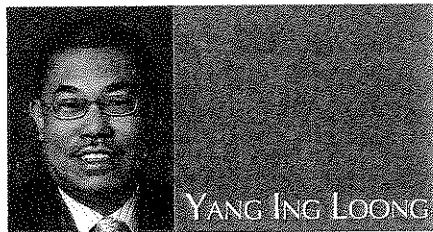


Enforcement of Arbitral Awards: the Taiwanese Perspective

This article discusses the enforcement of Convention awards in Taiwan and of Taiwanese awards in New York Convention jurisdictions and the statutory provisions governing enforcement in Taiwan and in several Convention jurisdictions.



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Introduction

Taiwan¹ is not a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('the New York Convention' or 'the Convention')². This state of affairs presents unique legal issues and challenges to the enforcement of (i) arbitral awards from New York Convention jurisdictions (Convention awards) in Taiwan, and (ii) awards made in Taiwan in Convention jurisdictions.

This article will discuss how awards are enforced as between these jurisdictions and the statutory conditions applicable to enforcement. With regard to Convention awards, the article will focus specifically on Mainland China, Hong Kong and Singapore.

Enforcement of Convention awards in Taiwan

The main legislation governing the enforcement of foreign arbitral awards in Taiwan is the Arbitration Law 1998³ ('the 1998 Law'), which was promulgated on 24 June 1998 and took effect on 24 December 1998, replacing the Commercial Arbitration Law 1961. Although Taiwan is not an UNCITRAL Model Law jurisdiction and Model Law drafting style is not followed, the

1998 Law is substantially Model Law compliant.

“Taiwan is not a signatory to the New York Convention ... This state of affairs presents unique legal issues and challenges to the enforcement of ... arbitral awards ... ”

Application for recognition and enforcement of a foreign award

A 'foreign arbitral award' is defined by art 47 of the 1998 Law as –

“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”.

Foreign awards are enforceable in Taiwan only after they have been recognized by the Taiwanese courts. Under art 49 of the 1998 Law, a plea for recognition and enforcement of a foreign arbitral award shall be dismissed:

- (1) where the recognition or enforcement of the arbitral award is contrary to the public order or good morals of Taiwan; or
- (2) where the dispute is not arbitrable under the laws of Taiwan.

The court may also issue a dismissal order under art 49 if the foreign jurisdiction where the award

is made or whose laws govern the arbitral award does not recognize awards made in Taiwan.

Since Taiwan is not a signatory to the New York Convention, the requirement of reciprocity under art 49 can present problems. To deal with this issue, the Supreme Court of Taiwan has held that, for the purpose of enhancing international judicial co-operation, Taiwanese courts may recognize and enforce foreign awards at their discretion, notwithstanding the absence of reciprocity⁴. It is not clear what factors the Taiwanese courts will take into consideration when determining whether or not to recognize a foreign award made in a country where there is lack of reciprocity. It is, however, clear that the reciprocity threshold is not difficult to cross. As was held in two High Court cases, the reciprocity requirement under art 49 of the 1998 Law does not require the State where the award is made *specifically* to recognize Taiwan arbitral awards first⁵. So long as the arbitration law of the subject State does not clearly reject the recognition of Taiwanese awards, the requirement of reciprocity is considered to have been met⁶.

In the past, the Taiwanese courts have refused to recognize a number of foreign awards. These cases may provide some indication as to under what circumstances the courts are more likely to consider that the requirement of reciprocity is not satisfied. For example, High Court decision No 609 of 1997 denied the recognition of a New York award as a result of a New York court's refusal to recognize a Taiwanese award. In another case, it

was held that Taiwanese courts may, in considering whether to enforce an award from a subject State, take into consideration whether the Arbitration Association of the Republic of China has signed a co-operation agreement with an equivalent body in the subject State.

Article 50 of the 1998 Law stipulates further circumstances in which a Taiwanese court may dismiss an application for recognition of an arbitral award. After a plea for recognition and enforcement of an award is made, the respondent to the plea may, within 20 days, apply for a dismissal order on the following grounds.

- (1) The arbitration agreement is invalid as a result of the incapacity of a party according to the law chosen by the parties to govern the arbitration agreement.
- (2) The arbitration agreement is null and void according to the law chosen to govern the 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 situation which gives 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 award.
- (5) The composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of such agreement, the law of the place of arbitration.
- (6) The award is not yet binding upon the parties or has been suspended or revoked by a competent court.

There is, therefore, a clear legislative framework for the enforcement of

foreign awards in Taiwan, under which awards from the US, the UK, Hong Kong, Japan and Korea (for example) have been recognized and enforced. Clear precedents regarding the enforcement of foreign awards are, however, somewhat limited, and this could present a degree of uncertainty when a party seeks to enforce a foreign award for which there is no readily available precedent (for example, whether a Taiwanese court would treat a particular foreign jurisdiction as having satisfied the reciprocity requirement under art 49 of the 1998 Law).

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“It is not clear what factors the Taiwanese courts will take into consideration when determining whether or not to recognize a foreign arbitral award made in a country where there is lack of reciprocity.” +

Enforcement of awards rendered in Mainland China, Hong Kong and Macau

(1) Mainland China

Enforcing an arbitral award rendered in Mainland China presents difficulties in Taiwan because, as a matter of Taiwanese constitutional law, Mainland China and Taiwan are the same territory. Due to this special relationship, a Mainland Chinese award is not treated as a ‘foreign award’. Because the two jurisdictions have separate legal systems, however, a Mainland Chinese award is not a domestic award either under Taiwanese law⁷.

As a result, the Act Governing Relations between the People of the Taiwan Area and the Mainland Area 1992⁸ (‘the Cross-strait Relations Act’) was enacted to provide a legal basis for the recognition and enforcement

in Taiwan of judgments and arbitral awards rendered in Mainland China. Article 74 of this Act states that:

“To the extent that an irrevocable civil ruling or judgment, or arbitral award rendered in the Mainland Area, is not contrary to the public order or good morals of the Taiwan Area, an application may be filed with a court for a ruling to recognize it.

“Where any ruling or judgment, or award recognized by a court’s ruling as referred to in the preceding paragraph requires performance, it may serve as a writ of execution.

“The preceding two paragraphs shall not apply until the time when for any irrevocable civil ruling or judgment, or arbitral award rendered in the Taiwan area, an application may be filed with a court of the Mainland Area for a ruling to recognize it, or it may serve as a writ of execution in the Mainland Area.”

Thus, arbitral awards rendered in Mainland China may be recognized and serve as a writ of execution in Taiwan if they are not contrary to the public or good morals of Taiwan. The grounds for dismissing enforcement of foreign awards under art 50 of the 1998 Law are not found in the Cross-strait Relations Act. With regard to the reciprocity requirement under art 74 of the Cross-strait Relations Act, it has been generally accepted by Taiwanese courts that such a requirement has been met since 1998, when the Supreme Court of the PRC issued regulations recognizing civil judgments rendered in Taiwan⁹.

(2) Hong Kong and Macau

Hong Kong and Macau are each Special Administrative Regions of the PRC. Because their legal systems are different from that of Mainland China, the recognition and enforcement of awards made in those SARs is regulated under the Act Governing Relations with Hong Kong and Macau 1997¹⁰. Under art 42 of this Act, arts 30-34 of the Commercial Arbitration Act 1961 originally applied to the validity, petition for court recognition and suspension of execution proceedings in cases

involving arbitral awards made in Hong Kong and Macau. Following the repeal of the 1961 Act, arts 47-51 of the 1998 Law concerning foreign arbitral awards now apply to cases involving arbitral awards made in Hong Kong and Macau.

Enforcement of Taiwanese awards by Convention jurisdictions

(1) Mainland China

In Mainland China, the enforcement of arbitral awards made in New York Convention jurisdictions is regulated by the Supreme People's Court Notice on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1987) ('the 1987 Notice')¹¹. Paragraph 4 of the 1987 Notice requires that the award shall be recognized and enforced by the competent People's Court in Mainland China in the absence of grounds for refusing enforcement set out in art V of the New York Convention.

Arbitral awards made in Taiwan are, however, treated as a special category, by contrast with awards made in Convention jurisdictions and in Hong Kong¹² and Macau¹³. The enforcement of Taiwanese arbitral awards is governed by two sets of regulations issued by the Supreme People's Court: the Regulations Concerning Recognition of the Civil Judgments of Taiwan Courts 1998 (the '1998 Regulations') and the Supplementary Regulations Concerning Recognition of the Civil Judgments of Taiwan Courts 2009¹⁴ (the '2009 Supplementary Regulations').

Regulation 19 of the 1998 Regulations provides that –

“these Regulations shall apply to the application for recognition of relevant civil judgments made by the courts in Taiwan and arbitral awards made by arbitration institutions in Taiwan.”

The 2009 Supplementary Regulations provide further that both the Regulations and the Supplementary Regulations apply not only to civil judgments but also to rulings, mediation decisions, payment

orders issued by Taiwan courts, and arbitral awards rendered by Taiwanese arbitral institutions¹⁵. Under Regulations 3 and 18 of the 1998 Regulations, any application for the enforcement of a recognized Taiwan arbitral award must be submitted to a competent intermediate court in accordance with the provisions of the PRC Civil Procedure Law 1991.

With regard to resisting recognition of a Taiwanese award, reg 9 of the 1998 Regulations sets out the following six grounds for the competent People's Courts in the Mainland to refuse recognition of a Taiwanese civil judgment. By virtue of reg 19 of the 1998 Regulations, these grounds also apply to Taiwanese arbitral awards.

“There is ... a clear legislative framework for the enforcement of foreign awards in Taiwan, under which awards from the US, the UK, Hong Kong, Japan and Korea (for example) have been recognized and enforced.”

- (1) The effectiveness of the Taiwan judgment has not been determined.
- (2) The Taiwan judgment was made in a situation where the defendant was absent from Court and had not been legally summoned, or where the defendant lacked the capacity to litigate and has not been given access to appropriate legal assistance.
- (3) The case falls within the exclusive jurisdiction of the People's Court.
- (4) The parties to the case have concluded an arbitration agreement.
- (5) The case has already been adjudicated by a People's Court,

or if by a foreign court or tribunal, has already been recognized by the People's Court.

- (6) The Taiwan judgment violates PRC fundamental principles or social and public interests.

Interestingly, the grounds for refusal to recognize a Taiwanese award do not appear to be exactly the same as those applicable to Convention awards under the 1987 Circular. For example, since the main objective of the 1998 Regulations, as their name suggests, is the enforcement of Taiwanese civil judgments rather than arbitral awards, some of the reg 9 grounds, such as reg 9(4) (the existence of arbitration agreement), would be practically inapplicable as a basis for challenging recognition of an award. On the other hand, some of the grounds set out in art V of the New York Convention, such as the invalidity of the arbitration agreement (art V.1(a)) and irregularities in the composition of the arbitral authority and arbitration procedures (art V.1(d)), are not reflected in either the 1998 Regulations or the 2009 Supplementary Regulations. Such discrepancies, as suggested by some academics in Mainland China, may cause ‘technical difficulties’ in the enforcement of Taiwanese arbitral awards in the Mainland¹⁶.

(2) Hong Kong

In Hong Kong, the enforcement of awards made in Convention jurisdictions is governed by Part IV of the Arbitration Ordinance (Cap 341) ('the Ordinance'), together with s 2GG, which applies to the summary enforcement of all awards¹⁷.

By contrast, Taiwanese awards (as non-Convention foreign awards) may be summarily enforced in Hong Kong under s 2GG of the Ordinance alone, but only with the leave of court¹⁸. Proof of the existence of a valid arbitration agreement and a copy of the award to be enforced must be submitted together with the application for enforcement. The Hong Kong court has a discretion in granting such leave and, when exercising such discretion, will consider various factors, not

limited to reciprocity. For example, leave to enforce may be refused if the validity of the award is doubtful¹⁹ or the award is not in a form which can be enforced as a judgment, particularly if it has failed to specify a sum to be paid²⁰.

Alternatively, or when leave of the court is not granted for summary enforcement under s 2GG of the Ordinance, a party may bring an action under common law for enforcement of a Taiwanese award in Hong Kong (an action on the award).

At common law, there is an implied promise in every arbitration agreement that the parties will perform and honor the arbitral award. If a party refuses to perform the arbitral award in breach of this implied agreement, the other party may bring an action on the award in any court of competent jurisdiction. The claimant in such common law actions has the burden of proving the validity of the arbitration agreement, that the arbitral tribunal has been duly constituted, that the award has been made following proper procedures and that the amount awarded has not been paid or that award has not otherwise been performed.

Although the applicant has liberty to proceed under either route, it is not surprising, given the relatively more onerous burden of proof on the applicant under a common law action, that summary enforcement under s 2GG of the Ordinance appears to be the preferred route²¹. In any case, the fact that the applicant has obtained leave of the court or has failed to do so, for the purpose of summary enforcement under s 2GG, will not prevent it from bringing a common law action on the award²².

The principal defences under both routes are largely the same as those available under art V of the New York Convention, given their common underlying rationale²³.

A Taiwanese arbitral award can therefore be enforced in Hong Kong, through summary enforcement by leave of the court in accordance with s 2GG of the Ordinance or through a common law action on the award.

(3) Singapore

In Singapore, enforcement of arbitral awards from Convention jurisdictions is governed by Part III of the International Arbitration Act (Cap 143A).

For arbitral awards from non-Convention jurisdictions, such as Taiwan, enforcement is available through an action on the award in largely similar terms to the position described above in Hong Kong), or under s 46 of the Arbitration Act (Cap 10).

“... [D]iscrepancies [in reg 9 of the 1998 Regulations] ... may cause ‘technical difficulties’ in the enforcement of Taiwanese arbitral awards in the Mainland.”

The Arbitration Act generally deals with domestic arbitrations conducted within Singapore²⁴. The Statutes (Miscellaneous Amendment) Act 2003 has added a new provision, s 46(3), to the Arbitration Act. Section 46 now provides:

- “(1) An award made by the arbitral tribunal pursuant to an arbitration agreement may, with leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect.
- (2) Where leave of the Court is so granted, judgment may be entered in the terms of the award.
- (3) Notwithstanding section 3, subsection (1) shall apply to an award irrespective of whether the place of arbitration is Singapore or elsewhere.”

(Emphasis added)

The Senior Minister of State for Law, Assoc Prof Ho Peng Kee, described the purpose of adding s 46(3) in the following terms²⁵:

“... [C]ause 3 amends the Arbitration Act to empower the High Court of Singapore to enforce an arbitral award irrespective of whether the place of arbitration is Singapore or elsewhere. This amendment was recommended by the Legal Services Working Group under the Economic Review Sub-Committee on Service Industries and is modelled after the UK and Hong Kong legislation.

“Sir, as part of our drive to make Singapore an international arbitration hub, we want to attract people to conduct their arbitrations in Singapore. For this to happen, it is important that arbitration awards made in Singapore are enforceable in whatever country assets in question are found. This is not a problem for countries that are parties to the New York Convention, where any signatory country’s awards can be enforced in any other signatory country. Singapore is a signatory country, as are most other countries.

“The problem arises when awards from Singapore are to be enforced in a non-New York Convention country. In such cases, there is no automatic recognition of a Singapore award by that country. However, many of these countries have laws that allow recognition of foreign arbitral awards on a reciprocal basis. Thus, if Singapore is able to recognise awards from these countries, they will likewise recognise awards from Singapore.

“Hence, this amendment to make it possible for foreign awards that cannot currently be enforced in Singapore to be enforced here. There will not be an automatic right to enforcement, as the leave of our High Court will be required. Of course, this does not mean that the Court will automatically grant leave to enforce foreign awards in all cases.

“An award must first be subject to the requirements in section 46(1), namely, that there must be an agreement by the parties to submit the dispute to arbitration and the award must be a decision on the

substance of the dispute made by an arbitral tribunal. ... [T]he courts have developed rules for the enforcement of foreign judgments and arbitral awards, and similar principles would be considered by a Court in deciding whether to grant leave. Thus, leave to enforce an award may not be granted if the person against whom it is sought to be enforced shows that the arbitral tribunal lacked substantive jurisdiction to make the award, or that the enforcement of the award would be contrary to public policy. Also, if the composition of the arbitral tribunal is not in accordance with the agreement of the parties or the applicable arbitration law, the Court may decline to enforce the award."

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 " ... [I]t is not surprising, given the relatively more onerous burden of proof on the applicant under a common law action, that summary enforcement ... appears to be the preferred route. "
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Thus, a party seeking to enforce a Taiwanese award in Singapore may make an application under s 46 of the Arbitration Act seeking leave of the Singapore court to enforce the award.

Conclusion

There are clear legislative frameworks for the enforcement of (i) foreign arbitral awards (including those of Mainland China, Hong Kong and Macau awards) in Taiwan, and (ii) non-Convention arbitral awards (such as Taiwanese awards) in Mainland China, Hong Kong and Singapore.

The respective legislative frameworks appear to provide a reasonable degree of certainty in relation to the enforcement of 'foreign' arbitral awards between these

jurisdictions, subject to the grounds available under those frameworks for resisting enforcement.

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- 1 The official name of Taiwan is the Republic of China.
- 2 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.
- 3 <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT01.asp?lslid=FL010105>.
- 4 *All American Cotton Co Ltd v Jiunn Long Textile Corp*, 7 August 1986 (Supreme Court of Taiwan).
- 5 High Court decision No 335, referred to in Supreme Court decision No 433 of 30 March 2005. Supreme Court decision No 433 is available in Chinese at http://jirs.judicial.gov.tw/FJUD/PrintFJUD03_0.aspx?jrecno=94%2c%e6%8a%97%2c433%2c20050330%2c1&v_court=TPH+%e8%87%ba%e7%81%a3%e9%ab%98%e7%ad%89%e6%b3%95%e9%99%a2&v_sys=V&jyear=94&j_case=%e6%8a%97&jno=433&jdate=940330&jcheck=1.
- 6 High Court decision No 1943 of 23 September 2004 is available in Chinese at http://jirs.judicial.gov.tw/FJUD/PrintFJUD03_0.aspx?jrecno=93%2c%e5%8f%b0%e4%b8%8a%2c1943%2c20040923&v_court=TPS+%e6%9c%80%e9%ab%98%e6%b3%95%e9%99%a2&v_sys=V&jyear=93&jcase=%e5%8f%b0%e4%b8%8a&jno=1943&jdate=930923&jcheck=.
- 7 See Alison Ross, *Cross-strait enforcement: a view from Taiwan*, *Global Arbitration Review*, 12 November 2010.
- 8 <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT0201.asp>.
- 9 See *infra*.
- 10 <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT0201.asp>.
- 11 Fa (Jing) Fa [1987] No 5; <http://www.cietac.org/index/references/Laws/47607b5429f8c27f001.cms>.
- 12 The enforcement of awards made in Hong Kong is governed by the Announcement of the Supreme People's Court on the Arrangement Between the Mainland and the Hong Kong SAR on the Mutual Enforcement of Arbitration Awards, Fa Shi [2000] No 3; <http://www.cietac.org/index/references/Laws/47607b542b87507f001.cms>. This refers to the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong SAR 1999 - www.legislation.gov.hk/intracountry/eng/pdf/mainlandmutual2e.pdf.
- 13 The enforcement of awards made in Macau is dealt with by the Announcement of the Supreme People's Court on the Arrangement Between the Mainland and the Macau SAR on the Mutual Enforcement of Arbitration Awards, Fa Shi [2007] No 17; <http://www.cietac.org/index/references/Laws/47607b542d36f001.cms>. This

- refers to the Arrangement on Mutual Enforcement of Arbitral Awards Made in the Mainland and the Macau SAR 2007.
- 14 http://www.chinacourt.org/flwk/show.php?file_id=135601 (in Chinese).
- 15 2009 Supplementary Regulations, reg 2.
- 16 Song Lian Bin, *An Analysis of Mutual Recognition and Enforcement of Arbitral Awards between the Mainland and Taiwan*, available in Chinese at http://cn.cietac.org/Hezuo/5_4.shtml. *Editorial note:* The system of pre-reporting to the Supreme People's Court any proposed refusal by Intermediate and Higher People's Courts to enforce foreign-related and foreign arbitral awards applies also to Taiwanese awards: see Notice of the Supreme People's Court Concerning the Handling of Issues Regarding Foreign-Related Arbitration and Foreign Arbitration Matters by the People's Courts, Fa Fa [1995] No 18, 28 August 1995.
- 17 *Editorial note:* With effect from 1 June 2011, Part IV of the Ordinance will be replaced by Part 10, Division 2 of the Arbitration Ordinance (Cap 609) and s 2GG will be replaced by s 84. These provisions are to similar effect.
- 18 Which provides:
 "(1) An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.
 (2) Notwithstanding anything in this Ordinance, this section applies to an award, order and direction made or given whether in or outside Hong Kong."
- 19 Robert Morgan, *The Annotated Ordinances of Hong Kong: Arbitration Ordinance* (1996, Hong Kong: Butterworths Asia/LexisNexis), p 23.
- 20 *Ibid*.
- 21 See Robert Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* (1997, Hong Kong: Butterworths Asia/LexisNexis), 1997 *Supplement* at p 80, referring to discussion of summary enforcement under s 2H of the Ordinance, the predecessor provision to s 2GG. See also commentary on s 2H in Morgan, *op cit* (note 19), where the author says that "this section should be used in the majority of cases instead of a common law action on the award."
- 22 See Morgan, *op cit* (note 21), 1997 *Supplement* at p 80.
- 23 *Ibid*. Note, however, that a larger number of defences apply in a common law action: for discussion, see *Halsbury's Laws of Hong Kong*, Vol 1(2) (2008 Reissue), Arbitration at [25.187].
- 24 Section 3 of the Arbitration Act provides that that Act applies only to any arbitration where the place of arbitration is Singapore and where Part II of the International Arbitration Act does not apply to that arbitration.
- 25 Parliamentary debates, Statutes (Miscellaneous Amendments) Bill, 24 April 2003.