ASIA ARBITRATION GUIDE

TAIWAN

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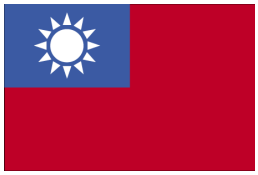


13. TAIWAN

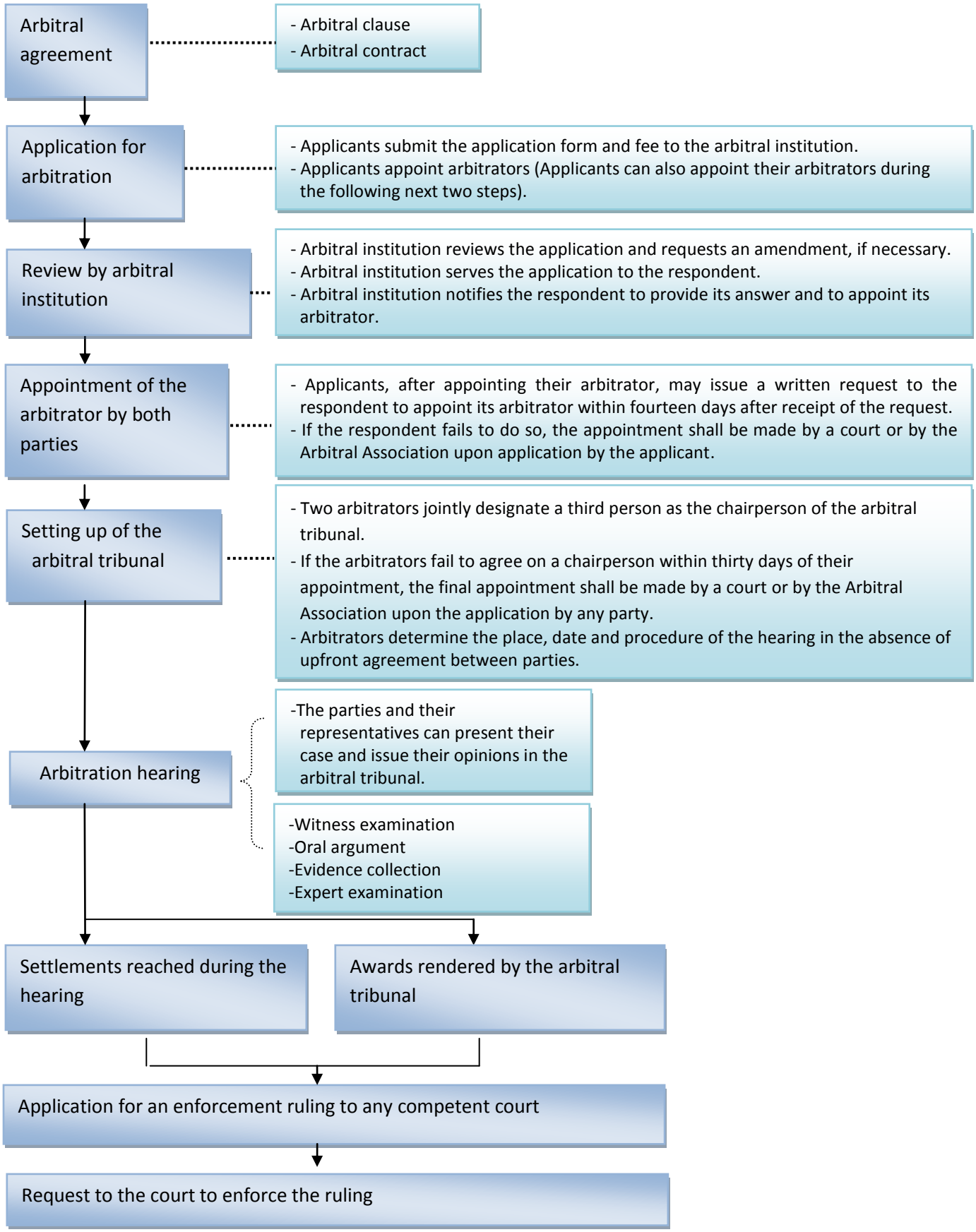
13.1 Which laws apply to arbitration in Taiwan?

In Taiwan, aside from litigation, civil disputes can also be resolved through mediation, settlement or arbitration. The legislature passed the current Arbitration Law of the Republic of China (R.O.C., hereinafter: Taiwan), amended from the earlier Statute for Commercial Arbitration, on 10 July, 2002 (hereinafter: Arbitration Law).

13.2 Is the Taiwanese Arbitration Law based on the UNCITRAL model law?

The Arbitration Law was drafted with reference to the UNCITRAL Model Law on International Commercial Arbitration, as well as a view to legislation in the U.S., U.K., Germany and Japan.

The following flow chart demonstrates the process of a common institutional arbitration:



13.3 What constitutes an arbitral agreement?

The Arbitration Law of the Republic of China ("Taiwan") does not contain a definition of what constitutes an arbitral agreement. Since the Arbitration Law was drafted with a view to the Model Law on International Commercial Arbitration Article 7, Paragraph 1, the latter's definition of arbitral agreements may provide some guidance[1]. Article 1 of the Arbitration Law allows disputing parties to enter into an arbitral agreement to submit the dispute to arbitration. The agreement could be a separate contract or an arbitration clause in the principal contract. The arbitral agreements can be made before or after the dispute arises.[2] Regardless of the form or wording adopted, a *prima facie* arbitral agreement shall be deemed to establish an arbitral agreement.[3] However, a valid arbitral agreement must be made in the written form.[4] In addition to these formal aspects, arbitration is applicable to disputes arising from certain legal relationships.[5] A legal relationship shall be "arbitrable" only if the parties have a right to make a compromise with regard to the subject matter in dispute.[6][7] For example, disputes concerning family law or inheritance issues shall not be subject to arbitration.

13.4 Separability of Arbitral Clauses

The issue of separability is also known as "the autonomy of the arbitral clause" or "the severability of the arbitral clause." When the arbitral agreement is presented as a clause enclosed in the principal contract, even if the contract is nullified, invalid, revoked, rescinded or terminated, the validity of an arbitral clause is determined separately, so as to facilitate arbitration.[8]

13.5 Force of Arbitral Agreement

The main force of an arbitral agreement is to suspend court proceedings when disputes can be referred to arbitration. If one of the parties to an arbitral agreement commences a legal action in conflict with the arbitral agreement, the court shall, upon petition by the adverse party, suspend the legal action and order the suing party to submit to arbitration within a specified time, unless the counter party has already proceeded to respond to the legal action. After the suspension, the legal action shall be deemed to have been withdrawn when an arbitral award is made. If the suing party fails to submit to arbitration within the specified time period ordered by the court, the court shall dismiss the legal action.[9]

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1 *See* YANG,CHONG-SEN (楊崇森) ET AL., On Arbitration (仲裁法新論), pp. 56 (3rd ed. 2008).
2 *See* LIN,JYUN-YI (林俊益), The Practical Benefit of Arbitration Law (仲裁法之實用權論), pp. 61-62 (1st ed. 2001).
3 *See* Arbitration Law of R.O.C. Article 1, Paragraph 4.
4 *See* Arbitration Law of R.O.C. Article 1, Paragraph 3 and 4; the sorts of "writing form" include and not limited to written documents, documentary instruments, correspondence, facsimiles and telegrams. *See also* UNCITRAL Model Law on International Commercial Arbitration (hereinafter UNCITRAL Model Law) Article 7 (2) and 16 (1).
5 *See* Arbitration Law of R.O.C. Article 2.
6 *See* Arbitration Law of R.O.C. Article 1, Paragraph 2.
7 *See* Code of Civil Procedure of Japan, Article 786.
8 *See* Arbitration Law of R.O.C. Article 3 and UNCITRAL Model Law Article 16 (1).
9 *See* Arbitration Law of R.O.C. Article 4 and UNCITRAL Model Law Article 8 (1).

13.6 Principle of Clarity and Definiteness and the Right of Procedural Choice

The clarity of the arbitral agreement may not only affect the validity of the agreement but also essentially influences the ensuing arbitral proceedings. For example, in the Taiwan Supreme Court Ruling Serial No. 87th Year Tai-Kang Tzu No. 88, an arbitral agreement stated that certain disputes "may," instead of "shall," be submitted to arbitration; the agreement was deemed valid by the Supreme Court. However, the ruling also dismissed the legal action brought by the plaintiff (who argued that the dispute should be arbitrated) because the court interpreted the arbitral agreement to be not binding. In other words, both parties have to agree to submit the dispute (after it arises) to arbitration.[10]

In addition to the specified dispute agreed to be submitted to arbitration, an arbitral agreement can also stipulate other procedural factors, including:

(1) **The place of arbitration**: Without an agreed place of arbitration specified in the agreement, it shall be determined by the arbitral tribunal.[11] The place of arbitration is important because it is the major, if not the only, factor in determining which country's procedural regulations are governing the arbitration process. In addition, whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced is also an influential factor in the arbitration process.[12]

(2) **The arbitrator(s) and arbitral institution**: In the absence of an appointment of an arbitrator or a method of appointment in an arbitral agreement, each party shall appoint an arbitrator for itself. The appointed arbitrators shall then jointly designate a third arbitrator to be the chairperson. However, if the parties have agreed that the arbitration shall be administered by an arbitral institution, the arbitrators shall be appointed by the arbitral institution.[13]

(3) **The language of the proceedings**: Parties to a trans-national dispute may designate a language or languages to be used to conduct the arbitral proceedings. However, 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.[14] In addition, it is also advisable to make an agreement beforehand that how the costs are to be split and paid by the parties along with the other arbitration costs.[15]

(4) **The arbitral proceeding rules**: In the absence of an agreement on the procedural rules governing the arbitration, the arbitral tribunal shall apply the Arbitration Law. Where the Arbitration Law is silent, the arbitral tribunal may apply the Code of Civil

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10 *See also* High Court Civil Ruling Serial No. 84th Year Kang Tzu No. 753.
11 *See* Arbitration Law of R.O.C. Article 20.
12 *See* UNCITRAL Notes on Organizing Arbitral Proceedings 1996 Article 22.
13 *See* Arbitration Law of R.O.C. Article 9, Paragraph 1 and 4.
14 *See* Arbitration Law of R.O.C. Article 25.
15 *See* UNCITRAL Notes on Organizing Arbitral Proceedings 1996 Article 20.

Procedure *mutatis mutandis* or such other procedural rules it deems proper.[16] In practice, parties may agree on certain arbitral rules or guidelines issued by arbitral institution or international organizations, such as The Arbitration Rules of the Chinese Arbitration Association (Taipei) or UNCITRAL Notes on Organizing Arbitral Proceedings.

(5) **The enforcement of an arbitral award:** An award may not be enforceable unless a competent court has 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: (a) Payment of a specified sum of money or certain amount of tangible things or valuable securities; (b) Delivery of a specified movable property.[17]

(6) **The confidentiality of arbitration:** Compared with other dispute-resolving mechanisms, the confidentiality of arbitration stands out. Arbitrators have to uphold the principle of confidentiality in conducting the arbitration[18] and the arbitral proceedings cannot be made public unless agreed upon by both parties.[19] There is, however, no clear rule regarding the extent to which the parties in an arbitration are under the duty to keep information relating to the dispute secret. Therefore, UNCITRAL advises disputing parties to make an agreement on the duty of confidentiality which might cover the following matters: the material or information that is to be kept confidential; measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means; circumstances in which confidential information may be disclosed in part or in whole.[20]

13.7 What are the main arbitration institutions in Taiwan?

Currently there are four registered arbitral institutions in Taiwan, including:

(1) **The Arbitration Association of the R.O.C.** (also known as the "Chinese Arbitration Association, Taipei") , is the arbitral body which administers disputes ranging from construction, maritime, securities, international trade, intellectual property rights, insurance, cross-Strait , information technology, etc.[21] Currently, most arbitral cases are referred to the Arbitration Association of the R.O.C.

(2) The **Taiwan Construction Arbitration Association**, which specializes in construction disputes.

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16 *See* Arbitration Law of R.O.C. Article 19.
17 *See* Arbitration Law of R.O.C. Article 37, Paragraph 2.
18 Arbitration Law of R.O.C. Article 15.
19 Arbitration Law of R.O.C. Article 23, Paragraph 2.
20 *See* UNCITRAL Notes on Organizing Arbitral Proceedings 1996 Article 32.
21 *See* http://www.arbitration.org.tw/english/index-1.html (last visited Apr. 24, 2009).

(3) The **Chinese Construction Industry Arbitration Association**, which also specializes in construction disputes.

(4) The **Association of Labour Dispute Construction Arbitration, R.O.C.,** which specializes in labour disputes.

13.8 How many arbitrators are usually appointed?

An arbitral tribunal should be constituted by an arbitral agreement designating a single arbitrator or an odd number of arbitrators to settle disputes. However, in the absence of an appointment of an arbitrator or a method of appointment in an arbitral agreement, each party shall appoint an arbitrator for itself. The appointed arbitrators shall then jointly designate a third arbitrator to be the chair of the arbitral tribunal. The arbitral tribunal shall notify the parties, in writing, of the final appointment[22].

If the parties have agreed that the arbitration shall be administered by an arbitral institution and do not appoint natural persons as arbitrators, the arbitrators shall be appointed by the arbitral institution.[23] When any non-arbitral organization is appointed as the arbitrator, it shall be deemed that no arbitrator has been appointed and each party shall appoint an arbitrator for itself.[24] If the parties agreed to appoint an arbitral institution as an arbitrator, however, the law is not clear about its validity. But it is believed that an arbitral institution shall not be deemed as an arbitrator either. Therefore, Arbitration Law Article 5, Paragraph 2 needs to be amended.[25]

In the aforementioned institutional arbitration, parties that have agreed the arbitration shall be administered by an arbitral institution. The arbitrators shall be appointed by the agreed arbitral institution and constitute an arbitral tribunal. The institution shall notify in writing both parties as well as the appointed arbitrators.[26] The process of appointing arbitrators and constituting arbitral tribunal is usually similar to the following:[27]

(1) A party that submits a dispute to arbitration chooses an arbitrator; the party notifies in writing the counter party as well as the appointed arbitrator.

(2) After the counter party chooses an arbitrator, it also notifies in writing the submitting party and the appointed arbitrator.

(3) The appointed arbitrators then jointly designate a third arbitrator to be the chair and the three arbitrators together constitute the arbitral tribunal, which shall notify in writing both parties of the final appointment.

Pursuant to Arbitration Law Article 14, except for those subject to withdrawal proceedings, the appointment of arbitrators by an arbitral institution or the court "shall

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22 *See* Arbitration Law of R.O.C. Article 9, Paragraph 1.
23 *See* LIN,JYUN-YI (林俊益), *supra* note 2, pp. 114.
24 *See* Arbitration Law of R.O.C. Article 5, Paragraph 2.
25 *See* YANG,CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 136.
26 *See* Arbitration Law of R.O.C. Article 9, Paragraph 4 and Article 10, Paragraph 1.
27 *See* HU,YUAN-JHEN (胡元禎),An Introduction to Arbitration. FT Law Review, Vol. 159, pp. 71.

not be challenged by the parties." Nevertheless, if the appointment falls into any of the listed circumstances in Article 40, a party may still petition the court to set aside the arbitral award.[28]

13.9 Qualifications of Arbitrators

By law, an arbitrator shall be a natural person who possesses legal or other professional knowledge or experience.[29] In addition, to act as an arbitrator, a person must have a reputation for integrity and impartiality and also possess any of the following qualifications:

(1) Serve as a judge or a prosecutor;
(2) Practice as a lawyer, accountant, architect, and mechanic or in any other commerce-related profession for more than five years;
(3) Act as an arbitrator of a domestic or foreign arbitral institution;
(4) Teach as an assistant professor or higher position in a domestic or foreign college certified or recognized by the Ministry of Education; and,
(5) Specialize in a particular field or profession and has practiced for more than five years.[30]

Any person with the qualifications stated above shall receive training and obtain a certificate before applying to an arbitral institution for being registered as an arbitrator.[31] Compared with items (3) and (4), there is no wording as "domestic or foreign" in item (1) and (2), which may be inferred that a foreign judge, prosecutor, lawyer, accountant, architect, mechanic, etc are not allowed to serve as an arbitration in Taiwan. In fact, there had been foreign lawyers registered as arbitrators with the Arbitration Association of the R.O.C.. In view of the globalization of business, foreign arbitrators should be considered as fulfilling the above criteria.[32]

13.10 Arbitrator's Independence and Impartiality

The independence and impartiality of arbitrators are the foundation of arbitration. The Arbitration Law takes several measures to assure that disputing parties have a just arbitration:

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28 *See* YANG,CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 167.
29 *See* Arbitration Law of R.O.C. Article 5, Paragraph 1.
30 *See* Arbitration Law of R.O.C. Article 6.
31 However, according to Arbitration Law of R.O.C. Article 8, those who meet both mentioned qualifications and any of the following criterions would be allowed to apply with an arbitration institution for being registered as an arbitrator exempted from training: 1. Having served practically as a judge or prosecutor; 2. Having practiced as a lawyer for more than three 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 years, or as an associate professor for three years, while teaching the major legal courses for more than three 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.
32 *See* YANG,CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 136 note 4. *See also* UNCITRAL Model Law Article 11 (1).

(1) **Duty of disclosure:** An arbitrator involved in any of the following circumstances shall disclose the details to the parties:[33] (a) the existence of any cause that would require judges to reject themselves from a judicial proceeding in accordance with Article 32 of the Code of Civil Procedure;[34] (b) an employment or agency relationship now or in the past between the arbitrator and a party; (c) an employment or agency relationship now or in the past between the arbitrator and an agent of a party or between the arbitrator and a key witness; and (d) the existence of any other circumstances which raise any justifiable doubts as to the impartiality or independence of the arbitrator.

(2) **Withdrawal of an arbitrator:** A party may apply for withdrawing an arbitrator, if the arbitrator does not meet the qualifications agreed by the parties, or if any of the aforementioned circumstances regarding disclosure obligations exist. However, a party shall not apply to withdraw an arbitrator whom it appointed unless the cause for the withdrawal arose or is known after the appointment[35] has been made. In the Arbitration Law, violations of disclosure obligations are causes for withdrawal. By contrast, the UNCITRAL Model Law uses "circumstances 'likely to' give rise to justifiable doubts as his independence and impartiality" as disclosure factor while uses "circumstances exist that give rise to justifiable doubts as his independence and impartiality" as withdrawal factor. It appears that the Arbitration Law has a wider range of causes for withdrawal.

(3) **Revocation of an arbitral award:** Unlike the duty of disclosure and the withdrawal of an arbitrator which protect the independence and impartiality before an arbitral award is made, the revocation of an arbitral award is a remedy for unjust arbitration.

13.11 Does the Taiwanese arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Arbitration Law Article 19 indicates that the parties can themselves determine the procedural rules governing the arbitration. Judicial guidance is required only if the parties' agreement is invalid or there is no agreement. Under Article 19, the arbitral tribunal shall conduct the arbitration pursuant to the Arbitration Law. If the Arbitration Law is silent, the arbitral tribunal can follow the procedural rules stipulated in the Code of Civil Procedure or other rules it deems proper. The respect for disputing parties' autonomy on procedural arrangements can also be seen in many other stipulations in the Arbitral Proceedings Chapter of the Arbitration Law. For instance:

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33 *See* Arbitration Law of R.O.C. Article 15, Paragraph 2.

34 Code of Civil Procedure of R.O.C. Article 32 : "Any judge shall voluntarily disqualify himself/herself in the following circumstances: 1.When the judge, or the judge's spouse, former spouse, or fiancée is a party to the proceeding; 2.When the judge is or was either a blood relative within the eighth degree or a relative by marriage within the fifth degree, to a party to the proceeding; 3.When the judge, or the judge's spouse, former spouse, or fiancée is a co-obligee, co-obligor with, or an indemnitor to, a party to the proceeding; 4.When the judge is or was the statutory agent of a party to the proceeding, or the head or member of the party's household; 5.When the judge is acting or did act as the advocate or assistant of a party to the proceeding; 6.When the judge is likely to be a witness or expert witness in the proceeding; 7.When the judge participated in making either the prior court decision or the arbitration award regarding the same dispute in the proceeding."

35 *See* Arbitration Law of R.O.C. Article 16.

(1) Article 18, Paragraph 2, on the commence date of the arbitral proceedings;
(2) Article 20, on the place of arbitration;
(3) Article 21, Paragraph 1: on the appointment of arbitrators;
(4) Article 23, Paragraph 2: on whether the proceeding shall be made public;
(5) Article 25, Paragraph 1: on the language used in the arbitral proceeding;
(6) Article 31: on whether the arbitral tribunal shall apply the rules of equity;
(7) Article 32, Paragraph 4: on the termination of arbitral proceedings;
(8) Article 33, Paragraph 2: on whether the relevant facts and reasons for the arbitral decision shall be recorded on the arbitral award; and
(9) Article 36: on whether to apply the Simplified Procedures prescribed in the Code of Civil Procedure to the arbitral proceedings.

Unless otherwise agreed upon by both parties, the arbitral proceedings for a dispute shall comply with the Arbitration Law.

Request for Arbitration: By law, one party shall provide the counter party with a written arbitration notification (specifying when the dispute is to be submitted to arbitration). The arbitral proceedings commence on the date specified on the written notice of arbitration received by the counter party.[36] In institutional arbitral practice, the applicant submits the written notice of arbitration and arbitrator appointment, as well as paying the arbitral fee,[37] to the arbitral institution. Then, the arbitral institution will send out the written notice to the counter party and ask the counter party to appoint its arbitrator. In practice, however, arbitration-requesting parties shall make the advance payment on costs which are regulated by *the Rules on Arbitration Institution, Mediation Procedures and Fees*. Aside from arbitral fee, parties also shall submit the following documents:

(a) The Request for Arbitration and a sufficient number of copies of the Request for each of the arbitrators and the parties against whom a claim is being made. The Request for Arbitration shall contain a statement of claim, including the names and addresses of the parties; the relief or remedy sought; the facts and reasons supporting it; the arbitral institution to administrate the arbitration; the date of the Request for Arbitration; the names and addresses of the legal representatives or the authorized

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36 *See* Arbitration Law of R.O.C. Article 18, Paragraph 1 and 2.

37 The Rules on Arbitration Institution, Mediation Procedures and Fees Article 25, Paragraph 1: "For arbitration regarding property disputes, in addition to the TWD600 net cost for the forms and information for application, the arbitral fee shall be progressively escalated according to the amount or price of the subject matter pursuant to the following standard: 1. Where the amount or price of the subject matter is TWD60,000 or less, the arbitral fee shall be TWD3,000. 2. Where the amount or price of the subject matter is greater than TWD60,000 and up to TWD600,000, the arbitral fee for the amount exceeding TWD60,000 shall be 4%. 3. Where the amount or price of the subject matter is greater than TWD600,000 and up to TWD1,200,000, the arbitral fee for the amount exceeding TWD600,000 shall be 3%. 4. Where the amount or price of the subject matter is greater than TWD1,200,000 and up to TWD2,400,000, the arbitral fee for the amount exceeding TWD1,200,000 shall be 2%. 5. Where the amount or price of the subject matter is greater than TWD2,400,000 and up to TWD4,800,000, the arbitral fee for the amount exceeding TWD2,400,000 shall be 1.5%. 6. Where the amount or price of the subject matter is greater than TWD4,800,000 and up to TWD9,600,000, the arbitral fee for the amount exceeding TWD4,800,000 shall be 1%. 7. Where the amount or price of the subject matter is greater than TWD9,600,000, the arbitral fee for the amount exceeding TWD9,600,000 shall be 0.5%." And Article 26, Paragraph 1: "For arbitration regarding non-property disputes, the arbitral fee shall be TWD9,000."

representatives for the arbitration, if any; the subject–matter of the arbitration; and the amount involved.

(b) The arbitral agreement or the contract containing an arbitral clause.

(c) The Power of Attorney for the authorized representative in the arbitration, if any.

(d) The Statement of Confirmation for appointing an arbitrator, in cases that the appointment has been made. The Statement should include the names and addresses of the appointed arbitrator and the circumstances the said arbitrator should disclose.[38]

On the other hand, the respondent may make a counterclaim pursuant to the submission of arbitration. The arbitral tribunal may consolidate the arbitral proceedings related to the claim and the counterclaim. Unless otherwise agreed upon by the parties, a counterclaim shall not fall outside of the scope of the agreement to arbitrate. In addition, the arbitral tribunal may not allow a counterclaim if it considers the counterclaim to be an attempt by the defendant to delay the arbitral proceedings.[39] During the arbitral proceedings, a party may amend or supplement its submissions as to the relevant parties, the subject matter of the arbitration and the relief or remedies sought, if the other party consents, or if such alteration will not unreasonably prejudice the defense of the other party or terminate the arbitration. However, the aforementioned restrictions shall not apply before the Respondent receives a copy of the Request for Arbitration. In addition, unless otherwise agreed upon by the parties, the arbitral tribunal shall not allow such amendment or supplement if it would fall outside the scope of the agreement to arbitrate.[40]

Place of Arbitration: Drafted with a view to the Model Law on International Commercial Arbitration Article 20 Paragraph 1, unless otherwise agreed upon by both parties, the arbitral tribunal shall determine the place of arbitration as well as the time and date for the hearing and notify both parties thereof within ten days upon receipt of notice of the final arbitral appointment.[41] Under best practice, parties shall agree on the place of arbitration on an arbitral institution and take arbitral fees, arbitrators' qualification and legal environment into consideration.

Principle of Confidentiality: Unless otherwise agreed upon by the parties, the arbitral proceedings shall not be made public.[42] This is one of the most important characters of arbitration and very different from the litigation process, which shall open the proceeding to the general public unless the law specifies otherwise.[43] In addition, institutional arbitral practice[44] and Arbitration Law Article 15 which impose certain obligations on arbitrators both protect the confidentiality of arbitration.

Full Opportunity of Presentation and Comprehension: 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. However, either

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38 *See* CAA Arbitration Rules, Article 8 and 9.

39 *See* CAA Arbitration Rules, Article 15.

40 *See* CAA Arbitration Rules, Article 14.

41 *See* Arbitration Law of R.O.C. Article 20 and Article 21, Paragraph 1.

42 *See* Arbitration Law of R.O.C. Article 23, Paragraph 2.

43 *See* Court Organic Act of R.O.C. Article 86; exceptions include but not limited to Code of Civil Procedure of R.O.C. Article 195-1, Article 344 Paragraph 2, Article 350 Paragraph 2, Article 410 Paragraph 2, Article 574 Paragraph 4 and Article 600.

44 *See* CAA Arbitration Rules, Article 6.

party may appoint a representative in writing to appear before the arbitral tribunal to make statements for and on its behalf. If the arbitral tribunal fails to give a 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, a party may apply to a court to set aside the arbitral award. International parties 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 by 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.[45] In practice, the arbitral tribunal makes inquiries into submissions during the hearing, which shall be held in camera unless the parties agree otherwise. During the hearing, each party has the burden of submitting statements in support of the facts and legal arguments addressing the subject of the dispute, and has the burden of proving the facts by producing relevant evidence. In addition, each party shall submit arguments addressing the facts and evidence presented by the other party. The arbitral tribunal may, at the request of a party or on its own motion, order witnesses or experts to testify at the hearing. The arbitral tribunal orders the parties to submit arguments addressing the inquiries requested by a party, and the tribunal arranges for their submissions to be recorded, unless the tribunal considers it unnecessary. The arbitral tribunal also orders the parties to submit arguments addressing the outcome of the aforementioned inquiries and to arrange for their submissions to be recorded. Normally there would be only one hearing. When the arbitral tribunal is satisfied that no future submission or argument shall be made by the parties, an arbitral award shall be made, and the arbitral tribunal shall declare the hearing closed. However, after the closure of the hearing, the arbitral tribunal may notify the parties that the hearing will be reopened before the arbitral award is made, if the tribunal considers it necessary.[46]

13.12 What are the formalities for arbitral awards?

Time frame for rendering of the Arbitral Award: By law, 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.[47] In other words, the length of the statutory decision period would not exceed nine months. However, if the arbitral tribunal fails to produce a decision within nine months, both parties may agree to resume the arbitration instead of commencing an action or filing a motion to litigate. In order to prevent the parties that agreed to extend the decision period from going to court against the agreement, it is advised that the agreement shall be executed in written form before the arbitral tribunal.[48] If the arbitral tribunal fails to produce a decision within the deadline, either party may commence an action or file a motion to litigate. Once a disputant has commenced an action or filed a motion to litigate, the arbitral proceeding are deemed terminated thereafter.[49]

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45 *See* Arbitration Law of R.O.C., Article 23, Paragraph 1, Articles 24, 25, and 40, Paragraph 1, Item 3

46 *See* CAA Arbitration Rules, Article 23, 24, 25, 27, and 34

47 *See* Arbitration Law of R.O.C., Article 21, Paragraph 1

48 *See* YANG,CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 212

49 *See* Arbitration Law of R.O.C., Article 21, Paragraph 3

13.13 On what conditions can arbitral awards be appealed or rescinded?

According to Arbitration Law, Article 29, Paragraph 1 (modeled after the Model Law on International Commercial Arbitration, Article 4) a party who knows or may know that the arbitral proceedings have derogated from the provisions of the Arbitration Law, or has not complied with the requirements of the arbitral agreement, yet proceeds with the arbitration without objecting to such non-compliance, shall be deemed to have waived the right to object. In addition, any objection raised shall be considered by the arbitral tribunal. The decisions made with respect thereto shall not be subject to appeal and the assertion and consideration of an objection shall not suspend the arbitral proceedings.[50]

Rescission of Arbitral Awards: After an arbitral decision has been handed down, a party seeking voidance of the arbitral decision may, under specified circumstances, file suit against the other party. However, it is noteworthy that the revocation of arbitral awards shall be deemed a correction of an arbitral procedural flaw rather than an additional substantive investigation process. A party may apply to a court to set aside the arbitral award in any of the following circumstances:

(i) The existence of any circumstances stated in Arbitration Law Article 38.
(ii) The arbitral agreement is nullified, invalid, or has yet to come into effect, or has become invalid prior to the conclusion of the arbitral proceedings; a party to the arbitral agreement was under some incapacity; or the arbitral 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.[51]
(iii) 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.
(iv) The composition of the arbitral tribunal or the arbitral proceedings is contrary to the arbitral agreement or the law.
(v) An arbitrator fails to fulfill the duty of disclosure prescribed in Paragraph 2 of Article 15 of the Arbitration Law 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.
(vi) An arbitrator violates any duty in the entrusted arbitration and such violation carries criminal liability.
(vii) A party or any representative has committed a criminal offense in relation to the arbitration.
(viii) If any evidence or content of any translation upon which the arbitral award relies, has been forged or fraudulently altered or contains any other misrepresentations.
(xi) If a judgment of a criminal or civil matter, or an administrative ruling upon which the arbitral award relies, has been reversed or materially altered by a subsequent judgment or administrative ruling.

Items (vi) to (viii) above are limited to instances where a final conviction has been rendered, or the criminal proceedings may not be commenced, or continued for reasons

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50 *See* Arbitration Law of R.O.C., Article 29, Paragraph 2 and 3
51 *See* UNCITRAL Model Law, Article 34 (2) (a) (i)

other than insufficient evidence. Item (iv), concerning circumstances contravening the arbitral agreement, and items (v) to (xi), are limited to the extent that the circumstances in question are sufficient to affect the arbitral award.[52] However, a party filing such a suit may only cite procedural flaws in the arbitral process as grounds for action; a party may not file a lawsuit seeking voidance of the arbitral decision if its dispute has to do with factual matters, such as whether the reasons for the decision were correct, or whether the decision was contradictory.

Rescission Procedures: An application to revoke an arbitral award may be filed at the district court at the place of arbitration. The Arbitration Law adopted the wording "may" instead of "shall," which leaves room for parties' autonomy to choose other competent courts regulated by the Code of Civil Procedure of R.O.C.[53] 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 in the above-mentioned items 6 to 9 exists, and if sufficient evidence is offered to show that the failure of a party to apply to the court to revoke an award before the end of the limitation period does not arise from any fault on the part 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. However, the application to revoke an arbitral award shall be barred in any event after five years have elapsed from the date on which the arbitral award was issued.[54] It is noteworthy that the above-mentioned application period is statutory and not subject to parties' autonomy. In addition, the court may grant an application to stay the enforcement of the arbitral award once the applicant has paid an appropriate and specific security to the court. When setting aside an arbitral award, the court shall, under the same authority, simultaneously revoke any enforcement order which has been issued with respect to the arbitral award.[55] 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.[56]

13.14 When and under what conditions can courts intervene in arbitrations?

A court may assist with the following aspects of arbitral proceedings:

(1) **Investigation:** The arbitral tribunal, if necessary, may request assistance with the conduct of the arbitral proceedings from a court or other agencies. A court so requested may exercise its investigative powers in the same manner and to the same extent as permitted in a legal action.[57] In addition, the arbitral tribunal may summon witnesses or expert witnesses to appear for questioning. However, 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.[58]

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52 *See* Arbitration Law of R.O.C., Article 40
53 *See* YANG,CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 321
54 *See* Arbitration Law of R.O.C., Article 41
55 *See* Arbitration Law of R.O.C., Article 42
56 *See* Arbitration Law of R.O.C., Article 43
57 *See* Arbitration Law of R.O.C., Article 28
58 *See* Arbitration Law of R.O.C., Article 26

(2) **Replacement of an arbitrator:** an arbitrator appointed in an arbitral 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 arbitral institution or the court to appoint the replacement. Should any one of the circumstances mentioned occur with respect to an arbitrator(s), appointed by an arbitral institution or by the court, such arbitral institution or the court may appoint a replacement, or replacements, upon an application by any party or by its own volition.[59]

(3) **Record keeping:** a certified copy of an arbitral award, along with proof of delivery, shall be filed with a court registry at the place of arbitration for record-keeping.[60]

13.15 What are the formal requirements for arbitral awards?

(1) **Determination of the Arbitral Award***:* 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 shall be 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.[61] After notification, both parties may turn to other mechanisms for resolving the dispute.

(2) **Issuance of the Arbitral Award:** 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:

- Names and residence or domicile of the individual parties. For a party that is a corporate entity or another type of organization or institution, its name(s), administrative office(s), principal office(s) or business office(s) address;
- If any, names and domiciles or residences of the statutory agents or representatives of the parties;
- If any, names, nationalities and residences or domiciles of the interpreters;
- The main text of the decision, which shall include the arbitral decision on disputes submitted by parties, and the allocation of the arbitration fee[62];
- The relevant facts and reasons for the arbitral award, unless the parties have agreed that no reasons shall be stated. However, because the reasons for the arbitral award are crucial to the subsequent arbitral award enforcement and

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59 *See* Arbitration Law of R.O.C., Article 13, Paragraphs 1 and 4
60 *See* Arbitration Law of R.O.C., Article 34, Paragraph 2
61 *See* Arbitration Law of R.O.C., Article 32
62 *See* The Rules on Arbitration Institution, Mediation Procedures and Fees, Article 34, Paragraph 1

revocation, if any, it is advised to address relevant reasons in an arbitral award; and

- 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).[63] The arbitral tribunal shall deliver a certified copy of the arbitral award to each party. The certified copy of the arbitral award, along with proof of delivery, shall be filed with a court registry at the place of arbitration for the record.[64] In addition, 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.[65]

(3) **Binding force of arbitral awards:** The award shall be binding on the parties and have the same force as the final judgment of a court.[66] However, the award binds not only both parties but also the following persons with respect to the arbitration:

(i) Successors of the parties after the commencement of the arbitration, or those who have taken possession of the contested property of a party or its successors.

(ii) Any entity, on whose behalf a party enters into an arbitral proceeding; the successors of said entity after the commencement of arbitration; and, those who have taken possession of the contested property of the said entity or its successors.[67]

13.16 What procedures exist for enforcement of foreign and domestic arbitral awards?

As Taiwan is not a signatory to the New York Convention, Arbitration Law must govern the recognition and enforcement of foreign arbitral awards. A "foreign" arbitral award is an arbitral award which is issued outside the territory of Taiwan or issued pursuant to foreign laws within the territory of the Taiwan. A foreign arbitral award may be enforceable only after an application for recognition has been granted by the court.[68] A party filing motion with a court for recognition of a foreign arbitral decision must submit the following documents:

(i) The original arbitral award or an authenticated copy thereof;
(ii) The original arbitral agreement or an authenticated copy thereof;

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63 *See* Arbitration Law of R.O.C., Article 33
64 *See* Arbitration Law of R.O.C., Article 34
65 *See* Arbitration Law of R.O.C., Article 35
66 *See* Arbitration Law of R.O.C., Article 37, Paragraph 1
67 *See* Arbitration Law of R.O.C., Article 37, Paragraph 3
68 *See* Arbitration Law of R.O.C., Article 47

(iii) The full text of the foreign arbitration law and regulation, the rules of the foreign arbitral institution, or the rules of the international arbitral institution which applied to the foreign arbitral award.

If the above-mentioned documents are made in a foreign language, Chinese translations of the documents must also be submitted to the court. The word "authenticated" mentioned in items (i) and (ii) means the authentication made by the embassies, consulates, representative offices, liaison offices, or any other organizations authorized by the Taiwan government. Copies of the above-mentioned application shall be made, corresponding to the number of respondents, and submitted to the court which shall deliver those copies to the respondents.[69]

However, when an application is submitted by a party seeking recognition of a foreign arbitral decision, the court must issue a dismissal if such award contains one of the following elements:

(1) Where the content of the arbitral award is contrary to public order or good morals of Taiwan.
(2) Under the Taiwan laws, the matter in dispute cannot be arbitrated or settled through arbitration.

In addition, the court may also issue a dismissal order with respect to an application for recognition of a foreign arbitral award if the country where the arbitral award was made, or whose laws govern the arbitral award, does not recognize the arbitral awards of Taiwan.[70]

However, apart from the fact that the court can deny recognition of the foreign award, the respondent may also request the court to dismiss the application within twenty days from the date of receipt of the notice of the application, if the counter party applies to the court for recognition of a foreign arbitral award that concerns any of the following circumstances:

(1) The arbitral agreement is invalid as a result of a party's incapacity according to the law chosen by the parties to govern the arbitral agreement.
(2) The arbitral agreement is null and void according to the law chosen to govern said agreement or, in the absence of a law of choice, the law of the country where the arbitral award was made.
(3) A party is not given proper notice of the appointment of an arbitrator, or of any other matter required in the arbitral proceedings, or any other situations that give rise to lack of due process.
(4) The arbitral award is not relevant to the subject of the dispute covered by the arbitral agreement, or exceeds the scope of the arbitral agreement, unless the offending portion can be severed from and shall not affect the remainder of the arbitral award.
(5) The composition of the arbitral tribunal or the arbitral procedure contravenes the arbitral agreement or, in the absence of an arbitral agreement, the law of the place of the arbitration.

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69 *See* Arbitration Law of R.O.C., Article 48
70 *See* Arbitration Law of R.O.C., Article 49

(6) The arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.[71]

(1) **Enforcement Order Application and Exception:** An award may not be enforced unless a competent court has granted an enforcement order on the application of a concerned party. It is noteworthy that to convert the award into a judgment or court order does not involve a factual investigation.[72] However, the arbitral award may be enforced without an enforcement order if both parties so agreed in writing and the arbitral award concerns only the following:

(i) Payment of a specified sum of money or a certain amount of fungibles or valuable securities;
(ii) Delivery of a specified movable property.[73]

(2.) **Rejection of Enforcement Order Application:** With the exception of the circumstances discussed above, an enforcement order is necessary for the enforcement of the award. The court shall reject an application for enforcement where:

(i) The arbitral award concerns a dispute not contemplated by the terms of the arbitral agreement, or exceeds the scope of the arbitral agreement, unless the offending portion of the award may be severed and the severance will not affect the remainder of the award;
(ii) The reasons for the arbitral award were not stated, as required, unless the omission was corrected by the arbitral tribunal. It is noteworthy that the omission of the required reasons for the arbitral award is the only factor governing the rejection of an enforcement order application among other items which are required in the arbitral award; and
(iii) The arbitral award directs a party to act contrary to the law.[74]

13.17 Recognition and Enforcement of arbitral awards between China, Hong Kong and Taiwan

The legal frameworks of arbitral systems for the recognition and enforcement of foreign arbitral awards of China, Hong Kong, and Taiwan are either subject to or modeled on the New York Convention,[75] but with minor variations on implementation.

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71 *See* Arbitration Law of R.O.C., Article 50
72 *See also* Supreme Court Civil Ruling, Serial No. 87th Year, Tai Kang Tzu, No. 266
73 *See* Arbitration Law of R.O.C., Article 37, Paragraph 2
74 *See* Arbitration Law of R.O.C., Article 38
75 *See* Leyda, José Alejandro Carballo, A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan? Chinese Journal of International Law, Vol. 6, Issue 2, pp. 345-361, 2007. Available at SSRN: http://ssrn.com/abstract=1154962 or DOI: jmm021, at Paragraph 64

(1) **Between Taiwan and China:** An application for a ruling to recognize an arbitral award, civil ruling, or judgment, rendered in China, which is not contrary to the public order or good morals of Taiwan, may be filed with a court. An arbitral award of China may be enforceable after recognition has been granted by the court.[76] The word "may" used above does not compel a court in Taiwan to immediately recognize an award of China. Therefore, the Arbitration Law will still be applicable after notification of an application for recognition of an award of China, and the counter party should still be able to request the court to dismiss the application on the grounds listed in Article 50 of the Arbitration Law.[77]

However, in accordance with the same law, it shall not apply until any arbitral award rendered in Taiwan may be filed with a court in China and a ruling to recognize it or permit its enforceability in China is effected.[78] After the announcement on 16 May 1998 that the PRC Supreme People's Court had passed the "Regulation of the Supreme People's Court Regarding the People's Court Recognition of the Civil Judgments of Taiwan Courts," Taiwan restored its recognition of China's arbitral and judgment decisions. In other words, since 1998, both judicial bodies have recognized each other's judicial judgments and arbitral decisions.

Nevertheless, although Article 19 of the "Regulation of the PRC Supreme People's Court Regarding the People's Court Recognition of the Civil Judgments of Taiwan Courts" extends the applicability of the regulation to arbitral awards rendered in Taiwan, any application for the enforcement of a recognized Taiwan arbitral award must still be submitted to a competent intermediate court in accordance with the provisions of the Civil Procedure Law of China. At the same time, Article 4 of the "Regulation of the PRC Supreme People's Court Regarding the People's Court Recognition of the Civil Judgments of Taiwan Courts" requires that the judgments of Taiwan courts "shall not violate the One-China principle," and since the grounds for the mutual recognition and enforcement of arbitral awards are based on unilateral legislation, such recognition and enforcement will still depend on cross-strait politics.[79]

(2) **Between Taiwan and Hong Kong:** According to "Act Governing Relations with Hong Kong and Macau," Article 30 through Article 34 of the Commercial Arbitration Act, instead of Article 47 through Article 51 of the Arbitration Law, shall apply to the validity, petition for court recognition, and suspension of execution proceedings in cases involving civil arbitral awards made in Hong Kong or Macau.[80] However, since the earlier Commercial Arbitration Act had been amended into the then re-named Arbitration Law, it is obvious that the Arbitration Law shall be applicable under this regulation.

Before 1997, Taiwan awards were summarily enforceable in Hong Kong. However, China resumed its sovereignty over Hong Kong on 1 July 1997, which resulted in a legal vacuum in the enforcement of arbitral awards from China and Taiwan until

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76 *See* Act Governing Relations Between Peoples of the Taiwan Area and Mainland Area Article 74, Paragraph 1
77 *See* Leyda, José Alejandro Carballo, *supra* note 43, Paragraph 57
78 *See supra* note 44, Article 74, Paragraph 3
79 *See* Leyda, José Alejandro Carballo, *supra* note 43, Paragraphs 59 and 60
80 *See* Act Governing Relations with Hong Kong and Macau, Article 42, Paragraph 2

further amendments to the Arbitration Ordinance of Hong Kong took effect in 2000. These substantially restored the status quo ante.[81] Therefore, although the 1998 "Regulation of the PRC Supreme People's Court Regarding the People's Court Recognition of Civil Judgments of of Taiwan Courts" is not applicable for Hong Kong, Taiwan awards may still be enforced under the "universal" enforcement provision contained in the modified Section 2GG (2) of the Arbitration Ordinance of Hong Kong.[82]

13.18 Settlement Agreements

Parties to an arbitration dispute may explore settlement options to their dispute prior to the issuance of an arbitral award. If the parties reach a settlement before the conclusion of the arbitration, the arbitrator shall record the terms of settlement in a settlement agreement. A settlement agreement 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 for enforcement and issued an enforcement order. The provisions of Arbitration Law, Article 38 and Articles 40 to 43, shall apply mutatis mutandis to the settlement proceedings hereunder.[83]

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81 *See* Morgan, Robert, Enforcement of Chinese Arbitral Awards Complete Once More, but with a Difference. Available at SSRN: http://ssrn.com/abstract=925211, p. 2

82 *See* Leyda, José Alejandro Carballo, *supra* note 43, Paragraph 62

83 *See* Arbitration Law of R.O.C., Articles 44 and 46

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