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Research Topic: A Comparative Analysis of the Mutual Recognition and Enforcement Regime of Arbitral Awards and Public Policy as a Refusal Ground in Greater China

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A COMPARATIVE ANALYSIS OF THE MUTUAL RECOGNITION AND ENFORCEMENT REGIME OF ARBITRAL AWARDS AND PUBLIC POLICY AS A REFUSAL GROUND IN GREATER CHINA

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I. Introduction

Since the economic downturn in the US and then the Europe, Mainland China has assumed a greater role in international commerce. Being the new major economic powerhouse of the world, China continues to generate a growing amount of trade. Yet, the growth also carries with the economy an increase in disputes. Following the acceptance of arbitration as one of the most recognized means for resolving international commercial disputes, various jurisdictions, including China, Hong Kong and Taiwan, have sought to modify their arbitration laws to match their international treaty obligations.

Recognition and enforcement of awards play a crucial role in international commercial arbitration. This process highlights the key factors for preferring arbitration to other modes of dispute resolutions.¹ Parties engaging in arbitration expect an award to be performed without undue delay. Unless the parties are relatively certain that they will be able to enforce the award at the end of the arbitral proceedings, an award in their favour will simply be an illusion and render the entire process substantially meaningless.²

Although China and Hong Kong are both parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“the New York Convention”), they do not entirely conform to the spirit of this treaty. Including Taiwan which is a non-New York Convention state, they either impose extra refusal grounds or modify them with slightly different languages, when it comes to an application for recognition of award from one of these jurisdictions. The purpose of imposing extra grounds or modifying these refusal grounds may relate to the protection of state interests or the attainment of certain political purposes. Notably, these extra grounds of refusal or modifications usually come under the public policy exception, which openly entitle national courts to exercise a wide discretion and to justify any

deviance from the uniform approach. Yet, such practice often causes prejudices to investors and is not likely to benefit the nation in the long run.

This paper aims to discuss the mutual refusal grounds of arbitral awards in Greater China. It also looks into the extent to which China, Hong Kong and Taiwan recognize and enforce each other’s arbitral awards through an analysis of different approaches to public policy as a ground of refusal. By comparing the present frameworks with the international standard, the paper could provide insights into the future development of the enforcement systems in Greater China.

In the following, Part II of this paper will deal with the arbitral framework in Greater China. The section looks into the legislative provisions and the recent developments regarding arbitration in the area. Part III will identify the mutual recognition and enforcement regimes between China, Hong Kong and Taiwan on an individual basis. Part IV is a comparative analysis of the additional refusal grounds in the three jurisdictions with the New York Convention, and elaborates on the public policy ground as an exception to enforcement. Lastly, Part V will examine certain specific issues and suggest any possible solutions.

II. The Legal Framework of Arbitration in Greater China

A. China

China adopts a civil law system. The Arbitration Law (“PRC-AL”) and the Civil Procedural Law (“CPL”) are the primary sources of law governing arbitration. These two laws are supplemented by the notices of the Supreme People's Court (“SPC”) of China and the provisions of the State Council. Although China is not a part of the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law jurisdiction3, to bring in line

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the legal framework with the international practice, the PRC-AL has adopted many of the internationally recognized principles of arbitration, such as party autonomy, the independence of arbitration commissions and the binding force of the arbitral award. The PRC-AL also provides for the establishments of a number of official arbitration institutions and the China International Economic and Trade Arbitration Commission ("CIETAC") is viewed as the most important one among them to handle foreign-related disputes.

The recent amendment of CIETAC Arbitration Rules in 2005 is a big step forward taken by the Chinese government to improve its arbitration system. Most noticeable of all, CIETAC now permits parties to appoint individuals not on its panel list, thereby effectively increasing the pool of experts and foreign arbitrators to serve on a CIETAC tribunal. In August 2006, the SPC also promulgated the Interpretation on Certain Issues Relating to the Application of China Arbitration Law ("the SPC Interpretation"). It consolidates previous judicial interpretations and provides guidance on the validity of arbitration agreements and challenges to arbitral awards. Since all arbitrations conducted in China are required to be administered by a recognized arbitral institution, an innominate or unclear identity of the arbitration commission would render arbitration agreements invalid in the past. By the SPC Interpretation, clauses providing for ambiguous and multiple arbitration commissions would now be deemed remediable and enforceable and parties' choice of institutional arbitration rules will be considered as their selection of the arbitral institution, which administers those rules.

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6 The PRC Arbitration Law, Article 16.
7 The SPC Interpretation 2006, Articles 1 to 9.
8 Gu (n 4) 274.
B. Hong Kong

Since the early 1980s, the Hong Kong government has committed to make the city a major international arbitration centre in the world. The establishment of the Hong Kong International Arbitration Centre in 1985 marked the beginning of a new era. In 1990, the Model Law was first introduced as part of the legal framework of arbitration in Hong Kong. Since then, there had been two regimes governing arbitration – domestic and international.

The latest version of the Hong Kong Arbitration Ordinance ("HKAO") (Cap.609) was passed in November 2010, and has become effective since 1 June 2011. Unlike the old framework, it adopts a unitary system for international and domestic arbitration. This could avoid confusion for parties in deciding between two types of arbitration. Under the new HKAO, the Model Law provisions are inserted directly into the relevant sections of the Ordinance, instead of being incorporated as a schedule. They are also applied to a greater extent for the purpose of reducing the extent of judicial supervision and intervention irrespective of whether the cases are domestic or international.

C. Taiwan

Similar to China, Taiwan practices a civil law system with a set of codified laws. Over the years, litigation remains as the traditional way to resolve commercial disputes within the jurisdiction. Yet, the complex court system, which enables the Supreme Court to often remand cases back to High Court, has made litigation very time consuming and costly. As a result,

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11 Arbitration Ordinance (Commencement) Notice L.N. 38 of 2011 (22 Feb 2011).

12 Romesh Weeramantry and John Choong, The Hong Kong Arbitration Ordinance: Commentary and Annotations (Sweet & Maxwell, Hong Kong 2011) 5.

13 ibid.


15 ibid 721.
corporations have been gradually moving towards arbitration as the prime dispute resolution method.

There are four national arbitration institutions in Taiwan: the Arbitration Association of the ROC, the ROC Association of Labour Dispute Arbitration, the Chinese Construction Industry Arbitration Association and the Arbitration Association and the Taiwan Construction Disputes Arbitration Association. As suggested by the names of the official arbitration institutions, arbitration in Taiwan is mostly employed in the construction field as the dispute resolution mechanism.

The main legislation governing arbitration is the Arbitration Law 1998 ("ROC-AL"), which was promulgated on 24 June 1998 and took effect on 24 December in the same year. Although Taiwan is not an UNCITRAL Model Law jurisdiction and Model Law drafting style is not followed, the ROC-AL is substantially Model Law compliant.

III. Enforcement of Foreign Awards

A. Chinese Perspective

i. General Enforcement Principles Regarding Enforcement

China acceded to the New York Convention in 1982 with both reciprocal and commercial reservations.\textsuperscript{16} In 1987, the SPC issued the Notice of the SPC Regarding the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China. The Notice mandates the courts in China to enforce foreign awards in due regard in a smooth and seamless manner. It also details the reservations and defines the extent of judicial jurisdiction over recognition and enforcement applications. More importantly, the Convention will prevail over the CPL of the PRC if the two are in conflict.

Where a country is not a contracting party to the New York Convention but has entered into a bilateral treaty with China, the issue of recognition and enforcement of a foreign arbitral award rendered within such

\textsuperscript{16} Tao (n 3) 9.
state would be dealt with in accordance with the provisions in the applicable treaty. There are also various international agreements in which China has entered into, such as the Washington Convention, which applies to arbitral awards rendered by the International Centre for the Settlement of Investment Disputes.\textsuperscript{17}

\textit{ii. Awards Rendered in Hong Kong}

Prior to the handover, Hong Kong acquired its membership under the New York Convention by virtue of the colonial status as a part of the United Kingdom. During the period, Chinese awards were treated as Convention awards and were enforced in accordance with the provisions of the New York Convention. However, after the resumption of sovereignty by the Chinese government over Hong Kong in 1997, the New York Convention continues to apply generally to Hong Kong in the capacity of China’s special administrative region. Due to this unique political status, the enforcement system under the Convention fails to operate between China and Hong Kong, because it only applies to enforcement of awards between two different contracting countries.

Such difficulty was manifested in the case of \textit{Ng Fong Hong Ltd v ABC}\textsuperscript{18}. The question before the court was whether a Mainland award made after 1 July 1997 was a New York Convention award for the purpose of enforcement. The court held that by virtue of Art 1(2) of the UNCITRAL Model Law and s.2(4) of the old HKAO (Cap. 341), the provisions of the Model Law applied only to arbitration conducted in the territory of Hong Kong. Therefore, the Mainland award could not be treated as a Convention award, nor could it be enforced under s.2GG of the HKAO (Cap.341).

The case \textit{Shandong Textiles Import and Export Corporation v Da Hua Non-ferrous Metals Co Ltd}\textsuperscript{19} illustrates the legal vacuum in enforcing a Chinese award after the handover. In that case, the court found itself lacking the jurisdiction to grant leave to enforce the Chinese awards as Convention awards. Although they were made before 1 July 1997, it was clear from the

\textsuperscript{17} Randall Peerenboom, \textit{The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the PRC} (2000) 1 APLPJ 12, 16.
\textsuperscript{18} [1998] 1 HKC 213 (CFI).
\textsuperscript{19} [2002] 2 HKC 122
amendments made by the Arbitration (Amendment) Ordinance 2000 (Ordinance No 2 of 2000) that, for the period 1 July 1997 to 1 February 2000, any Mainland awards, whenever made, could not be enforced as Convention awards. On the other hand, Hong Kong Heung Chun Cereal & Oil Food Co Ltd v Anhui Cereal & Oil Food Import & Export Co demonstrates a similar stance taken by the SPC in China during the period.

Not until 2 years after the handover, was the Memorandum of Understanding on the Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Mutual Enforcement of Arbitration Awards (‘the Memorandum’) reached on 21 June 1999. This was implemented in Hong Kong through an amendment to the old HKAO (Cap.341) and has been now adopted in the new HKAO (Cap.609). In China, the Memorandum was adopted directly as part of the local laws by virtue of a SPC Notice of 24 January 2000 entitled Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Mutual Enforcement of Arbitration Awards (“Notice of the China-Hong Kong Arrangement”) and this took effect on 1 February 2000.

Under the pro-enforcement-driven Memorandum, China has the obligation to recognize and enforce awards rendered in Hong Kong, and vice versa, as if they are New York Convention awards. While ad hoc arbitration has been commonly used in Hong Kong, it was not permitted in China. Therefore, there were uncertainties as to whether ad hoc or non-Chinese arbitral institution awards obtained in Hong Kong could be enforced in the Mainland.

In response to a letter from Hong Kong’s Secretary for Justice seeking for clarification in this regard, the SPC published the Notice Concerning

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20 See also Hebei Import & Export Corporation v Polytek Engineering Co Ltd [1998] 1 HKLRD 287 (CA).
21 Supreme People’s Court (2003) Civil 4 Miscellaneous No. 9.
Questions Related to the Enforcement of Hong Kong Arbitral Awards in the Mainland Court on 31 December 2009. It made clear that ad hoc and institutional arbitration awards made in Hong Kong are enforceable in China, subject to the same grounds for refusal. These specific grounds are encapsulated under Art 7 of the Memorandum in which largely reproduces the grounds for resisting the enforcement of awards set out in Art V of the New York Convention. This shall be further discussed below under Chapter IV.

iii. Awards Rendered in Taiwan

Awards made in Taiwan are treated as a special category in contrast with awards made in Convention jurisdictions and in Hong Kong. The enforcement of Taiwanese arbitral awards is now governed by two sets of regulations issued by the SPC: the Regulations Concerning Recognition of the Civil Judgments of Taiwan Court 1998 and the Supplementary Regulations Concerning Recognition of the Civil Judgments of Taiwan Courts 2009 (collectively known as the “the Taiwan Provisions”). Prior to the promulgations, arbitral awards rendered by arbitration institutions located in Taiwan were not recognized in the PRC.

The Taiwan Provisions apply not only to civil judgments but also to rulings, mediation decisions, payment orders issued by Taiwan courts and arbitral awards rendered by Taiwanese arbitral institutions. It is required under Art 2 of the Taiwan Provision 1998 that the application shall be filed in the jurisdiction where the defendant is domiciled or has his regular place of abode, or alternatively in the province, autonomous region or municipality directly under the central government in China where the defendants' property, against which an order for enforcement is sought, is situated.

26 Tao (n 3) 205.
B. **Hong Kong Perspective**

i. **General Enforcement Principles Regarding Enforcement**

Hong Kong is a contracting party to the New York Convention. Although the UNCITRAL Model Law has been largely inserted into the local legislation, the sections providing for the enforcement regime are specifically excluded.\(^\text{27}\) Instead, Part 10 of the HKAO sets out the recognition and enforcement regime of arbitral awards by modelling the provisions of New York Convention. The HKAO provides a complete, yet separate, framework for the enforcement of New York Convention awards, the Mainland awards and other awards.

ii. **Awards Rendered in China**

A 'Mainland award' is defined under s.2 of the HKAO as:

> ‘an arbitral award made in the Mainland by a recognized Mainland arbitral authority in accordance with the Arbitration Law of the People’s Republic of China.’

Accordingly, only awards that are rendered by certain Chinese arbitration organizations designated by the Legislative Affairs Office of the State Council will be eligible for enforcement in Hong Kong.\(^\text{28}\) Unlike the status of Hong Kong ad hoc awards in China, Mainland awards that are made using ad hoc arbitrations will therefore be barred from seeking to be recognized in Hong Kong.

The mechanism of enforcement of Mainland awards is to be found in Part 10 Div 3 of the HKAO. S.92 provides two methods in which a Mainland award can be enforced, namely, either by ‘action in the court’ or ‘in the same manner as an arbitral award and s.84 applies accordingly as if a reference in that section to an award were a Mainland award’.\(^\text{29}\)

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\(^{27}\) Justice Ma, Brock, et al (n 14) 498.

\(^{28}\) *ibid*, 511.

\(^{29}\) See *Yu Long Trading International Co Ltd v Sino-Jinlink Petrochemical Co Ltd* HCMP 2768/2000 where the court emphasized that the only course available to enforce a Mainland award is to be found under s.40B of the Ordinance (i.e. s.92 of the new Ordinance).
S.84(1) provides a summary enforcement for arbitral awards. Regardless of whether it is domestic or foreign, an arbitral award is enforceable in the same manner as a court judgment, with the leave of the court.\textsuperscript{30} However, a leave is granted not as a matter of right, but as a matter of judicial discretion.\textsuperscript{31}

Alternatively, or when leave of the court is not granted for enforcement under s.84, the party may bring a separate action under the common law for enforcement of the Chinese award.\textsuperscript{32} Such action is based on the implied promise in every arbitration agreement that the parties will honour the arbitral award.\textsuperscript{33} The claimant in such common law actions has a more onerous burden of proof. They have to satisfy the court on the validity of the arbitration agreement, that the arbitral tribunal has been duly constituted, that the award has been made following proper procedures and that the amount awarded has not been paid or that award has not otherwise been performed.

\textit{iii. Awards Rendered in Taiwan}

Under the old HKAO (Cap.341), Taiwanese award was summarily enforced in Hong Kong under s.2GG of the Ordinance with the leave of court.\textsuperscript{34} Following \textit{Ng Fung Hong Ltd v ABC}\textsuperscript{35} above, there were doubts as to whether s.2GG applied to arbitrations where the seat was outside Hong Kong. By the same token, it impliedly rejected the recognition of awards rendered in Taiwan.

In light of the uncertainty, s.2GG was amended in 2000 to include awards, orders and directions made or given whether in or outside Hong Kong. Accordingly, foreign awards, other than Convention awards, including those made in Taiwan, were enforceable at the discretion of the court.\textsuperscript{36} The court, when exercising the discretion to grant leave for enforcement, would consider various factors, not limited to reciprocity. Alternatively, or when the

\textsuperscript{30} The Hong Kong Arbitration Ordinance, Section 84(1).
\textsuperscript{31} Weeramantry and Choong (n 12) 443.
\textsuperscript{32} Loong (n 25) 53.
\textsuperscript{33} \textit{Stargas SPA v Petredec Ltd (The Sargasso)} [1994] 1 Lloyd’s Rep 412.
\textsuperscript{34} Loong (n 25) 52.
\textsuperscript{35} [1998] 1 HKC 213 (CFI)
\textsuperscript{36} Justice Ma, Brock, et al (n 14) 509.
leave was not granted, an action could be pursued under common law based on a breach of implied promise.\(^{37}\)

Under the new HKAO (Cap.609), there is a separate provision in Part 10 Div 1 recognizing other awards, namely, the non-Mainland and the non-Convention, which captures Taiwanese awards. The wordings of the amended s.2GG have been retained under the same Division in s.84 of the HKAO.

C. Taiwanese Perspective

i. General Enforcement Principles Regarding Enforcement

A foreign award is enforceable in Taiwan only after it has been recognized by the Taiwanese courts.\(^{38}\) Art 47(1) of the ROC-AL defines foreign award as:

…an arbitral award which is rendered outside the territory of ROC or rendered pursuant to foreign laws within the territory of ROC.

The provision reveals a bifurcation of the meaning of foreign arbitral award. One deals with the venue where an award is issued, while the other one deals with the laws that are involved in rendering an award.

Award that falls within the first category is relatively clear. No matter what laws and rules govern it, and even if it is made in accordance with the ROC-AL, an arbitral award that is rendered outside the Taiwanese territory is a foreign award. An arbitral award rendered in accordance with the Taiwanese laws in London by a three-member tribunal was held by the Taipei District Court to be a foreign award.\(^{39}\) As regards the later category of awards under Art 47(1), there has been no application for recognition or enforcement.

\(^{37}\) Loong (n 25) 53.

\(^{38}\) The ROC Arbitration Law 1998, Article 47(2).

under this limb. However, it is suggested that ‘foreign laws’ generally include the foreign arbitration laws and rules, the rules of foreign arbitration organizations, and the arbitration rules of international organizations, such as the UNCITRAL Arbitration Rules.

Art 49(1) of the ROC-AL requires that the court shall dismiss an application for recognition of a foreign arbitral award where the recognition or enforcement of the arbitral award is contrary to the public order or good morals of Taiwan, or where the dispute is not arbitrable under the laws of Taiwan. Furthermore, such application may also be dismissed if the country where the arbitral award is made or whose laws govern the arbitral award does not recognize arbitral awards of Taiwan. On the other hand, Art 50 provides six other grounds where the respondent may request, in response to the application for recognition of a foreign arbitral award by a party, the court to dismiss it within 20 days from the date of receipt of the notice of the application on any of the grounds therein.

Since Taiwan is not a signatory to the New York Convention, the Taiwanese courts are not bound to apply the principles, such as the refusal grounds under Chapter V under the Convention to the recognition and enforcement of foreign arbitral awards, but to apply the ROC-AL, such as the refusal grounds under Art 50 instead. As a result, the reciprocity requirement under Art 49 of the Law presents a unique problem to the arbitration environment in Taiwan.

It is unclear what factors will be taken into consideration by the court to determine whether to recognize a foreign award that is rendered in country with a lack of reciprocity. However, the Supreme Court of Taiwan in All American Cotton Co Ltd v Jiunn Long Textile Corp held that, for the purpose

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41 Justice Ma, Brock, et al (n 14) 732.
42 The ROC Arbitration Law 1998, Article 49(2).
44 Loong (n 25) 50.
45 All American Cotton Co Ltd v Jiunn Long Textile Corp, 7 August 1986 (Supreme Court of Taiwan)
of enhancing international judicial cooperation, Taiwanese courts may recognize and enforce foreign awards at their discretion, notwithstanding the absence of reciprocity. Further judicial decisions\(^{46}\) revealed that it is not a stringent condition for the state where the award is made to specifically recognize Taiwanese awards in the first place. The reciprocity requirement is satisfied as long as the law of that state does not explicitly reject the recognition of Taiwanese awards.\(^{47}\) Although there are precedents enforcing foreign awards rendered in the US, the UK, Hong Kong, Japan and Korea\(^{48}\), the Taiwanese system could still be a deterring factor for parties seeking enforcement from other jurisdictions where there is no available guideline.

\(\text{ii. Awards Rendered in China}\)

The politically sensitive relations between Taiwan and the Mainland China attract extra complications in recognizing and enforcing Chinese awards in Taiwan. Similar to the treatment of Hong Kong awards, a piece of legislation was specifically enacted by the Taiwanese government to provide a legal basis for the recognition and enforcement of judgments and arbitral awards rendered in China.\(^{49}\) It is known as the Act Governing Relations Between the People of the Taiwan Area and the Mainland Area 1992 ("the Taiwan-China Act") and recognition of Chinese award is found under Art 74. However, the proviso under Art 74(3) stipulates that the Art shall not be operative until the Chinese government makes provisions for reciprocal recognition for any irrevocable civil ruling or judgment, or arbitral award rendered in Taiwan.

The reciprocity requirement under such situation is expressly given a heavy weighing. If PRC courts did not recognize final civil court judgments or arbitral awards of Taiwan, Taiwan courts should dismiss applications for recognition of final civil judgments or arbitral awards rendered in the PRC.

\(^{46}\) High Court decision No. 335, referred to in Supreme Court decision No. 433 of 30 March 2005.
\(^{47}\) High Court decision No. 1943 of 23 September 2004.
\(^{48}\) Loong (n 25) 51.
Nevertheless, the Taiwan Provisions promulgated by the SPC in 1998 has expressly provided for the mutual recognition. Therefore, Chinese arbitral awards are now normally recognized in Taiwan.

iii. Awards Rendered in Hong Kong

Unlike Hong Kong’s unitary approach, Taiwan operates a separate regime for Hong Kong awards. Recognition and enforcement of Hong Kong awards is regulated unilaterally by the Taiwanese government under the Act Governing Relations with Hong Kong and Macau 1997 ("the Relations Act"), which came into force on 1 July 1997. Art 42 of the Relations Act 1997 provides that enforcement of an arbitral award from Hong Kong is governed by Arts 30 to 34 of the Commercial Arbitration Act 1961 ("ROC-CAA"). However, after the ROC-CAA was repealed, Arts 47 to 51 of the ROC-AL take over to apply to awards rendered in Hong Kong. These are the provisions applicable to recognition and enforcement of foreign awards in general. Although there is an absence of diplomatic relations and a system for mutual recognition of arbitral awards before 1997, the Taiwanese courts have consistently recognized Hong Kong arbitral awards on the principle of judicial comity.

IV. A Comparative Analysis of the Refusal Grounds of the Mutual Enforcement of Awards in Greater China with the New York Convention

The New York Convention is the major source governing recognition and enforcement of awards. In this section, the relevant Art of the New York Convention will be cited as a reference to the refusal grounds provided by the legislations and treaties of the three jurisdictions with respect to their mutual enforcement system. The Convention will be used as the reference point in finding out the enforcement attitudes of the three places. Art V of the

50 ibid 52.
51 Justice Ma, Brock, et al (n 14) 733.
52 ibid.
Convention affords limited grounds to national courts for resisting enforcement. Ideally, an arbitration-friendly state is expected to comply strictly with the refusal grounds under the Convention. Yet, certain states, whether or not it is a Convention jurisdiction, include extra grounds for the national courts to refuse enforcement of a foreign award. A summary of the comparison can be found in the Appendix.

A. The Refusal Grounds under the New York Convention

Art V provides a total of seven exhaustive grounds of refusal. Most of them deal with procedural defects, which are similar to Art 34 of the UNCITRAL Model Law. Art V(1) of the New York Convention reads:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in Art II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;
(d) the composition of the arbitration authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Two other refusal grounds are found under Art V(2) and they are different from Art V(1) grounds in terms of the content and the application. The court at the enforcing state may apply Art V(2) on its own volition. It provides that:

(a) the subject matter of the dispute is not capable of settlement by arbitration under the law of that country;

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

These grounds are respectively referred to in the following terms hereinafter:

(1) The party incapacity or agreement invalidity ground;
(2) The violation of due process ground;
(3) The excess of jurisdiction ground;
(4) The irregularity in procedure or composition of arbitral tribunal ground;
(5) The award not yet binding or set aside ground;
(6) The arbitrability ground;
(7) The public policy ground.

53 ibid, 461.
B. The Refusal Grounds in China Regarding Enforcement of Hong Kong and Taiwanese Awards

i. Hong Kong Awards

The Chinese courts are given power by the SPC’s Notice of the China-Hong Kong Arrangement to refuse enforcement of awards rendered in Hong Kong. Art VII of the Memorandum provides seven possible grounds that the competent Chinese courts may resist enforcement in the following circumstances:

1. Either party to the arbitration agreement lacks civil capacity as defined under the laws applicable to such party; or the arbitration agreement is invalid pursuant to the applicable law as agreed by the parties, or, if no applicable law has been clearly specified, the arbitration agreement is invalid pursuant to the law of the place at which the arbitral award was rendered.

2. The respondent did not receive an appropriate notice from the appointed arbitrator, or was otherwise unable to present its case.

3. The dispute treated in the arbitral award is not the subject matter submitted for arbitration, or does not fall within the scope of arbitral subject matter covered by the arbitration agreement, or the arbitral award contains any decision in relation to any matter outside the scope of the submission for arbitration. However, where the decision on the matter submitted for arbitration may be differentiated from the decision on the matter not submitted for arbitration, then the portion of the arbitral award containing the decision on the matter submitted for arbitration shall be enforced.

4. The composition or procedures of the arbitral tribunal were not consistent with the agreement between the parties, or, in the absence of such an agreement, were
not in accordance with the laws of the country in which
the arbitration took place.

(5) The arbitral award has not become binding upon the
parties, or has been discharged, or its enforcement is
suspended by a court at the place of arbitration or in
accordance with the laws applicable at the place of
arbitration.

(6) An arbitral award may not be enforced where the relevant
court decides that, under the laws applicable at the place
of enforcement, it is not possible to resolve the matter
under dispute through arbitration.

(7) An arbitral award may not be enforced where the court in
mainland China decides that the enforcement of the
award in mainland China would violate the public interest
of mainland China, or the court of Hong Kong decides
that the enforcement of the award in Hong Kong would
violate the public policy of Hong Kong.

Except for the last ground of refusal, the other paragraphs are
substantially a replication of Art V of the New York Convention: Arts VII(1) to
VII(6) respectively refer to the party incapacity or agreement invalidity ground,
the violation of due process ground, the excess of jurisdiction ground, the
irregularity in procedure or composition of arbitral tribunal ground, the award
not yet binding or set aside ground, and the arbitrability ground.

Unlike the New York Convention, the Art VII(7) ground goes beyond
the narrow scope of public policy. Instead of considering only the public policy
of the home state, it substitutes ‘public policy’ with ‘public interest’. It also
adds ‘the public policy of Hong Kong’ as an extra consideration. In other
words, the party seeking enforcement must convince the court that the
prospective enforcement will not violate the public interest and the public
policy of two different jurisdictions.54 It was suggested that the difference

54 For the purpose of discussion, it is intended here to treat China and Hong Kong as two
separate states/jurisdictions due to their different legal systems.
between the two expressions, namely, public interest and public policy, implied potential conflicts and inconsistencies between the two legal systems.

There are opposite views on this divergence. Some academics have argued that there is no difference between the two terms, while others pointed out that ‘public interest’ is more general and unclear. Public interest is said to be a defective concept that cannot function in the same way as public policy does in the international judicial practice. As a result, it opens to the courts a great discretion to decide whether an arbitral award would be enforced under such circumstances, especially when the public policy exception is often invoked by Chinese parties to resist enforcement of a foreign award.

At present, there is an absence of judicial definition of public interest. In *Hong Kong Heung Chun Cereal & Oil Food Co Ltd v Anhui Cereal & Oil Food Import & Export Co*, a case reported after the conclusion of the Memorandum, both the Intermediate People’s Court and the Higher People’s Court refused enforcement on the ground that it violated the public interest of China. Yet, neither court explained the standard and the extent of the concept. In 2003, the SPC considered that the discretionary power had been abused and decided to rectify the decision. Unfortunately, the SPC, again, did not take the chance to discuss the meaning of the concept.

Public interest in China can therefore be subject to a much broader and flexible interpretation. Instead of being based on a limited scope of clearly defined legal orders, the concept could cover not only adopted rules, expressed state commitments and social morality, but also less transparent state interests and unstable short-term policies. The commercial and the reciprocal reservations made at the time when China acceded to the New

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York Convention may also be used as some possible public interest considerations to refuse enforcement.\(^{60}\)

A court may rule out an enforcement application on the ground that the award deals with a non-commercial transaction and accordingly it would be against the public interest of China to honour it, even though this is not stipulated in the Memorandum. Due to its vast scope of application, invocation of the doctrine could amount to a denial of the application of any international practices and could be interpreted by the People’s Courts to justify non-enforcement of awards, including any economic and social consequences that may result in if the enforcement is granted.

As regards the scope of public policy, Chinese parties often invoke this ground to resist enforcement of a foreign award or foreign-related award.\(^{61}\) As public policy is also an elusive concept, any understanding of the term ‘public policy’ depends on an analysis of the statutes, if any, and how the judiciary have interpreted the term on a case-by-case basis.

*Dongfeng Garments Factory of Kai Feng City and Tai Chu International Trade (HK) Company Ltd v Henan Garments Import & Export (Group) Company (China)* was a case heard before the latest version of the PRC-AL was implemented and the Chinese courts at the time were still doubtful about international arbitration. In that case, the Zhenzhou People’s Court refused the application for enforcement on the ground that enforcement would seriously harm the economic influence of the public interest of the society and adversely affect the foreign trade order of the State. This decision has been subject to serious criticism due the court’s ignorance to the findings of the arbitrators that the defendant had breached the contract himself, and the court’s decision was influenced by the fact that the respondent was the major local economic concern.

Later in *ED&F (HK) v China Sugar & Wine Co (Group)*, Beijing No.1 Intermediate People’s Court refused to enforce the arbitration award made by

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the London Sugar Association on the ground that the award was against Chinese public policy. Yet, on appeal, the SPC considered that although the transaction between the parties was invalid under the PRC law, this did not amount to a violation of the public policy of China and accordingly recognized and enforced the award. The SPC clearly established the principle that violation of Chinese law does not automatically amount to a breach of public policy.

Although there is a lack of statutory definition of the terms ‘public policy’ and ‘public interest’, the prevailing view is that public policy may only become an issue if there is a breach of the fundamental principles of Chinese law, state sovereignty, national security, or violation of good morals and fundamental standards of morality in China. Specifically, awards that cause harm to the state sovereignty, destruction to China’s natural resources, heavy pollution to the environment, injury to people’s health and safety, deterioration and corruption of Chinese moral values are generally regarded as against social and public interests.

In fact, there have only been two reported cases where the SPC decided to refuse enforcement of awards on the public policy ground, only one of them being a New York Convention award. Thus, it is believed that the Chinese courts are less likely to resist enforcement on the ground of public policy in the foreseeable future following the changes in its investment policy. Since international arbitration has become the latest trend of dispute resolution, the Chinese Government will have to provide a set of confident arbitration rules in order to attract foreign investors. A complete and certain enforcement regime, whether it is domestic and foreign arbitral awards, plays a crucial role in this respect. To keep in line with the goal of becoming an arbitration-friendly jurisdiction, it is hoped that the SPC would take the chance to set out an official guideline to define the boundaries of the two terms.

62 ibid. See also SPC Answers to Foreign-related Commercial and Maritime Matters, Answer to Question 43.
64 Ma, Miao and Shi (n 61) 173.
In contrast, the situation in Hong Kong is fairly settled. The Court of Final Appeal succinctly identified the scope of public policy in the case of *Hebei Import & Export Corporation v Polytek Engineering Company Limited*.\(^{65}\) In that case, a dispute arose and was brought to arbitration in China after the respondent, a Hong Kong company, was found to have supplied defective equipment to the appellant, a PRC established company. The tribunal made an award in favour of the appellant ordering the respondent to refund. The respondent later successfully applied to set aside the award on the ground that it had been unable to present its case. The decision was appealed to the Court of Appeal of Hong Kong and the respondent contended, for the first time, that the arbitral process had been carried out with bias and the award should be refused as a matter of public policy. The Court held that there had been a breach of Art 32 of the CIETAC Rules and Art 45 of the PRC-AL, both of which deal with procedural regularities relating to the conduct of an arbitral tribunal. This decision was reversed in the Court of Final Appeal.

Bokhary PJ felt that the court should not only apply internal matters to determine the scope of public policy, but also matters with a foreign element by which other states were affected. In his Lordship’s words, public policy must mean ‘international public policy’ and it must contain elements of a state's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same, not only to purely internal matters, but even to matters with a foreign element by which other states are affected.\(^{66}\) Therefore, in order to invoke public policy as the ground for refusal, the award must be so fundamentally offensive to that forum jurisdiction’s notions of justice that, despite it being a party to the Convention, it cannot reasonably be expected to honour the enforcement.

It is clear that ‘the public policy of Hong Kong’ as the additional hurdle to enforcement of Hong Kong awards in China does not necessarily impose extra burden on the party. It remains that the term has been given a narrow meaning in an international context, and if China accords to the international practice and gives the same interpretation to the meaning of public interest,

\(^{65}\) [1999] 2 HKC 205
\(^{66}\) [1999] 2 HKC 205 as per Bokhary PJ at 216.
the two notions would not be in conflict. The party therefore would not run in difficulty in enforcing its Hong Kong awards in China as if it was enforced as a Convention award in any contracting state.

Against the above discussions, the Memorandum does not indeed provide genuine reciprocity as between Hong Kong and the Mainland. One may still have concerns regarding the broad and ill-defined ground for refusing enforcement of Hong Kong awards in the Mainland under Art VII(7). Bearing in mind that the public policy doctrine may be necessary to protect the forum against political intrusion or corrupt practice from other jurisdictions, it must not be ostensibly expanded which would otherwise defeat the purpose of providing limited grounds for refusal.

**ii. Taiwanese Awards**

Regarding enforcement of Taiwanese awards in the Mainland, there are six grounds for the competent People’s Courts to refuse recognition of a Taiwanese civil judgment, in which also apply to Taiwanese arbitral awards. Under Art 9 of the Taiwan Provisions, a civil judgment (including an arbitration award) rendered by a relevant court of Taiwan region shall not be recognized in the following circumstances:

1. Where the effect of the civil judgment under application for recognition has not been determined;
2. Where the civil judgment under application for recognition has been rendered under circumstances where the defendant was absent from the trial and had not been legally summoned, or where the defendant was unable to undertake litigious action and was not appropriately represented;
3. Where the case is under the exclusive jurisdiction of a People’s Court;
(4) Where the litigants on both sides in the case have concluded an agreement providing for the arbitration of the dispute;

(5) Where the case is one in which a People's Court has rendered a judgment, one for which a district court in a foreign country or outside mainland China has rendered a judgment, or one in which an arbitration institution outside mainland China has rendered an arbitration award which has been recognized by a People's Court;

(6) Where recognition of the civil judgment under application would violate the basic principles of State laws, or otherwise harm the public interest.

These provisions differ not only from those applicable to Convention awards and the Hong Kong awards, but also to the New York Convention. While the first three grounds generally reflect the award not yet binding or set aside ground, the violation of due process ground and the arbitrability ground under the New York Convention, the rest are the creations of the Taiwan Provision 1998.

The discrepancy can be explained by the objective of the Taiwan Provisions, which are to provide for the enforcement of Taiwanese civil judgments rather than arbitral awards. Therefore, some of the refusal grounds under Art 9 would be practically inapplicable for challenging recognition of an award. Art 9(4) would be an obvious example of such deficiency. Although elements of the violation of due process and the excess of jurisdiction grounds are reflected under the said Art, other refusal grounds such as the invalidity of the arbitration agreement and the irregularity in procedure or composition of arbitral tribunal are absent.

Moreover, the last refusal ground found under Art 9(6) does not entirely correspond to the public policy ground in the New York Convention. The present Art adds ‘the basic principles of State laws’ as an additional factor. Despite the vagueness inherent in the term ‘public interest’, the court could
also refuse to recognize Taiwanese awards if such would offend any Chinese laws.

The political considerations in the Taiwan Provisions are clear. Art 4 of the Taiwan Provisions upholds the One China Policy and any enforcement that contravenes to this principle will be refused. This Art further empowers the courts to take into account the political interest of China and to refuse Taiwanese awards if it sees fit. This will be a difficult issue if the two jurisdictions are in diplomatic conflict.

All these difficulties could hinder China from conforming to the international standard of arbitration and harm the hard-won confidence in Chinese arbitration. More importantly, a deviation from the spirit of the New York Convention may draw a serious consequence – a violation of an international treaty that could attract subsequent liabilities.

Hence, there have been calls for a new and better provision for the recognition and enforcement system for arbitral awards rendered in Taiwan. There are even voices for a bilateral agreement between the two jurisdictions in order to better capture the spirit of the New York Convention. Yet, there has been no report of diplomatic negotiations in this respect. Given the potential economic loss as a result of the deficient regime, it is hoped that China will incorporate the provisions of the New York Convention in any future arrangements on the recognition and enforcement of awards.

C. The Refusal Grounds in Hong Kong Regarding Enforcement of Chinese and Taiwanese Awards

i. Chinese Awards

Unlike China and Taiwan, the mutual recognition regime of Hong Kong towards Chinese awards is a reproduction of Art V of the New York Convention. This can be found under s.95 of the HKAO:

(1) Enforcement of a Convention award may not be refused except in the cases mentioned in this section.
(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves:
(a) The party incapacity ground;
(b) The Agreement invalidity ground;
(c) The violation of due process ground;
(d) The excess of jurisdiction ground;
(e) The irregularity in procedure or composition of arbitral tribunal ground;
(f) The award not yet binding or set aside ground;

(3) Enforcement of a Convention Award may also be refused if:
(a) The Arbitrability ground;
(b) The public policy ground.

The meaning of public policy has been discussed above and, since the provisions do not contain any extra grounds of refusal, there is no intention to pursue further discussion here.

ii. Taiwanese Awards

Similar to the enforcement of Chinese awards, s.86 of the HKAO also duplicates substantially Art V of the New York Convention. A major difference between this section and s.95 as mentioned above is that it also provides, under s.86(2)(c), that a court may refuse to enforce an award ‘for any other reason the court considers it just to do so’\textsuperscript{67}. There is no equivalent provision under s.95 or Art V of the New York Convention.

This subsection is a product of the latest HKAO. Similar to the United States and England and Wales, the HKAO creates separate regimes depending on whether the award is a Convention or a non-Convention award.\textsuperscript{68} Specifically, this additional ground is tailor-made for non-Convention and non-Mainland awards to be enforced in Hong Kong. Since Taiwan is not a

\textsuperscript{67} The Hong Kong Arbitration Ordinance, Section 86(2)(c).

\textsuperscript{68} Weeramantry and Choong (n 12) 455.
party to the New York Convention or a part of China for the purpose of enforcement under the Ordinance, enforcement of Taiwanese awards is governed solely by this subsection.

Arguably, this ground gives Hong Kong courts a greater power in deciding whether to enforce a non-Convention and non-Mainland award, i.e. a Taiwanese award. The scope the court considers it just to refuse enforcement has not been defined. Although it is not required under statute, a lack of reciprocal enforcement arrangement with the place where the award is made may give rise to a 'just' ground for refusing enforcement.\cite{ibid}

Nevertheless, enforcement of non-Convention award under this Div 1 of Part 10 of the Arbitration Ordinance is subject to s.26(2) of the same legislation. It stipulates that the court may refuse to grant leave for enforcement if there has been a challenge to an arbitrator and the award seeking to be enforced is made during that period by the tribunal that includes the challenged arbitrator. This may stand as a reason that the court may feel just to refuse enforcement. The same may also apply in cases where there has been a challenge to the award itself at the seat of the arbitration and the court may be justified in adjourning the enforcement proceeding or, in extreme cases, where actual bias has been done on a party, refusing to enforce the award. However, given the pro-enforcement attitude of the Hong Kong court as shown in \textit{Hebei}\cite{Hebei Import & Export Corporation v Polytek Engineering Company Limited [1999] 2 HKC 205}, it is not likely that they will introduce unsound justifications to resist enforcement.

Furthermore, when exercising its discretion whether to grant leave to enforce a Taiwanese award, a Hong Kong court may follow the approach taken by the Court of Final Appeal in \textit{Chen Li Hung & Anor v Ting Lei Miao & Ors}\cite{[2000] 1 HKC 461}, where it recognized a judgment of a Taiwanese court. In that case, the plaintiffs wished to enforce a Taiwanese bankruptcy order against the respondents in Hong Kong, in which Taiwanese courts at the material time

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\textsuperscript{69} Ibid.
\textsuperscript{70} \textit{Hebei Import & Export Corporation v Polytek Engineering Company Limited} [1999] 2 HKC 205
\textsuperscript{71} [2000] 1 HKC 461.
\end{flushleft}
were not officially recognized. The Court laid down principles in relation to recognition of foreign judgment of non-recognized court:

Our courts will give effect to the orders of non-recognized courts where: (a) the rights covered by those orders were private rights; (b) giving effect to such orders accorded with the interests of justice, the dictates of common sense and the needs of law and order; and (c) giving them effect would not be inimical to the sovereign’s interests or otherwise contrary to public policy.72

To the extent that recognition of Taiwanese award lies in judicial comity and justice, these principles may also be applicable in this context. Adhering to their pro-enforcement stance, it is expected that Hong Kong courts will recognize awards rendered in Taiwan, unless it contravenes either limb of s.86 of the HKAO or offends the basic notions of justice of Hong Kong.

D. The Refusal Grounds in Taiwan Regarding Enforcement of Chinese and Hong Kong Awards

i. Chinese Awards

Art 74(1) of the Taiwan-China Act 1992 offers a completely different regime for the refusal of Chinese awards in Taiwan. Apart from the reciprocity requirement under Art 74(3), the Art provides one single, yet confusing, ground of refusal. A Chinese award may be enforced in Taiwan so long as it is ‘not contrary to the public order or good morals of the Taiwan Area’.

This unique condition has been criticized as making enforcement of Mainland arbitral awards even more uncertain.73 However, scholars in Taiwan have rejected this criticism. They contend that the requirement of ‘public order or good morals’ resembles the public policy ground as permitted under Art

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72 [2000] 1 HKC 461 at 474, as per Bokhary PJ.
V(2) of the New York Convention. It was argued that they simply refer to ‘major important or basic interests of a country or society, or basic legal and moral principles’.\(^{74}\)

On the other hand, it has been suggested that once an application for the recognition of a Mainland award has been filed, the respondent should be able to request the court to dismiss the application on the grounds contained in Art 50 of the ROC-AL.\(^{75}\) This argument is entirely based on the loose wordings ‘may be filed’ found under Art 74(1) of the Taiwan-China Act, which does not compel a Taiwanese court to immediately recognize a Chinese award.

This view is, however, subject to two considerations. First, since there is a specific provision dealing with the enforcement of Chinese arbitral awards, other provisions, unless expressly provided for their applicability, should not be generally applicable to deal with the same matter.\(^{76}\) Second, Taiwan also practices the One-China Policy and, that China is therefore not considered as a foreign country, but the same. It follows that grounds for refusal of recognition applicable to foreign awards from non-Chinese jurisdictions, which reflect Art V of the New York Convention, should not be applicable to Chinese awards.\(^{77}\)

In any event, it seems from the judicial practice that recognition would only be refused if it violates the provisions of basic human rights under the Constitution of Taiwan and the Court would take only legal issues into account in such circumstance.\(^{78}\) Despite the elusive concepts of public order and good morals, Taiwanese courts generally follow international standards and

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\(^{76}\) Hasofer (n 49).


\(^{78}\) Wu (n 40).
practice in determining an application for recognition and enforcement of a foreign award and they have been trying to limit the use of these two terms.79

ii. Hong Kong Awards

Since Art 42 of the Relations Act 1997 dictates that Arts 47 to 51 of the ROC-AL take over to apply to awards rendered in Hong Kong, the provisions reveal a slightly different construction from the New York Convention. Specifically, Art 50 has adopted similar wordings as Art V(I) of the New York Convention:

A foreign arbitral award may be set aside by the court, before the 20-day period has elapsed from the date on which the party making that application had received the award, if the party making the application furnishes proof that:

1. The arbitration agreement is invalid as a result of the incapacity of a party according to the law chosen by the parties to govern the arbitration agreement.

2. The arbitration agreement is null and void according to the law chosen to govern said agreement or, in the absence of choice of law, the law of the country where the arbitral award was made.

3. A party is not given proper notice whether of the appointment of an arbitrator or of any other matter required in the arbitral proceedings, or any other situations which give rise to lack of due process.

4. The arbitral award is not relevant to the subject matter of the dispute covered by the arbitral agreement or exceeds the scope of the arbitration agreement, unless the offending portion can be severed from and not affect the remainder of the arbitral award.

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5. The composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of an arbitration agreement, the law of the place of the arbitration.

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

At the same time, Art 49(1) replicates Art V(II) and provides that:

(1) Recognition or enforcement of a foreign arbitral award shall be refused only if:

(1) the recognition or enforcement of the award would be contrary to the public policy of the Republic of China, Taiwan; or

(2) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of China, Taiwan.

However, an additional requirement of reciprocity is supplied by Art 49(2), which reads that:

The court may refuse the enforcement of an arbitral award if the court of the country where the arbitration took place or the applicable law of the country refuses to recognise or enforce the arbitral awards made in the Republic of China.

The reciprocity requirement has been discussed above under Chapter III(C). Although a degree of uncertainty is still present, it would not affect the long established system of mutual recognition between Hong Kong and Taiwan. A party seeking to enforce a Hong Kong award in Taiwan is not likely to be prejudiced by the additional refusal ground under Art 49(2) of the ROC-AL.
V. Further Developments and Discussions

This last chapter will focus on a number of issues of the mutual recognition between China, Hong Kong and Taiwan. While the three jurisdictions generally show a pro-enforcement attitude towards each other’s award through the compliance with the provisions of the New York Convention, the public policy ground remains as the major enforcement difficulty. In particular, the political tension between China and Taiwan has made the mutual enforcement more complicated. These issues will be further discussed in the following sections followed by individual recommendations.

A. Public Policy and Local Protectionism

Public policy has always been one of the greatest hurdles to the enforcement of foreign arbitral awards in a lot of jurisdictions, in which respondents often rely on as the last resort for defence. It gives rise to a residual discretion to domestic courts to justify any non-enforcement. Therefore, implementation of the New York Convention does not necessarily render a jurisdiction arbitration-friendly. If foreign awards are often refused on this ground, parties’ confidence will be squandered by a judicial system that is unable or unwilling to make the local parties pay up.

Local protectionism may be an important consideration in resisting enforcement on this ground in a number of conservative jurisdictions, such as China. It can take many forms and one of the common examples is deciding a case in favour of a local party or delay or refusal in enforcing an arbitral award in favour of the non-local party because this would make a major enterprise go bankrupt and that many workers lose their jobs. This may be attributed to the inadequate knowledge of judges about the international

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80 For the purpose of this section, this ground of refusal includes other concepts of public interest, public order and good morals.
82 Chi Manjiao, ‘Drinking Poison to Quench Thirst: The Discriminatory Arbitral Award Enforcement Regime under Chinese Arbitration Law’ (2009) 39 HKLJ 541, 549
consensus in favour of recognition and enforcement of foreign awards as well.\textsuperscript{84}

Apart from the economic and the social dimensions of local protectionism, the situation in China specifically demonstrates how the structural deficiency of the judiciary affects recognition. Since each local court is under the leadership of the local government, which in turn has either a direct or indirect interest in regional economic concerns, the judiciary is not totally free from executive interference.\textsuperscript{85} Such problem is further reinforced by the involvement of local government in local enterprises. A court does not enjoy financial autonomy since its budget is determined by other organs of the local government. Judges are therefore concerned that if they interfere with an important local interest, the court may be financially disadvantaged.

Unfortunately, this highly recognized weakness is not likely to be lessened until either of these factors is minimized or even absent.\textsuperscript{86} To better improve the arbitration atmosphere in the Mainland, a change of the internal structure of the judiciary is foremost needed. Judicial independence of local courts must be done in order to remove the local protectionism as a barrier in the award enforcement process.\textsuperscript{87} A vertical leadership model is suggested where a separate funding system is adopted and this can prevent local courts from excessively relying on the local governments for financial support.\textsuperscript{88}

B. Towards an International Standard in Refusing Enforcement of Taiwanese Awards in China and the Possibility of a Bilateral Enforcement Treaty

The analysis also finds that enforcement problem is particularly apparent to the mutual recognition and enforcement regime between China and Taiwan. This could be due to the absence of a codification of some mutual understandings, in terms of a bilateral agreement, to provide for a

\textsuperscript{84} Ibid.
\textsuperscript{85} Chen (n 81) 154.
\textsuperscript{86} Ibid.
\textsuperscript{87} Chi (n 81) 554.
\textsuperscript{88} Ibid.
complete mechanism. Although their trade ties have become much stronger since the conclusion of the Economic Cooperation Framework Agreement in June 2010\(^\text{89}\), the lack of a formal dialogue between the leaders in the early days resulted only in some unilateral arrangements made by the two respective states themselves.

At present, the political tension between China and Taiwan is still full of challenges as a consequence of the historical reason and the One China Policy.\(^\text{90}\) Inevitably, this has cast a shadow on the formation of a bilateral agreement on the recognition and enforcement of arbitral awards. Due to the mutual denial of political status, the current framework creates a conflicting system of recognition and enforcement. Yet, realizing an urgent need to attract cross-strait investment and foster development of arbitration as a reliable means for resolving commercial disputes, the leading arbitral institutions and the domestic courts on both lands have been closely working with each other to promote healthy development of arbitration and actively recognizing and enforcing each other’s arbitral awards.\(^\text{91}\)

While it is hoped that this close cooperation would yield some positive results, it seems unlikely that the Mainland and Taiwan will enter into a formal bilateral arrangement similar to the Memorandum between China and Hong Kong until there is a big leap forward in the political climate.\(^\text{92}\) It will be worthy to note the gradual change of attitude on how arbitral awards are recognized and enforced on both sides. Any signs of approaches not following the established procedure in reviewing enforcement petitions will be another focus of the academia and practitioners in the nearest future.\(^\text{93}\)

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\(^{90}\) Pé and Polkinghorne (n 60) 412.

\(^{91}\) Jason Blatt, ‘Mutual Recognition and Enforcement of Arbitral Awards in Mainland China and Taiwan: A Breakthrough in Cross-Strait Relations’ (2006) 36 HKLJ 585, 604

\(^{92}\) Pé and Polkinghorne (n 60) 413.

\(^{93}\) Blatt (n 91).
C. Is the Enforcement of Arbitral Awards between Hong Kong and China the Most Successful Model?

The Memorandum between China and Hong Kong serves to uphold the spirit of minimal court intervention and reinstate the duties of the contracting parties to the New York Convention. In a number of cases, the courts in Hong Kong have unambiguously restricted themselves to the grounds set forth in the Memorandum, which largely mimicked Art V of the New York Convention, when they were asked to refuse enforcement of Chinese awards. Similarly, the Chinese courts echoed the practice and have handled cases in strict accordance with the Memorandum.

In particular, from the interpretation of the abstract term ‘public policy’ by courts in both borders, it is not difficult to observe that it has been interpreted with extra caution. Hong Kong courts, based on a legal tradition that builds on English law, seem to be more ready to lend a helping hand to the arbitration process. While there are still reservations about the supportive role played by the Chinese courts, as manifested from for example the requirements of a valid arbitration agreement, they generally tend to review awards on the procedural issues only like Hong Kong. Therefore, it could be concluded that the bilateral arrangement has been relatively successful in binding the parties to the objective of the Convention, thereby conforming to the international standard.

VI. Conclusion

A comparison of the mutual recognition and enforcement regime between China, Hong Kong and Taiwan with the New York Convention can generally indicate the extent to which a particular jurisdiction favours arbitration. A review of the preceding chapters reflects that Hong Kong has effectively adopted the New York Convention with minor modifications. The

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95 ibid.
96 ibid.
arbitration legislations of China and Taiwan, however, reflect principles found in the Convention on a much more selective basis. The political tension between China and Taiwan, the local protectionism, the insufficiency of education on international arbitration in the judiciary are all factors contributing to the situation.

Although the arbitration environment in Greater China is progressive, certain controversial problems were left untouched. The discriminatory enforcement regime remains as the major defect in their mutual recognition and enforcement systems. Despite this weakness, China and Hong Kong are actively engaging in international arbitration and an increased caseload has been observed. To further increase the competitiveness as the Asian leading arbitration centres, the parties should, in terms of recognition and enforcement of foreign arbitral awards, honour their obligations under the New York Convention and uphold the pro-arbitration attitude in a general sense. It is also advised that bilateral agreements should be negotiated to take over any unilateral arrangements so as to avoid any misunderstandings that may hinder the arbitral process.
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