



UNIVERSITY  
OF  
JOHANNESBURG

## COPYRIGHT AND CITATION CONSIDERATIONS FOR THIS THESIS/ DISSERTATION

 creative  
commons



- Attribution — You must give appropriate credit, provide a link to the license, and indicate if changes were made. You may do so in any reasonable manner, but not in any way that suggests the licensor endorses you or your use.
- NonCommercial — You may not use the material for commercial purposes.
- ShareAlike — If you remix, transform, or build upon the material, you must distribute your contributions under the same license as the original.

### How to cite this thesis

Surname, Initial(s). (2012) Title of the thesis or dissertation. PhD. (Chemistry)/ M.Sc. (Physics)/ M.A. (Philosophy)/M.Com. (Finance) etc. [Unpublished]: [University of Johannesburg](https://ujcontent.uj.ac.za/vital/access/manager/Index?site_name=Research%20Output). Retrieved from: [https://ujcontent.uj.ac.za/vital/access/manager/Index?site\\_name=Research%20Output](https://ujcontent.uj.ac.za/vital/access/manager/Index?site_name=Research%20Output) (Accessed: Date).

POLITICS AND THE RECOGNITION AND ENFORCEMENT OF  
FOREIGN JUDGMENTS AND ARBITRAL AWARDS — THE CASE OF TAIWAN

by

HSIN-SHAN (SHANN) LU

MINOR-DISSERTATION

Submitted in partial fulfilment  
of the requirements for the degree

MASTER OF LAWS

in

International Commercial Law

in the

FACULTY OF LAW

at the

UNIVERSITY OF JOHANNESBURG

UNIVERSITY  
OF  
JOHANNESBURG  
SUPERVISOR: ADV E A FREDERICKS

November 2015

CHAPTER 1		
	BACKGROUND OF TAIWAN IN RESPECT OF ITS AWKWARD POLITICAL POSITION IN THE WORLD	3
1.1	Introduction	3
1.2	China's views and influence	4
1.3	Taiwan's own views	6
1.4	World's views	8
CHAPTER 2		
	THE RECOGNITION AND ENFORCEMENT OF TAIWANESE JUDGEMENTS OR ARBITRAL AWARDS IN CHINA	11
2.1	PIL or municipal law	11
2.2	Cases	13
2.3	Conclusions	16
CHAPTER 3		
	THE RECOGNITION AND ENFORCEMENT OF TAIWANESE JUDGEMENTS OR ARBITRAL AWARDS IN OTHER COUNTRIES	18
3.1	The effect of the One China Policy	18
3.2	Cases	19
3.2.1	the USA	19
3.2.2	the UK	20
3.2.3	Japan	22
3.3	In summary	23
CHAPTER 4		
	THE RECOGNITION AND ENFORCEMENT OF CHINESE AND FOREIGN JUDGEMENTS OR ARBITRAL AWARDS IN TAIWAN	25
4.1	Application of laws	25
4.2	Chinese judgements in Taiwan	26
4.3	Foreign judgments in Taiwan	28
4.3.1	Jurisdictional issues	29
4.3.2	Interpretations of article 402(2) of the Code of Civil Procedure	30
4.3.3	Contrary to public policy or morals	30
4.3.4	Reciprocity	31
4.3.5	The rulings	31
4.4	Conclusions	32
CHAPTER 5		
	THE PROPOSAL — WILL THERE BE JUDICIAL CERTAINTY IN THE CASE OF TAIWAN?	34
5.1	Where is Taiwan headed politically?	34
5.2	The recognition and enforcement of Taiwanese judgments or arbitral awards in China as opposed to Chinese judgments in Taiwan	35
5.3	The recognition and enforcement of Taiwanese judgments in the rest of the world as opposed to foreign judgments in Taiwan	36
5.4	Conclusions	37

# POLITICS AND THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND ARBITRAL AWARDS — THE CASE OF TAIWAN

## CHAPTER 1 BACKGROUND OF TAIWAN IN RESPECT OF ITS AWKWARD POLITICAL POSITION IN THE WORLD

### 1.1 Introduction

Law is politics. This is certainly true when it comes to the consistent changing dynamics of China, Hong Kong and Taiwan. It has been 17 years since the famous and welcomed publication of “a boat on the trouble strait” by RC Chen.<sup>1</sup> This article discusses how Taiwan’s legal role in respect of PIL would be positioned subsequent to Hong Kong’s return to China when it is no longer a British colony. Would Taiwan be seen as a foreign state or a province of China in the Hong Kong court after Hong Kong’s sovereignty being handed over to China? And since then, Private International Law (PIL) from the Taiwanese perspective has been absent from the international arena for quite some time. The PIL forum has been focused on Chinese PIL<sup>2</sup> as it has quickly become an economic powerhouse. According to the 2015 Index of Economic Freedom, Taiwan reported a Gross Domestic Products of \$929.5 billion.<sup>3</sup> And on the Forbes’s Best Countries for Business list, Taiwan is placed at 6th place in respect of its foreign reserves.<sup>4</sup> Further, Taiwan is forecasted to be the 13<sup>th</sup> largest exporter and 12<sup>th</sup> largest importer worldwide by 2017.<sup>5</sup> In light of Taiwan’s international trade importance, it is advantageous to examine how Taiwan’s awkward international political position reflects on its application, recognition and enforcement in respect of foreign arbitral awards and judgements as well as relevant reciprocity with other countries.

---

<sup>1</sup> Chen “a boat on the trouble strait: the interregional private law of the Republic of China on Taiwan” 1998 *International Law Journal* 599 623

<sup>2</sup> During this research, the writer has been re-directed to PIL in respect of China rather than Taiwan. This includes journals and international treaties between China and other countries. It is submitted that this result may be contributed by the growing economic power and political presence in respect of China. Information regarding Taiwan in PIL is comparatively very difficult to locate as opposed to the ones relating to China.

<sup>3</sup> “The Heritage Foundation: 2015 Index of Economic Freedom” <http://www.heritage.org/index/country/taiwan>. (26-11-2015)

<sup>4</sup> “Forbes Best Countries for Business” <http://www.forbes.com/places/taiwan/> (26-11-2015)

<sup>5</sup> “ING International Trade Study Developments in global trade: from 1995 to 2017 – Taiwan” <https://www.ingcb.com/media/238299/taiwan.pdf> (26-11-2015)

Taiwan lost its seat at the United Nations (UN) in 1970 by the erstwhile ruling political party Koumintang<sup>6</sup> (KMT) to the Chinese Communist Party (CCP).<sup>7</sup> That loss involved giving away its seat at the UN Security Council. Further, the loss of the UN seat is the result of the KMT's insistence on declaring itself the sole legitimate government of China despite the fact that Taiwan was the only *de facto* territory under its control.<sup>8</sup> Since that withdrawal of the UN seat, Taiwan has not been able to return to the UN. And the number of countries that wished remaining diplomatically tied to Taiwan has since dwindled to 16<sup>9</sup> whereas China increased to over 172.<sup>10</sup>

The consequences of not being a Member State of the UN in the realm of PIL can be substantially adverse. It has also ultimately led to the loss of diplomatic ties with other countries. In this paper, the inference and effect of Taiwan's "non-state" status, particularly in regard to the recognition and enforcement of arbitral awards and judgments abroad, are examined. At the same time, it would also be worthwhile to investigate how foreign judgements (including those of China's) are recognised and enforced in Taiwan in consideration of its current global trading position. This paper further offers a proposal on how predictable judicial decisions may be sought in Taiwan for the future.

## 1.2 *China's views and influence*

The names Taiwan ("the Republic of China") versus China ("the People's Republic of China") are confusing to differentiate for people who have not considered Chinese politics or history. Taiwan is an island east of China and is separated by the Taiwan Strait. China regards Taiwan as a renegade

---

<sup>6</sup> Also known as the Nationalist Party. The KMT describes itself as "The Kuomintang (KMT) ...the establishment of the Republic of China (ROC) as a free, democratic, prosperous and dignified modern nation...the conflict with the Chinese Communist party (CCP) and Japanese aggression during the latter stages of the first half of the last century; and the continuing struggle to break the CCP's long term military confrontation..." See the KMT's official website at <http://www1.kmt.org.tw/english/page.aspx?type=para&mnum=105> (28-11-2015)

<sup>7</sup> Refer to United Nations General Assembly Resolution 1668 dated 12 December 1961 entitled "Representation of China in the United Nations", therein states "..., Decides, in accordance with Article 18 of the Charter of the United Nations, that any proposal to change the representation of China is an important question." Read together with the United Nations General Assembly Resolution 2758 dated 25 October 1971 entitled "Restoration of the lawful rights of the People's Republic of China in the United Nations", therein states "Decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it."

<sup>8</sup> Territorially, Taiwan was under the control of the KMT whereas China (mainland) was under the control of the Communists. Also see n 7 above.

<sup>9</sup> "The Ministry of Foreign Affairs of the Republic of China" <http://www.mofa.gov.tw/AlliesIndex.aspx?n=0757912EB2F1C601@sms=26470E539B6FA395> (27-07-2015)

<sup>10</sup> "The Ministry of Foreign Affairs of the People's Republic of China" [http://www.fmprc.gov.cn/web/ziliao\\_674904/2193\\_674977/](http://www.fmprc.gov.cn/web/ziliao_674904/2193_674977/) (26-11-2015)

province, therefore technically “a province of China” in the eyes of the Chinese Government.<sup>11</sup> The Chinese Government further emphasises that the “question” of Taiwan is the “product” of China’s civil war of the late 1940s and consequently categorised as “internal affair” which is not subject to any external interference.<sup>12</sup> The Anti-Secession Law was promulgated in order to ensure that the people of China, Hong Kong, Macao and Taiwan uphold the idea of One China Policy.<sup>13</sup> Further, although Taiwan enjoys a higher degree of autonomy, it is destined to reunite with the “motherland” eventually.<sup>14</sup>

It is clear that China has grown in stature over the last two decades. Being the most populous country in the world,<sup>15</sup> it is politically and economically beneficial that every country would like to share in this market that offers huge domestic consumption potential<sup>16</sup> and massive talent pool as well as workforce.<sup>17</sup> With years of securing the position as the world factory,<sup>18</sup> China has gathered immense reserve of foreign currency,<sup>19</sup> skills and talents<sup>20</sup> which enables it to carry its foreign aids and investments outside the borders as well as establishing diplomatic ties with the majority of the countries in the world. Accordingly, Taiwan’s stance in respect of asserting its political position<sup>21</sup> has become increasingly compromised and ignored.

- 
- <sup>11</sup> Roberg and Lee “China-Taiwan Relations” 2009 *Council on Foreign Relations* “After losing the civil war to Communist Chinese and fleeing to Taiwan in 1949, the nationalist Kuomintang (KMT) leaders of the Republic of China regarded the Communist Chinese government as illegitimate, claiming the mainland as rightfully their own. Beijing, in turn, regards Taiwan as a renegade province, and has tried repeatedly to persuade the island to negotiate a return to the fold.” This article is an e-publication can be viewed at <http://www.cfr.org/china/china-taiwan-relations/p9223>, therefore no page number can be provided for this reference. (28-11-2015)
- <sup>12</sup> article 3 of Anti-Secession Law of 2005
- <sup>13</sup> Xinhua News (17-11-2012) [http://news.xinhuanet.com/english/special/18cpnc/2012-11/17/c\\_131981259\\_11.htm](http://news.xinhuanet.com/english/special/18cpnc/2012-11/17/c_131981259_11.htm) (28-11-2015)
- <sup>14</sup> article 4 of Anti-Secession Law of 2005
- <sup>15</sup> “National Bureau of Statistics of The People’s Republic of China” [http://www.stats.gov.cn/tjsj/zxfb/201502/t20150226\\_685799.html](http://www.stats.gov.cn/tjsj/zxfb/201502/t20150226_685799.html) (28-11-2015) As at 26 February 2015, China reported a total population close to 1.37 billion (136 782 000) excluding the population in Hong Kong, Macao and Taiwan.
- <sup>16</sup> See n 15 above, China reported a GDP of 63 646.3 billion yuan (Chinese Yuan). Further, according to the data published by the World Bank <http://data.worldbank.org/country/united-states> (28-11-2015), the United States of America recorded a GDP of \$17.42 trillion in 2014 as opposed to China’s GDP of \$10.36 trillion. <http://data.worldbank.org/country/china> (28-11-2015)
- <sup>17</sup> See n 15 above, statistics show that between 2010 and 2014, China recorded a total of 184.8 thousand postgraduate students, 2 547.7 thousand bachelor students and 1 802.9 thousand high school students. Further, the working labour force was standing at 77 253 thousand and China posted a 4.09% unemployment rate in 2014.
- <sup>18</sup> Gao “China as the workshop of the world: an analysis at the national and industry level of China in the international division of labor” 2014 *The China Journal* 212 212. “In the 12 years since its admission to the World Trade Organization, China has often been described as the ‘workshop of the world’ or, alternatively, as the ‘factory of the world’.”
- <sup>19</sup> See n 15 above, China posted a national foreign currency reserve of \$3 843 billion in 2014.
- <sup>20</sup> See statistics provided in n 17 above.
- <sup>21</sup> That Taiwan (“the Republic of China”) is the legitimate government of China (mainland). See n 11 above.

### 1.3 Taiwan's own views

As the preceding paragraphs have indicated, it is prudent and valuable to start this discussion by looking at how the Taiwanese government and its people identify themselves. The government published its interpretation and presentation of how Taiwan should be viewed.<sup>22</sup> Accordingly, Taiwan (“the Republic of China”) is a country that enjoys multiparty political democracy (and freedom) and upholds freedom of trade, press, health care and human rights. This is contrary to what China has purported Taiwan to be (specifically the part relating to political freedom).<sup>23</sup> The majority of the people of Taiwan share the same view as the government — that Taiwan is distinctively different from China.<sup>24</sup> However, the conflicted interpretations between Taiwan and China in relation to Taiwan’s *status quo*<sup>25</sup> beg constant debates in respect of its future political position. There are two extremist groups, namely the pro-reunification with China group and pro-independence of Taiwan group. The former leans toward the expression of steadily stepping for reunification and the latter argues that the ultimate goal should be having Taiwan recognised as a separate state from China. The majority of the Taiwanese are however neutral on the issue as neither extremities appears possible in the very near future.<sup>26</sup>

The present opposition political party Democratic Progressive Party (DPP)<sup>27</sup> is gaining momentum for the 2016 election in respect of increasing its seats at the legislature and the ultimate win at the

---

<sup>22</sup> “Taiwan Info” is an official government website that is hosted and maintained by the Ministry of Foreign Affairs, Republic of China (Taiwan) “ <http://www.taiwan.gov.tw/ct.asp?xItem=140079&CtNode=3812&mp=1> (28-11-2015) “Taiwan, officially the Republic of China,... After material law was lifted in 1987, the country marked on a path of political democratisation and economic liberalisation...Today, Taiwan enjoys one of the highest standards of living in Asia and ranks among the top in terms of economic liberalisation, freedom of the press, health care, human rights and political freedom.”

<sup>23</sup> See n 11 - n 14 above.

<sup>24</sup> “Election Study Centre N.C.C.U. Important political attitude trend distribution” <http://esc.nccu.edu.tw/app/news.php?Sn=166>. (28-07-2015) N.C.C.U stands for National Chengchi University who conducts surveys on an annual basis in respect of Taiwanese political inclination through a particular methodology. In terms of this survey that was conducted in June 2015, 3.3% of the sample population identify themselves as Chinese; 33.7% would refer to themselves as both Chinese and Taiwanese; and 59% call themselves Taiwanese.

<sup>25</sup> Compare n 11 - n 14 with n 22 and n 24 above.

<sup>26</sup> Taipei Times (31-11-2013) <http://www.taipetimes.com/News/front/archives/2013/10/31/2003575806> (28-11-2015) “Asked about their (Taiwanese) position on cross-relations, 66 percent of respondents supported the ‘*status quo*’, 24 percent wanted independence and 7 percent supported unification with China.” Further, there have not been discussions or negotiations between China and Taiwan having the effect of reaching a consensus of reunification or separation given light to the leaders of both parties met for the very first time on 7 November 2015 in Singapore after 66 years. See announcement published by Ministry of Foreign Affairs, Republic of China (Taiwan) [http://www.mofa.gov.tw/News\\_Content.aspx?n=BD3B450373053909&s=0E6F56A76C6CFF64](http://www.mofa.gov.tw/News_Content.aspx?n=BD3B450373053909&s=0E6F56A76C6CFF64) (28-11-2015).

<sup>27</sup> As opposed to the KMT, the DPP identifies itself as “We’re the party of democracy, freedom, human rights, and a strong Taiwanese identity...From our role in toppling the KMT’s one-party dictatorship to our continued fight for the freedom of speech, assembly and the press...as well as after centuries of foreign rule, a Taiwan-centric identity.” <http://english.dpp.org.tw/about-the-dpp/> (28-11-2015)

presidency. This party appears to be the frontrunner of the presidency.<sup>28</sup> It has at this stage positioned itself well<sup>29</sup> and appealed to the people of Taiwan with emphasis on its proclamation that while maintaining a political *status quo*, the future of Taiwan (in the event that it should change) must be decided by its 23 million citizens (and no one else).<sup>30</sup> The aforesaid stance was a carefully calculated move<sup>31</sup> that evolved from former President, Shui-bian Chen's<sup>32</sup> rejection of One China Policy<sup>33</sup> to current President, Yin-jeou Ma's<sup>34</sup> 1992 consensus.<sup>35</sup> In light of the aforesaid different approaches in respect of Taiwan-China relations by the DPP and KMT,<sup>36</sup> whether China's policy turns hostile toward Taiwan in the event that the DPP wins the presidential election again still remains to be seen after 16 January 2016.<sup>37</sup>

---

<sup>28</sup> "Taiwan Indicators Survey Research" <http://www.tisr.com.tw> (only Chinese text available) (28-07-2015)

<sup>29</sup> The DPP traditionally has had a Taiwan-centric identity that projects an impression of pro-Taiwan independence. And indeed, the DPP charter includes therein the independence clause as well as the party's historic refusal to succumb to Beijing's One China Policy. Referring to Wei "China's anti-secession law and Hu Jintao's Taiwan policy" 2010 *Yale Journal of International Affairs* 112 112, "... When Taiwan's independence forces induce a crisis, China's leaders are forced to act harshly... China's top leader is charged with four key tasks: ..., overseeing the military and dealing with issues related to Taiwan." This entails that when the DPP proclaims a strong attitude of pro-Taiwan independence, China's leaders might consider military attacks on Taiwan which causes fear in the people of Taiwan. (See Washington Post (15-01-2008) <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/15/AR2008011501347.html> "... the official China Daily newspaper quoted a Chinese military official saying, 'Taiwan choosing independence is tantamount to choosing war..."). That fear has cost two losses (apart from other factors) of presidency by the DPP to the KMT respectively in 2008 and 2012. The Presidential candidate of the DPP, Ing-wen Tsai has made an effort to reassure Beijing and Washington that the current *status quo* will be maintained (namely no reunification or independence will be considered). See the speech given by Tsai at the session with Taiwan Foreign Correspondents Club on 01 July 2015 at the DPP Headquarters - <http://english.dpp.org.tw/chair-tsai-ing-wen-our-role-in-maintaining-regional-stability/> (28-11-2015).

<sup>30</sup> This proclamation is an effort to rebut China's statement on 11 June 2014 that "the future of Taiwan must be decided by all Chinese people" as opposed to the DPP's statement "the future of Taiwan must be decided by its 23 million citizens (meaning the citizens of Taiwan only to the exclusion of other 'Chinese people')". China's statement can be viewed at China Times (11-06-2014) <http://www.chinatimes.com/realtimenews/20140611002789-260409> (28-11-2015).

<sup>31</sup> See n 26 above.

<sup>32</sup> Mr Shui-bian Chen, the presidential candidate for the DPP was elected the President of Taiwan ("the Republic of China") on 18 March 2000 marking the first victory in Taiwan's history for the DPP and effectively ending its opposition party position.

<sup>33</sup> Wang "the Chen Shui-bian administrations mainland policy: toward a modus vivid or continued stalemate?" 2002 *American Asian Review* 20, no. 3 91 91 "Although Chen has accelerated his political maturation, his China policy continues to be constrained by various factors... led Chen to move toward to a hardened position, such as his Taiwan and China, each side is a country across the Taiwan Strait formula in August 2002".

<sup>34</sup> Mr Yin-jeou Ma defeated the erstwhile ruling party DPP and regained control of the Office of the President in 2008 for the KMT. Mr Ma won the subsequent presidential election in 2012 and secured a further 4-year-term of the Office.

<sup>35</sup> President Yin-jeou Ma's speech published by the Office of the President, Republic of China (Taiwan) can be viewed at <http://www.president.gov.tw/Default.aspx?tabid=1103&itemid=34635> (28-11-2015) wherein explains that 1992 consensus means "one China, respective interpretations". This is a concept formulated in 1992 during the negotiation between the two semi-official organisations namely, Taiwan's Straits Exchange Foundation and China's Association for Relations Across the Taiwan Straits. This consensus and its purported meaning provide ambiguity for the One China Policy whereas both the People's Republic of China and the Republic of China are given room to claim respectively as the sole legitimate government of "China" even though it is not reasonable or particularly meaningful in the sense of public international law.

<sup>36</sup> Compare n 33 and n 35 above.

<sup>37</sup> 16 January 2015 is Taiwan's election day in respect of the 14th presidency and the 9th legislature seats, both serving a four-year-term. "Central Election Commission" <http://www.cec.gov.tw/bin/home.php> (29-11-2015)



#### 1.4 World's views

How does the world view Taiwan then? The United States of America promulgated the Taiwan Relations Act<sup>38</sup> (TRA) which came into force on 1 January 1979. The main purpose of the TRA is to ensure that peace, security and stability are maintained in the Western Pacific area.<sup>39</sup> Further, despite the termination of American diplomatic relations with Taiwan, the TRA allows the continuum of commercial and cultural exchanges between the USA and Taiwan as well as mainland China.<sup>40</sup> The USA intends on playing a peace keeping role in the aforesaid area but is ironically also entitled to sell firearms to Taiwan and provide military services for the purpose of the latter's defense force.<sup>41</sup> Finally, section 4 of the TRA clarifies the position concerning the application of laws between the USA and Taiwan. Section 4(2)1 of the TRA clearly sets out: "Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with such respect to Taiwan." This provision does not affirm Taiwan's political status but simply clarifies that, though Taiwan is not recognised as a state, the USA regards Taiwan as a legal entity (not a country) for the purposes of American applying international law.

Unlike the USA, Japan did not enact laws to govern its relationship with Taiwan. It must be noted that a prior colonial relationship existed between Japan and Taiwan from 1895 to 1945.<sup>42</sup> Thereafter, diplomatic ties between Japan and Taiwan were established in 1953<sup>43</sup> but then severed in 1972

---

<sup>38</sup> the Taiwan Relations Act of 1979 (the TRA)

<sup>39</sup> preamble of the TRA

<sup>40</sup> section 2(2)1 of the TRA

<sup>41</sup> section 2(2)5 and s 3 of the TRA

<sup>42</sup> When China was defeated by Japan in 1895 ending the first Sino-Japanese War, the Treaty of Shimonoseki was entered into between the two states. A 2(b) of the Treaty states, "China cedes to Japan in perpetuity and full sovereignty the following territories,..(b) the island of Formosa, together with all islands appertaining or belonging to the said island of Formosa." The entire Treaty of Shimonoseki can be viewed at <http://www.taiwandocuments.org/shimonoseki01.htm> (29-11-2015). The island of "Formosa" is a name given to now known as Taiwan by the Portuguese in 1542. According to Taiwan's National Palace Museum, the "Origin of Taiwan" article". This article can be viewed at <http://www.npm.gov.tw/exhibition/formosa/english/02.htm> (29-11-2015). Subsequent to the signing of the Treaty of Shimonoseki, Japan exercised sovereignty over Taiwan (Formosa) until 1945. The colonial relationship ended as a result of Japan's loss at the World War II wherefor the ROC-Japan Peace Treaty was entered into in order to "settle the post-war relationship between the two sides." Information can be found on the Ministry of Foreign Affairs, Republic of China (Taiwan) website. <http://www.mofa.gov.tw/en/cp.aspx?n=32DA7197FA3FD5D7> (29-11-2015)

<sup>43</sup> The ROC-Japan Peace Treaty was signed on 28 April 1952 and entered into force on 5 August 1952. <http://www.mofa.gov.tw/en/cp.aspx?n=32DA7197FA3FD5D7> (29-11-2015)

when the China-Japan Joint Statement of 1972 was proclaimed.<sup>44</sup> The same day Japan established diplomatic relationships with China, the relationship to Taiwan fell away.<sup>45</sup> There were three further documents signed by China and Japan, namely the China-Japan Treaty of Peace and Friendship,<sup>46</sup> the China-Japan Joint Declaration<sup>47</sup> and a joint statement on advancing relations in 2008.<sup>48</sup> The common denominators for all four documents are peaceful co-existence, mutual respect, mutual beneficial cultural and economic exchange as well as long-term friendship. As Taiwan is geographically situated between China and Japan, it is in China's interests to secure friendly relations with Japan not only for the stability of the region but also to ensure that Taiwan remains isolated.<sup>49</sup> There are however proposals proffered by Japanese lawmakers to promulgate laws similar to that of the USA's the TRA.<sup>50</sup> This could be seen as a sign of Japan's attempt to normalise or better define the Japan-Taiwan relationship.



- 
- <sup>44</sup> In “the Resumption of Sino-Japanese Diplomatic Relations” announcement published on the Ministry of Foreign Affairs of the People’s Republic of China website, “On September 29, heads of the two governments signed the ‘Joint Statement of the Government of the People’s Republic of China and the Government of Japan’ which states that, as on the date of publication of this statement, the abnormal state of affairs between the two countries, which has hitherto existed, is declared terminated., the Japanese Government acknowledges the government of the People’s Republic of China as the sole legal government of China;” [http://www.fmprc.gov.cn/mfa\\_eng/ziliao\\_665539/3602\\_665543/3604\\_665547/t18010.shtml](http://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18010.shtml). No publish date shown on the website (29-11-2015)
- <sup>45</sup> Further on n 44 above, “...the government of the PRC reaffirms that Taiwan is an inalienable part of the territory of the People’s Republic of China. The Japanese Government fully understands and respects this stand of the Chinese Government...” Also see n 49 below.
- <sup>46</sup> The Treaty of Peace and Friendship between Japan and the People’s Republic of China was signed at Beijing on 12 August 1978 and entered into force on 23 October 1978 by the exchange of the instruments of ratification at Tokyo. <http://www.taiwandocuments.org/beijing.htm> (29-11-2015)
- <sup>47</sup> “The Japan-China Joint Declaration on Building a Partnership of Friendship and Cooperation for Peace and Development “was announced during the official visit to Japan between 25 to 30 November 1998 by the President Jiang Zemin of the People’s Republic of China. <http://www.mofa.go.jp/region/asia-paci/china/visit98/joint.html> (29-11-2015)
- <sup>48</sup> “The Joint Statement between the Government of Japan and the Government of the People’s Republic of China on Comprehensive promotion of a ‘Mutually Beneficial Relationship Based on Common Strategic Interests”” was announced during the official visit to Japan between 6 to 10 May 2008 by President Hu Jintao of the People’s Republic of China. <http://www.mofa.go.jp/region/asia-paci/china/joint0805.html> (29-11-2015)
- <sup>49</sup> Further on n 44 above, “The rise of China’s international status generated great impact on Japan, and demand for resumption of diplomatic ties between Japan and China by all the political parties in Japan...Under these circumstances, China put forth three principles for the resumption of diplomatic ties with Japan, that is 1. There is only one China in the world, i.e. the People’s Republic of China. The Government of the People’s Republic of China is the sole and legal government representing the Chinese people. Any absurd fallacy advocating two Chinas, one China, one Taiwan or one China, two governments will be firmly opposed. 2. Taiwan is an inalienable part of the territory of the People’s Republic of China, and it has already been returned to China. The Taiwan question is a purely China’s internal affair and brooks no external interference. The Chinese Government is resolutely opposed to the theory that the status of Taiwan remains to be determined and any conspiracy for Taiwan’s independence will be firmly opposed. 3. The Taiwan-Japan Treaty is illegal and invalid and must be abrogated.”
- <sup>50</sup> Kyodo News International (29-02-2014), “A group of around 70 lawmakers., is aiming to institute a law that would serve as a basis for strengthening economic relations and personal exchanges with Taiwan, which does not have diplomatic relationship with Japan. The law is tentatively called the Japanese version of the Taiwan Relations Act, a U.S. law based on which Washington has been exporting weapons to protect Taiwan from China’s military threat.” (29-11-2015)

The European Union (the EU) follows the One China Policy and therefore recognises the Government of the People’s Republic of China as the only legal representative of China.<sup>51</sup> Bilateral exchange between the EU and Taiwan is, however, highly encouraged as they are important trading partners.<sup>52</sup> Henceforth, the EU regards Taiwan as an economic and commercial entity and supports its participation in international organisations where statehood is not required.<sup>53</sup> The viewpoint of the EU epitomises Taiwan’s awkward position where it is not recognised as a state, however, it is regarded as an entity that is separated from China economically and commercially.<sup>54</sup> Accordingly, politics would then prevent Taiwan from joining international treaties and organisations such as the New York Convention<sup>55</sup> or World Health Organisation (WHO).<sup>56</sup> The effect of such political quarantine can be grave for Taiwan in many respects which will be investigated and discussed in the following chapters.



---

<sup>51</sup> Published on “European Union External Action” website. [http://eeas.europa.eu/taiwan/index\\_en.htm](http://eeas.europa.eu/taiwan/index_en.htm) (29-11-2015)

<sup>52</sup> Further on n 51 above.

<sup>53</sup> Further on n 51 above.

<sup>54</sup> See n 51 - n 53 above.

<sup>55</sup> Taiwan is ineligible for membership to the New York Convention as it is not a Member State of the United Nations. <http://en.arbitration.org.tw/FAQ.htm> (29-11-2015) The reasons why Taiwan is not a Member State of the UN are provided for in n 7 above and par 2 ch 1.1 of this paper.

<sup>56</sup> Published on the “World Health Organisation” website, “All countries which are Members of the United Nations may become members of WHO by accepting its Constitution.” <http://www.who.int/countries/en/> (29-11-2015). The reasons why Taiwan is not a Member State of the UN are provided for in n 7 above and par 2 ch 1.1 of this paper.

CHAPTER 2  
THE RECOGNITION AND ENFORCEMENT OF  
TAIWANESE JUDGEMENTS OR ARBITRAL AWARDS IN CHINA

2.1 *PIL or municipal law*

The One China Policy invariably directs that China regards Taiwan as a province of China.<sup>57</sup> But how does that political stance filter through China's judicial system? China's Judicial Committee of the Supreme People's Court deliberated and adopted "the Opinions"<sup>58</sup> in 1988 in order to interpret specific matters where its General Principle of Civil Law requires such assistance. Chapter 7 of the Opinions<sup>59</sup> entitled "Application of Law to Foreign Civil Relationships" defines how choice of law should function relating to parties' foreign status. The status of Taiwan or Taiwanese in particular is understandably not set out in the aforesaid chapter since Taiwan is deemed a part of China.<sup>60</sup> It is however worthy of further addressing the inconsistent definitions in respect of the "question" of Taiwan and Taiwanese<sup>61</sup> through the lens of the following judicial decisions in China.

The crux of the matter is that even though Taiwan is a "non-state", it is not under the *de facto* control of China in spite of China's several proclamations.<sup>62</sup> The poignant question herein is then, can one expect Taiwanese judgements or arbitral awards that were rendered in Taiwan to be interpreted, recognised and enforced in accordance with China's municipal laws?

In order to provide pertinent answer to the aforesaid question, a further question posed would be "are Taiwanese also Chinese citizens" within the ambit of China's laws?<sup>63</sup> The Constitution of the People's Republic of China (China's Constitution) does not favour the word "citizenship" to de-

---

<sup>57</sup> See n 7 & n 12 - n 14 above.

<sup>58</sup> the Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation) of 1988 (最高人民法院關於審理中國人民共和國（民法通則的實施試行若干問題的意見）

It is invalidated in respect of the real rights. "The Opinions" was deliberated and adopted at the Judicial Committee of the Supreme People's Court on 26 January 1988 for the purpose of putting forward opinions on the issues encountered in the implementation of the General Principle of the Civil Law of the People's Republic of China which came into force on 1 January 1987.

<sup>59</sup> 七、涉外民事關係的法律適用

<sup>60</sup> See n 7 & n 12 - n 14 above.

<sup>61</sup> See n 12 - n 14 above.

<sup>62</sup> Compare n 22 & n 37 above with n 44, n 45 & n 49 above. Specifically n 37 above indicating Taiwan's forthcoming presidential election that is exclusively afforded to the citizens of Taiwan ("the Republic of China") by the virtue of the Republic of China constitution. This election is clearly conducted free from the interference of the government of the People's Republic of China.

<sup>63</sup> The definition of "citizen" is not offered in either the Opinions or the General Principle of Civil Law of the People's Republic of China.

scribe the people of China in the preamble. “Nationality” or “national” in a collective sense are preferred in order to afford a blanket recognition of Chinese citizenship to all Chinese people.<sup>64</sup> Thus, citizenship is defined in article 33 of China’s Constitution: “All persons holding the nationality of the People’s Republic of China are citizens of the People’s Republic of China.” As it is further asserted in the preamble of China’s Constitution, it can be safe to assume that China intends to include the people of Taiwan as the citizens of China.<sup>65</sup> Then, how has this status been implemented in the judicial decisions in respect of choice of law relating to cases involving Taiwanese element?

There were a total of 30 cases that involved with Taiwanese element before Chinese courts between 2002 and 2006.<sup>66</sup> The choice of law in 11 of those cases were dependent upon party autonomy; 7 adopted the closest connection test;<sup>67</sup> 2 followed a hybrid approach which combines party autonomy and the closest connection test; 2 were decided on the basis of *lex loci delicti*;<sup>68</sup> and 8 cases were adjudicated without giving rationales in respect of choice of law.<sup>69</sup> Wang<sup>70</sup> believes that the aforesaid inconsistent phenomenon pursuant to the approach various courts followed is due to unclear judicial definitions<sup>71</sup> of the Taiwan-China relationship. The courts often find ambiguity in

---

<sup>64</sup> preamble of the constitution of the People’s Republic of China (China’s Constitution), “...The people of all of China’s nationalities have jointly created a culture of grandeur and have a glorious revolutionary tradition...The People’s Republic of China is a unitary multi-national State created jointly by the people of all its nationalities...” The constitution of the People’s Republic of China was adopted at the fifth session of the fifth National People’s Congress and promulgated for implementation by the announcement of the National People’s Congress on 4 December, 1982. All references made in this paper are based on its full text after amendment on 14 March, 2004.

<sup>65</sup> Further on n 64 above, “Taiwan is part of the sacred territory of the People’s Republic of China. It is the inviolable duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.”

<sup>66</sup> Wang “Current situation and prospect of the conflict of civil and commercial laws between the two sides of the strait” 2007 *Taiwan Research Quarterly* 9 9.

<sup>67</sup> There are three instances where the closest connection test applies in the Opinions:  
Article 182 - For an alien who has double or multi-nationalities, the law of the country of his residence or the country of closest connection shall be deemed as his domestic law.

Article 183 - In case the residence of a party is not clear or cannot be determined, his habitual abode shall be his residence. If a party has several abodes, the abode that has closest connection with the civil relationship in dispute shall be his residence.

Article 185 - Where a party has two or more business places, the business place that has closest connection with the civil relationship in dispute shall be followed; if a party has no business place, his residence place or habitual residence shall be taken instead.

<sup>68</sup> The *lex delicti* applies in article 187 of the Opinions, “The *lex delicti* (law of the place where a tort is committed) shall include the *lex loci delicti commissi* (law of the place where a tort is committed) and the law of the place where the result of a tort took place. If the two laws are inconsistent with each other, the people’s court may choose to apply either of them.”

<sup>69</sup> Wang (n 66) 10.

<sup>70</sup> See n 66 above.

<sup>71</sup> Even though it is politically defined.

terms of Taiwan's status and therefore resort to PIL rather than municipal law to dispose of the matter.<sup>72</sup>

## 2.2 Cases

The perplex status of Taiwan may be best illustrated in the following labour dispute.<sup>73</sup> In *Zheng Jianbing v Taiwan Mother Nature Co., Ltd and the Xiamen Representative Office of Taiwan Mother Nature Co., Ltd*, the respondent, a Taiwanese company that has a representative office in Xiamen, China hired the plaintiff, a Chinese employee to work in that office. The plaintiff referred an unfair dismissal dispute first to the Xiamen City People's Court of Fujian Province<sup>74</sup> (court of first instance) as he was dismissed by the employer due to "cultural differences"<sup>75</sup> or rather in South African labour terms, incompatibility. The court of first instance dismissed the claim on the basis that the aforesaid representative office does not constitute a legal entity and therefore incapable of being sued.<sup>76</sup> The plaintiff then requested his claim to be adjudicated by Xiamen City Labour Dispute Arbitration Commission.<sup>77</sup> The aforesaid Commission dismissed the claim on the principles commensurate with the court of first instance.<sup>78</sup> This dispute was thereafter brought before the Xiamen City Intermediate People's Court of Fujian Province<sup>79</sup> and the relevant grounds of ruling to this matter were made hereunder.

---

<sup>72</sup> Wang (n 15) 9, "An empirical analysis of Taiwan-related civil and commercial cases shows that it is the common practice by courts in Mainland China to apply private international law rules analogically or directly when resolving conflict of laws issues in such cases. The divergence of treatment among different courts results from the fact that some courts identify such cases as foreign ones while others don't, while the high proportion of application of state laws is mainly due to the parties' conscious obviation of the application of Taiwan laws in view of the special status across the Straits. For Mainland China, it seems to be a way out of this predicament to legitimate the recognition of the validity of Taiwan civil and commercial laws before its reunification with Mainland by way of forming proper concepts, constructing theoretical framework, reviewing current policy and integrating relevant norms."

<sup>73</sup> *Zheng Jianbing v Taiwan Mother Nature Co., Ltd and the Xiamen Representative Office of Taiwan Mother Nature Co., Ltd*. (福建省廈門市中級人民法院 (2008) 廈民終字第3717號)

<sup>74</sup> 福建省廈門市思明區人民法院

<sup>75</sup> See n 73 above, it is stated in that judgment that "upon the applicant fulfilling his probation period, the respondent dismissed the applicant on 20 February 2008 on the ground of 'cultural differences' between Taiwan and mainland China." (試用期滿後，被告台灣春橋田公司代表處卻於2008年2月20日以"大陸與台灣的文化差異為由"，強行與被告解除勞動關係。)

<sup>76</sup> See n 73 above. The gist of this ruling is set out in par 2 ch 2.2 of this paper herein above. (本院認為，根據"廈門市境外企業常駐代表機構管理規定"代表處聘用境內工作人員，應向廈門市人民政府指定的廈門市對外服務部門辦理聘用合同手續。辦理聘用合同手續...代表處聘用的境內外工作人員，應於聘用合同簽訂...持聘用合同和聘用手續部門的證明書向市工商局申請辦理工作證手續的規定，原告與被告台灣春橋田公司代表處建立勞動關係應到相關部門辦理手續，但原、被告並未辦理相關手續，屬非法用工，為無效勞動合同。)

<sup>77</sup> 廈門市勞動爭議仲裁委員會

<sup>78</sup> See n 76 above.

<sup>79</sup> 福建省廈門市中級人民法院

Firstly, in accordance with the Provisions of Xiamen City on the Administration of Resident Representative Offices of Overseas Enterprises,<sup>80</sup> the employment contract of local<sup>81</sup> employees must be registered at the designated agency<sup>82</sup> by the ‘overseas enterprise’s representative office’<sup>83</sup> within 7 working days. The defendant in this matter failed to register the employment contract and rendered this employment contract invalid as a result. Secondly, all overseas representative offices must mandate designated government agencies<sup>84</sup> to assist in matters relating to leasing properties as well as hiring local staff.<sup>85</sup> Therefore, the court ruled that the People’s Republic of China’s labour laws are inapplicable in labour disputes in circumstances where the aforesaid mandate is not followed.<sup>86</sup>

Another case in Hong Kong<sup>87</sup> is also worth exploring. A Taiwanese judgement sought to be recognised and enforced before the Hong Kong court. In *CEF New Asia v Wong Kwong Yiu John*,<sup>88</sup> the plaintiff applied to have its Taiwanese judgement debt enforced in Hong Kong. The defendant submitted that no court in Taiwan bears any competence before the Hong Kong court due to Taiwan’s status or specifically lack thereof.<sup>89</sup> The dispute that the parties depended upon speaks of the dilemma pursuant to Taiwan’s status. The argument that the government of Taiwan having no legal foundation brings the ultimate consequence of the efficacy of its courts’ ruling being non-existent.

---

<sup>80</sup> Promulgated by Order No. 9 of the Government of Xiamen City on 4 Jan, 1995 and amended according to the decision of the People’s Government of Xiamen City respectively on 29 December 1997 and 16 April, 2002. (廈門市境外企業常駐代表機構管理規定)

<sup>81</sup> “Local” means mainland Chinese in this ruling.

<sup>82</sup> 廈門市對外服務部門

<sup>83</sup> 境外企業常駐代表機構

<sup>84</sup> 廈門市對外服務部門

<sup>85</sup> The State Council of the People’s Republic of China in respect of the Administration of Resident Representative Office of Overseas Enterprises of 2000 (國務院關於管理外國企業常駐代表機構的暫行規定)

<sup>86</sup> Rulings in Chinese text are in n 76 above.

<sup>87</sup> Hong Kong was returned to the People’s Republic of China on 1 July 1997 by the United Kingdom in accordance with the Joint Declaration of the Government of United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the question of Hong Kong. The entire declaration can be viewed on the website of the Constitutional and Mainland Affairs Bureau (The Government of the Hong Kong Special Administrative Region). <http://www.cmab.gov.hk/en/issues/jd2.htm> (05-12-2015)

<sup>88</sup> *CEF New Asia Co. Ltd. v Wong Kwong Yiu, John* [1999] HKCA 262

<sup>89</sup> See n 88 above. “The appeal relied on the argument that the Hong Kong courts do not, and should not recognise the status, existence or competence of any court in Taiwan and that Hong Kong, as part of the PRC, recognises only one country of China, namely the PRC. The judge approached the issue (with the agreement of both parties) on the basis that (1) Taiwan is part of and subject to China’s sovereignty, (2) the Taiwanese government has no legal foundation and (3) the Taiwanese courts are not recognised by the Hong Kong courts (see *Ku Chia Chun & Others v Ting Lei Miao & Others* [1998] 3HKC 119).” The writer hereof is unable to obtain the actual judgment. The aforesaid rulings were obtained from the International Association of Restructuring, Insolvency & Bankruptcy Professionals’ (INSOL International) website in relation to Hong Kong’s cross border insolvency cases. [http://www.insol.org/pdf/cross\\_pdfs/Hong%20Kong.pdf](http://www.insol.org/pdf/cross_pdfs/Hong%20Kong.pdf) (05-12-2015)

In order for the court *a quo* to dispose of the matter, a statement by Lord Wilberforce<sup>90</sup> was referred to: “Where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned ... the courts may, in the interest of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question.”<sup>91</sup> The court *a quo* posited that the enforcement of this judgment does not involve recognition of the Taiwanese government in the realm of public international law but merely realising private rights. In the *obiter dictum*, the court *a quo* stated that it is in the interest of the people of the PRC<sup>92</sup> to recognise Taiwanese civil judgments insofar as the rules are provided for in respect of the Mainland’s Supreme People’s Court.<sup>93</sup>

Finally, another recent Taiwanese civil judgement<sup>94</sup> to be recognised and enforced before the Chinese court may showcase the progress of the bilateral cooperation between two sides of the strait.<sup>95</sup> *In casu*, both parties are from Taiwan. The writ of execution was issued by the Taiwanese court and the applicant applied to have the aforesaid writ recognised and enforced in China as the respondent owned assets in China. The Zhongshan City Intermediate People’s Court<sup>96</sup> based its decision solely on the now replaced article 9<sup>97</sup> of the Supreme People’s Court on the People’s Courts’ Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region<sup>98</sup> (the Provisions of 1998) wherein the circumstances<sup>99</sup> are set out pursuant to what would render a Taiwanese judgment unenforceable. Accordingly, this Taiwanese judgment was unequivocally recognised and enforced before the afore-

---

<sup>90</sup> *Carl Zeiss Stiftung-V-Rayner & Keeler Ltd* (NO 2); HL 1966

<sup>91</sup> See n 90 above.

<sup>92</sup> People’s Republic of China

<sup>93</sup> See n 89 above. The writer hereof obtained further information on the rulings from this website. <http://www.internationalallawoffice.com/Newsletters/Litigation/Hong-Kong/Herbert-Smith/Hong-Kong-Enforces-Taiwanese-Judgment> (05-12-2015)

<sup>94</sup> *09 Taisheng Tzu Zi No. 4560* (臺灣士林地方法院 2 0 0 9 年度促字第 4 5 6 0 號)

<sup>95</sup> Strait means Taiwan Strait. See par 1 ch 1.2 of this paper above.

<sup>96</sup> 中山市人民中等法院

<sup>97</sup> Article 15 of the Supreme People’s Court on the People’s Courts’ Recognition of Civil Judgements of the Relevant Courts of the Taiwan Region of 2015 that replaced the indicated article in n 98 below. (最高人民法院關於認可和執行臺灣地區法院民事判決的規定(法釋[2015]13號)

<sup>98</sup> article 9 of the Supreme People’s Court on the People’s Courts’ Recognition of Civil Judgements of the Relevant Courts of the Taiwan Region of 1998 (最高人民法院關於人民法院認可臺灣地區有關法院民事判決的規定(法釋[1998]11號)

<sup>99</sup> article 9 of the Provisions of 1998: (writer’s own translation)

1. where the civil judgment in question has not been confirmed;
2. where the civil judgement in question was handed down in the absence of the defendant specifically when he was not notified in accordance with the prescribed procedures or when the defendant had no capacity to act nor given opportunity to obtain necessary legal representation;
3. where the civil judgment in question affords People’s court exclusive jurisdiction;
4. where the parties to the civil judgment in question have concluded prior arbitration agreement;
5. where the same matter has been disposed of by the People’s court, foreign court or arbitral tribunal;
6. where the civil judgement in question is against the general principles of law of the PRC or public interest.



said court since this judgment does not fall into the ambit of the restrictions laid down in article 9 of the Provisions of 1998.

### 2.3 Conclusions

The first judicial interpretation governing matters relating to the recognition and enforcement of Taiwanese civil judgements was promulgated in 1998.<sup>100</sup> On 1 July 2015, two judicial interpretations namely the “Supreme People’s Court’s Regulations on Recognition and Enforcement of Civil Judgements Made by the Courts of Taiwan”<sup>101</sup> and “Supreme People’s Court’s Regulations on Recognition and Enforcement of Arbitral Awards Made by the Courts of Taiwan”<sup>102</sup> entered into force. It is suggested that these two new regulations may potentially clear the ambiguity the case law has created thus far.<sup>103</sup>

In the first paragraph, it is unveiled that Taiwan has undoubtedly been treated by the Chinese judiciary as a separate legal entity. Whether that legal unit can be prudently classified as a foreign jurisdiction depends on the legal as well as the historical interpretations<sup>104</sup> of that Chinese judge. The three cases presented above have their various historical backgrounds. The first case occurred in 2008 where Taiwan was regarded as a “foreign entity”.<sup>105</sup> The second case had its judgment handed down with a fair share of its colonial background<sup>106</sup> as well as the manifestation of its political reality (as recently being part of China).<sup>107</sup> In the last case, there was no question regarding whether Taiwan should be deemed a foreign entity<sup>108</sup> or not. A straight forward application of China’s municipal law was the approach adopted to reach the verdict.<sup>109</sup>

<sup>100</sup> See par 5 ch 2.2 of this paper, “the Supreme People’s Court on the People’s Courts’ Recognition of Civil Judgements of the Relevant Courts of the Taiwan Region of 1998.” (最高人民法院關於人民法院認可臺灣地區有關法院民事判決的規定(法釋[1998]11號)

<sup>101</sup> See n 97 above, “the Supreme People’s Court on the People’s Courts’ Recognition of Civil Judgements of the Relevant Courts of the Taiwan Region of 2015” (最高人民法院關於認可和執行臺灣地區法院民事判決的規定(法釋[2015]13號)

<sup>102</sup> 最高人民法院關於認可和執行台灣地區法院仲裁裁決的規定

<sup>103</sup> See n 72 and n 73 above.

<sup>104</sup> One might say “political stance” in lieu of historical interpretation.

<sup>105</sup> See par 2 ch 2.2 of this paper herein above where “overseas enterprise” was referred to in relation to an office a Taiwanese company set up in China.

<sup>106</sup> See n 87, n 89, n 90 and par 4 ch 2.2 of this paper above.

<sup>107</sup> See par 4 ch 2.2 of this paper above, “In *obiter dictum*, the present court stated that it is in the interest of the people of the PRC to recognise Taiwanese civil judgments insofar as the rules are provided for in respect of the Mainland’s Supreme People’s Court.”

<sup>108</sup> In contrast to the position in par 2 ch 2.2 of this paper herein above.

<sup>109</sup> See par 5 ch 2.2 of this paper above. Further, a recent case that is similar to the facts of this matter had the same rulings reached on 4 August 2014. *13 Taisheng Zhongsu Zi No 315* (台灣士林地方法院2013年度重訴字第315號民事判決) (a Taiwanese civil judgment) was recognised in the Suzhou City’s Supreme People’s Court.

It would appear that the status of Taiwan before the Chinese court was articulated since the advent of the Provisions of 1998<sup>110</sup> by making mention of Taiwan being an “area” of China.<sup>111</sup> By examining the bases in respect of how the judgments were reached regarding the first case and the third unfortunately do not shed enough light in providing legal certainty. What can be concluded herein with certainty is that the recognition and enforcement of Taiwanese judgment debts in China is applicable in terms of the Provisions of 2015.<sup>112</sup> However, further clarification is required when the Chinese courts are faced with disputes that involve Taiwanese entities that have establishments in China.<sup>113</sup> As for the Hong Kong courts, Taiwanese judgements have been consistently recognised and enforced as such recognition and enforcement do not afford any political recognition in respect of Taiwan’s status.<sup>114</sup>



<sup>110</sup> See n 100 above.

<sup>111</sup> article 1 of the Provisions of 1998

<sup>112</sup> See n 97 above, “the Supreme People’s Court on the People’s Courts’ Recognition of Civil Judgements of the Relevant Courts of the Taiwan Region of 2015” (最高人民法院關於認可和執行臺灣地區法院民事判決的規定(法釋[2015]13號)

<sup>113</sup> See par 2 ch 2.2 of this paper above.

<sup>114</sup> See n 89 above and par 4 ch 2.2 of this paper which together are the summary of the undermentioned paragraph in Song “a discussion in pursuant to the judicial collaboration and improvement between mainland China, Hong Kong and Macao areas” 2009 *One Country Two Systems Research* 106 108 (only Chinese text available).

宋錫祥之一國兩制研究第一期:論中國內地與港澳區際民商事司法協助及其完善:

“迄今為止,香港與台灣在司法協助方面尚未有關共同認可與執行的協定,現階段在香港執行台灣地區法院的判決只能採取遵循先例的做法。...1999年香港終審法院對陳麗紅訴丁磊森一案所作的民事終審判決(99年第 2 號),...體現了香港判例法的原則,該案可以視為香港法院在執行與認可台灣民事判決時的指導原則。...香港上訴法院認定,台灣是中華人民共和國的一部分...,香港法院無法認可台灣法院的地位,因為中華人民共和國並未認可台灣為合法政府...,本案在原訟法庭的判決是基於一個前提,即台灣在香港不被視為合法政府。因此,香港法院無法認可台灣法院的判令;(4)上訴法庭裁定,按照普通法原則,由不合法政府所作出的有限範圍內的行為是可以被承認和執行的,...另外,如果該判決對該地區人民正常交往與良好秩序是必要的,則香港法院可予以認可並予以執行;...據此卻確立了一個同樣適用於其他台灣法院民事判決的法律原則,即當有關的台灣法院民事判決並非直接承認台灣政府的權威,不違背香港的公共政策,也不對中華人民共和國的合法主權構成敵意,而只是涉及普通民事權利與責任時,香港法院將採納與承認外國判決有關的普通法原則;...成為未來香港法院認可與執行台灣民事法院判決的判例法依據。”

CHAPTER 3  
THE RECOGNITION AND ENFORCEMENT OF  
TAIWANESE JUDGEMENTS OR ARBITRAL AWARDS IN OTHER COUNTRIES

3.1 *The effect of the One China Policy*

It is well established that the majority of the countries in the world uphold the One China Policy and therefore regard the People's Republic of China as the sole representative of China.<sup>115</sup> Emanating therefrom, it is not surprising that Taiwanese criminal suspects residing in third countries have been extradited to China awaiting trial.<sup>116</sup> Although this chapter aims to explore the aspect of recognition and enforcement of Taiwanese judgements or arbitral awards, it is not without merits presenting the following precedents as the starting point. Taiwanese citizens' rights such as right to fair trial<sup>117</sup> are infringed as a result of Taiwan's "non-state" status. The effect of the aforesaid extradition in fact entails a second extradition between Taiwan and China on the basis of Cross-strait Joint Fight against Crime and Mutual Legal Assistance Agreement.<sup>118</sup> This practice has created conflicts between Taiwan and the countries that decided on China as the extradition destination. Further, it has caused an unnecessary burden on China and Taiwan in respect of second extradition.

Thus, how does the world then treat Taiwanese judgements or arbitral awards generally when Taiwan and its citizens are both awkwardly placed?

---

<sup>115</sup> See n 7, n 44 – n 49, n 51 and par 4.1 ch 1 of this paper.

<sup>116</sup> Radio Free Asia (22-5-2012), forty nine Taiwanese citizens were extradited to China from Cambodia due to its alleged involvement in an internet extortion scheme. "The Ministry of the Interior (of Cambodia) is working on an urgent measure to expel the 49 Taiwanese on a special flight to China, not to Taiwan, because of the government's One-China Policy." This report can be viewed at <http://www.rfa.org/english/news/cambodia/taiwan-05222012154740.html/> (11-12-2015). Further, Live in the Philippines e-Magazine (25-2-2011), 14 Taiwanese citizens that were involved in a fraud scheme were awaiting extradition to China from the Philippines. "China considers Taiwan to be a renegade Province of China. The Philippines has a 'one China' policy, meaning that it only recognises mainland China as a nation, and not the island of Taiwan". This article can be viewed at <http://liveinthephilippines.com/content/deportation-woes/> (11-12-2015).

<sup>117</sup> The extradition of Taiwanese citizens to China for trial violates their right to a fair trial. That means even though the same language (mandarin) is spoken, the Taiwanese are not familiar with the Chinese judicial system. Further, it is more difficult for the Taiwanese accused's family to provide legal, financial and emotional support.

<sup>118</sup> the Cross-strait Joint Fight against Crime and Mutual Legal Assistance Agreement was signed and entered into force in 2009 with the aims to protect rights of people from both sides of the strait as well as maintain orders. This agreement covers judicial collaboration in respect of both civil and criminal matters between China and Taiwan. (海峽兩岸共同打擊犯罪及司法互助協議:為保障海峽兩岸人民權益,維護兩岸交流秩序,財團法人海峽交流基金會與海峽兩岸關係協會就兩岸共同打擊犯罪及司法互助與聯繫事宜)

## 3.2 Cases

### 3.2.1 the USA

In *Clientron Corp v Devon IT Inc*, an United States federal trial court refused to recognise and enforce a Taiwanese arbitral award in respect of a supply and purchase agreement.<sup>119</sup> The applicant made the aforesaid application on the basis that the court would rely on either the New York Convention<sup>120</sup> or the Pennsylvania's version of Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA)<sup>121</sup> to substantiate the claim. The court *a quo* found that the United States ratified the New York Convention under certain reservations, specifically, the declaration that “the United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.”<sup>122</sup> Taiwan is ostensibly not a Contracting State<sup>123</sup> and consequently the court found that the New York Convention inapplicable in this instance.

The court *a quo* had to investigate the status of Taiwan in two phases in order to confirm the inapplicability of the New York Convention. Firstly, it referred to the Federal Arbitration Act<sup>124</sup> which made reference to the TRA<sup>125</sup> in regard to the issue of Taiwan's “non-state” status.<sup>126</sup> Taiwan is accordingly by virtue of the TRA deemed as a state for the purpose of application of the Federal Arbitration Act.<sup>127</sup> Thereafter, the court approached the question concerning Taiwan's membership to the New York Convention. As a consequence, New York Convention is inapplicable since Taiwan is not a Contracting State to the Convention.

---

<sup>119</sup> *Clientron Corp v Devon IT Inc*, No. 13-05634, E.D. Pa. 2014

<sup>120</sup> the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

<sup>121</sup> the Uniform Foreign-Country Money Judgments Recognition Act of 2005

<sup>122</sup> This declaration may be found on the website of New York Arbitration Convention. <http://www.newyorkconvention.org/list+of+contracting+states> (11-12-2015)

<sup>123</sup> See n 55 above.

<sup>124</sup> The Federal Arbitration Act of 1925 is “An act to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.” S 1 ch 2 of this Act provides that “The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.”

<sup>125</sup> Further on n 124 above, s 3 ch 2 of this Act states that “An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.” See n 126 below. The status of Taiwan is enunciated in the TRA.

<sup>126</sup> See n 38 – n 41 above.

<sup>127</sup> See n 125 and n 126 above.

In pursuant to the second argument that the applicant purported, the court had to deal with the applicability of the UFCMJRA. The UFCMJRA<sup>128</sup> is enacted for the purpose of dealing with “foreign judgments”.<sup>129</sup> The court also had to undertake a two stage assessment to determine whether this Taiwanese arbitral award satisfies the requirements. First prerequisite requires the claim be one that is a judgement issued by a foreign governmental unit.<sup>130</sup> Second condition demands the conformity in respect of parties’ conduct pursuant to dispute resolution stipulated in their agreement. It was accepted by this court that the Taiwanese arbitral award was confirmed by a Taiwanese court and therefore enforceable under the UFCMJRA.<sup>131</sup> The contention remained on the second condition where certain disputed products were not included in the aforesaid agreement and consequently the application had to fail on ground that is not relating to Taiwan’s political status.

### 3.2.2 the UK

*Zain Taj Dean v The Lord Advocate and the Scottish Minister* involved a British business man (accused) that was linked to a hitting and killing of a delivery man under the influence of alcohol whilst driving in 2010. He was consequently convicted with drunk driving, negligent manslaughter as well as leaving the scene of the accident and sentenced to two and a half years imprisonment by the Supreme Court of Taiwan.<sup>132</sup> As the accused failed to report to the legal authority on time in pursuant to his imprisonment, the Taiwanese customs confirmed that he had fled Taiwan using his friend’s British passport to Scotland in September 2012.<sup>133</sup> The accused was subsequently arrested and detained in a Scottish prison on 17 October 2013 pending the outcome of the extradition order. The extradition order was made by the Scottish Minister for the purpose of returning the accused to Taiwan concerning the execution of his sentence rendered in the Taiwanese court.<sup>134</sup>

It is common cause that there is no precedent extraditing persons between Taiwan and the UK and no such extradition treaty in force between the two parties.<sup>135</sup> Henceforth, the Home Office of the

---

<sup>128</sup> In the prefatory note of the UFCMJRA: “...Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad.”

<sup>129</sup> section 1(2) of the UFCMJRA

<sup>130</sup> section 1(1) of the UFCMJRA

<sup>131</sup> This entails that in the event a Taiwanese arbitral award is not confirmed by a Taiwanese court, that arbitral award does not constitute a “foreign judgement” in the ambit of the UFCMJRA.

<sup>132</sup> par 6 of Taiwan Supreme Court *00 Chiaoshan Zu Zi No 49 Criminal Judgment* (臺灣高等法院100年度交上訴字第49號刑事判決)

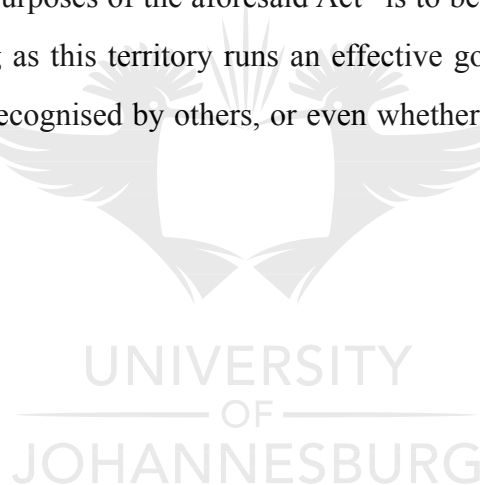
<sup>133</sup> Liberty Times Net (10-4-2013) <http://news.ltn.com.tw/news/society/paper/669270> (12-12-2015)

<sup>134</sup> *Zain Taj Dean v The Lord Advocate and the Scottish Ministers* 2014 par 2

<sup>135</sup> (n 134) par 3

UK and the judicial authorities of Taiwan entered into a special memorandum of understanding<sup>136</sup> in terms of section 194<sup>137</sup> of the Extradition Act<sup>138</sup> on 16 October 2013. On entering into this special memorandum, Taiwan is treated as a category 2 territory<sup>139</sup> by virtue of the aforesaid Act as a result.<sup>140</sup> Subsequently, the written request for the extradition of the accused was tendered by the representative of Taiwan<sup>141</sup> in this matter to the UK's Secretary of State for the Home Department. This request was duly certified by the Scottish Minister in respect of section 70(1)<sup>142</sup> of the Extradition Act. With the extradition order being materialised by the certificate,<sup>143</sup> the accused appealed against the aforesaid order under section 103<sup>144</sup> and 108<sup>145</sup> of the aforesaid Act.

The sheriff rejected the argument in respect of the appeal under section 103 of the Extradition Act.<sup>146</sup> Further, the court went on and supported the sheriff's opinion that Taiwan is indeed a territory in terms of the Extradition Act.<sup>147</sup> Additionally, the court is of the opinion that the statement "Taiwan is a territory for the purposes of the aforesaid Act" is to be regarded as a matter of judicial knowledge.<sup>148</sup> Finally, so long as this territory runs an effective government, it is of no relevance whether "that government is recognised by others, or even whether its right to govern is denied by others."<sup>149</sup>



---

<sup>136</sup> (n 134) par 3.

<sup>137</sup> Section 194 of the Extradition Act of 2003 entitled "special extradition arrangements".

<sup>138</sup> the Extradition Act of 2003

<sup>139</sup> If the Secretary of State issues such a certificate (refer to n 137 above) (which is conclusive evidence of the facts contained within it) Part 2 of the 2003 Act applies in respect of the person's extradition to the territory as if the territory were a category 2 territory. This power is the basis on which the Home Secretary can enter into special extradition arrangements to give effect to ad hoc extradition requests from countries and territories which are not otherwise designated as category 2 territories.

<sup>140</sup> See n 136 above.

<sup>141</sup> Director General of Department of International and Cross-Strait Legal Affairs, Ministry of Justice, Taiwan

<sup>142</sup> section 70(1) of the Extradition Act of 2003:

Extradition request and certificate -

(1) The Secretary of State must (subject to subsection (2)) issue a certificate under this section if he receives a valid request for the extradition of a person to a category 2 territory.

<sup>143</sup> See n 141 above.

<sup>144</sup> (n 134) par 5.

<sup>145</sup> (n 134) par 5.

<sup>146</sup> (n 134) par 14.

<sup>147</sup> (n 134) par 16.

<sup>148</sup> (n 134) par 17.

<sup>149</sup> (n 134) par 19.

### 3.2.3 Japan

In the “Kokaryo Case”,<sup>150</sup> a property ownership dispute between Taiwan (“the Republic of China”, hereinafter, the “ROC”) and China (“the People’s Republic of China”, hereinafter the “PRC”) was adjudicated five times in 40 years.<sup>151</sup> The latest judgment rendered by the Supreme Court of Kyoto in 2007 held that the original judgement, which affirmed the ROC authority’s ownership of Kokaryo, was to be rescinded and remanded to the court of first instance on the ground that the authority that represented the ROC government who filed the claim is no longer in existence.<sup>152</sup>

This finding has its historical and political origins. Japan recognised the ROC government as the sole representative of China only until September 1972 when the Joint Communiqué of the Government of Japan and the Government of the People’s Republic of China was signed. With immediate effect, the ROC government was replaced by the PRC government as the only legal government of China.<sup>153</sup> In the first judgment of 1977 in the Kyoto District Court, it was held that the eviction claim made by the ROC government must fail as a result of the fact that property ownership was transferred to the PRC government.<sup>154</sup> However, in the subsequent judgement in 1982, the court stated that the ROC’s ownership of the property is not lost as long as that government maintains its *de facto* control of that area (i.e. Taiwan).<sup>155</sup> This decision caused a minor rift between the PRC and Japan.<sup>156</sup>

---

<sup>150</sup> *The Republic of China v Y et al.*, Supreme Court 3rd P.B., March 27, 2007 Case No. (o) No. 685 of 1987 61 MINSHU 711; 1967 HANREI JIH091

Further in Kitamura “Japanese Supreme Court Judgment in the so-called ‘Kokaryo Case’” 2008 *Chinese Journal of International Law* 713 713, “The so-called ‘Kokaryo Case’, popularly called the ‘Guanghualiao An’ in Chinese, is the case filed by the Republic of China in Japan...issues such as the recognition of the Chinese government and the juridical status of the Taiwan authorities were involved...The building in question was an apartment building located in Kyoto, Japan, originally owned by a private company. In April 1945, Kyoto Imperial University (currently Kyoto University) leased the building and established a boarding house for the collective education of Chinese students. Although the university abolished the collective education and terminated the lease contract of the building after the end of the war in August of the same year, the boarding students continued to live in the boarding house (they named in ‘Kokaryo’) by establishing a management board and collecting boarding fees by themselves. In early 1950s, the delegate of the ROC (subsequently, the Embassy of the ROC) purchased the boarding house in response to the request of the boarding students, and in 1961, it completed the ownership transfer registration in the name of the ROC. However, according to the ROC, some of the boarding students in support of the government of the PRC obstructed the administration of the boarding house. Therefore, the government of the ROC filed complaints against those students with the Kyoto District Court in 1967, seeking their eviction from the occupied parts of the boarding house.”

<sup>151</sup> Kitamura (n 150) 713.

<sup>152</sup> Kitamura (n 150) 713, “... The Supreme Court quashed the original judgment and remanded the case to the court of first instance, on the ground that the authority to represent the State of China held by the Ambassador of the Republic of China (hereinafter, ‘the ROC’) to Japan had been extinguished.”

<sup>153</sup> See n 44 and n 45 as well as par 2 ch 1.4 of this paper above.

<sup>154</sup> Kitamura (n 150) 714.

<sup>155</sup> Kitamura (n 150) 715.

<sup>156</sup> Vogel, Yuan and Tanaka *The Golden age of the U.S.-China-Japan triangle, 1972-1989* (2002) 224 - 225, “... The climax was Deng Xiaoping’s remarks on June 4, 1987, to the effect that the Japanese government should be able to do something about the Kokaryo case..”

The two later judgments reaffirmed the 1982 decision.<sup>157</sup> Further, the doctrine of “incomplete succession” mentioned therein intimated that the properties owned by a former government in a foreign state are not to be succeeded to by the new government.<sup>158</sup> This theory accordingly appears to be applicable to the property ownership dispute *in casu*. Finally, the latest judgment applied articles 36<sup>159</sup> and 124<sup>160</sup> of the Code of Civil Procedure of Japan and reached a reversed verdict<sup>161</sup> as opposed to the ones of 1982, 1986, as well as 1987. The final instance consequently resulted in the original judgment being rescinded and remanded under the aforesaid provisions.<sup>162</sup>

### 3.3 *In summary*

The known fact that Taiwan is not a member of the UN places a significant obstacle on receiving due weight in respect of its courts’ judgments and arbitral awards.<sup>163</sup> As presented above, the defense that Taiwan is not a recognised state, therefore its courts’ judgments or arbitral awards are not entitled to international recognition or enforcement, becomes common cause.<sup>164</sup>

---

<sup>157</sup> Kitamura (n 150) 715.

<sup>158</sup> Kitamura (n 150) 715: “...the switch of recognition of government made by Japan in 1972 was the case of incomplete succession, since the government of the ROC was still exercising effective control over Taiwan and other islands around it. Although in the case of complete succession, properties of the former government are all succeeded to by the new government, in the case of incomplete succession, properties that the former government owned in a foreign State are, in principle, not succeeded to by the new government. The building in question, in this respect, is not the kind of property that is to be succeeded to by the new government, since it is not the property that the former government owned and controlled as the representative of the State, nor is it the property for the exercise of State power. Thus, in spite of the switch of recognition of government, the plaintiff/appellee does not lose the ownership of the building, and therefore the eviction claim made by it is to be accepted.”

<sup>159</sup> Article 36 of the Code of Civil Procedure of Japan provides that -  
“The extinction of the authority of statutory representation shall not take effect unless the principal of his/her statutory representative notifies the other party of it.”

<sup>160</sup> Article 124 of the Code of Civil Procedure of Japan states that -  
(1) “An action shall be abated due to any of the cases listed in the following items...The property’s loss of the capacity to stand trial, or the statutory representative’s death or the extinction of his/her authority of representation: the statutory representative, or the party who has acquired the capacity to stand trial...  
(2) The provision of the preceding paragraph shall not apply as long as there is a counsel...”

<sup>161</sup> Kitamura (n 150) 717, “...it was because the recognition of the former government was withdrawn, and thereby the basis of the former government to provide such authority was lost, that the diplomatic agent’s authority to represent was extinguished. Therefore, the nature of the case is different from the case where only the authority to represent is extinguished. Further, since it is obvious that the interests of the newly recognized government are in conflict with those of the former government, the interests of the foreign State after the recognition of the new government would be undermined, if the counsel with only the authority vested by the diplomatic agent sent by the former government continues to conduct the lawsuit.”

<sup>162</sup> See n 152 above.

<sup>163</sup> See n 7 above.

<sup>164</sup> See n 119, n 144 and n 152 above.



It however appears that in the cases of the United States<sup>165</sup> and the United Kingdom,<sup>166</sup> a certain status is afforded to Taiwan in order for it to sue and be sued by virtue of the TRA<sup>167</sup> and memorandum of understanding,<sup>168</sup> respectively. Taiwan is accordingly considered a distinct entity in the realm of PIL on the ground of certain legislation or agreement. However, such legislation or agreement does not exist between Taiwan and Japan. And as a result, the Kokaryo case reached an unfavourable judgement in respect of Taiwan.<sup>169</sup> The status of Taiwan thus remains a contentious issue where no similar arrangement such as the TRA is in force. And it can be concluded that no legal certainty can be had where the status of Taiwan hinges on ambiguity.



---

<sup>165</sup> See case presented in ch 3.2.1 of this paper above.

<sup>166</sup> See case presented in ch 3.2.2 of this paper above.

<sup>167</sup> See n 38 above.

<sup>168</sup> See n 136 above.

<sup>169</sup> See n 152 above.

CHAPTER 4  
THE RECOGNITION AND ENFORCEMENT OF  
CHINESE AND FOREIGN JUDGEMENTS OR ARBITRAL AWARDS IN TAIWAN

4.1 *Application of laws*

Taiwan promulgated the Act Governing Relations between the People of Taiwan Area and the Mainland Area<sup>170</sup> in 1992<sup>171</sup> (the Relations Act). Article 74<sup>172</sup> of the Relations Act echoes that of the Provisions of 2015.<sup>173</sup> The reciprocity therefore exists between Taiwan and China in respect of the recognition and enforcement of final and conclusive judgment debts on either side of the strait.<sup>174</sup> There is only one extra step concerning the PRC civil judgments or arbitral awards to be recognised and enforced in Taiwan. The authentication thereof must be obtained from the Straits Exchange Foundation<sup>175</sup> prior to making a formal application to the Taiwanese courts.<sup>176</sup>

It is interesting and noteworthy in the case of application of the Relations Act in respect of Hong Kong<sup>177</sup> and Macao<sup>178</sup> as the two Special Administrative Regions<sup>179</sup> of the PRC evidently do not

---

<sup>170</sup> Mainland Area means China (“the Republic of China”). The use of Mainland Area (not China) is to align with the One China Policy.

<sup>171</sup> the Act Governing Relations between the People of Taiwan Area and the Mainland Area of 1992 (台灣地區人民與大陸地區關係條例)

<sup>172</sup> Article 74 of n 170 above: “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 maybe filed with a court for a ruling to accept 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...”

<sup>173</sup> See n 112 above.

<sup>174</sup> Compare n 97 and par 3 ch 2.3 of this paper with n 172 above.

<sup>175</sup> 財團法人海峽交流基金會

<sup>176</sup> the Ministry of Justice 86.4.22 Fa 86 Lu Zi No 11101 (法務部86.4.22.法86.律字第一一一〇一號函) -

“關於未經財團法人海峽交流基金會驗證之供大陸內地使用之公證書，戶政機關可否逕予採認疑義乙案，查臺灣地區與大陸地區人民關係條例第七條規定之立法意旨，係以在大陸地區製作之文書，是否真正，查證不易，故明定經行政院設立或指定之機構或委託之民間團體驗證者，推定為真正...”

<sup>177</sup> See n 87 above.

<sup>178</sup> Los Angeles Times (24-03-1987), “China and Portugal reached a settlement Monday under which the tiny but picturesque enclave of Macao, which for centuries served as the hub of early European trade with East Asia, will return to Chinese rule in 1999.” [http://articles.latimes.com/1987-03-24/news/mn-245\\_1\\_hong-kong](http://articles.latimes.com/1987-03-24/news/mn-245_1_hong-kong) (16-12-2015)

<sup>179</sup> Hong Kong and Macao are not regarded as provinces of China but rather as the Special Administrative Regions in order to reflect “the One Country, Two Systems” rules. Leng “on the fundamental characteristics of the ‘One Country, Two Systems’ policy” Vol 1 *Academic Journal of ‘One Country Two Systems’* 49 49, “The policy of “One Country, Two Systems” is a basic national policy adopted by the Government of the People’s Republic of China (PRC) in handling matters related to Hong Kong and Macao Special Administrative Regions (SARs)... Since the 1980s, a new political term “One Country, Two Systems”, unheard of before, has appeared in Chinese and world media.1 The evolution of the “One Country, Two Systems” policy and its basic components have demonstrated that it is a policy based on a recognition of historical factors and reality, and on a comprehensive grasp of international situation and conditions in China. It is a basic national policy, proposed by the Chinese Communist Party (CCP) leadership, through seeking truth from facts, for addressing the Taiwan, Hong Kong and Macao issues left over by history and ultimately achieving peaceful reunification of the country. It is a policy with distinct Chinese characteristics.”

have the same status as the PRC. Judgments or arbitral awards from Hong Kong or Macao find application in the Act Governing Relations with Hong Kong and Macao<sup>180</sup> (the HK & Macao Act) as opposed to the Relations Act.<sup>181</sup> Article 42<sup>182</sup> of the HK & Macao Act provides how Hong Kong and Macao's civil judgments and arbitral awards may be recognised and enforced in Taiwan. The aforesaid article makes reference<sup>183</sup> to the applicability of article 402 of the Taiwan Code Civil Procedure<sup>184</sup> (Taiwan Civil Code). As article 402<sup>185</sup> of the Taiwan Civil Code deals only with the recognition of foreign judgments, Hong Kong and Macao are undeniably positioned as foreign countries in respect of their judgements.

#### 4.2 Chinese judgements in Taiwan

How does the Relations Act<sup>186</sup> apply in practice? *Zhejiang Textiles Import & Export Group Co., Ltd. and Evergreen International Storage & Transport Corp* centres on the dispute in respect of the breach of a carriage contract. The applicant, a Chinese company, lodged claims in the Chinese court against the respondent, a Taiwanese company (the shipping company *in casu*) for delivering the goods to the third party without the original bill of lading. The court *a quo* ruled in favour of the applicant and awarded certain damages in the order.<sup>187</sup> The aforesaid order was accordingly delivered to the court in Taiwan for subsequent recognition and enforcement. The court of the first instance and appellate court in Taiwan ruled that the judgements in the Mainland Area are automatically recognised and enforceable in Taiwan since the aforesaid order has complied with the Relations Act.<sup>188</sup> The foregoing rulings were, however, overturned by the Taiwanese Supreme Court of Appeal<sup>189</sup> upon appeal by the Taiwanese company. The ground for varying the prior judgements

---

<sup>180</sup> Promulgated by Presidential Order No. Hua-Tsung-(1)-Yi-Tze-8600080010 on 2 April, 1997. (香港澳門關係條例)

<sup>181</sup> article 1 of the Relations Act

<sup>182</sup> "In determining the conditions for the validity, jurisdiction, and enforceability of civil judgements made in Hong Kong or Macau, Article 402 of the Code of Civil Procedure and Article 4, Paragraph 1 of the Compulsory Execution Law shall apply *mutatis mutandis*. Article 30 through Article 34 of the Commercial Arbitration Act 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."

<sup>183</sup> See n 182 above.

<sup>184</sup> 台灣民事訴訟法

<sup>185</sup> "A final and binding judgment rendered by a foreign court shall be recognized, except in case of any of the following circumstances..."

<sup>186</sup> See n 171 above.

<sup>187</sup> *Zhejian Textiles Import & Export Group Co., Ltd. and Evergreen International Storage & Transport Corp* (浙江省紡織品進出口集團有限公司與長榮國際儲運股份有限公司, 滬海法商初字第四四一號判決, 上海市高級人民法院(2003)滬高民四(海)中字第三九號判決)

<sup>188</sup> 96 *Taisheng Zi No. 2531*(96年台上字第2531號)

<sup>189</sup> 97 *Taisheng Zi No. 2376* (97年台上字第2376號)

from the court *a quo* was based on an elaborated interpretation of article 74<sup>190</sup> of the Relations Act. Similarly, the court stated that the Taiwan's Compulsory Execution Law (Execution Law)<sup>191</sup> governs all cases where judgments intend seeking execution in Taiwan.<sup>192</sup>

Article 4(1)<sup>193</sup> of the Execution Law provides that the execution (of the judgment debts) may be enforced in circumstances where that foreign judgment is confirmed by the foreign court. The court *a quo* went on and stated that, in principle, once a Mainland Area civil judgment is recognised in the Taiwanese court, it is enforceable. However, it is not yet final and binding on the parties by virtue of article 14<sup>194</sup> of the Execution Law. This article entitles the debtor rights of objection to the judgment on bases that there was no debt or the debt so claimed has been extinguished before the closure of the execution proceedings. As such objection was launched by the appellant, this case was invariably remanded to the court of first instance so that the merits of the claim can be investigated in court pursuant to the appellant's (debtor's) objection.

Insofar as arbitral awards' recognition and enforcement in Taiwan, Taiwan's the Non-contentious Matters Law<sup>195</sup> becomes applicable. *Guangdong Shending Law Firm and Tien Chin Yu Machinery Mfg. Co., Ltd.* concerns a Chinese arbitral order seeking recognition and enforcement in the Taiwanese court.<sup>196</sup> The Chinese arbitrator ordered the respondent, a Taiwanese company to pay the applicant, a Chinese law firm damages in respect of outstanding legal fees on the ground of breach of contract. Specifically the dispute involves contractual terms relating to the notice period of certain mandate's termination. The respondent argued before the Taiwanese court on several bases and requested a review of the arbitral order. The court *a quo* confirmed that inasmuch as there are merits in the respondent's submission, the court is not permitted to review the substantive elements of the matter in terms of the Non-contentious Matters Law. The aforesaid Law only extends assistance to

---

<sup>190</sup> “... 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...”

<sup>191</sup> 強制執行法

<sup>192</sup> which takes precedence over the Relations Act.

<sup>193</sup> 依外國法院確定判決聲請強制執行者，以該判決無民事訴訟法第四百零二條各款情形之一，並經中華民國法院以判決宣示許可其執行者為限，得為強制執行。

<sup>194</sup> 執行名義成立後，如有消滅或妨礙債權人請求之事由發生，債務人得於強制執行程序終結前，向執行法院對債權人提起異議之訴。如以裁判為執行名義時，其為異議原因之事實發生在前訴訟言詞辯論終結後者，亦得主張之。

<sup>195</sup> 非訟事件法

<sup>196</sup> *Guandong Shending Law Firm and Tien Chin Yu Machinery Mfg. Co., Ltd, 2007* (廣東深鼎律師事務所與添進裕機械股份有限公司)

the procedural unfairness and thus rejected the respondent's request in respect of the review of the merits of the arbitral order.<sup>197</sup> Another Chinese arbitral award referred to the Taiwanese court for review encountered the same fate.<sup>198</sup>

It appears that the Chinese civil judgments and arbitral awards bear different degrees of legal certainty in the Taiwanese court. This differentiation will be discussed further in chapter 5 below.

### 4.3 *Foreign judgments in Taiwan*

Article 402 of the Code of Civil Procedure<sup>199</sup> (the Civil Procedure) contains four subsections that outline the position of the Taiwanese court in respect of the recognition and enforcement of foreign judgments. Each subsection will be discussed and explored in respect of its application accordingly hereunder through an American-Taiwanese family matter.

An American divorce order was sought to be recognised before the Taiwanese court. The validity of this order carried effects of succession entitlements<sup>200</sup> relating to properties in Taiwan. In the appeal<sup>201</sup> of this case, both parties evoked all four subsections of the aforesaid article in their arguments. Different interpretations pursuant to those subsections were posited. This case is presented as the judgment of this matter serves an important benchmark in terms of the application of article 402 of the Civil Procedure.

The gist of the matter is that both parties were married to the same man (the husband) at different times who passed away before the dispute arose. The properties of the husband in Taiwan became the centre of the dispute upon his passing. Chronologically, the respondent was married to the hus-

---

<sup>197</sup> 97 *Zongren Zi No. 1* (97年度仲認字第1號民事裁定書)

<sup>198</sup> 93 *Zaikan Zi No. 5* (93年度再抗字第5號裁定書)

<sup>199</sup> A final and binding judgment rendered by a foreign court shall be recognized, except in case of any of the following circumstances:

1. Where the foreign court lacks jurisdiction pursuant to the R.O.C. laws;
2. Where a default judgment is rendered against the losing defendant, except in the case where the notice or summons of the initiation of action had been legally served in a reasonable time in the foreign country or had been served through judicial assistance provided under the R.O.C. laws;
3. Where the performance ordered by such judgment or its litigation procedure is contrary to R.O.C. public policy or morals;
4. Where there exists no mutual recognition between the foreign country and the R.O.C.

The provision of the preceding paragraph shall apply mutatis mutandis to a final and binding ruling rendered by a foreign court.

<sup>200</sup> 99 *Chiasu Zi No. 325* (99年度家訴字第325號裁定書)

<sup>201</sup> 00 *Chiashan Zi No. 50* (100年度家上字第50號裁定書)

band in the state of California, USA in 1967. A divorce order was obtained by the husband at the Superior Court of California, County of Los Angeles (US Court) on 10 May 1989 against the respondent.<sup>202</sup> The appellant was subsequently married to the husband in Taiwan and that marriage was duly registered in terms of Taiwan's Civil Procedure. The US divorce order was contended by the respondent as invalid *in casu*. And the respondent averred thereupon such invalidity entitled her the right to inherit from the (late) husband as the lawful surviving spouse.

#### 4.3.1 Jurisdictional issues

As the respondent submitted that the US court had no jurisdiction to hear the divorce matter,<sup>203</sup> the appellant argued otherwise in terms of article 20<sup>204</sup> of the Taiwan's Civil Procedures. The Civil Procedures subject a person's residence to an intention test. The appellant's evidence presented that the husband resigned from a position that he had worked for in excess of ten years, secured his American green card, purchased property in the state of California, relocated his son to live with him and started a business there. It was submitted that the husband had the intention to obtain domicile in the state of California permanently. Further, as the same article prohibits dual domiciles, the US court is effectively the only court exercising jurisdiction.<sup>205</sup> This shifted the burden onto the respondent to provide counter evidence and rebut the appellant's submission in respect of the husband's domicile choice.

Hereafter, the respondent contended that the US Court had no jurisdiction on the bases of article 402(1) of the Civil Procedure read together with article 568(1).<sup>206</sup> Accordingly, the respondent submitted proof from the Taiwanese customs records which confirm the fact that the husband spent

---

<sup>202</sup> The year of marriage between the husband and the appellant was undisclosed. However, it is established in the submission that the husband was having an affair with the appellant while still married to the respondent.

<sup>203</sup> Based on the husband's records at the customs that he spent more days in Taiwan than in the US in a year. See the following paragraph in this section.

<sup>204</sup> A person who resides in a place with the intention of remaining there permanently, upon presence of supporting fact, is to establish his domicile at that place. Every person has at all times one domicile, and no person has more than one domicile at a time.

<sup>205</sup> See n 204 above.

<sup>206</sup> In matters seeking the nullification of, or the revocation of a marriage, or an action for a declaratory judgment confirming the existence or nonexistence of a marriage, for divorce or for the husband's or the wife's fulfilment of mutual obligation to co-habit, the court for the place where the husband and the wife domicile, or the court for the place where the husband or the wife domiciled at the time of death, has exclusive jurisdiction. Notwithstanding, where the grounds and occurrences giving rise to the action took place at the place where the husband and the wife reside, the court for that place shall have jurisdiction. Where the court for the place where the husband and the wife domicile cannot exercise jurisdiction, or the husband and the wife have no domicile in the R.O.C., or their domicile is unknown, the provisions of the second sentence of the first and the second paragraphs of Article 1 shall apply *mutatis mutandis*. Where the husband or the wife is an R.O.C. citizen and the court having jurisdiction cannot be determined in accordance with the provisions of the two preceding paragraphs, the court at the place where the central government is located shall have jurisdiction.

longer periods residing in Taiwan in a year and that the respondent had not even lived in the USA at all. The respondent intended establishing Taiwan's exclusive jurisdiction on grounds of the places where the husband and the wife were domiciled at the time as well as where the action of dispute arose.<sup>207</sup>

#### 4.3.2 Interpretations of article 402(2) of the Code of Civil Procedure

The parties proposed two interpretations in respect of article 402(2)<sup>208</sup> of the Civil Procedures in their arguments. The appellant submitted that it suffices to complete the service so long as the defendant in the divorce action is afforded the opportunity to defend herself. Whereas, the respondent contended that the service is incomplete in circumstances where the defendant is not afforded sufficient time to institute actions despite the defendant being duly informed in this instance.<sup>209</sup>

#### 4.3.3 Contrary to public policy or morals

This part of the dispute surrounds the family maintenance and possible adultery issues. Firstly, article 293<sup>210</sup> of the Criminal Code of the Republic of China<sup>211</sup> (the Criminal Code) sanctions against abandonment of people in need. This article uniquely reflects Taiwan's strong stance on the obligation and fulfilment of filial piety. "A helpless person" in this article extends mostly to family members (elderlies and minors in particular) or hit-and-run incidents in practice. Secondly, article 239<sup>212</sup> of the Criminal Code affords the cheated spouse protection against adultery. However, this provision has been commented by the scholars and legal practitioners as outdated and conservative.<sup>213</sup>

The submission made by the appellant affirmed that the husband had met his obligations in accordance with article 293 of the Criminal Code. He was therefore not in violation of public policy or morals. However, the respondent averred that the US divorce order was granted in contrary to Taiwan's public policy or morals. Simply put, the forum chose by the husband to institute the divorce

---

<sup>207</sup> See n 206 above.

<sup>208</sup> See n 199 above.

<sup>209</sup> (n 201) par 2 and 3

<sup>210</sup> A person who abandons a helpless person shall be sentenced to imprisonment for not more than six months, short-term imprisonment, or a fine of not more than one hundred yuan. If the commission of the offence results in death, the offender shall be sentenced to imprisonment for not more than five years; if aggravated injury results, the offender shall be sentenced to imprisonment for not more than three years.

<sup>211</sup> 中華民國刑法

<sup>212</sup> A married person who commits adultery with another shall be sentenced to imprisonment for not more than one year; the other party to the adultery shall be subject to the same punishment.

<sup>213</sup> ET Today News (26-02-2015) <http://www.ettoday.net/news/20150226/471487.htm> (20-12-2015)

action was done with the sole aim to avoid suits<sup>214</sup> (or potential investigation) in respect of his adultery in Taiwan.<sup>215</sup> In addition, the assertion that the husband had failed to pay maintenance to the respondent and the children is a further violation of Taiwan's public policy or morals.<sup>216</sup>

#### 4.3.4 Reciprocity

It has been long established that Taiwan and the US recognise judgments from each other and that US judgments are automatically recognised in Taiwan by reading together the Taiwan Relations Act<sup>217</sup> and the Civil Procedure. The appellant invariably submitted the aforesaid judicial knowledge. However, the respondent cited case law (awkwardly placed) to state that the Household Registration Office<sup>218</sup> was not provided with the opportunity to investigate the validity of the foreign divorce order. Despite acknowledging and accepting the divorce order being recognised and enforceable in Taiwan, the lack of verification thereof had resulted in the rights of the respondent being infringed.<sup>219</sup>

#### 4.3.5 The rulings

The court confirmed again that the US judgments enjoy the status of automatic recognition in Taiwan. *In casu*, the divorce order in respect of the husband and the respondent was endorsed and authenticated by the ROC overseas mission and therefore enforceable.<sup>220</sup> Nonetheless, the court's decision in terms of the arguments submitted by both parties pursuant to articles 402(2)<sup>221</sup> and 402(4)<sup>222</sup> of the Civil Procedures was omitted in this judgment.

Notably, the most important aspect in this judgment concerns article 402(3) of the Civil Procedure. The court stated that the standard to determine whether there is violation of public policy or morals is subject to public consensus. Further, that consensus is solely based on the maintenance of public interests and Taiwanese citizens' rights. The court found that the husband did not meet his obliga-

---

<sup>214</sup> See n 201 above.

<sup>215</sup> See n 212 above.

<sup>216</sup> See n 210 above.

<sup>217</sup> See n 38 above.

<sup>218</sup> This office is similar to South Africa's Home Affairs Office where Taiwanese must attend and register marriage thereto.

<sup>219</sup> (n 201) par 2 and 3.

<sup>220</sup> (n 201) par 5 "This also means that a foreign divorce order's authenticity needs not to be investigated by the Household Registration Office as argued by the respondent in ch 4.3.4 in this paper."

<sup>221</sup> Relating to service.

<sup>222</sup> Relating to reciprocity.



tions to financially upkeep and physically visit his children due to his unavailability arising from the adultery. And the fact that the husband instituted the divorce action based on irreconcilable differences in the US Court had shown his intention to evade the possible charges of his adultery before the Taiwanese court.<sup>223</sup> Accordingly, the appeal was dismissed and the divorce order granted in the US Court was not recognised on the ground of article 402(3) of the Civil Procedure.<sup>224</sup>

#### 4.4 Conclusions

The recognition and enforcement of China's (Mainland Area) civil judgments are governed by the Act Governing Relations between the People of Taiwan Area and the Mainland Area of 1992. Whereas, the judgements of China's Special Administrative Areas of Hong Kong and Macao are regulated by the Laws and Regulations Regarding Hong Kong and Macao Affairs. The latter directs the judgements from these two Areas categorised as "foreign judgments" as opposed to China's unique category, "Mainland Area judgments". The Taiwanese courts will investigate the merits of the Mainland Area judgments if so raised by the defendant despite it being final and conclusive.<sup>225</sup> Chinese arbitral awards are entitled to legal certainty where no merits of the matter will be reviewed or investigated.<sup>226</sup> Notwithstanding the above, the Hong Kong and Macao judgments or arbitral awards enjoy the status of automatic recognition and enforcement as foreign judgments in contrast to Mainland Area judgements or Chinese arbitral awards.

Article 402 of Taiwan's Civil Procedure is strictly adhered to by the Taiwanese courts in respect of recognition and enforcement of foreign judgments.<sup>227</sup> The litigants certainly must take Taiwan's domicile test<sup>228</sup> into consideration in ascertaining whether the foreign court has the competence to adjudicate the matter. Notices must be duly served on the defendant in order to satisfy the requirements of article 402(2).<sup>229</sup> The standards determining whether certain acts violate Taiwan's public policy or morals could be subjected to rules that are non-existent in the foreign forum and *vice ver-*

---

<sup>223</sup> (n 201) par 6.

<sup>224</sup> (n 201) par 7.

<sup>225</sup> See n 189 above.

<sup>226</sup> See n 197 and n 198 above.

<sup>227</sup> See n 201 above.

<sup>228</sup> See n 204 above.

<sup>229</sup> 93 *Chongshan Zi No. 290* (93年度重上字第29號裁定書)

sa.<sup>230</sup> Non-reciprocity is often claimed on the basis that Taiwan has no diplomatic ties to that country and is therefore incapable of disposing of the foreign matter before its court.<sup>231</sup>



---

<sup>230</sup> See n 210 and n 212 above. Further in 96 *Taisheng Zi No. 582* (96年度台上字第582號裁定書), wherein the recognition and enforcement of an Auckland Court's (New Zealand) civil judgment in respect of asset distribution as a result of parties' separation could be at risk of violating Taiwan's public policy or morals as there is no such provision made in terms of couples' separation.

<sup>231</sup> Liberty Times (19-10-2011) <http://news.ltn.com.tw/news/society/paper/532595> (15-8-2015)

## CHAPTER 5

### THE PROPOSAL — WILL THERE BE JUDICIAL CERTAINTY IN THE CASE OF TAIWAN?

#### 5.1 *Where is Taiwan headed politically?*

It has been established that Taiwan's political status has strong effects on its judicial efficacy.<sup>232</sup> This paragraph wishes to start the discussion in respect of Taiwan's possible political certainty in order to settle its judicial certainty in the later paragraphs.

The Constitution of the Republic of China (the ROC Constitution)<sup>233</sup> was promulgated in 1947 by the national government situated in Nanjing, China. It was enacted at the time when the ROC government still had *de facto* control over China. Subsequent to the war<sup>234</sup> between the CCP and the KMT, the latter was defeated and retreated to Taiwan in 1949. Taiwan thus became the only territory under the control of the ROC government since then. The CCP invariably has remained in control over China thereon. With this background in mind, the National Assembly has amended the ROC Constitution a number of times in order to reflect the *status quo*.<sup>235</sup> And that *status quo* maintains an ultimate objective to reunite with China.<sup>236</sup> In contrast, there were also theories posited in the past two decades in respect of how Taiwan can find its way back to the UN as opposed to reunite with China.<sup>237</sup> This evidences that the issue of where Taiwan eventually belongs is not yet settled since the KMT's defeat in 1949.

So where is Taiwan headed? Former ROC's Vice President, Ms Annette Hsiu-lien Lu<sup>238</sup> proffered that Taiwan should strive to become a neutral state such as Switzerland in order that the Asia Pacific region may continue to remain peaceful and stable.<sup>239</sup> It is suggested that this is a rather elegant euphemism for Taiwan's independence and such proposal will not be accepted by China.<sup>240</sup> Further,

---

<sup>232</sup> Refer to what has been discussed and investigated from chapters 1 to 4 in this paper.

<sup>233</sup> The Constitution of the Republic of China was adopted by the National Constituent Assembly on 25 December 1946, promulgated by the National Government on 1 January 1947, and went into effect on 25 December 1947.

<sup>234</sup> It is defined as civil war by the CCP. Refer to par 1 ch 1.2 of this paper above.

<sup>235</sup> The ROC Constitution has undergone seven revisions since its promulgation. The latest revision is in 2005. The aforesaid revisions relate mostly to matters involving elections and power to appoint certain seats.

<sup>236</sup> Preface of the second amendment of the ROC Constitution: "To meet the requisites of the nation prior to national unification, the following articles of the Republic of China Constitution are added or amended to the Republic of China Constitution..."

<sup>237</sup> Chen "Prospects for Taiwan's Membership in the United Nations" in Yang (ed) *Taiwan in the Modern World* (1997) 16

<sup>238</sup> Ms Annette Hsiu-lien Lu is the Vice President of the Republic of China under President Shui-bian Chen from year 2000 to 2008.

<sup>239</sup> Central News Agency (17-8-2015) <http://www.cna.com.tw/news/aopl/201508170330-1.aspx>. (20-12-2015)

<sup>240</sup> Refer to ch 1.2 of this paper above.

although the KMT pursues the ROC Constitution's goal in respect of the eventual reunification with China, the political party further elaborates that such will only take place on the basis of the CCP implementing democratic systems and values throughout China.<sup>241</sup> This is yet another non-agreeable idea to China.<sup>242</sup> What will certainly be welcomed by China would be that Taiwan succeeds the steps of Hong Kong and Macao by submitting to the "One Country, Two Systems" scheme.<sup>243</sup> Where Taiwan is right now, is the product of a compromise between both sides of the strait. It is submitted that the aforesaid compromise can only be altered by the willingness of the government together with the majority vote of the Taiwanese citizens by means of referendum.<sup>244</sup>

## 5.2 *The recognition and enforcement of Taiwanese judgments or arbitral awards in China as opposed to Chinese judgments in Taiwan*

As the preceding chapter 2 of this paper has intimated, it is yet to be seen how the Chinese judges will apply the Supreme People's Court's Regulations on Recognition and Enforcement of Arbitral Awards Made by the Courts of Taiwan<sup>245</sup> since it only came into force on 1 July, 2015. The case law thus far has not elucidated judicial certainty in respect of Taiwanese matters not relating to judgment debts before the Chinese courts.<sup>246</sup> However, as the One China Policy dictates China's (and the world's) political stance, it is likely that the Chinese judicial system will inevitably observe that doctrine in its entirety in due course.

As for the recognition and enforcement of Chinese judgements in Taiwan, there appears, however, discrimination against Chinese judgements in Taiwan. One may compare the choice of words between Taiwan's Arbitration Law<sup>247</sup> and the Relations Act.<sup>248</sup> On examination of the aforesaid two legislations in their Chinese texts, it is noticeable that Taiwan does manifestly differentiate between

---

<sup>241</sup> Taipei Times (13-11-2015) <http://www.taipeitimes.com/News/editorials/archives/2015/11/13/2003632318> (21-12-2015)

<sup>242</sup> article 1 of China's Constitution -  
The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants.  
The socialist system is the basic system of the People's Republic of China. Disruption of the socialist system by any organization or individual is prohibited.

<sup>243</sup> See n 179 above.

<sup>244</sup> It must be a joint effort between the government and the Taiwanese citizen as the procedural threshold for the proposal of referendum and its acceptance into the Central Election Commission is extremely high. See articles 10 - 14 of Taiwan's Referendum Act Of 2003. This indicates a legislative reforms or even constitutional amendments.

<sup>245</sup> See n 97 above.

<sup>246</sup> Refer to ch 2 of this paper above.

<sup>247</sup> 仲裁法

<sup>248</sup> See n 171 above.

Chinese judgments and foreign ones. Article 74 of the Relations Act uses acknowledge, “rènkě”<sup>249</sup> relating to the recognition of Chinese judgments. It is submitted that “rènkě” carries a certain undertone of “acknowledgement” rather than actual “recognition”. Whereas, in the Arbitration Law, the usage of formal recognition, “chéngrèn”<sup>250</sup> applies throughout the entire chapter 7 concerning the recognition of foreign arbitral awards in Taiwan. These discernible nuances open room for the Taiwanese courts to challenge the efficacy of the Chinese judgments.<sup>251</sup> It, nevertheless, indicates quite the contrary to foreign judgments which are entitled to automatic recognition and enforcement provided that those conform to what are prescribed in article 402 of the Civil Procedure.<sup>252</sup>

### 5.3 *The recognition and enforcement of Taiwanese judgments in the rest of the world as opposed to foreign judgments in Taiwan*

The often raised argument by the opposing party relating to Taiwan’s “non-state” status must be ousted in order for it to attain legal certainty. Countries such as the USA<sup>253</sup> and the UK<sup>254</sup> have made provisions for Taiwan’s special status. The Japanese judgment<sup>255</sup> is unfortunate in the case of Taiwan. However, that undesirable result could have been avoided by simply appointing a counsel to deal with the state’s legal matters.<sup>256</sup> Notwithstanding the above, signing memorandum with respective countries<sup>257</sup> or appointing counsels<sup>258</sup> are not holistic approaches in securing competence for Taiwanese judgments. Feasible proposals that facilitate a more systematic path to recognise and enforce Taiwanese judgements and arbitral awards must be dispensed sooner than later.

In all cases of the recognition and enforcement of foreign judgments in Taiwan, article 402 of the Code of Civil Procedure<sup>259</sup> applies. The aforesaid article is straightforward except for the provision pursuant to public policy where the litigants must take into consideration of Taiwan’s comparatively conservative nature. Abandoning helpless persons<sup>260</sup> or committing adultery<sup>261</sup> are still criminal offences in Taiwan under the Criminal Code. It is submitted that the jurisdictional issue was argued in

---

249 “Rènkě” (認可), carries the meaning of approve, confirm or accept.

250 “Chéngrèn” (承認), carries the meaning of formal recognition.

251 Compare n 245 and n 246 above.

252 See n 199 above.

253 See n 38 above.

254 See n 136 above.

255 See n 152 above.

256 This requirement only refers to Japanese law. See n 160 above.

257 Refer to n 38 and n 136 above.

258 See n 160 above.

259 See n 199 above.

260 See n 210 above.

261 See n 212 above.

the US divorce order case above incorrectly.<sup>262</sup> Since the crux of the matter involves a dispute relating to properties in Taiwan, the Taiwanese court has exclusive jurisdiction.<sup>263</sup> The intention test in respect of one's domicile<sup>264</sup> is fundamentally irrelevant. Finally, the determination of unanswered differed interpretations in respect of article 402(2) of the Civil Procedure<sup>265</sup> should be obvious. The aforesaid article concerns whether the service was served in a reasonable time. It does not speak about that reasonable time includes providing the opposing party enough time to institute actions.<sup>266</sup>

#### 5.4 Conclusions

It is only logical that the provisions of the Supreme People's Court on the People's Courts' Recognition of Civil Judgements of the Relevant Courts of the Taiwan Region<sup>267</sup> will be implemented and consistently referred to in respect of the recognition and enforcement of Taiwanese judgements in China. Note must be taken concerning disputes that arise within the Mainland between a Chinese entity and Taiwanese entity. It is still unclear thus far in terms of case law how the Chinese courts would define Taiwanese entities.<sup>268</sup> One perhaps may safely assume that the arrangements pursuant to "One Country, Two Systems" similar to that of Hong Kong<sup>269</sup> and Macao<sup>270</sup> would be adhered to also in the case of Taiwan. Thus, PIL will no longer partake in this judicial process.

The effect emanates from the One China Policy resulting in the majority of the countries not recognising Taiwan as a state.<sup>271</sup> Consequently, Taiwan is not party to important international organisations. Therefore, judicial reciprocity plays an intrinsic role apart from treaties or agreements<sup>272</sup> in respect of the recognition and enforcement of Taiwanese civil judgements abroad.<sup>273</sup> Judgments

---

<sup>262</sup> Refer to ch 4.3.1 of this paper above. No rulings were made on the jurisdictional issue in this case.

<sup>263</sup> article 21 of Taiwan's Code of Civil Procedures:

When the defendant's domicile, or the locus of real property, or the locus of the tort, or any other loci determinative of the court that has jurisdiction crosses or spreads over the jurisdictional boundaries of several courts, any such court may have jurisdiction over the action.

<sup>264</sup> See n 204 above.

<sup>265</sup> See ch 4.3.2 of this paper above.

<sup>266</sup> See n 199 above.

<sup>267</sup> See n 101 above.

<sup>268</sup> See ch 2.1 of this paper and n 72 and n 73 above.

<sup>269</sup> The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of Hong Kong Pursuant to Choice of Court Agreements between Parties Concerned was signed on 14 July 2006.

<sup>270</sup> The Arrangement between the Mainland and Macao on the Mutual Recognition and Enforcement of Civil and Commercial Judgments was signed on 28 February 2008.

<sup>271</sup> See n 12 - 14 and ch 1.2 of this paper above.

<sup>272</sup> See n 38 and n 136 above.

<sup>273</sup> Weems "guidelines for enforcing money judgments abroad" Volume 21, Number 11 *International Business Lawyer* 510 - "Countries that still strictly adhere to reciprocity requirement in their law - Austria, Egypt, Germany, Guatemala, Israel, Japan, Jordan, Korea, Nigeria, Peru, Singapore, Syria, Taiwan, and the United Arab Emirates."

from countries that do not recognise Taiwan's civil judgements will similarly not be recognised in Taiwan.

In regards to the recognition and enforcement of Chinese judgments and arbitral awards in Taiwan, likewise, those will be subject to the provisions of the Act Governing Relations between the People of Taiwan Area and the Mainland Area.<sup>274</sup> The judicial certainty thereof should be generally expected. Nevertheless, heed must be paid when the judge overexerts his discretion in some cases.<sup>275</sup> As to the application of the "One Country, Two Systems" in Taiwan, the approach is distinctly different to that of China. On the one hand, the Relations Act regulates the relationship between the Mainland and Taiwan. And on the other, the Act Governing Relations with Hong Kong and Macao<sup>276</sup> administers the legal interactions between Taiwan and the two Special Administrative Areas. Further in particular, the recognition and enforcement of Hong Kong and Macao judgments are subject to Taiwan's Civil Procedure concerning "foreign judgments".<sup>277</sup> It appears that Taiwan does not incline to incorporate the arrangements purported by China and simply view Hong Kong and Macao judgments as pure foreign judgments.

In the short term, Taiwan can only try to enhance its trade importance and position itself economically indispensable to the world. Further, it is imperative to advocate its democratic values internationally to secure a prominent democratic image in contrast to that of the communist China. It will, however, be a mistake to antagonise China in the process. A balancing act is going to be Taiwan's biggest task for its long-term stability. The so-called *status quo* is in fact constantly changing to accommodate the international political climate. The only solution for Taiwan's long-term legal certainty is to find a way to arrive at political certainty together with China's collaboration. It is respectfully submitted that the 1992 Consensus<sup>278</sup> will not illuminate Taiwan's *status quo* definition. A peaceful joint decision must be determined in respect of Taiwan's political status. Whether Taiwan will be an independent state, neutral state or a province of China, as Dr Elie Wiesel<sup>279</sup> wisely professed: "We must always take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented."<sup>280</sup>

---

<sup>274</sup> See n 171 above.

<sup>275</sup> See n 189 & 193 above as well as par 2 of ch 4.2 of this paper above.

<sup>276</sup> See n 180 above.

<sup>277</sup> See n 179 and n 182 above.

<sup>278</sup> See n 35 above.

<sup>279</sup> Dr Elie Wiesel is the Nobel Peace Prize winner.

<sup>280</sup> This quote is part of Dr Elie Wiesel's Nobel Peace Prize Acceptance Speech on 10 December 1986 in Oslo, Norway.

## LIST OF BIBLIOGRAPHY

### CASES

#### China

*Guandong Shending Law Firm and Tien Chin Yu Machinery Mfg. Co., Ltd*, 2007 (廣東深鼎律師事務所與添進裕機械股份有限公司)

*Zheng Jianbing v Taiwan Mother Nature Co., Ltd and the Xiamen Representative Office of Taiwan Mother Nature Co., Ltd*. 2008 (福建省廈門市中級人民法院 (2008) 廈民終字第3717號)

*Zhejiang Textiles Import & Export Group Co., Ltd. and Evergreen International Storage & Transport Corp.* 2003 (浙江省紡織品進出口集團有限公司與長榮國際儲運股份有限公司, 滬海法商初字第四四一號判決, 上海市高級人民法院(2003)滬高民四(海)中字第三九號判決)

#### Hong Kong

*Carl Zeiss Stiftung-v-Rayner & Keeler Ltd and others* [HL 1966] 2 All ER 536

*CEF New Asia Co. Ltd. v Wong Kwong Yiu, John* [1999] HKCA 262

*Ku Chia Chun & Others v Ting Lei Miao & Others* [1998] 3HKC 119

#### Japan

*The Republic of China v Y et al.*, Supreme Court 3rd P.B., March 27, 2007 Case No. (o) No. 685 of 1987 61 MINSHU 711; 1967 HANREI JIH091



## Taiwan

93 Chongshan Zi No. 290 (93年度重上字第29號裁定書)

93 Zaikan Zi No. 5 (93年度再抗字第5號裁定書)

96 Taisheng Zi No. 582 (96年度台上字第582號裁定書)

96 Taisheng Zi No. 2531(96年台上字第2531號)

97 Zongren Zi No. 1 (97年度仲認字第1號民事裁定書)

97 Taisheng Zi No. 2376 (97年台上字第2376號)

99 Chiasu Zi No. 325 (99年度家訴字第325號裁定書)

00 Chiaoshan Zu Zi No 49 Criminal Judgment (臺灣高等法院100年度交上訴字第49號刑事判決)

00 Chiashan Zi No. 50 (100年度家上字第50號裁定書)

00 Chiasu Zi No 50 (100年度家訴字第50號裁定書)

09 Taisheng Tzu Zi No. 4560 (臺灣士林地方法院2009年度促字第4560號)

13 Taisheng Zhongsu Zi No 315 (台灣士林地方法院2013年度重訴字第315號民事判決)

## United Kingdom

*Carl Zeiss Stiftung-v-Rayner & Keeler Ltd and others* [HL 1966] 2 All ER 536

*Zain Taj Dean v The Lord Advocate and the Scottish Ministers* [2015] HCJA 52

**USA**

*Clientron Corp v Devon IT Inc.*, No 13-05634, E.D. Pa. 2014



## JOURNALS AND BOOKS

Chen RC “A boat on the trouble strait: the interregional private law of the Republic of China on Taiwan” 1998 *International Law Journal* 599

Chen LC “Prospects for Taiwan’s membership in the United Nations“ in Yang (ed) *Taiwan in the Modern World* (1997) 16

Leng T “On the fundamental characteristics of the ‘One Country, Two Systems’ policy” 2009 Vol 1 *Academic Journal of 'One Country Two Systems* 49

Gao Y “China as the workshop of the world: an analysis at the national and industry level of China in the international division of labor” 2014 *The China Journal* 212

Kitamura T “Japanese Supreme Court Judgment in the so-called ‘Kokaryo Case’” 2008 *Chinese Journal of International Law* 713

Roberg M and Lee Y “China-Taiwan Relations” 2009 *Council on Foreign Relations* (E-publication, no page number available)

Song X “A discussion in pursuant to the judicial collaboration and improvement between mainland China, Hong Kong and Macao areas” 2009 1st edition *One Country Two Systems Research* 106

Vogel EF, Yuan M and Tanaka A *the golden age of the U.S.-China-Japan triangle, 1972-1989* Harvard East Asian Monographs Boston (2002)

Wang JY “Current situation and prospect of the conflict of civil and commercial laws between the two sides of the strait” 2007 *Taiwan Research Quarterly* 9

Wang VW “The Chen Shui-bian administrations mainland policy: toward a modus vivid or continued stalemate?” 2002 no. 2 *American Asian Review* 91

Weems PR “guidelines for enforcing money judgments abroad” 1993 Volume 21, Number 11 *International Business Lawyer* 510

Wei CN “China’s anti-secession law and Hu Jintao’s Taiwan policy” 2010 *Yale Journal of International Affairs* 112



## ***NEWS AND OTHER RESOURCES***

Central News Agency (17-8-2015) <http://www.cna.com.tw/news/aopl/201508170330-1.aspx>.  
(20-12-2015)

China Times (11-06-2014) <http://www.chinatimes.com/realtimenews/20140611002789-260409> (28-11-2015)

“Election Study Centre N.C.C.U. Important political attitude trend distribution” <http://esc.nccu.edu.tw/app/news.php?Sn=166>. (28-07-2015)

ET Today News (26-02-2015) <http://www.ettoday.net/news/20150226/471487.htm> (20-12-2015)

“European Union External Action” website. [http://eeas.europa.eu/taiwan/index\\_en.htm](http://eeas.europa.eu/taiwan/index_en.htm)  
(29-11-2015)

“Forbes Best Countries for Business” <http://www.forbes.com/places/taiwan/> (26-11-2015)

“ING International Trade Study Developments in global trade: from 1995 to 2017 – Taiwan” <https://www.ingcb.com/media/238299/taiwan.pdf> (26-11-2015)

Kyodo News International (29-02-2014) <http://www.globalpost.com/dispatch/news/kyodo-news-international/140218/japan-lawmakers-eye-enhancing-taiwan-relations-line--0> (29-11-2015)

Liberty Times (19-10-2011) <http://news.ltn.com.tw/news/society/paper/532595> (15-8-2015)

Liberty Times Net (10-4-2013) <http://news.ltn.com.tw/news/society/paper/669270> (12-12-2015)

Los Angeles Times (24-03-1987) [http://articles.latimes.com/1987-03-24/news/mn-245\\_1\\_hong-kong](http://articles.latimes.com/1987-03-24/news/mn-245_1_hong-kong) (16-12-2015)

“National Bureau of Statistics of The People’s Republic of China” [http://www.stats.gov.cn/tjsj/zxfb/201502/t20150226\\_685799.html](http://www.stats.gov.cn/tjsj/zxfb/201502/t20150226_685799.html) (28-11-2015)

Radio Free Asia (22-5-2012) <http://liveinthephilippines.com/content/deportation-woes/>  
(11-12-2015)

Taipei Times (13-11-2015) <http://www.taipeitimes.com/News/editorials/archives/2015/11/13/2003632318> (21-12-2015)

Taipei Times (31-11-2013) <http://www.taipeitimes.com/News/front/archives/2013/10/31/2003575806> (28-11-2015)

“Taiwan Indicators Survey Research” <http://www.tisr.com.tw> (only Chinese text available) (28-07-2015)

“The Heritage Foundation: 2015 Index of Economic Freedom” <http://www.heritage.org/index/country/taiwan>. (26-11-2015)

“The Ministry of Foreign Affairs of the People’s Republic of China” [http://www.fmprc.gov.cn/web/ziliao\\_674904/2193\\_674977/](http://www.fmprc.gov.cn/web/ziliao_674904/2193_674977/) (26-11-2015)

“The Ministry of Foreign Affairs of the Republic of China” <http://www.mofa.gov.tw/AlliesIndex.aspx?n=0757912EB2F1C601@sms=26470E539B6FA395> (27-07-2015)

Washington Post (15-01-2008) <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/15/AR2008011501347.html> (28-7-2015)

Xinhua News (17-11-2012) [http://news.xinhuanet.com/english/special/18cpnc/2012-11/17/c\\_131981259\\_11.htm](http://news.xinhuanet.com/english/special/18cpnc/2012-11/17/c_131981259_11.htm) (28-11-2015)

## STATUTES AND TREATIES

### China

the Anti-secession Law of 2005 (反分裂法)

the Arrangement between the Mainland and Macao on the Mutual Recognition and Enforcement of Civil and Commercial Judgments of 1999 (內地與澳門民商事判決的相互認可與執行)

the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of Hong Kong Pursuant to Choice of Court Agreements between Parties Concerned of 2006 (關於內地與香港特別行政區法院相互認可和執行當事人協議管轄的民商事案件判決的安排)

the Constitution of the People's Republic of China of 1982 (中華人民共和國憲法)

the Cross-strait Joint Fight against Crime and Mutual Legal Assistance Agreement of 2009 (海峽兩岸共同打擊犯罪協定)

the Japan-China Joint Declaration on Building a Partnership of Friendship and Cooperation for Peace and Development of 1998

the Joint Statement between the Government of Japan and the Government of the People's Republic of China on Comprehensive promotion of a 'Mutually Beneficial Relationship Based on Common Strategic Interests of 2008

the Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation) of 1988

the Provisions of Xiamen City on the Administration of Resident Representative Offices of Overseas Enterprises of 1995

the Resumption of Sino-Japanese Diplomatic Relations (no publish date)

The State Council of the People's Republic of China in respect of the Administration of Resident Representative Office of Overseas Enterprises Of 2000 (國務院關於管理外國企業常駐代表機構的暫行規定)

the Supreme People's Court on the People's Courts' Recognition of Civil Judgements of the Relevant Courts of the Taiwan Region of 1998 (最高人民法院關於認可和執行臺灣地區法院民事判決的規定)

the Supreme People's Court on the People's Courts' Recognition of Civil Judgements of the Relevant Courts of the Taiwan Region of 2015 (最高人民法院關於認可和執行臺灣地區法院民事判決的規定)

the Supreme People's Court's Regulations on Recognition and Enforcement of Arbitral Awards Made by the Courts of Taiwan of 2015 (最高人民法院關於認可和執行臺灣地區仲裁裁決的規定)

the Treaty of Peace and Friendship between Japan and the People's Republic of China of 1978

## **Hong Kong**

the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of Hong Kong Pursuant to Choice of Court Agreements between Parties Concerned of 2006 (關於內地與香港特別行政區法院相互認可和執行當事人協議管轄的民商事案件判決的安排)

## **International**

the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958



the United Nations General Assembly Resolution 1668

the United Nations General Assembly Resolution 2758

## **Japan**

the Code of Civil Procedure of 1996

the Japan-China Joint Declaration on Building a Partnership of Friendship and Cooperation for Peace and Development of 1998

the Joint Statement between the Government of Japan and the Government of the People's Republic of China on Comprehensive promotion of a 'Mutually Beneficial Relationship Based on Common Strategic Interests of 2008

the Resumption of Sino-Japanese Diplomatic Relations (no publish date)

the ROC-Japan Peace Treaty of 1952

the Treaty of Peace and Friendship between Japan and the People's Republic of China of 1978

the Treaty of Shimonoseki of 1895

## **Macao**

the Arrangement between the Mainland and Macao on the Mutual Recognition and Enforcement of Civil and Commercial Judgments of 1999 (內地與澳門民商事判決的相互認可與執行)

## **Taiwan**

the Act Governing Relations between the People of Taiwan Area and the Mainland Area of 1992 (台灣地區人民與大陸地區關係條例)

the Act Governing Relations with Hong Kong and Macao of 1997 (香港澳門關係條例)

the Arbitration Law of 2009 (仲裁法)

the Civil Code of 2015 (amended) (民法)

the Code of Civil Procedure of 2003 (民事訴訟法)

the Compulsory Execution Law of 2014 (強制執行法)

the Constitution of the Republic of China of 1947 (中華民國憲法)

the Criminal Code of 2014 (刑法)

the Cross-strait Joint Fight against Crime and Mutual Legal Assistance Agreement of 2009 (海峽兩岸共同打擊犯罪協定)

the Ministry of Justice 86.4.22 Fa 86 Lu Zi No 11101 (法務部86.4.22.法86.律字第一一一〇一號函)

the Non-contentious Matters Law of 2005 (非訟事件法)

the Referendum Act of 2003 (公投法)

the ROC-Japan Peace Treaty of 1952

## **UK**

the Extradition Act of 2003

## USA

the Federal Arbitration Act of 1925

the Taiwan Relations Act of 1979

the Uniform Foreign Money Judgment Recognition Act of 2005

