)<sup>213</sup>, the *Arbitration Act 1998* (ROC),<sup>214</sup> the *Civil Procedure (Amendment) Act 1968* (ROC),<sup>215</sup> and the *Civil Procedure (Amendment) Act 1968* (ROC).<sup>216</sup> The application may be made orally before the clerk of the court or made in written form.<sup>217</sup> If the application is made orally, the clerk

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<sup>210</sup> *New York Convention* art 3.

<sup>211</sup> *Arbitration Act 1998* (ROC) art 37 para 2.

<sup>212</sup> This sort of application is a kind of Non-litigious matter.

<sup>213</sup> *Court Organisation (Amendment) Act 1989* (ROC) art 9(3).

<sup>214</sup> *Arbitration Act 1998* (ROC) art 52.

<sup>215</sup> *Civil Procedure (Amendment) Act 1968* (ROC) arts 3-17, 19-22, 24-7, 29-31..

<sup>216</sup> *Civil Procedure (Amendment) Act 2003* (ROC) arts 1,2, 18, 23, 28.

<sup>217</sup> *Arbitration Act 1998* (ROC) art 52 and *Non-litigious Matters (Amendment) Act 1972* (ROC) art 13 paras 1,2.



of the court must record the oral application and the applicant or his representative must sign it.<sup>218</sup> The information required is the same as a petition that is submitted to the court when applying for recognition of a foreign arbitral award.<sup>219</sup> The applications, whether a record of the oral application or a written application must be written in Chinese, and any foreign language must be noted when it is needed for reference.<sup>220</sup> The record or written application must be signed by the applicant or his representative. If the applicant is unable to sign, he may request another person to write the applicant's name and impress a seal or fingerprint on the record or written application.<sup>221</sup> The applicant must also pre-pay the cost of proceedings.<sup>222</sup> But the applicant does not need to make copies of the record of the oral application or the written application corresponding to the number of the respondents and submit them to the court.<sup>223</sup>

Comparing the formalities of applying for an order to recognize a foreign arbitral award with the formalities of applying for an order to enforce a

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<sup>218</sup> *Arbitration Act 1998* (ROC) art 52 and *Non-litigious Matters (Amendment) Act 1972* (ROC) art 13 para 3.

<sup>219</sup> *Arbitration Act 1998* (ROC) art 52 and *Non-litigious Matters (Amendment) Act 1972* (ROC) art 14.

<sup>220</sup> *Court Organisation (Amendment) Act 1989* (ROC) art 99.

<sup>221</sup> *Non-litigious Matters (Amendment) Act 1972* (ROC) art 14 para 2.

<sup>222</sup> *Arbitration Act 1998* (ROC) art 52 and *Non-litigious Matters (Amendment) Act 1972* (ROC) art 102 para 1.

<sup>223</sup> *Arbitration Act 1998* (ROC) arts 37-9. Cf *Arbitration Act 1998* (ROC) art 48 para 1.

domestic arbitral award, they are almost the same. There are only three differences.

***(i) Copies of Petition***

Firstly, applying for an order to recognize a foreign arbitral award, the applicant must submit a petition and copies of the petition corresponding to the number of the respondents.<sup>224</sup> Copies are not required in the case of a domestic arbitral award.<sup>225</sup> However, submitting a petition and copies of the petition corresponding to the number of the respondents instead of only applying orally is not difficult. It is not a substantially more onerous condition for obtaining recognition and enforcement of a foreign arbitral award. Therefore, it does not conflict with the *New York Convention*.<sup>226</sup>

***(ii) Authentication and Translation***

Secondly, applying for an order to recognize a foreign arbitral award, the applicant must submit the original arbitral award or an authenticated copy, the original arbitration agreement or an authenticated copy, and the full text of the foreign arbitration law, the full text of the arbitration rules of foreign

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<sup>224</sup> *Arbitration Act 1998* (ROC) art 48 paras 1, 4.

<sup>225</sup> *Arbitration Act 1998* (ROC) art 37 para 2, art 52, and *Non-litigious Matters (Amendment) Act 1972* (ROC) art 13 para 1.

<sup>226</sup> *New York Convention* art 3. See Appendix .

arbitration institution, or the full text of the arbitration rules of international organisation that was applied to the foreign arbitral award with their Chinese translations if they are not in Chinese.<sup>227</sup> Applying for an order to enforce a domestic arbitral award, the applicant does not need to submit these documents.<sup>228</sup>

Nonetheless, an applicant applying for recognition of a foreign arbitral award must supply the duly authenticated original award or a duly certified copy, the original agreement or a duly certified copy and the certified official language translation if they are not in an official language of the country in which the arbitral award is relied upon under the *New York Convention*<sup>229</sup> and the UNCITRAL Model Law.<sup>230</sup>

An applicant who applies for an order to recognize a foreign arbitral award in ROC only must submit the original arbitral award that does not need to be authenticated.<sup>231</sup> This condition required by the *Arbitration Act 1998* (ROC) is less burdensome than the condition required by the *New York Convention* and the UNCITRAL Model Law. It is not in conflict with the

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<sup>227</sup> *Arbitration Act 1998* (ROC) art 48 paras 1-2.

<sup>228</sup> *Arbitration Act 1998* (ROC) arts 37-9.

<sup>229</sup> *New York Convention* art 4. See Appendix .

<sup>230</sup> UNCITRAL Model Law art 35(2). See Appendix .

<sup>231</sup> *Arbitration Act 1998* (ROC) art 48 para 1(1).

*New York Convention* and the UNCITRAL Model Law,<sup>232</sup> either.

In addition, the applicant who applies for an order to recognize a foreign arbitral award in ROC must submit the Chinese translation of the agreement and the arbitral award that are not in Chinese, but these Chinese translations do not need to be certified.<sup>233</sup> This condition required by the *Arbitration Act 1998* (ROC) also is less onerous than the condition required by the *New York Convention* and the UNCITRAL Model Law. It does not conflict with the *New York Convention* and UNCITRAL Model Law,<sup>234</sup> either.

***(iii) Submission of Full Text of Arbitration Law or Rule***

Thirdly, the applicant who applies for an order to recognize a foreign arbitral award in ROC must submit the full text of the foreign arbitration law, the full text of the arbitration rules of the foreign arbitration institution, or the full text of the arbitration rules of the international organisation that was applied to the foreign arbitral award and their Chinese translations if they are not in Chinese.<sup>235</sup> These formalities are not required by the *New York Convention*<sup>236</sup> and the UNCITRAL Model Law.<sup>237</sup> Nevertheless, these

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<sup>232</sup> UNCITRAL Model Law note 3. See Appendix .

<sup>233</sup> *Arbitration Act 1998* (ROC) art 48 paras 1(1)(2), 2.

<sup>234</sup> UNCITRAL Model Law note 3. See Appendix .

<sup>235</sup> *Arbitration Act 1998* (ROC) art 48 paras 1(3), 2.

<sup>236</sup> *New York Convention* art 4. See Appendix .

formalities are not unreasonable because the judges of ROC have no duty to know foreign arbitration laws, arbitration rules of foreign arbitration institutions, and arbitration rules of international organisations.<sup>238</sup> In addition, these documents are not very difficult to get. Therefore, these formalities also are not in conflict with the *New York Convention*<sup>239</sup> and the UNCITRAL Model Law.<sup>240</sup>

### **3. Time Limit**

Section 9 of the *Federal Arbitration (Amendment) Act 1992 (USA)*<sup>241</sup> and section 207 of the *Federal Arbitration (Amendment) Act 1970 (USA)*<sup>242</sup> grant parties one year or three years respectively from the time when an arbitral award is made in which to seek an order to confirm an arbitral award which does not or does fall under the *New York Convention*.<sup>243</sup> However, the *Arbitration Act 1998 (ROC)* does not require parties to apply to recognize a foreign arbitral award within a specific time. Moreover, the proceedings of application for granting an order to recognize a foreign arbitral award are

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<sup>237</sup> UNCITRAL Model Law art 35(2). See Appendix .

<sup>238</sup> Cf *Civil Procedure (Amendment) Act 1968 (ROC)* art 283 providing that: ‘With respect to ... foreign laws which the court does not know, the burden of proof rests with the party alleging them.’

<sup>239</sup> *New York Convention* art 3. See Appendix .

<sup>240</sup> UNCITRAL Model Law art 35(2) and note 3. See Appendix .

<sup>241</sup> *Federal Arbitration (Amendment) Act 1992 (USA)* s 9; 9 U.S.C. § 9.

<sup>242</sup> *Federal Arbitration (Amendment) Act 1970 (USA)* s 207; 9 U.S.C. § 207.

<sup>243</sup> Born, above n 17, 883, 888.

non-litigious proceedings, ROC courts do not review whether the merits of a foreign arbitral award are adequate or not.<sup>244</sup> Whether the time period set out in the applicable statute of limitations has run relates to the merits of the right. Therefore, lodging recognition-of-foreign-award proceedings does not carry the force of tolling the statute of limitations under the *Civil Code 1929* (ROC).<sup>245</sup> In addition, lodging enforcement-of-foreign-arbitral proceedings also does not carry the force of tolling the statute of limitations under the *Civil Code 1929* (ROC). Nonetheless, the respondent can institute a suit of objection protesting against such enforcement proceedings if the time period set out in the applicable statute of limitations has run.<sup>246</sup> The time period set

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<sup>244</sup> Civil decision of 18 April 2000 (*Smith Kline Beecham Corporation v Hsin Wan Jen Chemical & Pharmaceutical Co Ltd*), Taichung Branch of Taiwan High Court, 2000 Kang Zi Di 81 Hao Min Shi Cai Ding (ROC); Decision of 29 November 2001 (*Fersam AG v Pei Qing Enterprise Corporation Ltd*), Taiwan High Court, 2001 Kang Zi Di 3935 Hao Min Shi Cai Ding (ROC); Decision of 1 May 2002 (*Bronson, Bronson & McKinnon v Chao Rui Electronic Corporation Ltd et al*), Taiwan High Court, 2002 Kang Zi Di 561 Hao Min Shi Cai Ding (ROC); Civil decision of 8 January 2003 (*Mambo Commodities S A v San Yue Textile Co Ltd*), Changhua District Court, 2002 Zhong Ren Zi Di 1 Hao Min Shi Cai Ding (ROC).

<sup>245</sup> *Min Fa 1929* [trans: *Civil Code*] (ROC) (*Civil Code 1929* (ROC)); Decision of 30 November 1998 (*Asia North America Eastbound Rate Agreement et al v Xin He Xing Ocean Enterprise Corporation Ltd*), Taipei District Court, 1980 Zhong Sheng Zi Di 4 Hao Min Shi Cai Ding (ROC), rev'd on other grounds, Decision of 31 July 1999 (*Asia North America Eastbound Rate Agreement et al v Xin He Xing Ocean Enterprise Corporation Ltd*), Taiwan High Court, 1999 Kang Zi Di 102 Hao Min Shi Cai Ding (ROC), rev'd, Decision of 3 March 2000 (*Asia North America Eastbound Rate Agreement et al v Xin He Xing Ocean Enterprise Corporation Ltd*), The Supreme Court, 2000 Tai Kang Zi Di 82 Hao Min Shi Cai Ding (ROC), aff'd, Decision of 31 December 2001 (*Asia North America Eastbound Rate Agreement et al v Xin He Xing Ocean Enterprise Corporation Ltd*), Taiwan High Court, 2000 Kang Geng Yi Zi Di 9 Hao Min Shi Cai Ding (ROC), aff'd, Decision of 11 April 2002 (*Asia North America Eastbound Rate Agreement et al v Xin He Xing Ocean Enterprise Corporation Ltd*), The Supreme Court, 2002 Tai Kang Zi Di 186 Hao Min Shi Cai Ding (ROC).

<sup>246</sup> Interpretation of 15 May 1936, Judicial Yuan, Yuan Zi Di 1498 Hao; *Qiang Zhi Zhi Xing Fa 1940* as amended by *Qiang Zhi Zhi Xing Fa 1996* [trans: *Civil Execution Act*] (ROC) (*Civil Execution (Amendment) Act 1996* (ROC)) art 14 para 1.

out in the applicable statute of limitations recommences to run from the time when the arbitral award was made.<sup>247</sup>

#### **4. Conclusion**

The *Arbitration Act 1998* (ROC) does not require that the applicant who applies for an order to recognize a foreign arbitral award must submit an authenticated original arbitral award instead of an unauthenticated original arbitral award.<sup>248</sup> The *Arbitration Act 1998* (ROC) also does not require the applicant who applies for an order to recognize a foreign arbitral award must supply a certified Chinese translation of the foreign arbitral award and the arbitration agreement that are not in Chinese instead of a uncertified Chinese translation.<sup>249</sup> These conditions are less onerous than the conditions set forth by the *New York Convention* and the UNCITRAL Model Law, however, the applicant must prove the genuineness of these documents if the respondent raises any dispute relating to their genuineness.<sup>250</sup>

In addition, although the *Arbitration Act 1998* (ROC) require the

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<sup>247</sup> *Min Fa 1929* as amended by *Min Fa 1982* [trans: *Civil Code*] (ROC) (*Civil (Amendment) Code 1982* (ROC)) art 137 para 1; Decision of 20 December 2001 (*Asia Food Corporation Ltd et al v Maersk Line et al*), Kaohsiung District Court, 2001 Su Zi Di 3139 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 15 March 2004 (Copy on file with author).

<sup>248</sup> *Arbitration Act 1998* (ROC) art 48 para 1(1).

<sup>249</sup> *Arbitration Act 1998* (ROC) art 48 paras 1(1)(2), 2.

<sup>250</sup> *Arbitration Act 1998* (ROC) art 52 and *Civil Procedure (Amendment) Act 1968* (ROC) art 357. Article 357 of the *Civil Procedure (Amendment) Act 1968* (ROC) provides that: ‘The genuineness of a private document shall be proved by the party who submits it except the other party does not

applicant who applies for an order to recognize a foreign arbitral award must submit the Chinese translation of the full text of foreign arbitration law, the full text of the arbitration rules of the foreign arbitration institution, or the full text of the arbitration rules of the international organisation those are applied to the foreign arbitral award and are not in Chinese, the *Arbitration Act 1998* (ROC) does not require that the applicant must supply certified Chinese translation.<sup>251</sup>

It is very convenient for the applicant who applies for an order to recognize a foreign arbitral award. Nonetheless, the applicant also must prove the genuineness of these documents, if the respondent raises any dispute relating to their genuineness.<sup>252</sup> The judges of ROC bear more burdens and take more time to deal with related cases.

Consequently, the *Arbitration Act 1998* (ROC) should be revised to require the applicant to submit an authenticated original arbitral award instead of an unauthenticated original arbitral award, to submit a certified Chinese translation of the foreign arbitral award and the arbitration agreement that are not in Chinese instead of a uncertified Chinese translation, and to submit the

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raise any dispute relating to its genuineness.’

<sup>251</sup> *Arbitration Act 1998* (ROC) art 48 paras 1(3), 2.



certified Chinese translation of the full text of foreign arbitration law, the full text of the arbitration rules of the foreign arbitration institution, or the full text of the arbitration rules of the international organisation those are applied to the foreign arbitral award and are not in Chinese instead of the uncertified Chinese translation when the applicant applies for an order to recognize a foreign arbitral award.

Article 48 paragraph 1 sub-paragraph 1 of the *Arbitration Act 1998* (ROC) should be amended as ‘To obtain recognition of a foreign arbitral award, an application shall be submitted to the court and accompanied by the authenticated original arbitral award or an authenticated copy thereof’.

Article 48 paragraph 2 of the *Arbitration Act 1998* (ROC) should be revised as ‘If the documents in the preceding paragraph are made in a foreign language, a certified copy of the Chinese translation shall be submitted.’

### ***C. The Grounds on Which a Foreign Arbitral Award Must Be Refused Recognition***

There are two grounds on which a foreign arbitral award must be refused recognition by the competent court. The first ground is if the recognition or

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<sup>252</sup> *Arbitration Act 1998* (ROC) art 52 and *Civil Procedure (Amendment) Act 1968* (ROC) art 357.

enforcement of the foreign arbitral award is contrary to the public order or good morals of ROC.<sup>253</sup> The second ground is that the dispute resolved by the arbitral award is not one capable of settlement by arbitration under the law of ROC.<sup>254</sup>

### **1. *Contrary to the Public Order or Good Morals***

The competent court must dismiss the application for granting an order to recognize a foreign arbitral award if the recognition or enforcement of the arbitral award is contrary to the public order or good morals of ROC.<sup>255</sup> The public order or good morals mean the general interests and general moral concepts of the nation and the society in ROC.<sup>256</sup>

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<sup>253</sup> *Arbitration Act 1998* (ROC) art 49 para 1(1).

<sup>254</sup> *Arbitration Act 1998* (ROC) art 49 para 1(2).

<sup>255</sup> *Arbitration Act 1998* (ROC) art 49 para 1(1).

<sup>256</sup> Decision of 21 August 1980 (*Huang Shou-ren v Cai De-he*), the Supreme Court, 1980 Tai Shang Zi Di 2603 Hao Min Shi Pan Jue (ROC). See ROC, the Supreme Court, *Zui Gao Fa Yuan Pan Li Yao Zhi: 1927-1994* [trans: *Brief of the Supreme Court's Precedents: 1927-1994*] (1997) vol 1, The Court, Taipei, Taiwan. ROC, 28; *Zui Gao Fa Yuan Fa Lu Cong Shu Bian Ji Wei Yuan Hui* [trans: Legal Books Editing Committee of the Supreme Court] (ed), *Zui Gao Fa Yuan Min Xing Shi Cai Pan Xuan Ji: July 1980- September 1980* [trans: *Collection of Selected Civil and Criminal Judgements and Decisions of the Supreme Court: July 1980- September 1980*] (1981) vol 1:3, *Zui Gao Fa Yuan Fa Lu Cong Shu Bian Ji Wei Yuan Hui* [trans: Legal Books Editing Committee of the Supreme Court], Taipei, Taiwan, ROC, 4-7. Decision of 11 May 1984 (*Taiwan Business Bank Corporation Ltd, Chia Yi Branch v Bo Zhen-zhong*), the Supreme Court, 1984 Tai Shang Zi Di 1930 Hao Min Shi Pan Jue (ROC). See *Zui Gao Fa Yuan Fa Lu Cong Shu Bian Ji Wei Yuan Hui* [trans: Legal Books Editing Committee of the Supreme Court] (ed), *Zui Gao Fa Yuan Min Xing Shi Cai Pan Xuan Ji: January 1984- June 1984* [trans: *Collection of Selected Civil and Criminal Judgements and Decisions of the Supreme Court: January 1984- June 1984*] (1985) vol 5:1, *Zui Gao Fa Yuan Fa Lu Cong Shu Bian Ji Wei Yuan Hui* [trans: Legal Books Editing Committee of the Supreme Court], Taipei, Taiwan, ROC, 9-11. Decision of 17 June 1994 (*Qiu Wang-shi v Zhang Chao-lai*), the Supreme Court, 1994 Tai Shang Zi Di 1530 Hao Min Shi Pan Jue (ROC). See the Supreme Court (ed), *Zui Gao Fa Yuan Min Shi Cai Pan Hui Bian: April 1994- June 1994* [trans: *Collection of Civil Judgements and Decisions of the Supreme Court: April 1994- June 1994*] (1994) vol 16, the Supreme Court, Taipei, Taiwan, ROC, 39-43. Decision of 17 June 1999 (*Wang Ke-zhi v Yi Nuo Co Ltd, Taiwan Branch*), the Supreme Court, 1999 Tai Shang Zi Di 1356 Hao Min Shi Pan

Thus, the *Arbitration Act 1998* (ROC) conforms to the *New York Convention*<sup>257</sup> and the UNCITRAL Model Law which stipulates that recognition and enforcement of an arbitral award may be refused if the court finds that the recognition or enforcement of the arbitral award would be contrary to the public policy of this country.<sup>258</sup>

In *Chen Zhen-huan v Chang Bo-ping*, the couple signed a contract in which the couple agreed that: ‘If the appellant assault or insult the appellee, the couple shall divorce. The appellant is willing to let the appellee be awarded custody of their daughter. The appellant also is willing to give half of all his property to the appellee.’<sup>259</sup> The Supreme Court of ROC concluded that: ‘The couple signed a divorce contract in advance. This contract is a trifling matter, so it is contrary to good morals.’<sup>260</sup>

In *Huang Qiu-mao v Chen Jin-e*, Huang Qiu-mao was married. For seducing Chen Jin-e to cohabit with him, Huang Qiu-mao transferred the

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Jue (ROC). <http://www.judicial.gov.tw> at 3 October 2003 (copy on file with author).

<sup>257</sup> *New York Convention* art 5(2)(b). See Appendix .

<sup>258</sup> UNCITRAL Model Law art 36 (1)(b)(ii). See Appendix .

<sup>259</sup> Judgement of 30 November 1961 (*Chen Zhen-huan v Chang Bo-ping*), the Supreme Court, 1961 Tai Shang Zi Di 2596 Hao Min Shi Pan Jue (ROC). See Zui Gao Fa Yuan Fa Lu Cong Shu Bian Ji Wei Yuan Hui [trans: Legal Books Editing Committee of the Supreme Court] (ed), *Zui Gao Fa Yuan Min Xing Shi Pan Li Quan Wen Hui Bian: 1961- 1962* [trans: *Collection of the Full Text of Civil and Criminal Precedents of the Supreme Court: 1961- 1962*] (1983), Zui Gao Fa Yuan Fa Lu Cong Shu Bian Ji Wei Yuan Hui [trans: Legal Books Editing Committee of the Supreme Court], Taipei, Taiwan, ROC, 19-22.

<sup>260</sup> *Ibid.*

ownership of the disputed land to Chen Jin-e. Huang Qiu-mao and Chen Jin-e agreed that, once they terminated their cohabitation relationship, Chen Jin-e should return the ownership of the disputed land to Huang Qiu-mao. Chen Jin-e terminated the cohabitation relationship with Huang Qiu-mao. Thus, Huang Qiu-mao sued Chen Jin-e to return the ownership of the disputed land.<sup>261</sup> The district court dismissed the lawsuit. Huang Qiu-mao appealed to the Tainan Branch of Taiwan High Court (ROC). The Tainan Branch of the Taiwan High Court (ROC) held that: ‘The purpose of Huang Qiu-mao to sign the agreement was to maintain the cohabitation relationship. This agreement is contrary to good morals.’ Thus, the judgement of the district court was affirmed by the Tainan Branch of the Taiwan High Court (ROC).<sup>262</sup> Then, Huang Qiu-mao appealed to the Supreme Court of ROC. The judgement of the Tainan Branch of the Taiwan High Court (ROC) also was

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<sup>261</sup> Judgement of 14 October 1976 (*Huang Qiu-mao v Chen Jin-e*), the Supreme Court, 1976 Tai Shang Zi Di 2436 Hao Min Shi Pan Jue (ROC). See ROC, the Supreme Court, *Brief of the Supreme Court's Precedent: 1927-1994* vol 1, above n 256, 27; Zui Gao Fa Yuan Fa Lu Cong Shu Bian Ji Wei Yuan Hui [trans: Legal Books Editing Committee of the Supreme Court] (ed), *Zui Gao Fa Yuan Min Xing Shi Pan Li Quan Wen Hui Bian: 1975- 1976* [trans: *Collection of the Full Text of Civil and Criminal Precedents of the Supreme Court: 1975- 1976*] (1983), Zui Gao Fa Yuan Fa Lu Cong Shu Bian Ji Wei Yuan Hui [trans: Legal Books Editing Committee of the Supreme Court], Taipei, Taiwan, ROC, 28-30.

<sup>262</sup> Judgement of 21 April 1976 (*Huang Qiu-mao v Chen Jin-e*), Tainan Branch of Taiwan High Court, 1975 Shang Zi Di 1607 Hao Min Shi Pan Jue (ROC). See Legal Books Editing Committee of the Supreme Court (ed), *Collection of the Full Text of Civil and Criminal Precedents of the Supreme Court: 1975- 1976*, above n 261, 28-30.

affirmed by the Supreme Court of ROC.<sup>263</sup>

Although these two cases are in the domestic context, they still can be authorities when dealing with cases having a foreign element. Thus, recognition or enforcement of a foreign arbitral award is contrary to public policy or good morals if this foreign arbitral award is based on an arbitration agreement dealing with a trifling matter or dealing with a relationship which is contrary to public policy or good morals. For instance, a contract dealing with trafficking drugs or murdering a third party is contrary to public policy and good morals of ROC. Consequently, recognition or enforcement of a foreign arbitral award dealing with a difference arising from this contract is contrary to public policy and good morals of ROC. An application for granting an order to recognize this foreign arbitral award must be dismissed.

*In North American Foreign Trading Corp v San Ai Electronic Industrial*

*Corp Ltd*,<sup>264</sup> North American Foreign Trading Corporation applied to the

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<sup>263</sup> Judgement of 14 October 1976 (*Huang Qiu-mao v Chen Jin-e*), the Supreme Court, 1976 Tai Shang Zi Di 2436 Hao Min Shi Pan Jue (ROC). See ROC, the Supreme Court, *Brief of the Supreme Court's Precedent: 1927-1994* vol 1, above n 256, 27; Legal Books Editing Committee of the Supreme Court (ed), *Collection of the Full Text of Civil and Criminal Precedents of the Supreme Court: 1975- 1976*, above n 261, 28-30.

<sup>264</sup> Decision of 16 September 1983 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), Taipei District Court, 1983 Sheng Zi Di 1402 Hao Min Shi Cai Ding (ROC), see Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 221-8, rev'd, Decision of 28 December 1983, Taiwan High Court, 1983 Kang Zi Di 2252 Hao Min Shi Cai Ding (ROC), see Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 229-37, rev'd, Decision of 18 May 1984, the Supreme Court, 1984 Tai Kang Zi Di 234 Hao Min Shi Cai Ding (ROC), see Legal Books Editing Committee of the Supreme Court (ed), *Collection of Selected*

Taipei District Court (ROC) for granting an order to enforce an arbitral award rendered by American Arbitration Association in New York City, USA. San Ai Electronic Industrial Corporation Limited contended that:

This arbitral award rendered by American Arbitration Association in New York City, USA did not state the reasons upon which it is based. The court of ROC is not able to review whether the arbitral award is contrary to the public order or good morals of ROC.... The total amount of the sale is US\$ 1,000,000. The arbitral award requires that San Ai Electronic Industrial Corporation Limited shall pay compensation of the amount of US\$ 995,000 to North American Foreign Trading Corporation. This arbitral award is not fair. If the court grants an order to enforce this arbitral award, almost one thousand employees will lose their jobs. The stable situation between the manufacturer and the financial organisation will be destroyed. Serious social problems will occur. Thus, this arbitral award is contrary to the public order and good morals of ROC obviously.... The arbitral tribunal held six days hearing and gave North American Foreign Trading Corporation five and half days to state but only gave San Ai Electronic Industrial Corporation Limited half day to state. The arbitrators arbitrated this case partially. Therefore, this arbitral award is contrary to the public order and good morals of ROC obviously.<sup>265</sup>

The Court was not convinced by the contention of San Ai Electronic Industrial Corporation Limited and granted an order to enforce this arbitral award.<sup>266</sup> San Ai Electronic Industrial Corporation Limited appealed.

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*civil and Criminal Judgements and Decisions of the Supreme Court: January 1984- June 1984* vol 5:1, above n 256, 643-7, aff'd, Decision of 25 February 1985, Taiwan High Court, 1984 Kang Geng Yi Zi Di 26 Hao Min Shi Cai Ding (ROC), see Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 242-6.

<sup>265</sup> Decision of 16 September 1983 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), Taipei District Court, 1983 Sheng Zi Di 1402 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 221-8.

<sup>266</sup> Decision of 16 September 1983 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), Taipei District Court, 1983 Sheng Zi Di 1402 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 221-8. *Commercial Arbitration (Amendment) Act 1982* (ROC) art 30 para 2 provides that: 'After applying to courts for granting orders to recognize, foreign arbitral awards are enforceable.' Thus, Taipei District Court should grant an order to recognize this arbitral award instead of granting an order to

The Taiwan High Court (ROC) reversed the decision of the lower Court and dismissed the application of North American Foreign Trading Corporation. The Court held that:

The total amount of the sale is US\$ 1,000,000. The arbitral award requires that San Ai Electronic Industrial Corporation Limited shall pay compensation of the amount of US\$ 995,000 to North American Foreign Trading Corporation. This arbitral award is not fair. If the court grants an order to enforce this arbitral award, the stable situation of the public order of ROC will be damaged seriously. Thus, this arbitral award is contrary to the public order and good morals of ROC.... The application for granting an order to enforce the arbitral award shall be dismissed.<sup>267</sup>

North American Foreign Trading Corporation appealed. The Supreme Court of ROC remanded this case to the Taiwan High Court (ROC). The Court held that:

Whether reasoning shall be attached to a foreign arbitral award depends on the foreign law that shall be applied to the foreign arbitral award.... Whether the amount of compensation rendered by the arbitral award is too high is regarding whether the merit is adequate or not. It is irrelevant to the public order. The order in which the Taiwan High Court (ROC) dismissed the application of North American Foreign Trading Corporation by reason of contrary to the public order is not correct.<sup>268</sup>

Then, the Taiwan High Court (ROC) dismissed the appeal of San Ai Electronic Industrial Corporation Limited and affirmed the decision of the

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enforce it.

<sup>267</sup> Decision of 28 December 1983 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), Taiwan High Court, 1983 Kang Zi Di 2252 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 229-37.

<sup>268</sup> Decision of 18 May 1984 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), the Supreme Court, 1984 Tai Kang Zi Di 234 Hao Min Shi Cai Ding (ROC). See Legal Books Editing Committee of the Supreme Court (ed), *Collection of Selected civil and Criminal Judgements and Decisions of the Supreme Court: January 1984- June 1984* vol 5:1, above n 256, 643-7.

Taipei District Court (ROC). Except holding the same ruling of the Supreme Court of ROC, the Court held that: ‘Courts shall not review whether the merits of a foreign arbitral award are adequate or not’.

Therefore, a foreign arbitral award in which the reasoning is not attached or a foreign arbitral award in which the compensation rendered by the foreign arbitral award is very high is not contrary to the public order or good morals. The courts of ROC will not review the merits of a foreign arbitral award, where there is an application to the court to grant an order to recognize this foreign arbitral award. Nevertheless, the respondent may apply to dismiss an application in which the applicant applies for recognition of a foreign arbitral award within 20 days from the date of receipt of the notice of the application, if the foreign arbitral award in which the reasoning is not attached is in contravention of the arbitration agreement or is in contravention of the law of the place of the arbitration in the absence of an arbitration agreement.<sup>269</sup>

In *All American Cotton Co Ltd v Jian Rong Textile Corp*, All American Cotton Company Limited applied to the Changhua District Court (ROC) for granting an order to recognize an English arbitral award. This arbitral award

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<sup>269</sup> *Arbitration Act 1998* (ROC) art 50(5).



required Jian Rong Textile Corporation to pay compensation of US\$ 10,623.88 with interest to All American Cotton Company Limited. The Court granted an order to recognize this arbitral award.<sup>270</sup>

Jian Rong Textile Corporation appealed. The Taichung Branch of the Taiwan High Court (ROC) reversed the order made by the lower Court and dismissed the application of All American Cotton Company Limited. The Court stated that:

The cotton handed over by All American Cotton Company Limited did not comply with the grade, the quality, the length of the fiber, and the thinness of the fiber provided by the contract. Jian Rong Textile Corporation alleged that All American Cotton Company Limited broke the contract and applied to Osaka Cotton Arbitration Association of Japan for arbitration. In addition, the International Trade Bureau under the Ministry of Economic Affairs of ROC conciliated on 23 July 1982, 14 August 1982, and 24 August 1982. In the conciliation, Jian Rong Textile Corporation also alleged that All American Cotton Company Limited broke the contract and should pay compensation. All American Cotton Company Limited applied to the Liverpool Cotton Association Limited of the United Kingdom of Great Britain (UK) for arbitration. It not only did not mention that it broke the contract, but also hid the defect of the goods. Moreover, it did not tell the arbitrators the fact that Jian Rong Textile Corporation had alleged that the contract was cancelled. Consequently, the arbitrators made the arbitral award against Jian Rong Textile Corporation. The arbitral award is contrary to the public order and good morals of ROC. The application for granting an order to recognize the foreign arbitral award shall be dismissed according to article 32 paragraph 1(2) of the *Commercial Arbitration (Amendment) Act 1982* (ROC).<sup>271</sup>

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<sup>270</sup> Decision of 22 November 1985 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Changhua District Court, 1985 Sheng Zi Di 321 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 312-14.

<sup>271</sup> Decision of 22 December 1986 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Taichung Branch of Taiwan High Court, 1986 Guo Mao Kang Geng Yi Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61,

All American Cotton Company Limited appealed. The Supreme Court of ROC reversed the decision made by the lower Court and remanded. The Court held that:

All American Cotton Company Limited contended that: ‘The arbitral award made by arbitrators R John Anderson and Arthur Aldcroft of the Liverpool Cotton Association Limited of the UK on 12 October 1983 required Jian Rong Textile Corporation to pay compensation calculated in accordance with the contract between the two parties. In addition, the proper notices have been given to both parties.’ If it is true, why Jian Rong Textile Corporation did not allege that the goods had defect and the contract had been cancelled? The Taichung Branch of the Taiwan High Court (ROC) did not explain the reason and ruled that the arbitral award was contrary to the public order and good morals.... It is not adequate.<sup>272</sup>

Then, the Taichung Branch of the Taiwan High Court (ROC) reversed the decision made by the lower Court and remanded on other grounds.<sup>273</sup>

The Changhua District Court (ROC) granted an order to recognize this arbitral award again. The Court stated that:

Jian Rong Textile Corporation contends that: ‘When All American Cotton Company Limited applied for arbitration, it hid the fact that the quality of the cotton that it delivered did not comply with the contract and Jian Rong Textile Corporation had cancelled the contract after having been arbitrated by Osaka Cotton Arbitration Association of Japan.... Thus, the arbitral award is contrary to the public order and good morals.’... The Supreme Court of ROC in *North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*, (Decision of 18 May 1984, 1984 Tai Kang Zi Di 234 Hao Min Shi Cai Ding) ruled that: ‘whether the amount of

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<sup>272</sup> Decision of 17 April 1987 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), the Supreme Court, 1987 Tai Kang Zi Di 129 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 327-9.

<sup>273</sup> Decision of 4 August 1987 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Taichung Branch of Taiwan High Court, 1987 Guo Mao Kang Geng Er Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 330-1.

compensation rendered by the arbitral award is too high is irrelevant to the public order and good morals'.... Jian Rong Textile Corporation did not allege its right during the arbitration proceedings. It contends the arbitral award is contrary to the public order and good morals after the arbitral award has become binding. It is not allowed.<sup>274</sup>

Jian Rong Textile Corporation appealed again. The Taichung Branch of the Taiwan High Court (ROC) upheld the lower Court and dismissed the appeal of Jian Rong Textile Corporation.<sup>275</sup>

Consequently, when the contract in which the dispute has occurred has been cancelled, this goes to the merits of the foreign arbitral award, and it does not relate to the public order and good morals.

In *Bronson, Bronson & McKinnon v Chao Rui Electronic Corporation Ltd et al*, Bronson, Bronson & McKinnon applied to the Panchiao District Court (ROC)<sup>276</sup> for recognition of a US arbitral award requiring Chao Rui Electronic Corporation Ltd et al to pay US \$ 142,331.47 as their remuneration and expense for providing legal service. Chao Rui Electronic Corporation Ltd et al contended that:

They had designated Bronson, Bronson & McKinnon as their representative in the lawsuit between International Micro Associates, Inc and them to claim NT 7,000,000.

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<sup>274</sup> Decision of 30 September 1988 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Changhua District Court, 1987 Sheng Geng Zi Di 3 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 334-42.

<sup>275</sup> Decision of 19 December 1988 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Taichung Branch of Taiwan High Court, 1988 Guo Mao Kang Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 343-50.

<sup>276</sup> Taiwan Panchiao Di Fang Fa Yuan [trans: Panchiao District Court] (Panchiao District Court (ROC)).

Bronson, Bronson & McKinnon did not get any penny from International Micro Associates, Inc for them. However, the arbitral award required them to pay Bronson, Bronson & McKinnon NT 5,000,000 as remuneration. The remuneration is too high and the arbitral award is contrary to the public order and good morals.<sup>277</sup>

The Panchiao District Court (ROC) ruled that attorney's remuneration too high was not contrary to the public order or good morals.<sup>278</sup> Chao Rui Electronic Corporation Ltd et al appealed to the Taiwan High Court. The Taiwan High Court dismissed the appeal and also held that attorney's remuneration too high was not contrary to the public order or good morals.<sup>279</sup>

It can be concluded that not only the provisions of the *Arbitration Act 1998* (ROC) regarding the public order or good morals defence comply with the *New York Convention* and UNCITRAL Model Law, but further the courts of ROC also construe the public order and good morals relating to recognition or enforcement of foreign arbitral awards narrowly. A foreign arbitral award to which reasoning is not attached, a foreign arbitral award in which the compensation rendered by the arbitral award is very high, or a foreign arbitral award dealing with a dispute occurred from an arbitration agreement which

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<sup>277</sup> Decision of 28 December 2001 (*Bronson, Bronson & Mckinnon v Chao Rui Electronic Corporation Ltd et al*), Panchiao District Court, 2001 Zhong Zhi Zi Di 6 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 12 September 2003 (Copy on file with author).

<sup>278</sup> Ibid.

<sup>279</sup> Decision of 1 May 2002 (*Bronson, Bronson & McKinnon v Chao Rui Electronic Corporation Ltd et al*), Taiwan High Court, 2002 Kang Zi Di 561 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 12 September 2003 (Copy on file with author).

has been cancelled – all relate to the merits of the foreign arbitral award. All of these do not relate to the public order and good morals of ROC.

Therefore, an application for granting an order to recognize a foreign arbitral award cannot be refused due to these reasons. Nonetheless, an application for granting an order to recognize a foreign arbitral award must be dismissed if this foreign arbitral award is based on an underlying agreement deals with a trifling matter or a relationship which is contrary to the public order or good morals.

In USA, the courts also construe public policy concerning recognition or enforcement of foreign arbitral awards narrowly. Thus, the precedents of the US Courts regarding the public policy defence of recognition or enforcement of foreign arbitral awards can be references for the courts of ROC.

In *Parsons & Whittemore Overseas Co, Inc v Societe Generale De L'Industrie Du Papier (RAKTA)*, the US Court of Appeals for the Second Circuit held that:

Public policy defence of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards should be construed narrowly....  
Enforcement of foreign arbitral awards may be denied on the basis of the public policy defence of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards only where enforcement would violate the forum state's most

basic notions of morality and justice.<sup>280</sup>

In *Laminoirs-Trefileries-Cableries de Lens, SA v Southwire Co*, the US

District Court for the Northern District of Georgia concluded that:

Article 17, par. 2(b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C.A. §201 *et seq.*, provides that enforcement of an award may be refused if such enforcement would be contrary to the public policy of the country where enforcement is sought. However, enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum country's most basic notions of morality and justice.<sup>281</sup>

In *Fertilizer Corp of India v IDI Management, Inc*, the US District Court

for the Southern District of Ohio concluded that failure to disclose an

arbitrator's relationship with a party to the arbitration agreement did not so

taint the arbitral proceedings in India that recognition or enforcement of the

arbitral award could be denied as contrary to the public policy in US under the

*New York Convention*.<sup>282</sup>

The motion for reconsideration of IDI Management, Inc was denied.

The Court ruled that enforcement of a foreign arbitral award would not be

denied owing to failure to disclose the fact that an arbitrator nominated by one

of the parties had served as counsel of this party in at least two other legal or

arbitral proceedings, since enforcement of this foreign arbitral award did not

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<sup>280</sup> *Parsons & Whittemore Overseas Co, Inc v Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2<sup>nd</sup> Cir. 1974).

<sup>281</sup> *Laminoirs-Trefileries-Cableries De Lens, S. A. v Southwire Co*, 484 F.Supp. 1063, 1068 (N.D. Ga. 1980).

rise to level of being contrary to the public policy of US.<sup>283</sup>

In *Waterside Ocean Navigation Co, Inc, v International Navigation Ltd*, the US Court of Appeals for the Second Circuit held that despite the claim that the testimony before arbitrators of an executive officer of one party allegedly contradicting testimony that he had given in prior judicial proceedings, confirmation of the arbitration awards rendered in a foreign country in favor of this party would not be contrary to the public policy of US.<sup>284</sup> The Court stated that: ‘We believe that the assertion that the [public] policy against inconsistent testimony is one of our nation’s “most basic notions of morality and justice” goes much too far’.<sup>285</sup>

In *Brandeis Intsel Ltd v Calabrian Chemicals Corp*, the US District Court for the Southern District of New York ruled that:

Petitioner Brandeis ... moves for an order confirming an arbitration award rendered in its favor and against respondent Calabrian ... following arbitration before the London Metal Exchange ... in Calabrian’s submission, the English arbitrators were guilty of ‘manifest disregard’ of the law, American public policy requires that the award be vacated. ... But I conclude that, in any event, the ‘manifest disregard’ defense is not available to Calabrian. That is because ‘manifest disregard’ of law, whatever the phrase may mean, does not rise to the level of contravening ‘public policy,’ as that phrase is used in Article ... of the Convention [New York Convention]. Nor, ... can manifest disregard of law be urged as an independent ground for vacating an award

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<sup>282</sup> *Fertilizer Corp of India v IDI Management, Inc*, 517 F.Supp 948 (S.D. Ohio 1981).

<sup>283</sup> *Fertilizer Corp of India v IDI Management, Inc*, 530 F.Supp 542 (S.D. Ohio 1982).

<sup>284</sup> *Waterside Ocean Nav Co, Inc, v International Nav Ltd*, 737 F.2d 150 (2<sup>nd</sup> Cir. 1984).

<sup>285</sup> *Waterside Ocean Nav Co, Inc, v International Nav Ltd*, 737 F.2d 150, 152 (2<sup>nd</sup> Cir. 1984).

falling within the Convention. ... In my view, the 'manifest disregard' defense is not available under Article of the Convention or otherwise to a party such as Calabrian, seeking to vacate an award of foreign arbitrators based upon foreign law.<sup>286</sup>

The public policy defence regarding recognition and enforcement of foreign arbitral awards is construed by US Courts as to be applied only where enforcement would violate the forum state's basic notions of morality and justice. Failure to disclose the arbitrator's relationship with a party to arbitration agreement, failure to disclose that the arbitrator nominated by one of parties had served as his counsel in other legal or arbitral proceedings, testimony of the applicant's employee before arbitrator contradicting testimony that he had given in prior judicial proceedings, and manifest disregard of foreign law are not regarded as contrary to public policy of USA in cases relating to recognition and enforcement of foreign arbitrals by US Courts. The courts of ROC construe the public order and good morals regarding recognition and enforcement of foreign arbitral awards narrowly as indicated above. Thus, the reasoning that US Courts have applied is also applied by the courts of ROC. Only when recognition or enforcement of a foreign arbitral award would violate ROC most basic notions of morality and justice, an application for granting an order to recognize the foreign arbitral

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<sup>286</sup> *Brandeis Intsel Ltd v Calabrian Chemicals Corp*, 656 F.Supp. 160, 161, 163, 165, 167 (S.D.N.Y.



awards will be dismissed. Failure to disclose an arbitrator's relationship with a party to arbitration agreement, failure to disclose that an arbitrator nominated by one of parties had served as his counsel in other legal or arbitral proceedings, testimony of the applicant's employee before arbitrator contradicting testimony that he had given in prior judicial proceedings, and manifest disregard of foreign law should not be regarded as contrary to the public order or good morals of ROC in cases relating to recognition and enforcement of foreign arbitrals.

## ***2. Non-Arbitrability***

### ***(a) In General***

Not all disputes are suitable for settlement by arbitration because of their public importance and need for formal judicial procedures.<sup>287</sup> Each state has its own idea of what disputes may not be resolved by arbitration owing to its own political, social, and economic policy.<sup>288</sup>

Before 24 December 1998, the date when the *Arbitration Act 1998* (ROC) took effect,<sup>289</sup> only commercial disputes were capable of resolution by

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1987).

<sup>287</sup> Born, above n 17, 245; Redfern and Hunter, above n 17, 20, 148.

<sup>288</sup> Born, above n 17, 245-53, 257-73, 283-90; Redfern and Hunter, above n 17, 148-54, 471.

<sup>289</sup> *Arbitration Act 1998* (ROC) art 56, *Standard Act of Central Governmental Acts and Regulations 1970* (ROC) art 14.

arbitration under the *Commercial Arbitration Act 1961* (ROC).<sup>290</sup> In order to promote internationalization and liberalization of arbitration law, the Ministry of Justice of ROC took the provisions of the UNCITRAL Model Law and the arbitration laws of UK, USA, Germany, Japan, and France into consideration when the Ministry drafted the Bill for the Arbitration Act 1998 (ROC).<sup>291</sup> Then, ROC amended the *Commercial Arbitration 1961* (ROC) as the *Arbitration Act 1998* (ROC).<sup>292</sup> The *Arbitration Act 1998* (ROC) expands the concept of ‘a dispute capable of resolution by arbitration’ from commercial disputes to any kind of dispute capable of compromise in accordance with law.<sup>293</sup> Therefore, the concept of ‘disputes capable of resolution by arbitration’ under the *Arbitration Act 1998* (ROC) covers a very wide range. It includes contractual disputes and non-contractual disputes.<sup>294</sup> It includes all of the disputes capable of resolution by arbitration articulated in the UNCITRAL Model Law note 2 that arise from any trade transaction for the supply or exchange of goods or services, distribution agreement,

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<sup>290</sup> *Commercial Arbitration Act 1961* (ROC) art 1.

<sup>291</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 265, 318-9.

<sup>292</sup> ROC, *Presidential Office Gazette*, 6224 (1998) 40-50.

<sup>293</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 265, 318-9.

<sup>294</sup> Huang Cheng-chung, ‘Zhong Cai Hsieh Yi’ [trans: ‘Arbitration Agreement’], in Wang Chih-hsing (ed), *Zhong Cai Fa Hsin Lun* [trans: *New Theories on Arbitration Law*] (1999), Chung Huang Min Kuo Zhong Cai Hsieh Hui [trans: Arbitration Association of ROC], Taipei, Taiwan, ROC, 70.

commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation and carriage of goods or passengers by air, sea, rail or road.<sup>295</sup> Disputes arising from torts<sup>296</sup> or management of affairs without mandate also are capable of compromise, so they are capable of resolution by arbitration also.<sup>297</sup>

The court must dismiss the application for granting an order to recognize a foreign arbitral award if the dispute resolved by the arbitral award is not capable of resolution by arbitration under the law of ROC.<sup>298</sup> This provision is in conformity with the *New York Convention*<sup>299</sup> and the UNCITRAL Model Law<sup>300</sup> which stipulate that recognition and enforcement of an arbitral award may be refused if the court finds that the subject matter of the dispute is not

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<sup>295</sup> UNCITRAL Model Law art 1, note 2.

<sup>296</sup> Judgement of 20 July 2001 (*Yuan Fu (Master Link) Securities Corporation Ltd v Qiu Jiang Gui-ying*), Taipei District Court, 2001 Zhong Su Zi Di 3 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 3 June 2003 (Copy on file with author).

<sup>297</sup> Huang Cheng-chung, above n 294, 70. Hsieh Ming-yang, 'Lun Chih Hui Cai Chan Chuan Chiu Fen Chih Ko Zhong Cai Hsing' [trans: 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights'] in Wang Chih-hsing (ed), *Shang Wu Zhong Cai Lun Chu Hui Pien - Chih Hui Cai Chan Pien* ( ) [trans: *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( )] (1998), Chung Huang Min Kuo Shang Wu Zhong Cai Hsieh Hui [trans: Commercial Arbitration Association of ROC], Taipei, Taiwan, ROC, 60, 63.

<sup>298</sup> *Arbitration Act 1998* (ROC) art 49 para 1(2).

<sup>299</sup> *New York Convention* art 5(2)(a). See Appendix .

<sup>300</sup> UNCITRAL Model Law art 36 (1)(b)(i). See Appendix .

capable of settlement by arbitration under the law of the country where recognition or enforcement is sought.

Almost any kind of civil dispute is capable of resolution by arbitration in ROC. Any dispute capable of compromise in accordance with law is capable of resolution by arbitration no matter whether it has already existed or will arise in the future.<sup>301</sup> However, if the arbitration agreement is not entered into in respect of a defined legal relationship or a controversy arising out of such legal relationship, the arbitration agreement is invalid.<sup>302</sup>

Therefore, a foreign arbitral award in which a dispute not capable of compromise has been resolved is not recognizable in ROC. A foreign arbitral award in which a dispute that is not in respect of the defined legal relationship or a controversy arising out of such legal relationship of the arbitration agreement has been resolved also is not recognizable in ROC.

A dispute capable of compromise in accordance with law means that the dispute is in respect of a right or legal relationship relating to property law that is capable of disposition by one's own intention.<sup>303</sup> A dispute with respect to a right or legal relationship relating to family law, such as marriage

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<sup>301</sup> *Arbitration Act 1998* (ROC) art 1 paras 1, 2.

<sup>302</sup> *Arbitration Act 1998* (ROC) art 2.

or the relationship between parents and children, or succession law is not capable of compromise in accordance with law since it relates to the public interest,<sup>304</sup> even though this right or legal relationship includes property rights such as the right to accept maintenance from relatives.<sup>305</sup> Criminal cases also involve the public interest. Disputes regarding criminal cases are not capable of compromise in accordance with law,<sup>306</sup> and in addition, a dispute regarding an administrative act such as permission of public listing of securities or termination of public listing of securities<sup>307</sup> that can be resolved by an administrative agency, an administrative appeal<sup>308</sup>, or the administrative courts<sup>309</sup> is not capable of resolution by arbitration.<sup>310</sup>

The court system of ROC is diverse. There are five kinds of court.

The first kind is the ordinary courts that are in charge of hearing and

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<sup>303</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 270-1.

<sup>304</sup> Chang Jia-zhen, 'Qin Quan Xing Wei Shi Fou De Fu Zhu Zhong Cai' (1993) 71 *Wan Kuo Fa Lu* 9, 10 [trans: 'Is a Dispute Regarding Torts Arbitrable' in *Formosa Transnational Law Review*].

<sup>305</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 270-1.

<sup>306</sup> Ibid.

<sup>307</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author).

<sup>308</sup> *Su Yuan Fa 1930* as amended by *Su Yuan Fa 1998* [trans: *Administrative Appeal Act*] (ROC) (*Administrative Appeal (Amendment) Act 1998* (ROC)) arts 1, 2.

<sup>309</sup> *Hsing Cheng Su Sung Fa 1932* as amended by *Hsing Cheng Su Sung Fa 1998* [trans: *Administrative Proceedings Act*] (ROC) (*Administrative Proceedings (Amendment) Act 1998* (ROC)) art 2.

<sup>310</sup> Huang Cheng-chung, above n 294, 70.

deciding civil lawsuits, criminal lawsuits, other lawsuits stipulated by laws and handling non-litigious cases provided by laws.<sup>311</sup> The ordinary courts are divided into three instances or three levels.<sup>312</sup> The first instance is the District Court.<sup>313</sup> The second instance is the High Court.<sup>314</sup> The third instance, the highest court, is the Supreme Court.<sup>315</sup>

The second kind is the administrative courts that are in charge of hearing and deciding administrative litigation.<sup>316</sup>

The third kind is the Committee on the Discipline of Public Functionaries. It is in charge of adjudicating the cases concerning disciplinary measures against public functionaries.<sup>317</sup>

The fourth kind is the military courts. The military courts primarily are in charge of hearing and deciding criminal cases concerning crimes committed by those who are in active military service.<sup>318</sup>

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<sup>311</sup> *Court Organisation (Amendment) Act 1989* (ROC) art 2.

<sup>312</sup> *Court Organisation (Amendment) Act 1989* (ROC) art 1.

<sup>313</sup> See *Court Organisation (Amendment) Act 1989* (ROC) art 1(1).

<sup>314</sup> See *Court Organisation (Amendment) Act 1989* (ROC) art 1(2).

<sup>315</sup> See *Court Organisation (Amendment) Act 1989* (ROC) art 1(3).

<sup>316</sup> *Xing Zheng Fa Yuan Zhu Zhi Fa 1932* as amended by *Xing Zheng Fa Yuan Zhu Zhi Fa 1999* [trans: *Administrative Court Organisation Act*] (ROC) (*Administrative Court Organisation (Amendment) Act 1999* (ROC)) art 1.

<sup>317</sup> *Gong Wu Yuan Cheng Jie Wei Yuan Hui Zhu Zhi Fa 1931* as amended by *Gong Wu Yuan Cheng Jie Wei Yuan Hui Zhu Zhi Fa 1993* [trans: *Organisation Act of the Committee on the Discipline of Public Functionaries*] (ROC) (*Organisation (Amendment) Act of the Committee on the Discipline of Public Functionaries 1993* (ROC)) art 1.

<sup>318</sup> *Jun Shi Shen Pan Fa 1956* as amended by *Jun Shi Shen Pan Fa 1999* [trans: *Military Litigation Procedure Act*] (ROC) (*Military Litigation Procedure (Amendment) Act 1999* (ROC)) arts 1-4.

The last kind of court is tribunals hearing and decided cases concerning capture on the seas during wars.<sup>319</sup>

Thus, although there are many court systems, only disputes concerning property law that are civil lawsuits and are heard and decided by the ordinary courts are capable of resolution by arbitration. The other kinds of disputes heard and decided by other court systems are not capable of resolution by arbitration. Moreover, even civil lawsuits heard and decided by the ordinary courts are not capable of resolution by arbitration if they are not disputes concerning property law.

### ***(b) Arbitrability of Disputes Relevant to Intellectual Property***

#### ***Rights***

Disputes relevant to intellectual property rights are capable of resolution by arbitration, except these disputes that must be resolved by administrative agencies, an administrative appeal, or the administrative courts,<sup>320</sup> or these

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<sup>319</sup> *Hai Shang Bu Huo Tiao Li 1932* as amended by *Hai Shang Bu Huo Tiao Li 1955* [trans: *Act of Capture on the Seas*] (ROC) ((*Amendment*) *Act of Capture on the Seas 1955* (ROC)) art 1, *Hai Shang Bu Huo Fa Ting Shen Pan Tiao Li 1932* as amended by *Hai Shang Bu Huo Fa Ting Shen Pan Tiao Li 1955* [trans: *Act of the Tribunals Hearing and Deciding Cases Concerning Capture on the Seas*] (ROC) ((*Amendment*) *Act of the Tribunals Hearing and Deciding Cases Concerning Capture on the Seas 1955* (ROC)) art 1.

<sup>320</sup> Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 297, 62.

disputes regarding criminal penalties.<sup>321</sup>

**(i) Patents**<sup>322</sup>

There is no specific provision dealing with arbitrability of disputes relating to patents under the laws of ROC. Thus, whether a dispute regarding patents is capable of resolution by arbitration depends on how this dispute is resolved and by what kind of institution. If this dispute is resolved by the civil courts, it is capable of resolution by arbitration. If this dispute is resolved by an administrative agency, an administrative appeal, or the administrative courts, it is not capable of resolution by arbitration.<sup>323</sup>

**(1) Disputes Relating to the Validity of Patents**

Unlike USA where disputes regarding the validity of patents are arbitrable,<sup>324</sup> these disputes are not capable of resolution by arbitration in

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<sup>321</sup> See above Part C2(a).

<sup>322</sup> All of the provisions of *Chuan Li Fa 1944* [trans: *Patent Act*] (ROC) (*Patent Act 1944* (ROC)) was revised and promulgated on 6 February 2003. Except article 11 regarding representative of patent applicant has already taken effect from 8 February 2003 and the original criminal provisions (*Chuan Li Fa 1944* as amended by *Chuan Li Fa 1997* [trans: *Patent Act*] (ROC) (*Patent Amendment Act 1997* (ROC)) arts 125-6, 128-9; *Chuan Li Fa 1944* as amended by *Chuan Li Fa 2001* [trans: *Patent Act*] (ROC) (*Patent Amendment Act 2001* (ROC)) arts 83, 131) has been deleted on 31 March 2003, nonetheless, the other provisions have not yet entered into force until 1 September 2003. See *Chuan Li Fa 1944* as amended by *Chuan Li Fa 2003* [trans: *Patent Act*] (ROC) (*Patent Amendment Act 2003* (ROC)) art 138, *Standard Act of Central Governmental Acts and Regulations 1970* (ROC) arts 13-4, No 0920016719-c Letter made by the Executive Yuan of ROC on 31 March 2003.

<sup>323</sup> See above Part C2(a).

<sup>324</sup> *Rest. 3<sup>rd</sup> Restatement of the Foreign Relations Law of the United States* §488 Reporters' Note 1 (1990). 35 U.S.C. §§ 294, 135(d).



ROC because they are treated as an administrative process.<sup>325</sup>

In case of dissatisfaction with a rejection decision for a patent application for an invention, a new utility model, or a new design,<sup>326</sup> the applicant may apply for re-examination.<sup>327</sup> If the application is rejected on procedural grounds or on the ground of ineligibility of the applicant, the applicant may

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<sup>325</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xie Zu-song, 'Zhi Hui Cai Chan Quan Zhong Cai – Ge Guo Shi Shi Xian Kuang Zhi Bi Jiao Yu Wo Guo Zhong Cai Zhi Du Zhi Jian Tao' (2002) 38 *Zhi Hui Cai Chan Quan* 49, 64 [trans: 'IP Arbitration: The Review of Arbitration System of Taiwan and Comparison with Other Countries' in *Intellectual Property Rights*]. Xu Sheng-guo, 'Lun Chih Hui Chuan Chiu Fen Chih Zhong Cai Rong Xu Hsing' (2001) 27 *Zhi Hui Cai Chan Quan* 71, 81 [trans: 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue' in *Intellectual Property Rights*]. Xu Sheng-guo, 'Lun Chih Hui Chuan Chiu Fen Chih Zhong Cai Rong Xu Hsing (3)' (2001) 29 *Zhi Hui Cai Chan Quan* 86, 98 [trans: 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )' in *Intellectual Property Rights*]. Xu Sheng-guo, 'Zhi Hui Quan Zhi Te Zheng Yu Dui Zhong Cai Zhi Xu Qiu Xing (1)' (2000) 18 *Zhi Hui Cai Chan Quan* 71, 82-3 [trans: 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )' in *Intellectual Property Rights*]. Xu Sheng-guo, 'You Mei Guo Zhi Hui Quan Zhong Cai Fa Zhi Zhi Fa Zhan Lun Wo Guo Zhong Cai Fa Yu Zhi Hui Quan Fen Zheng Zhi Ju Xian' (2000) 14 *Zhi Hui Cai Chan Quan* 63, 81, 87 [trans: 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights' in *Intellectual Property Rights*]. Tsai Ming-cheng, 'Lun Wo Kuo Tzu Hsun Chih Hui Cai Chan Chuan Chiu Fen Chih Zhong Cai Jung Hsu Fan Wei' [trans: 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information'] in Wang Chih-hsing (ed), *Shang Wu Zhong Cai Lun Chu Hui Pien - Chih Hui Cai Chan Pien ( )* [trans: *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*] (1998), Chung Huang Min Kuo Shang Wu Zhong Cai Hsieh Hui [trans: Commercial Arbitration Association of ROC], Taipei, Taiwan, ROC, 27. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 48-55. Hsieh Ming-yang, 'Lun Chih Hui Cai Chan Chuan Chiu Fen Chih Ko Zhong Cai Hsing' (1995) 40 *Shang Wu Zhong Cai* 13, 18-20 [trans: 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*]. Tsai Ming-cheng, 'Lun Wo Kuo Tzu Hsun Chih Hui Cai Chan Chuan Chiu Fen Chih Zhong Cai Jung Hsu Fan Wei' (1995) 40 *Shang Wu Zhong Cai* 6, 8 [trans: 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*].

<sup>326</sup> *Chuan Li Fa 1944* as amended by *Chuan Li Fa 1994* [trans: *Patent Act*] (ROC) (*Patent (Amendment) Act 1994* (ROC)) art 22 para 1; *Patent (Amendment) Act 1997* (ROC) art 105; *Patent (Amendment) Act 2001* (ROC) art 112 para 1.

directly appeal for administrative remedies.<sup>328</sup>

In case of dissatisfaction with any of the decisions rendered upon the re-examination,<sup>329</sup> opposition action,<sup>330</sup> or cancellation action<sup>331</sup> regarding an invention patent, a new utility model patent, or a new design patent, the party concerned may appeal for administrative remedies.<sup>332</sup> In case of dissatisfaction with the revocation decision regarding an invention patent, a new utility model patent, a new design patent, or an extension of patent term,<sup>333</sup> the party concerned also may appeal for administrative remedies.<sup>334</sup>

These issues all relate to the validity of patents. The party concerned can appeal for administrative remedies as discussed above. Thus, these disputes are not capable of resolution by arbitration in ROC.<sup>335</sup>

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<sup>327</sup> *Patent (Amendment) Act 1994* (ROC) art 40 para 1.

<sup>328</sup> *Patent (Amendment) Act 1994* (ROC) art 40 para 1.

<sup>329</sup> *Patent (Amendment) Act 1994* (ROC) art 40 para 1.

<sup>330</sup> *Patent (Amendment) Act 1994* (ROC) arts 41, 102; *Patent (Amendment) Act 2001* (ROC) art 115.

<sup>331</sup> *Patent (Amendment) Act 1994* (ROC) arts 35, 54, 55, 71, 104; *Patent (Amendment) Act 2001* (ROC) arts 72, 121; *Patent (Amendment) Act 1997* (ROC) arts 105, 122.

<sup>332</sup> *Patent (Amendment) Act 1994* (ROC) art 46, *Patent (Amendment) Act 1997* (ROC) arts 105, 122.

<sup>333</sup> *Patent (Amendment) Act 1994* (ROC) arts 35, 54, 55, 71, 104; *Patent (Amendment) Act 2001* (ROC) arts 72, 121; *Patent (Amendment) Act 1997* (ROC) arts 105, 122.

<sup>334</sup> *Patent (Amendment) Act 1994* (ROC) art 74 para 1; *Patent (Amendment) Act 1997* (ROC) arts 105, 122. *Patent (Amendment) Act 1994* (ROC) art 74 para 1 stipulates that: 'Under any of the following circumstances, the revocation of an invention patent right shall become irrevocable: (1) No administrative remedy has been sought for in accordance with the law. (2) Where an irrevocable decision on dismissal of the action instituted for administrative remedy is rendered.' *Patent (Amendment) Act 1997* (ROC) art 105 and 122 provides that the provision of article 74 of this Act shall apply *mutatis mutandis* to new utility model patent and new design patent respectively.

<sup>335</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca Enterprises Corporation Ltd)*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue

Even though the *Treaty of Friendship between ROC and USA* exists, an arbitral award rendered in USA is a foreign arbitral award as discussed above.<sup>336</sup> An arbitral award regarding a dispute relating to validity of patents rendered in USA cannot be recognized in ROC under the *Arbitration Act 1998* (ROC) since this dispute is not capable of resolution by arbitration under the law of ROC.<sup>337</sup> This is not inconsistent with the *New York Convention* and the UNCITRAL Model Law, because the *New York Convention*<sup>338</sup> and the UNCITRAL Model Law<sup>339</sup> both stipulate that recognition and enforcement of an arbitral award may be refused if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of the

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(ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xie Zu-song, above n 325, 64. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue', above n 325, 81. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )', above n 325, 98. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 82-3. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81, 87. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 325, 27. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 48-55. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-20. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 8.

<sup>336</sup> See above Part A3.

<sup>337</sup> *Arbitration Act 1998* (ROC) art 49 para 1(2).

<sup>338</sup> *New York Convention* art 5(2)(a). See Appendix .

<sup>339</sup> UNCITRAL Model Law art 36 (1)(b)(i). See Appendix .

country where recognition and enforcement is sought.

### ***(2) Disputes Concerning the Ownership of Patent Rights***

Contracts relating to rights arising out of patents frequently give rise to disputes. These include agreements made between employers and employees and may concern ownership and remuneration.

Where an invention, a new utility model, or a new design is made by an employee in the performance of the duties of his job, the right to apply for the patent and the resulting patent right is vested in his employer, and the employer must pay the employee a reasonable remuneration, unless there is a contrary provision in an agreement, and that such provision shall prevail.<sup>340</sup>

Where an invention, a new utility model, or a new design made by an employee is irrelevant to the duties of his job, the right to apply for the patent and the patent right concerned is vested in the employee provided that, however, if such invention, new utility model, or new design is made by use of the employer's resources or experience, the employer may, after having paid the employee a reasonable remuneration, put the invention, new utility model, or new design into use in the enterprise concerned.<sup>341</sup>

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<sup>340</sup> *Patent (Amendment) Act 1994 (ROC) art 7 para 1.*

<sup>341</sup> *Patent (Amendment) Act 1994 (ROC) art 8 para 1.*

Where there are funded research and development programs, the right to apply for the patent and the resulting patent right is vested in the inventor or creator, subject to any contrary agreement.<sup>342</sup>

Disputes relating to remuneration between employers and employees relate to property rights. They are capable of resolution by arbitration undoubtedly.<sup>343</sup>

Although there is no provision dealing with arbitrability of the ownership of patent rights explicitly under the *Patent (Amendment) Act 1994* (ROC), it can be inferred that such disputes regarding the ownership of patent rights are capable of resolution by arbitration.<sup>344</sup>

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<sup>342</sup> *Patent (Amendment) Act 1994* (ROC) art 7 para 3.

<sup>343</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 270-1.

<sup>344</sup> *Patent (Amendment) Act 1994* (ROC) art 10. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 84. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 325, 27. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 297, 50-6. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-21. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 8. Cai Kun-cai, 'Mei Guo Zhuan Li Zhong Cai Zhi Yun Yong - Jian Lun Wo Guo Zhuan Li Zhong Cai Zhi Ke Xing' (1993) 34 *Shang Wu Zhong Cai* 52, 61 [trans: The Application of Patent Arbitration in USA - Also Discuss the Possibility of Patent Arbitration in ROC] in *Commercial Arbitration*].

**(3) Disputes Regarding Civil Remedies, Claiming Compensation,  
or Paying Royalty**

Disputes concerning an infringement of invention patents,<sup>345</sup> new utility model patents,<sup>346</sup> and new design patents<sup>347</sup> are capable of resolution by arbitration, because these claims are claims for damages relating to torts<sup>348</sup> and are capable of compromise in accordance with law.<sup>349</sup>

A patentee of an invention patent may claim an appropriate pecuniary compensation from a person who used invention for a commercial purpose prior to the publication of the invention patent, subject to some conditions.<sup>350</sup>

A licensee who in good faith has used the new design or has completed

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<sup>345</sup> *Patent (Amendment) Act 1997* (ROC) art 88.

<sup>346</sup> *Patent (Amendment) Act 1997* (ROC) arts 88, 105.

<sup>347</sup> *Patent (Amendment) Act 1997* (ROC) arts 88, 122.

<sup>348</sup> Judgement of 20 July 2001 (*Yuan Fu (Master Link) Securities Corporation Ltd v Qiu Jiang Gui-ying*), Taipei District Court, 2001 Zhong Su Zi Di 3 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 3 June 2003 (Copy on file with author).

<sup>349</sup> Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 84-5. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 60. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 8. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 22-3. Lin Juinn-yih, 'Fan Lun Zhi Hui Cai Chan Quan Jiu Fen Zhi Zhong Cai' (1996) 11 *Zhi Hui Cai Chan Quan Guan Li* 38, 38-9 [trans: 'Arbitration of Disputes Regarding Intellectual Property Rights' in *Intellectual Property Management*]. Lin Juinn-yih, 'Cong Xin Zhong Cai Fa Tan Zhi Hui Cai Chan Quan Jiu Fen Zhi Jie Jue' (1999) 20 *Zhi Hui Cai Chan Quan Guan Li* 36, 36 [trans: 'Resolution of Disputes Regarding Intellectual Property Rights under the New Arbitration Act' in *Intellectual Property Management*]. Li Yi-qian, 'Zhi Hui Cai Chan Quan Zhong Cai - Su Song Wai De Ling Lue Xuan Ze' (1999) 21 *Zhi Hui Cai Chan Quan Guan Li* 14, 17 [trans: 'Arbitration Regarding Intellectual Property Rights - An Alternative of Litigation' in *Intellectual Property Management*].

the necessary preparations for its use prior to the revocation of a patent right may continue to use the new patent in his original enterprise if that revocation resulted from cancellation action filed by the patentee against a person held not entitled to the patent.<sup>351</sup> However, the licensee must pay the patentee a reasonable royalty from the date when he receives the patentee's written notice.<sup>352</sup>

Claiming for an appropriate pecuniary compensation is a property right. Paying a reasonable royalty is a property obligation. Both of them are capable of compromise. Thus, both of them are capable of arbitration, too.<sup>353</sup>

#### ***(4) Disputes Relating to Assignment, Licence, or Creation,***

##### ***Change, or Extinguishment of a Pledge of Patent***

Where the patentee of an invention, a new utility model, or a new design assigns, entrusts, licenses his patent right to another person to put the patented invention, new utility model, or new design into practice, this assignment or licence cannot be set up as defence against any third party unless it has been

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<sup>350</sup> *Patent (Amendment) Act 2001* (ROC) art 36*quinquies* paras 1, 2.

<sup>351</sup> *Patent (Amendment) Act 2001* (ROC) art 118 paras 1(5), 2.

<sup>352</sup> *Patent (Amendment) Act 2001* (ROC) art 118*bis*.

<sup>353</sup> Cai Kun-cai, above n 344, 61.

registered with the competent authority<sup>354</sup> which is the Intellectual Property Office of the Ministry of Economic Affairs (IPO of ROC).<sup>355</sup> In the case of the creation, change, or extinguishment of a pledge over an invention patent, a new utility model patent, or a new design patent, a written application signed by all parties concerned, together with the supporting documents, must be submitted to the IPO of ROC for registration. In the absence of such registration, the creation, change, or extinguishment of a pledge over an invention patent, a new utility model patent, or a new design patent cannot be set up as defence against any third party.<sup>356</sup> However, registration with the IPO of ROC is not required for the validity of the assignment, the license, or the creation, change, or extinguishment of a pledge. Therefore, without registration with the IPO of ROC, the assignment between the assignor and the assignee, the licence between the licensor and the licensee, or the creation, change, or extinguishment of a pledge has already taken effect between the parties. Registration with the IPO of ROC only relates to the issue of

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<sup>354</sup> *Patent (Amendment) Act 2001* (ROC) arts 59, 119; *Patent (Amendment) Act 1997* (ROC) art 105.

<sup>355</sup> *Patent (Amendment) Act 1994* (ROC) art 3 para 2; *Jing Ji Bu Zhi Hui Cai Chan Ju Zhu Zhi Tiao Li 1998* as amended by *Jing Ji Bu Zhi Hui Cai Chan Ju Zhu Zhi Tiao Li 2002* [trans: *Organisation Act of the Intellectual Property Office of the Ministry of Economic Affairs*] (ROC) (*Organisation (Amendment) Act of the Intellectual Property Office of the Ministry of Economic Affairs 2002* (ROC)) art 2(1)(2)(6)-(8).

<sup>356</sup> *Patent (Amendment) Act 1994* (ROC) art 64; *Patent (Amendment) Act 1997* (ROC) arts 105, 122.



validity against a third party. Therefore, these disputes relating to assignment, licence, or creation, change, or extinguishment of a pledge over invention patent, new utility model patent, and new design patent relate to property rights, and are not decided by any administrative agency, administrative appeal, and the administrative courts. They are capable of compromise in accordance with law and so they are capable of resolution by arbitration also.<sup>357</sup>

#### ***(5) Disputes Regarding Compulsory Licence***

In the event of dissatisfaction with the decisions of the IPO of ROC regarding granting of a compulsory licence to put a patented invention into practice<sup>358</sup> or the revocation of a compulsory licence,<sup>359</sup> the party concerned may institute an action seeking an administrative remedy.<sup>360</sup> Therefore, disputes concerning granting of compulsory licence and revocation of

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<sup>357</sup> Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 83-5. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 56-9. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 8. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 21-22. Cai Kun-cai, above n 344, 61.

<sup>358</sup> *Patent (Amendment) Act 1997* (ROC) art 78 paras 1, 2.

<sup>359</sup> *Patent (Amendment) Act 1997* (ROC) art 79.

<sup>360</sup> *Patent (Amendment) Act 1994* (ROC) art 81.

compulsory licence are not capable of resolution by arbitration.<sup>361</sup>

The grantee of a compulsory licence must pay the patentee an appropriate compensation. In case of any dispute over the amount of such compensation, the IPO of ROC decides the amount.<sup>362</sup> Since this decision of the IPO of ROC about the amount of compensation is an administrative act of a government agency, a dispute regarding this decision itself is resolved through an administrative appeal<sup>363</sup> and administrative proceedings.<sup>364</sup> This dispute is, therefore, not capable of resolution by arbitration.<sup>365</sup>

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<sup>361</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue', above n 325. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )', above n 325, 98. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 82-3. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81, 87. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 48-55. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-20.

<sup>362</sup> *Patent (Amendment) Act 1997* (ROC) art 78 para 5.

<sup>363</sup> *Su Yuan Fa 1930* as amended by *Su Yuan Fa 2000* [trans: *Administrative Appeal Act*] (ROC) (*Administrative Appeal (Amendment) Act 2000* (ROC)); *Administrative Appeal (Amendment) Act 1998* (ROC) art 1 para 1 provides that: 'An administrative appeal may be filed by a person when his right or interest is injured by an unlawful or improper administrative act of the central or local government agency, unless the law provides otherwise.'

<sup>364</sup> *Administrative Proceedings (Amendment) Act 1998* (ROC) art 4 para 1 stipulates that: 'A person may institute administrative proceedings in the administrative high court if his right is infringed by an unlawful administrative act of a central or local government agency and he disagrees with the decision on administrative appeal instituted in accordance with *Su Yuan Fa* [trans: *Administrative Appeal Act*] (ROC), or if no decision has been made three months or extended another two months after the institution of the administrative appeal.'

<sup>365</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue

Nevertheless, disputes regarding payment and acceptance of the compensation for compulsory licence relate to property rights and are capable of compromise in accordance with law. They are capable of resolution by arbitration no matter the amount of the compensation was decided by the grantee and patentee through mutual consent or by the IPO of ROC, an administrative appeal, or the administrative courts.<sup>366</sup>

**(ii) Trademarks<sup>367</sup>**

There also is no specific provision dealing with the arbitrability of disputes relating to trademarks under the laws of ROC. Thus, whether a dispute regarding a trademark is capable of resolution by arbitration depends on how this dispute is resolved and by what kind of institution. If this

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(ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue', above n 325, 81. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )', above n 325, 98. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 82-3. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81, 87. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 48-55. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-20.

<sup>366</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 270-1.

<sup>367</sup> All of the provisions of *Shang Biao Fa 1930* [trans: *Trademark Act*] (ROC) (*Trademark Act 1930* (ROC)) was revised and promulgated on 28 May 2003. Nonetheless, it will not take effect until 28 November 2003. See *Shang Biao Fa 1930* as amended by *Shang Biao Fa 2003* [trans: *Trademark Act*] (ROC) (*Trademark (Amendment) Act 2003* (ROC)) art 94, *Standard Act of Central Governmental Acts and Regulations 1970* (ROC) arts 14.

dispute is resolved by the civil courts, it is capable of resolution by arbitration.

If this dispute is resolved by an administrative agency, an administrative appeal, or the administrative courts, it is not capable of resolution by arbitration. A dispute regarding criminal penalties also is not capable of resolution by arbitration.<sup>368</sup>

### ***(1) Disputes Concerning Validity of Trademark***

In case an applicant for a trademark registration<sup>369</sup> is not satisfied with a decision rejecting his application or is not satisfied with a decision of revoking the approval of his application,<sup>370</sup> he may institute an administrative appeal.<sup>371</sup>

In case an applicant of a trademark registration or the opposer<sup>372</sup> is not satisfied with a decision on an opposition,<sup>373</sup> he also may institute an administrative appeal.<sup>374</sup>

There is no specific provision regulating how a person who is not

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<sup>368</sup> See above Part C2(a).

<sup>369</sup> Trademark refers to trademark, associated trademark, defensive trademark, service mark, certification mark, and collective mark in this thesis, except mentioned otherwise. See *Shang Biao Fa 1930* as amended by *Shang Biao Fa 1997* [trans: *Trademark Act*] (ROC) (*Trademark (Amendment) Act 1997* (ROC)) art 2; *Shang Biao Fa 1930* as amended by *Shang Biao Fa 1993* [trans: *Trademark Act*] (ROC) (*Trademark (Amendment) Act 1993* (ROC)) art 22 paras 1-2, art 35 para 1, art 72 para 1, arts 73-4.

<sup>370</sup> *Trademark (Amendment) Act 1993* (ROC) art 42 para 1, arts 72-4, 77.

<sup>371</sup> *Trademark (Amendment) Act 1993* (ROC) arts 44, 72-4, 77.

<sup>372</sup> *Trademark (Amendment) Act 1993* (ROC) arts 46-7.

<sup>373</sup> *Trademark (Amendment) Act 1993* (ROC) art 49.

<sup>374</sup> *Trademark (Amendment) Act 1993* (ROC) arts 50, 72-4, 77.

satisfied with the decision concerning an application for extension of the term of the right<sup>375</sup> to the exclusive use of a trademark, an application for changing of the approved or registered particulars of a trademark,<sup>376</sup> an application for changing of the type of a trademark<sup>377</sup> rendered by the competent authority which is the IPO of ROC<sup>378</sup> can obtain remedies under the *Trademark (Amendment) Act 1997* (ROC). Nonetheless, since these decisions all are administrative acts of a central government agency, any person who is dissatisfied with them may institute an administrative appeal also.<sup>379</sup>

In the case of dissatisfaction with a decision made in a review for invalidation of a registration<sup>380</sup> or a review for defining the scope of the right to the exclusive use of a trademark,<sup>381</sup> an administrative appeal may also be instituted.<sup>382</sup>

A party dissatisfied with the decision of revocation of the right to exclusive use of a trademark<sup>383</sup> may file an administrative appeal.<sup>384</sup>

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<sup>375</sup> *Trademark (Amendment) Act 1993* (ROC) arts 25, 72-4, 77.

<sup>376</sup> *Trademark (Amendment) Act 1993* (ROC) arts 19, 72-4, 77.

<sup>377</sup> *Trademark (Amendment) Act 1993* (ROC) art 22 para 4, arts 72-4, 77.

<sup>378</sup> *Trademark (Amendment) Act 1993* (ROC) art 7; *Organisation (Amendment) Act of the Intellectual Property Office of the Ministry of Economic Affairs 2002* (ROC) art 2(1)(3)(6)-(8).

<sup>379</sup> *Administrative Appeal (Amendment) Act 1998* (ROC) art 1 para 1.

<sup>380</sup> *Trademark (Amendment) Act 1993* (ROC) arts 52, 72-4, 77.

<sup>381</sup> *Trademark (Amendment) Act 1993* (ROC) arts 54, 72-4, 77.

<sup>382</sup> *Trademark (Amendment) Act 1993* (ROC) arts 58, 77.

<sup>383</sup> *Trademark (Amendment) Act 1993* (ROC) art 31 para 1, arts 72-4, 77.

<sup>384</sup> *Trademark (Amendment) Act 1993* (ROC) arts 32, 72-4, 77.

A decision regarding revocation of the owner's right to the exclusive use of a service mark, a certification mark, or a collective mark owing to inappropriate use the mark causing damages to another person or the public is an administrative act.<sup>385</sup> Any dispute concerning it is resolved through an administrative appeal and administrative proceedings.<sup>386</sup>

These disputes discussed above relate to the validity of a trademark.

All of them are resolved through administrative appeals and administrative proceedings. Thus, they are not capable of resolution by arbitration, just as disputes concerning validity of patents are not capable of resolution by arbitration.<sup>387</sup>

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<sup>385</sup> *Trademark (Amendment) Act 1993* (ROC) art 76.

<sup>386</sup> *Administrative Appeal (Amendment) Act 1998* (ROC) art 1 para 1; *Administrative Proceedings (Amendment) Act 1998* (ROC) art 4 para 1.

<sup>387</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xie Zu-song, above n 325, 64. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue', above n 325, 81. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )', above n 325, 98. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 82-3. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81, 87. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 325, 27. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 48-55. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-20. Hsieh Ming-yang, 'Shang Biao Quan Jiu Fen Zhi Zhong Cai Jie Jue' (1995) 16 *Zhi Hui Cai Chan* 39, 39-40 [trans: 'Disputes Regarding Trademarks Resolved by Arbitration' in *Intellectual Property*

## ***(2) Disputes Regarding the Right to Apply for Trademark***

When two or more people apply separately for registration of an identical or similar trademark, service mark or certification mark, or collective mark designated for use on the same goods or similar goods,<sup>388</sup> the same service or similar service,<sup>389</sup> or the similar group<sup>390</sup> respectively, the applicant who first files an application is granted registration. If two or more such applications are filed on the same date and there is no way to ascertain who is the first applicant, the applicants can come to an agreement to let one of them enjoy the exclusive use. If no agreement can be reached, it is determined by drawing lots.<sup>391</sup> Therefore, disputes relevant to the right to apply for trademarks, service marks, certification marks, or collective marks registration are capable of compromise in accordance with law and are capable of resolution by arbitration.<sup>392</sup>

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*Journal*]. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 8. Xu Bi-hu, 'Shang Biao Jiu Fen Yu Shang Wu Zhong Cai' (1993) 34 *Shang Wu Zhong Cai* 48, 49 [trans: 'Disputes Regarding Trademarks and Commercial Arbitration' in *Commercial Arbitration*].

<sup>388</sup> *Trademark (Amendment) Act 1993* (ROC) art 36.

<sup>389</sup> *Trademark (Amendment) Act 1993* (ROC) arts 36, 72-3, 77.

<sup>390</sup> *Trademark (Amendment) Act 1993* (ROC) arts 36, 74, 77.

<sup>391</sup> *Trademark (Amendment) Act 1993* (ROC) arts 36, 72-4, 77.

<sup>392</sup> Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 84. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 325, 27. Hsieh Ming-yang, 'The Arbitrability of the

Rights derived from an application for registration of a trademark may be assigned to another person. The assignee taking over the rights derived from an application of a trademark cannot set up the assignment as a defence against third parties, unless he has applied to the IPO of ROC and has obtained approval from the IPO of ROC to substitute his name for that of the original applicant.<sup>393</sup> However, obtaining approval from the IPO of ROC is not an element of the validity of the assignment, but deals only with rights against third parties. Therefore, disputes relating to such assignment concern property rights. They are not decided by an administrative agency, an administrative appeal, and administrative proceedings. These disputes are capable of compromise in accordance with law, so that they are capable of resolution by arbitration.<sup>394</sup>

### ***(3) Disputes Relating to Licence, Assignment or Creation, Change,***

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Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 297, 50-6. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-21. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 8. Hsieh Ming-yang, 'Disputes Regarding Trademarks Resolved by Arbitration', above n 387, 40.

<sup>393</sup> *Trademark (Amendment) Act 1993* (ROC) arts 35, 38, 72-4, 77.

<sup>394</sup> Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 84-5. Xu Sheng-guo 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 297, 56-9. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-19.



### *or Extinguishment of a Pledge of Trademark*

The owner of the right to the exclusive use of a trademark or a service mark may license other people to use his trademark or service mark on the whole or a part of the goods or services covered by his trademark or service mark registration. The licence must be recorded with the IPO of ROC. A sub-licence, with prior consent of the owner, also must be recorded with the IPO of ROC. An unrecorded licence may not be set up as a defence against third parties.<sup>395</sup> The assignment of the right to the exclusive use of a trademark or a service mark also must be recorded with the IPO of ROC, or it may not be set up as a defence against third party.<sup>396</sup> In the case of creating, changing, or extinguishing a pledge on the right to the exclusive use of a trademark or a service mark, the owner must apply to the IPO of ROC for the recording of the transaction. Without a prior record, it cannot be set up as a defence against third parties.<sup>397</sup> But it is not an element of the validity of the assignment, the licence, or the creation, change, or extinguishment of a pledge.

Therefore, these disputes relate to property rights and are not decided by

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<sup>395</sup> *Trademark (Amendment) Act 1993* (ROC) art 26 paras 1-2, art 77.

<sup>396</sup> *Trademark (Amendment) Act 1993* (ROC) art 28 para 1, art 77.

an administrative agency, an administrative appeal, and administrative proceedings. These disputes are capable of compromise in accordance with law, so that they are capable of resolution by arbitration also.<sup>398</sup>

Nonetheless, if in violation of the requirement that the licensed user of a trademark must indicate on his goods, the package or container thereof the licence of the trademark, the IPO of ROC must notify the licensed user to correct the violation within a prescribed time limit.<sup>399</sup> The same will also occur in the case of violation of the requirement that the licensed user of a service mark must indicate the licence on his articles, documents, publicity materials, or advertisements for promotion of his services of the licence of the service mark.<sup>400</sup> If there is a failure to make a correction within the time limit, the IPO of ROC will revoke the licence record of a trademark or a

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<sup>397</sup> *Trademark (Amendment) Act 1993* (ROC) art 30 para 1, art 77.

<sup>398</sup> Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 83-5. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 56-9. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 8. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 21-22. Hsieh Ming-yang, 'Disputes Regarding Trademarks Resolved by Arbitration', above n 387, 40. Cai Kun-cai, above n 344, 61. Xu Bi-hu, above n 387, 49.

<sup>399</sup> *Trademark (Amendment) Act 1993* (ROC) art 27.

<sup>400</sup> *Trademark (Amendment) Act 1993* (ROC) arts 27, 77.

service mark.<sup>401</sup> Since the revocation of the licence record is an administrative act, any dispute concerning it must be resolved through an administrative appeal and administrative proceedings.<sup>402</sup>

Therefore, any dispute concerning the revocation of the licence record of a trademark or a service mark is not capable of compromise and is not capable of resolution by arbitration.<sup>403</sup>

A certification mark or a collective mark may not be assigned or licensed to another person for use nor made an object of a pledge, unless this assignment or licence for use will not be likely to infringe the interests of consumers or contravene fair competition and has been approved by the IPO

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<sup>401</sup> *Trademark (Amendment) Act 1993* (ROC) arts 27, 77.

<sup>402</sup> *Administrative Appeal (Amendment) Act 1998* (ROC) art 1 para 1; *Administrative Proceedings (Amendment) Act 1998* (ROC) art 4 para 1.

<sup>403</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xie Zu-song, above n 325, 64. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue', above n 325, 81. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )', above n 325, 98. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 82-3. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81, 87. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 325, 27. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 48-55. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-20. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 8.

of ROC.<sup>404</sup> Since the approval of the assignment or licence of a certification mark or a collective mark is an administrative act, any dispute concerning it must be resolved through an administrative appeal and administrative proceedings.<sup>405</sup> Therefore, any dispute concerning the approval of the assignment or licence of a certification mark or a collective mark is not capable of compromise and is not capable of resolution by arbitration.<sup>406</sup>

Nonetheless, any dispute concerning the assignment or licence of a certification mark or a collective mark itself is a dispute relating to contract. Thus, it is capable of compromise in accordance with law and is capable of

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<sup>404</sup> *Trademark (Amendment) Act 1993* (ROC) art 75.

<sup>405</sup> *Administrative Appeal (Amendment) Act 1998* (ROC) art 1 para 1; *Administrative Proceedings (Amendment) Act 1998* (ROC) art 4 para 1.

<sup>406</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xie Zu-song, above n 325, 64. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue', above n 325, 81. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )', above n 325, 98. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 82-3. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81, 87. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 325, 27. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 48-55. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-20. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 8.

resolution by arbitration.<sup>407</sup>

#### ***(4) Disputes Concerning Civil Remedies***

The owner of the right to exclusive use or the licensed user of a trademark may claim compensation against the infringer of the exclusive right or the licensed right and may request the removal of such infringement. If there is any likelihood of infringement, the owner of the right or the licensed user may seek its prevention.<sup>408</sup> Using a design that is identical with or similar to another person's registered trademark on the same or similar goods is an infringement of the right to the exclusive use or the licensed right to the use of the trademark.<sup>409</sup> So is adding a design that is identical with or similar to another person's registered trademark<sup>410</sup> or service mark<sup>411</sup> design to the advertisements, labels, descriptive literature, price lists, or other

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<sup>407</sup> Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 83-5. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 56-9. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 8. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 21-22. Hsieh Ming-yang, 'Disputes Regarding Trademarks Resolved by Arbitration', above n 387, 40. Cai Kun-cai, above n 344, 61.

<sup>408</sup> *Trademark (Amendment) Act 1997* (ROC) art 61 para 1; *Trademark (Amendment) Act 1993* (ROC) arts 69, 75, 77.

<sup>409</sup> *Trademark (Amendment) Act 1997* (ROC) art 61 para 2; *Trademark (Amendment) Act 1993* (ROC) arts 62(1), 69.

<sup>410</sup> *Trademark (Amendment) Act 1997* (ROC) art 61 para 2; *Trademark (Amendment) Act 1993* (ROC) arts 62(2), 69.

<sup>411</sup> *Trademark (Amendment) Act 1997* (ROC) art 61 para 2; *Trademark (Amendment) Act 1993*

documents of the same or similar goods or of the same or similar service and displaying or circulating such materials. In claiming compensation or making requests for the removal infringement or prevention of an infringement, the owner of the right or the licensed user may request the destruction or other disposal of the infringing goods, or of the materials or equipment that have been used for the infringement.<sup>412</sup>

In claiming for compensation, the owner of the right or the licensed user may select any one of the three methods stipulated by the *Trademark (Amendment) Act 1993* (ROC) to calculate the amount of his damages.<sup>413</sup>

The owner of the right or the licensed user may claim for additional compensation in a reasonable amount if the business reputation of the owner or the licensed user suffers any damages on account of the infringement.<sup>414</sup>

A person who intentionally or through negligence sells, displays for sale, exports or imports the goods infringing another person's registered trademark is liable jointly and severally with the infringer of the right to the exclusive use or the licensed right to the use of a trademark for the damages arising

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(ROC) arts 62(2), 75, 77.

<sup>412</sup> *Trademark (Amendment) Act 1997* (ROC) art 61 para 3; *Trademark (Amendment) Act 1993* (ROC) arts 69, 75, 77.

<sup>413</sup> *Trademark (Amendment) Act 1993* (ROC) art 66 para 1(1)-(3), arts 69, 75, 77; *Civil Code 1929* (ROC) art 216.

<sup>414</sup> *Trademark (Amendment) Act 1993* (ROC) art 66 para 3, arts 69, 75, 77.

from such acts.<sup>415</sup>

The owner of the right to the exclusive use or the licensed user of a trademark may make a request for the publication in full or in part of the court judgement in which the fact of infringement is confirmed at the expense of the infringer in a newspaper.<sup>416</sup>

Disputes concerning compensation, removal of infringement, prevention of infringement, disposal of the infringing goods, materials or equipment, and publication the court judgement in which the fact of infringement is confirmed in a newspaper between the owner of the right to the exclusive use or the licensed user of a trademark and the infringer are all torts. They are capable of compromise and so they are capable of resolution by arbitration.<sup>417</sup>

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<sup>415</sup> *Trademark (Amendment) Act 1993* (ROC) arts 67, 69.

<sup>416</sup> *Trademark (Amendment) Act 1993* (ROC) arts 68-9, 75, 77.

<sup>417</sup> Judgement of 20 July 2001 (*Yuan Fu (Master Link) Securities Corporation Ltd v Qiu Jiang Gui-ying*), Taipei District Court, 2001 Zhong Su Zi Di 3 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 3 June 2003 (Copy on file with author). Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 84-5. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 297, 60. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 8. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 22-3. Hsieh Ming-yang, 'Disputes Regarding Trademarks Resolved by Arbitration', above n 387, 41. Lin Juinn-yih, 'Arbitration of Disputes Regarding Intellectual Property Rights', above n 349, 38-9. Lin Juinn-yih, 'Resolution of Disputes Regarding Intellectual Property Rights under the New Arbitration Act', above n 349, 36. Li Yi-qian, above n 349, 17. Zhao Jin-mei, 'Mei Guo Shang Biao Zhong Cai De Li Lun Yu Shi Ji' (1996) 41 *Shang Wu Zhong Cai* 21, 30 [trans: 'The Theory and Practice of US Trademarks Arbitration' in *Commercial Arbitration*].

### *(5) Disputes Relevant to Criminal Penalties*

Any dispute concerning whether the accused committed a crime concerning infringing the right of exclusive use of a trademark of another person<sup>418</sup> or whether confiscating the infringing articles<sup>419</sup> is regarding criminal proceedings and the public interest. Therefore, this kind of dispute is not capable of resolution by arbitration.<sup>420</sup>

### *(iii) Copyrights*

In ROC, there is no specific provision dealing with arbitrability concerning copyright disputes. Therefore, whether a dispute regarding copyrights is capable of resolution by arbitration depends on how this dispute is resolved and by what kind of institution. If this dispute is resolved by the civil courts, it is capable of resolution by arbitration. If this dispute is resolved by an administrative agency, an administrative appeal, or the administrative courts, it is not capable of resolution by arbitration. A dispute regarding criminal penalties also is not capable of resolution by arbitration.<sup>421</sup>

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<sup>418</sup> *Trademark (Amendment) Act 1993* (ROC) arts 62-3, 65.

<sup>419</sup> *Trademark (Amendment) Act 1993* (ROC) art 64.

<sup>420</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 270-1.

<sup>421</sup> See above Part C2(a).



### *(1) Disputes Concerning Authorship or Ownership of Copyrights*

In ROC, the author of a work enjoys copyrights which include moral rights<sup>422</sup> and economic rights<sup>423</sup> upon completion of a work.<sup>424</sup> That means that the author of a work gets copyright protection immediately upon completion of a work automatically without any formality.

Disputes regarding how many shares of the economic rights of each author in a joint work,<sup>425</sup> who the author of a work made for hire is,<sup>426</sup> who the owner of the economic rights of a work made for hire is,<sup>427</sup> who the author of a commissioned work is,<sup>428</sup> who the owner of the economic rights of a commissioned work is,<sup>429</sup> who the author or of a work in which a person's name or pseudonym familiar to the public is represented in a normal way as the author on the original of a work or on a published copy of the work or in connection with a public release of a work is,<sup>430</sup> and who the owner of the economic rights of a work in which a person's name or pseudonym

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<sup>422</sup> *Zhu Zuo Quan Fa 1928* as amended by *Zhu Zuo Quan Fa 1998* [trans: *Copyright Act*] (ROC) (*Copyright (Amendment) Act 1998* (ROC)) art 15 para 1, art 16 para 1, art 17.

<sup>423</sup> *Copyright (Amendment) Act 1998* (ROC) arts 23, 25, 27, 28; *Zhu Zuo Quan Fa 1928* as amended by *Zhu Zuo Quan Fa 2003* [trans: *Copyright Act*] (ROC) (*Copyright (Amendment) Act 2003* (ROC)) arts 22, 24, 26, 26bis, 28bis, 29.

<sup>424</sup> *Copyright (Amendment) Act 1998* (ROC) art 10; *Copyright (Amendment) Act 2003* (ROC) art 3 para 1(3).

<sup>425</sup> *Copyright (Amendment) Act 1998* (ROC) art 40.

<sup>426</sup> *Copyright (Amendment) Act 1998* (ROC) art 11 paras 1, 3.

<sup>427</sup> *Copyright (Amendment) Act 1998* (ROC) art 11 paras 2, 3.

<sup>428</sup> *Copyright (Amendment) Act 1998* (ROC) art 12 para 1.

<sup>429</sup> *Copyright (Amendment) Act 1998* (ROC) art 12 paras 2, 3.

familiar to the public is represented in a normal way as the owner of the economic rights to the work on the original of a work or on a published copy of the work or in connection with a public release of a work is<sup>431</sup> all relate to property rights and are capable of compromise. Thus, these disputes are capable of resolution by arbitration.<sup>432</sup>

***(2) Disputes Regarding Transfer or Licence of Economic Rights  
or Establishment of a Pledge of Economic Rights***

Disputes regarding the scope and effect of transfer of the economic rights of a work,<sup>433</sup> the scope and effect of licence of the economic rights in a work,<sup>434</sup> the effect of submission a work to a newspaper or magazine,<sup>435</sup> the effect of licence public broadcast of a work,<sup>436</sup> and the effect of establishment of a pledge over the economic rights<sup>437</sup> all relate to property rights and are all capable of compromise in accordance with law. Consequently, these

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<sup>430</sup> *Copyright (Amendment) Act 1998* (ROC) art 13 para 1.

<sup>431</sup> *Copyright (Amendment) Act 1998* (ROC) art 13 para 2.

<sup>432</sup> Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 84-5. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 297, 50, 52, 55-6. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-20.

<sup>433</sup> *Copyright (Amendment) Act 1998* (ROC) art 36.

<sup>434</sup> *Copyright (Amendment) Act 2003* (ROC) art 37 paras 1-4.

<sup>435</sup> *Copyright (Amendment) Act 1998* (ROC) art 41.

<sup>436</sup> *Copyright (Amendment) Act 1998* (ROC) art 41.

<sup>437</sup> *Copyright (Amendment) Act 1998* (ROC) art 39.

disputes are capable of resolution by arbitration.<sup>438</sup>

### ***(3) Disputes Relating to Compulsory Licence of Musical Works***

Granting a compulsory licence of a musical work,<sup>439</sup> including the manner of exploitation and the method of calculating royalty,<sup>440</sup> rejecting an application of compulsory licence of a musical work,<sup>441</sup> and revocation of a compulsory licence of a musical work<sup>442</sup> by the IPO of ROC<sup>443</sup> are all administrative acts. Any dispute concerning these administrative acts, including the method of calculating royalties, is resolved through an administrative appeal and administrative proceedings.<sup>444</sup> Thus, these

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<sup>438</sup> Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 83-5. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 56-9. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 9. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 21-2.

<sup>439</sup> *Copyright (Amendment) Act 2003* (ROC) art 2, art 69 para 1.

<sup>440</sup> *Yin Yue Zhu Zuo Qiang Zhi Shou Quan Shen Qing Xu Ke Ji Shi Yong Bao Chou Ban Fa 1992* as amended by *Yin Yue Zhu Zuo Qiang Zhi Shou Quan Shen Qing Xu Ke Ji Shi Yong Bao Chou Ban Fa 2002* [trans: *Rule of Applying for Permission of Compulsory Licence of Exploiting Musical Work and Royalty*] (ROC) ((*Amendment*) *Rule of Applying for Permission of Compulsory Licence of Exploiting Musical Work and Royalty 2002* (ROC)) art 12.

<sup>441</sup> *Copyright (Amendment) Act 2003* (ROC) art 69 para 1.

<sup>442</sup> *Copyright (Amendment) Act 2001* (ROC) art 71.

<sup>443</sup> *Copyright (Amendment) Act 2003* (ROC) art 2 provides that: 'The competent authority under this Act is the Ministry of Economic Affairs. The Ministry of Economic Affairs shall designate a specialized agency in charge of matters concerning copyright.' The *Intellectual Property Office* under the Ministry of Economic Affairs is in charge of the matters concerning copyright according to *Organisation (Amendment) Act of the Intellectual Property Office of the Ministry of Economic Affairs 2002* (ROC) art 2(1)(4)(6)-(8). Thus, the *Intellectual Property Office* is in charge of the affairs concerning copyright.

<sup>444</sup> *Administrative Appeal (Amendment) Act 1998* (ROC) art 1 para 1; *Administrative Proceedings (Amendment) Act 1998* (ROC) art 4 para 1.

disputes are not capable of resolution by arbitration.<sup>445</sup>

#### ***(4) Disputes Concerning Registration of Plate Rights***

For a literary work in which there are no economic rights or for which the economic rights have expired, a plate maker who arranges and prints the literary work and duly registers has the exclusive right to photocopy, print, or use similar methods to reproduce the base on the plate. For an artistic work in which there are no economic rights or for which the economic rights have expired, a plate maker who photocopies, prints, or uses a similar method to reproduce the artistic work and first publishes the reproduction based on such original artistic work and duly registers also has the exclusive right to photocopy, print, or use similar methods to reproduce base on the plate.<sup>446</sup>

This kind of right is called ‘plate rights’.<sup>447</sup>

Where there is any mistake in the application for registration of plate

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<sup>445</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xu Sheng-guo, ‘The Possibility of Applying Arbitration to the Intellectual Property Rights Issue’, above n 325, 81. Xu Sheng-guo, ‘The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )’, above n 325, 98. Xu Sheng-guo, ‘The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )’, above n 325, 82-3. Xu Sheng-guo, ‘From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights’, above n 325, 87.

<sup>446</sup> *Copyright (Amendment) Act 2003* (ROC) art 79 para 1.

<sup>447</sup> The title of *Copyright (Amendment) Act 1998* (ROC) ch 4 is ‘Plate Rights’; also see *Copyright*

rights or any other mistake or omission in the registration, the owner of the plate rights may apply to correct the registration after the registration of the plate rights has been made.<sup>448</sup> The IPO of ROC also may correct the registration of plate rights *ex officio*.<sup>449</sup> Where there is any change in the registration of the plate rights, the owner of the plate right may apply to change the registration.<sup>450</sup>

Approval or rejection of the application for registration of plate rights, approval or rejection of the application for correcting the registration of plate rights, correction the registration of the plate rights *ex officio*, and approval or rejection of the application for changing the registration of the plate rights are all administrative acts. Any dispute relating to these decisions is resolved through an administrative appeal and administrative proceedings.<sup>451</sup>

Therefore, these disputes are not capable of resolution by arbitration.<sup>452</sup>

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(Amendment) Act 1998 (ROC) art 80.

<sup>448</sup> *Zhi Ban Quan Deng Ji Ban Fa 1998* [trans: *Rule of Registration of Plate Rights*] (ROC) (*Rule of Registration of Plate Rights 1998* (ROC)) art 13.

<sup>449</sup> *Rule of Registration of Plate Rights 1998* (ROC) art 14.

<sup>450</sup> *Rule of Registration of Plate Rights 1998* (ROC) art 15.

<sup>451</sup> *Administrative Appeal (Amendment) Act 1998* (ROC) art 1 para 1; *Administrative Proceedings (Amendment) Act 1998* (ROC) art 4 para 1.

<sup>452</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca Enterprises Corporation Ltd)*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca Enterprises Corporation Ltd)*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC).

<<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue', above n 325, 81. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )',

## *(5) Disputes Relating to the Rate of Royalties of Copyright*

### *Intermediary Organisations*

Owners of economic rights of works may establish copyright intermediary organisations with the approval of the IPO of ROC for the purposes of exercising rights or collecting and distributing royalties. Any exclusive licensee may join copyright intermediary organisations. In an application for approval of establishing a copyright intermediary organisation, the initiator must turn in the application as well as the rate of royalties and other matters.<sup>453</sup> The rate of royalties turned in by the initiator of the copyright intermediary organisation is examined and decided by the Copyright Examination and Mediation Committee established by the IPO of ROC before the IPO of ROC approves the application for approval of establishing the copyright intermediary organisation.<sup>454</sup> The decision of the rate of royalties decided by the Copyright Examination and Mediation

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above n 325, 98. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 82-3. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 87. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 8-9.

<sup>453</sup> *Zhu Zuo Quan Zhong Jie Tuan Ti Tiao Li 1997* [trans: *Copyright Intermediary Organisation Act*] (ROC) (*Copyright Intermediary Organisation Act 1997* (ROC)) art 4 para 1.

<sup>454</sup> *Copyright (Amendment) Act 2003* (ROC) art 82 para 1(1); *Copyright Intermediary Organisation Act 1997* (ROC) art 4 para 4.

Committee is an administrative act. Any dispute relating to the decision of the rate of royalties is resolved through an administrative appeal or administrative proceedings.<sup>455</sup> Therefore, these disputes are not capable of resolution by arbitration.<sup>456</sup>

The Copyright Examination and Mediation Committee also mediates disputes between copyright intermediary organisations and users concerning royalties as well as mediates disputes concerning copyrights and plate rights.<sup>457</sup> Nonetheless, these disputes are not resolved by Copyright Examination and Mediation Committee thoroughly. These disputes are capable of compromise between copyright intermediary organisations and users as well as between other parties in accordance with law. Consequently, these disputes are capable of resolution by arbitration.<sup>458</sup>

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<sup>455</sup> *Administrative Appeal (Amendment) Act 1998* (ROC) art 1 para 1; *Administrative Proceedings (Amendment) Act 1998* (ROC) art 4 para 1.

<sup>456</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue', above n 325, 81. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )', above n 325, 98. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 82-3. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 87.

<sup>457</sup> *Copyright (Amendment) Act 2003* (ROC) art 82 para 1(2)(3).

<sup>458</sup> Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 83-5. Xu Sheng-guo, 'From the Development of USA Arbitration

***(6) Disputes Regarding Civil Remedies for Infringement of Moral***

***Rights, Economic Rights, or Plate Rights***

The owner or joint owners of the economic rights of a work or the owner or joint owners of the plate rights may request the removal of any infringement of his economic rights or plate rights individually. Where there is any likelihood of infringement of his, her, or their economic rights or plate rights, the owner or joint owners of the economic rights of a work or the owner or joint owners of the plate rights also may request for prevention individually.<sup>459</sup> However, there are some limitations on economic rights and plate rights, which are called ‘fair use’.<sup>460</sup>

If these limitations exist, exploitation of a work or a plate does not constitute an infringement.<sup>461</sup> However, limitations on the economic rights do not affect the moral rights of an author.<sup>462</sup>

A person who intentionally or negligently unlawfully infringes on another person’s economic rights or plate rights is liable to compensate for the

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Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights’, above n 325, 81.

<sup>459</sup> *Copyright (Amendment) Act 1998* (ROC) arts 84, 90.

<sup>460</sup> *Copyright (Amendment) Act 1998* (ROC) arts 44-8, 48bis, 51, 52, 54, 55, 57-9, 62, 80;

*Copyright (Amendment) Act 2003* (ROC) arts 49, 50, 53, 56, 56bis, 59bis, 60, 61, 63, 65.

<sup>461</sup> *Copyright (Amendment) Act 1998* (ROC) art 80; *Copyright (Amendment) Act 2003* (ROC) art 65 para 1.

<sup>462</sup> *Copyright (Amendment) Act 1998* (ROC) art 66.



damages. Where more than one person engages in unlawful infringement, they are jointly liable for the damages. In claiming for damages, the person whose economic rights or plate rights are infringed may select any one of the three methods stipulated by the *Copyright (Amendment) Act 2003 (ROC)*.<sup>463</sup>

If the economic rights or plate rights are enjoyed by more than one person, each owner may request compensation for damages based on his share of the rights infringed.<sup>464</sup>

When the owner or joint owners of the economic rights of a work or the owner or joint owners of the plate rights request the removal of any infringement of his, her or their economic rights or plate rights or claim damages occurred from any infringement of his, her or their economic rights or plate rights, he, she, or they may request the destruction or other necessary disposition of goods made by means of the infringing act or articles used for the commission of infringing acts predominantly.<sup>465</sup>

The author of a work may request the removal of any infringement of his moral rights. Where there is any likelihood of infringement of his moral

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<sup>463</sup> *Copyright (Amendment) Act 2003 (ROC)* art 88 paras 2, 3.

<sup>464</sup> *Copyright (Amendment) Act 1998 (ROC)* art 90.

<sup>465</sup> *Copyright (Amendment) Act 1998 (ROC)* arts 88bis, 90.

rights, the author of a work also may request prevention.<sup>466</sup>

A person who infringes the moral rights of the author of a work is liable to compensate for injury incurred. The author whose moral rights were infringed may request a commensurate amount of compensation for non-pecuniary damage; and also the disclosure of the author's name, correction of contents, or other appropriate measures necessary for the restoration of his reputation.<sup>467</sup>

Unless otherwise specified by a will of the author, the author's spouse, children, parents, grandchildren, brothers and sisters, and grandparents in the order indicated (hereinafter family members) may request the removal of any infringement of the moral rights of the author, may request prevention of any likelihood of infringement of the moral rights of the author, and may request the disclosure of the author's name, correction of contents, or other appropriate measures necessary for the restoration the reputation of the author after the death of the author.<sup>468</sup> Nevertheless, an author's family members may not request compensation or a commensurate amount of compensation for non-pecuniary damage owing to infringement on the moral rights of the

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<sup>466</sup> *Copyright (Amendment) Act 1998 (ROC)* art 84.

<sup>467</sup> *Copyright (Amendment) Act 1998 (ROC)* art 85.

author after the death of the author.<sup>469</sup>

When the author of a work, the person designated by the will of the author, the author's family members request the removal of any infringement of the moral rights of the author, they may also request the destruction or other necessary disposition of goods made by means of the infringing act or articles used for the commission of infringing acts predominantly.<sup>470</sup>

The injured party may request that the infringer bear the costs of printing in full or in part of the court judgement in a newspaper or magazine.<sup>471</sup>

Any dispute regarding civil remedies for infringement of moral rights, economic rights, or plate rights relates to torts and is capable of compromise even though some of the civil remedies of infringement of moral rights are not property rights. Therefore, any dispute concerning civil remedies for infringement of moral rights, economic rights, or plate rights is capable of resolution by arbitration.<sup>472</sup>

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<sup>468</sup> *Copyright (Amendment) Act 1998* (ROC) art 86.

<sup>469</sup> *Copyright (Amendment) Act 1998* (ROC) art 86.

<sup>470</sup> *Copyright (Amendment) Act 1998* (ROC) arts 88bis.

<sup>471</sup> *Copyright (Amendment) Act 1998* (ROC) art 89.

<sup>472</sup> Judgement of 20 July 2001 (*Yuan Fu (Master Link) Securities Corporation Ltd v Qiu Jiang Gui-ying*), Taipei District Court, 2001 Zhong Su Zi Di 3 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 3 June 2003 (Copy on file with author). Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 85-6. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses*

### *(7) Disputes Relating to Detention of Import or Export Goods*

With regard to the import or export of goods that infringe on the moral rights, the economic rights, or plate rights, the copyrights owner, the owner of the moral rights and the owner of the economic rights or the plate rights owner may apply to the customs authorities to detain the goods.<sup>473</sup> The application must be filed in writing, explaining the facts of the infringement and with a bond in an amount equivalent to the customs authorities assessed landed cost of imported goods or the FOB price of export goods. The party whose goods are subject to the detention has the same rights as a pledgee with regard to the bond.<sup>474</sup> The applicant or the party whose goods are detained may apply to the customs authorities for inspection of the detained goods.<sup>475</sup> Detained goods must be confiscated by the customs authorities where the applicant has obtained a final and non-appealable civil judgement in which the goods infringe on moral rights, economic rights, or plate rights has been decided. The owner of the detained goods is liable for all expenses incurred

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*on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 297, 59-63. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 22-3. Lin Juinn-yih, 'Arbitration of Disputes Regarding Intellectual Property Rights', above n 349, 38-9. Lin Juinn-yih, 'Resolution of Disputes Regarding Intellectual Property Rights under the New Arbitration Act' above n 349, 36. Li Yi-qian, above n 349, 17.

<sup>473</sup> *Copyright (Amendment) Act 2001* (ROC) art 90bis para 1.

<sup>474</sup> *Copyright (Amendment) Act 2001* (ROC) art 90bis para 10.

<sup>475</sup> *Copyright (Amendment) Act 2001* (ROC) art 90bis para 4.

as a result of the delay of containers, storage, loading and unloading, destruction of the goods, and other related expenses.<sup>476</sup> If the expenses incurred as a result of the destruction of the goods are not paid by the owner of the detained goods within the period prescribed by the customs authorities, the customs authorities may refer to the administrative execution authorities for compulsory execution.<sup>477</sup> The detention order must be revoked by the customs authorities and the applicant must compensate the party whose goods were detained for damages incurred on account of the detention if any of the three circumstances provided by the *Copyright (Amendment) Act 2001* (ROC) exists.<sup>478</sup>

The customs authorities must return the security bond upon the request of the applicant if any of the three circumstances stipulated by the *Copyright (Amendment) Act 2001* (ROC) exists.<sup>479</sup>

The rejection of granting detention order, the detention order including the amount of the bond, the permission or non-permission of inspection of the detained goods, the confiscation order, the order of paying destruction

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<sup>476</sup> *Copyright (Amendment) Act 2001* (ROC) art 90bis para 5.

<sup>477</sup> *Copyright (Amendment) Act 2001* (ROC) art 90bis para 6; *Xing Zheng Zhi Xing Fa 1932* as amended by *Xing Zheng Zhi Xing Fa 1998* [trans: *Administrative Execution Act*] (ROC) (*Administrative Execution (Amendment) Act 1998* (ROC)) art 4 para 1.

<sup>478</sup> *Copyright (Amendment) Act 2001* (ROC) art 90bis paras 7, 8.

<sup>479</sup> *Copyright (Amendment) Act 2001* (ROC) art 90bis para 9.

expenses, the order of revocation of detention including extension of the period that the applicant must notify the customs authorities that he has already initiated litigation with regard to the detained goods,<sup>480</sup> the order of returning the security bond, and the rejection of returning the security bond are all administrative acts. Any dispute relating to these administrative acts are resolved through an administrative appeal or administrative proceedings. Consequently, these disputes are not capable of resolution by arbitration.<sup>481</sup>

Nonetheless, compensation of damages relates to torts. In addition, compensation of damages and the rights of pledge with regard to the bond, as well as expenses incurred as a result of the delay of containers, storage, loading and unloading are concerning property rights. Any dispute with regard to these property rights is capable of compromise. Thus, these disputes are capable of resolution by arbitration.<sup>482</sup>

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<sup>480</sup> *Copyright (Amendment) Act 2001* (ROC) art 90bis paras 7, 8.

<sup>481</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue', above n 325, 81. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )', above n 325, 98. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 82-3. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 87.

<sup>482</sup> Judgement of 20 July 2001 (*Yuan Fu (Master Link) Securities Corporation Ltd v Qiu Jiang*

### *(8) Disputes Concerning Criminal Penalties*

Except where a person who infringes economic rights of other people as his vocation or infringes economic rights of other people with intent to profit by means of reproducing onto an optical disk, prosecution for any offenses concerning infringing economic rights is instituted only upon complaint.<sup>483</sup> That means the infringer who infringed economic rights of other people and the infringe may reach a compromise in which the infringe agrees not to institute a complaint. Nevertheless, any dispute concerning whether instituting a complaint,<sup>484</sup> whether seizing the infringing articles,<sup>485</sup> or whether the accused committed a crime is regarded as criminal proceedings and the public interest. Therefore, these disputes are not capable of resolution by arbitration.<sup>486</sup>

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*Gui-ying*), Taipei District Court, 2001 Zhong Su Zi Di 3 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 3 June 2003 (Copy on file with author). Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 85-6. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 59-63. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 22-3. Lin Juinn-yih, 'Arbitration of Disputes Regarding Intellectual Property Rights', above n 349, 38-9. Lin Juinn-yih, 'Resolution of Disputes Regarding Intellectual Property Rights under the New Arbitration Act' above n 349, 36. Li Yi-qian, above n 349, 17.

<sup>483</sup> *Copyright (Amendment) Act 1998* (ROC) art 96; *Copyright (Amendment) Act 2003* (ROC) arts 91-5, 96bis, 100-1.

<sup>484</sup> *Copyright (Amendment) Act 2003* (ROC) art 100.

<sup>485</sup> *Copyright (Amendment) Act 1998* (ROC) art 103.

<sup>486</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 270-1.

#### *(iv) Integrated Circuit Layouts*

There is no specific provision dealing with arbitrability of disputes relating to integrated circuit layouts under the law of ROC.<sup>487</sup> Thus, whether a dispute regarding an integrated circuit layout is capable of resolution by arbitration depends on how this dispute is resolved and by what kind of institution. If this dispute is resolved by the civil courts, it is capable of resolution by arbitration. If this dispute is resolved by an administrative agency, an administrative appeal, or the administrative courts, it is not capable of resolution by arbitration.<sup>488</sup>

#### *(1) Disputes Regarding Validity of Circuit Layouts*

A circuit layout is not protected under the *Integrated Circuit Layout Protection Act 1995* (ROC) unless it has already been registered.<sup>489</sup> Approval or rejection of an application for registration of a circuit layout<sup>490</sup>

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<sup>487</sup> Integrated circuit means a finished or intermediate product having electronic circuitry functions and with transistors, capacitors, resistors, or other electronic components and their interconnections integrated onto or within a semiconducting material. Circuit layout means a two-dimensional or three-dimensional design of electronic components and interconnection leads on an integrated circuit. See *Ji Ti Tian Lu Tian Lu Bu Ju Bao Fu Fa 1995* [trans: *Integrated Circuit Layout Protection Act*] (ROC) (*Integrated Circuit Layout Protection Act 1995* (ROC)) art 2(1)(2).

<sup>488</sup> See above Part C2(a).

<sup>489</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) art 15 para 1.

<sup>490</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) arts 5-13, *Ji Ti Tian Lu Tian Lu Bu Ju Bao Fu Fa 1995* as amended by *Ji Ti Tian Lu Tian Lu Bu Ju Bao Fu Fa 2002* [trans: *Integrated Circuit Layout Protection Act*] (ROC) (*Integrated Circuit Layout Protection (Amendment) Act 2002* (ROC)) art 14.



or revocation of a registration of a circuit layout<sup>491</sup> which is regarding validity of the circuit layout is an administrative act. Any dispute concerning it is resolved through an administrative appeal or administrative proceedings.<sup>492</sup> Consequently, any dispute relevant to the validity of a circuit layout is not capable of resolution by arbitration in ROC.<sup>493</sup>

## ***(2) Disputes Relevant to the Right to Apply for Integrated Circuit***

### ***Layouts***

The creator of a circuit layout or the creator's successor or assignee may apply to the agency in charge of circuit layout affairs which is the IPO of ROC for registration of the circuit layout with.<sup>494</sup> If there is a plurality of creators, successors, or assignees, they must jointly apply for registration

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<sup>491</sup> *Integrated Circuit Layout Protection (Amendment) Act 2002* (ROC) art 27.

<sup>492</sup> *Administrative Appeal (Amendment) Act 1998* (ROC) art 1 para 1; *Administrative Proceedings (Amendment) Act 1998* (ROC) art 4 para 1.

<sup>493</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue', above n 325, 81. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )', above n 325, 98. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 82-3. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 87. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 297, 48-55. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-20.

<sup>494</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) art 3; *Organisation (Amendment) Act of the Intellectual Property Office of the Ministry of Economic Affairs 2002* (ROC) art 2(5).

unless there is a contract to the contrary.<sup>495</sup> If a circuit layout is created by an employee within the scope of employment, the employer has the right to apply for registration unless there is a contract to the contrary.<sup>496</sup> If a circuit layout is created by a person under commission, the commissioning person has the right to apply for registration except there is a contract to the contrary.<sup>497</sup>

Any dispute regarding who has right to apply for registration of a circuit layout relates to property rights and is capable of compromise. Thus, these disputes are capable of resolution by arbitration.<sup>498</sup>

### ***(3) Disputes Concerning Assignment or Licence of Circuit Layout***

#### ***Rights or Creation, Transfer, Alteration or Extinguishment of***

#### ***a Pledge of Circuit Layout Rights***

To assign or license circuit layout rights or to create, transfer, alter, or extinguish a pledge of circuit layout rights, there must be an application to the

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<sup>495</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) art 6.

<sup>496</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) art 7 para 1.

<sup>497</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) art 7 para 2.

<sup>498</sup> Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 83-4. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 297, 50-6. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-21.

IPO of ROC for registration. Without prior registration, the assignment, licence, or creation, transfer, alteration, or extinguishment of a pledge cannot be set up as a defence against third parties.<sup>499</sup> Approval or rejection of an application for registration of assignment, licence, or creation, transfer, alteration, or extinguishment of a pledge regarding circuit layout rights is an administrative act. Any dispute relating to these approvals or rejections is resolved through an administrative appeal and administrative proceedings.<sup>500</sup> Thus, these disputes are not capable of resolution by arbitration.<sup>501</sup>

Nonetheless, any other kind of dispute regarding assignment, licence, or creation, transfer, alteration, or extinguishment of a pledge relating to circuit layout rights is concerning property rights. Therefore, these disputes are

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<sup>499</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) art 22 para 1; *Ji Ti Tian Lu Tian Lu Bu Ju Bao Fu Fa Shi Xing Xi Ze 1996* [trans: *Enforcement Rule of the Integrated Circuit Layout Protection Act*] (ROC) (*Enforcement Rule of the Integrated Circuit Layout Protection Act 1996* (ROC)) art 16 para 1.

<sup>500</sup> *Administrative Appeal (Amendment) Act 1998* (ROC) art 1 para 1; *Administrative Proceedings (Amendment) Act 1998* (ROC) art 4 para 1.

<sup>501</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca) Enterprises Corporation Ltd*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue', above n 325, 81. Xu Sheng-guo, 'The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )', above n 325, 98. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 82-3. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 87. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 297, 48-55. Hsieh Ming-yang, 'The Arbitrability of the Disputes

capable of compromise and are capable of resolution by arbitration.<sup>502</sup>

#### ***(4) Disputes Relating to Compulsory Licence***

For a use to promote the non-profit public interest, the IPO of ROC may grant a compulsory licence upon application by an applicant to the applicant to put a circuit layout into practice that is restricted mainly to the purpose of satisfying the demand of domestic market. If an owner of the circuit layout rights is found to have engaged in unfair competition, and that has been irrevocably confirmed by the court or by the Fair Trade Commission under the Executive Yuan of ROC, the IPO of ROC also may grant a compulsory licence upon application by an applicant to the applicant to put a circuit layout into practice. The licensee of a compulsory licence must pay the owner of the circuit layout rights appropriate compensation. In the case of dispute over the amount of such compensation, the amount must be decided by the IPO of ROC. The right of compulsory licence cannot be assigned or

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Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 18-20.

<sup>502</sup> ROC, *Legislative Yuan Gazette*, 87(31.2) (1998) 270-1. Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 83-5. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 297, 56-9. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 21.

licensed to or pledged in favor of any third party unless it is assigned together with the business pertaining the compulsory licence. Upon termination of the cause of compulsory licence to practice a circuit layout, the IPO of ROC may terminate the compulsory licence upon application. If the licensee of a compulsory licence acts contrary to the purpose of the compulsory licence, the IPO of ROC may revoke the compulsory licence *ex officio* or upon application by the owner of the circuit layout rights.<sup>503</sup>

Granting of compulsory licence or revocation of compulsory licence is an administrative act of the IPO of ROC. The decision of the IPO of ROC regarding the dispute over the amount of the compensation of the compulsory licence is also an administrative act. Therefore, any dispute concerning granting of compulsory licence, revocation of compulsory licence, or decision of the amount of the compensation of the compulsory licence is resolved through an administrative appeal and administrative proceedings.<sup>504</sup> These disputes are not capable of resolution by arbitration.<sup>505</sup>

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<sup>503</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) art 24.

<sup>504</sup> *Administrative Appeal (Amendment) Act 1998* (ROC) art 1 para 1; *Administrative Proceedings (Amendment) Act 1998* (ROC) art 4 para 1.

<sup>505</sup> Judgement of 22 November 2002 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca Enterprises Corporation Ltd)*), the Supreme Court, 2002 Tai Shang Zi Di 2367 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Judgement of 30 April 2003 (*Taiwan Stock Exchange Corporation v Xin Kai (Sinoca Enterprises Corporation Ltd)*), Taiwan High Court, 2003 Shang Geng Er Zi Di 9 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 5 June 2003 (Copy on file with author). Xu Sheng-guo, "The

## *(5) Disputes Regarding Civil Remedies for Infringement of Circuit*

### *Layout Rights*

An owner of circuit layout rights has the exclusive right<sup>506</sup> to preclude others from reproducing the circuit layout in whole or in part without his authorization. An owner of circuit layout rights also has the exclusive right to preclude others from importing or distributing the circuit layout or an integrated circuit containing the circuit layout for commercial purpose without his authorization.<sup>507</sup>

In the event of infringement on circuit layout rights, the owner of the circuit layout rights may claim damages and request removal of the infringement.<sup>508</sup> The injured party also may request the destruction of integrated circuits containing the infringing circuit layouts and the publication of the contents of the court judgement in whole or in part in a newspaper with

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Possibility of Applying Arbitration to the Intellectual Property Rights Issue’, above n 325, 81. Xu Sheng-guo, ‘The Possibility of Applying Arbitration to the Intellectual Property Rights Issue ( )’, above n 325, 98. Xu Sheng-guo, ‘The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )’, above n 325, 82-3. Xu Sheng-guo, ‘From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights’, above n 325, 87. Hsieh Ming-yang, ‘The Arbitrability of the Disputes Relevant to Intellectual Property Rights’ in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 297, 62. Hsieh Ming-yang, ‘The Arbitrability of the Disputes Relevant to Intellectual Property Rights’ in *Commercial Arbitration*, above n 325, 23.

<sup>506</sup> Circuit layout rights do not apply to the circumstances stipulated by article 18 of the *Integrated Circuit Layout Protection Act 1995* (ROC).

<sup>507</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) art 17.

<sup>508</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) art 29 para 1.

costs to be borne by the infringer.<sup>509</sup> Where a likelihood of infringement on circuit layout rights can be proved, the owner of the circuit layout rights may request prevention of infringement.<sup>510</sup> An exclusive licensee of a circuit layout also may claim damages and request removal or prevention of infringement if there is no contrary provision in the licence contract and the owner of the circuit layout rights does not claim for damages or does not request removal or prevention of infringement after having been notified. A person who knew or should have known from sufficient provable facts that the product which was imported or distributed for commercial purpose contained integrated circuit produced from illegally reproduced circuit layout also is an infringer on the circuit layout rights unless he has separated the integrated circuit from the product. Where two or more people jointly infringe on circuit layout rights, they are jointly liable to compensate for damages.<sup>511</sup>

In claiming for damages, the person whose circuit layout rights are infringed may select any one of the three methods stipulated by the *Integrated*

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<sup>509</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) art 32.

<sup>510</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) art 29 para 1.

<sup>511</sup> *Integrated Circuit Layout Protection Act 1995* (ROC) art 29 paras 2, 3, 5.

*Circuit Layout Protection Act 1995 (ROC).*<sup>512</sup>

To import or distribute illegally-produced integrated circuits by an owner who obtained them without knowledge that the integrated circuits infringe the circuit layout rights of another person does not constitute an infringement of the circuit layout rights.<sup>513</sup> However, if the owner of the integrated circuits continues to import or distribute for commercial purposes after having received from the owner of the circuit layout rights a written notice stating the facts of infringement and accompanied by an infringement assessment report, the owner of the circuit layout rights may claim damages based on the usual royalties charged to use the infringed circuit layout.<sup>514</sup>

All civil remedies concerning infringement of circuit layout rights relate to torts and property rights and are capable of compromise. Thus, any dispute concerning civil remedies relating to infringement of circuit layout rights is capable of resolution by arbitration.<sup>515</sup>

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<sup>512</sup> *Integrated Circuit Layout Protection Act 1995 (ROC)* art 30.

<sup>513</sup> *Integrated Circuit Layout Protection Act 1995 (ROC)* art 18(4).

<sup>514</sup> *Integrated Circuit Layout Protection Act 1995 (ROC)* art 31.

<sup>515</sup> Judgement of 20 July 2001 (*Yuan Fu (Master Link) Securities Corporation Ltd v Qiu Jiang Gui-ying*), Taipei District Court, 2001 Zhong Su Zi Di 3 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 3 June 2003 (Copy on file with author). Xu Sheng-guo, 'The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )', above n 325, 85-6. Xu Sheng-guo, 'From the Development of USA Arbitration Law Regarding Disputes Concerning Intellectual Property Rights to Evaluate the Limitation of the ROC Arbitration Act Regarding Disputes Concerning Intellectual Property Rights', above n 325, 81. Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights ( )*, above n 297, 59-63.



### ***(c) Arbitrability of Disputes Regarding Trade Secrets***

There is no specific provision dealing with the arbitrability of disputes relating to trade secrets under the laws of ROC.<sup>516</sup> Thus, whether a dispute regarding trade secrets is capable of resolution by arbitration depends on how this dispute is resolved and by what kind of institution. If this dispute is resolved by the civil courts, it is capable of resolution by arbitration. If this dispute is resolved by an administrative agency, an administrative appeal, or the administrative courts, it is not capable of resolution by arbitration.<sup>517</sup>

### ***(i) Disputes Regarding the Ownership of Trade Secrets***

A trade secret does not need to be registered with the competent authority as a prerequisite of its protection. If a trade secret is the result of research or development by an employee in the course of his employment, the trade secret belongs to the employer, unless otherwise provided for in a contract. In which case the contract prevails. If a trade secret is the result

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Hsieh Ming-yang, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights' in *Commercial Arbitration*, above n 325, 22-3. Lin Juinn-yih, 'Arbitration of Disputes Regarding Intellectual Property Rights', above n 349, 38-9. Lin Juinn-yih, 'Resolution of Disputes Regarding Intellectual Property Rights under the New Arbitration Act' above n 349, 36. Li Yi-qian, above n 349, 17.

<sup>516</sup> 'Trade secret' means any method, technique, producing process, formula, program, design or other information that may be used in the course of production, sales, or operations and also meet the following requirements: (1) It is not known to people who generally involve in this type of information. (2) It has actual or potential economic value due to its secretive nature. (3) Its owner has taken reasonable measures to maintain its secrecy. See *Trade Secrets Act 1996* (ROC) art 2.

<sup>517</sup> See above Part C2(a).

of research or development by an employee other than in the course of employment, the trade secret belongs to the employee. Nevertheless, if the trade secret is the result of utilizing the resources or experience of the employer, the employer may exploit such trade secret in the employer's business after paying a reasonable compensation to the employee.<sup>518</sup>

Where one provides funding and contracts another person to conduct research or development that results in a trade secret, the ownership of the trade secret is determined by the terms of the contract. If the ownership is not specified in the contract, the trade secret belongs to the commissioned person. However, the commissioner is entitled to exploit the trade secret within his business.<sup>519</sup>

Where a trade secret is the result of joint research or development by two or more persons, the respective shares in the ownership are determined by contract. In the absence of a contract, equal shares of the ownership are presumed.<sup>520</sup>

A trade secret may be assigned in whole or in part or jointly owned. No co-owner may assign his share of the ownership without the consent of the

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<sup>518</sup> *Trade Secrets Act 1996* (ROC) art 3.

<sup>519</sup> *Trade Secrets Act 1996* (ROC) art 4.

remaining co-owners, unless otherwise provided for in a contract. In which case the contract prevails. Any exploitation or disposition of a jointly owned trade secret must be unanimously agreed to by all co-owners in the absence of contractual provision. Nonetheless, no co-owner may refuse consent without proper justification.<sup>521</sup>

Any dispute concerning the ownership of a trade secret,<sup>522</sup> the shares of each co-owner, assignment of a trade secret,<sup>523</sup> exploitation of a trade secret, or disposition of a trade secret relates to property rights and is capable of compromise. Consequently, these disputes are capable of resolution by arbitration.

### ***(ii) Disputes Concerning Licence of Trade Secrets***

An owner of a trade secret may grant a licence to another person for the exploitation of the trade secret. A co-owner of a trade secret may not grant a licence to another person for the exploitation of the jointly owned trade secret without the unanimous consent of the remaining co-owner, even though no

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<sup>520</sup> *Trade Secrets Act 1996* (ROC) art 5.

<sup>521</sup> *Trade Secrets Act 1996* (ROC) art 6.

<sup>522</sup> Lee Nian-zu and Lin Huan-yi, 'Ying Ye Mi Mi Yu Shang Wu Zhong Cai' (1995) 16 *Zhi Hui Cai Chan* 49, 52 [trans: 'Trade Secrets and Commercial Arbitration' in *Intellectual Property Journal*].

<sup>523</sup> Lee Nian-zu and Lin Huan-yi, above n 522. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 325, 32. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 10.

co-owner may refuse to consent without proper justification. The territory, term, contents, method of exploitation, or other matters in connection with the licence is determined by the contract between the parties. The licensee cannot sub-license the licensed trade secret without the consent of the owner of the trade secret.<sup>524</sup>

Any dispute relating to the licence of a trade secret is in connection with property rights and is capable of compromise. Therefore, these disputes are capable of resolution by arbitration.<sup>525</sup>

***(iii) Disputes Relating to Civil Remedies for Infringement of Trade Secrets***

If a trade secret is infringed,<sup>526</sup> the injured party may request the removal of such infringement. If there is a likelihood of infringement, prevention may be requested. When requesting removal or prevention of an infringement, the injured party may request the destruction or other necessary dispositions of products generated from the infringement or items used

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<sup>524</sup> *Trade Secrets Act 1996* (ROC) art 7.

<sup>525</sup> Lee Nian-zu and Lin Huan-yi, above n 522. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 325, 32. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Commercial Arbitration*, above n 325, 10.

<sup>526</sup> *Trade Secrets Act 1996* (ROC) art 10.

exclusively in the infringement.<sup>527</sup>

One who intentionally or negligently infringes another's trade secret is liable for damages. If two or more people jointly infringe another's trade secret, they are jointly and severally liable. The right to claim damages is extinguished if the right is not exercised within two years from the date when the owner of the right has knowledge of both the act of infringement and the identity of the party liable for the damages. The right to claim damages also is extinguished within 10 years from the date of the act of infringement.<sup>528</sup>

In claiming for damages, the person whose trade secret is infringed may select any one of the two methods stipulated by the *Trade Secrets Act 1996* (ROC).<sup>529</sup>

Any dispute concerning civil remedies relating to infringement of trade secrets is in connection with property rights and torts and is capable of compromise. Therefore, these disputes are capable of resolution by arbitration.<sup>530</sup>

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<sup>527</sup> *Trade Secrets Act 1996* (ROC) art 11.

<sup>528</sup> *Trade Secrets Act 1996* (ROC) art 12.

<sup>529</sup> *Trade Secrets Act 1996* (ROC) art 13 para 1.

<sup>530</sup> Judgement of 20 July 2001 (*Yuan Fu (Master Link) Securities Corporation Ltd v Qiu Jiang Gui-ying*), Taipei District Court, 2001 Zhong Su Zi Di 3 Hao Min Shi Pan Jue (ROC). <<http://www.judicial.gov.tw>> at 3 June 2003 (Copy on file with author). Lee Nian-zu and Lin Huan-yi, above n 522. Tsai Ming-cheng, 'The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information' in *Collection of Theses on Commercial Arbitration - Part of Intellectual Property Rights* ( ), above n 325, 32. Tsai Ming-cheng,

#### *(d) Arbitrability of Labor Disputes*

There are two kinds of labor disputes in ROC. One kind is labor disputes concerning matters of rights. The other kind is labor disputes regarding adjustment matters. A labor dispute concerning matters of rights is a labor dispute regarding rights and obligations between workers and employers according to statutes, regulations, collective agreements, or labor contracts. A labor dispute regarding adjustment matters is a labor dispute regarding whether to maintain or change the terms of the conditions of work between workers and employers.<sup>531</sup>

A labor dispute concerning matters of rights is settled by mediation procedures and a labor dispute regarding adjustment matters is settled by mediation or arbitration procedures under *Settlement of Labor Disputes (Amendment) Act 1988* (ROC).<sup>532</sup>

When both parties of a labor dispute agree with the mediation proposal made by the mediation committee set up by a competent authority and sign on

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‘The Arbitrability of the Disputes Relevant to Intellectual Property Rights Concerning Information’ in *Commercial Arbitration*, above n 325, 10. Xu Sheng-guo, ‘The Characteristics of Intellectual Property Rights and the Demand of Arbitration ( )’ in *Intellectual Property Rights*, above n 325, 84-5.

<sup>531</sup> *Lao Zi Zheng Yi Chu Li Fa 1928* as amended by *Lao Zi Zheng Yi Chu Li Fa 1988* [trans: *Settlement of Labor Disputes Act*] (ROC) (*Settlement of Labor Disputes (Amendment) Act 1988* (ROC)) art 4.

<sup>532</sup> *Settlement of Labor Disputes (Amendment) Act 1988* (ROC) art 5 para 1, art 6 para 1.

the mediation minutes, the mediation is successfully concluded.<sup>533</sup> When the mediation is successfully concluded, the agreement is deemed a contract between the parties to the dispute. In case one of the parties is a labor organisation, the agreement is deemed a collective agreement between the parties.<sup>534</sup>

In case a labor dispute concerning right matters has not been settled through mediation procedure,<sup>535</sup> it can be sued in the court.<sup>536</sup>

In case a labor dispute concerning adjustment matters has not been settled through mediation procedures,<sup>537</sup> the parties may apply to the competent authority of the municipality, county, or city for arbitration.<sup>538</sup> If the competent authority considers that this labor dispute is serious, it may refer this dispute to arbitration *ex officio*.<sup>539</sup> When both parties to a labor dispute concerning adjustment matters agree, the labor dispute may directly be referred to arbitration without going through mediation procedures.<sup>540</sup>

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<sup>533</sup> *Settlement of Labor Disputes (Amendment) Act 1988* (ROC) arts 12-14, 16-17, *Lao Zi Zheng Yi Chu Li Fa 1928* as amended by *Lao Zi Zheng Yi Chu Li Fa 2000* [trans: *Settlement of Labor Disputes Act*] (ROC) (*Settlement of Labor Disputes (Amendment) Act 2000* (ROC)) art 11.

<sup>534</sup> *Settlement of Labor Disputes (Amendment) Act 1988* (ROC) art 21.

<sup>535</sup> *Settlement of Labor Disputes (Amendment) Act 1988* (ROC) arts 18-19.

<sup>536</sup> *Settlement of Labor Disputes (Amendment) Act 1988* (ROC) art 5 para 2 provides that: ‘For the purpose of adjudicating labor disputes regarding right matters, the court shall set up a labor court when it is necessary.’

<sup>537</sup> *Settlement of Labor Disputes (Amendment) Act 1988* (ROC) arts 18-19.

<sup>538</sup> *Settlement of Labor Disputes (Amendment) Act 1988* (ROC) art 25.

<sup>539</sup> *Settlement of Labor Disputes (Amendment) Act 1988* (ROC) art 24 para 2.

<sup>540</sup> *Settlement of Labor Disputes (Amendment) Act 1988* (ROC) art 24 para 3.

The parties to the labor dispute may reach a compromise during the process of arbitration. When the parties of the labor dispute reach a compromise, the compromise is deemed a contract between the parties to the labor dispute. If one of the parties is a workers' organisation, the compromise is deemed a collective agreement between the parties.<sup>541</sup> The arbitral award rendered by the arbitration committee of a labor dispute is binding on both parties of the labor dispute. The arbitral award is deemed a contract between the parties of the labor dispute. If one of the parties is a workers' organisation, the arbitral award is deemed a collective agreement between the parties.<sup>542</sup>

A labor dispute concerning matters of rights is regarding property rights and is capable of compromise. Thus, it is capable of resolution by arbitration under *Arbitration Act 1998* (ROC) even though there is no provision regulating it under the *Settlement of Labor Disputes (Amendment) Act 1988* (ROC). In addition, a labor dispute regarding adjustment matters is capable of resolution by arbitration under the *Settlement of Labor Disputes (Amendment) Act 1988* (ROC). Consequently, any labor dispute is capable

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<sup>541</sup> *Settlement of Labor Disputes (Amendment) Act 1988* (ROC) arts 21, 34.

<sup>542</sup> *Settlement of Labor Disputes (Amendment) Act 1988* (ROC) art 35.



of resolution by arbitration.<sup>543</sup>

**(e) Conclusion**

Not only commercial disputes, but also all civil disputes relating to property rights, are capable of arbitration in ROC. Labor disputes and disputes regarding intellectual property rights including patents, trademarks, copyrights, integrated circuit layouts, and trade secrets are almost always capable of arbitration. However, criminal or administrative disputes are not capable of arbitration in ROC. Thus, an application for granting an order to recognize a foreign arbitral award will be denied if the foreign arbitral award does not resolve dispute relating to property rights or resolves disputes regarding criminal or administrative disputes.

In PRC, disputes regarding contract or property rights between citizens, legal entities, and other organisations as equal subjects of law are capable of arbitration.<sup>544</sup> Nonetheless, disputes regarding marriage, adoption, guardianship, relative maintenance, or succession, or administrative disputes

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<sup>543</sup> Chang Xian-zheng, 'Jin Su Xiu Ding Lao Zi Zheng Yi Chu Li Fa Fa Hui Zhong Cai Gong Neng Jie Jue Lao Zi Zheng Yi' (2000) 62 *Zheng Ce Yue Kan* 32, 36 [trans: 'Revise the Settlement of Labor Disputes Act as Quickly as Possible to Develop the Function of Arbitration and Resolve Labor Disputes' in *Policy Journal*]. Liu Zhi-peng, 'Yi Zhong Cai Fa Ban Li Lao Zi Zheng Yi Zhong Cai Ke Xing Xing Zhi Ping Gu' (1999) 53 *Zhong Cai* 68, 69 [trans: 'Evaluate the Possibility of Resolving Labor Disputes under Arbitration Act' in *Arbitration*]. Wei Min, 'Zhong Ying Lao Zi Zheng Yi Zhong Cai Zhi Du Bi Jiao Yen Jiu' (2000) 64 *Zheng Da Fa Xue Ping Lun* 389, 394, 396-7, 421 [trans: 'A Comparative Analysis of the Labor Arbitration Systems in Taiwan and Britain' in *Chengchi Law Review*].

falling within the jurisdiction of the relevant administrative organ are not capable of arbitration.<sup>545</sup> The provisions dealing with arbitrability under PRC law can be a reference when ROC court deals with the problem of arbitrability.

Under the law of USA, even disputes those are not capable of arbitration in a domestic transaction, such as disputes concerning purchasing securities or antitrust claims, may be covered by arbitration in an international transaction.<sup>546</sup> There are two good illustrations.

In *Fritz v Alberto-Culver Co*, the US Supreme Court held that:

In... *Wilko v Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168, which held that an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933... the Court noted that § 14 of the Security Act, 15 U.S.C. § 77n, provides: 'any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.' The Court ruled that an agreement to arbitrate 'is a "stipulation," and [that] the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act.'... Thus, *Wilko's* advance agreement to arbitrate any disputes subsequently arising out of his contract to purchase the securities was unenforceable.... We find, crucial differences between the agreement involved in *Wilko* and the one signed by the parties here. *Alberto-Culver's* contract to purchase the business entities belonging to *Scherk* was a truly international agreement.... In *Wilko*, quite apart from the arbitration provision, there was no question but that the laws of the United States... would govern disputes arising out of the stock-purchase agreement.... In this case, by contrast, in

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<sup>544</sup> *Arbitration Act 1994* (PRC) art 2.

<sup>545</sup> *Arbitration Act 1994* (PRC) art 3.

<sup>546</sup> *Rest. 3<sup>rd</sup> Restatement of the Foreign Relations Law of the United States* §488 Reporters' Note 1 (1990).

the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to resolution of disputes arising out of the contract.... An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before US would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts.'... For all these reasons we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act.<sup>547</sup>

*In Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, the US

Supreme Court ruled that:

We... find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims.... We now turn to consider whether Soler's antitrust claims are nonarbitrable even though it has agreed to arbitrate them. In holding that they are not, the Court of Appeals followed the decision of the Second Circuit in *American Safety Equipment Corp v. J.P. Maguire & Co*, 391 F.2d 821 (1968). Notwithstanding the absence of any explicit support for such an exception in either the Sherman Act or the Federal Arbitration Act, the Second Circuit there reasoned that 'the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make ... antitrust claims ... inappropriate for arbitration.' *Id.*, at 827-828. We find it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions. ... As in *Scherk v. Alberto-Culver Co*, 417 U.S. 506, ... we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic

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<sup>547</sup> *Fritz Scherk v Alberto-Culver Co*. 417 U.S. 506, 510, 512-13, 515-16, 519-20 (1974), *rehearing denied*, 419 U.S. 885 (1974).

context.<sup>548</sup>

Nonetheless, these precedents of the US Supreme Court mentioned above cannot be references to ROC, since where a dispute is not arbitrable under the law of ROC, the court must dismiss the application for granting an order to recognize a foreign arbitral award.<sup>549</sup>

#### ***D. The Grounds on Which a Respondent May Apply to Dismiss the Application for Recognition of a Foreign Arbitral Award***

There are seven grounds on which the respondent may apply to dismiss an application for recognition of a foreign arbitral award. This must be done within 20 days from the date of receipt of the notice of the application.

The grounds are:

- (1) A party is incapable;
- (2) The arbitration agreement is null and void;
- (3) The arbitration proceedings are void for lack of due process;
- (4) The arbitral award is not relevant to the subject matter of the dispute;
- (5) The composition of the arbitral tribunal contravenes the arbitration agreement or the law of the place of the arbitration;

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<sup>548</sup> *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 U.S. 614, 625, 628-9 (1985).

- (6) The arbitration procedure contravenes the arbitration agreement or the law of the place of the arbitration;
- (7) The arbitral award is not binding or has been revoked or suspended.<sup>550</sup>

### **1. Incapacity of the Parties**

Where a party applies to the court for recognition of a foreign arbitral award, the respondent may request the court to dismiss the application within 20 days from the date of receipt of the notice of the application if the arbitration agreement is invalid as a result of the incapacity of the parties according to the law that must be applied.<sup>551</sup> This provision complies with the *New York Convention*<sup>552</sup> and the UNCITRAL Model Law.<sup>553</sup> Both stipulate that recognition of an arbitral award may be refused at the request of the party against whom it is invoked on proof that a party to the arbitration agreement was under some incapacity.

Generally applicable contract defences going to incapacity -- such as

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<sup>549</sup> *Arbitration Act 1998* (ROC) art 49 para 1 (2).

<sup>550</sup> *Arbitration Act 1998* (ROC) art 50.

<sup>551</sup> *Arbitration Act 1998* (ROC) art 50(1).

<sup>552</sup> *New York Convention* art 5(1)(a). See Appendix .

<sup>553</sup> UNCITRAL Model Law art 36(1)(a)(i). See Appendix .

incompetence, minority, mental illness or defect<sup>554</sup> -- apply in the context of an arbitration agreement.<sup>555</sup>

Whether any of the parties, including natural persons, legal entities, and states, of an arbitration agreement is under some incapacity is determined by the conflicts of laws rules of the country where a foreign arbitral award is to be recognized.<sup>556</sup>

The law of the person's country (nationality) determines the capacity of a person under the conflicts of laws rules of ROC. The person's nationality is the person's domicile. An alien who has no capacity or only has limited capacity under the law of his own country, but has capacity under the law of ROC is considered as having capacity with respect to his act in ROC, unless this act relates to immovable property in a foreign country. With respect to a foreign legal entity, the law of its domicile applies as the law of its country.<sup>557</sup>

The domicile of a legal entity is the location of its principal office.<sup>558</sup>

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<sup>554</sup> *Civil Code 1929* (ROC) arts 12-13, 15, 75-84, *Civil (Amendment) Code 1982* (ROC) art 85; Restatement (Second) Contracts §§12-16 (1981).

<sup>555</sup> Born, above n 17, 231; Redfern and Hunter, above n 17, 144.

<sup>556</sup> Born, above n 17, 231; Chang Ting-zhen, 'Guo Ji Shang Wu Zhong Cai Qi Yue You Xiao Yao Jian Zhi Yen Jiu ' (1996) 43 *Shang Wu Zhong Cai* 88, 89-95 [trans: 'Study on the Validity of International Commercial Arbitration Contract ' in *Commercial Arbitration*].

<sup>557</sup> *She Wai Min Shi Fa Lu Shi Yong Fa 1953* [trans: *Act Governing the Application of Laws to Civil Matters Involving Foreign Elements, Conflict of Laws*] (ROC) (*Act Governing the Application of Laws to Civil Matters Involving Foreign Elements 1953* (ROC)) arts 1-2.

<sup>558</sup> *Civil Code 1929* (ROC) art 29.

There has been no case until now in ROC in which an application for granting an order to recognize a foreign arbitral award was dismissed owing to invalidity of the arbitration agreement as a result of the incapacity of the parties under the law applicable to them.<sup>559</sup>

The legislation of ROC conforms to the *New York Convention* and UNCITRAL Model Law in this regard. In addition, there is no practice inconsistent with the legislation. Consequently, there is no deficiency of the legislation and practices of ROC.

## ***2. The Arbitration Agreement Is Invalid***

Where a party applies to the court for recognition of a foreign arbitral award, the respondent may request the court to dismiss the application within 20 days from the date of receipt of the notice of the application if the arbitration agreement is invalid according to the law chosen by the parties to govern the arbitration agreement or according to the law of the place where the arbitral award was rendered in the absence of an express choice of law by the parties.<sup>560</sup> This provision is in compliance with the *New York*

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<sup>559</sup> <http://www.judicial.gov.tw> visited 12 September 2003.

<sup>560</sup> *Arbitration Act 1998* (ROC) art 50 (2).

*Convention*<sup>561</sup> and the UNCITRAL Model Law.<sup>562</sup> Both stipulate that recognition of an arbitral award may be refused at the request of the party against whom it is invoked, where there is proof that the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the arbitral award was made.

General applicable contract law to contest the validity of any contract -- such as fraudulent inducement, fraud, illegality, unconscionability, and duress – applies in the context of arbitration agreement.<sup>563</sup> Moreover, the validity of an arbitration agreement is judged applying the separability doctrine.<sup>564</sup> The validity of an arbitration clause which forms part of a principal contract between the parties must be determined separately from the rest of the principal contract. A decision that the contract is nullified, invalid, revoked, rescinded, or terminated does not affect the validity of the arbitration clause.<sup>565</sup>

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<sup>561</sup> *New York Convention* art 5(1)(a). See Appendix .

<sup>562</sup> UNCITRAL Model Law art 36. See Appendix .

<sup>563</sup> Born, above n 17, 195-231. Chang Ting-zhen, above n 556, 101.

<sup>564</sup> Born, above n 17, 195-231.

<sup>565</sup> Born, above n 17, 55-73. Redfern and Hunter, above n 17, 154-6. *Arbitration Act 1998* (ROC) art 3.



In addition, the *New York Convention*<sup>566</sup> and the UNCITRAL Model Law<sup>567</sup> both require that the arbitration agreement must be in writing.<sup>568</sup> In ROC, an arbitration agreement also must be in writing. Written documents, documentary instruments, correspondence, facsimiles, telegrams, or any other similar types of communications between the parties evincing prima facie arbitration agreement are deemed to establish an arbitration agreement.<sup>569</sup> Furthermore, an arbitration agreement can be in an electronic format which can show the whole text, and which can be downloaded to be examined, if it is agreed by the parties to the agreement to do so.<sup>570</sup>

Nonetheless, whether an arbitration agreement regarding a foreign arbitral award which is applied to the competent court of ROC for granting an order to recognize is valid is governed by the law chosen by the parties or is governed by the law of the place where the arbitral award was made, in the absence of an express choice of law.<sup>571</sup>

There has been no case until now in ROC in which an application for granting an order to recognize a foreign arbitral award was dismissed on the

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<sup>566</sup> *New York Convention* art 2(1)(2). See appendix .

<sup>567</sup> UNCITRAL Model Law art 7(2). See Appendix .

<sup>568</sup> Redfern and Hunter, above n 17, 141.

<sup>569</sup> *Arbitration Act 1998* (ROC) art 1 paras 3-4.

<sup>570</sup> *Electronic Signatures Act 2001* (ROC) art 4 para 2.

ground that the arbitration agreement is invalid under the *Arbitration Act 1998* (ROC).<sup>572</sup> Nonetheless, the cases discussed below still are precedents under the *Arbitration Act 1998* (ROC) since they use almost the same words as are in the *Arbitration Act 1998* (ROC) and the *Commercial Arbitration (Amendment) Act 1982* (ROC).<sup>573</sup>

In *Lawson, Lewis & Peat Cotton, Inc v Shun Ji Textile Corp*,<sup>574</sup> Lawson, Lewis & Peat Cotton, Inc incorporated in North Carolina, USA applied to the Taipei District Court (ROC) to grant an order to recognize an arbitral award rendered in England. The Court granted an order to recognize the foreign arbitral award and held that:

Shun Ji Textile Corp contended that the sales contract in which the arbitration clause was included was forged by somebody. However, the proceedings of application to the competent court for granting an order to recognize a foreign arbitral award are non-litigious proceedings, the court does not need to examine whether the sales contract was forged or not.<sup>575</sup>

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<sup>571</sup> *Arbitration Act 1998* (ROC) art 50(2).

<sup>572</sup> <http://www.judicial.gov.tw> visited 12 September 2003.

<sup>573</sup> Cf *Arbitration Act 1998* (ROC) art 50(2) with *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(4), art 23 para 1(2).

<sup>574</sup> Decision of 25 November 1986 (*Lawson, Lewis & Peat Cotton, Inc v Shun Ji Textile Corp*), Taipei District Court, 1986 Zhong Zi Di 7 Hao Min Shi Cai Ding (ROC), rev'd, Decision of 10 February 1987, Taiwan High Court, 1987 Kang Zi Di 69 Hao Min Shi Cai Ding (ROC), Decision of 23 June 1987, Taipei District Court, 1987 Zhong Geng Zi Di 14 Hao Min Shi Cai Ding (ROC), rev'd on other grounds, Decision of 11 September 1987, Taiwan High Court, 1987 Kang Zi Di 1504 Hao Min Shi Cai Ding (ROC), rev'd on other grounds, Decision of 6 November 1987, The Supreme Court, 1987 Tai Kang Zi Di 409 Hao Min Shi Cai Ding (ROC). In the end, the parties reached a compromise and Lawson, Lewis & Peat Cotton, Incorporation withdrew its application. See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 266-84.

<sup>575</sup> Decision of 25 November 1986 (*Lawson, Lewis & Peat Cotton, Inc v Shun Ji Textile Corp*), Taipei District Court, 1986 Zhong Zi Di 7 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 266-9.

Shun Ji Textile Corp appealed.<sup>576</sup> The Taiwan High Court (ROC)

reversed the decision of the lower Court and concluded that:

If the arbitration agreement is forged, the respondent of the application for granting an order to recognize a foreign arbitral award may apply the court to dismiss the application in accordance with *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(4), art 23 para 1(8). Thus, the court shall review whether the arbitration agreement is forged or not. The decision of the Taipei District Court (ROC) shall be reversed.<sup>577</sup>

Then, the Taipei District Court (ROC) turned down the application for granting an order to recognize the foreign arbitral award and concluded that:

That the sales contract in which the arbitration agreement was included was forged has been confirmed by final criminal judgement made by the Taiwan High Court (ROC). Consequently, the application for granting an order to recognize the arbitral award shall be denied.<sup>578</sup>

Even though these decisions dismissing the application for granting an order to recognize the foreign arbitral award due to forgery of the arbitration agreement were made under the *Commercial Arbitration (Amendment) Act 1982* (ROC),<sup>579</sup> an application for granting an order to recognize a foreign arbitral award also may be denied due to the invalidity of the arbitration

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<sup>576</sup> Decision of 10 February 1987 (*Lawson, Lewis & Peat Cotton, Inc v Shun Ji Textile Corp*), Taiwan High Court, 1987 Kang Zi Di 69 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 270-3.

<sup>577</sup> *Ibid.*

<sup>578</sup> Decision of 23 June 1987 (*Lawson, Lewis & Peat Cotton, Inc v Shun Ji Textile Corp*), Taipei District Court, 1987 Zhong Geng Zi Di 14 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 274-80.

<sup>579</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(4), art 23 para 1(8). Decision of 10 February 1987 (*Lawson, Lewis & Peat Cotton, Inc v Shun Ji Textile Corp*), Taiwan High Court, 1987 Kang Zi Di 69 Hao Min Shi Cai Ding (ROC), Decision of 23 June 1987, Taipei District Court, 1987 Zhong Geng Zi Di 14 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 270-80.

agreement under the law to which the parties have subjected it or under the law of the country where the foreign arbitral award was rendered in the absence of choice of law of the parties under the *Arbitration Act 1998* (ROC).<sup>580</sup> If the sales contract in which the arbitration agreement is included is forged, the arbitration agreement is invalid everywhere. Therefore, this case still is a precedent under the *Arbitration Act 1998* (ROC).

In *Iron Line Inc v Hu Ji Enterprise Corp*, Iron Line Incorp which is a Liberian maritime company applied to the Kaohsiung District Court (ROC) for granting an order to recognize an arbitral award rendered in Hong Kong on 15 May 1989 when Hong Kong was still governed by the government of the UK. The Court granted an order to recognize this arbitral award.<sup>581</sup>

The respondent, Hu Ji Enterprise Corp, who was a ROC corporation appealed and contended that the charter contract in which the arbitration agreement was included had not been signed by it and was a forgery. The Kaohsiung Branch of the Taiwan High Court (ROC)<sup>582</sup> held that the lower Court did not review whether the charter contract in which the arbitration

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<sup>580</sup> *Arbitration Act 1998* (ROC) art 50(2).

<sup>581</sup> Decision of 20 June 1990 (*Iron Line Inc v Hu Ji Enterprise Corp*), Kaohsiung District Court, 1990 Zhong Sheng Zi Di 1 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1061-3.

<sup>582</sup> Taiwan Gao Deng Fa Yuan Kaohsiung Fen Yuan [trans: Kaohsiung Branch of Taiwan High Court] (ROC) (The Kaohsiung Branch of the Taiwan High Court (ROC)).

agreement was included was a forgery or not and reversed the decision of the lower Court.<sup>583</sup>

Iron Line Inc appealed to the Supreme Court of ROC. The Court dismissed the appeal with the same reasoning as the lower Court held.<sup>584</sup>

Then, the Kaohsiung District Court (ROC) granted an order to recognize the arbitral award. The Court ruled that:

A contract is concluded when the parties have reciprocally declared expressly or implicitly their concordant intention.... The applicant noticed the respondent designating an arbitrator.... From the letter that the respondent replied the applicant, the fact that the respondent and the applicant had concluded a carriage contract has no doubt. Thus, although the respondent contended that the charter contract in which the arbitration agreement was included was forgery, the fact that the respondent and the applicant had concluded a charter contract still can be concluded.<sup>585</sup>

Hu Ji Enterprise Corp appealed. The Kaohsiung Branch of the Taiwan High Court (ROC) reversed the decision of the lower Court and held that:

An arbitration agreement shall be in writing.... 'Agreement in writing' is a prerequisite of a valid arbitration agreement.... In the arbitral award, the sole arbitrator who was designated by the applicant stated that: 'The respondent did not sign the charter contract. In addition, the name of the respondent is not on the charter contract.' The respondent also denied that it had signed any charter contract. Whether the charter contract in which the arbitration agreement is included is true cannot be concluded. If the charter contract in which the arbitration agreement is

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<sup>583</sup> Decision of 4 September 1990 (*Iron Line Inc v Hu Ji Enterprise Corp*), Kaohsiung Branch of Taiwan High Court, 1990 Kang Zi Di 124 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1064-5.

<sup>584</sup> Decision of 5 November 1990 (*Iron Line Inc v Hu Ji Enterprise Corp*), The Supreme Court, 1990 Tai Kang Zi Di 352 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1066-7.

<sup>585</sup> Decision of 27 June 1991 (*Iron Line Inc v Hu Ji Enterprise Corp*), Kaohsiung District Court, 1990 Zhong Sheng Geng Zi Di 1 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1068-72.

included is not true, the validity of the arbitral award will not exist. The lower court did not review this prerequisite clearly. Consequently, the decision of the lower court shall be reversed.<sup>586</sup>

Then, the Kaohsiung District Court (ROC) concluded that whether the charter contract in which the arbitration agreement was included was genuine could not be proved. Therefore, the Court dismissed the application for granting an order to recognize the arbitral award.<sup>587</sup>

Although the decision of the Court dismissing the application for granting an order to recognize the foreign arbitral award due to the invalidity of the arbitration agreement because it was not in writing were made under the *Commercial Arbitration (Amendment) Act 1982* (ROC)<sup>588</sup> in this case,<sup>589</sup> an application for granting an order to recognize a foreign arbitral award also may be dismissed for the same reason under the *Arbitration Act 1998*

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<sup>586</sup> Decision of 30 August 1991 (*Iron Line Inc v Hu Ji Enterprise Corp*), Kaohsiung Branch of Taiwan High Court, 1991 Kang Zi Di 440 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1073-4.

<sup>587</sup> Decision of 14 November 1991 (*Iron Line Inc v Hu Ji Enterprise Corp*), Kaohsiung District Court, 1991 Zhong Sheng Geng Yi Zi Di 1 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1075-7.

<sup>588</sup> If the arbitration agreement that is not in writing is invalid, the respondent of the application for granting an order to recognize a foreign arbitral award may apply the court to dismiss the application within 14 days from the date of receipt of the notice of the application in accordance with *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(4), art 23 para 1(2) and art 1 para 2.

<sup>589</sup> Decision of 20 June 1990 (*Iron Line Inc v Hu Ji Enterprise Corp*), Kaohsiung District Court, 1990 Zhong Sheng Zi Di 1 Hao Min Shi Cai Ding (ROC), rev'd, Decision of 4 September 1990, Kaohsiung Branch of Taiwan High Court, 1990 Kang Zi Di 124 Hao Min Shi Cai Ding (ROC), aff'd, Decision of 5 November 1990, The Supreme Court, 1990 Tai Kang Zi Di 352 Hao Min Shi Cai Ding (ROC), Decision of 27 June 1991, Kaohsiung District Court, 1990 Zhong Sheng Geng Zi Di 1 Hao Min Shi Cai Ding (ROC), rev'd, Decision of 30 August 1991, Kaohsiung Branch of Taiwan High Court, 1991 Kang Zi Di 440 Hao Min Shi Cai Ding (ROC), Decision of 14 November 1991, Kaohsiung District Court, 1991 Zhong Sheng Geng Yi Zi Di 1 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1061-77.

(ROC).<sup>590</sup> Therefore, this case also still is a precedent.

The legislation of ROC complies with international standards and the practices of ROC are not inconsistent with the legislation in this regard.

Thus, there is no deficiency of ROC legislation and practices.

### ***3. Lack of Due Process in Arbitration Proceedings***

Where a party applies to the court for recognition of a foreign arbitral award, the respondent may request the court to dismiss the application within 20 days from the date of receipt of the notice of the application if the respondent was not given proper notice of the appointment of arbitrators or of any other matters required to be notified in the arbitral proceedings or any other situation in which may be considered lack of due process.<sup>591</sup> This provision conforms to the *New York Convention*<sup>592</sup> and the UNCITRAL Model Law.<sup>593</sup> Both stipulate that recognition of an arbitral award may be refused at the request of the party who alleges and can prove that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. This ground for

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<sup>590</sup> *Arbitration Act 1998* (ROC) art 50(2).

<sup>591</sup> *Arbitration Act 1998* (ROC) art 50(3).

<sup>592</sup> *New York Convention* art 5(1)(b).

<sup>593</sup> UNCITRAL Model Law art 36 (1)(a)(ii).

refusing to recognize a foreign arbitral award is a denial of procedural fairness, equality of treatment, or natural justice in Europe and is regarded as a denial of due process in US.<sup>594</sup>

The object of this due process requirement of the arbitration proceedings is to ensure that the parties are treated with equality and are given a fair hearing, with a full and proper opportunity to present their cases.<sup>595</sup>

The meaning of ‘not given proper notice whether of the appointment of arbitrators or of any other matter required in the arbitral proceedings’ is not difficult to define, on the one hand. However, the meaning of ‘any other situation in which the arbitration proceedings are considered lack of due process’ is not easy to define, on the other hand. Whether proper notice of the appointment of arbitrators, or of any other matter required in the arbitral proceedings, has been given or whether arbitration proceedings are considered lack of due process must be decided in accordance with the law chosen by the parties to govern the arbitration agreement or, in the absence of an express choice of law, the law of the country where the arbitral award was made.<sup>596</sup>

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<sup>594</sup> Born, above n 17, 832.

<sup>595</sup> Redfern and Hunter, above n 17, 425.

<sup>596</sup> *Arbitration Act 1998* (ROC) art 50(5). Decision of 3 March 2000 (*Asia North America Eastbound Rate Agreement et al v Xin He Xing Ocean Enterprise Corporation Ltd*), The Supreme Court, 2000 Tai Kang Zi Di 82 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 12 September 2003 (Copy on file with author). Nonetheless, some practitioners advocate that it must



It is left to courts to determine case by case from their own standpoint.<sup>597</sup>

Nonetheless, article 23 paragraph 1 of the *Arbitration Act 1998* (ROC) can be a reference. This states that: ‘the arbitral tribunal shall ensure that each party has a full opportunity to present its case and the arbitral tribunal shall conduct the necessary investigations of the claims by the parties’. In addition, section 10(c) of the *Federal Arbitration Act 1947* as amended by the *Federal Arbitration (Amendment) Act 1992* (USA) also can be a reference. This provides that:

Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced’.<sup>598</sup>

In *Lawson, Lewis & Peat Cotton, Inc v Shun Ji Textile Corp*,<sup>599</sup> Lawson, Lewis & Peat Cotton, Inc incorporated in North Carolina, USA applied to the Taipei District Court (ROC) to grant an order to recognize an arbitral

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be decided in accordance with the law of the country where the arbitral award was made. See Su Wen-tang and Chang Zhe-lun, ‘Lun Guo Ji Shang Wu Zhong Cai Zhong De Zheng Dang Fa Lu Cheng Xu’ (2002) 67 *Zhong Cai* 65, 70 [trans: ‘Due Process in International Commercial Arbitration’ in *Arbitration*].

<sup>597</sup> Redfern and Hunter, above n 17, 426.

<sup>598</sup> 9 U.S.C. § 10 ©.

<sup>599</sup> Decision of 25 November 1986 (*Lawson, Lewis & Peat Cotton, Inc v Shun Ji Textile Corp*), Taipei District Court, 1986 Zhong Zi Di 7 Hao Min Shi Cai Ding (ROC), rev’d, Decision of 10 February 1987, Taiwan High Court, 1987 Kang Zi Di 69 Hao Min Shi Cai Ding (ROC), Decision of 23 June 1987, Taipei District Court, 1987 Zhong Geng Zi Di 14 Hao Min Shi Cai Ding (ROC), rev’d on other grounds, Decision of 11 September 1987, Taiwan High Court, 1987 Kang Zi Di 1504 Hao Min Shi Cai Ding (ROC), rev’d on other grounds, Decision of 6 November 1987, The Supreme Court, 1987 Tai Kang Zi Di 409 Hao Min Shi Cai Ding (ROC). In the end, the parties reached a compromise and Lawson, Lewis & Peat Cotton, Incorporation withdrew its application. See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 266-84.

award rendered in England. The Court granted an order to recognize the foreign arbitral award.<sup>600</sup>

Shun Ji Textile Corp appealed and contended that:

Since it was not given notice of the arbitration proceedings, it never knew the arbitration proceedings. In addition, because it did not appoint any representative in the arbitration proceedings, it had no opportunity to present the case. Thus, the arbitral award shall not be recognized.<sup>601</sup>

The Taiwan High Court (ROC) reversed the decision of the lower Court and held that:

There is no evidence showing notice of arbitration proceedings was given to Shun Ji Textile Corporation to let Shun Ji Textile Corporation have opportunity to present the case or to appoint any representative in the arbitral award. Whether the arbitral award shall be recognized depends on if the arbitration proceedings are lawful or not. Thus, the decision of the Taipei District Court (ROC) shall be reversed.<sup>602</sup>

Then, the Taipei District Court (ROC) turned down the application for granting an order to recognize the foreign arbitral award and concluded that:

There is no evidence approving Shun Ji Textile Corp have already received notice of attending the arbitration proceedings. Neither there is evidence approving Shun Ji Textile Corp had opportunity to present the case or to appoint any representative. Thus, the application for granting an order to recognize the arbitral award shall be denied.<sup>603</sup>

Although these decisions denying the application for granting an order to

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<sup>600</sup> Decision of 25 November 1986 (*Lawson, Lewis & Peat Cotton, Inc v Shun Ji Textile Corp*), Taipei District Court, 1986 Zhong Zi Di 7 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 266-9.

<sup>601</sup> Decision of 10 February 1987 (*Lawson, Lewis & Peat Cotton, Inc v Shun Ji Textile Corp*), Taiwan High Court, 1987 Kang Zi Di 69 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 270-3.

<sup>602</sup> *Ibid.*

<sup>603</sup> Decision of 23 June 1987 (*Lawson, Lewis & Peat Cotton, Inc v Shun Ji Textile Corp*), Taipei District Court, 1987 Zhong Geng Zi Di 14 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed),

recognize the foreign arbitral award owing to lacking of proper notice in the arbitration proceedings were made under the *Commercial Arbitration (Amendment) Act 1982 (ROC)*,<sup>604</sup> an application for granting an order to recognize a foreign arbitral award also may be denied due to lack of proper notice or other due process in the arbitration proceedings under the *Arbitration Act 1998 (ROC)*.<sup>605</sup> Therefore, this case still is a precedent.

In *All American Cotton Co Ltd v Jian Rong Textile Corp*, All American Cotton Co Ltd applied to the Changhua District Court (ROC) to grant an order to recognize an English arbitral award that was rendered by arbitrators R. John Anderson and Arthur Aldcroft of the Liverpool Cotton Association Ltd on 12 October 1983. This arbitral award required Jian Rong Textile Corp to pay compensation of US\$ 10,623.88 with interest to All American Cotton Co Ltd. The Court granted an order to recognize the arbitral award. Jian Rong Textile Corp contended that it did not receive proper notice of the arbitration proceedings and ask the court to dismiss the application of All

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*International Commercial Arbitration* vol 2, above n 61, 274-80.

<sup>604</sup> *Commercial Arbitration (Amendment) Act 1982 (ROC)* art 33 para 1(4), art 23 para 1(3). Decision of 10 February 1987 (*Lawson, Lewis & Peat Cotton, Inc v Shun Ji Textile Corp*), Taiwan High Court, 1987 Kang Zi Di 69 Hao Min Shi Cai Ding (ROC), Decision of 23 June 1987, Taipei District Court, 1987 Zhong Geng Zi Di 14 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 270-80.

<sup>605</sup> *Arbitration Act 1998 (ROC)* art 50(3).

American Cotton Co Ltd. The Court overruled the contention of Jian Rong Textile Corp and stated that:

All American Cotton Co Ltd notified Jian Rong Textile Corp by telegram in which All American Cotton Co Ltd said that it would submit the dispute between them to the Liverpool Cotton Association Ltd to arbitrate according to the contract between them and the dispute would be arbitrated in accordance with the Rules of the Liverpool Cotton Association Ltd on 9 November 1982. In the telegram, All American Cotton Co Ltd also told Jian Rong Textile Corp the name of the arbitrator who it designated and asked Jian Rong Textile Corp to designate an arbitrator. Nonetheless, Jian Rong Textile Corp did not answer. All American Cotton Co Ltd applied to the Liverpool Cotton Association Ltd to designate an arbitrator for Jian Rong Textile Corp *ex officio* pursuant to article 205 paragraph 4(b) of the By-Laws of the Liverpool Cotton Association Ltd on 29 June 1983. The Liverpool Cotton Association Ltd notified Jian Rong Textile Corp that Jian Rong Textile Corp should designate an arbitrator before 14 July 1983, otherwise it would designate an arbitrator for Jian Rong textile Corp *ex officio* by telegram and registered mail on 1 July 1983. On 12 July 1983, Jian Rong Textile Corp replied to the Liverpool Cotton Association Ltd that the cotton delivered by All American Cotton Co Ltd had shortage, unfit, and delay and lead to difficulty of its production so it had to cancel the contract by telegram. The Liverpool Cotton Association Ltd replied to Jian Rong Textile Corp that the contract could not be cancelled in accordance with By-Laws and Rules of the Liverpool Cotton Association Ltd by telegram on the same day. It also told Jian Rong Textile Corp that the duration that Jian Rong Textile Corp should designate an arbitrator postponed to 19 July 1983 and the arbitrators would render an arbitral award through taking any contention alleged by both parties into account in the telegram. Since Jian Rong Textile Corp did not reply the telegram, the Liverpool Cotton Association Ltd notified Jian Rong Textile Corp by mail that it had designated Arthur Aldcroft as the arbitrator of Jian Rong Textile Corp according to its Rules on 20 July 1983. Arthur Aldcroft also urged Jian Rong Textile Corp to submit relating material that could be taken into account by mails on 21 July 1983 and on 22 August 1983. Jian Rong Textile Corp did not reply again. The arbitrators examined all evidence that they had gotten carefully and rendered the arbitral award.... The arbitrators had given both parties opportunities to express opinions before they rendered the arbitral award.... James Newton, general manager of the Liverpool Cotton Association Ltd, also stated that Jian Rong Textile Corp had had fair and adequate opportunity to protect its rights and interests during arbitration

proceedings in his affidavit made on 15 April 1988. Thus, the contention of not receiving proper notice in the arbitration proceedings of Jian Rong Textile Corp cannot be adopted.<sup>606</sup>

Jian Rong Textile Corp appealed and alleged the same reason contended in the lower Court. The Taichung Branch of the Taiwan High Court (ROC) overruled the appeal. It held the same reason stated by the lower Court.<sup>607</sup>

Consequently, if a party was given proper notice in arbitration proceedings, this party cannot contend that the arbitration proceedings suffered from a lack of due process and ask the court to dismiss the application to grant an order to recognize a foreign arbitral award, even though he was not present in the arbitration proceedings.

In a case, an American Instrument Company applied to the Taipei District Court (ROC) for granting an order to recognize an arbitral award rendered by an arbitrator who was designated by the American Arbitration Association in Albany, New York on 23 December 1992. This arbitral award required a company of ROC to pay compensation, attorney's fees, and expenses occurred in the arbitration proceedings. The Court dismissed the

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<sup>606</sup> Decision of 30 September 1988 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Changhua District Court, 1987 Sheng Geng Zi Di 3 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 334-42.

<sup>607</sup> Decision of 19 December 1988 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Taichung Branch of Taiwan High Court, 1988 Guo Mao Kang Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 343-50.

application. The Court held that:

The respondent contended that: 'It did not receive the notice in which the arbitrator informed it the hearing would be held on 16 September 1992 until 18 October 1992 or 19 October 1992.... The notice was delivered by ordinary mail instead of registered mail. In addition, its address on the notice was incorrect. It was not able to present the hearing on time.'... The notice of the hearing sent to No. 29-286 mailbox, but the number of the mailbox of the respondent is 29-296.... Although the result of fax transmitting was 'O.K.', the respondent having already received the notice of hearing cannot be proved. The notice of the hearing shall be delivered by a special messenger or by registered mail before eight days of the hearing date in accordance section 7506(b) of the Arbitration Act of New York State. The applicant cannot prove the notice of hearing had been delivered to the respondent by registered mail or through assistance of the court of ROC before eight days of the hearing date. The respondent did not have sufficient time and opportunity to present. The process of service did not comply with the law of the arbitration place.... Consequently, the application for granting an order to recognize the foreign arbitral award shall be dismissed.<sup>608</sup>

*In Asia North America Eastbound Rate Agreement v Jia Lu*

*Technological (Megamedia) Corporation Ltd, the Asia North America*

*Eastbound Rate Agreement applied to the Keelung District Court (ROC)*<sup>609</sup> to

grant an order to recognize an arbitral award rendered in Hong Kong on 4

November 1991 when Hong Kong was governed by the government of the

UK. This arbitral award required a corporation of ROC to pay a penalty

with interest on the ground of non-performance of obligation and expenses

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<sup>608</sup> Decision of 24 June 1995, Taipei District Court, 1994 Zhong Sheng Zi Di 11 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1137-9. The cited source did not give the names of the parties. The names of the parties also cannot be discovered from any source. Thus, it is impossible to give this case a title.

<sup>609</sup> Taiwan Keelung Di Fang Fa Yuan [trans: Keelung District Court] (ROC) (Keelung District Court) (ROC).

occurred in the arbitration proceedings. The Court dismissed the application.

The Court held that:

The arbitrator noticed the respondent to plead by faxes on 29 May 1991, 26 June 1991 and 15 October 1991. The arbitrator also noticed the respondent to plead before 22 October 1991 by registered mail on 21 October 1991. The respondent denied that it had received the faxes mentioned above. In addition, the respondent received the registered mail on 28 October 1991 when the duration of pleading lapsed. Although the service contract between the parties provides that service may be executed by fax, this kind of service only can be applied to contact relating to service contract. This kind of service cannot be applied to arbitration proceedings. Even though service may be executed by handing over the document to the person to be served directly, leaving the document at the place of service, delivering the document by registered mail or other method provided in arbitration agreement according to article 31 of the Arbitration Act of Hong Kong, service executed by fax that is permissible in service contract cannot be applied to arbitration proceedings. Thus, the arbitrator did not give the respondent adequate opportunity to plead before making the arbitral award. Therefore, this application shall be dismissed in accordance with article 33 paragraph 1(4) of the *Commercial Arbitration (Amendment) Act 1982* (ROC).<sup>610</sup>

The Asia North America Eastbound Rate Agreement appealed. The

Taiwan High Court (ROC) upheld the opinion of the lower Court but reversed

the decision on other grounds. The Court stated that:

The applicant contended that the arbitrator had delivered the notices that had been delivered via faxes before by registered mail. The applicant also submitted certificates in which stated that these registered mails were delivered to the post office in Hong Kong on 29 May 1991, 27 June 1991 and 19 October 1991. If these registered mails delivered to the respondent within ordinary delivering period, the respondent would have reasonable time to plead before the arbitral award was made. The holding of the lower court in which the lower court held that the respondent was not given adequate

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<sup>610</sup> Decision of 9 June 1993 (*Asia North America Eastbound Rate Agreement v Jia Lu Technological (Megamedia) Corporation Ltd*), Keelung District Court, 1993 Zhong Zhi Zi Di 1 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1115-16.

opportunity to plead is not adequate.<sup>611</sup>

The respondent appealed. The Supreme Court of ROC dismissed the appeal with the same reason held by the Taiwan High Court (ROC).<sup>612</sup>

Then, the Keelung District Court (ROC) dismissed the application again.

The Court stated that:

Service of notice may be executed by handing over the document to the person to be served directly, leaving the document at the place of service, delivering the document by registered mail or other methods provided in arbitration agreement according to article 31(2) of Arbitration Act of Hong Kong.... Nonetheless, there is no agreement on the method of service in the arbitration agreement. Thus, noticing the respondent to plead via faxes by the arbitrator is not legal service. Additionally, the respondent received the registered mail when the duration of pleading lapsed. It also is not a legal service.... The applicant contended that the arbitrator had delivered the notices that had been delivered via faxes before by registered mail. The applicant also submitted certificates in which stated that these registered mails were delivered to the post office in Hong Kong on 29 May 1991, 27 June 1991 and 19 October 1991. The respondent denied that it had received these registered mails. Furthermore, the certificates can only prove that the arbitrator mailed the notices to the respondent. These certificates cannot prove that the notices have already delivered to the respondent legally. The arbitrator did not give the respondent adequate opportunity to plead before making the arbitral award. Therefore, this application shall be dismissed in accordance with article 33 paragraph 1(4) and article 23 paragraph 1(3) of the *Commercial Arbitration (Amendment) Act 1982* (ROC).<sup>613</sup>

The Asia North America Eastbound Rate Agreement appealed again.

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<sup>611</sup> Decision of 29 October 1993 (*Asia North America Eastbound Rate Agreement v Jia Lu Technological (Megamedia) Corporation Ltd*), Taiwan High Court, 1993 Kang Zi Di 1263 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1117-19.

<sup>612</sup> Decision of 25 February 1994 (*Asia North America Eastbound Rate Agreement v Jia Lu Technological (Megamedia) Corporation Ltd*), The Supreme Court, 1994 Tai Kang Zi Di 88 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1120-2.

<sup>613</sup> Decision of 8 October 1994 (*Asia North America Eastbound Rate Agreement v Jia Lu Technological (Megamedia) Corporation Ltd*), Keelung District Court, 1994 Zhong Zhi Geng Zi Di 1 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1123-6.



The Taiwan High Court (ROC) upheld the opinion held by the lower Court and dismissed the appeal of the Asia North America Eastbound Rate Agreement.<sup>614</sup>

Consequently, we can reach a conclusion that the applicant who applies for recognition of a foreign arbitral award must prove that the respondent was given proper notice of the appointment of the arbitrator and of the arbitration proceedings and was able to present his case. In addition, service of notice by fax is not a legal service unless it is permissible in the arbitration agreement or, failing such agreement, is permissible by the law of the country where the arbitration took place.

Although these decisions denying the application to grant an order to recognize the foreign arbitral award owing to lack of proper notice in the arbitration proceedings were made under the *Commercial Arbitration (Amendment) Act 1982*,<sup>615</sup> an application for granting an order to recognize a foreign arbitral award also may be denied due to lack of proper notice or other due process in the arbitration proceedings under the *Arbitration Act 1998*

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<sup>614</sup> Decision of 28 February 1995 (*Asia North America Eastbound Rate Agreement v Jia Lu Technological (Megamedia) Corporation Ltd*), Taiwan High Court, 1994 Kang Zi Di 2331 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1127-34.

<sup>615</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(4), art 23 para 1(3).

(ROC).<sup>616</sup> Therefore, these decisions still are precedents.

In *Maersk Line et al v Asia Food Corporation Ltd et al*, Maersk Line et al (the applicants) applied to the Tainan District Court (ROC)<sup>617</sup> for recognition of an arbitral award made in Hong Kong on 16 September 1992. The Tainan District Court (ROC) recognized this arbitral award.<sup>618</sup> *Asia Food Corporation Ltd et al* (the respondents) appealed to the Tainan Branch of the Taiwan High Court (ROC). The respondents contended that they had not been given proper notice of the appointment of the arbitrator and had never presented and pleaded at the arbitral tribunal. The Tainan Branch of the Taiwan High Court overruled the appeal and held that:

The contract between the applicants and the respondents provided that any and all disputes arising from the contract or relevant to the contract ... must be resolved by arbitration in Hong Kong or any other place agreed by both parties. The arbitration proceedings must be proceeded by a sole arbitrator appointed by both parties. If both parties cannot appoint a sole arbitrator jointly, any party may apply to the Hong Kong International Arbitration Center for appointment of a sole arbitrator.... The applicants asked the respondents to appoint J A Lister as the sole arbitrator by fax and registered mail on 25 March 1992. The respondents had received the notice, but they did not answer. Then, the applicants inquired the respondents whether the respondents agree to appoint J A Lister as the sole arbitrator by express delivery on 1 April 1992.... The respondents still did not answer. Consequently, the applicants applied to the Hong Kong International Arbitration Center for appointment of a sole arbitrator. Then, the

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<sup>616</sup> *Arbitration Act 1998* (ROC) art 50(3).

<sup>617</sup> Taiwan Tainan Di Fang Fa Yuan [trans: Tainan District Court] (ROC) (Tainan District Court (ROC)).

<sup>618</sup> Decision of 7 April 1999 (*Maersk Line et al v Asia Food Corporation Ltd et al*), Tainan District Court, 1998 Sheng Zi Di 46 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

Hong Kong International Arbitration Center appointed Philip Yang as the sole arbitrator.... During the arbitration proceedings, the arbitrator and the applicants have been noticed the respondents to present this case several times. The arbitrator and the applicants also designated a lawyer to inform the respondents to present this case by registered mail several times. The respondents contended that they had breached the contract resulting from circumstances of force majeure by fax sent to the sole arbitrator on 30 May 1992.... The respondents pleaded during the arbitration proceedings, so they had been given proper notice. The appointment of the arbitrator and the notice of the arbitration proceedings comply with the arbitration agreement and the applicable law of the arbitration proceedings. Thus, there is no circumstance stipulated by article 50(3) of the *Arbitration Act 1998* (ROC) in this case.<sup>619</sup>

Accordingly, the party against whom a foreign arbitral award is invoked was given proper notice of the appointment of the arbitrator and of the arbitration proceedings and was able to present his case even though he did not appoint an arbitrator or did not present his case, the application for recognition of the foreign arbitral award cannot be refused owing to lack of due process.

In *American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*, American President Lines Ltd et al (the applicants) applied to the Kaohsiung District Court (ROC) for recognition of an arbitral award made in Hong Kong. The Kaohsiung District Court dismissed the application. The Court held that:

Although the applicants contended that the arbitrator had given proper notice of the

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<sup>619</sup> Decision of 8 March 2002 (*Maersk Line et al v Asia Food Corporation Ltd et al*), Tainan Branch of Taiwan High Court, 1999 Kang Zi Di 358 Hao Min Shi Cai Ding (ROC).

arbitration proceedings by registered mail and fax to the respondent several times, the respondent denied. The applicant cannot prove that the respondent has been given proper notice of the arbitration proceedings. Therefore, the application must be dismissed in accordance with article 50(3) of the *Arbitration Act 1998* (ROC).<sup>620</sup>

The applicants appealed and contended that:

The arbitration proceedings commenced from the notice of the appointment of the arbitrator by them via registered mail. The respondent did not deny that it had received this notice. Thus, the situation that the respondent was not given proper notice of the arbitration proceedings does not exist. Moreover, the applicants and the arbitrator had given proper notice of the arbitration proceedings by registered mail and fax to the respondent several times.<sup>621</sup>

The Kaohsiung Branch of the Taiwan High Court dismissed the appeal

and ruled that:

That the party against whom a foreign arbitral award is invoked was not given proper notice of the appointment of the arbitrator is not the sole reason that an application for recognition a foreign arbitral award may be dismissed. If the situation that the party against whom a foreign arbitral award is invoked was not given proper notice of the arbitration proceedings exists, the application also may be dismissed.... Otherwise, the parties will be deprived of the rights of the arbitration proceedings. It is against the principle of due process obviously.... The applicants cannot prove that the respondent has received the registered mail, in which proper notice was given, sent by the applicants and the arbitrator. In addition, the fact that the fax, in which proper notice had been given, sent by the applicants and the arbitrator to the number of the respondent attached to the contract between the parties is proved by the successful transmitted report and the affidavit of the arbitrator and the lawyer of the applicants. However, the content of the fax cannot be proved. Thus, the fact that the respondent has been given proper notice of the arbitration proceedings cannot be proved.... The lower court dismissed the application by the reason that the respondent has not been

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<<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

<sup>620</sup> Decision of 18 August 2000 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung District Court, 1998 Zhong Sheng Zi Di 2 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

<sup>621</sup> Decision of 22 November 2000 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2000 Kang Zi Di 968 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

given proper notice of the arbitration proceedings in accordance with article 50(3) of the *Arbitration Act 1998* (ROC) is correct.<sup>622</sup>

The applicants remained unconvinced by the decision and applied to the Kaohsiung Branch of the Taiwan High Court for retrial twice. Nonetheless, the Court denied their applications.<sup>623</sup>

Consequently, if either the party against whom a foreign arbitral award is invoked was not given proper notice of the appointment of the arbitrator, or he was not given proper notice of the arbitration proceedings, or other circumstance of a lack of due process exists, the application for recognition of this foreign arbitral award may be refused at his request.

In *Azzura Yachting Italia SRL v Da Xin Yachting Corporation Ltd*, Azzura Yachting Italia SRL (the applicant) applied to the Tainan District Court for recognition of a final award on costs and an award on taxation made in London, England. Da Xin Yachting Corporation Ltd (the respondent) applied to the Court to dismiss the application of the applicant. The respondent contended that it was not given proper notice of the arbitration

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<sup>622</sup> Decision of 22 November 2000 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2000 Kang Zi Di 968 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

<sup>623</sup> Decision of 30 January 2001 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2000 Zai Zi Di 76 Hao Min Shi Cai Ding (ROC); Decision of 17 May 2001 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2001 Zai Zi Di 13 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

proceedings. The Court dismissed the application for recognition of these two foreign arbitral awards and held that:

The arbitrator required the respondent to submit its opinion after receiving the copy of the detailed list of costs and the copy of the receipt of the payment within 21 days.... The attorney of the applicant sent the detailed list of costs and the copy of the receipt of the payment to C S & Partners, the attorney of the respondent, by fax in accordance with the direction of the arbitrator. The respondent did submit its opinion after its attorney had received the copy of the detailed list of costs and the copy of the receipt of the payment within 21 days.... Nonetheless, the respondent only designated C S & Partners as its representative to negotiate the cost of the arbitration proceedings with the attorney of the applicant outside the arbitration proceedings. The respondent did not designate C S & Partners as its representative in the arbitration proceedings. Thus, the respondent was not given proper notice of the arbitration proceedings even though the attorney of the applicant sent the detailed list of costs and the copy of the receipt of the payment to C S & Partners.... The application of the applicant for recognition of these two foreign arbitral awards must be dismissed pursuant to article 50(3) of the *Arbitration Act 1998 (ROC)*.<sup>624</sup>

Thus, the notice of the appointment of the arbitrator and the notice of the arbitration proceedings must be sent to the parties or the persons who have the right to represent the parties. Otherwise, the notice is not legal service.

The ROC legislation is consistent with the *New York Convention* and the UNCITRAL Model Law in this regard. Moreover, the ROC practices comply with the legislation. Consequently, there is no deficiency of ROC legislation and practices.

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<sup>624</sup> Decision of 10 April 2003 (*Azzura Yachting Italia SRL v Da Xin Yachting Corporation Ltd*), Tainan District Court, 2002 Zhong Zhi Zi Di 2 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

It does not constitute lack of due process of the arbitration proceedings if the parties of the arbitration proceedings have received a fundamentally fair hearing under US law. If the parties have been given adequate opportunities to attend the arbitration proceedings and to submit relevant evidences, the parties' right to a fundamentally fair hearing has not been denied.<sup>625</sup> The parties waived notice of hearing if the parties or their representatives have attended the arbitration hearing.<sup>626</sup> The failure of the arbitrator to inquire into the legal opinion of a witness does not constitute denial of fundamentally fair hearing.<sup>627</sup> The arbitrator's desire to get to the essence of issue, which is before arbitration panel, also does not constitute a denial of fundamentally fair hearing.<sup>628</sup> Nonetheless, ex parte receipt of evidence as the basis for the computation of the amount of the award constitutes lack of due process of the arbitration proceedings.<sup>629</sup> ROC Courts should adopt the theories adopted by US law discussed above while dealing with the same issue.

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<sup>625</sup> *Dan River, Inc v Cal-Togs, Inc*, 451 F.Supp. 497 (S.D.N.Y. 1978); *Concourse Beauty School, Inc v Polakov*, 685 F.Supp. 1311 (S.D.N.Y. 1988); *Blue Tee Corp v Koehring Co*, 754 F.Supp. 26 (S.D.N.Y. 1990); *Roche v Local 32B-32J Service Employees Intern. Union*, 755 F.Supp. 622 (S.D.N.Y. 1991); *Berlacher v PaineWebber Inc*, 759 F.Supp. 21 (D.D.C. 1991); *Agarwal v Agarwal*, 775 F.Supp. 588 (E.D.N.Y. 1991), *aff'd*, 969 F.2d 1041 (2<sup>nd</sup> Cir. 1992); *ARW Exploration Corp v Aguirre*, 45 F.3d 1455 (10<sup>th</sup> Cir. 1995); *Areca, Inc v Oppenheimer & Co, Inc*, 960 F.Supp. 52 (S.D.N.Y. 1997).

<sup>626</sup> *Borden v Hammers*, 941 F.Supp. 1170 (M.D. Fla. 1996).

<sup>627</sup> *Fairchild & Co, Inc v Richmond, F & P R Co*, 516 F.Supp. 1305, 1314 (D.D.C. 1981).

<sup>628</sup> *Health Services Management Corp v Hughes*, 975 F.2d 1253 (7<sup>th</sup> Cir. 1992).

<sup>629</sup> *Totem Marine Tug & Barge, Inc v North American Towing, Inc*, 607 F.2d 649, 652-3 (5<sup>th</sup> Cir. 1979).

#### ***4. The Arbitral Award Is Not Relevant to the Subject Matter of the Dispute***

Where a party applies to the court for recognition of a foreign arbitral award, the respondent may request the court to dismiss the application within 20 days from the date of receipt of the notice of the application if the arbitral award is not relevant to the subject matter of the dispute covered by the arbitration agreement or exceeds the scope of the arbitration agreement, unless the offending portion can be severed from and not affect the remainder of the arbitral award.<sup>630</sup> This provision is in conformance with the *New York Convention*<sup>631</sup> and the UNCITRAL Model Law.<sup>632</sup> Both stipulate that recognition of an arbitral award may be refused at the request of the party against whom proof is invoked that the arbitral award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. This is subject to the proviso that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the arbitral award which contains decisions on matters

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<sup>630</sup> *Arbitration Act 1998* (ROC) art 50(4).

<sup>631</sup> *New York Convention* art 5(1)(c). See Appendix .



submitted to arbitration may be recognized.

In *All American Cotton Co Ltd v Jian Rong Textile Corp*, All American Cotton Co Ltd applied to the Changhua District Court (ROC) to grant an order to recognize an English arbitral award that was rendered by arbitrators R. John Anderson and Arthur Aldcroft of the Liverpool Cotton Association Ltd on 12 October 1983. This arbitral award required Jian Rong Textile Corp to pay compensation of US\$ 10,623.88 with interest to All American Cotton Co Ltd. The Court granted an order to recognize the arbitral award.

The Court stated that:

Jian Rong Textile Corp contended that: 'In the sales contract, both parties agreed that any irreconcilable dispute concerning contract terms, validity or alleged default to be referred to technical arbitration by the Liverpool Cotton Association Ltd. The amount of the compensation is not under the scope of the arbitration agreement. The arbitral award in which requires Jian Rong Textile Corp to pay compensation to All American Cotton Co Ltd exceeds the scope of the arbitration agreement. Thus, the application for granting an order to recognize the arbitral award shall be dismissed.'... Rule 141 of the By-Laws and the Rules of the Liverpool Cotton Association Ltd provides that: 'For resolving dispute, the arbitrator can decide the amount of compensation in accordance with the price provided by the By-Laws and Rules of the Association or the price stated in the contract.' The arbitrators require Jian Rong Textile Corp to pay compensation according to the price stipulated by Rule 141 of the By-Laws and Rules of the Association. Therefore, the arbitral award does not exceed the scope of the arbitration agreement.<sup>633</sup>

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<sup>632</sup> UNCITRAL Model Law art 36(1)(a)(iii). See Appendix .

<sup>633</sup> Decision of 30 September 1988 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Changhua District Court, 1987 Sheng Geng Zi Di 3 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 334-42.

Jian Rong Textile Corp appealed and alleged the same reason contended in the lower Court. The Taichung Branch of the Taiwan High Court (ROC) overruled the appeal. It held the same reason stated by the lower Court.<sup>634</sup>

Although this case was made under the *Commercial Arbitration (Amendment) Act 1982* (ROC), it still is precedent since a foreign arbitral award not relevant to the subject matter of the dispute is also a defence of the respondent regarding an application for an order to recognize a foreign arbitral award under the *Arbitration Act 1998* (ROC).<sup>635</sup> Consequently, whether a foreign arbitral award relates to the dispute covered by an arbitration agreement is not solely decided by the explicit provisions of the arbitration agreement. Whether a foreign arbitral award does concern the dispute covered by an arbitration agreement is also decided by the implicit or inferential meaning of the provisions of the arbitration agreement. Namely, these disputes are all covered by the arbitration agreement.

In *New Construction Office of Public Works Department under Kaohsiung City Government v Yuan Dong Construction Corp*, the Kaohsiung

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<sup>634</sup> Decision of 19 December 1988 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Taichung Branch of Taiwan High Court, 1988 Guo Mao Kang Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 343-50.

<sup>635</sup> *Arbitration Act 1998* (ROC) art 50(4).

Branch of the Taiwan High Court held that:

An arbitral award not relevant to the subject matter of the dispute covered by an arbitration agreement means that the matters adjudicated by the arbitral award are absolutely not relevant to the matters that can be submitted to the arbitral tribunal for arbitration.<sup>636</sup>

*In New Construction Office of Public Works Department under*

*Kaohsiung City Government v Yuan Dong Construction Corp*), the Kaohsiung

Branch of the Taiwan High Court concluded that:

An arbitration agreement provides that: ‘any dispute occurred due to not provided in the contract expressly or the interpretation of the contract shall be resolved by arbitration.’ Owing to rising of wage and material costs, the contractor who agreed to execute the construction work paid more expenses on the construction work and required the employer to pay more remuneration. The arbitrator made an arbitral award regarding dispute relating to paying more remuneration in accordance with the provision mentioned above. This arbitral award is relevant to the subject matter of the dispute covered by the arbitration agreement.<sup>637</sup>

*In New Construction Office of Public Works Department under*

*Kaohsiung City Government v Shan Sheng Construction Co Ltd*, the

Kaohsiung Branch of the Taiwan High Court ruled that:

An arbitral award not relevant to the subject matter of the dispute covered by an arbitration agreement also means that the matters adjudicated by the arbitral award are

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<sup>636</sup> Judgement of 13 February 1995 (*New Construction Office of Public Works Department under Kaohsiung City Government v Yuan Dong Construction Corp*), Kaohsiung Branch of Taiwan High Court, 1994 Shang Zi Di 545 Hao Min Shi Pan Jue (ROC), aff’d, Judgement of 24 October 1996, the Supreme Court, 1996 Tai Shang Zi Di 2441 Hao Min Shi Pan Jue (ROC), <http://wjirs.judicial.gov.tw/jirs> (Copy on file with author).

<sup>637</sup> Judgement of 13 February 1995 (*New Construction Office of Public Works Department under Kaohsiung City Government v Yuan Dong Construction Corp*), Kaohsiung Branch of Taiwan High Court, 1994 Shang Zi Di 545 Hao Min Shi Pan Jue (ROC), aff’d, Judgement of 24 October 1996, the Supreme Court, 1996 Tai Shang Zi Di 2441 Hao Min Shi Pan Jue (ROC), <http://wjirs.judicial.gov.tw/jirs> (Copy on file with author).

beyond the matters that were submitted to the arbitral tribunal for arbitration.<sup>638</sup>

In *New Construction Office of Public Works Department under Kaohsiung City Government v Shan Sheng Construction Co Ltd*, the

Kaohsiung Branch of the Taiwan High Court held that:

An arbitral award not relevant to the subject matter of the dispute covered by an arbitration agreement means that the matters adjudicated by the arbitral award are beyond the matters that were agreed to be arbitrated or have not been submitted to the arbitral tribunal for arbitration.<sup>639</sup>

The identical ruling was also made by the Taiwan High Court in *Taipei Municipal Zoo v Feng Rong Construction Corp.*<sup>640</sup>

In *Meng Li Automation Corp v Kaohsiung Bank Corp*, the Kaohsiung Branch of the Taiwan High Court concluded that:

If a penalty agreed by the parties to be paid by the debtor in case the debtor does not perform the obligation is relevant to the subject matter of the dispute covered by an arbitration agreement. Reducing penalty to a reasonable amount due to disproportionately high of the stipulated penalty also is relevant to the subject matter of the dispute covered by an arbitration agreement.<sup>641</sup>

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<sup>638</sup> Judgement of 27 January 1997 (*New Construction Office of Public Works Department under Kaohsiung City Government v Shan Sheng Construction Co Ltd*), Kaohsiung Branch of Taiwan High Court, 1996 Shang Zi Di 446 Hao Min Shi Pan Jue (ROC), aff'd, Judgement of 16 January 1998, the Supreme Court, 1998 Tai Shang Zi Di 110 Hao Min Shi Pan Jue (ROC), <http://wjirs.judicial.gov.tw/jirs> (Copy on file with author).

<sup>639</sup> Judgement of 27 January 1997 (*New Construction Office of Public Works Department under Kaohsiung City Government v Shan Sheng Construction Co Ltd*), Kaohsiung Branch of Taiwan High Court, 1996 Shang Zi Di 446 Hao Min Shi Pan Jue (ROC), aff'd, Judgement of 16 January 1998, the Supreme Court, 1998 Tai Shang Zi Di 110 Hao Min Shi Pan Jue (ROC), <http://wjirs.judicial.gov.tw/jirs> (Copy on file with author).

<sup>640</sup> Judgement of 23 June 1999 (*Taipei Municipal Zoo v Feng Rong Construction Corp*), Taiwan High Court, 1999 Shang Zi Di 168 Hao Min Shi Pan Jue (ROC), aff'd, Judgement of 22 September 2000, the Supreme Court, 2000 Tai Shang Zi Di 2136 Hao Min Shi Pan Jue (ROC), <http://wjirs.judicial.gov.tw/jirs> (Copy on file with author).

<sup>641</sup> Judgement of 2 February 2000 (*Meng Li Automation Corp v Kaohsiung Bank Corp*), Kaohsiung Branch of Taiwan High Court, 1999 Shang Geng Shan Zi Di 102 Hao Min Shi Pan Jue (ROC), aff'd, Judgement of 4 May 2000, the Supreme Court, 2000 Tai Shang Zi Di 1021 Hao Min Shi Pan Jue (ROC), <http://wjirs.judicial.gov.tw/jirs> (Copy on file with author).

Although some of these decisions were made under the *Commercial Arbitration (Amendment) Act 1982* (ROC), these decisions still are precedents since an arbitral award not relevant to the subject matter of the dispute is also a defence of the respondent regarding an application for granting an order to enforce a domestic arbitral award under the *Arbitration Act 1998* (ROC).<sup>642</sup> In addition, these cases also are precedents in the international context (even though they are in the domestic context) since the defences are the same.<sup>643</sup>

Consequently, it can be concluded that the Courts of ROC give broadest possible interpretation as to subject matter of arbitration agreements regarding recognition and enforcement of foreign arbitral awards.

The ROC legislation complies with the *New York Convention* and the UNCITRAL Model Law. Furthermore, ROC Courts go further. Unlike some countries that adopt restrictive interpretation of the scope of arbitration agreement,<sup>644</sup> ROC Courts adopt a ‘pro-arbitration’ approach and give the broadest possible interpretation about subject matter of arbitration agreement relating to recognition and enforcement of foreign arbitral awards. Thus, there is no deficiency of ROC legislation and practices in this regard.

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<sup>642</sup> *Arbitration Act 1998* (ROC) art 38(1).

<sup>643</sup> Cf *Arbitration Act 1998* (ROC) art 38(1) with *Arbitration Act 1998* (ROC) art 50(4).

In construing the scope of the subject matter of an arbitration agreement under US federal law, the parties' intentions control.<sup>645</sup> The intentions of parties with respect to the scope of the subject matter of an arbitration agreement must be determined from the entire agreement.<sup>646</sup> The parties' intentions are generously construed as to issues about the scope of the arbitration clause. This clause is given the broadest possible interpretation.<sup>647</sup> Any doubt concerning the scope of the subject matter of an arbitration agreement is resolved in favor of arbitration.<sup>648</sup> However, a

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<sup>644</sup> Born, above n 17, 318.

<sup>645</sup> *McKinley v Martin*, 722 F.Supp. 697 (D. Wyo. 1989); *Durkin v CIGNA Property & Gas. Corp*, 942 F.Supp 481 (D. Kan. 1996).

<sup>646</sup> *Georgia Power Co v Cimarron Coal Corp*, 526 F.2d 101 (6<sup>th</sup> Cir. 1975), *certiorari denied*, 425 U.S. 952 (1976).

<sup>647</sup> *Fox v The Giuseppe Mazzini*, 110 F.Supp. 212 (D.C.N.Y. 1953); *Local 201, Intern. Union of Elec., Radio and Mach. Workers, AFL-CIO v General Elec. Co*, 262 F.2d 265 (1<sup>st</sup> Cir. 1959); *Maryland Tel. Union v Chesapeake & Potomac Tel. Co. of Maryland*, 187 F.Supp. 101 (D.C. Md. 1960); *Coastal States Trading, Inc v Zenith Nav. S. A.*, 446 F.Supp. 330 (S.D.N.Y. 1977); *Becker Autoradio USA, Inc v Becker Autoradiowerk GmbH*, 585 F.2d 39 (3<sup>rd</sup> Cir. 1978); *Tac Travel America Corp v World Airways Inc*, 443 F.Supp. 825 (S.D.N.Y. 1978); *Mobil Oil Indonesia Inc v Asamera Oil (Indonesia) Ltd*, 487 F.Supp. 63 (S.D.N.Y. 1980); *General Tel. Co of Ohio v Communications Workers of America, AFL-CIO*, 648 F.2d 452 (6<sup>th</sup> Cir. 1981); *Fund Administration Services, Inc v Jackson*, 518 F.Supp. 783 (W.D. La 1981); *Klein Sleep Products, Inc v Hillside Bedding Co*, 563 F.Supp. 904 (S.D.N.Y. 1982); *Commerce Park at DFW Freeport v Mardian Const. Co*, 729 F.2d 334 (5<sup>th</sup> Cir. 1984); *Goodwin v Elkins & Co*, 730 F.2d 99 (3<sup>rd</sup> Cir. 1984), *certiorari denied*, 469 U.S. 831 (1984); *Management Recruiters of Albany, Inc v Management Recruiters Intern., Inc*, 643 F.Supp. 750 (N.D.N.Y. 1986); *McKinley v Martin*, 722 F.Supp. 697 (D. Wyo. 1989); *Sandvik Inc v Libby*, 762 F.Supp. 596 (S.D.N.Y. 1991); *Crabtree v Tristar Automotive Group, Inc*, 776 F.Supp. 155 (S.D.N.Y. 1991); *Gestetner Holdings, PLC v Nashua Corp*, 784 F.Supp.78 (S.D.N.Y. 1992); *Mayor and City Council of Baltimore v Baltimore City Composting Partnership*, 800 F.Supp. 305 (D. Md. 1992); *Jih v Long & Foster Real Estate, Inc*, 800 F.Supp 312 (D. Md. 1992); *Philadelphia Elec. Co v Nuclear Elec. Inc Ltd*, 845 F.Supp. 1026 (S.D.N.Y. 1994); *Gingiss Intern., Inc v Bormet*, 58 F.3d 328 (7<sup>th</sup> Cir. 1995); *Finegold, Alexander & Associates, Inc v Setty & Associates, Ltd*, 81 F.3d 206 (D.C. Cir. 1996), *rehearing denied on remand*; *Durkin v CIGNA Property & Gas. Corp*, 942 F.Supp 481 (D. Kan. 1996).

<sup>648</sup> *RPJ Energy Fund Management, Inc v Collins*, 552 F.Supp. 946 (D.C. Minn. 1982); *Banque de Paris et des Pays-Bas v Amoco Oil Co*, 573 F.Supp. 1464 (S.D.N.Y. 1983); *Campeau Corp v May Dep. Stores Co*, 723 F.Supp. 224 (S.D.N.Y. 1989); *Nemes v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 741 F.Supp. 657 (E.D. Mich. 1990); *Nilsen v Prudential-Bache Securities*, 761 F.Supp. 279 (S.D.N.Y. 1991); *Crabtree v Tristar Automotive Group, Inc*, 776 F.Supp. 155 (S.D.N.Y. 1991);

particular dispute is not within the scope of the subject matter of an arbitration agreement if it is explicitly excluded by the arbitration agreement.<sup>649</sup>

In ROC, courts also give the broadest possible interpretation as to subject matter of arbitration agreements. Thus, the US federal law dealing with the issue regarding the scope of the subject matter of an arbitration agreement can be references, when the courts of ROC deal with the same issue.

### ***5. Composition of the Arbitral Tribunal Contravenes the Arbitration Agreement or the Law of the Place of the Arbitration***

Where a party applies to the court for recognition of a foreign arbitral award, the respondent may request the court to dismiss the application within 20 days from the date of receipt of the notice of the application if the composition of the arbitral tribunal contravenes the arbitration agreement or

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*Philadelphia Elec. Co v Nuclear Elec. Inc Ltd*, 845 F.Supp. 1026 (S.D.N.Y. 1994); *Gruntal & Co, Inc v Steinberg*, 854 F.Supp. 324 (D.N.J. 1994), *aff'd*, 46 F.3d 1116 (3<sup>rd</sup> Cir. 1994); *Cherry v Wertheim Schroder and Co, Inc*, 868 F.Supp. 830 (D.S.C. 1994); *Webb v Investacorp, Inc*, 89 F.3d 252 (5<sup>th</sup> Cir. 1996), *rehearing denied*; *Insurance Co. of North America v ABB Power Generation, Inc*, 925 F.Supp. 1053 (S.D.N.Y. 1996), *question certified*, 112 F.3d 70 (2<sup>nd</sup> Cir. 1997); *American Recovery Corp v Computerized Thermal Imaging, Inc*, 96 F.3d 88 (4<sup>th</sup> Cir. 1996); *Stone v Pennsylvania Merchant Group, Ltd*, 949 F.Supp. 316 (E.D. Pa. 1996).

<sup>649</sup> *United Steelworkers of America v Warrior & Gulf Nav. Co*, 363 U.S. 574 (1960); *Maryland Tel. Union v Chesapeake & Potomac Tel. Co. of Maryland*, 187 F.Supp. 101 (D.C. Md. 1960); *Butler Products Co. v Unistrut Corp*, 367 F.2d 733 (7<sup>th</sup> Cir. 1966); *The Monroe Sander Corp v David Livingston*, 262 F.Supp. 129 (D.C.N.Y. 1966), *aff'd in part, rev'd in part on other grounds*, 377 F.2d 6 (2<sup>nd</sup> Cir. 1967), *certiorari denied*, 389 U.S. 831 (1967); *Pas-Ebs v Group Health, Inc*, 442 F.Supp. 937 (S.D.N.Y. 1977); *Milwaukee Typographical Union No 23 v Newspapers, Inc*, 639 F.2d 386 (7<sup>th</sup> Cir. 1981), *certiorari denied*, 454 U.S. 838 (1981); *Gestetner Holdings, PLC v Nashua Corp*, 784 F.Supp.78 (S.D.N.Y. 1992).

the composition of the arbitral tribunal contravenes the law of the place of the arbitration in the absence of an arbitration agreement.<sup>650</sup> This provision conforms to the *New York Convention*<sup>651</sup> and the UNCITRAL Model Law.<sup>652</sup> Both stipulate that recognition of an arbitral award may be refused at the request of the party against whom it is invoked, if it can be proved that the composition of the arbitral authority was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

There has been no case until now in ROC in which an application for granting an order to recognize a foreign arbitral award was dismissed on the ground that the composition of the arbitral tribunal contravened the arbitration agreement or the law of the place of the arbitration in the absence of an arbitration agreement under the *Arbitration Act 1998 (ROC)*.<sup>653</sup> Nonetheless, the case discussed below still is a precedent under the *Arbitration Act 1998 (ROC)* since they arise almost under the same words as are in the *Arbitration Act 1998 (ROC)* and the *Commercial Arbitration (Amendment) Act 1982*

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<sup>650</sup> *Arbitration Act 1998 (ROC)* art 50(5).

<sup>651</sup> *New York Convention* art 5(1)(d). See Appendix .

<sup>652</sup> UNCITRAL Model Law art 36(1)(a)(iv). See Appendix .

<sup>653</sup> <http://www.judicial.gov.tw> visited 12 September 2003.



(ROC).<sup>654</sup>

An American Company applied to the Taipei District Court (ROC) for granting an order to recognize an arbitral award rendered by sole arbitrator David in the Republic of South Africa on 30 July 1990. This arbitral award required a company of ROC to pay compensation of US\$ 104,605.6 to the American company. Although the respondent contended that the composition of the arbitral tribunal contravened the arbitration agreement and the arbitration law of the country, Republic of South Africa, where the arbitration took place, the Court held that the composition of the arbitral tribunal did not contravene the arbitration agreement and the arbitration law of the Republic of South Africa and granted an order to recognize this arbitral award.<sup>655</sup>

The respondent appealed. The Taiwan High Court (ROC) reversed the decision of the lower Court and dismissed the application for granting an order to recognize the arbitral award. The Court ruled that:

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<sup>654</sup> Cf *Arbitration Act 1998* (ROC) art 50(5) with *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(1).

<sup>655</sup> Decision of 10 April 1991, Taipei District Court, 1991 Zhong Zhi Zi Di 1 Hao Min Shi Jian Cai Ding (ROC), rev'd on other grounds, Decision of 23 May 1991, Taiwan High Court, 1991 Kang Zi Di 811 Hao Min Shi Cai Ding (ROC), rev'd on other grounds, Decision of 12 July 1991, The Supreme Court, Tai Kang Zi Di 245 Hao Min Shi Cai Ding (ROC), Decision of 28 April 1992, Taipei District Court, 1991 Zhong Zhi Geng Zi Di 39 Hao Min Shi Jian Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1078-90. The cited source did not give the names of the parties. The names of the parties also cannot be discovered from any source.

The arbitration agreement states that: 'Arbitration shall be arbitrated in accordance with the current arbitration law of Cape Town, the Republic of South Africa where the arbitration takes place.... Arbitration shall be arbitrated by an arbitrator who is designated by both parties in writing. If both parties cannot reach an agreement in which an arbitrator is designated, the arbitration shall be arbitrated by two arbitrators who have experience on fruit selling for more than five years. Each party shall designate one arbitrator. For preventing from not reaching an agreement, these two designated arbitrators shall designate a third arbitrator in writing before arbitration proceedings proceed. These three arbitrator arbitrated the arbitration together and the third arbitrator is the chairperson.'... Article 10 paragraph 1 and 2 of the *Arbitration Act* of the Republic of South Africa provide that: 'If the parties agrees that arbitration shall be arbitrated by more than two arbitrators and each party shall designate one arbitrator in the arbitration agreement, the party who has designated an arbitrator may notice the other party who has not designated an arbitrator in accordance with the arbitration agreement to designate an arbitrator within seven days from receiving the notice which is in writing. In case the party who had not designated an arbitrator still did not designate an arbitrator within the designated duration of the notice, the other party may designate the arbitrator who has been designated by him or her as the sole arbitrator of the arbitration. This arbitrator shall be deemed the arbitrator who is designated by both parties. Both parties shall be bound by the arbitral award made by this arbitrator.' Nonetheless, Article 9 of the *Arbitration Act* of the Republic of South Africa stipulates that: 'Except there is contrary provision in the arbitration agreement, arbitration shall be arbitrated by sole arbitrator.' Thus, the agreement that arbitration shall be arbitrated by an arbitrator who is designated by both parties in writing shall be applied. The applicant did not discuss which sole arbitrator shall be designated with the respondent and noticed the respondent to designate an arbitrator to attend the arbitration directly. Since the respondent did not designate an arbitrator within seven days, the arbitration was arbitrated by the sole arbitrator designated by the applicant. The composition of the arbitral tribunal contravenes the law of the place of the arbitration.... This application shall be dismiss in accordance with article 33 paragraph 1(1) of the *Commercial Arbitration (Amendment) Act 1982* (ROC).<sup>656</sup>

The applicant appealed. The Supreme Court of ROC dismissed the

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Thus, it is impossible to give this case a title.

<sup>656</sup> Decision of 8 September 1992, Taiwan High Court, 1992 Kang Zi Di 962 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1091-5. The cited source did not give the names of the parties. The names of the parties also cannot be discovered

appeal with the same reason held by the Taiwan High Court (ROC).<sup>657</sup>

These decisions made by the Taiwan High Court (ROC) and the Supreme Court of ROC were under the *Commercial Arbitration (Amendment) Act 1982* (ROC) requiring the composition of the arbitral tribunal to comply with the law of the place of the arbitration.<sup>658</sup> Actually, the courts dismissed the application because the composition of the arbitral tribunal contravened the arbitration agreement, in which the law of the place of the arbitration must be applied. Therefore, this case still is a precedent under the *Arbitration Act 1998* (ROC).

The legislation of ROC is consistent with the *New York Convention* and the UNCITRAL Model law. Moreover, the practices of ROC comply with the legislation. Thus, there is no deficiency of ROC legislation and practices in this regard.

## ***6. The Arbitration Procedure Contravenes the Arbitration***

### ***Agreement or the Law of the Place of the Arbitration***

Where a party applies to the court for recognition of a foreign arbitral

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from any source. Thus, it is impossible to give this case a title.

<sup>657</sup> Decision of 4 December 1992, The Supreme Court, 1992 Tai Kang Zi Di 517 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1096-9. The cited source did not give the names of the parties. The names of the parties also cannot be discovered from any source. Thus, it is impossible to give this case a title.

<sup>658</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(1).

award, the respondent may request the court to dismiss the application within 20 days from the date of receipt of the notice of the application if the arbitration procedure contravenes the arbitration agreement or the arbitration procedure contravenes the law of the place of the arbitration in the absence of an arbitration agreement.<sup>659</sup> This provision is in conformance with the *New York Convention*<sup>660</sup> and the UNCITRAL Model Law.<sup>661</sup> Both stipulate that recognition of an arbitral award may be refused at the request of the party against whom it is invoked proof that the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

There has been no case until now in ROC in which an application for granting an order to recognize a foreign arbitral award was dismissed on the ground that the arbitration procedure contravened the arbitration agreement or the law of the place of the arbitration in the absence of an arbitration agreement under the *Arbitration Act 1998* (ROC).<sup>662</sup> Nonetheless, the case discussed below still are precedents under the *Arbitration Act 1998* (ROC)

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<sup>659</sup> *Arbitration Act 1998* (ROC) art 50(5).

<sup>660</sup> *New York Convention* art 5(1)(d). See Appendix .

<sup>661</sup> UNCITRAL Model Law art 36(1)(a)(iv). See Appendix .

<sup>662</sup> <http://www.judicial.gov.tw> visited 12 September 2003.

since they arise almost under the same words as are in the *Arbitration Act 1998* (ROC) and the *Commercial Arbitration (Amendment) Act 1982* (ROC).<sup>663</sup>

In *North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*, North American Foreign Trading Corp applied to the Taipei District Court (ROC) for granting an order to enforce an arbitral award rendered by American Arbitration Association on 11 November 1981 in New York City, USA. The Court granted an order to enforce this arbitral award.<sup>664</sup>

San Ai Electronic Industrial Corp Ltd appealed. The Taiwan High Court (ROC) reversed the decision of the lower Court and dismissed the application of North American Foreign Trading Corp. The Court held that:

An arbitral award shall contain the reasons for the arbitral award in accordance with article 19 of the *Commercial Arbitration (Amendment) Act 1982* (ROC). In addition, an application to the competent court for granting an order to recognize a foreign arbitral award shall be dismissed if the arbitral award is contrary to any imperative or prohibitive provision of law of ROC pursuant to article 32 paragraph 1(1) of the *Commercial Arbitration (Amendment) Act 1982* (ROC). This arbitral award does not contain the reasons for the arbitral award. It does not comply with the provisions of article 19 and article 32 paragraph 1(1) of the *Commercial Arbitration (Amendment) Act*

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<sup>663</sup> Cf *Arbitration Act 1998* (ROC) art 50(5) with *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(1).

<sup>664</sup> Decision of 16 September 1983 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), Taipei District Court, 1983 Sheng Zi Di 1402 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 221-8. *Commercial Arbitration (Amendment) Act 1982* (ROC) art 30 para 2 provides that 'After applying to courts for granting orders to recognize, foreign arbitral awards are enforceable.' Thus, Taipei District Court should grant an order to recognize this arbitral award instead of granting an order to enforce it.

1982 (ROC).... Article 33 paragraph 1(1) of the *Commercial Arbitration (Amendment) Act 1982 (ROC)* provides that: ‘An application to the competent court for granting an order to recognize a foreign arbitral award shall be dismissed if the composition of the arbitral tribunal or the arbitral procedure does not conform to the law of the place where the arbitration took place.’ This foreign arbitral award was made by American Arbitration Association in accordance with American Arbitration Association Commercial Arbitration Rules. Section 7(a) of the American Arbitration Association Commercial Arbitration Rules stipulates that: ‘The party who submits a dispute to arbitration shall notify the respondent of his intention including the nature of the dispute, the amount concerning the dispute and the remedies of the dispute.’ There was only the nature of the dispute in the notification sent by North American Foreign Trading Corp. It did not contain the amount regarding the dispute. Section 28 of the American Arbitration Association Commercial Arbitration Rules states that: ‘The arbitrator shall give both parties equal opportunities to submit any relevant evidence.’ The arbitrator held hearing for six days. The arbitrator gave North American Foreign Trading Corp five and half days to present its case. However, the arbitrator only gave San Ai Electronic Industrial Corp Ltd half day to present its case. The arbitrator did not give San Ai Electronic Industrial Corp Ltd equal opportunities to present its case and submit evidence. Section 34 of the American Arbitration Association Commercial Arbitration Rules provides that: ‘Arbitrator shall inquire each party individually whether there is any other evidence to submit or any other witness to testify about the result of the hearing. If the arbitrator has received negative answers from both parties, the arbitrator shall declare the hearing closed.’ Nevertheless, the arbitrator did not carry out the procedure mentioned above. Moreover, Section 40 of the American Arbitration Association Commercial Arbitration Rules provides that: ‘Except provided otherwise by agreement or law, arbitrator shall render arbitral award within 30 days from the date of closing hearing.’ The date of closing hearing of the arbitration was 12 June 1981. Nonetheless, the arbitrator rendered the arbitral award on 11 November 1981 when the time limit lapsed. The arbitration procedure was not in accordance with the American Arbitration Association Commercial Arbitration Rules. Thus, the application for granting an order to recognize the arbitral award shall be dismissed.<sup>665</sup>

North American Foreign Trading Corp appealed. The Supreme Court

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<sup>665</sup> Decision of 28 December 1983 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), Taiwan High Court, 1983 Kang Zi Di 2252 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 229-37.

of ROC reversed the decision of the lower Court and ruled that:

Whether a foreign arbitral award shall contain reasons shall be pursuant to the law of the country where the arbitration takes place. The Taiwan High Court (ROC) did not clarify whether an arbitral award shall contain reasons under American law and dismissed the application of North American Foreign Trading Corp for granting an order to recognize the arbitral award. It is not adequate.... Section 37 of the American Arbitration Association Commercial Arbitration Rules provides that: 'Any party knows that any provision or requirement of this Rule was not complied with and proceeds the arbitration proceedings without submitting written objection. It shall be deemed that this party gave up the right of objection.' San Ai Electronic Industrial Corp Ltd contended that the arbitration procedure was not in accordance with this Rule. However, the Taiwan High Court (ROC) did not investigate whether San Ai Electronic Industrial Corp Ltd submitted its objection and dismissed the application of North American Foreign Trading Corp for granting an order to recognize the arbitral award. It is not adequate, either.<sup>666</sup>

Then, the Taiwan High Court (ROC) dismissed the appeal of San Ai Electronic Industrial Corp Ltd and affirmed the decision of the lower Court.

The Court held that:

Whether a foreign arbitral award shall contain reasons shall be pursuant to the law of the country where the arbitration takes place. The arbitral award was made by American Arbitration Association. In accordance with section 8 of the Uniform Arbitration Code and section 7507 of the Civil Procedure Act of New York State, an arbitral award only shall be in writing and signed by arbitrator. There is no provision requiring that an arbitral award shall contain reasons. Therefore, San Ai Electronic Industrial Corp Ltd cannot contend that the arbitration procedure did not conform to the law of the country where the arbitration took place.... Section 37 of the American Arbitration Association Commercial Arbitration Rules provides that: 'Any party knows that any provision or requirement of this Rule was not complied with and proceeds the

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<sup>666</sup> Decision of 18 May 1984 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), The Supreme Court, 1984 Tai Kang Zi Di 234 Hao Min Shi Cai Ding (ROC). See Legal Books Editing Committee of the Supreme Court (ed), *Collection of Selected civil and Criminal Judgements and Decisions of the Supreme Court: January 1984- June 1984*] (1984) vol 5:1, above n 256, 643-7.

arbitration proceedings without submitting written objection, it shall be deemed that this party gave up the right of objection.’ Section 7507 of the Civil Procedure Act of New York State states that: ‘Except submitting objection to arbitrator before accepting an arbitral award, any party may not object regarding the arbitral award was not made within time limit. San Ai Electronic Industrial Corp Ltd contended that the arbitration procedure was not in accordance with the American Arbitration Association Commercial Arbitration Rules. However, San Ai Electronic Industrial Corp Ltd did not submit written objection. It shall be deemed that San Ai Electronic Industrial Corp Ltd has given up the right of objection no matter the contention of San Ai Electronic Industrial Corp Ltd is true or not. Thus, the arbitration procedure did comply with the law of the country where the arbitration took place.<sup>667</sup>

These decisions were made under the *Commercial Arbitration*

(*Amendment*) Act 1982 (ROC) requiring the arbitration proceedings comply

with the law of the place of the arbitration.<sup>668</sup> The *Arbitration Act 1998*

(ROC) is in the same terms.<sup>669</sup> Therefore, this case still is a precedent.

The legislation of ROC complies with the *New York Convention* and the UNCITRAL Model Law. Furthermore, the practices are in compliance with the legislation. Consequently, there is no deficiency of ROC legislation and practices in this regard.

In *Gibbons v United Transp. Union*, US District Court for the Northern

District of Illinois held that: ‘Defects in proceedings prior to or during

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<sup>667</sup> Decision of 25 February 1985 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), Taiwan High Court, 1984 Kang Geng Yi Zi Di 26 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 242-6.

<sup>668</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(1).

<sup>669</sup> Cf *Arbitration Act 1998* (ROC) art 50(5) with *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(1).



arbitration may be waived if a party acquiesces to arbitration with knowledge of defect.<sup>670</sup>

This US case can be a reference when the courts of ROC handle an application for granting an order to recognize a foreign arbitral award. Thus, the respondent may not plead to dismiss an application applied to the competent court of ROC for granting an order to recognize a foreign arbitral award if he acquiesced to arbitration with knowledge of defects in proceedings. The doctrine of estoppel applies in this situation.<sup>671</sup>

### ***7. The Arbitral Award Is Not Binding or Has Been Revoked or Suspended***

Where a party applies to the court for recognition of a foreign arbitral award, the respondent may request the court to dismiss the application within 20 days from the date of receipt of the notice of the application if the arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent authority.<sup>672</sup> This provision complies with the *New York Convention*<sup>673</sup> and the UNCITRAL Model Law.<sup>674</sup> Both stipulate that

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<sup>670</sup> *Gibbons v United Transp. Union*, 462 F.Supp. 838 (N.D. Ill. 1978), *motion to vacate denied*.

<sup>671</sup> Redfern and Hunter, above n 17, 466-7.

<sup>672</sup> *Arbitration Act 1998* (ROC) art 50(6).

<sup>673</sup> *New York Convention* art 5(1)(e). See Appendix .

<sup>674</sup> UNCITRAL Model Law art 36(1)(a)(v). See Appendix .

recognition of an arbitral award may be refused at the request of the party against whom proof is invoked that the arbitral award has not become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that arbitral award was made.

Whether an arbitral award has been suspended or revoked by a competent court is easy to establish since it is an obvious fact. Whether an arbitral award is not yet binding is not easy to establish because there is no definition of this in the *Arbitration Act 1998* (ROC). However, article 4 of the *Inter-American Convention on International Commercial Arbitration* providing that ‘an arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgement’ can be a reference.<sup>675</sup> In addition, section 10(a)(4) of the *Federal Arbitration Act 1947* (USA) as amended by the *Federal Arbitration (Amendment) Act 1992* (USA) which provides that: ‘where the arbitrators so imperfectly executed their powers that a mutual, final, and definite award upon the subject matter submitted was not made’ also can be a reference.<sup>676</sup>

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<sup>675</sup> *Inter-American Convention on International Commercial Arbitration*, signed at Panama, 30 January 1975; entry into force 16 June 1976; published in Organisation of American States, Treaty Series, no. 42.

<sup>676</sup> 9 U.S.C. § 10(a)(4) provides that: ‘Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made, the United States court in and for the district wherein the award was made may make an

Namely, an arbitral award not yet binding means an arbitral award that is appealable or not yet mutual, final, or definite upon the subject matter submitted under the applicable law or procedural rules.

There has been no case until now in ROC in which an application for granting an order to recognize a foreign arbitral award was dismissed on the ground that the arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent authority under the *Arbitration Act 1998* (ROC).<sup>677</sup> Nonetheless, the case discussed below still is a precedent under the *Arbitration Act 1998* (ROC) since they arise almost under the same words as are in the *Arbitration Act 1998* (ROC) and the *Commercial Arbitration (Amendment) Act 1982* (ROC).<sup>678</sup>

In *Waterman Steamship Corp v Gan Hua Enterprise Co Ltd, et al*,<sup>679</sup> Waterman Steamship Corporation applied to the Kaohsiung District Court (ROC) for granting an order of enforcement of an arbitral award rendered in USA. At the beginning, the Court granted an order of enforcement of the

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order vacating the award upon the application of any party to the arbitration.’

<sup>677</sup> <http://www.judicial.gov.tw> visited 12 September 2003.

<sup>678</sup> Cf *Arbitration Act 1998* (ROC) art 50(6) with *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(2).

<sup>679</sup> Decision of 23 December 1982 (*Waterman Steamship Corp v Gan Hua Enterprise Co Ltd, et al*), Kaohsiung District Court, 1982 Zhong Zi Di 1 Hao Fei Song Shi Jian Cai Ding (ROC), rev'd, Decision of 16 March 1983, Kaohsiung District Court, 1982 Zhong Zi Di 1 Hao Fei Song Shi Jian Cai Ding (ROC), aff'd, Decision of 21 June 1983, Tainan Branch of Taiwan High Court, 1983 Kang Zi Di 434 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial*

arbitral award.<sup>680</sup>

One of the respondents, Wang Zi-hua, appealed. Wang Zi-hua contended that the arbitral award relating to him had been revoked by the competent authority, the US District Court for the Southern District of New York. The Kaohsiung District Court (ROC) reversed the order of granting an order of enforcement of the arbitral award relating to Wang Zi-hua and rejected the application of granting an order of enforcement of the arbitral award relating to Wang Zi-hua. The Court ruled that:

Article 34 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) provides that: ‘A foreign arbitral award has been revoked by the competent authority of the country where the foreign arbitral award is rendered, the court shall revoke the order of recognition of the foreign arbitral award.’ The arbitral award rendered in USA relating to Wang Zi-hua has been revoked by US District Court for the Southern District of New York. Therefore, the order of enforcement of the arbitral award relating to Wang Zi-hua shall be revoked. The application of granting an order of enforcement of the arbitral award relating to Wang Zi-hua shall be rejected.<sup>681</sup>

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*Arbitration* vol 2, above n 61, 212-20.

<sup>680</sup> Decision of 23 December 1982 (*Waterman Steamship Corp v Gan Hua Enterprise Co Ltd, et al*), Kaohsiung District Court, 1982 Zhong Zi Di 1 Hao Fei Song Shi Jian Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 212-13. Actually, Kaohsiung District Court (ROC) should grant an order of recognition of the arbitral award instead of granting an order of enforcement of the arbitral award since an arbitral award rendered in USA is a foreign arbitral award according to *Commercial Arbitration (Amendment) Act 1982* (ROC) art 30.

<sup>681</sup> Decision of 16 March 1983 (*Waterman Steamship Corp v Gan Hua Enterprise Co Ltd, et al*), Kaohsiung District Court, 1982 Zhong Zi Di 1 Hao Fei Song Shi Jian Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 215-17. This case the Court made the decision in accordance with *Commercial Arbitration (Amendment) Act 1982* (ROC) art 34 para 2 dealing with revocation of recognition of foreign arbitral awards adjourned the process of enforcement. It should be decided pursuant to *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(2) dealing with refusal of recognition of a foreign arbitral award which has been revoked by the competent authority of the country in which the foreign arbitral award was rendered since the arbitral award rendered in USA had not been adjourned the process of enforcement. Nonetheless, the outcome is the same.

Waterman Steamship Corp appealed. The Tainan Branch of the Taiwan High Court (ROC) affirmed the decision of the lower Court.<sup>682</sup>

This case was made under the *Commercial Arbitration (Amendment) Act 1982* (ROC) regarding refusal recognition of foreign arbitral awards which have been revoked by the competent authority. The *Arbitration Act 1998* (ROC) is almost in the same terms. Therefore, this case still is a precedent.

The ROC legislation conforms to the *New York Convention* and the UNCITRAL Model Law. In addition, its practices comply with its legislation. Thus, there is no deficiency of ROC legislation and practices in this regard.

Under US law, an arbitral award which is clear enough to indicate what each party is required to do and resolves all issues submitted to arbitration and determines each issue fully so that no further litigation is necessary is final and definite, even though this arbitral award leaves open possibility of another arbitration and another arbitral award after a specified future date.<sup>683</sup>

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<sup>682</sup> Decision of 21 June 1983 (*Waterman Steamship Corp v Gan Hua Enterprise Co Ltd, et al*), Tainan Branch of Taiwan High Court, 1983 Kang Zi Di 434 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 218-20.

<sup>683</sup> *Island Territory of Curacao v Solitron Devices, Inc*, 356 F.Supp. 1 (S.D.N.Y. 1973), *Aff'd*, 489 F.2d 1313 (2<sup>nd</sup> Cir. 1973), *Certiorari denied*, 416 U.S. 986 (1974); *Local 2, Intern. Broth. of Elec. Workers, AFL-CIO v Gerstner Elec., Inc*, 614 F.Supp. 874 (E.D. Mo 1985); *Local 144, Hotel, hosp., Nursing Home & Allied Services Union, SEIU, AFL-CIO v American Nursing Home*, 631 F.Supp. 354 (S.D.N.Y. 1986); *Konkar Maritime Enterprises, S.A. v Compagnie Belge D'Affretement*, 668 F.Supp. 267 (S.D.N.Y. 1987); *Dighello v Busconi*, 673 F.Supp. 85 (D. Conn. 1987), *Aff'd*, 849 F.2d

Nevertheless, an arbitrator's failure to resolve all issues submitted to arbitration causes an arbitral award to lack finality and definiteness.<sup>684</sup> Even though these are US precedents, ROC Courts should adopt the same theories while dealing with the issue of whether a foreign arbitral award is binding or not.

### ***E. The Ground on Which a Foreign Arbitral Award May be Refused Recognition – Non-Reciprocity***

The court may dismiss an application for recognition of a foreign arbitral award if the country where the arbitral award is rendered or whose arbitration laws govern the foreign arbitral award does not recognize arbitral awards of ROC.<sup>685</sup>

As mentioned above, there was no specific provision regulating recognition and enforcement of foreign arbitral awards in the *Commercial Arbitration Act 1961* (ROC). There were five articles (article 30 to article 34) regulating recognition and enforcement of foreign arbitral awards in the *Commercial Arbitration (Amendment) Act 1982* (ROC). These articles adopted the theory of reciprocity regarding recognition of foreign arbitral

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1467 (2<sup>nd</sup> Cir. 1988).

<sup>684</sup> *Harper Builders, Inc v Edens*, 318 S.E.2d. 363 (S.C. 1984).

awards.<sup>686</sup> When the Executive Yuan of ROC sent the Bill for the Commercial Arbitration (Amendment) Act 1982 (ROC) to the Legislative Yuan of ROC to pass, the Executive Yuan of ROC stated in the document which it sent to the Legislative Yuan of ROC that:

Regarding whether to recognize a foreign arbitral award or not, a country should adopt the theory of reciprocity. However, when an applicant is a citizen of ROC, we should concern about and protect the interest of the applicant. Thus, article 32 para 2 of the Bill provides that: 'The court may dismiss an application for recognition of a foreign arbitral award if the country where the foreign arbitral award is rendered does not recognize arbitral awards of ROC.' Then, the court may take the interest of the citizens of ROC into account.<sup>687</sup>

The reciprocity theory regarding recognition of foreign arbitral awards adopted in the *Commercial Arbitration (Amendment) Act 1982* (ROC) is maintained in the *Arbitration Act 1998* (ROC). Even the terms have been revised to match the revision of the definition of foreign arbitral awards. It complies with the *New York Convention*, which also adopted the reciprocity theory.<sup>688</sup>

The ground of non-reciprocity is decided by the court, case by case. It not only depends on the discretion of the court of ROC, but it also depends on whether the country where the arbitral award was rendered or whose

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<sup>685</sup> *Arbitration Act 1998* (ROC) art 49 para 2.

<sup>686</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 32 para 2.

<sup>687</sup> ROC, *Legislative Yuan Gazette*, 71(41) (1982) 63-4, 67.

<sup>688</sup> *New York Convention* art 1(3). See Appendix .

arbitration laws govern the arbitral award recognizes the arbitral awards of ROC. If a country where the arbitral award was rendered or whose arbitration laws govern the arbitral award recognizes the arbitral awards of ROC, the court of ROC must recognize the arbitral awards rendered in that country or in accordance with its arbitration laws, unless there is any other ground for a refusal to recognize the award.

In *All American Cotton Co Ltd v Jian Rong Textile Corp*, All American Cotton Co Ltd applied to the Changhua District Court (ROC) to grant an order to recognize an English arbitral award. The Court granted the order.<sup>689</sup>

Jian Rong Textile Corp appealed. The Taichung Branch of the Taiwan High Court (ROC) reversed the order made by the lower Court and dismissed the application of All American Cotton Co Ltd. The Court ruled that:

Article 32 paragraph 2 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) stipulates that: 'The court may dismiss an application for recognition of a foreign arbitral award if the country where the foreign arbitral award is rendered does not recognize arbitral awards of ROC.' The arbitral award that was applied to recognize was rendered by arbitrators R. John Anderson and Arthur Aldcroft of the Liverpool Cotton Association Ltd of the UK on 12 October 1983.... The Ministry of Foreign Affairs of ROC said that: 'The Representative Office of ROC in the UK inquired London Court of International Arbitration about whether an arbitral award rendered in ROC can be recognized and enforced in the UK. London Court of International Arbitration replied that: "The UK is a member state of the *Convention on the Execution*

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<sup>689</sup> Decision of 22 November 1985 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Changhua District Court, 1985 Sheng Zi Di 321 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih



of *Foreign Arbitral Awards* and the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, so an arbitral award rendered in any member state of these two *Conventions* can be recognized and enforced in the UK. The court of the UK recognizes and enforces almost all arbitral awards rendered in countries other than member states of these two *Conventions* in accordance with the spirit of section 26 of the *Arbitration Act 1950* (U.K.), even though the court shall consider the international situation of the country in which the arbitral award was rendered. As to what attitude the court of the UK adopts and whether the attitude adopted by the court will affect recognition and enforcement of ROC arbitral awards are under the jurisdiction of the court and has no precedent. Therefore, it cannot express any opinion.” There is no diplomatic relationship between ROC and the UK. There is neither agreement concerning recognition final judgements of either country. On 6 November 1980, the Ministry of Foreign Affairs of ROC said that: ‘The court of Hong Kong does not recognize final judgements of ROC.’ Thus, the attitude concerning the international situation of ROC of the court of the UK has affected the recognition and enforcement of ROC arbitral awards in the UK. The court of the UK does not recognize ROC arbitral awards, so the application shall be dismissed. The order of the Changhua District Court (ROC), which recognized the arbitral award rendered by arbitrators R. John Anderson and Arthur Aldcroft of the Liverpool Cotton Association Ltd of the UK on 12 October 1983, shall be reversed.<sup>690</sup>

All American Cotton Co Ltd appealed to the Supreme Court of ROC.

The Court reversed the decision made by the lower Court. It held that:

Article 32 paragraph 2 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) stipulates that: ‘The court may dismiss an application for recognition of a foreign arbitral award if the country where the foreign arbitral award is rendered does not recognize arbitral awards of ROC.’ The theory of reciprocity is adopted. Nonetheless, the theory of reciprocity does not mean that the country where a foreign arbitral award was rendered recognizes ROC arbitral awards first then the court of ROC is able to recognize the foreign arbitral award. Otherwise, not only the notion of comity of the international community will be hurt, the promotion of the relationship of international judicial cooperation but also will be impeded. Thus, article 32 paragraph

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(ed), *International Commercial Arbitration* vol 2, above n 61, 312-14.

<sup>690</sup> Decision of 13 May 1986 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Taichung Branch of Taiwan High Court, 1986 Guo Mao Kang Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 315-17.

2 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) stipulates that: ‘The court “may” dismiss an application for recognition of a foreign arbitral award if the country where the foreign arbitral award is rendered does not recognize arbitral awards of ROC.’ It does not state that: ‘The court “shall” dismiss an application for recognition of a foreign arbitral award if the country where the foreign arbitral award is rendered does not recognize arbitral awards of ROC.’<sup>691</sup>

Then, the Taichung Branch of the Taiwan High Court (ROC) reversed the order made by the Changhua District Court (ROC) and dismissed the application of All American Cotton Co Ltd on other grounds.<sup>692</sup> All American Cotton Co. Ltd appealed. The Supreme Court of ROC again reversed the decision of the lower Court on other grounds.<sup>693</sup>

Then, the Taichung Branch of the Taiwan High Court (ROC) reversed the order, which recognized the foreign arbitral award, made by the lower Court and remanded this case to the lower Court on other grounds.<sup>694</sup>

All American Cotton Co Ltd appealed to the Supreme Court of ROC again. The Court overruled the appeal of All American Cotton Co Ltd on

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<sup>691</sup> Decision of 7 August 1986 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), the Supreme Court, 1986 Tai Kang Zi Di 335 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 319-21.

<sup>692</sup> Decision of 22 December 1986 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Taichung Branch of Taiwan High Court, 1986 Guo Mao Kang Geng Yi Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 322-6.

<sup>693</sup> Decision of 17 April 1987 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), The Supreme Court, 1987 Tai Kang Zi Di 129 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 327-9.

<sup>694</sup> Decision of 4 August 1987 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Taichung Branch of Taiwan High Court, 1987 Guo Mao Kang Geng Er Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 330-1.

other grounds.<sup>695</sup> Then, the Changhua District Court (ROC) recognized the foreign arbitral award again.<sup>696</sup>

Jian Rong Textile Corp appealed. The Taichung Branch of the Taiwan High Court (ROC) overruled the appeal of Jian Rong Textile Corp. It held the same reasons that the Supreme Court of ROC stated above.<sup>697</sup>

Actually, the court of ROC not only adopted the theory of reciprocity but also adopted the notion of comity regarding recognition of foreign arbitral awards in this case. It is a good illustration that the judges of ROC have an open mind and tend to favor arbitration, no matter whether it is a domestic or a foreign arbitration. Although this case was brought under the *Commercial Arbitration (Amendment) Act 1982* (ROC),<sup>698</sup> the *Arbitration Act 1998* (ROC) also adopts the theory of reciprocity concerning recognition of foreign arbitral awards as mentioned above.<sup>699</sup> Thus, this case still is a precedent. From then on, there was seldom a foreign arbitral award that was not recognized by

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<sup>695</sup> Decision of 15 October 1987 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), the Supreme Court, 1987 Tai Kang Zi Di 388 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 331-3.

<sup>696</sup> Decision of 30 September 1988 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Changhua District Court, 1987 Sheng Geng Zi Di 3 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 334-42.

<sup>697</sup> Decision of 19 December 1988 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), Taichung Branch of Taiwan High Court, 1988 Guo Mao Kang Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 343-50.

<sup>698</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 32 para 2.

<sup>699</sup> *Arbitration Act 1998* (ROC) art 49 para 2.

the court of ROC because the country where the arbitral award was rendered or whose arbitration law was pursuant to did not recognize ROC arbitral awards. Moreover, there has been no case until now in ROC in which an application for granting an order to recognize a foreign arbitral award was dismissed on the ground that the country where the arbitral award was rendered or whose arbitration law was pursuant to did not recognize ROC arbitral awards under the *Arbitration Act 1998* (ROC).<sup>700</sup> Namely, the court of ROC actually adopts the notion of comity regarding recognition of foreign arbitral awards from then on.

In *Kingshaven Co Ltd v Zheng Xin Co*, Kingshaven Co Ltd applied to the Taipei District Court (ROC) for granting an order to recognize an arbitral award rendered in Korea. The Court referred to the precedent of the Supreme Court of ROC in which the notion of comity regarding recognition of foreign arbitral awards was adopted<sup>701</sup> and granted an order to recognize this arbitral award. The Court held that:

Article 32 paragraph 2 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) stipulates that: 'The court may dismiss an application for recognition of a foreign arbitral award if the country where the foreign arbitral award is rendered does not

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<sup>700</sup> <http://www.judicial.gov.tw> visited 12 September 2003.

<sup>701</sup> Decision of 7 August 1986 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), the Supreme Court of ROC, 1986 Tai Kang Zi Di 335 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 319-21.

recognize arbitral awards of ROC.’ The theory of reciprocity is adopted. Nonetheless, the theory of reciprocity does not mean that the country where a foreign arbitral award was rendered recognizes ROC arbitral awards first then the court of ROC is able to recognize the foreign arbitral award. Otherwise, not only the notion of comity of the international community will be hurt, the promotion of the relationship of international judicial cooperation but also will be impeded.... For enhancing the notion of comity and promoting the relationship of international judicial cooperation, the arbitral award shall be recognized.<sup>702</sup>

The holding of the Taipei District Court (ROC) is identical to the Supreme Court of ROC.

In *Wu He Shipping Co Ltd v Yi Li Maritime Corp*, Wu He Shipping Co Ltd applied to the Taipei District Court (ROC) for granting an order to recognize a Hong Kong arbitral award rendered on 3 May 1985 when Hong Kong was still governed by the government of the UK. The Court granted an order to recognize this arbitral award because Yi Li Maritime Corp did not make or submit any statement within legitimate duration that is 14 days from receiving notice.<sup>703</sup>

Nonetheless, Yi Li Maritime Corp appealed. Yi Li Maritime Corp contended that:

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<sup>702</sup> Decision of 30 October 1986 (*Kingshaven Co Ltd v Zheng Xin Co*), Taipei District Court, 1986 Zhong Zi Di 5 Hao Min Shi Cai Ding (ROC), rev'd on other grounds, Decision of 24 February 1987, Taiwan High Court, 1986 Kang Zi Di 2858 Hao Min Shi Cai Ding (ROC), rev'd on other grounds, Decision of 5 June 1987, The Supreme Court, 1987 Tai Kang Zi Di 208 Hao Min Shi Cai Ding (ROC), aff'd, Decision of 29 July 1987, Taiwan High Court, 1987 Kang Geng Yi Zi Di 8 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 430-61.

<sup>703</sup> Decision of 26 January 1987 (*Wu He Shipping Co Ltd v Yi Li Maritime Corp*), Taipei District Court, 1986 Zhong Zi Di 10 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International*

The government of the UK announced that it only recognized the arbitral awards of the member states of the *New York Convention*. There was no diplomatic relationship between ROC and the UK. It is impossible to conclude an international agreement to recognize arbitral awards of each part between ROC and the UK. Consequently, the application should be dismissed in accordance with article 32 paragraph 2 of the *Commercial Arbitration (Amendment) Act 1982 (ROC)*.<sup>704</sup>

The Taiwan High Court (ROC) referred to the precedent of the Supreme Court in which the notion of comity regarding recognition of foreign arbitral awards was adopted<sup>705</sup> and dismissed the appeal of Yi Li Maritime Corp.

The Court held that:

Article 32 paragraph 2 of the *Commercial Arbitration (Amendment) Act 1982 (ROC)* stipulates that: ‘The court may dismiss an application for recognition of a foreign arbitral award if the country where the foreign arbitral award is rendered does not recognize arbitral awards of ROC.’ The theory of reciprocity is adopted. Nonetheless, the theory of reciprocity does not mean that the country where a foreign arbitral award was rendered recognizes ROC arbitral awards first then the court of ROC is able to recognize the foreign arbitral award. Otherwise, not only the notion of comity of the international community will be hurt, the promotion of the relationship of international judicial cooperation but also will be impeded. Moreover, article 32 paragraph 2 of the *Commercial Arbitration (Amendment) Act 1982 (ROC)* stipulates that: ‘The court “may” dismiss an application for recognition of a foreign arbitral award if the country where the foreign arbitral award is rendered does not recognize arbitral awards of ROC.’ It does not state that: ‘The court “shall” dismiss an application for recognition of a foreign arbitral award if the country where the foreign arbitral award is rendered does not recognize arbitral awards of ROC.’ Thus, although the UK and Hong Kong do not recognize ROC arbitral awards, the recognizing of the original

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*Commercial Arbitration* vol 2, above n 61, 422-3.

<sup>704</sup> Decision of 29 May 1987 (*Wu He Shipping Co Ltd v Yi Li Maritime Corp*), Taiwan High Court, 1987 Kang Zi Di 699 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 425-9.

<sup>705</sup> Decision of 7 August 1986 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), the Supreme Court of ROC, 1986 Tai Kang Zi Di 335 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 319-21.

instance of court on account of the notion of comity is not incorrect.<sup>706</sup>

The holding of the Taiwan High Court (ROC) is also identical to the precedent of the Supreme Court of ROC in which the notion of comity regarding recognition of foreign arbitral awards was adopted<sup>707</sup>.

In another case, *Wu He Shipping Co Ltd v Yi Li Maritime Corp*, Wu He Shipping Co Ltd also applied to the Taipei District Court (ROC) for granting an order to recognize a Hong Kong arbitral award rendered on 26 February 1986 when Hong Kong was still governed by the government of the UK. Yi Li Maritime Corp contended that the UK did not recognize ROC arbitral awards so the application should be dismissed. Nonetheless, the Court referred to the precedent of the Supreme Court of ROC in which the notion of comity regarding recognition of foreign arbitral awards was adopted<sup>708</sup> and granted an order to recognize this arbitral award. The Court held that:

Article 32 paragraph 2 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) stipulates that: 'The court may dismiss an application for recognition of a foreign arbitral award if the country where the foreign arbitral award is rendered does not recognize arbitral awards of ROC.' The theory of reciprocity is adopted.

Nonetheless, the theory of reciprocity does not mean that the country where a foreign arbitral award was rendered recognizes ROC arbitral awards first then the court of ROC

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<sup>706</sup> Decision of 29 May 1987 (*Wu He Shipping Co Ltd v Yi Li Maritime Corp*), Taiwan High Court, 1987 Kang Zi Di 699 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 425-9.

<sup>707</sup> Decision of 7 August 1986 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), the Supreme Court of ROC, 1986 Tai Kang Zi Di 335 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 319-21.

<sup>708</sup> *Ibid.*

is able to recognize the foreign arbitral award. Otherwise, not only the notion of comity of the international community will be hurt, the promotion of the relationship of international judicial cooperation but also will be impeded.... Thus, on account of the theory of reciprocity and the notion of comity, this foreign arbitral award shall be recognized.<sup>709</sup>

The holding of the Taipei District Court (ROC) is almost the same as the precedent of the Supreme Court of ROC in which the notion of comity regarding recognition of foreign arbitral awards was adopted.<sup>710</sup>

Yi Li Maritime Corp appealed. The Taiwan High Court (ROC) overruled the appeal of Yi Li Maritime Corp.<sup>711</sup>

A Liberian maritime company applied to the Kaohsiung District Court (ROC) for granting an order to recognize an arbitral award rendered in Hong Kong on 15 May 1989 when Hong Kong was still governed by the government of the UK. The Court granted an order to recognize this arbitral award.<sup>712</sup>

The respondent who was a ROC corporation appealed. The Kaohsiung

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<sup>709</sup> Decision of 14 May 1987 (*Wu He Shipping Co Ltd v Yi Li Maritime Corp*), Taipei District Court, 1986 Zhong Zi Di 9 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 413-16.

<sup>710</sup> Decision of 7 August 1986 (*All American Cotton Co Ltd v Jian Rong Textile Corp*), the Supreme Court of ROC, 1986 Tai Kang Zi Di 335 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 319-21.

<sup>711</sup> Decision of 30 September 1987 (*Wu He Shipping Co Ltd v Yi Li Maritime Corp*), Taiwan High Court, 1987 Kang Zi Di 1322 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 417-20.

<sup>712</sup> Decision of 20 June 1990, Kaohsiung District Court, 1990 Zhong Sheng Zi Di 1 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1061-3. The cited source did not give the names of the parties. The names of the parties also cannot be discovered from any source. Thus, it is impossible to give this case a title.



Branch of the Taiwan High Court (ROC) held that:

Article 32 paragraph 2 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) stipulates that: ‘The court may dismiss an application for recognition of a foreign arbitral award if the country where the foreign arbitral award is rendered does not recognize arbitral awards of ROC.’ Hong Kong is a British colony. There is no diplomatic relationship between ROC and the UK. The lower court shall review whether the UK recognizes ROC arbitral awards or not. However, the lower court did not review this matter and granted an order to recognize the arbitral award. It is not adequate.<sup>713</sup>

The applicant appealed. The Supreme Court of ROC dismissed the appeal on other ground.<sup>714</sup>

Then, the Kaohsiung District Court (ROC) granted an order to recognize the arbitral award. The Court ruled that:

Although the UK does not recognize ROC arbitral awards according to the letter of the Ministry of Foreign Affairs of ROC, whether Hong Kong recognizes foreign arbitral awards is in accordance with three international documents attached to the letter mentioned above. Therefore, that Hong Kong does not recognize foreign arbitral awards is not absolute.... If the arbitral award is made in a place where the parties agreed to and the arbitral award does not interfere with judicial independence or legal interest of ROC, the arbitral award shall be recognize in ROC in order to upgrade ROC international reputation, comply with international trend and achieve the goal of internationalization economy.<sup>715</sup>

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<sup>713</sup> Decision of 4 September 1990, Kaohsiung Branch of Taiwan High Court, 1990 Kang Zi Di 124 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1064-5. The cited source did not give the names of the parties. The names of the parties also cannot be discovered from any source. Thus, it is impossible to give this case a title.

<sup>714</sup> Decision of 5 November 1990, The Supreme Court, 1990 Tai Kang Zi Di 352 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1066-7. The cited source did not give the names of the parties. The names of the parties also cannot be discovered from any source. Thus, it is impossible to give this case a title.

<sup>715</sup> Decision of 27 June 1991, Kaohsiung District Court, 1990 Zhong Sheng Geng Zi Di 1 Hao Min Shi Cai Ding (ROC), rev'd on other grounds, Decision of 30 August 1991, Kaohsiung Branch of Taiwan High Court, 1991 Kang Zi Di 440 Hao Min Shi Cai Ding (ROC), rev'd on other grounds, Decision of 14 November 1991, Kaohsiung District Court, 1991 Zhong Sheng Geng Yi Zi Di 1 Hao Min Shi Cai Ding (ROC).. See Civil Affairs Department of Judicial Yuan (ed), above n 89,

An American Company applied to the Taipei District Court (ROC) for granting an order to recognize an arbitral award rendered in the Republic of South Africa on 30 July 1990. Although the respondent contended that the applicant did not submit evidence to prove that the Republic of South Africa has recognized ROC arbitral awards and the theory of reciprocity should not apply, the Court granted an order to recognize this arbitral award. The Court held that:

Article 32 paragraph 2 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) stipulates that: ‘The court may dismiss an application for recognition of a foreign arbitral award if the country where the foreign arbitral award is rendered does not recognize arbitral awards of ROC.’ The theory of reciprocity is adopted. Nonetheless, the theory of reciprocity does not mean that the country where a foreign arbitral award was rendered recognizes ROC arbitral awards first then the court of ROC is able to recognize the foreign arbitral award. Otherwise, not only the notion of comity of the international community will be hurt, the promotion of the relationship of international judicial cooperation but also will be impeded. In addition, there is formal diplomatic relationship between ROC and the Republic of South Africa. The circumstance that the Republic of South Africa did not recognize ROC arbitral awards does not exist. Consequently, the arbitral award shall be recognized.<sup>716</sup>

In *Fersam AG v Pei Qing Enterprise Corporation Ltd*, Fersam applied to the Taipei District Court for granting an order to recognize an arbitral award

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1068-77. The cited source did not give the names of the parties. The names of the parties also cannot be discovered from any source. Thus, it is impossible to give this case a title.  
<sup>716</sup> Decision of 28 April 1992, Taipei District Court, 1991 Zhong Zhi Geng Zi Di 39 Hao Min Shi Jian Cai Ding (ROC), rev'd on other grounds, Decision of 8 September 1992, Taiwan High Court, 1992 Kang Zi Di 962 Hao Min Shi Cai Ding (ROC), rev'd on other grounds, Decision of 4 December 1992, The Supreme Court, 1992 Tai Kang Zi Di 517 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1085-99. The cited source did not give the names of the parties. The names of the parties also cannot be discovered from any source. Thus, it is impossible to give this case a title.

rendered in accordance with the Rules of Arbitration of the International Chamber of Commerce in Switzerland. The Court recognized this arbitral award.<sup>717</sup> Pei Qing Enterprise Corporation Ltd appealed to the Taiwan High Court and contended that: ‘Switzerland does not recognize ROC arbitral awards, so arbitral awards rendered in Switzerland should not be recognized on the ground of non-reciprocity.’ The Court dismissed its appeal and held that:

Recognition of foreign arbitral awards does not relate to diplomatic relationship.... The *Arbitration Act 1998* (ROC) adopts the theory of flexible reciprocity. It is not the prerequisite for recognition of a foreign arbitral award that this foreign country where the arbitral award is rendered recognizes ROC arbitral awards.<sup>718</sup>

In *Xin He Xing Ocean Enterprise Co Ltd v Asia North American Eastbound Rate Agreement*,<sup>719</sup> *American President Lines Ltd et al v Asia Food Corporation Ltd et al*,<sup>720</sup> *Maersk Line et al v Asia Food Corporation Ltd et al*,<sup>721</sup> *Bronson, Bronson & McKinnon v Chao Rui Electronic*

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<sup>717</sup> Decision of 30 August 2001 (*Fersam AG v Pei Qing Enterprise Corporation Ltd*), Taipei District Court, 2001 Zhong Sheng Zi Di 3 Hao Min Shi Cai Ding (ROC).

<<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

<sup>718</sup> Decision of 29 November 2001 (*Fersam AG v Pei Qing Enterprise Corporation Ltd*), Taiwan High Court, 2001 Kang Zi Di 3935 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

<sup>719</sup> Decision of 31 December 2001 (*Xin He Xing Ocean Enterprise Co Ltd v Asia North American Eastbound Rate Agreement*), Taiwan High Court, 2000 Kang Geng Yi Zi Di 9 Hao Min Shi Cai Ding (ROC).

<sup>720</sup> Decision of 23 July 1999 (*American President Lines Ltd et al v Asia Food Corporation Ltd et al*), Tainan District Court, 1998 Sheng Zi Di 83 Hao Min Shi Cai Ding (ROC).

<sup>721</sup> Decision of 8 March 2002 (*Maersk Line et al v Asia Food Corporation Ltd et al*), Tainan Branch of Taiwan High Court, 1999 Kang Zi Di 358 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

*Corporation Ltd et al*,<sup>722</sup> *Apple Computer, Inc v Tatung Company*,<sup>723</sup> the

ROC Courts also adopted the theory of reciprocity and the notion of comity to recognize arbitral awards rendered in Hong Kong and USA respectively.

However, the Taipei District Court (ROC) dismissed an application for granting an order to recognize an arbitral award rendered in Malaysia owing to non-reciprocity. The court ruled that:

Malaysia does not recognize foreign arbitral award except arbitral awards of the State of the Commonwealth.... Malaysia does not recognize ROC arbitral awards. Thus, the application for granting an order to recognize the Malaysian arbitral award shall be dismissed.<sup>724</sup>

Therefore, we can reach a conclusion that the courts of ROC will grant an order to recognize any foreign arbitral award if the country where the arbitral award was rendered or whose arbitration laws govern the arbitral award has never refused to recognize ROC arbitral awards. The legislation of ROC complies with the *New York Convention*. The practices go further and adopt the notion of comity. Consequently, the ROC legislation and

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<sup>722</sup> Decision of 28 December 2001 (*Bronson, Bronson & McKinnon v Chao Rui Electronic Corporation Ltd et al*), Panchiao District Court, 2001 Zhong Zhi Zi Di 6 Hao Min Shi Cai Ding (ROC), aff'd, Decision of 1 May 2002 (*Bronson, Bronson & McKinnon v Chao Rui Electronic Corporation Ltd et al*), Taiwan High Court, 2002 Kang Zi Di 561 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 12 September 2003 (Copy on file with author).

<sup>723</sup> Decision of 30 July 2003 (*Apple Computer, Inc v Tatung Company*), Taipei District Court, 2003 Zhong Sheng Zi Di 14 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 12 September 2003 (Copy on file with author).

<sup>724</sup> Decision of 16 February 1995, Taipei District Court, 1994 Zhong Sheng Zi Di 17 Hao Min Shi Cai Ding (ROC). See Civil Affairs Department of Judicial Yuan (ed), above n 89, 1140-1. The cited source did not give the names of the parties. The names of the parties also cannot be discovered from any source. Thus, it is impossible to give this case a title.

practices are excellent in this regard.

## ***F. Adjournment of the Process of Recognition of a Foreign Arbitral Award***

Where a party to an arbitration has applied for a judicial revocation of a foreign arbitral award, the court at the request of the party may order the party to pay a suitable and certain security to suspend the proceedings of application for recognition of the foreign arbitral award prior to granting an order for recognition of the foreign arbitral award.<sup>725</sup> This provision is in compliance with the *New York Convention*<sup>726</sup> and the UNCITRAL Model Law.<sup>727</sup> Both stipulate that if an application for the setting aside or suspension of an arbitral award has been made to a competent authority, the authority before which the arbitral award is sought to be relied upon may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming enforcement of the arbitral award, order the other party to give suitable security.

If the foreign arbitral award that was adjourned the process of applying for recognition has been revoked by the competent authority of the country in

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<sup>725</sup> *Arbitration Act 1998* (ROC) art 51 para 1.

<sup>726</sup> *New York Convention* art 6. See Appendix .

which the foreign arbitral award was rendered or under the law of which the foreign arbitral award was rendered definitely according to the law, the court must dismiss the application for granting an order of recognition of the foreign arbitral award.<sup>728</sup> This provision also complies with the *New York Convention*<sup>729</sup> and the UNCITRAL Model Law.<sup>730</sup>

There has been no case until now in ROC in which the proceedings of recognition of a foreign arbitral award was adjourned because an application for setting aside or suspension of the foreign arbitral award had been made to a competent authority under the *Arbitration Act 1998* (ROC) and the *Commercial Arbitration (Amendment) Act 1982* (ROC).<sup>731</sup>

The ROC legislation complies with the *New York Convention* and the UNCITRAL Model Law. The ROC practices are not incompliant with the legislation. Consequently, there is no deficiency of ROC legislation and practices in this regard.

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<sup>727</sup> UNCITRAL Model Law art 36(2). See Appendix .

<sup>728</sup> *Arbitration Act 1998* (ROC) art 51 para 2. ROC, *Legislative Yuan Gazette*, 87(31) (1998) 314-15.

<sup>729</sup> *New York Convention* 5(1)(e). See Appendix .

<sup>730</sup> UNCITRAL Model Law art 36(1)(a)(v). See Appendix .

<sup>731</sup> <http://www.judicial.gov.tw> visited 12 September 2003.

## ***G. Revocation of the Recognition of a Foreign Arbitral Award***

If a foreign arbitral award that was recognized, but the process of enforcement was adjourned by the competent court of ROC, and the award has been revoked, the court must revoke the recognition of the foreign arbitral award upon request. The revocation must have made by the competent authority of the country where the award was rendered or whose law the award was made.<sup>732</sup> This provision complies with the *New York Convention*<sup>733</sup> and the UNCITRAL Model Law.<sup>734</sup> Both stipulate that recognition of an arbitral award may be refused at the request of the party against whom it is invoked proof that the arbitral award has been set aside by a competent authority of the country in which, or under the law of which, that arbitral award was made.

Before 24 December 1998 when the *Arbitration Act 1998* (ROC) took effect, the court could revoke the recognition of a foreign arbitral award only in the situation that the foreign arbitral award had been revoked by the

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<sup>732</sup> *Arbitration Act 1998* (ROC) art 51 para 2. ROC, *Legislative Yuan Gazette*, 87(31) (1998) 314-15.

<sup>733</sup> *New York Convention* art 5(1)(e). See Appendix .

<sup>734</sup> UNCITRAL Model Law art 36 (1)(a)(v). See Appendix .

competent authority of the country in which the foreign arbitral award had been rendered. The court could not revoke the recognition of a foreign arbitral award in the situation that the foreign arbitral award had been revoked by the competent authority of the country under whose law the foreign arbitral award had been rendered.<sup>735</sup> This provision is inconsistent with the definition of foreign arbitral awards provided by the *Arbitration Act 1998* (ROC)<sup>736</sup>, the *New York Convention*<sup>737</sup> and the UNCITRAL Model Law.<sup>738</sup> Thus, the provision of the *Commercial Arbitration (Amendment) Act 1982* (ROC) regarding this<sup>739</sup> was revised under the *Arbitration Act 1998* (ROC).<sup>740</sup>

In *Waterman Steamship Corp v Gan Hua Enterprise Co Ltd, et al*,<sup>741</sup>

Waterman Steamship Corp applied to the Kaohsiung District Court (ROC) for granting an order of enforcement of an arbitral award rendered in USA. At the beginning, the Court granted an order of enforcement of the arbitral

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<sup>735</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 34 para 2.

<sup>736</sup> *Arbitration Act 1998* (ROC) art 47 para 1.

<sup>737</sup> *New York Convention* art 5(1)(e). See Appendix .

<sup>738</sup> UNCITRAL Model Law art 36 (1)(a)(v). See Appendix .

<sup>739</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 34 para 2.

<sup>740</sup> *Arbitration Act 1998* (ROC) art 51 para 2. ROC, *Legislative Yuan Gazette*, 87(31) (1998) 264-72, 314-15, 318-23.

<sup>741</sup> Decision of 23 December 1982 (*Waterman Steamship Corp v Gan Hua Enterprise Co Ltd, et al*), Kaohsiung District Court, 1982 Zhong Zi Di 1 Hao Fei Song Shi Jian Cai Ding (ROC), rev'd, Decision of 16 March 1983, Kaohsiung District Court, 1982 Zhong Zi Di 1 Hao Fei Song Shi Jian Cai Ding (ROC), aff'd, Decision of 21 June 1983, Tainan Branch of Taiwan High Court, 1983 Kang Zi Di 434 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial*



award.<sup>742</sup>

One of the respondents, Wang Zi-hua, appealed. Wang Zi-hua contended that the arbitral award relating to him had been revoked by the competent authority, the US District Court for the Southern District of New York. The Kaohsiung District Court (ROC) reversed the order of granting an order of enforcement of the arbitral award relating to Wang Zi-hua and rejected the application of granting an order of enforcement of the arbitral award relating to Wang Zi-hua. The Court ruled that:

Article 34 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) provides that: ‘A foreign arbitral award has been revoked by the competent authority of the country where the foreign arbitral award is rendered, the court shall revoke the order of recognition of the foreign arbitral award.’ The arbitral award rendered in USA relating to Wang Zi-hua has been revoked by US District Court for the Southern District of New York. Therefore, the order of enforcement of the arbitral award relating to Wang Zi-hua shall be revoked. The application of granting an order of enforcement of the arbitral award relating to Wang Zi-hua shall be rejected.<sup>743</sup>

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*Arbitration* vol 2, above n 61, 212-20.

<sup>742</sup> Decision of 23 December 1982 (*Waterman Steamship Corp v Gan Hua Enterprise Co Ltd, et al*), Kaohsiung District Court, 1982 Zhong Zi Di 1 Hao Fei Song Shi Jian Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 212-13. Actually, Kaohsiung District Court (ROC) should grant an order of recognition of the arbitral award instead of granting an order of enforcement of the arbitral award since an arbitral award rendered in USA is a foreign arbitral award according to *Commercial Arbitration (Amendment) Act 1982* (ROC) art 30.

<sup>743</sup> Decision of 16 March 1983 (*Wang Zi-hua v Waterman Steamship Corp*), Kaohsiung District Court, 1982 Zhong Zi Di 1 Hao Fei Song Shi Jian Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 215-17. This case the Court made the decision in accordance with *Commercial Arbitration (Amendment) Act 1982* (ROC) art 34 para 2 dealing with revocation of recognition of foreign arbitral awards adjourned the process of enforcement. It should be decided pursuant to *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33 para 1(2) dealing with refusal of recognition of a foreign arbitral award which has been revoked by the competent authority of the country in which the foreign arbitral award was rendered since the arbitral award rendered in USA had not been adjourned the process of enforcement. Nonetheless, the outcome is the same.

Waterman Steamship Corp appealed. The Tainan Branch of the Taiwan High Court (ROC) affirmed the decision of the lower Court.<sup>744</sup>

This case was made under the *Commercial Arbitration (Amendment) Act 1982* (ROC) regarding refusal recognition of foreign arbitral awards which have been revoked by the competent authority. The *Arbitration Act 1998* (ROC) is almost in the same terms. Therefore, this case still is a precedent.

Nevertheless, there has been no case until now in ROC in which the recognition of the foreign arbitral award has been revoked on the ground that the foreign arbitral award had been revoked under the *Arbitration Act 1998* (ROC).<sup>745</sup>

The ROC legislation had some deficiencies in the past, but no longer. The present ROC legislation complies with the *New York Convention* and the UNCITRAL Model Law. The ROC practices are not inconsistent with the present legislation. Thus, there is no deficiency of ROC practices in this regard.

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<sup>744</sup> Decision of 21 June 1983 (*Wang Zi-hua v Waterman Steamship Corp*), Tainan Branch of Taiwan High Court, 1983 Kang Zi Di 434 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 218-20.

<sup>745</sup> <http://www.judicial.gov.tw> visited 12 September 2003.

## ***H. Enforcement of a Foreign Arbitral Award***

After the court has granted an order for recognition of a foreign arbitral award, the foreign arbitral award is enforceable.<sup>746</sup> The foreign arbitral award that has been granted an order for recognition by the competent court can be enforced.<sup>747</sup> The procedure of enforcement of a foreign arbitral award is the same as a domestic arbitral award and a final judgement of the court of ROC.<sup>748</sup> It is in conformance with the *New York Convention*<sup>749</sup> and the UNCITRAL Model Law.<sup>750</sup> Both stipulate that each state shall recognize foreign arbitral awards as binding and enforce them in accordance with the rules of the territory where the arbitral award is relied upon and shall not impose substantially more onerous conditions or higher fees or charges on the enforcement of foreign arbitral awards than impose on the enforcement of domestic arbitral awards.

However, where a party to an arbitration has applied for a judicial revocation of a foreign arbitral award or for suspension of enforceability thereof, the court at the request of the party may order the party to pay a

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<sup>746</sup> *Arbitration Act 1998* (ROC) art 47 para 2.

<sup>747</sup> *Civil Execution (Amendment) Act 1996* (ROC) art 4 para 1(6).

<sup>748</sup> *Arbitration Act 1998* (ROC) art 37 para 1; *Civil Execution (Amendment) Act 1996* (ROC) art 4 para 1(1).

<sup>749</sup> *New York Convention* art 3. See Appendix .

suitable and certain security to suspend the enforcement proceedings of the foreign arbitral award prior to the end of the enforcement proceedings of the foreign arbitral award.<sup>751</sup> It also is in compliance with *New York Convention*<sup>752</sup> and the UNCITRAL Model Law.<sup>753</sup> Both stipulate that if an application for the setting aside or suspension of an arbitral award has been made to a competent authority, the authority before which the arbitral award is sought to be relied upon may, if it considers it proper, adjourn its decision on the enforcement of the arbitral award and may also, on the application of the party claiming enforcement of the arbitral award, order the other party to give suitable security.

The legislation complies with the *New York Convention* and the UNCITRAL model Law. In addition, there is no case in which a recognized foreign arbitral award was refused enforcement until now.<sup>754</sup> Therefore, there is no deficiency of ROC legislation and practices in this regard.

### ***I. Retroactive Effect***

Do the provisions regarding the recognition and enforcement of foreign

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<sup>750</sup> UNCITRAL Model Law art 35(1). See Appendix .

<sup>751</sup> *Arbitration Act 1998* (ROC) art 51 para 1.

<sup>752</sup> *New York Convention* art 6. See Appendix .

<sup>753</sup> UNCITRAL Model Law art 36(2). See Appendix .

<sup>754</sup> <http://www.judicial.gov.tw> visited 12 September 2003.

arbitral awards under the *Arbitration Act 1998* (ROC) mentioned above have retroactive effect? In *Maersk Line et al v Asia Food Corporation Ltd et al*<sup>755</sup> and *American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*,<sup>756</sup> the ROC Courts all ruled that the provisions regarding the recognition and enforcement of foreign arbitral awards under the *Arbitration Act 1998* (ROC) have retroactive effect. In *Maersk Line et al v Asia Food Corporation Ltd et al*,<sup>757</sup> the Court did not explain the reason. In *American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*,<sup>758</sup> the Courts only held that the provisions regarding the recognition and enforcement of foreign arbitral awards under the *Arbitration Act 1998* (ROC) have retroactive effect based upon the principle that the new

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<sup>755</sup> Decision of 8 March 2002 (*Maersk Line et al v Asia Food Corporation Ltd et al*), Tainan Branch of Taiwan High Court, 1999 Kang Zi Di 358 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

<sup>756</sup> Decision of 22 November 2000 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2000 Kang Zi Di 968 Hao Min Shi Cai Ding (ROC), retrial denied, Decision of 30 January 2001 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2000 Zai Zi Di 76 Hao Min Shi Cai Ding (ROC), retrial denied, Decision of 17 May 2001 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2001 Zai Zi Di 13 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

<sup>757</sup> Decision of 8 March 2002 (*Maersk Line et al v Asia Food Corporation Ltd et al*), Tainan Branch of Taiwan High Court, 1999 Kang Zi Di 358 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

<sup>758</sup> Decision of 22 November 2000 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2000 Kang Zi Di 968 Hao Min Shi Cai Ding (ROC); Decision of 30 January 2001 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2000 Zai Zi Di 76 Hao Min Shi Cai Ding (ROC); Decision of 17 May 2001 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2001 Zai Zi Di 13 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003

provisions regulating proceedings prevail. The Courts did not explain the reason thoroughly. Nonetheless, there have been two cases dealing with the issue under the *Commercial Arbitration (Amendment) Act 1982* (ROC) thoroughly.

In *North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*, North American Foreign Trading Corp applied to the Taipei District Court (ROC) to grant an order to enforce an arbitral award rendered by American Arbitration Association on 11 November 1981 in New York City, USA. The Court granted an order to enforce this arbitral award.<sup>759</sup>

San Ai Electronic Industrial Corp Ltd appealed. The Taiwan High Court (ROC) reversed the decision of the lower Court and dismissed the application of North American Foreign Trading Corp. The Court held that:

The arbitral award was rendered by American Arbitration Association in New York City, USA, on 11 November 1981. The *Commercial Arbitration (Amendment) Act 1982* (ROC) was promulgated on 11 June 1982. There was no provision regulating foreign arbitral awards prior to the *Commercial Arbitration (Amendment) Act 1982* (ROC). Therefore, the provisions regulating foreign arbitral awards in the *Commercial Arbitration (Amendment) Act 1982* (ROC) has no retroactive effect.<sup>760</sup>

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(Copy on file with author).

<sup>759</sup> Decision of 16 September 1983 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), Taipei District Court, 1983 Sheng Zi Di 1402 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 221-8. *Commercial Arbitration (Amendment) Act 1982* (ROC) art 30 para 2 provides that 'After applying to courts for granting orders to recognize, foreign arbitral awards are enforceable.' Thus, Taipei District Court should grant an order to recognize this arbitral award instead of granting an order to enforce it.

<sup>760</sup> Decision of 28 December 1983 (*North American Foreign Trading Corp v San Ai Electronic*

North American Foreign Trading Corp appealed. The Supreme Court of ROC remanded this case to the lower Court. The Court concluded that:

The *Commercial Arbitration (Amendment) Act 1982* (ROC) was promulgated on 11 June 1982. There was no provision regulating foreign arbitral awards prior to the *Commercial Arbitration (Amendment) Act 1982* (ROC). However, the provisions relating to foreign arbitral awards of the *Commercial Arbitration (Amendment) Act 1982* (ROC) only provide the proceedings relating to applying to courts for granting orders to recognize foreign arbitral awards. Referring to article 2 of the (*Amendment) Act Governing the Enforcement of the Civil Procedure Act 1968* (ROC), which provides that procedural change shall be applied retroactively, and the Supreme Court of ROC 1956 Tai Shang Zi Di 83 Hao Pan Li [civil judgement of 21 January 1956 (*Wang You-dao v Liu Jin-wang*)], in which the Court held that procedural change should be applied retroactively, the appellant can apply to court for granting an order to recognize the arbitral award rendered in New York City, USA, on 11 November 1981 pursuant to the *Commercial Arbitration (Amendment) Act 1982* (ROC).<sup>761</sup>

Then, the Taiwan High Court (ROC) dismissed the appeal of San Ai Electronic Industrial Corp Ltd and affirmed the decision of the lower Court (ROC). The Court held the same reasoning as the Supreme Court of ROC ruled.<sup>762</sup>

In *NV 'SCA' SA v Tung Hsing Textile Corp Ltd*, NV 'SCA' SA applied to the Taichung District Court (ROC) to grant an order to recognize an arbitral

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*Industrial Corp Ltd*), Taiwan High Court, 1983 Kang Zi Di 2252 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 229-37.

<sup>761</sup> Decision of 18 May 1984 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), The Supreme Court, 1984 Tai Kang Zi Di 234 Hao Min Shi Cai Ding (ROC). See Legal Books Editing Committee of the Supreme Court (ed), *Collection of Selected civil and Criminal Judgements and Decisions of the Supreme Court: January 1984- June 1984* vol 5:1, above n 256, 643-7.

<sup>762</sup> Decision of 25 February 1985 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), Taiwan High Court, 1984 Kang Geng Yi Zi Di 26 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 242-6.

award rendered in England on 31 January 1993. The Court granted the order.

The Court held that:

After obtaining court's order to recognize a foreign arbitral award, the foreign arbitral award is enforceable in accordance with article 30 of the *Commercial Arbitration (Amendment) Act 1982* (ROC). Article 30 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) was added into this *Act* in June 1982. It took effect on 13 June 1982. The dispute occurred on 29 March 1982, but the arbitral award rendered on 31 January 1983. Thus, article 30 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) is applicable.<sup>763</sup>

Tung Hsing Textile Corp Ltd Appealed. The Taichung Branch of the Taiwan High Court (ROC) dismissed the appeal. Its holding was the same as the holding of the lower Court.<sup>764</sup>

In *North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*, both the Taiwan High Court (ROC)<sup>765</sup> and the Supreme Court of ROC<sup>766</sup> held that procedural change should be applied retroactively and the newly-added provision recognizing foreign arbitral awards under the *Commercial Arbitration (Amendment) Act 1982* (ROC) was applicable to

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<sup>763</sup> Civil decision of 29 July 1985 (*NV 'SCA' SA v Tung Hsing Textile Corp Ltd*), Taichung District Court, 1985 Zhong Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 302-4.

<sup>764</sup> Civil decision of 18 October 1985 (*NV 'SCA' SA v Tung Hsing Textile Corp Ltd*), Taichung Branch of Taiwan High Court, 1985 Kang Zi Di 966 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 305-10.

<sup>765</sup> Decision of 25 February 1985 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), Taiwan High Court, 1984 Kang Geng Yi Zi Di 26 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 242-6.

<sup>766</sup> Decision of 18 May 1984 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), the Supreme Court, 1984 Tai Kang Zi Di 234 Hao Min Shi Cai Ding (ROC). See Legal Books Editing Committee of the Supreme Court (ed), *Collection of Selected civil and Criminal Judgements and Decisions of the Supreme Court: January 1984- June 1984* vol 5:1, above n 256,



foreign arbitral awards rendered before the newly added provision took effect.

In *NV 'SCA' SA v Tung Hsing Textile Corp Ltd*, both the Taichung District Court (ROC)<sup>767</sup> and the Taichung Branch of the Taiwan High Court (ROC)<sup>768</sup> ruled that the newly-added provision recognizing foreign arbitral awards under the *Commercial Arbitration (Amendment) Act 1982* (ROC) was applicable to foreign arbitral awards, arising out of disputes before the newly-added provision took effect, and rendered after the newly-added provision took effect.

Although these two cases were made under the *Commercial Arbitration (Amendment) Act 1982* (ROC), they still are precedents since the theory that procedural change should be applied retroactively still is valid.<sup>769</sup> The different provisions relating to recognition and enforcement of foreign arbitral awards between the *Commercial Arbitration (Amendment) Act 1982* (ROC) and the *Arbitration Act 1998* (ROC) constitute procedural change and do not

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<sup>767</sup> Civil decision of 29 July 1985 (*NV 'SCA' SA v Tung Hsing Textile Corp Ltd*), Taiwan Taichung Di Fang Fa Yuan [trans: Taichung District Court] (ROC) (Taichung District Court (ROC)), 1985 Zhong Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 302-4.

<sup>768</sup> Civil decision of 18 October 1985 (*NV 'SCA' SA v Tung Hsing Textile Corp Ltd*), Taichung Branch of Taiwan High Court, 1985 Kang Zi Di 966 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 305-10.

<sup>769</sup> (*Amendment*) Act Governing the Enforcement of The Civil Procedure Act 1968 (ROC) art 2 provides that: 'Except otherwise provided for by this Act, the revised *Civil Procedure Act* shall be equally applicable to matters occurred before its enforcement; provided, however, that the legal effects produced by virtue of the old *Civil Procedure Act* are not thereby affected.'

alter substantive rights, so the provisions of the *Arbitration Act 1998* (ROC) apply retroactively. Namely, the provisions regarding recognition and enforcement of foreign arbitral award under the *Arbitration Act 1998* (ROC) not only are applicable to arbitral awards rendered after the *Arbitration Act 1998* (ROC) took effect but also are applicable to arbitral awards rendered before the *Arbitration Act 1998* (ROC) took effect. Furthermore, the provisions regarding recognition and enforcement of foreign arbitral awards under the *Arbitration Act 1998* (ROC) are applicable to arbitral awards rendered before or after the *Arbitration Act 1998* (ROC) took effect, no matter whether the arbitral awards arose out of contracts concluded before or after the *Arbitration Act 1998* (ROC) took effect. In addition, the provisions regarding recognition and enforcement of foreign arbitral awards under the *Arbitration Act 1998* (ROC) are applicable to arbitral awards rendered before or after the *Arbitration Act 1998* (ROC) took effect, no matter whether the arbitral awards arose out of disputes occurred before or after the *Arbitration Act 1998* (ROC) took effect.

*Smith Kline Beecham Corporation v Hsin Wan Jen Chemical &*

*Pharmaceutical Co Ltd* is a good example. Although the Courts did not

discuss the issue of the retroactive effect, both the Taichung District Court (ROC) and the Taichung Branch of the Taiwan High Court (ROC) recognized a foreign arbitral award, which was rendered in US by International Court of Arbitration under the International Chamber of Commerce on 1 July 1997 when the *Arbitration Act 1998* (ROC) had not yet taken effect, in accordance with the *Arbitration Act 1998* (ROC) on 2 November 1999<sup>770</sup> and 18 April 2000<sup>771</sup> respectively.

*Fersam AG v Pei Qing Enterprise Corporation Ltd* is another good illustration. Both the Taipei District Court (ROC) and the Taiwan High Court (ROC) recognized a foreign arbitral award, which arose out of an arbitration agreement concluded on 22 August 1994 when the *Arbitration Act 1998* (ROC) had not yet taken effect and was rendered in accordance with the Rules of arbitration of the International Chamber of Commerce in Switzerland on 19 April 2000, pursuant to the *Arbitration Act 1998* (ROC) on 30 August 2001<sup>772</sup> and 29 November 2001<sup>773</sup> respectively even though the Courts also

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<sup>770</sup> Civil decision of 2 November 1999 (*Smith Kline Beecham Corporation v Hsin Wan Jen Chemical & Pharmaceutical Co Ltd*), Taichung District Court, 1998 Zhong Sheng Zi Di 4 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 30 June 2003 (Copy on file with author).

<sup>771</sup> Civil decision of 18 April 2000 (*Smith Kline Beecham Corporation v Hsin Wan Jen Chemical & Pharmaceutical Co Ltd*), Taichung Branch of Taiwan High Court, 2000 Kang Zi Di 81 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 30 June 2003 (Copy on file with author).

<sup>772</sup> Decision of 30 August 2001 (*Fersam AG v Pei Qing Enterprise Corporation Ltd*), Taipei District Court, 2001 Zhong Sheng Zi Di 3 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

did not discuss the issue of retroactive effect.

In USA, the recognition and enforcement of foreign arbitral awards are regulated by the *Federal Arbitration (Amendment) Act 1970 (USA)*<sup>774</sup> which took effect on 29 December 1970.<sup>775</sup> The *New York Convention* is enforced in USA in accordance with the *Federal Arbitration (Amendment) Act 1970 (USA)*.<sup>776</sup>

To the same effect as in ROC, US District Court for the Southern District of Ohio also held that the *New York Convention* had retroactive effect in *Fertilizer Corporation of India v IDI Management, Inc.*

Fertilizer Corporation of India brought a petition for enforcement, under the *New York Convention* of an arbitral award rendered in India in its favor against IDI Management, Incorporation. The arbitral award was rendered on 1 November 1976 in accordance with a contract concluded in 1962. Since IDI Management, Incorporation failed to pay its share of the arbitration's costs and expenses, the arbitral award was not released to the parties until

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<sup>773</sup> Decision of 29 November 2001 (*Fersam AG v Pei Qing Enterprise Corporation Ltd*), Taiwan High Court, 2001 Kang Zi Di 3935 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

<sup>774</sup> *Federal Arbitration (Amendment) Act 1970 (USA)* ch 2, 9 U.S.C. §§ 201-208. See *Rest. 3<sup>rd</sup> Restatement of the Foreign Relations Law of the United States* §487 Source Note (1990).

<sup>775</sup> 9 U.S.C.A. § 201, Historical and Statutory Notes (West Supp. 1998).

<sup>776</sup> *Federal Arbitration (Amendment) Act 1970 (USA)* ch 2, 9 U.S.C. §§ 201-208. See 9 U.S.C.A. § 201 (West Supp. 1998).

Fertilizer Corporation of India deposited the full amount of those fees in 1979.

The Court said that the *New York Convention* was remedial in nature and might properly be given retroactive effect. The court also found that the *New York Convention* did not affect parties' substantive rights that were effectively determined by parties' contract. Thus, the Court ruled that the *New York Convention* applied to an arbitral award rendered in India after US had acceded to the *New York Convention*, even though the award arose out of a contract concluded before the *New York Convention* was entered into force for USA.<sup>777</sup>

Therefore, the ROC legislation and practices comply with international standards and have no deficiency in this regard.

## **J. Conclusion**

ROC present legislation and practices regarding recognition and enforcement of foreign arbitral awards are consistent with the *New York Convention* and the UNCITRAL Model Law even though the former legislation and practices were not. Nonetheless, there are the following deficiencies of ROC legislation regarding formalities which:

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<sup>777</sup> *Fertilizer Corporation of India v IDI Management, Inc*, 517 F.Supp. 948 (S.D. Ohio 1981), reconsideration denied, 530 F.Supp 542 (S.D. Ohio 1981).

- (1) Does not require the applicant who applies for granting an order to recognize a foreign arbitral award to submit an authenticated original arbitral award;
- (2) Does not require the applicant to supply a certified Chinese translation of the foreign arbitral award and the arbitration agreement that are not in Chinese;
- (3) Does not require the applicant to submit the Chinese translation of the full text of the foreign arbitration law, the full text of the arbitration rules of the foreign institution, or the full text of the arbitration rules of the international organisation those are applied to foreign arbitral award and are not in Chinese.

Thus, the relevant provisions of the *Arbitration Act 1998* (ROC) should be revised to require those formalities.

Article 48 paragraph 1(1) of the *Arbitration Act 1998* (ROC) should be amended as ‘ To obtain recognition of a foreign arbitral award, an application shall be submitted to the court and accompanied by the authenticated original arbitral award or an authenticated copy thereof’.

In addition, article 48 paragraph 2 of the *Arbitration Act 1998* (ROC)

should be revised as 'If the documents in the preceding paragraph are made in a foreign language, a certified copy of the Chinese translation shall be submitted.'

## **. RECOGNITION AND ENFORCEMENT OF PRC ARBITRAL AWARDS IN ROC**

### ***A. The Scope of PRC Arbitral Awards***

ROC was founded in 1912. At that time, the government of ROC controlled the whole territory of China.<sup>778</sup> Japan renounced its claims to Taiwan after the Second World War.<sup>779</sup> The government of ROC has been in Control of Taiwan from 1945. PRC was established in 1949 and it has been in control of Mainland China from that time. Since 1949, only Taiwan Island, Penghu, Kinmen and Matsu have been controlled by the government of ROC.<sup>780</sup> Both the government of ROC and the government of PRC claimed Taiwan as part of China before 9 July 1999.<sup>781</sup> On 9 July 1999, the President of ROC at that time, Lee Teng-hui, described the relationship between ROC and PRC as a ‘state-to-state relationship or at least a special state-to-state relationship, rather than an internal relationship between a legitimate government and a renegade group, or between a central

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<sup>778</sup> Mainland Affairs Council, Executive Yuan of ROC, above n 30.

<sup>779</sup> *Rest. 3<sup>rd</sup> Restatement of the Foreign Relations Law of the United States* §201 Reporters’ Note 8 (1990).

<sup>780</sup> Mainland Affairs Council, Executive Yuan of ROC, above n 30.

<sup>781</sup> *Rest. 3<sup>rd</sup> Restatement of the Foreign Relations Law of the United States* §201 Reporters’ Note 8 (1990).



government and a local government'.<sup>782</sup> In addition, the current President of ROC, Chen Shui-bian, stated on 3 August 2002 that: 'Taiwan and China standing on opposite sides of the Strait, there is one country on each side'.<sup>783</sup> However, *the Additional (Amendment) Articles 2000 of the Constitution of the Republic of China* states that 'to meet the requisites before national unification, the additional articles are added to *Constitution*'.<sup>784</sup> Moreover, the territory of ROC within its existing national boundaries cannot be altered except by a proposition and resolution of legislators and by a confirmation of the National Assembly in accordance with *the Additional (Amendment) Articles 2000 of the Constitution of the Republic of China*.<sup>785</sup> The legislators have not made any proposition and resolution to alter the existing national boundaries. Therefore, both Taiwan and Mainland China are part of the territory of ROC in accordance with the *Constitution of the Republic of China* and the *Additional (Amendment) Articles 2000 of the Constitution of the Republic of China*.

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<sup>782</sup> Lee Teng-hui, 'Responses to Questions Submitted by Deutsche Welle (Voice of Germany)' (1999), Government Information Office of ROC, ROC, <<http://www.gio.gov.tw/info/99html/99lee/0709.htm>> (Copy on file with author) [1].

<sup>783</sup> Chen Shui-bian, 'President Chen's Opening Address of the 29<sup>th</sup> Annual Meeting of the World Federation of Taiwanese Associations' (2002), Government Information Office of ROC, ROC, <http://www.gio.gov.tw/taiwan-website/4-oa/20020803/2002080301.html> (copy on file with author) [2].

<sup>784</sup> *Additional (Amendment) Articles 2000 of the Constitution of the Republic of China* preamble.

<sup>785</sup> *Additional (Amendment) Articles 2000 of the Constitution of the Republic of China* art 1 para

An arbitral award rendered in Mainland China is not rendered outside the territory of ROC. It is not the first sort of foreign arbitral award stipulated in article 47 paragraph 1 of the *Arbitration Act 1998* (ROC) namely one which is rendered outside the territory of ROC. Nevertheless, article 10 of the *Additional (Amendment) Articles 1994 of the Constitution of the Republic of China* stipulates that ‘Rights and obligations between the people of the area of Mainland China and the people of the free area, and the disposition of other related affairs shall be specially regulated by law.’<sup>786</sup> The *PRC Relations (Amendment) Act 1997 (ROC)* was enacted accordingly.<sup>787</sup> No matter what law it is pursuant to, an arbitral award rendered in Mainland China is neither a foreign arbitral award nor a domestic arbitral award under the *PRC Relations (Amendment) Act 1997 (ROC)*.<sup>788</sup> In addition, the region of Mainland China means the territory of ROC other than Taiwan Island, Penghu, Kinmen, Matsu and other regions controlled by the government of ROC.<sup>789</sup> Moreover, Hong

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2(2), art 4 para 5.

<sup>786</sup> *Additional Articles 1991 of the Constitution of the Republic of China* as amended by *Additional (Amendment) Articles 1994 of the Constitution of the Republic of China (Additional (Amendment) Articles 1994 of the Constitution of the Republic of China)* art 10.

<sup>787</sup> *PRC Relations (Amendment) Act 1997 (ROC)* art 1.

<sup>788</sup> *PRC Relations (Amendment) Act 1997 (ROC)* art 74.

<sup>789</sup> *Taiwan Di Qu Yu Da Lu Di Qu Ren Min Guan Xi Tiao Li 1992* as amended by *Taiwan Di Qu Yu Da Lu Di Qu Ren Min Guan Xi Tiao Li 2000* [trans: *The Relationship between People of Taiwan Region and People of Mainland China Region Act*] (ROC) (*PRC Relations (Amendment) Act 2000 (ROC)*) art 2(1)(2).

Kong and Macao are not included in the region of Mainland China.<sup>790</sup> Thus, a PRC arbitral award is an arbitral award rendered in the region of Mainland China does not include Taiwan, Hong Kong, and Macao.

## ***B. Jurisdiction and Formalities***

### ***1. Jurisdiction***

Applying for recognition of PRC arbitral award in ROC, a petition must be submitted to the competent court.<sup>791</sup> Since this kind of matter is a non-litigious matter,<sup>792</sup> the petition must be submitted to district court.<sup>793</sup> There is no provision regulating the jurisdiction for this kind of application in the *PRC Relations (Amendment) Act 2002* (ROC).<sup>794</sup> However, article 1 of the *PRC Relations Act 1992* (ROC) stipulates that: ‘With regard to matters not provided in this *Act*, relevant provisions of other acts or regulations shall govern.’ Article 52 of the *Arbitration Act 1998* (ROC) provides that:

The court in dealing with procedures of arbitration matters shall apply the provisions of the *Non-litigious Matters Act* in addition to this *Act*, if in the absence of any relevant provisions therein, it shall apply *mutatis mutandis* the provisions of the *Civil Procedure*

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<sup>790</sup> *Hong Kong and Macao Relations Act 1997* (ROC) arts 1-2.

<sup>791</sup> *PRC Relations (Amendment) Act 1997* (ROC) art 74 para 1.

<sup>792</sup> Chen Yen-jia, ‘Hai Xia Liang An Zhong Cai Pan Duan Zhi Xiang Hu Ren Ke’ (2001) 261 *Lu Shih Tsa Chih* 66, 72 [trans: ‘Recognition of ROC Arbitral Awards in PRC and Recognition of PRC Arbitral Awards in ROC’ in *Taipei Bar Journal*].

<sup>793</sup> *Court Organisation (Amendment) Act 1989* (ROC) art 9(3) stipulates that: ‘Non-litigious case provided by *Acts* shall be handled by district courts.’

<sup>794</sup> *Taiwan Di Qu Yu Da Lu Di Qu Ren Min Guan Xi Tiao Li 1992* as amended by *Taiwan Di Qu Yu Da Lu Di Qu Ren Min Guan Xi Tiao Li 2002* [trans: *The Relationship between People of Taiwan Region and People of Mainland China Region Act*] (ROC) (*PRC Relations (Amendment) Act 2002*

Act.

There is no provision providing the jurisdiction for this kind of application in the *Non-litigious Matters (Amendment) Act 1999* (ROC), either. Thus, the provisions stipulating venue of civil litigation in the *Civil Procedure (Amendment) Act 1968* (ROC)<sup>795</sup> and the *Civil Procedure (Amendment) Act 2003* (ROC)<sup>796</sup> apply *mutatis mutandis*. Nonetheless, if the petition is submitted to a court which is not competent, the court must, upon application of the petitioner or *ex officio*, transfer this petition to the competent court according to the *Arbitration Act 1998* (ROC)<sup>797</sup> and the *Civil Procedure (Amendment) Act 2003* (ROC).<sup>798</sup>

## **2. Formalities**

There is no provision setting out the information required in an application for granting an order of recognition of a PRC arbitral award, and that must be included in a petition under the *PRC Relations (Amendment) Act 2002* (ROC) and the *Arbitration Act 1998* (ROC). Consequently, this is regulated by the *Non-litigious Matters (Amendment) Act 1972* (ROC)<sup>799</sup>.

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(ROC)).

<sup>795</sup> *Civil Procedure (Amendment) Act 1968* (ROC) arts 3-17, 19-22, 24-7, 29-31.

<sup>796</sup> *Civil Procedure (Amendment) Act 2003* (ROC) arts 1, 2, 18, 23, 28.

<sup>797</sup> *Arbitration Act 1998* (ROC) art 52

<sup>798</sup> *Civil Procedure (Amendment) Act 2003* (ROC) art 28 para 1.

<sup>799</sup> *Non-litigious Matters (Amendment) Act 1972* (ROC) art 14.

The information required includes:

- (1) The full name, sex, age, occupation, and place of domicile or place of residence of the petitioner; in case the petitioner is an artificial person or other kind of entity, its name and the place of its office or the place of its business establishment.
- (2) If there is any representative of the petitioner, the full name, sex, age, occupation, and place of domicile or place of residence.
- (3) Allegations of the petition, the reason thereof and the fact thereof.
- (4) The evidence to be used as proof or explanation.
- (5) The annexed documents and the number thereof.
- (6) The court to which the petitioner applies.
- (7) The date when the petition is made.<sup>800</sup>

The petition must be written in Chinese.<sup>801</sup> However, foreign language shall be noted when it is needed for reference.<sup>802</sup> In addition, the petitioner or his representative must sign his name on the petition. If the petitioner is

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<sup>800</sup> *Non-litigious Matters (Amendment) Act 1972* (ROC) art 14 para 1.

<sup>801</sup> *Court Organisation (Amendment) Act 1989* (ROC) art 99.

<sup>802</sup> *Court Organisation (Amendment) Act 1989* (ROC) art 99 provides that 'The document used in litigation shall be written in Chinese. However, dialect or foreign language shall be noted when it is needed for reference.' Although a petition submitted by a petitioner to apply for recognition of a PRC arbitral award is not a document used in litigation, *Court Organisation (Amendment) Act 1989* (ROC) art 99 shall apply *mutatis mutandis*.

unable to sign, he may request another person to write his name and impress his seal or fingerprint on the petition.<sup>803</sup>

Moreover, a PRC arbitral award, where there has been an application to ROC Courts for recognition must be authenticated by the institution established or designated by the Executive Yuan of ROC or authenticated by a private organisation entrusted by the Executive Yuan of ROC.<sup>804</sup>

The Straits Exchange Foundation is the sole organisation entrusted by the Executive Yuan of ROC to authenticate arbitral awards rendered in PRC. Therefore, an arbitral award rendered in PRC applied to ROC Courts for recognition must be authenticated by the Straits Exchange Foundation.

In *Guo Teng Electronic Company Ltd v Kun Fu Construction Corporation Ltd*, the Taichung District Court recognized an arbitral award rendered by China International Economic and Trade Arbitration Commission in PRC since this arbitral award was authenticated by the Straits Exchange Foundation.<sup>805</sup>

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<sup>803</sup> *Non-litigious Matters (Amendment) Act 1972* (ROC) art 14 para 2.

<sup>804</sup> *Taiwan Di Qu Yu Da Lu Di Qu Ren Min Guan Xi Tiao Li Shi Xing Xi Ze 1992* as amended by *Taiwan Di Qu Yu Da Lu Di Qu Ren Min Guan Xi Tiao Li Shi Xing Xi Ze (Amendment) 1998* [trans: *Enforcement Rule of the Relationship between People of Taiwan Region and People of Mainland China Region Act*] (ROC) (*Enforcement (Amendment) Rule 1998 of PRC Relations Act* (ROC)) art 54bis.

<sup>805</sup> Decision of 24 June 2003 (*Guo Teng Electronic Company Ltd v Kun Fu Construction Corporation Ltd*), Taichung District Court, 2003 Zhong Sheng Zi Di 1 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 18 September 2003 (Copy on file with author).

### **3. Conclusion**

The jurisdiction and formalities regarding applying for recognition of a PRC arbitral award are almost the same as the jurisdiction and formalities relevant to applying for recognition of a foreign arbitral award. This complies with the ‘regional conflict of laws’ theory adopted by ROC.<sup>806</sup> As discussed above,<sup>807</sup> these formalities also are not in conflict with the *New York Convention*<sup>808</sup> and the UNCITRAL Model Law.<sup>809</sup>

### ***C. The Grounds on which a PRC Arbitral Award May Be Refused Recognition***

ROC and PRC both insist on a ‘one China’ policy. Both the government of ROC and the government of PRC claim Taiwan as a part of China. Furthermore, both the government of ROC and the government of PRC claim that it represents the whole of China. There is serious political opposition between ROC and PRC. However, ROC adopted the ‘full faith and credit’ doctrine provided in Article IV Section 1 of the *Constitution for the United States of America* which provides that ‘Full faith and credit shall

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<sup>806</sup> See above Part E.

<sup>807</sup> See above Part B2.

<sup>808</sup> *New York Convention* arts 3-4. See Appendix .

<sup>809</sup> UNCITRAL Model Law art 35(2), note 3. See Appendix .

be given in each State to ... judicial proceedings of every other State...<sup>810</sup> to recognize arbitral awards rendered in PRC. Thus, there is no political ground on which an arbitral award rendered in PRC must be refused recognition under ROC legislation. In addition, there is no possibility in practice that a PRC arbitral award may be refused recognition owing to any political reason.

There are two grounds on which an arbitral award rendered in PRC may be refused recognition – if they are contrary to the public order or good morals of the Taiwan Region and also non-reciprocity.<sup>811</sup>

### **1. *Contrary to the Public Order or Good Morals***

A PRC arbitral award may be the subject of an application to the competent court for recognition if the PRC arbitral award is not contrary to the public order or good morals of Taiwan Region.<sup>812</sup> The systems of civil procedure and arbitration are different in ROC and PRC. To protect the legal system of ROC and the interests of the parties, an arbitral award rendered in PRC will be recognized in ROC only if it is not contrary to the public order

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<sup>810</sup> Black Henry Campbell, *Black's Law Dictionary* (6<sup>th</sup> ed, 1990) 672.

<sup>811</sup> *PRC Relations (Amendment) Act 1997* (ROC) art 74.

<sup>812</sup> *PRC Relations (Amendment) Act 2000* (ROC) art 2(1); *PRC Relations (Amendment) Act 1997* (ROC) art 74 para 1.



and good morals of Taiwan Region.<sup>813</sup> This complies with the *New York Convention*<sup>814</sup> and the UNCITRAL Model Law both stipulating that recognition and enforcement of an arbitral award may be refused if the court finds that the recognition or enforcement of the arbitral award would be contrary to the public policy of this country.<sup>815</sup> The meaning and judicial practices of the defence of the public order or good morals are the same as mentioned above for foreign arbitral awards.<sup>816</sup>

There has been no case in which a PRC arbitral award was refused to recognize by the ROC Courts on the ground that the arbitral award was contrary to the public order or good morals of Taiwan Region.<sup>817</sup>

In *Guo Teng Electronic Company Ltd v Kun Fu Construction Corporation Ltd*, the Taichung District Court recognized an arbitral award rendered by China International Economic and Trade Arbitration Commission in PRC since this arbitral award was not contrary to the public order and good morals of Taiwan Region.<sup>818</sup> This case did not deal with the public order and

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<sup>813</sup> ROC, *Legislative Yuan Gazette*, 81(51) (1992) 161-2.

<sup>814</sup> *New York Convention* art 5(2)(b). See Appendix .

<sup>815</sup> UNCITRAL Model Law art 36 (1)(b)(ii). See Appendix .

<sup>816</sup> See above Part C1.

<sup>817</sup> <<http://www.judicial.gov.tw>> visited 18 September 2003.

<sup>818</sup> Decision of 24 June 2003 (*Guo Teng Electronic Company Ltd v Kun Fu Construction Corporation Ltd*), Taichung District Court, 2003 Zhong Sheng Zi Di 1 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 18 September 2003 (Copy on file with author).

good morals defence thoroughly.

However, ROC Courts dealt with the public order and good morals defence thoroughly in the following cases in which PRC final civil judgements were recognized.

In *Xia Men Da Ya Xing Ye Zipper Corp v Zhao Feng-fu*,<sup>819</sup> Xia Men Da Ya Xing Ye Zipper Corporation applied to the Taoyuan District Court (ROC) for recognition of a final civil judgement made by the High People's Court of Fujian Province (PRC).<sup>820</sup> Xia Men Da Ya Xing Ye Zipper Corporation claimed that:

Xia Men Da Ya Xing Ye Zipper Corporation is invested by Taiwanese in Mainland China. Zhao Feng-fu is one of the shareholders of Xia Men Da Ya Xing Ye Zipper Corporation and is the superintendent of the plant. Zhao Feng-fu stole and sold the machines and raw materials of Xia Men Da Ya Xing Ye Zipper Corporation. Xia Men Da Ya Xing Ye Zipper Corporation sued Zhao Feng-fu and claimed for compensation in accordance with the law of PRC. The final civil judgement made by the High People's Court of Fujian Province (PRC) approved the claim for compensation of Xia Men Da Ya Xing Ye Zipper Corporation. Therefore, Xia Men Da Ya Xing Ye Zipper Corporation applied to the Taoyuan District Court (ROC) for recognition of this final civil judgement made by the High People's Court of Fujian Province (PRC).<sup>821</sup>

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<sup>819</sup> Decision of 29 February 1996 (*Xia Men Da Ya Xing Ye Zipper Corp v Zhao Feng-fu*), Taiwan High Court, 1996 Kang Zi Di 514 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 21 December 2001 (Copy on file with author). Also see Taiwan High Court, *Taiwan Gao Deng Fa Yuan Min Shi Cai Pan Shu Hui Bian: 1996* [trans: *Collection of Civil Judgements and Orders of Taiwan High Court: 1996*] (1997) vol 1:1, 521-4.

<sup>820</sup> *Xia Men Da Ya Xing Ye Zipper Corp v Zhao Feng-fu*, Fujian Sheng Gao Ji Ren Min Fa Yuan [trans: High People's Court of Fujian Province] (High People's Court of Fujian Province (PRC)), 1993 Min Jing Zhong Zi Di 95 Hao Min Shi Pan Jue (PRC).

<sup>821</sup> Decision of 29 February 1996 (*Xia Men Da Ya Xing Ye Zipper Corporation v Zhao Feng-fu*), Taiwan High Court, 1996 Kang Zi Di 514 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 21 December 2001 (Copy on file with author). Also see Taiwan High Court, *Collection of Civil Judgements and Orders of Taiwan High Court: 1996* vol 1:1, above

Zhao Feng-fu contended that:

This case relates to dispute of withdraw investment in PRC. The policy of withdraw investment of PRC is unreasonable. The conditions of withdraw investment in PRC is strict, so that investment in PRC is not able to withdraw. Thus, the final civil judgement made by the High People's Court of Fujian Province (PRC) is contrary to the public order and good morals of Taiwan Region. This judgement shall not be recognized.<sup>822</sup>

The Taoyuan District Court (ROC) granted an order to recognize this judgement.<sup>823</sup>

Zhao Feng-fu appealed to the Taiwan High Court (ROC). The Court affirmed the order made by the lower Court (ROC) and held that:

The final civil judgement made by the High People's Court of Fujian Province (PRC) did not violate the provisions of protection basic human rights under the *Constitution of the Republic of China*.... Moreover, the final civil judgement made by the High People's Court of Fujian Province (PRC) did not refer to PRC law regarding withdraw Taiwanese investment or foreign investment. The Court of ROC cannot review Zhao Feng-fu's contention that the policy and laws of PRC regarding withdraw Taiwanese investment are contrary to the public order and good morals.... Therefore, the final civil judgement made by the High People's Court of Fujian Province (PRC) is not contrary to the public order and good morals of Taiwan Region. The order made by the Taoyuan District Court (ROC) shall be affirmed.<sup>824</sup>

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<sup>822</sup> Decision of 29 February 1996 (*Xia Men Da Ya Xing Ye Zipper Corporation v Zhao Feng-fu*), Taiwan High Court, 1996 Kang Zi Di 514 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 21 December 2001 (Copy on file with author). Also see Taiwan High Court, *Collection of Civil Judgements and Orders of Taiwan High Court: 1996* vol 1:1, above n 819.

<sup>823</sup> Decision of 29 February 1996 (*Xia Men Da Ya Xing Ye Zipper Corporation v Zhao Feng-fu*), Taiwan High Court, 1996 Kang Zi Di 514 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 21 December 2001 (Copy on file with author). Also see Taiwan High Court, *Collection of Civil Judgements and Orders of Taiwan High Court: 1996* vol 1:1, above n 819.

<sup>824</sup> Decision of 29 February 1996 (*Xia Men Da Ya Xing Ye Zipper Corporation v Zhao Feng-fu*), Taiwan High Court, 1996 Kang Zi Di 514 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 21 December 2001 (Copy on file with author). Also see Taiwan High Court, *Collection of Civil Judgements and Orders of Taiwan High Court: 1996* vol 1:1, above

In *Chai Chang-lin v Lin Yu-ying*, the Taipei District Court (ROC) refused to recognize a final civil judgement, in which the Dai Shan County District People's Court of Zhejiang Province (PRC) approved the divorce of Chai Chang-lin and Lin Yu-ying.<sup>825</sup>

Chai Chang-lin appealed to the Taiwan High Court (ROC). The Court granted an order to recognize this final civil judgement and held that:

The final civil judgement, in which the Dai Shan County District People's Court of Zhejiang Province (PRC) approved the divorce of Chai Chang-lin and Lin Yu-ying, is based upon the statement of Lin Yu-ying in which Lin Yu-ying said that: 'Chai Chang-lin was caught by military of Kuomintang and was sent to Taiwan five years ago. There is no message until now. My knowledge is lifted owing to educated by Chinese Communism and People's government. In order to define the boundaries between Chinese Communism and our enemy and struggle for my prospect, I claim for divorce.' Although the statement of Lin Yu-ying is full of political consciousness, it is only her own opinion and is not contrary to the public order and good morals.... Thus, this final civil judgement, in which the court approved the divorce of Chai Chang-lin and Lin Yu-ying, is not contrary to the public order and good morals of Taiwan Region.<sup>826</sup>

ROC Courts construe the public order and good morals regarding recognition of PRC civil judgements narrowly. Only where a civil judgement violates the provisions of protection basic human rights under the

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n 819.

<sup>825</sup> *Chai Chang-lin v Lin Yu-ying*, Zhejiang Sheng Dai Shan Xian Ren Min Fa Yuan [trans: Dai Shan County District People's Court of Zhejiang Province] (Dai Shan County District People's Court of Zhejiang Province (PRC)), 1954 Min Zi Di 40 Hao Min Shi Pan Jue (PRC).

<sup>826</sup> Decision of 30 September 1996 (*Chai Chang-lin v Lin Yu-ying*), Taiwan High Court, 1996 Jia Kang Zi Di 91 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 21 December 2001 (Copy on file with author). Also see Taiwan High Court, *Taiwan Gao Deng Fa Yuan Min Shi Cai Pan Shu Hui Bian: 1996* [trans: *Collection of Civil Judgements and Orders of Taiwan High Court: 1996*] (1997) vol 2:1, 755-8.

*Constitution of the Republic of China*, should ROC Courts refuse recognition.

ROC Courts do not construe the defence of the public order and good morals from a political aspect but only from a legal aspect when they deal with cases regarding recognition of PRC civil judgements. These cases discussed above still are precedents when ROC Courts deal with cases relating to recognition of PRC arbitral awards since they are in the same context.

## ***2. Non-Reciprocity***

Final civil decisions of ROC Courts and civil arbitral awards rendered in Taiwan Region can be recognized or enforced in PRC Courts, and PRC arbitral awards can seek recognition in ROC Courts.<sup>827</sup> This complies with the *New York Convention* which also adopted the reciprocity theory.<sup>828</sup>

Before 1 July 1997, ROC did not adopt the theory of reciprocity regarding recognition and enforcement of PRC arbitral awards. Thus, PRC arbitral awards could be the subjects of applications to ROC Courts for recognition only if they were not contrary to the public order and good morals of Taiwan Region.<sup>829</sup> Nonetheless, the authorities of PRC did not rely upon

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<sup>827</sup> *PRC Relations (Amendment) Act 2000* (ROC) art 2(1), (2); *PRC Relations (Amendment) Act 1997* (ROC) art 74 paras 1, 3.

<sup>828</sup> *New York Convention* art 1(3). See Appendix .

<sup>829</sup> *PRC Relations Act 1992* (ROC) art 2(1), art 74 para 1.

the theory of reciprocity and equality to refuse to recognize and enforce ROC final civil decisions and arbitral awards rendered in Taiwan Region. ROC final civil decisions and arbitral awards rendered in Taiwan Region were not permitted to seek for recognition or enforcement in PRC Courts. It was not fair. Thus, the principle of fairness and reciprocity was adopted by ROC to urge the authority of PRC to resolve this problem.<sup>830</sup> As a result, ROC final civil decisions and civil arbitral awards rendered in Taiwan Region can apply to PRC Courts for recognition or enforcement, and PRC arbitral awards can apply to ROC Courts for recognition as from 1 July 1997.<sup>831</sup>

Consequently, the Trial Committee of the Supreme People's Court of PRC<sup>832</sup> passed the *Provision Regarding Recognition of ROC Civil Judgements* 1998 (PRC) in its 957<sup>th</sup> meeting on 15 January 1998. Then, the Supreme People's Court of PRC promulgated this *Provision* on 22 May 1998 and stipulated that this *Provision* took effect from 26 May 1998.<sup>833</sup> Any final civil decision of ROC Courts and any arbitral award rendered by an

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<sup>830</sup> ROC, *Legislative Yuan Gazette*, 86(9) (1997) 96.

<sup>831</sup> *PRC Relations (Amendment) Act 2000* (ROC) art 2(1)(2); *PRC Relations (Amendment) Act 1997* (ROC) art 74 paras 1, 3. *PRC Relations (Amendment) Act 1997* (ROC) art 96 para 2 provides that: 'The amendment of this Act takes effect from the date that is promulgated by the Executive Yuan of ROC.' The Executive Yuan of ROC promulgated that *PRC Relations (Amendment) Act 1997* (ROC) art 74 took effect from 1 July 1997 on 30 June 1997. See ROC, *Xing Zheng Yuan Gong Bao* [trans: *The Executive Yuan of ROC Gazette*], 3(28) (1997) 1.

<sup>832</sup> Zui Gao Ren Min Fa Yuan Shen Pan Wei Yuan Hui [trans: the Trial Committee of the Supreme People's Court of PRC] (PRC) (the Trial Committee of the Supreme People's Court of PRC).

arbitration institution of Taiwan Region may apply to PRC Courts for recognition in accordance with this *Provision*.<sup>834</sup> In addition, any civil decision of ROC Courts and any arbitral award rendered by an arbitration institution of Taiwan Region recognized by PRC Courts and needing to be enforced can seek enforcement in PRC.<sup>835</sup>

On 9 June 1998, as a result, the Tai Zhou City intermediate People's Court of Zhe Jiang Province (PRC)<sup>836</sup> recognized a civil order of the Nantou District Court (ROC)<sup>837</sup> in which the Nantou District Court (ROC) approved the adoption by Chu Chun Cai of Chu Jin Chou as his son.<sup>838</sup> In 1999, the Zhong Shang City intermediate People's Court of Guang Dong Province (PRC)<sup>839</sup> not only recognized a civil judgement of the Shih Lin District Court (ROC)<sup>840</sup> but also allowed this civil judgement, in which the defendant

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<sup>833</sup> Proclamation of the Supreme People's Court of PRC on 22 May 1958.

<sup>834</sup> *Provision Regarding Recognition of ROC Civil Judgements 1998* (PRC) arts 2, 9(1), 19.

<sup>835</sup> *Provision Regarding Recognition of ROC Civil Judgements 1998* (PRC) arts 18-19.

<sup>836</sup> Zhe Jiang Sheng Tai Zhou Shi Zhong Ji Ren Min Fa Yuan [trans: Tai Zhou City intermediate People's Court of Zhe Jiang Province] (PRC) (Tai Zhou City intermediate People's Court of Zhe Jiang Province (PRC)).

<sup>837</sup> Taiwan Nantou Di Fang Fa Yuan [trans: Nantou District Court] (ROC) (Nantou District Court (ROC)).

<sup>838</sup> 'Tai Zhong Fa Yuan Ren Ke Taiwan Fa Yuan Yi Min Shi Cai Ding', *Ren Min Fa Yuan Bao* (Beijing, China), 13 June 1998, 1 [trans: Tai Zhong Court Recognized a Civil Order Made by Taiwan Court].

<sup>839</sup> Guang Dong Sheng Zhong Shan Shi Zhong Ji Ren Min Fa Yuan [trans: Zhong Shang City intermediate People's Court of Guang Dong Province] (PRC) (Zhong Shang City intermediate People's Court of Guang Dong Province (PRC)).

<sup>840</sup> Civil judgement of 3 June 1997 (*He Min-qiang v Dong Qi Enterprise Co Ltd*), Taiwan Shih Lin Di Fang Fa Yuan [trans: Shih Lin District Court] (Shih Lin District Court (ROC)), 1997 Shih Jian Zi Di 237 Hao Min Shi Pan Jue (ROC).

should pay the plaintiff NT\$ 1,000,000 and interest, to be enforced.<sup>841</sup>

In *Luo Shun-ming v Ceng Cui-hua*,<sup>842</sup> to the same effect, the Miao Li District Court (ROC) recognized a civil judgement in which the Ning Hua County District People's Court of Fujian Province (PRC)<sup>843</sup> approved the divorce of Luo Shun-ming and Ceng Cui-hua.

This case regarding recognition of PRC a civil judgement is a precedent for application to the ROC Courts for recognition of PRC arbitral awards, because they are in the same context. It supports the conclusion that PRC arbitral awards can be recognized by ROC Courts on the grounds of reciprocity.

After the *Provision Regarding Recognition of ROC Civil Judgements* (PRC) entered into force, there has been no case in which a PRC arbitral award was refused to recognize by the ROC Courts on the ground of non-reciprocity.<sup>844</sup>

#### *In Guo Teng Electronic Company Ltd v Kun Fu Construction*

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<sup>841</sup> 'Guang Dong Fa Yuan Ren Ke Taiwan Fa Yuan Pan Jue', *Lian He Bao* (Taipei, Taiwan, ROC), 17 August 1999, 13 [trans: Guang Dong Court Recognized Judgement of Taiwan Court].

<sup>842</sup> Decision of 17 September 1998 (*Luo Shun-ming v Ceng Cui-hua*), Miao Li District Court, 1998 Jia Sheng Zi Di 5 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 21 December 2001 (Copy on file with author). Also see Miao Li District Court, *Taiwan Miao Li Di Fang Fa Yuan Min Xing Cai Pan Shu Hui Bian: 1998* [trans: *Collection of Civil and Criminal Judgements and Orders of Miao Li District Court: 1998*] (1999) 81-3.

<sup>843</sup> *Luo Shun-ming v Ceng Cui-hua*, Ning Hua County District People's Court of Fujian Province, 1997 Ning Min Chu Zi Di 208 Hao Min Shi Pan Jue (PRC).



*Corporation Ltd*, consequently, the Taichung District Court recognized an arbitral award rendered by China International Economic and Trade Arbitration Commission in PRC. The Court held that: ‘Since ROC civil judgements and arbitral awards can be recognized by PRC Courts in accordance with the *Provision Regarding Recognition of ROC Civil Judgements* (PRC), this PRC arbitral award can be recognized.’<sup>845</sup>

### **D. Enforcement of PRC Arbitral Awards**

After being recognized by a ROC Court, a PRC arbitral award is enforceable if the party requires execution of the arbitral award.<sup>846</sup> A PRC arbitral award requiring payment in foreign currencies also is enforceable.<sup>847</sup> The procedure of enforcement of PRC arbitral awards is the same as ROC arbitral awards and final judgements of ROC Courts.<sup>848</sup> It is in conformity with the *New York Convention* stipulating a country shall enforce foreign arbitral awards recognized by it in accordance with the rules of procedure of this country and shall not impose substantially more onerous conditions or

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<sup>844</sup> <<http://www.judicial.gov.tw>> visited 18 September 2003.

<sup>845</sup> Decision of 24 June 2003 (*Guo Teng Electronic Company Ltd v Kun Fu Construction Corporation Ltd*), Taichung District Court, 2003 Zhong Sheng Zi Di 1 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 18 September 2003 (Copy on file with author).

<sup>846</sup> *PRC Relations (Amendment) Act 2000* (ROC) art 2(1)(2); *PRC Relations (Amendment) Act 1997* (ROC) art 74.

<sup>847</sup> *Civil Code 1929* (ROC) art 202; *Guan Li Wai Hui Tiao Li 1949* as amended by *Guan Li Wai Hui Tiao Li 1978* [trans: *Regulating Foreign Currencies Act*] (ROC) (*Regulating Foreign Currencies (Amendment) Act 1978* (ROC)) art 13(2)(9).

higher fees or charges on the enforcement than impose on the enforcement of domestic arbitral awards.<sup>849</sup> It also complies with the UNCITRAL Model Law which stipulates that an arbitral award shall be enforced irrespective of the country where it was made.<sup>850</sup>

### ***E. Retroactive Effect***

The ROC legislation and regulation regarding recognition and enforcement of PRC arbitral awards<sup>851</sup> discussed above have retroactive effect. The legislation and regulation relating to recognition and enforcement of PRC arbitral awards constitute a procedural change and do not alter substantive rights, so they apply retroactively. Therefore, they not only are applicable to PRC arbitral awards rendered after they took effect but also are applicable to PRC arbitral awards rendered before they took effect. Furthermore, they are applicable to PRC arbitral awards rendered before or after they took effect, no matter whether the arbitral awards arise out of arbitration agreements concluded before or after they took effect, or disputes

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<sup>848</sup> *Civil Execution (Amendment) Act 1996* (ROC) art 4 para 1(1)(6).

<sup>849</sup> *New York Convention* art 3. See Appendix .

<sup>850</sup> UNCITRAL Model Law art 35(1). See Appendix .

<sup>851</sup> *PRC Relations (Amendment) Act 1997* (ROC) art 74 and *Taiwan Di Qu Yu Da Lu Di Qu Ren Min Guan Xi Tiao Li Shi Xing Xi Ze 1992* as amended by *Taiwan Di Qu Yu Da Lu Di Qu Ren Min Guan Xi Tiao Li Shi Xing Xi Ze 1997* [trans: *Enforcement Rule of the Relationship between People of Taiwan Region and People of Mainland China Region Act*] (ROC) (*Enforcement (Amendment) Rule 1997 of PRC Relations Act* (ROC)) art 54bis.

that occurred before or after it took effect.

These conclusions come from the following reasons.

In *Chai Chang-lin v Lin Yu-ying*,<sup>852</sup> the Taiwan High Court (ROC) recognized a final civil judgement, in which the Dai Shan County District People's Court of Zhejiang Province (PRC) approved the divorce of Chai Chang-lin and Lin Yu-ying.<sup>853</sup> The Dai Shan County District People's Court of Zhejiang Province (PRC) made this judgement on 13 March 1954 before *PRC Relations Act 1992* (ROC), in which regulates recognition and enforcement of PRC civil decisions and arbitral awards, entered into force.

The Taiwan High Court (ROC) ruled that the provision regarding recognition of PRC civil final decisions and arbitral awards under *PRC Relations Act 1992* (ROC)<sup>854</sup> applied to PRC civil judgement made before *PRC Relations Act 1992* (ROC) took effect. Although this case was decided before the present legislation and regulation<sup>855</sup> took effect, it still is a precedent since they are in the same context.

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<sup>852</sup> Decision of 30 September 1996 (*Chai Chang-lin v Lin Yu-ying*), Taiwan High Court, 1996 Jia Kang Zi Di 91 Hao Min Shi Cai Ding (ROC). The Taiwan High Court made this decision in accordance with *PRC Relations Act 1992* (ROC) art 74 para 1. <<http://www.judicial.gov.tw>> at 21 December 2001 (Copy on file with author). Also see Taiwan High Court, *Collection of Civil Judgements and Orders of Taiwan High Court: 1996* vol 2:1, above n 826.

<sup>853</sup> *Chai Chang-lin v Lin Yu-ying*, Judgement of 13 March 1954, Dai Shan County District People's Court of Zhejiang Province 1954 Min Zi Di 40 Hao Min Shi Pan Jue (PRC).

<sup>854</sup> *PRC Relations Act 1992* (ROC) art 74 para 1.

<sup>855</sup> *PRC Relations (Amendment) Act 1997* (ROC) art 74 and the *Enforcement (Amendment) Rule*

In *Wang You-Dao v Liu Jin-wang*<sup>856</sup> and in *North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*,<sup>857</sup> the Supreme Courts of ROC both held that procedural change should be applied retroactively. Moreover, the Taichung District Court (ROC)<sup>858</sup> and the Taichung Branch of the Taiwan High Court (ROC)<sup>859</sup> in *NV 'SCA' SA v Tung Hsing Textile Corp Ltd* both ruled that the newly added provisions regulating recognition of foreign arbitral awards were applicable to foreign arbitral awards whose disputes occurred before the newly added provision took effect or rendered after the newly added provisions took effect. Although these cases were made under different laws, they still are precedents since the theory that a procedural change should be applied retroactively stipulated in the *(Amendment) Act Governing the Enforcement of the Civil Procedure Act 1968*

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1997 of PRC Relations Act (ROC) art 54bis.

<sup>856</sup> Judgement of 21 January 1956 (*Wang You-Dao v Liu Jin-wang*), the Supreme Court, 1956 Tai Shang Zi Di 83 Hao Min Shi Pan Jue (ROC). See Precedent Research Committee of National Taiwan University and National Cheng-Chih University (ed), *Zhong Hua Min Guo Cai Pan Lei Bian: Min Shi Fa* [trans: *Collection of Judgement of ROC: Civil Judgement*] (1976) vol 4, Zheng Zhong Book Store, Taipei, Taiwan, ROC, 6-7. This Judgement was selected as precedent by the Supreme Court of ROC. See the Supreme Court, *Brief of the Supreme Court's Precedents: 1927-1994* (1997) vol 1, above n 256, ROC, 802.

<sup>857</sup> Decision of 18 May 1984 (*North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*), the Supreme Court, 1984 Tai Kang Zi Di 234 Hao Min Shi Cai Ding (ROC). See Legal Books Editing Committee of the Supreme Court (ed), *Collection of Selected Civil and Criminal Judgements and Decisions of the Supreme Court: January 1984- June 1984* vol 5:1, above n 256, 643-7.

<sup>858</sup> Civil decision of 29 July 1985 (*NV 'SCA' SA v Tung Hsing Textile Corp Ltd*), Taichung District Court, 1985 Zhong Zi Di 1 Hao Min Shi Cai Ding (ROC). See Lin Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 302-4.

<sup>859</sup> Civil decision of 18 October 1985 (*NV 'SCA' SA v Tung Hsing Textile Corp Ltd*), Taichung Branch of Taiwan High Court, 1985 Kang Zi Di 966 Hao Min Shi Cai Ding (ROC). See Lin

(ROC)<sup>860</sup> still is valid.

The facts and the reasoning of the courts in *North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*, and in *NV 'SCA' S.A. v Tung Hsing Textile Corp Ltd*, are discussed above.<sup>861</sup>

In *Fertilizer Corporation of India v IDI Management, Inc*, US District Court for the Southern District of Ohio held that US legislation regarding recognition and enforcement of foreign arbitral awards was remedial in nature and might properly be given retroactive effect since the legislation did not affect parties' substantive rights that were effectively determined by parties' contract. Thus, the Court ruled that the legislation applied to arbitral award rendered in a foreign country even though the award arose out of a contract concluded before the legislation entered into force.<sup>862</sup> This case also can be a precedent for the retroactive effect of the ROC legislation and regulation regarding recognition and enforcement of PRC arbitral awards.

## **F. Conclusion**

A PRC arbitral award that is a foreign arbitral award *de facto* based on

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Juinn-yih (ed), *International Commercial Arbitration* vol 2, above n 61, 305-10.

<sup>860</sup> (Amendment) Act Governing the Enforcement of The Civil Procedure Act 1968 (ROC) art 2.

<sup>861</sup> See above Part I.

<sup>862</sup> *Fertilizer Corporation of India v IDI Management, Inc*, 517 F.Supp. 948 (S.D. Ohio 1981), reconsideration denied, 530 F.Supp 542 (S.D. Ohio 1981). The fact and the reasoning of the

‘regional conflict of laws’ theory and the theory of reciprocity can apply to a ROC Court for recognition and enforcement if the PRC arbitral award is not contrary to the public order or good morals of Taiwan Region. The jurisdiction and formalities regarding applying for recognition and enforcement a PRC arbitral award are almost the same as the jurisdiction and formalities relevant to applying for recognition of a foreign arbitral award. In addition, the procedure of enforcement of PRC arbitral awards is the same as ROC arbitral awards and final judgements of ROC Courts.<sup>863</sup> These conform to the *New York Convention* and the UNCITRAL Model Law.

There is serious political opposition between ROC and PRC. However, there is no political ground on which an arbitral award rendered in PRC must be refused recognition or enforcement under ROC legislation. In addition, ROC Courts do not deal with cases regarding recognition or enforcement of PRC arbitral awards from a political aspect but only from a legal aspect. There is no possibility that a PRC arbitral award may be refused recognition or enforcement owing to any political reason in practice. Thus, the ROC present legislation and practices relating to recognition and enforcement of

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Court of this case see above Part 9.

<sup>863</sup> *Civil Execution (Amendment) Act 1996* (ROC) art 4 para 1(1)(6).

PRC arbitral awards have no deficiency even if the former legislation had some deficiencies.

# RECOGNITION AND ENFORCEMENT OF HONG KONG OR MACAO ARBITRAL AWARDS IN ROC

## *A. The Scope of Hong Kong or Macao Arbitral award*

Hong Kong has been part of the territory of China since ancient times.

Britain occupied Hong Kong after the Opium War in 1840. The government of PRC resumed the exercise of sovereignty over Hong Kong from 1 July 1997.<sup>864</sup> Hong Kong now is a part of the territory of PRC.

Macao has been part of the territory of China since ancient times.

Portugal occupied Macao after 16th century gradually. The government of PRC resumed the exercise of sovereignty over Macao from 20 December 1999.<sup>865</sup> Macao now also is a part of the territory of PRC.

Theoretically, an arbitral award rendered in Hong Kong or Macao has the same effect as an arbitral award rendered in Mainland China.

Maintaining the prosperity and stability of Hong Kong, and taking account of its history and realities, PRC established the Hong Kong SAR upon its resumption of the exercise of sovereignty over Hong Kong.<sup>866</sup>

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<sup>864</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) preamble.

<sup>865</sup> *Basic Law of the Macao SAR of PRC 1993* (PRC) preamble.

<sup>866</sup> *Constitution of the People's Republic of China* art 31; *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) preamble.



Contributing to social stability and economic development of Macao, and taking account of its history and realities, PRC also established the Macao SAR upon its resumption of the exercise of sovereignty over Macao.<sup>867</sup> PRC adopted the principle of ‘one country, two systems’. The socialist system and policies which are applied in Mainland China are not practised in the Hong Kong SAR<sup>868</sup> and the Macao SAR.<sup>869</sup> In addition, PRC authorises the Hong Kong SAR and the Macao SAR to exercise a high degree of autonomy and to enjoy executive, legislative and independent judicial power, including that of final adjudication.<sup>870</sup> Consequently, ROC enacted the *Hong Kong and Macao Relations Act 1997* (ROC) in accordance with the *Additional (Amendment) Articles 1994 of the Constitution of the Republic of China*<sup>871</sup> to regulate and promote the relationship of economy, trade, culture and others between Taiwan and Hong Kong as well as between Taiwan and Macao.<sup>872</sup>

No matter what law it is pursuant to, an arbitral award rendered in Hong Kong or Macao is neither a domestic arbitral award nor a foreign arbitral award

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<sup>867</sup> *Constitution of the People’s Republic of China* art 31; *Basic Law of the Macao SAR of PRC 1993* (PRC) preamble.

<sup>868</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) preamble.

<sup>869</sup> *Basic Law of the Macao SAR of PRC 1993* (PRC) preamble.

<sup>870</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) art 2; *Basic Law of the Macao SAR of PRC 1993* (PRC) art 2.

<sup>871</sup> *Additional (Amendment) Articles 1994 of the Constitution of the Republic of China* art 10.

<sup>872</sup> *Hong Kong and Macao Relations Act 1997* (ROC) art 1 para 1. ROC, *Legislative Yuan Gazette*, 86(7.1) (1997) 181-5.

under the *Hong Kong and Macao Relations Act 1997* (ROC).<sup>873</sup> Thus, a Hong Kong arbitral award or a Macao arbitral award is an arbitral award rendered in Hong Kong or Macao respectively no matter what law it is in accordance with.

## ***B. A Hong Kong or a Macao Arbitral Award Is Deemed a Foreign Arbitral Award***

The validity, recognition, and stay of enforcement proceedings of an arbitral award rendered in Hong Kong or Macao is subject to article 30 to article 34 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) *mutatis mutandis*.<sup>874</sup> In the document which the Executive Yuan of ROC sent the Bill for the Hong Kong and Macao Relations Act<sup>875</sup> to the Legislative Yuan of ROC to enact, the Executive Yuan of ROC said that:

Mainland China was occupied by Communist China from 1949. ... Nevertheless, Hong Kong and Macao are still free regions and maintain close relationship with Taiwan Region. ... British government will terminate its administration of Hong Kong on 1 July 1997. Portuguese government will terminate its administration of Macao on 20 December 1999. ... Hong Kong and Macao will be part of Mainland China region from 1 July 1997 and 20 December 1999 respectively. ... If regulating the relationship between Taiwan Region and Hong Kong and the relationship between Taiwan and Macao in accordance with *PRC Relations Act* (ROC) from those times, the relationship between Taiwan and Hong Kong and the relationship between Taiwan and

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<sup>873</sup> *Hong Kong and Macao Relations Act 1997* (ROC) art 42 para 2.

<sup>874</sup> *Hong Kong and Macao Relations Act 1997* (ROC) art 42 para 2.

<sup>875</sup> The Bill for the Xiang Gang Ao Men Guan Xi Tiao Li 1997 [trans: The Bill for the Hong Kong and Macao Relations Act] (ROC).

Macao will become backwards. The interest of the people of Hong Kong and Macao will be influenced or will be damaged. ... Communist China has already announced that it will establish 'Hong Kong SAR' and 'Macao SAR' and will adopt the principle of 'one country, two systems'. Communist China also has already enacted 'Basic Act' to bestow Hong Kong and Macao the right of self-rule. The membership of international economic and trade organisations of Hong Kong and Macao will be maintained. ... Although Hong Kong and Macao will be part of Mainland China in the form, they will keep the position of liberalization and internationalization in essence and will maintain the right of self-rule. ... The perfection of the legal systems of Hong Kong and Macao is similar to general democratic country. Therefore, arbitral awards rendered in Hong Kong or Macao are deemed foreign arbitral awards.<sup>876</sup>

Article 30 to article 34 of the *Commercial Arbitration (Amendment) Act*

1982 (ROC) stipulate the definition of a foreign arbitral award and its enforcement,<sup>877</sup> the formalities of applying for recognition of a foreign arbitral award,<sup>878</sup> the grounds on which the court must or may dismiss the application for recognition of a foreign arbitral award,<sup>879</sup> the grounds on which the respondent may request the court to dismiss the application for recognition of a foreign arbitral award,<sup>880</sup> suspending the enforcement proceedings of a foreign arbitral award,<sup>881</sup> and revocation an order of recognition of a foreign arbitral award.<sup>882</sup> These provisions relate to recognition and enforcement of a foreign arbitral award. Therefore, a Hong

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<sup>876</sup> ROC, *Legislative Yuan Gazette*, 86(7.1) (1997) 71-4, 136, 181-5.

<sup>877</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 30.

<sup>878</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 31.

<sup>879</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 32.

<sup>880</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 33.

<sup>881</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 34 para 1.

<sup>882</sup> *Commercial Arbitration (Amendment) Act 1982* (ROC) art 34 para 2.

Kong or Macao arbitral award is deemed a foreign arbitral award. However, the *Commercial Arbitration (Amendment) Act 1982* (ROC) was amended by the *Arbitration Act 1998* (ROC). Not only the title of the *Act* was revised, but also the provisions regarding recognition and enforcement of foreign arbitral awards were amended.<sup>883</sup> Then, the question of whether the provisions of the *Commercial Arbitration (Amendment) Act 1982* (ROC) or the provisions of the *Arbitration Act 1998* (ROC) should apply to recognition and enforcement of Hong Kong or Macao Arbitral Awards occurs.

The provisions concerning recognition and enforcement of a foreign arbitral award under the *Commercial Arbitration (Amendment) Act 1982* (ROC) were superseded by the provisions regarding recognition and enforcement of a foreign arbitral award under the *Arbitration Act 1998* (ROC), the provisions regarding recognition and enforcement of a foreign arbitral award under the *Arbitration Act 1998* (ROC) should apply to recognition and enforcement of a Hong Kong or Macao arbitral award. *Xin He Xing Ocean Enterprise Co Ltd v Asia North American Eastbound Rate Agreement*,<sup>884</sup>

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<sup>883</sup> Cf *Commercial Arbitration (Amendment) Act 1982* (ROC) arts 30-4 with *Arbitration Act 1998* (ROC) arts 47-51.

<sup>884</sup> Decision of 31 December 2001 (*Xin He Xing Ocean Enterprise Co Ltd v Asia North American Eastbound Rate Agreement*), Taiwan High Court, 2000 Kang Geng Yi Zi Di 9 Hao Min Shi Cai Ding (ROC).

*American President Lines Ltd et al v Asia Food Corporation Ltd et al*,<sup>885</sup>

*Maersk Line et al v Asia Food Corporation Ltd et al*,<sup>886</sup> *American President*

*Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*,<sup>887</sup> all are

good illustrations. In these cases, the ROC Courts all ruled that the

provisions regarding recognition and enforcement of a foreign arbitral award

under the *Arbitration Act 1998* (ROC) should apply to recognition and

enforcement of a Hong Kong or Macao arbitral award.

Nonetheless, article 42 paragraph 2 of the *Hong Kong and Macao*

*Relations Act 1997* (ROC) should be amended as to comply with the current

law, that is the *Arbitration Act 1998* (ROC). In order to prevent the

occurrence of the same situation in the future, article 42 paragraph 2 of the

*Hong Kong and Macao Relations Act 1997* (ROC) should be revised as

‘Arbitral awards rendered in Hong Kong or Macao shall be deemed foreign

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<sup>885</sup> Decision of 23 July 1999 (*American President Lines Ltd et al v Asia Food Corporation Ltd et al*), Tainan District Court, 1998 Sheng Zi Di 83 Hao Min Shi Cai Ding (ROC); Decision of 15 April 2000 (*American President Lines Ltd et al v Asia Food Corporation Ltd et al*), Tainan Branch of Taiwan High Court, 1999 Kang Zi Di 709 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 18 September 2003 (Copy on file with author).

<sup>886</sup> Decision of 8 March 2002 (*Maersk Line et al v Asia Food Corporation Ltd et al*), Tainan Branch of Taiwan High Court, 1999 Kang Zi Di 358 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

<sup>887</sup> Decision of 22 November 2000 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2000 Kang Zi Di 968 Hao Min Shi Cai Ding (ROC); Decision of 30 January 2001 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2000 Zai Zi Di 76 Hao Min Shi Cai Ding (ROC); Decision of 17 May 2001 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2001 Zai Zi Di 13 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003

arbitral awards’.

Since a Hong Kong or Macao arbitral award is deemed a foreign arbitral award, the jurisdiction and formalities of the application for recognition of a foreign arbitral award, the grounds on which an arbitral award is refused recognition, the grounds on which the respondent may apply to dismiss the application for recognition of a foreign arbitral award, the ground on which a foreign arbitral award may be refused recognition, suspension of the process of recognition of a foreign arbitral award, revocation of the recognition of a foreign arbitral award, and enforcement of a foreign arbitral award discussed above apply to recognition and enforcement of Hong Kong and Macao arbitral awards.

The Executive Yuan of ROC may authorise the institution established or appointed by the Executive Yuan of ROC or the private organisation entrusted by the Executive Yuan of ROC to authenticate any document made in Hong Kong or Macao.<sup>888</sup> The Executive Yuan of ROC established the Bureau of Hong Kong Affairs under the Council of Mainland Affairs whose name in

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<sup>888</sup> *Hong Kong and Macao Relations Act 1997* (ROC) art 6 para 1, art 9 para 1.

Hong Kong is Chung Hwa Travel Service<sup>889</sup> to handle all affairs related to Hong Kong on 1 July 1997 when Hong Kong was returned to PRC. The Executive Yuan of ROC also authorised the Bureau of Hong Kong Affairs under the Council of Mainland Affairs to authenticate any document made in Hong Kong from 1 July 1997.<sup>890</sup> Thus, a Hong Kong arbitral award must be authenticated by the Bureau of Hong Kong Affairs under the Council of Mainland Affairs if this arbitral award is applied to ROC Courts for recognition. In addition, the Executive Yuan of ROC established the Office of Macao Affairs under the Council of Mainland Affairs whose name in Macao is Taipei Economic and Cultural Center<sup>891</sup> to handle all affairs related to Macao when Macao was returned to PRC. The Executive Yuan of ROC also authorised the Office of Macao Affairs under the Council of Mainland Affairs to authenticate any document made in Macao.<sup>892</sup> Consequently, a

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<sup>889</sup> Council of Mainland Affairs, Executive Yuan of ROC, 'Organisational Structure of MAC' The Council, Taipei, Taiwan, ROC, <<http://www.mac.gov.tw/english/english/orafunc/16.jpg>> at 22 September 2003 (Copy on file with author) [1].

<sup>890</sup> *Xing Zheng Yuan Da Lu Wei Yuan Hui Xiang Gang Shi Wu Ju Zhu Zhi Gui Cheng 1997* [trans: *Organisation Rule of the Bureau of Hong Kong Affairs under the Council of Mainland Affairs of the Executive Yuan*] (ROC) (*Organisation Rule of the Bureau of Hong Kong Affairs under the Council of Mainland Affairs of the Executive Yuan 1997* (ROC)) art 2(5); No. 8612511 Letter made by the Council of Mainland Affairs under the Executive Yuan of ROC and sent to The Executive Yuan of ROC on 5 September 1997. <<http://www.judicial.gov.tw>> at 21 December 2001 (Copy on file with author) [1].

<sup>891</sup> Council of Mainland Affairs, Executive Yuan of ROC, 'Organisational Structure of MAC' The Council, Taipei, Taiwan, ROC, <<http://www.mac.gov.tw/english/english/orafunc/16.jpg>> at 22 September 2003 (Copy on file with author) [1].

<sup>892</sup> *Xing Zheng Yuan Da Lu Wei Yuan Hui Ao Men Shi Wu Chu Zhu Zhi Gui Cheng 1998* [trans: *Organisation Rule of the Office of Macao Affairs under the Council of Mainland Affairs of the*

Macao arbitral award must be authenticated by the Office of Macao Affairs under the Council of Mainland Affairs if this arbitral award is applied to ROC Courts for recognition.

### ***C. Retroactive Effect***

The provision relating to recognition and enforcement of Hong Kong and Macao arbitral awards under the *Hong Kong and Macao Relations Act 1997* (ROC)<sup>893</sup> also constitute procedural change and do not alter substantive right, so the provision applies retroactively. It not only is applicable to Hong Kong and Macao arbitral awards rendered after it took effect but also is applicable to arbitral awards rendered before it took effect, no matter whether the arbitral awards arise out of contracts concluded before or after it took effect, or disputes that occurred before or after it took effect.

These conclusions are based on similar reasoning and decisions as discussed above in relation to PRC.<sup>894</sup>

In *Wang Min-jie v Chen Di-guo*, the Taipei District Court (ROC) held that:

The provision that ‘the validity, jurisdiction, requirements of enforcement of a final

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*Executive Yuan*] (ROC) (*Organisation Rule of the Office of Macao Affairs under the Council of Mainland Affairs of the Executive Yuan* 1998 (ROC)) art 2(3).

<sup>893</sup> *Hong Kong and Macao Relations Act 1997* (ROC) art 42.

<sup>894</sup> See above Part E.



civil decision made in Hong Kong or Macao shall apply the provisions of article 402 of the *Civil Procedure (Amendment) Act 1968* (ROC) and article 4bis of the *Civil Execution (Amendment) Act 1996* (ROC) *mutatis mutandis* and the validity, recognition, and stay of enforcement proceedings of an arbitral award rendered in Hong Kong or Macao shall apply the provisions of article 30 to article 34 of the *Commercial Arbitration (Amendment) Act 1982* (ROC) *mutatis mutandis*<sup>895</sup> is stipulated in article 42 of the *Hong Kong and Macao Relations Act 1997* (ROC) which was enacted and promulgated on 2 April 1997.... 1996 No. A4781 Judgement of the Supreme Court of Hong Kong made in 1996, in which Chen Di-guo shall pay Wang Min-jie HK\$ 1,147,400 with interest from 9 August 1995, may be applied to the competent court of ROC for granting an judgement to permit enforcing.<sup>895</sup>

The Court recognized this Hong Kong judgement made before article 42 of the *Hong Kong and Macao Relations Act 1997* (ROC) entered into force.

The Court ruled that article 42 of the *Hong Kong and Macao Relations Act 1997* (ROC) had retroactive effect. This also is a precedent regarding

recognition of Hong Kong or Macao arbitral awards because it is in the same context.

From then on, the ROC Courts recognized two Hong Kong arbitral awards rendered on 16 September 1992 and 15 February 1993 respectively in *American President Lines Ltd et al v Asia Food Corporation Ltd et al*.<sup>896</sup>

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<sup>895</sup> Decision of 15 June 1998 (*Wang Min-jie v Chen Di-guo*), Taipei District Court, 1998 Su Zi Di 1982 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 21 December 2001 (Copy on file with author). Also see Taiwan Taipei Di Fang Fa Yuan, *Taiwan Taipei Di Fang Fa Yuan Min Xing Cai Pan Shu Hui Bian: 1998* [trans: *Collection of Civil and Criminal Judgements and Orders of Taipei District Court: 1998*] (1999) 637-49.

<sup>896</sup> Decision of 23 July 1999 (*American President Lines Ltd et al v Asia Food Corporation Ltd et al*), Tainan District Court, 1998 Sheng Zi Di 83 Hao Min Shi Cai Ding (ROC), aff'd, Decision of 15 April 2000 (*American President Lines Ltd et al v Asia Food Corporation Ltd et al*), Tainan Branch of Taiwan High Court, 1999 Kang Zi Di 709 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 18 September 2003 (Copy on file with author).

The Taiwan High Court (ROC) also recognized two Hong Kong arbitral awards rendered on 14 January 1993 and 18 February 1993 respectively in *Xin He Xing Ocean Enterprise Co Ltd v Asia North American Eastbound Rate Agreement*.<sup>897</sup> In *Maersk Line et al v Asia Food Corporation Ltd et al*, the ROC Courts recognized a Hong Kong arbitral award rendered on 16 September 1992 as well.<sup>898</sup>

As yet, no Macao arbitral award has applied to ROC Courts for recognition under the *Hong Kong and Macao Relations Act 1997* (ROC).<sup>899</sup>

## **D. Conclusion**

Hong Kong and Macao arbitral awards are deemed foreign arbitral awards in ROC.<sup>900</sup> Since ROC legislation regarding recognition and enforcement of foreign arbitral awards comply with the *New York Convention* and the UNCITRAL Model Law, ROC legislation regarding recognition and enforcement of Hong Kong and Macao arbitral awards also conform to these international standards.

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<sup>897</sup> Decision of 31 December 2001 (*Xin He Xing Ocean Enterprise Co Ltd v Asia North American Eastbound Rate Agreement*), Taiwan High Court, 2000 Kang Geng Yi Zi Di 9 Hao Min Shi Cai Ding (ROC).

<sup>898</sup> Decision of 7 April 1999 (*Maersk Line et al v Asia Food Corporation Ltd et al*), Tainan District Court, 1998 Sheng Zi Di 46 Hao Min Shi Cai Ding (ROC), aff'd, Decision of 8 March 2002 (*Maersk Line et al v Asia Food Corporation Ltd et al*), Tainan Branch of Taiwan High Court, 1999 Kang Zi Di 358 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

<sup>899</sup> <http://www.judicial.gov.tw> visited 18 September 2003.

Until now, there are only two cases in which Hong Kong arbitral award were refused recognition or enforcement in ROC.<sup>901</sup> In *American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*, the Courts refused to recognize a Hong Kong arbitral award on the ground that the arbitration proceedings were lack of due process.<sup>902</sup> In *Xin He Xing Ocean Enterprise Co Ltd v Asia North American Eastbound Rate Agreement*, the Taiwan High Court dismissed part of an application for recognition of two Hong Kong arbitral awards on the ground that the applicants of this part were lack of authority to apply.<sup>903</sup> Thus, the practices of ROC Courts have no deficiency.

Nonetheless, ROC legislation relating to recognition and enforcement of Hong Kong and Macao arbitral awards has some deficiencies and needs to be revised. Article 42 paragraph 2 of the *Hong Kong and Macao Relations Act*

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<sup>900</sup> *Hong Kong and Macao Relations Act 1997* (ROC) art 42 para 2.

<sup>901</sup> <http://www.judicial.gov.tw> visited 18 September 2003.

<sup>902</sup> Decision of 18 August 2000 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung District Court, 1998 Zhong Sheng Zi Di 2 Hao Min Shi Cai Ding (ROC), aff'd, Decision of 22 November 2000 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2000 Kang Zi Di 968 Hao Min Shi Cai Ding (ROC), retrial denied, Decision of 30 January 2001 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2000 Zai Zi Di 76 Hao Min Shi Cai Ding (ROC), retrial denied, Decision of 17 May 2001 (*American President Lines Ltd et al v Xian Ning Frozen Food Factory Corporation Ltd*), Kaohsiung Branch of Taiwan High Court, 2001 Zai Zi Di 13 Hao Min Shi Cai Ding (ROC). <<http://www.judicial.gov.tw>> at 11 July 2003 (Copy on file with author).

<sup>903</sup> Decision of 31 December 2001 (*Xin He Xing Ocean Enterprise Co Ltd v Asia North American Eastbound Rate Agreement*), Taiwan High Court, 2000 Kang Geng Yi Zi Di 9 Hao Min Shi Cai Ding (ROC).

*1997 (ROC)* should be revised as ‘Arbitral awards rendered in Hong Kong or Macao shall be deemed foreign arbitral awards’. This will simplify the situation and will be in conformity with international standards.

## V. RECOGNITION AND ENFORCEMENT OF PRC ARBITRAL AWARDS IN HONG KONG AND RECOGNITION AND ENFORCEMENT OF HONG KONG ARBITRAL AWARDS IN PRC

### A. *One Country, Two Systems*

Before 1 July 1997 when the government of PRC resumed the exercise of sovereignty over Hong Kong,<sup>904</sup> both PRC and Hong Kong were members of the *New York Convention*. Therefore, Hong Kong arbitral awards could be recognized and enforced in PRC and PRC arbitral awards could be recognized and enforced in Hong Kong without any obstacle.<sup>905</sup>

Hong Kong is a part of the territory of PRC from 1 July 1997.

Theoretically, an arbitral award rendered in Hong Kong should have the same effect as an arbitral award rendered in Mainland China. However, in order to maintain the prosperity and stability of Hong Kong, and to take account of its history and realities, PRC established the Hong Kong SAR in accordance with the *Constitution of the People's Republic of China*.<sup>906</sup> PRC adopted the

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<sup>904</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) preamble.

<sup>905</sup> Li Hu, *Guo Ji Shang Shi Zhong Cai Cai Jue De Qiang Zhi Zhi Xing – Te Bei Shu Ji Zhong Cai Cai Jue Zai Zhong Guo De Qiang Zhi Zhi Xing* [trans: *Enforcement Of the International Commercial Arbitration Award – with Special Reference to the Enforcement of the Arbitral Award in the P.R.China*] (2000), Fa Lu Chu Ban She [trans: Legal Publishing], Beijing, PRC, 168-9.

<sup>906</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) preamble; *Constitution of the People's*

principle of ‘one country, two systems’. The socialist system and policies which are applied in Mainland China are not practised in Hong Kong. Thus, the National People’s Congress of PRC enacted the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) in order to ensure the implementation of the basic policies of PRC regarding Hong Kong in accordance with the *Constitution of the People’s Republic of China*.<sup>907</sup> The National People’s Congress of PRC authorises the Hong Kong SAR to exercise a high degree of autonomy and to enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC).<sup>908</sup> Therefore, the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law must be maintained, except for any that contravene the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC), and subject to any amendment by the legislature of the Hong Kong SAR.<sup>909</sup> Moreover, the law in force in the Hong Kong SAR is the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC), the laws

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*Republic of China* art 31.

<sup>907</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) preamble.

<sup>908</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) art 2.

<sup>909</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) art 8.

previously in force in Hong Kong as provided for in article 8 of the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) and the laws enacted by the legislature of the Hong Kong SAR. National laws of PRC must not be applied in the Hong Kong SAR except for those listed in Annex to the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC). The laws listed in Annex to the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) are to be applied locally by way of promulgation or legislation by the Hong Kong SAR. The Standing Committee of the National People's Congress of PRC may add to or delete from the list of laws in Annex to the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) after consulting its Committee for the Basic Law of the Hong Kong SAR and the government of the Hong Kong SAR. Laws listed Annex to the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Hong Kong SAR as specified by the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC).<sup>910</sup>

## ***B. Arrangements Regarding Mutual Enforcement of***

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<sup>910</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) art 18 paras 1-3.

## *Arbitral Awards Between PRC and Hong Kong*

Laws regarding recognition and enforcement of arbitral awards are not listed in Annex to the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC)<sup>911</sup> and its first<sup>912</sup> and second revision.<sup>913</sup> Consequently, the laws relating to recognition and enforcement of arbitral awards previously in force in Hong Kong and any amendment by the legislature of the Hong Kong SAR apply.

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<sup>911</sup> Annex to the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) states that:

The following national laws shall be applied locally with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong SAR:

1. Resolution on the Capital, Calendar, National Anthem and National Flag of the People's Republic of China
2. Resolution on the National Day of the People's Republic of China
3. Order on the National Emblem of the People's Republic of China Proclaimed by the Central People's Government
4. Declaration of the Government of the People's Republic of China on the Territorial Sea
5. Nationality Law of the People's Republic of China
6. Resolution of the People's Republic of China Concerning Diplomatic Privileges and Immunities.

<sup>912</sup> Decision of the Standing Committee of the National People's Congress on the Addition to or Deletion from the List of National Laws in Annex to the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) which was adopted at the Twenty Sixth Session of the Standing of the Eighth National People's Congress on 1 July 1997 states that:

1. The following national laws are added to the list of laws in Annex to the *Basic Law of the Hong Kong SAR of the People's Republic of China* – (1) Law of the People's Republic of China on the National flag; (2) Regulations of the People's Republic of China concerning Consular Privileges and Immunities; (3) Law of the People's Republic of China on the National Emblem; (4) Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone; (5) Law of the People's Republic of China on the Garrisoning of the Hong Kong SAR. The above national laws shall be applied with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong SAR.
2. The following national law is deleted from Annex to the *Basic Law of the Hong Kong SAR*: Order on the National Emblem of the People's Republic of China Proclaimed by the Central People's Government.

<sup>913</sup> Decision of the Standing Committee of the National People's Congress on the Addition to the List of National Laws in Annex to *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) which was adopted on 4 November 1998 states that:

The fifth meeting of the Standing Committee of the Ninth National People's Congress decides: the national law being the 'law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf' is added to the list of laws in Annex to the *Basic Law of*



The Hong Kong SAR has independent judicial power, including that of final adjudication. The courts of the Hong Kong SAR shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong will be maintained.<sup>914</sup> Accordingly, in *Ng Fung Ltd v ABC*,<sup>915</sup> the High Court of the Hong Kong SAR refused to enforce an arbitral award rendered by China International Economic and Trade Arbitration Commission in Beijing on the ground that the arbitral award was not an arbitral award of the *New York Convention* in 1998. The creditor must sue in Hong Kong for enforcing arbitral awards rendered in PRC.<sup>916</sup> In *RAAB Karcherkoke GmbH v Shanxi Sanjia Coal Chemistry Company Ltd*,<sup>917</sup> the Tai Yuan Intermediate People's Court of Shanxi Province (PRC) also refused to enforce an arbitral award rendered by the Hong Kong International Arbitration Center in Hong Kong on the ground that there was no clear legal base to enforce Hong Kong arbitral awards in PRC and to enforce PRC arbitral awards in Hong Kong on

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*the Hong Kong SAR of the People's Republic of China.*

<sup>914</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) art 19 paras 1-2.

<sup>915</sup> *Ng Fung Ltd v ABC*, (1998) 1 HKC 213.

<sup>916</sup> Li Hu, above n 905, 170.

<sup>917</sup> Shanxi Sheng Tai Yuan Zhong Ji Ren Min Fa Yuan [trans: Tai Yuan Intermediate People's Court of Shanxi Province] (Tai Yuan Intermediate People's Court of Shanxi Province (PRC)).

31 July 1998.<sup>918</sup>

The Hong Kong SAR may, through consultations and in accordance with law, maintain judicial relations with the judicial organs of other parts of PRC and they may render assistance to each other.<sup>919</sup> Thus, the Supreme People's Court of PRC and the government of the Hong Kong SAR consulted with each other in accordance with article 95 of the *Basic Law of the Hong Kong SAR of PRC 1990* (PRC). Eventually, the courts of the Hong Kong SAR agreed to enforce arbitral awards rendered by arbitration institutions of the Mainland China in accordance with PRC arbitration law. PRC courts also agreed to enforce arbitral awards rendered in Hong Kong SAR according to arbitration law of the Hong Kong SAR.<sup>920</sup>

Then, the Supreme People's Court of PRC and the representative of the Hong Kong SAR agreed that the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong SAR 2000* (PRC) should be promulgated by the Supreme People's Court of

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<sup>918</sup> Li Hu, above n 905, 170.

<sup>919</sup> *Basic Law of the Hong Kong SAR of PRC 1990* (PRC) art 95.

<sup>920</sup> *Zui Gao Ren Min Fa Yuan Guan Yu Nei Di Yu Xiang Gang Te Bie Xing Zheng Qu Xiang Fu Zhi Xing Zhong Cai Cai Jue De An Pai* [trams: *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong Special Administrative Region*] (PRC) (*Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000* (PRC)) preamble. See appendix .

PRC in the form of judicial interpretation. The Supreme People's Court PRC promulgated the *Arrangement* on 24 January 2000. The Supreme People's Court of PRC also promulgated that this *Arrangement* took effect from 1 February 2000.<sup>921</sup> In addition, the Hong Kong SAR amended its *Arbitration Ordinance* (HKSAR) in which Part IIIA 'Enforcement of Mainland Awards' was added. The *Arbitration (Amendment) Ordinance 2000* (HKSAR) entered into force from 1 February 2000 as well.<sup>922</sup>

### ***C. Jurisdiction***

A Hong Kong arbitral award may apply to PRC people's intermediate court at the place where the respondent has his domicile or where the property of the respondent is located for enforcement according to the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000* (PRC) if the respondent does not perform the obligation required by the arbitral award. Nonetheless, the applicant only can apply to one PRC people's intermediate court for enforcement of the Hong Kong arbitral award if the place where the respondent has his domicile and where the property of the respondent is located are subject to different

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<sup>921</sup> *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000* (PRC) note.

jurisdiction of two or more PRC people's intermediate court. A PRC arbitral award also may apply to the High Court of the Hong Kong SAR for enforcement in accordance with this *Arrangement* if the respondent does not perform the obligation required by the arbitral award. The applicant cannot apply both to PRC people's intermediate court and to the High Court of the Hong Kong SAR for enforcement of an arbitral award if the place where the respondent has his domicile or where the property of the respondent is located is in Hong Kong and Mainland China. Nonetheless, when the applicant has applied to a PRC people's intermediate court for enforcement of an arbitral award and the obligation has not been carried out thoroughly, the applicant may apply to the High Court of Hong Kong SAR for enforcement of the rest of the obligation that has not been fulfilled completely, and *vice versa*. Moreover, the total amount received by the applicant from the enforcement both in PRC and Hong Kong cannot exceed the total amount rendered by the arbitral award.<sup>923</sup>

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<sup>922</sup> Li Hu, above n 905, 173-4.

<sup>923</sup> *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000* (PRC) ss 1-2, *Arbitration (Amendment) Ordinance 2000* (Hong Kong SAR) s 40C.

## ***D. Formalities***

The applicant who applies to the competent court of PRC or the Hong Kong SAR for enforcement of an arbitral award rendered in PRC or the Hong Kong SAR must submit a Chinese application, the arbitral award, and the arbitration agreement. If the arbitral award or arbitration agreement is not made in Chinese, the applicant must submit a certified Chinese translation copy. In addition, the application shall contain following items:

- (1) When the applicant is a natural person, the name and the address of the applicant. When the applicant is a legal entity or any other organisation, the name and address of the legal entity or the organisation and its statutory representative.
- (2) When the respondent is a natural person, the name and the address of the respondent. When the respondent is a legal entity or any other organisation, the name and address of the legal entity or the organisation and its statutory representative.
- (3) When the applicant is a legal entity or any other organisation, the applicant shall submit a copy of the certificate of registration.

When the applicant is a foreign legal entity or any other organisation,

the applicant shall also submit a notarized or authenticated copy of the certificate of registration.

- (4) The reason of the application and the contents of the application as well as the location of the respondent's property and the circumstance of the respondent's property.<sup>924</sup>

An applicant who applies to the competent court of PRC or the Hong Kong SAR for enforcement of arbitral award rendered in PRC or the Hong Kong SAR shall pay enforcement costs in accordance with the provision of the place where the enforcement is sought.<sup>925</sup>

Even though these required formalities do not relate to enforcement of foreign arbitral awards but only relating to the enforcement of arbitral awards rendered in a different jurisdiction within a federal state *de jure*, these formalities are not inconsistent with the *New York Convention*<sup>926</sup> and the UNCITRAL Model Law.<sup>927</sup>

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<sup>924</sup> *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000* (PRC) ss 3-4, *Arbitration (Amendment) Ordinance 2000* (Hong Kong SAR) s 40D.

<sup>925</sup> *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000* (PRC) s 8.

<sup>926</sup> *New York Convention* arts 3, 4. See Appendix .

<sup>927</sup> UNCITRAL Model Law art 35(2) and note 3. See Appendix .

## ***E. Time Limit***

The time limit for applying for enforcement of an arbitral award made in PRC or the Hong Kong SAR must be in accordance with the provisions of the place of enforcement.<sup>928</sup> In the PRC, the time limit for applying for enforcement of an arbitral award is one year if both or one of the parties are natural persons. However, the time limit for applying for enforcement of an arbitral award is six months if both parties are legal entities or other organisations. The time limit is calculated from the last day of the period of performance specified by the arbitral award. If the arbitral award specifies performance in stages, the time limit shall be calculated from the last day of the period specified for each stage of performance.<sup>929</sup> In the Hong Kong SAR, the time limit of applying for enforcement of an arbitral award is 12 months no matter the parties are natural persons or legal entities or other organisations.<sup>930</sup>

Upon receiving an application, the competent court must handle the

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<sup>928</sup> *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000* (PRC) s 5.

<sup>929</sup> *Min Shi Su Song Fa 1991* [*Civil Procedure Act*] (PRC) (*Civil Procedure Act 1991* (PRC)) art 219.

<sup>930</sup> *Arbitration (Amendment) Ordinance 2000* (Hong Kong SAR) s 2GG, *Judgments (Facilities for Enforcement) Ordinance 1921* as amended by *Judgments (Facilities for Enforcement) (Amendment) Ordinance 1997* (Hong Kong SAR) (*Judgments (Facilities for Enforcement) (Amendment) Ordinance 1997* (Hong Kong SAR)) ss 2(1), 3(1).

application and enforce it in accordance with the law of the place where the enforcement is sought.<sup>931</sup>

Even though the time limit does not relate to enforcement of foreign arbitral awards but only relating to enforcement of arbitral awards rendered in a different jurisdiction within a federal state *de jure*, the time limit are not inconsistent with the *New York Convention* requiring that a state shall not impose substantially more onerous conditions on the enforcement of foreign arbitral awards than impose on the enforcement of domestic arbitral awards.<sup>932</sup>

## ***F. The Grounds on Which Enforcement May Be Refused***

Enforcement of an arbitral award where there is an application to the competent court of PRC or the Hong Kong SAR for enforcement may be refused at the request of the party against whom it is invoked if that party proves that:

- (1) The parties to the arbitration agreement under the law applicable to them under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or failing any

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<sup>931</sup> *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000* (PRC) s 6.



indication thereon, under the law of the place where the arbitral award was made.

(2) The party against whom the arbitral award is invoked was not given proper notice of the appointment of the arbitrator or was otherwise unable to present his case.

(3) The arbitral award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the arbitral award which contains decisions on matters submitted to arbitration must be enforced.

(4) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the place where the arbitration took place.

(5) The arbitral award has not yet become binding on the parties, or has

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<sup>932</sup> *New York Convention* art 3. See Appendix .

been set aside or suspended by a competent court of the place in which, or under the law of which, that arbitral award was made.

In addition, enforcement of an arbitral award where there is an application to the competent court of PRC or the Hong Kong SAR for enforcement may also be refused if the competent court finds that:

- (1) The subject matter of the difference is not capable of settlement by arbitration under the law of the place where the enforcement is sought.
- (2) If the enforcement of the arbitral award would be contrary to the public interest of PRC where the enforcement is sought.
- (3) If the enforcement of the arbitral award would be contrary to the public policy of the Hong Kong SAR where the enforcement is sought.<sup>933</sup>

These grounds on which enforcement of PRC arbitral awards may be refused by the competent court of Hong Kong SAR, and *vice versa*, comply with the *New York Convention* restricting the grounds for refusing enforcement of foreign arbitral awards, although they do not relate to

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<sup>933</sup> *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000* (PRC) s 7, *Arbitration (Amendment) Ordinance 2000* (Hong Kong SAR) s

enforcement of foreign arbitral awards but to arbitral awards rendered in a different jurisdiction within a federal state *de jure*.<sup>934</sup> These grounds also are in conformity with the UNCITRAL Model Law which restrains the grounds for refusing enforcement an arbitral award irrespective of the country where the arbitral award was made.<sup>935</sup>

## ***G. Conclusion***

The relations between PRC government and Hong Kong government are analogous to the relationship between the federal government and a State government of the federal state. It is a federal state *de jure* which is one international person, but it has different jurisdictions within it. Thus, an arbitral award rendered on one side is a foreign arbitral award *de jure* on the other side. There is enforceability of Hong Kong arbitral awards in PRC and of PRC arbitral awards in Hong Kong according to the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000* (PRC) and the *Arbitration (Amendment) Ordinance 2000* (Hong Kong SAR) respectively discussed above. Nevertheless, the provisions of this *Arrangement* and the *Arbitration (Amendment) Ordinance*

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40E.

<sup>934</sup> *New York Convention* art 5. See Appendix .

2000 (Hong Kong SAR) comply with the international standards set out in the  
*New York Convention* and the UNCITRAL Model Law.

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<sup>935</sup> UNCITRAL Model Law art 36. See Appendix .

## VI. CONCLUSION

Arbitration is a speedy, economical, secret, and amicable method to resolve international trade or transnational commerce disputes.<sup>936</sup> However, if an arbitral award rendered in a country cannot be recognized and enforced in another country, people will not like to use the mechanism of arbitration to resolve their international trade or transnational commerce disputes.

The primary objective of the *New York Convention* is to establish a general presumption that an arbitral award no matter where it is rendered must be recognized and enforced. Thus, the *New York Convention* limits non-recognition or non-enforcement of arbitral awards in specified circumstances.<sup>937</sup> The objective of the UNCITRAL Model Law is to constitute a sound and promising basis for the desired harmonization and improvement of national laws. Articles 35 and 36 of the UNCITRAL Model Law reflect the significant policy decision that the same rules must apply to arbitral awards whether made in the country of recognition and enforcement or abroad.<sup>938</sup> There are 134 member states of the *New York Convention* on 3

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<sup>936</sup> Born, above n 17, 7-10; Redfern and Hunter, above n 17, 23-30; Yang Chong-sen, above n 17, 1-2, 11-15.

<sup>937</sup> Born, above n 17, 795; Redfern and Hunter, above n 17, 66-8.

<sup>938</sup> See United Nations, 'United Nations Commission on International Trade Law (UNCITRAL): Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration' note 2, 45, <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm> at 31 March

November 2003.<sup>939</sup> Legislation based on the UNCITRAL Model Law has been enacted in 37 states, Hong Kong SAR, Macao SAR, Scotland, and 5 states of USA on 3 November 2003.<sup>940</sup> Consequently, the *New York Convention* and the UNCITRAL Model Law reflect the international standard regarding recognition and enforcement of foreign arbitral awards.

International trade and transnational commerce are very important to ROC.<sup>941</sup> Therefore, the mechanism of ROC regarding recognition and enforcement of foreign arbitral awards must comply with the international standard set forth by the *New York Convention* and the UNCITRAL Model Law. Eventually, the *Commercial Arbitration (Amendment) Act 1982* (ROC) added some provisions regarding recognition and enforcement of foreign arbitral awards into it by reference to the *New York Convention* to strengthen the system regarding recognition and enforcement of foreign arbitral awards in ROC.<sup>942</sup> In addition, the *Arbitration Act 1998* (ROC) took into account the UNCITRAL Model Law to enhance the mechanism regarding recognition

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2003 (Copy on file with author) [16, 25].

<sup>939</sup> See United Nations, 'United Nations Commission on International Trade Law (UNCITRAL): Status of Conventions and Model Laws', <http://www.uncitral.org/english/status/status-e.htm> at 23 November 2003 (Copy on file with author) [1, 12-18].

<sup>940</sup> See United Nations, 'United Nations Commission on International Trade Law (UNCITRAL): Status of Conventions and Model Laws', <http://www.uncitral.org/english/status/status-e.htm> at 23 November 2003 (Copy on file with author) [1, 18].

<sup>941</sup> See above Part A.

<sup>942</sup> ROC, *Legislative Yuan Gazette*, 71(41) (1982) 39-69.

and enforcement of foreign arbitral awards in ROC also.<sup>943</sup>

The provisions regarding recognition and enforcement of foreign arbitral awards including the scope of foreign arbitral awards, the prescribed formalities, the grounds on which a foreign arbitral awards must be refused recognition, the grounds on which a respondent may apply to dismiss the application for recognition of a foreign arbitral award, the grounds on which a foreign arbitral award may be refused recognition, adjournment of the process of recognition of a foreign arbitral award, and revocation of the recognition of a foreign arbitral award under the *Arbitration Act 1998* (ROC) all conform to the *New York Convention* and the UNCITRAL Model Law.

Nonetheless, the *Arbitration Act 1998* (ROC) does not require that the applicant who applies for recognition of a foreign arbitral award must submit an authenticated original arbitral award instead of an unauthenticated original arbitral award.<sup>944</sup> The *Arbitration Act 1998* (ROC) also does not require the applicant who applies for recognition of a foreign arbitral award must supply a certified Chinese translation of the foreign arbitral award and the arbitration agreement that are not in Chinese instead of a uncertified Chinese

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<sup>943</sup> ROC, *Legislative Yuan Gazette*, 87(31) (1998) 265-323.

<sup>944</sup> *Arbitration Act 1998* (ROC) art 48 para 1(1).

translation.<sup>945</sup> The *Arbitration Act 1998* (ROC) does not require the applicant who applies for recognition of a foreign arbitral award must supply a certified Chinese translation of the full text of foreign arbitration law, the full text of the arbitration rules of the foreign arbitration institution, or the full text of the arbitration rules of the international organisation those are applied to the foreign arbitral award that are not in Chinese instead of a uncertified Chinese translation as well.<sup>946</sup> These required formalities are less onerous than the conditions set forth by the *New York Convention* and the UNCITRAL Model Law. It is very convenient for the applicant who applies for recognition of a foreign arbitral award. However, the judges of ROC bear more burdens and take more time to deal with related cases. Consequently, the *Arbitration Act 1998* (ROC) should be revised to require the applicant to submit an authenticated original arbitral award instead of an unauthenticated original arbitral award, to submit a certified Chinese translation of the foreign arbitral award and the arbitration agreement that are not in Chinese instead of a uncertified Chinese translation, and to submit the certified Chinese translation of the full text of foreign arbitration law, the full text of the

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<sup>945</sup> *Arbitration Act 1998* (ROC) art 48 paras 1(1)(2), 2.

<sup>946</sup> *Arbitration Act 1998* (ROC) art 48 paras 1(3), 2.



arbitration rules of the foreign arbitration institution, or the full text of the arbitration rules of the international organisation those are applied to the foreign arbitral award and are not in Chinese instead of the uncertified Chinese translation when the applicant applies for recognition of a foreign arbitral award.<sup>947</sup>

A PRC arbitral award that is a foreign arbitral award *de facto* based on ‘regional conflict of laws’ theory and the theory of reciprocity can apply to a ROC Court for recognition and enforcement if the PRC arbitral award is not contrary to the public order or good morals of Taiwan Region. The jurisdiction and formalities regarding applying for recognition and enforcement a PRC arbitral award are almost the same as the jurisdiction and formalities relevant to applying for recognition of a foreign arbitral award.<sup>948</sup> These conform to the *New York Convention* and the UNCITRAL Model Law.

An arbitral award rendered in Hong Kong or Macao also may apply to the competent court of ROC for recognition and enforcement and it is deemed a foreign arbitral award.<sup>949</sup> There is no difficulty to apply for recognition and enforcement of Hong Kong and Macao arbitral awards in ROC.

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<sup>947</sup> See above Part B3.

<sup>948</sup> See above Part A, B, C.

Consequently, the legislation and practices regarding recognition and enforcement of Hong Kong arbitral awards and Macao arbitral awards also are in conformity with the *New York Convention* and the UNCITRAL Model Law. Nonetheless, the provision regarding recognition and enforcement of Hong Kong and Macao arbitral awards should be revised to comply with the *Arbitration Act 1998 (ROC)*.<sup>950</sup>

There is serious political opposition between ROC and PRC. However, there is no political ground on which an arbitral award rendered in PRC, Hong Kong, or Macao must be refused recognition or enforcement under ROC legislation. In addition, ROC Courts do not deal with cases regarding recognition or enforcement of PRC, Hong Kong, or Macao arbitral awards from a political aspect but only from a legal aspect. There is no possibility that a PRC, Hong Kong, or Macao arbitral award may be refused recognition or enforcement owing to any political reason in practice.

Hong Kong arbitral awards are enforceable in PRC and PRC arbitral awards also are enforceable in Hong Kong SAR in accordance with the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between*

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<sup>949</sup> *Hong Kong and Macao Relations Act 1997 (ROC)* art 42 para 2.

<sup>950</sup> See above Part B.

*Mainland and the Hong Kong SAR 2000 (PRC) and the Arbitration (Amendment) Ordinance 2000 (Hong Kong SAR)* respectively based on the principle of ‘one country, two systems’. Both the provisions of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR 2000 (PRC) and the Arbitration (Amendment) Ordinance 2000 (Hong Kong SAR)* comply with the international standards set out in the *New York Convention* and the UNCITRAL Model Law as well.

When USA acceded to the *New York Convention*, it revised its relevant law, the *Federal Arbitration (Amendment) Act 1970 (USA)*,<sup>951</sup> because its original legislation did not comply with the *New York Convention*.<sup>952</sup> ROC is not a contracting party of the *New York Convention* because of the international political situation.<sup>953</sup> Since ROC legislation regarding recognition and enforcement of foreign, PRC, Hong Kong, and Macao arbitral awards comply with the *New York Convention* as discussed above, it does not need to enact or revise any legislation if it enters into the *New York*

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<sup>951</sup> *Federal Arbitration (Amendment) Act 1970 (USA)* ch 2, 9 U.S.C. §§ 201-208.

<sup>952</sup> *Rest. 3<sup>rd</sup> Restatement of the Foreign Relations Law of the United States* §487 Source Note (1990).

<sup>953</sup> See above Part C.

*Convention.*

Moreover, the ROC legislation and practices regarding recognition and enforcement of foreign, PRC, Hong Kong, and Macao arbitral awards go further than international standards. Applying for recognition or enforcement of a foreign, PRC, Hong Kong, or Macao arbitral awarding ROC, an original arbitration agreement or an original arbitral award can be substituted by an electronic format, which was made originally and can show the whole text as well as can be downloaded for examination.<sup>954</sup>

Furthermore, the courts of ROC construe the limitations regarding recognition or enforcement foreign, PRC, Hong Kong, and Macao arbitral awards narrowly.<sup>955</sup> In addition, even though the ROC legislation regarding recognition and enforcement of foreign, Hong Kong, and Macao arbitral awards adopts the principle of reciprocity, one's subjects will enjoy certain privileges within the other's jurisdiction if it gives the subjects of the other similar privileges,<sup>956</sup> the ROC Courts adopt the notion of comity,<sup>957</sup> ROC courts will give effect to arbitral awards of the other out of deference and

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<sup>954</sup> See above Part B2(a).

<sup>955</sup> See above Part C, D, E, C.

<sup>956</sup> Black, above n 810, 1270.

<sup>957</sup> See above Part E.

mutual respect.<sup>958</sup>

Furthermore, foreign, PRC, Hong Kong, and Macao judgements also are recognizable and enforceable under ROC legislation.<sup>959</sup>

It can be concluded that despite the difficult international situation of ROC, ROC legislation and judges have found a way to further the policy of an improved dispute resolution regime.

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<sup>958</sup> Black, above n 810, 267.

<sup>959</sup> *Civil Procedure (Amendment) Act 1968* (ROC) art 402; *PRC Relations (Amendment) Act 1997* (ROC) art 74; *Hong Kong and Macao Relations Act 1997* (ROC) art 42 para 1; *Civil Execution (Amendment) Act 1996* (ROC) art 4 para 1(6), art 4bis.

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**APPENDIX : ARBITRATION ACT OF THE  
REPUBLIC OF CHINA\***

As amended on 24 June 1998 and effective on 24 December 1998  
Articles 8, 54, and 56 as amended on 10 July 2002 and effective on 12 July 2002

**CHAPTER I: ARBITRATION AGREEMENT**

**Article 1**

Parties to a dispute arising at present or in the future may enter into an arbitration agreement designating a single arbitrator or an odd number of arbitrators to constitute an arbitral tribunal to determine the dispute.

The dispute referred to in the preceding paragraph is limited to those which may be settled in accordance with the law.

The arbitration agreement shall be in writing.

Written documents, documentary instruments, correspondence, facsimiles, telegrams or any other similar types of communications between the parties evincing prima facie arbitration agreement shall be deemed to establish an arbitration agreement.

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\* This English translation is provided by the Arbitration Association of the Republic of China.

## **Article 2**

No arbitration agreement shall be valid unless it was entered in respect of a legal relationship or a dispute thereto.

## **Article 3**

The validity of an arbitration clause which forms part of a principal contract between the parties may be determined separately from the rest of the principal contract. A decision that the contract is nullified, invalid, revoked, rescinded or terminated shall not affect the validity of the arbitration clause.

## **Article 4**

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.

If a plaintiff fails to submit to arbitration within the specified time period prescribed in the preceding paragraph, the court shall dismiss the legal action.

After the suspension mentioned in the first paragraph of this Article, the legal action shall be deemed to have been withdrawn at the time an arbitral award is made.

## **CHAPTER II: CONSTITUTION OF ARBITRAL TRIBUNAL**

### **Article 5**

An arbitrator shall be a natural person.

In the event that a corporate entity or any other organisation which is not an arbitration institution is appointed as an arbitrator in an arbitration agreement, it shall be deemed that no arbitrator was appointed.

### **Article 6**

To act as an arbitrator, a person must possess legal or other professional knowledge or experience, a reputation for integrity and impartiality, and any of the following qualifications:

1. Service as a judge or public prosecutor;
2. Practice for more than five years as a lawyer, accountant, architect, mechanic or in any other commerce-related profession;

3. Act as an arbitrator of a domestic or foreign arbitration institution;
4. Teaching as an assistant professor or higher post in a domestic or foreign college certified or recognized by the Ministry of Education; and,
5. Specialist in a particular field or profession and has practised for more than five years.

#### **Article 7**

A person falling into any of the following categories shall not be an arbitrator:

1. Convicted of a criminal offense for corruption or malfeasance;
2. Convicted of any offense other than those in the preceding category

and sentenced to serve a prison term of one year or more;

3. Disfranchised;
4. Bankrupt;
5. Interdicted; or,
6. A minor.

#### **Article 8**

Any person qualified as an arbitrator under this Law, except for those who meet any of the following criteria, shall receive training and obtain a certificate before



applying with an arbitration institution for being registered as an arbitrator:

1. Having served practically as a judge or prosecutor;
2. Having practiced as a lawyer for more than three (3) years;
3. Having taught with the department of law or graduate school of law of a domestic or foreign university or college accredited by the Ministry of Education as a professor for two (2) years, or as an associate professor for three (3) years, while teaching the major legal courses for more than three (3) years; and
4. Having been registered as an arbitrator in any arbitration institution prior to the effectiveness of amendment of this Law, and acted practically as an arbitrator in a dispute.

Calculation of teaching experience and definition of major legal courses under Subparagraph 3 of the preceding paragraph shall be jointly regulated by the Ministry of Justice and other relating governmental agencies.

Any arbitrator fails to apply for registration with an arbitration institution pursuant to Paragraph 1 shall be still subject to the training prescribed by this Law.

An arbitrator who has applied for registration with an arbitration institution shall participate in lectures held by the arbitration institution on an annual schedule; the arbitration institution may cancel the registration of an arbitrator who fails to participate in such lectures on schedule.

Guidelines of arbitrators' training and lecturing shall be jointly provided by the

Executive Yuan and the Judicial Yuan.

### **Article 9**

Where in the absence of an appointment of an arbitrator or a method of appointment in an arbitration agreement, each party shall appoint an arbitrator for itself. The appointed arbitrators shall then jointly designate a third arbitrator to be the chair and the arbitral tribunal shall notify the parties, in writing, of the final appointment.

If the arbitrators fail to agree on a chair within thirty days of their appointment, the final appointment shall be made by a court upon the application of any party.

Where an arbitration is to be conducted by a sole arbitrator and the parties fail to agree on an arbitrator within thirty days upon the receipt of the written request to appoint by any party, the appointment shall be made by a court pursuant to the application of any party.

In situations referred to in the preceding two paragraphs of this Article, the parties have agreed that the arbitration shall be administered by an arbitration institution, then the arbitrator shall be appointed by the arbitration institution.

Where there are numerous people in any party, and they are unable to agree on the appointment of an arbitrator, the appointment shall be made by a majority vote.

In the event of a tie, the appointment shall be made by drawing lots.

#### **Article 10**

After choosing an arbitrator, a party shall notify in writing the other party as well as the appointed arbitrator. When an arbitrator is appointed by an arbitration institution, the institution shall likewise notify in writing both parties as well as the appointed arbitrator.

Once the written notice mentioned in the preceding paragraph of this Article has been received, the withdrawal or amendment of the written notice shall not be made without prior agreement of both parties.

#### **Article 11**

A party who has already appointed its own arbitrator may issue a written request to the other party to appoint its arbitrator within fourteen days after receipt of the request.

Where the arbitrator is to be appointed by an arbitration institution, either party to the dispute may request the arbitration institution to appoint an arbitrator within the same time period specified in the preceding paragraph of this Article.

## **Article 12**

Where the arbitrator has not been appointed within the time period specified in the first paragraph of the preceding Article, the requesting party may apply to an arbitration institution or the court to make the appointment.

Where the arbitrator has not been appointed within the time period specified in the second paragraph of the preceding Article, the requesting party may apply to the court to make the appointment.

## **Article 13**

An arbitrator appointed in an arbitration agreement may be replaced if such arbitrator becomes unable to perform as a result of death or any other cause, or refuses to conduct the arbitration, or [unreasonably] delays the performance of arbitration. In the event that the parties fail to agree upon a replacement, either party may apply to an arbitration institution or the court to appoint the replacement.

So long as an arbitrator appointed by one party becomes unable to perform as a result of any of the circumstances mentioned in the preceding paragraph of this Article, the other party may request the former party to appoint a replacement

within fourteen days after receipt of the request. However, the chair appointed pursuant to paragraph 1 of Article 9 shall not be affected [by the appointment of the replacement].

When the party receiving the request to appoint a replacement fails to do so within the time period specified in the preceding paragraph of this Article, the requesting party may apply to an arbitration institution or the court to make the appointment.

Should any one of the circumstances mentioned in paragraph 1 of this Article occur in respect of an arbitrator or arbitrators appointed by an arbitration institution or by the court, such arbitration institution or the court may appoint a replacement or replacements upon an application by any party or by its own volition.

Should any one of the circumstances mentioned in paragraph 1 of this Article occur in respect of the chair of an arbitral tribunal, the court may appoint a replacement upon an application by any party or by its own volition.

#### **Article 14**

Except for those subject to withdrawal proceedings hereunder, the appointment of arbitrators either by an arbitration institution or by the court pursuant to the

provisions of this chapter shall not be challenged by the parties.

### **Article 15**

The arbitrator shall be independent, impartial and uphold the principle of confidentiality in conducting the arbitration.

An arbitrator involved in any of the following circumstances shall immediately disclose the details thereof to the parties:

1. the existence of any of the causes requiring a judge to withdraw from a judicial proceeding in accordance with Article 32 of the Code of Civil Procedure;
2. the existence or history of an employment or agency relationship between the arbitrator and a party;
3. the existence or history of an employment or agency relationship between the arbitrator and an agent of a party or between the arbitrator and a key witness; and,
4. the existence of any other circumstances which raise any justifiable doubts as to the impartiality or independence of the arbitrator.

## **Article 16**

A party may apply to withdraw an arbitrator in any one of the following circumstances:

1. where the arbitrator does not meet the qualifications agreed by the parties; and,
2. where any of the circumstances in paragraph 2 of the preceding Article exists.

A party shall not apply to withdraw an arbitrator whom it appointed unless the cause for the withdrawal arose after the appointment or the cause is only known after the appointment.

## **Article 17**

A party intending to request for the withdrawal of an arbitrator shall do so within fourteen days of knowing the cause [for withdrawal]. Such party shall submit a written application stating the reasons for the withdrawal to the arbitral tribunal. The arbitral tribunal shall make a decision within ten days upon receipt of such application, unless the parties have agreed otherwise.

In the event that the arbitral tribunal has not yet been constituted, the time

period for [requesting] a withdrawal mentioned in the preceding paragraph shall commence from the date that the arbitral tribunal is constituted.

Where a party wishes to challenge a decision made hereunder by the arbitral tribunal, such party shall apply for a judicial ruling within fourteen days of receiving notice of the arbitral decision.

A party shall not challenge the ruling reached by the court mentioned in the preceding paragraph of this Article.

An arbitrator shall withdraw in the event that both parties request the withdrawal.

An application to withdraw a sole arbitrator shall be submitted to the court for determination.

### **CHAPTER III: ARBITRAL PROCEEDINGS**

#### **Article 18**

A party shall provide written notification to the respondent party as to when the dispute is to be submitted to arbitration.

Unless otherwise agreed by both parties, the arbitral proceedings for a dispute shall commence on the date specified on the written notice of arbitration received



by the respondent party.

In the event that the circumstance mentioned in the preceding paragraph of this Article involves multiple parties, the arbitral proceedings shall commence on the date on which the first written notification is received by the respondents.

### **Article 19**

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.

### **Article 20**

The place of arbitration, unless agreed by the parties, shall be determined by the arbitral tribunal.

### **Article 21**

In the absence of any stipulation in the arbitration agreement as to how the arbitration is to be conducted, the arbitral tribunal shall, within ten days upon

receipt of notice of the [final arbitral] appointment, determine the place of arbitration as well as the time and date for the hearing, and shall notify both parties thereof. The arbitral tribunal shall render an arbitral award within six months [of commencement of the arbitration]. However, the arbitral tribunal may extend [the decision period] an additional three months if the circumstances so require.

In the event of a subsequent dispute, the ten-day period mentioned in the preceding paragraph shall commence from the date upon receipt of notice [to arbitrate] the dispute that has occurred.

If an arbitral award has not been rendered by the arbitral tribunal within the above-mentioned time period, either party may, unless compelled to arbitrate, refer the dispute to the court or proceed with a previously initiated legal action. The arbitral proceedings shall be deemed terminated thereafter.

Article 133 of the Civil Code shall not be applicable in the event that the dispute is referred to the court as mentioned in the preceding paragraph of this Article.

## **Article 22**

An objection raised by a party as to the scope of authority of the arbitral tribunal shall be determined by the arbitral tribunal. However, a party may not object if it

has submitted the statement of defence regarding the subject matter of the dispute.

### **Article 23**

The arbitral tribunal shall ensure that each party has a full opportunity to present its case and the arbitral tribunal shall conduct the necessary investigations of the claims by the parties.

Unless otherwise agreed by the parties, the arbitral proceedings shall not be made public.

### **Article 24**

Either party may, in writing, appoint a representative to appear before the arbitral tribunal to make statements for and on its behalf.

### **Article 25**

Parties to a dispute with an international character may designate a language or languages to be used to conduct the arbitral proceedings. However, the arbitral tribunal or a party may request that any documents relating to the arbitration be accompanied with a translation in another language.

Interpreters shall be provided under the direction of the arbitral tribunal in the event that a party or an arbitrator is not familiar with Mandarin.

#### **Article 26**

The arbitral tribunal may summon witnesses or expert witnesses to appear for questioning but may not compel any witness to enter any undertaking.

In the event that a witness fails to appear without sufficient reason, the arbitral tribunal may apply for a court order compelling the witness to appear.

#### **Article 27**

The delivery of documents relating to the arbitration conducted by the arbitral tribunal shall be governed *mutatis mutandis* by the provisions regarding "service of process" in the Code of Civil Procedure.

#### **Article 28**

The arbitral tribunal, if necessary, may request assistance from a court or other agencies in the conduct of the arbitral proceedings.

A requested court may exercise its investigative powers in the same manner and

to the same extent as permitted in a legal action.

### **Article 29**

A party who knows or may know that the arbitral proceedings have derogated from the provisions of this Law or has not complied with the requirements under the arbitration agreement yet proceeds with the arbitration without objecting to such non-compliance shall be deemed to have waived the right to object.

Any objection raised shall be considered by the arbitral tribunal and the decisions made with respect thereto shall not be subject to appeal.

[The assertion and consideration of] An objection shall not suspend the arbitral proceedings.

### **Article 30**

In the event that a party asserts any of the following which the arbitral tribunal finds unjustifiable, the parties may still proceed with the arbitration and obtain an arbitral award:

1. The arbitration agreement is nullified;
2. The arbitral proceedings have derogated from the provisions of the

law;

3. The arbitration agreement has not been followed;
4. The arbitration agreement is not related to the dispute for resolution;
5. The arbitral tribunal lacks the authority to arbitrate;
6. Any other reason which allows a party to apply to a court to set

aside an arbitral award.

### **Article 31**

If expressly authorised by the parties, the arbitral tribunal may apply the rules of equity to determine [the arbitral award].

### **Article 32**

The deliberations of an arbitral award shall not be made public.

If there is more than one arbitrator, the arbitral award shall be determined by a majority vote.

When calculating an amount in dispute and none of the opinions of the arbitrators prevail, the highest figure in an opinion shall be averaged with the second highest figure in another opinion and so forth, until a majority consensus is

obtained.

In the event that a majority consensus of the arbitrators cannot be reached, the arbitral proceedings are deemed terminated, unless otherwise agreed by the parties, and the arbitral tribunal shall notify the parties of the reasons for failing to reach a majority consensus.

Article 133 of the Civil Code shall not be applicable to the circumstance mentioned in the preceding paragraph of this Article unless a party has yet to proceed to a court within one month of receipt of the notification.

### **Article 33**

To the extent that a decision on the dispute may be satisfactorily obtained, the arbitral tribunal shall declare the conclusion of the hearing and within ten days thereafter, issue an arbitral award addressing the claims and issues raised by the parties.

An arbitral award shall contain the following items:

1. Names and residence or domicile of the individual parties. For a party that is a corporate entity or another type of organisation or institution, then its name(s), administrative office(s), principal office(s) or business

office(s) [address];

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

The original copy of the award shall be signed by the arbitrator(s) who deliberated on the award. If an arbitrator refuses to or cannot sign the award for any reason, the arbitrator(s) who do sign the award shall state the reason for the missing signature(s).

#### **Article 34**

The arbitral tribunal shall deliver a certified copy of the arbitral award to each party.

The certified copy of the arbitral award mentioned in the preceding paragraph,



along with the proof of delivery, shall be filed with a court registry, at the place of the arbitration for record-keeping.

### **Article 35**

The arbitral tribunal may correct, on its own initiative or upon request, any clerical, computational or typographic errors or any other similar obvious mistakes in the award and shall provide written notification of this correction to the parties as well as the court. The foregoing is likewise applicable to any discrepancy between a certified copy of the arbitral award and the original version thereof.

### **Article 36**

Any dispute in a legal proceeding that shall only be settled pursuant to the Simplified Procedures prescribed in the Code of Civil Procedure may be submitted to an arbitration institution upon the agreement of the parties. The arbitration institution shall appoint a sole arbitrator to conduct the arbitration pursuant to the procedural rules for expedited arbitration stipulated by the arbitration institution.

In any case other than those mentioned in the preceding paragraph, the parties may agree to adopt the procedural rules for expedited arbitration established by the

arbitration institution.

## **CHAPTER IV: ENFORCEMENT OF ARBITRAL AWARD**

### **Article 37**

The award shall, insofar as relevant, be binding on the parties and have the same force as a final judgment of a court.

An award may not be enforceable unless a competent court has, on application of a concerned party, granted an enforcement order. However, the arbitral award may be enforced without having an enforcement order granted by a competent court if the contending parties so agree in writing and the arbitral award concerns any of the following subject-matters:

1. Payment of a specified sum of money or certain amount of fungible things or valuable securities;
2. Delivery of a specified movable property.

The previous paragraph is binding not only on the parties but also on the following persons with respect to the arbitration:

1. Successors of the parties after the commencement of the arbitration, or those who have taken possession of the contested property for a party or its

successors.

2. Any entity, on whose behalf a party enters into an arbitration proceeding; the successors of said entity after the commencement of arbitration; and, those who have taken possession of the contested property for said entity or its successors.

### **Article 38**

The court shall reject an application for enforcement in any of the following circumstances where:

1. The arbitral award concerns a dispute not contemplated by the terms of the arbitration agreement, or exceeds the scope of the arbitration agreement, unless the offending portion of the award may be severed and the severance will not affect the remainder of the award;
2. The reasons for the arbitral award were not stated, as required, unless the omission was corrected by the arbitral tribunal;
3. The arbitral award directs a party to act contrary to the law.

### **Article 39**

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.

Upon the failure of the applicant seeking provisional relief in the preceding paragraph to submit to arbitration or proceed with legal action by the aforementioned time period, the court may, pursuant to a petition by the respondent, invalidate the order for provisional seizure or disposition.

## **CHAPTER V: REVOCATION OF THE ARBITRAL AWARD**

### **Article 40**

A party may apply to a court to set aside the arbitral award in any of the following circumstances:

1. The existence of any circumstances stated in Article 38.
2. The arbitration agreement is nullified, invalid or has yet to come

into effect or has become invalid prior to the conclusion of the arbitral proceedings.

3. The arbitral tribunal fails to give any party an opportunity to present its case prior to the conclusion of the arbitral proceedings, or if any party is not lawfully represented in the arbitral proceedings.

4. The composition of the arbitral tribunal or the arbitral proceedings is contrary to the arbitration agreement or the law.

5. An arbitrator fails to fulfill the duty of disclosure prescribed in paragraph 2 of Article 15 herein and appears to be partial or has been requested to withdraw but continues to participate, provided that the request for withdrawal has not been dismissed by the court.

6. An arbitrator violates any duty in the entrusted arbitration and such violation carries criminal liability.

7. A party or any representative has committed a criminal offense in relations to the arbitration.

8. If any evidence or content of any translation upon which the arbitration award relies, has been forged or fraudulently altered or contains any other misrepresentations.

9. If a judgment of a criminal or civil matter, or an administrative ruling upon which the arbitration award relies, has been reversed or materially altered by a subsequent judgment or administrative ruling.

The foregoing items 6 to 8 are limited to instances where final conviction has been rendered or the criminal proceeding may not be commenced or continue for reasons other than insufficient evidence.

The foregoing item 4 concerning circumstances contravening the arbitration agreement and items 5 to 9 referred to in paragraph 1 of this Article are limited to the extent sufficient to affect the arbitral award.

#### **Article 41**

An application to revoke an arbitral award may be filed at the district court of the place of arbitration.

An application to revoke an arbitral award shall be submitted to the court within the thirty-day statutory period after the arbitral award has been issued or delivered. However, if any cause mentioned in items 6 to 9 of the first paragraph of the preceding Article exists and if sufficient reasons are offered that the failure of a party to apply to the court to revoke an award before the limitation period does not

arise from any fault of such party, then the thirty-day statutory period commences to run from the time when the party becomes aware of the cause for revocation. In any event, the application to revoke an arbitral award shall be barred after five years have elapsed from the date on which the arbitral award was issued.

#### **Article 42**

In the event that a party applies for revocation of an arbitral award, the court may grant an application by the said party to stay enforcement of the arbitral award once the applicant has paid a suitable and certain security [into court].

When setting aside an arbitral award, the court shall under the same authority simultaneously revoke any enforcement order which has been issued in respect of the arbitral award.

#### **Article 43**

Once an arbitral award has been revoked by a final judgment of a court, a party may bring the dispute to the court unless otherwise agreed by the parties.

### **CHAPTER VI: SETTLEMENT AND MEDIATION**

#### **Article 44**

Parties to an arbitration may explore settlement options to their dispute prior to the issuance of an arbitral award. If the parties reach a settlement [prior to the conclusion of the arbitration], the arbitrator shall record the terms of settlement in a settlement agreement.

A settlement agreement under the preceding paragraph has the same force and effect as that of an arbitral award. However, the terms of the settlement agreement may be enforced only after the court has granted an application by a party for enforcement and issued an enforcement order.

#### **Article 45**

In the absence of any arbitration agreement [to the contrary], the parties may choose to submit their dispute to mediation and jointly appoint an arbitrator to conduct the mediation. Upon the successful conclusion of the mediation between the parties, the arbitrator shall record the results of the mediation in a mediated agreement.

A mediated agreement under the preceding paragraph has the same force and effect as that of an arbitral settlement agreement. However, the terms of the



mediated agreement may be enforced only after the court has granted an application for enforcement by a party and issued an enforcement order.

#### **Article 46**

The provisions of Article 38 and Articles 40 to 43 shall apply *mutatis mutandis* to settlement and mediation proceedings hereunder.

### **CHAPTER VII: FOREIGN ARBITRAL AWARD**

#### **Article 47**

A foreign arbitral award is an arbitral award which is issued outside the territory of the Republic of China or issued pursuant to foreign laws within the territory of the Republic of China.

A foreign arbitral award, after an application for recognition has been granted by the court, shall be enforceable.

#### **Article 48**

To obtain recognition of a foreign arbitral award, an application shall be submitted to the court and accompanied by the following documents:

1. The original arbitral award or an authenticated copy thereof;
2. The original arbitration agreement or an authenticated copy thereof;
3. The full text of the foreign arbitration law and regulation, the rules of the foreign arbitration institution or the rules of the international arbitration institution which applied to the foreign arbitral award.

If the documents in the preceding paragraph are made in a foreign language, a copy of the Chinese translation of the same shall be submitted.

The word "authenticated" mentioned in items 1 and 2 of paragraph 1 herein means the authentication made by the embassies, consulates, representative offices, liaison offices or any other organisations authorised by the government of the Republic of China.

Copies of the application mentioned in paragraph 1 herein shall be made corresponding to the number of respondents and submitted to the court which shall deliver those copies to the respondents.

#### **Article 49**

The court shall issue a dismissal with respect to an application submitted by a party for recognition of a foreign arbitral award, if such award contains one of the

following elements:

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

The 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.

#### **Article 50**

If a party applies to the court for recognition of a foreign arbitral award which concerns any of the following circumstances, the respondent may request the court to dismiss the application within twenty days from the date of receipt of the notice of the application:

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 said 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 whether 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 not affect the remainder of the arbitral award.

5. The composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of an arbitration agreement, the law of the place of the arbitration.

6. The arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.

### **Article 51**

Where a party to an arbitration applies for a judicial revocation of a foreign

arbitral award or for suspension of enforceability thereof, the court at the request of the respondent may order the applicant to pay a suitable and certain security to suspend the recognition or enforcement proceedings prior to issuing any order for recognition or enforcement of the foreign arbitral award.

If the foreign arbitral award mentioned in the preceding paragraph has been revoked according to the law, the court shall dismiss any application for recognition or upon request, revoke any recognition of the arbitral award.

## **CHAPTER VIII: ADDITIONAL PROVISIONS**

### **Article 52**

The court in dealing with procedures of arbitral matters shall apply the provisions of the *Non-contentious Matters Law* in addition to this Law, if in the absence of any relevant provisions therein, apply *mutatis mutandis* the provisions of the *Code of Civil Procedure*.

### **Article 53**

A dispute which according to other laws must be submitted to arbitration, may be governed *mutatis mutandis* by this Law unless otherwise specified by those other

laws.

#### **Article 54**

Arbitration institution(s) may be solely or jointly established by any professional or social organisation(s) of any level and shall be responsible for arbitrators' registration, cancellation of arbitrators' registration and handling arbitration matters.

Regulation(s) or guideline(s) of organisation, 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.

#### **Article 55**

To promote the development of arbitration and to reduce litigation, the government may subsidize the arbitration institutions, as it deems necessary.

#### **Article 56**

The provisions of this Law, except for those which were revised and promulgated on 24 June 1998 and took effect six months after such date, shall take effect from the date of promulgation.

**APPENDIX : CONVENTION ON THE  
RECOGNITION AND ENFORCEMENT  
OF FOREIGN ARBITRAL AWARDS**

Done at New York, 10 June 1958

Entered into force, 7 June 1959

330 U.N.T.S. 38 (1959)

**Article I**

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it

will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

## **Article II**

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds



that the said agreement is null and void, inoperative or incapable of being performed.

### **Article III**

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards

### **Article IV**

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
  - (a) The duly authenticated original award or a duly certified copy thereof;
  - (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

#### **Article V**

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
  - (c) The award deals with a difference not contemplated by or not falling within

the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public

policy of that country.

#### **Article VI**

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

#### **Article VII**

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to

have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

### **Article VIII**

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.
2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

### **Article IX**

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary- General of the United Nations.

## **Article X**

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

## **Article XI**

In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of the constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- (c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

## **Article XII**

1. This Convention shall come into force on the ninetieth day following the date

of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

### **Article XIII**

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.
3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.



#### **Article XIV**

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

#### **Article XV**

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

#### **Article XVI**

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United

Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VII.

## **APPENDIX : the UNCITRAL Model Law**

As adopted by the  
United Nations Commission on International Trade Law  
on 21 June 1985

### **CHAPTER I - GENERAL PROVISIONS**

#### **Article 1 - Scope of application\***

1. This Law applies to international commercial\*\* arbitration, subject to any agreement in force between this State and any other State or States.
2. The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.
3. An arbitration is international if:
  - (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
  - (b) one of the following places is situated outside the State in which the parties have their places of business:
    - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
    - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the

subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

4. For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

5. This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

\* Article headings are for reference purposes only and are not to be used for purposes of interpretation.

\*\* The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

## **Article 2 - Definitions and rules of interpretation**

For the purposes of this Law:

- (a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;
- (b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
- (c) "court" means a body or organ of the judicial system of a State;
- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party, including an institution, to make that determination;
- (e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties; such agreement includes any arbitration rules referred to in that agreement;
- (f) where a provision of this Law, other than in articles 25 (a) and 32 (2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

### **Article 3 - Receipt of written communications**

1. Unless otherwise agreed by the parties:

- (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;
- (b) the communication is deemed to have been received on the day it is so delivered.

2. The provisions of this article do not apply to communications in court proceedings.

#### **Article 4 - Waiver of right to object**

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived

his right to object.

#### **Article 5 - Extent of court intervention**

In matters governed by this Law, no court shall intervene except where so provided in this Law.

#### **Article 6 - Court or other authority for certain functions of arbitration assistance and supervision**

The functions referred to in articles 11(3), 11(4), 13(3), 14,16 (3) and 34 (2) shall be performed by... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

### **CHAPTER II - ARBITRATION AGREEMENT**

#### **Article 7 - Definition and form of arbitration agreement**

1. "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An

arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

#### **Article 8 - Arbitration agreement and substantive claim before court**

1. A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is real and void, inoperative or incapable of being performed.
2. Where an action referred to in paragraph (1) of this article has been brought,



arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

**Article 9 - Arbitration agreement and interim measures by court**

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

**CHAPTER III - COMPOSITION OF ARBITRAL TRIBUNAL**

**Article 10 - Number of arbitrators**

1. The parties are free to determine the number of arbitrators.
2. Failing such determination, the number of arbitrators shall be three.

**Article 11 - Appointment of arbitrators**

1. No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
2. The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

3. Failing such agreement,

- (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
- (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

4. Where, under an appointment procedure agreed upon by the parties,

- (a) a party fails to act as required under such procedure, or
- (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
- (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the

agreement on the appointment procedure provides other means for securing the appointment.

5. A decision on a matter entrusted by paragraph (3) and (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

#### **Article 12 - Grounds for challenge**

1. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

2. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

### **Article 13 - Challenge procedure**

1. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.
2. Failing such agreement, a party which intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
3. If a challenge under any procedure agreed upon by the parties or under the

procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

#### **Article 14 - Failure or impossibility to act**

1. If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.
2. If, under this article or article 13 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or

article 12 (2).

### **Article 15 - Appointment of substitute arbitrator**

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

## **CHAPTER IV - JURISDICTION OF ARBITRAL TRIBUNAL**

### **Article 16 - Competence of arbitral tribunal to rule on its jurisdiction**

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later

than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

#### **Article 17 - Power of arbitral tribunal to order interim measures**

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the

arbitral tribunal may consider necessary in respect of the subject- matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

## **CHAPTER V - CONDUCT OF ARBITRAL PROCEEDINGS**

### **Article 18 - Equal treatment of parties**

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

### **Article 19 - Determination of rules of procedure**

1. Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
2. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate.

The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.



### **Article 20 - Place of arbitration**

1. The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
2. Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

### **Article 21 - Commencement of arbitral proceedings**

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

### **Article 22 - Language**

1. The parties are free to agree on the language or languages to be used in the  
arbitral proceedings. Failing such agreement, the arbitral tribunal shall  
determine the language or languages to be used in the proceedings. This  
agreement or determination, unless otherwise specified therein, shall apply to  
any written statement by a party, any hearing and any award, decision or other  
communication by the arbitral tribunal.
  
2. The arbitral tribunal may order that any documentary evidence shall be  
accompanied by a translation into the language or languages agreed upon by  
the parties or determined by the arbitral tribunal.

### **Article 23 - Statements of claim and defence**

1. Within the period of time agreed by the parties or determined by the arbitral  
tribunal, the claimant shall state the facts supporting his claim, the points at  
issue and the relief or remedy sought, and the respondent shall state his  
defence in respect of these particulars, unless the parties have otherwise  
agreed as to the required elements of such statements. The parties may submit  
with their statements all documents they consider to be relevant or may add a  
reference to the documents or other evidence they will submit.

2. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

#### **Article 24 - Hearings and written proceedings**

1. Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.
2. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.
3. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its

decision shall be communicated to the parties.

#### **Article 25 - Default of a party**

Unless otherwise agreed by the parties, if, without showing sufficient cause,

- (a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
- (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

#### **Article 26 - Expert appointed by arbitral tribunal**

1. Unless otherwise agreed by the parties, the arbitral tribunal

- (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

2. Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

#### **Article 27 - Court assistance in taking evidence**

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.

The court may execute the request within its competence and according to its rules on taking evidence.

### **CHAPTER VI - MAKING OF AWARD AND TERMINATION OF PROCEEDINGS**

#### **Article 28 - Rules applicable to substance of dispute**

1. The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.  
  
Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
2. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
3. The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.
4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

#### **Article 29 - Decision-making by panel of arbitrators**

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the

arbitral tribunal.

### **Article 30 - Settlement**

1. If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
2. An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

### **Article 31 - Form and contents of award**

1. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitrator proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
2. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed

terms under article 30.

3. The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.
4. After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

#### **Article 32 - Termination of proceedings**

1. The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.
2. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:
  - (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
  - (b) the parties agree on the termination of the proceedings;
  - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.



3. The mandate of the arbitral tribunal terminates with the termination of the  
arbitral proceedings, subject to the provisions of articles 33 and 34 (4).

**Article 33 - Correction of interpretation of award; additional award**

1. Within thirty days of receipt of the award, unless another period of time has  
been agreed upon by the parties:
  - (a) a party, with notice to the other party, may request the arbitral tribunal to  
correct in the award any error in computation, any clerical or typographical  
errors or any errors of similar nature;
  - (b) if so agreed by the parties, a party, with notice to the other party, may request  
the arbitral tribunal to give an interpretation of a specific point or part of  
the award.

If the arbitral tribunal considers the request to be justified, it shall make the  
correction or give the interpretation within thirty days of receipt of the request.  
The interpretation shall form part of the award.

2. The arbitral tribunal may correct any error of the type referred to in paragraph (1)
  - (a) of this article on its own initiative within thirty days of the day of the  
award.

3. Unless otherwise agreed by the parties, a party, with notice to the other party,  
  
may request, within thirty days of receipt of the award, the arbitral tribunal to  
  
make an additional award as to claims presented in the arbitral proceedings  
  
but omitted from the award. If the arbitral tribunal considers the request to be  
  
justified, it shall make the additional award within sixty days.
4. The arbitral tribunal may extend, if necessary, the period of time within which it  
  
shall make a correction, interpretation or an additional award under paragraph  
  
(1) or (3) of this article.
5. The provisions of article 31 shall apply to a correction or interpretation of the  
  
award or to an additional award.

## **CHAPTER VII - RECOURSE AGAINST AWARD**

### **Article 34 - Application for setting aside as exclusive recourse against arbitral**

#### **award**

1. Recourse to a court against an arbitral award may be made only by an  
  
application for setting aside in accordance with paragraphs (2) and (3) of this  
  
article.
2. An arbitral award may be set aside by the court specified in article 6 only if:

- (a) the party making the application furnishes proof that:
- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
  - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
  - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;

or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration

under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

3. An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

4. The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

## **CHAPTER VIII - RECOGNITION AND ENFORCEMENT OF**

### **AWARDS**

#### **Article 35 - Recognition and enforcement**

1. An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
2. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.\*\*\*

\*\*\* The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

### **Article 36 - Grounds for refusing recognition or enforcement**

1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
  - (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
    - (i) a party to the arbitration agreement referred to in article 7 was under some

incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which,

that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration

under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the

public policy of this State.

2. If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

**APPENDIX : ARRANGEMENT CONCERNING  
MUTUAL ENFORCEMENT OF ARBITRAL  
AWARDS BETWEEN THE MAINLAND AND THE  
HONG KONG SPECIAL ADMINISTRATIVE  
REGION\***

Promulgated on 24 January 2000

Took effect from 1 February 2000

In accordance with the provision of Article 95 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and through mutual consultations between the Supreme People's Court and the Government of the Hong Kong Special Administrative Region (HKSAR), the Courts of the HKSAR agree to enforce the awards made pursuant to the Arbitration Law of the People's Republic of China by the arbitral authorities in the Mainland (the list to be supplied by the Legislative Affairs Office of the State Council through the Hong Kong and Macao Affairs Office of the State Council) and the People's Courts of the Mainland agree to enforce the awards

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\* The English version of this Arrangement was downloaded from <http://www.info.gov.hk/justice/new/depart/doc/mainlandmutual2e.pdf>.



made in the HKSAR pursuant to the Arbitration Ordinance of the HKSAR.

The following arrangement is made in respect of mutual enforcement of arbitral awards by the Mainland and the HKSAR:

1. Where a party fails to comply with an arbitral award, whether made in the Mainland or in the HKSAR, the other party may apply to the relevant court in the place where the party against whom the application is filed is domiciled or in the place where the property of the said party is situated to enforce the award.

2. For the purpose of Article 1 above, "relevant court", in the case of the Mainland, means the Intermediate People's Court of the place where the party against whom the application is filed is domiciled or the place in which the property of the said party is situated and, in the case of the HKSAR, means the High Court of the HKSAR.

If the place where the party against whom the application is filed is domiciled or the place where the property of the said party is situated falls within the jurisdiction of different Intermediate People's Courts of the Mainland, the applicant may apply to any one of the People's Courts to enforce the award.

The applicant shall not file his application with two or more People's Courts.

If the place where the party against whom the application is filed is domiciled or the place where the property of the said party is situated is in the Mainland as well as in the HKSAR, the applicant shall not file applications with relevant courts of the two places at the same time. Only when the result of the enforcement of the award by the court of one place is insufficient to satisfy the liabilities may the applicant apply to the court of another place for enforcement of the outstanding liabilities. The total amount recovered from enforcing the award in the courts of the two places one after the other shall in no case exceed the amount awarded.

3. The applicant shall submit the following documents in applying to the relevant court for enforcement of an award, made either in the Mainland or in the HKSAR:

- i) An application for enforcement;
- ii) The arbitral award;
- iii) The arbitration agreement.

4. An application for enforcement shall contain the following:

- (1) Where the applicant is a natural person, his name and address; where the applicant is a legal entity or any other organisation, its name and address and

the name of its legally authorised representative;

(2) Where the party against whom the application is filed is a natural person, his name and address; where the party against whom the application is filed is a legal entity or any other organisation, its name and address and the name of its legally authorised representative;

(3) Where the applicant is a legal entity or any other organisation, a copy of the enterprise registration record shall be submitted. Where the applicant is a foreign legal entity or any other foreign organisation, the corresponding notarisation and authentication material shall be submitted;

(4) The grounds for and the particulars of the application for enforcement; the place where the property of the party against whom the application is filed is situated and the status of the property.

Application for enforcement made in the Mainland shall be in the Chinese language. If the arbitral award or arbitration agreement is not in the Chinese language, the applicant shall submit a duly certified Chinese translation of it.

5. The time limit for an applicant to apply to the relevant court for enforcement of the arbitral award, whether made in the Mainland or in the HKSAR, shall be governed by the law on limitation period of the place of

enforcement.

6. Upon receipt of an application for enforcement from an applicant, the relevant court shall handle the application and enforce the award according to the legal procedure of the place of enforcement.

7. The party against whom an application is filed may, after receiving notice of an arbitral award, whether made in the Mainland or in the HKSAR, adduce evidence to show any of the situations set out below. Upon such evidence being examined and any of the said situations being found proved, the relevant court may refuse to enforce the arbitral award:

(1) A party to the arbitration agreement was, under the law applicable to him, under some incapacity, or the arbitration agreement was not valid under the law to which the parties subjected it, or, failing any indication thereon, under the law of the place in which the arbitral award was made;

(2) The party against whom the application is filed was not given proper notice of the appointment of the arbitrator or was otherwise unable to present his case;

(3) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or the award contains decisions on matters beyond the scope of the submission to arbitration. However, if the

award contains decisions on matters submitted to arbitration that can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration shall be enforced;

(4) The composition of the arbitral authority or the arbitral procedure was not in accordance with agreement of the parties or, failing such agreement, with the law of the place where the arbitration took place;

(5) The award has not yet become binding on the parties, or has been set aside or suspended by the court or in accordance with the law of the place where the arbitration took place.

If the relevant court finds that under the law of the place of enforcement, the dispute is incapable of being settled by arbitration, then the court may refuse to enforce the award.

The enforcement of the award may be refused if the court of the Mainland holds that the enforcement of the arbitral award in the Mainland would be contrary to the public interests of the Mainland, or if the court of the HKSAR decides that the enforcement of the arbitral award in Hong Kong would be contrary to the public policy of the HKSAR.

8. The applicant, in applying to the relevant court to enforce an arbitral

award, whether made in the Mainland or in the HKSAR, shall pay the enforcement fees prescribed by the court of enforcement.

9. Applications made after 1<sup>st</sup> July, 1997 for enforcement of arbitral awards, whether made in the Mainland or in the HKSAR, shall be enforced according to this Arrangement.

10. In respect of applications for enforcement made between 1<sup>st</sup> July, 1997 and the coming into force of the Arrangement, both parties agree that:

Where the applications for enforcement cannot, for some reasons, be made to the court of the Mainland or the court of the HKSAR between 1<sup>st</sup> July, 1997 and the coming into force of this Arrangement, then, in the case of the applicant being a legal entity or any other organisation, the application for enforcement may be made within six months after this Arrangement comes into force and, in the case of the applicant being a natural person, the application for enforcement may be made within one year after this Arrangement comes into force.

Parties to cases which the court of Mainland or the HKSAR had, between 1<sup>st</sup> July, 1997 and the coming into force of this Arrangement, refused to handle or to enforce the award, shall be allowed to make fresh application for

enforcement.

11. Any problem arising in the course of implementing this Arrangement and any amendment to this Arrangement shall be resolved through consultations between the Supreme People's Court and the Government of the HKSAR.

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