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# CONTRACT MANAGEMENT AND DISPUTE RESOLUTION

## The Legal System of the Republic of China

HUNGDAH CHIU\*

### I. INTRODUCTION

United States businesspeople entering the Republic of China ("ROC") should consider a number of questions concerning how the ROC's legal system will affect their business interests. The following information provides answers to some of these questions.<sup>1</sup> First, this Article describes the nature of Chinese law to provide a historical perspective for the current situation. Businesspeople becoming resident aliens within the ROC should study this section to familiarize themselves with the foundations of the present legal system. The next section provides a general description of the current judicial system, methods of alternative dispute resolution, the legal profession, and the administration of justice in the ROC, with special emphasis on aspects which differ from the United States legal system. The final section focuses on aliens in the ROC. First, it examines the status of aliens in the ROC. Second, it discusses the special relationship between the United States and the ROC as outlined in the major treaties between these two countries pertaining to the status of citizens inside the other's jurisdiction.

### II. THE NATURE OF CHINESE LAW AND MAJOR LEGISLATION

#### A. *The Traditional Legal System*

Traditional Chinese concepts of law differ from fundamental legal concepts of the West. Chinese law rests on the order of nature and the necessity for human actions to harmonize with the natural order. A ruler's basic function was to maintain this harmony. Confucius and his followers considered law necessary to the preservation of

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1. For a detailed discussion of the ROC legal system, see Hungdah Chiu & Jyh-pin Fa, *The Legal System of the Republic of China in Taiwan*, 2 MODERN LEGAL SYSTEM CYCLOPEDIA, 602-62 (1984).

harmony, but secondary to virtuous conduct and morality among rulers and officials. The family, not the individual, constituted the unit of the social and political community and served as a model for government.

Under the Chinese legal system, punishment could be mitigated or aggravated depending on the social relationship of the parties involved.<sup>2</sup> For example, parents and elders command the most respect, and thus, stricter legal obligations are attached to these relationships.<sup>3</sup> As a result, law in China did not develop to protect the individual, either politically or economically. This is very different from Roman law, the origin of modern Western law, which contained elaborate provisions for protecting individuals' personal and economic rights.

The Chinese code was chiefly penal and administrative. It consisted mainly of public law. Civil matters were either ignored by legislation entirely or were given limited treatment within the penal system. Law was not considered an independent specialty, but instead was part of the general administration. Law served the interest of the state and society in maintaining the Confucian hierarchy of relationships and social order.

Under the traditional Chinese concept of law, private law remained undeveloped. Law was primarily designed to govern an isolated agricultural society and neither capitalism nor an independent business class was encouraged. As a result, conflicts between people were resolved through unofficial channels. Disputes arising out of business deals and contracts were often settled according to the customs of the craft or merchant guilds. Disputes between individuals or families were often mediated by village elders, neighborhood organizations, or gentry members. Business relations were considered part of friendship, kinship, and personal relationships rather than cold, impersonal, legal matters. In traditional China, the concept of limited liability for a juristic person, or corporation, conducting business, never developed.

Chinese law, therefore, was part of the government administration, designed to serve state rather than individual interests. It is thus not surprising that no independent judiciary nor separate procuracy

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2. JYH-PIN FA, A COMPARATIVE STUDY OF JUDICIAL REVIEW UNDER NATIONALIST CHINESE AND AMERICAN CONSTITUTIONAL LAW 16-17 (School of Law, University of Maryland, Occasional Papers/Reprints Series in Contemporary Asian Studies, No. 4-1980 (33), 1980).

3. *Id.*

and police developed in traditional China. For similar reasons, there was no rationale for recognizing defense lawyers, as there were few economic or civil rights to be protected.<sup>4</sup> This does not mean, however, that the officials had complete discretion in applying the law. Traditional China developed an elaborate system to prevent abuse or miscarriage of justice by officials. The Chinese drafted their legal code in very specific and rigid terms to prevent official manipulation of the laws. This approach failed to address many unforeseen criminal offenses. To remedy this situation, the code allowed analogies to be used in applying code provisions, but stipulated that a higher authority was required to approve each of these decisions.<sup>5</sup>

In its procedural aspects, the code provided an automatic appeal in most cases. A prisoner could be executed only after personal approval by the Emperor.<sup>6</sup> In addition, an independent censorate organ was employed to receive complaints from the people concerning official corruption or abuse.<sup>7</sup>

### B. Contemporary Legal Reform

Despite its long tradition, the weaknesses of Chinese law became apparent in the nineteenth century after China came in contact with Western countries. China was forced to grant extraterritorial rights to foreigners and to foreign governments for their enclaves along China's coasts because the foreigners claimed that Chinese law was primitive. Reformers believed that modernizing the law would assist China in overcoming its weaknesses and would eliminate the demand for extraterritoriality. This idea gained added impetus in the late nineteenth century from the Japanese legal reforms and their successful abolition of extraterritoriality.

Moreover, as China opened up to the world, the intrusion of Western economic power and commercial ideas, including corporations, negotiable instruments, and insurance, made it clear that traditional Chinese law simply lacked the tools for conflict resolution. There was a growing need for comprehensive civil and commercial laws. Further, many foreign states promised to abolish extraterritori-

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4. Underground, illegal lawyers did exist and there are code provisions punishing these so-called "litigation tricksters" (*sung kun*, meaning "litigation sticks"). See D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA*, 413-17 (1973).

5. *Id.* at 32, 175-78.

6. *Id.* at 113-22.

7. *Id.* at 121.

ality as soon as China modernized its legal system.<sup>8</sup>

China, in modernizing its legal system, borrowed heavily from Japan, which had successfully modernized its system. The Japanese patterned their legal system after the systems of countries such as Germany and France. As a result, the Chinese also adopted a civil law system. The fragmentation of the common law systems prevented easy borrowing from such a system.<sup>9</sup>

After the fall of the Ch'ing dynasty (1644-1911) and the turmoil of the early Republican period, the Kuomintang (Nationalist Party) established the Nationalist government which unified the country in 1928. The government began a series of legal reforms which continued until the outbreak of the Sino-Japanese War in 1937. During this period, the Nationalists codified all the major civil, criminal, and commercial laws of China. Although many of these laws were patterned after the codes of Germany, Switzerland, France, and Japan, the Nationalists tried to retain traditional values which they believed were consonant with the goal of modernization. For example, a suspect who voluntarily surrendered to the authorities before the crime was discovered would automatically receive a reduction in sentence.

The Nationalist government continued legal reform during the years of the Sino-Japanese War. The highlight of these efforts was the abrogation of foreign extraterritoriality in China in 1943. In 1947, China adopted a new constitution based on democratic principles. Unfortunately, the Nationalist army was defeated by Communist forces in late 1949, and the Nationalist government moved to Taiwan.

### *C. The Taiwan Period (1949-Present)*

When the Nationalist government moved to Taiwan in late 1949, it brought with it all of the current codes. Additionally, the ROC government was very active in enacting special legislation to implement its social and economic policies. In this respect it has followed one supreme guiding concept: Dr. Sun Yat-sen's Principle of People's Livelihood, one of the Three Principles of the People on which the Nationalist Party was built. Under this concept, a government's social and economic policies should respond to the six major requirements of the people—food, clothing, housing, communications,

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8. 2 G. KEETON, *THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA*, 2 (1928).

9. Keeton, *The Progress of Law Reform in China—II*, 20 *J. COMP. LEGIS. AND INT'L LAW* 210, 220 (1938); see also Chung-hui Wang, *Revision of the Chinese Criminal Code*, 13 *ILL. L. REV.* 77 (1918).

education, and recreation. To that end, the Nationalist government enacted new labor legislation which included the Labor Insurance Statute (1958), the Vocational Training Fund Statute (1972), the Law Governing Labor Safety and Health (1974), and the Basic Labor Standards Law (1985).

Since the mid-1950s, the ROC has been actively soliciting overseas Chinese and foreign investment to strengthen the ROC's economy and to advance technological development. Several important laws were enacted to implement this policy.<sup>10</sup> In addition, many of the existing laws, such as the Negotiable Instrument Law, were revised to facilitate foreign trade and investment.

The influence of United States law has increased since the 1950s with the growth of trade and investment from the United States. When the ROC amended the commercial law, both United States theory and practice were studied to aid in modernizing four commercial statutes: Company Law, Law of Negotiable Instruments, Maritime Law, and Insurance Law. Additionally, the Chattel Secured Transactions Act, an important appendix to the Civil Code, is said to be based on the United States model. Certain United States rules of criminal procedure were also incorporated into the Chinese Code of Criminal Procedure after the 1966 revision.

Although formal diplomatic relations were terminated between the ROC and the United States on January 1, 1979, the countries retain most of the substance of their relations prior to 1979, under the United States-Taiwan Relations Act of 1979.<sup>11</sup> Thus, it is likely that United States law will continue to impact legal development in the ROC.

### III. THE CURRENT JUDICIAL SYSTEM, PROCEDURE, BAR, AND ADMINISTRATION OF JUSTICE

#### A. *Council of Grand Justices*

The Council of Grand Justices is one of the government's most important organs. The Council is the only part of the government with the authority to interpret the Constitution and render a uniform interpretation of laws and regulations. The President appoints each of

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10. These include the Statute for Investment by Foreign Nationals (1954), the Statute for Investment by Overseas Chinese (1955), the Statute for Encouragement of Investment (1960), the Statute for Technical Cooperation (1962), and the Statute on Management of Export Processing Zones (1965).

11. The 1979 United States-Taiwan Relations Act § 4(c), 22 U.S.C. § 3301 (1979).

the Council's seventeen members, subject first to the Control Yuan's approval. Justices serve nine-year terms and can be reappointed without restriction. The Council's jurisdiction includes issues of the constitutionality of statutes or regulations, and the application of the Constitution. Since 1958, anyone whose constitutional rights have been violated has standing to challenge the constitutionality of the statute or regulation in question. However, all other legal remedies must first be exhausted.

### *B. Administrative Court*

Following the French model, administrative adjudication is separate from the regular courts. Any individual who feels that his or her rights have been injured through an unlawful or improper administrative order, may file a petition with the issuing authority's immediate supervising authority.<sup>12</sup> If that ruling is unsatisfactory, the petitioner may appeal to the next highest authority. If dissatisfied with the decision on appeal, the Administrative Court is the petitioner's last resort. This court is divided into several divisions, with each division having judges from both judicial and civil service experience. All judges have life tenure.

### *C. Commission on the Discipline of Public Functionaries*

In addition to the administrative remedies, a misbehaving public official can be dismissed or suspended from public office for one year. This order can be issued by the Commission on the Discipline of Public Functionaries, created to hear impeachment cases brought by the Control Yuan against offending officials. However, this procedure is often overshadowed by regular criminal charges filed in the ordinary courts.

### *D. Ordinary Courts*

#### 1. The District Courts

Most people enter the court system through the District Court, the court of original jurisdiction for most civil and criminal cases.<sup>13</sup> Almost every city and county has its own District Court. There are seventeen of these in the ROC, plus two more for the offshore islands of Quemoy and Matsu. In addition to the usual civil and criminal

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12. ADMINISTRATIVE PETITION LAW art. 2 (ROC).

13. LAW OF ORGANIZATION OF THE COURT [L. ORG. CT.] art. 10 (ROC).

divisions, several new divisions have been established in recent years including the Traffic Division, the Tax Division, the Family Division, and the Juvenile Delinquency Division.

At the District Court level, cases are usually tried before a single judge without a jury. However, three judges sit as a panel to hear cases deemed "important," including cases of murder, robbery, kidnapping, rape, and those crimes that pose a serious threat to the social order.<sup>14</sup>

## 2. The High Court

Above the District Court is the Taiwan High Court, sitting in Taipei. The High Court has three branches located in the central (Taichung), southern (Tainan) and eastern (Hualien) parts of the island. The offshore islands of Quemoy and Matsu are served by the Fukien High Court, Hsiamen Branch.

The High Court serves as the major court of appeal in almost all civil and criminal cases. Criminal cases relating to internal or external security or foreign relations are tried originally in the High Court.<sup>15</sup> Usually, three judges sit in council to hear cases. One judge may be assigned to conduct the preliminary proceedings and carry out investigation of evidence.<sup>16</sup> Oral arguments are conducted as in the lower courts, and questions of both fact and law may be fully reconsidered.

## 3. The Supreme Court

The Supreme Court is divided into several divisions. Each division is composed of five judges, including one chief judge.<sup>17</sup> Three or five judges, depending on the nature of the case, are legally required to hear cases in the Supreme Court.<sup>18</sup> Unlike the lower courts which can review questions of fact and law, the Supreme Court is limited only to reviewing questions of law.<sup>19</sup>

The Supreme Court's function is to hear civil and criminal cases appealed from the lower courts.<sup>20</sup> Although the jurisdictional scope

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14. *Id.* art. 3, para. 1.

15. CRIMINAL CODE [CRIM. C.] arts. 100-19 (ROC).

16. L. ORG. CT. art. 3, para. 2 (ROC).

17. *See id.* art. 24.

18. *Id.* art. 3, para. 3.

19. CODE OF CIVIL PROCEDURE [C. CIV. PROC.] art. 467 (ROC); CODE OF CRIMINAL PROCEDURE [C. CRIM. PROC.] art. 377 (ROC).

20. However, as noted earlier, cases concerning questions of constitutionality and admin-



of the Chinese Supreme Court appears to be narrower than that of the United States Supreme Court, the volume of civil and criminal cases it decides every year is substantial. In 1982, the sixty-seven judges decided seventeen thousand cases, with each judge deciding roughly thirty cases a month. The large volume can be attributed to the lack of limitations imposed on cases appealed from below. Civil cases are prohibited from appeal if the benefits sought are less than NT \$300,000 (approximately US \$12,000.00). However, this limitation provides little restraint.

### *E. Other Methods of Dispute Resolution*

#### 1. Mediation

Cases which can be instituted only upon complaint, such as libel, trespass, and rape, are eligible for out-of-court mediation under the jurisdiction of a local Mediation Committee.<sup>21</sup> The Committees are composed of seven to fifteen "men of justice" who have legal knowledge. Each are appointed and confirmed at the local level.<sup>22</sup> Such mediation is informal and less expensive than other means, but requires the consent of the parties or victim.

Court mediation is required before other litigation is formally instituted in all property cases valued under NT \$6,000 (approximately US \$240). Other cases can be mediated by a sitting judge at the discretion of the parties involved.

#### 2. Settlement

Another way to minimize lawsuits is an in-court process called "settlement."<sup>23</sup> It differs from mediation because it is employed after the case is formally under way. During the litigation period, the plaintiff may withdraw before a final judgment if both parties reach agreement.

#### 3. Arbitration

A dispute may be submitted to arbitration if both parties have so

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istrative law are handled by the Council of Grand Justices and the Administrative Court, respectively.

21. STATUTE OF MEDIATION IN VILLAGES, TOWNS AND CITIES art. 1 (ROC).

22. *Id.* art. 3.

23. C. CIV. PROC. arts. 403, 427 (ROC).

agreed in writing.<sup>24</sup> Lawyers, accountants, and others with commercial arbitration experience must register with the arbitration association, which is jointly established by the chambers of commerce and industrial associations at different levels.<sup>25</sup>

The arbitrator, who is selected from the arbitration panel, hears the case and renders an award. However, his award may not be directly enforced. An execution order, issued by the court after application, is legally required to enforce the award.<sup>26</sup>

#### 4. Public Notarization

The status of Chinese notaries as officials of the court is perhaps unique in the world. Notarial functions are divided into two categories: (1) execution of certificates of authentication, and (2) acknowledgement of private instruments. Papers notarized in either form can thus be treated as prima facie evidence. Using the public notary saves time and expense in litigation. For this reason, notarization is especially popular in small cases, such as relinquishing possession of a leased or borrowed house upon the expiration of the lease period.

#### F. The Procurator

A procuratorship office is attached to each court. A procurator has extensive authority to perform duties similar to those performed by the prosecutor and the grand jury in the United States. He or she holds preliminary examinations to see if evidence warrants a trial, and may summon, arrest, and detain the accused without approval of a judge. In addition, a procurator may compel the appearance of witnesses and may perform investigations.<sup>27</sup> The procurator, having such broad powers, has no counterpart in the United States judicial system.

Procurators enjoy a status similar to that of a judge. They have the same qualifications and training as judges, and transfers between the two positions are routine, especially early in a career. With the exception of being assignable to different locations, a procurator receives the same constitutional protections as a judge. Procurators also have life tenure.

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24. STATUTE OF COMMERCIAL ARBITRATION [STATUTE COM. ARB.] art. 1, para. 2 (ROC).

25. *Id.* art. 5, para. 2.

26. *Id.* arts. 21, 30.

27. JYH-PIN FA, *supra* note 2, at 32.

### G. *The Role of Precedent*

In the ROC, decisions of higher courts are not binding on lower courts. Most judges follow their own prior decisions out of habit, while others follow the decisions of higher justices to enhance their chances for promotion. A target rate for upholding lower decisions is set at 45% for civil and 55% for criminal cases. Decisions overturned in excess of the target percentage would harm the promotion potential of the lower court judges. Consequently, few lower court judges ignore the leading opinions of the higher court judges.

The decisions of the Council of Grand Justices bind all courts. At the Supreme Court level, certain decisions are designated as having binding force, but only the essentials of those judgments are published. Full texts of judgments are not regularly published. Precedent, therefore, does exist, albeit in a form different from that in the United States and other common law systems.

### H. *The Bar and Legal Services to the Poor*

There are two principal methods of becoming a lawyer in the ROC. One method is to take and pass the High Examination conducted annually by the Examination Yuan. During the thirty year period from 1950 to 1980, the average passing rate was only 2.99%. In some years the rate dropped below one percent. The second route is comparatively more accessible. Judges, procurators, judge advocates, professors of law, and judicial administrators may apply to the Minister of Examination and Selection of the Examination Yuan to be certified as lawyers. For judges, procurators, and those with doctorate degrees, all exams are waived. All others are required to take a modified examination. While only 463 passed the High Examination in the thirty-year period prior to 1980, some 2,215 attorneys were certified by this alternate method.

Any candidate who either passes the High Examination or who is certified can practice immediately. However, judges and procurators must undergo further training. There are now roughly 2,000 practicing attorneys in the ROC, one for every 10,000 residents.

Chinese attorneys usually engage in general practice, but a few have formed large law firms that specialize in international trade, foreign investment, and the like. Every lawyer must join the local bar association before he can practice law. The bar association is supervised by the Ministry of Legal Affairs (formerly, the Ministry of Justice) and the chief procurator in each region.

In 1941, the Ministry of Justice issued a decree requiring the local bar association in each area to provide free legal services to those who could not afford lawyers' fees. Lawyers regularly take turns at providing such free services. A decree of 1954 requires that the procurator's office of each area make monthly inspections of the local bar association's legal services to the people.

### *I. Criminal Process*

Like other civil law countries, the Chinese Criminal Procedure Code does not provide for trial by jury. Judges decide both questions of fact and law. Although there are no strict rules of evidence, the Chinese Supreme Court has developed case law on this subject. The Code of Criminal Procedure recognizes the concept of presumption of innocence, however there is no prohibition against self-incrimination. A warrant authorizing an arrest or search may be issued by a procurator in the course of an investigation or by a judge in the course of a trial. The accused has no right to demand cross-examination or confrontation of a witness. Permission for cross-examination or confrontation is granted at the discretion of the trial judge.

In 1967, the Criminal Procedure Code was revised to provide more protection for individual rights. For instance, an accused may be detained for no more than two months during an investigation and three months during trial; any extension must be approved by the court itself. Furthermore, each extension may not exceed two months. In 1982, the code was further revised to grant the right to counsel when a person is arrested and during interrogation. Counsel is provided for indigents if the charge carries a sentence of three years or more.

### *J. Police Offenses*

By circumventing the more rigid procedural requirements provided in the Code of Criminal Procedure, the Law for the Punishment of Police Offenses provides the police with substantial powers to investigate crimes. The law covers a wide variety of petty offenses ranging from spitting in a public place to vagrancy. The major controversy concerning the Police Offenses Law is its enforcement procedures. Police may take custody of an individual for seven days. Under certain circumstances, the police may extend detention to two weeks. Moreover, there is no judicial review of procedures. An aggrieved individual's only opportunity for appeal is to a "higher police

authority.”<sup>28</sup> In 1980, the Council of Grand Justices declared part of the Police Offenses Law unconstitutional. The government reportedly is in the process of abolishing this law and enacting a new law requiring the establishment of a separate division in each district court to deal with police offenses.

#### *K. Responsibility of the State for Doing Injury to Individuals*

The ROC Constitution provides that any injured person may, in accordance with the law, claim compensation from the state for damages sustained as a result of state action.<sup>29</sup> To implement this provision, the “Law of Compensation for Wrongful Detentions and Execution” was enacted in 1959 and the “State Compensation Law” was enacted in 1980. Rights of foreigners under both laws are based on treaties or reciprocity.

#### *L. Civil Procedure*

There is no provision for jury trials in civil cases in the ROC. In rendering a judgment, the court decides on the truth or falsity of the facts according to its moral conviction while giving due consideration to the issues raised by the oral proceedings and the evidence. If the court cannot obtain this moral conviction from the evidence tendered by the parties, or if the court deems it necessary for other reasons, it may investigate evidence on its own motion.

Generally, service shall be executed at the domicile, residence, business office, or business establishment of the person to be served, or wherever the person is actually found. If the location where service is to be executed is unascertainable, the service may be effected by court notice or publication in a government gazette or newspaper. Service takes effect 60 days after publication.

In the United States, deposing a witness is primarily a private matter. The witness is examined by lawyers for both parties. The testimony is recorded verbatim by a court reporter, who is a private person paid for the work. Because the reporter is usually a notary as well, he or she can administer an oath to the witness. In the Republic of China, domestic or foreign lawyers are not allowed to take the deposition of a witness outside of court. A foreign court seeking to obtain evidence in the Republic of China must go through the procedure

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28. LAW FOR THE PUNISHMENT OF POLICE OFFENSES arts. 46, 47 (ROC).

29. R.O.C. CONST. art. 24.

provided in the 1963 Law Governing Extension of Assistance to Foreign Courts.

*M. Recognition and Enforcement of Foreign Judgments or Arbitral Awards*

A foreign judgment will be recognized except in any of the following cases:

- (1) If the foreign court has no jurisdiction over the case according to the law of the Republic of China;
- (2) If the losing party is a national of the Republic of China who has not responded to the action, except where the summons or orders necessary for the commencement of the action has been served on the party himself in that country or served on him through the judicial assistance of the ROC;
- (3) If the judgment of the foreign court is considered to be incompatible with public order or good morals; [or]
- (4) If the foreign country does not reciprocally recognize the judgments of the Chinese courts.<sup>30</sup>

Since the ROC does not have diplomatic relations with many countries, a judgment rendered in a country having no diplomatic relations with the ROC must first be verified by unofficial organs of the ROC in that country before it can be presented to an ROC court. Even if a foreign judgment is not recognized by the ROC court under the above article, the judgment will not be automatically excluded as evidence.<sup>31</sup> The ROC court can still use the judgment as evidence in its investigation and examination.

Foreign arbitral awards will not be recognized in the ROC in the following situations:

- (1) the award violates an imperative or prohibitive provision of a law of the Republic of China;
- (2) the award is contrary to public order or good morals of the Republic of China; and
- (3) under the law of the place of arbitration, the subject matter of the dispute is not subject to arbitration.<sup>32</sup>

Where an award is rendered in a country which does not recognize the ROC's arbitral awards, the court *may* reject an application for

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30. C. CIV. PROC. art. 402 (ROC).

31. Civil Judgment of the Supreme Court, 75 T'ai-shang No. 1096 (1986), translated in Hungdah Chiu & Jyh-pin Fa, *supra* note 1, at 296-99.

32. STAT. COM. ARB. art. 32 (ROC).

recognition of that foreign award. Therefore, the principle of reciprocity is not always applied.<sup>33</sup>

#### IV. STATUS OF ALIENS AND SPECIAL UNITED STATES-REPUBLIC OF CHINA TREATY RELATIONS

##### *A. Status of Aliens*

An alien may enter the ROC with a properly secured visa, or with a letter of introduction issued by an "unofficial mission" of the ROC in a country which maintains no diplomatic or official relationship with the ROC. The visa will be issued at the airport upon the presentation of the letter. Although the United States has not had diplomatic relations with the ROC since January 1, 1979, the ROC's representative organ for dealing with the United States, the Coordination Council for North American Affairs, and its twelve offices in the United States, can issue visas to United States nationals. However, an alien carrying a transit visa but having no return or next destination airline ticket, ship ticket, or entry visa of next destination may still be denied entry.

Article 4 of the Regulations Governing the Entry or Exit and Residence or Transit of Aliens provides that an alien who falls into one of the following categories may be refused entry:

- (1) He does not carry a passport or refuses to submit his passport for examination;
- (2) His passport is counterfeited or altered;
- (3) He uses or receives the passport of another person;
- (4) There is no valid visa on his passport or his visa has expired;
- (5) He was formerly refused entry, ordered to leave [the ROC] within a prescribed period of time or previously expelled from [the ROC];
- (6) He may undermine public order or social morals;
- (7) He is mentally ill or is considered by a quarantine organ to have a contagious disease or potentially to have such a disease;
- (8) He carries contraband;
- (9) There is evidence that he will not be able to support himself in [the ROC];
- (10) He has a transit visa but he does not have a return or next destination airline ticket, ship ticket or entry visa of next destination;
- (11) There is a possibility that he may violate the laws or regula-

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33. Civil Judgment of the Supreme Court, 75 T'ai K'ang No. 335 (1986), translated in Hungdah Chiu & Jyh-pin Fa, *supra* note 1, at 294-96.

tions of [the ROC].<sup>34</sup>

After an alien has entered and resided in the ROC, the Ministry of the Interior may order the mandatory departure of an alien in one of the following situations:

- (1) An alien whose visa has been cancelled;
- (2) An alien who enters the country [without submitting his valid passport with a visa and without filling out an entry registration form for examination by the police organs of the airport or port];
- (3) An alien [with a resident visa who fails to file an application for an alien resident card within 15 days after entry] or [an alien whose card has expired and fails to file an application for an extension within 10 days after the expiration];
- (4) An alien who overstays his permitted time in [the ROC];
- (5) An alien who engages in activities or is employed for work which is inconsistent with the purpose of his visa;
- (6) An alien who is subject to expulsion from [the ROC];
- (7) An alien who cannot financially support himself in [the ROC];
- (8) An alien who may undermine any public policy or social morals;
- (9) An alien who uses a written statement, picture, speech or other means to libel or slander the leader of the Republic of China, or intentionally defames the government of the Republic of China or its officials;
- (10) An alien who has committed an offense outside the territory of [the ROC] and is at large, or who has been sentenced to a fixed-term of imprisonment but has not yet begun to serve his term, or the prison term has not yet been completely served; or
- (11) An alien whose behavior may violate the laws or regulations of [the ROC].<sup>35</sup>

After receiving a notice for mandatory departure, an alien must depart within seven days. If he does not depart within the prescribed time, he may be forced to depart. Under international law, a state can expel an alien from its territory, therefore, no administrative or judicial review for a decision of mandatory departure made by the Ministry of the Interior appears to exist. Also, a dual national of the ROC and a foreign country will be treated as a foreigner if he enters the ROC with a foreign passport.

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34. Regulations Governing the Entry or Exit and Residence or Transit of Aliens, art. 4, translated in, *Contemporary Practice and Judicial Decisions of the Republic of China Relating to International Law, 1986-1988*, 7 CHINESE Y.B. OF INT'L. L. & AFF. 241-51 (H. Chiu ed. 1987-88).

35. *Id.* art. 33, at 249-50.



An alien may be refused exit in the following situations:

- (1) A judicial organ has notified the police organ to restrict his exit;
- (2) He has not submitted a certificate verifying required tax payments (or attesting to a tax exemption) or the financial or tax organ has notified the police organ to restrict his exit; [or]
- (3) He has a case under investigation by a relevant government organ.<sup>36</sup>

To protect the personal security of aliens in the ROC, aliens generally are granted the treatment that the ROC grants its own citizens. Aliens are allowed access to ROC courts, but free legal aid is granted only where there exists reciprocity with the alien's country or a special provision of a treaty entered into by the ROC.

Aliens may participate in land, mineral, banking, and insurance enterprises, however, they must fulfill certain conditions prescribed by law. Under the 1954 Statute for Investment by Foreign Nationals and the 1960 Statute for Encouragement of Investment, foreign investments are guaranteed against expropriation for twenty years. Foreign investors also receive tax concessions, the right to remit their capital and profits abroad, and other privileges.

Aliens in the ROC generally are permitted to work in common occupations of the community without an employment permit. Aliens, however, are restricted or excluded from certain professions, such as fisherman, ship master, and port pilot. Also, aliens may not engage in specialized professions<sup>37</sup> or be technicians<sup>38</sup> unless their home countries grant similar privileges to citizens of the ROC.

### *B. Special United States-Republic of China Treaty Relationships*

The United States and the ROC severed diplomatic relations on January 1, 1979.<sup>39</sup> The United States Congress agreed to continue all treaties and other international agreements entered into between the United States and the governing authorities in the ROC prior to January 1, 1979, and which were effective on December 31, 1978 (until terminated in accordance with law). The ROC confirmed the continuity of the Sino-American treaties and agreements in a letter from

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36. *Id.* art. 6, at 242.

37. Specialized professions include accounting, law, and medicine.

38. Restricted technical areas include architecture, agriculture, industry, and mining.

39. 22 U.S.C. § 3301 (1979).

the Ministry of Foreign Affairs to the Ministry of Justice (now called the Ministry of Legal Affairs).

The most important treaty between the United States and the ROC is the 1946 Treaty of Friendship, Commerce, and Navigation.<sup>40</sup> The treaty granted the nationals and corporations of each country most-favored status.<sup>41</sup> The nationals of the contracting parties are entitled to reside, travel, and conduct trade throughout each other's territory.<sup>42</sup> Each country's corporations and associations are entitled to have their juridical status recognized within the territories of the other contracting party.<sup>43</sup> The nationals, corporations, and associations of each party shall enjoy free access to the courts of justice, administrative tribunals, and agencies in the territories of the other, as established by law, in the pursuit and defense of their rights.<sup>44</sup>

Under a 1952 agreement, the United States Overseas Private Investment Corporation ("OPIC") extended its coverage to include United States investments in the ROC.<sup>45</sup> Although there is no general double taxation treaty between the United States and the ROC, the two countries did agree to relieve double taxation on earnings from the operation of ships and aircraft.<sup>46</sup>

After January 1, 1979, all agreements concluded between the United States American Institute in Taiwan ("AIT") and the Republic of China's Coordination Council for North American Affairs ("CCNAA") are nominally "unofficial." The agreements, however, have full force and effect under the laws of the United States pursuant to Sections 6 and 10(a) of the Taiwan Relations Act.<sup>47</sup> Their va-

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40. Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-Republic of China, 63 Stat. 1299, T.I.A.S. No. 1871 *reprinted in* 6 BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, 761 (1971).

41. *Id.* at 763.

42. *Id.* at 762.

43. *Id.* at 764.

44. *Id.* at 767.

45. China Economic Cooperation, June 25, 1952, 3 U.S.T. 4846, T.I.A.S. 2657, 136 (as amended, 1963, 14 U.S.T. 2222, T.I.A.S. 5509, 505 U.N.T.S. 308). The rapid rise of per capita income in the ROC (about US \$7,500 in 1989) disqualifies the ROC for OPIC coverage.

46. Double Taxation: Earnings from Operation of Ships and Aircraft, Feb. 26, 1972, United States-Republic of China, 23 U.S.T. 129, T.I.A.S. 7282. This agreement is replaced by *Exchange of Letters between the CCNAA and AIT Relating to Relief from Double Taxation on Earning Derived from the Operation of Ships and Aircraft*, May 31, 1988, *reprinted in* 7 CHINESE Y.B. OF INT'L L. & AFF. 496-99 (H. Chiu ed. 1987-88).

47. *See* 22 U.S.C. § 3305 (1979).

lidity in the ROC is similar to that of any other international treaties or agreements.

## V. CONCLUSION

In the last four decades, the ROC government has established the foundation of a modern legal system in the ROC and has planted the seeds for its future growth. While the ROC's economic growth is well-known, its legal development has been ignored by Westerners.

There is a common impression that the ROC does not have a sophisticated modern legal system. This is untrue; without a modern legal system, the ROC would have been unable to reach its present level of economic development. A United States businessman operating in the ROC would not be able to adequately protect his rights under this system.

# Commercial Litigation, Arbitration, and the Enforcement of Foreign Judgments and Arbitral Awards in the Republic of China

K. C. FAN\*

## I. INTRODUCTION

Businesspersons are usually optimistic when negotiating commercial contracts. They tend to pay more attention to the potential economic gain of a transaction and often give little thought to preparing possible solutions to potential problems. Lawyers, on the other hand, tend to approach the matter more conservatively. Consequently, lawyers are more concerned with finding legally viable positions which afford the greatest protection to their client in the event that a dispute arises. Regardless of the style in approaching commercial contracts, disputes will often arise over the interpretation of a contract. If the parties cannot settle the dispute by themselves, either through mediation or conciliation, the last method for settlement will be some form of litigation or arbitration or both.

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