Choosing a Forum for International Disputes

Focus US/Taiwan

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A. Introduction – the 'Lowly' Forum Clause?

It remains common for companies negotiating international deals to treat forum selection clauses as “boilerplate” – not as the important strategic terms they are. Forum selection clauses encountered in litigation today all-too-frequently employ stock phraseology outmoded for decades without accounting for legal evolution and globalization.

The euphoria accompanying the deal, and the focus on the substantive commercial terms of price and performance may relegate forum selection to an afterthought. Optimism prevails, and the possibility of a future dispute is a remote abstraction no one wants to consider.¹

That sort of myopia is a mistake. Dispute forum selection is a crucial term in a well-drafted contract, with major economic consequences. Indeed, the selection of forum for disputes frequently determines the economic success or failure of the deal when viewed in hindsight. The so-called “boilerplate” term of forum selection can even have bet-the-company consequences.

Later in the commercial relationship, the abstraction of a dispute becomes reality. At this stage, a well-drafted forum selection clause can be a decisive factor in settlement negotiations, or in litigation outcome. On the other hand, a poorly crafted forum clause, or the absence of a clause can be very difficult to overcome, in some cases overshadowing the merits at dispute, or preventing the parties from ever reaching the merits.

A third stage at which forum selection decisions have major consequences is after litigation results in a judgment or arbitral award. In what forums may the judgment or award be enforced? Are the enforcement remedies real or illusory? Is the victory Pyrrhic, or the loss more imaginary than real?

¹ A party may perceive it has no negotiating leverage to contest a forum choice dictated by the other side. In other situations, for tactical reasons, or perhaps as a matter of diplomacy or etiquette, a party may not want to raise the specter of later disputes or to appear contentious during negotiations. Even where a party decides not to negotiate forum selection, it pays to have a clear understanding of the potential consequences of proposed forum clauses and what later strategy choices are foreclosed or remain viable should a dispute ensue. Thus, forum selection strategy is an important factor to take into account even where nothing is expressly discussed during negotiations.
In this paper, experienced litigators and intellectual property specialists from both the United States and Taiwan examine forum selection issues for companies involved in international commerce at these three critical, inter-related decision points. The examination focuses on practical, real-world choices and solutions for the decision-making lawyer or executive, and exposes outmoded conventional wisdom about this important subject. While the specific focus is on the US and Taiwan, the principles involved have much broader application to international commerce.

B. Forum Selection Clauses in Contract Negotiations

The “forum clause” or “disputes clause” is frequently scorned in negotiations, even in the biggest deals. Experience teaches this can be a costly mistake, especially in international deals, where there may be a wider spectrum of forum options, and where the economic costs and legal consequences of the forum choice are most dramatic. In this section we discuss some of the more consequential wording issues and forum options such as arbitration in this context.

1. United States

For forty-two years since the US Supreme Court decision in *The Bremen v. Zapata Off-Shore Company*, the enforcement of forum selection agreements in international commerce has been firmly embedded in United States law. For nearly as long, arbitration clauses in international contracts, termed “a specialized kind of forum-selection clause,” have been enforced by US courts with equal rigor. Enforcement of international arbitration clauses has been aided in the US by the Federal Arbitration Act’s adoption of the New York Convention, including federal subject matter jurisdiction to compel international arbitration and enforce international awards.

The United States Supreme Court has very recently and unanimously reinforced the primacy of contractual forum clauses over other factors in deciding the proper forum for litigation, albeit in the context of a dispute between domestic US companies.

Applying these principles, federal and state courts in the US vigorously enforce mandatory, exclusive forum selection and arbitration clauses, even more so where the court or arbitral forum is designated in an *international* contract. For example, the Ninth Circuit federal appeals court and the courts of California have enforced agreements to litigate or arbitrate in the United Kingdom, Italy, Switzerland, Saudi Arabia, France, Germany, Canada, Mexico and Japan, to name just a few countries. While there are few reported cases involving Taiwan, nothing suggests a lesser result for a well-drafted clause choosing courts or arbitration in Taiwan.

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4 9 U.S.C. §§ 201 et seq.
5 *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas*, 134 S.Ct. 568, 547 (2013) (No. 12-929) (“A valid forum-selection clause is to be given controlling weight in all but the most exceptional cases.” Slip opinion at 12.)
7 In a very recent matter in the California Superior Court of Los Angeles County, case no. SC120830, entitled *EFT Holdings, Inc. et al. v. Meifu Development Co. Ltd., et al.*, Taiwanese defendants moved to dismiss a complaint brought by US investors in a Taiwan real estate development. The motion to dismiss for forum non conveniens was premised in part on a dispute forum clause selecting the courts of Taiwan. Before the motion was heard, the plaintiffs dismissed their case in the US.
Where a party to the international contract attempts to evade the contractually-agreed forum by initiating litigation elsewhere, the standard procedural device for defending the contractual forum is a motion to dismiss or stay the offending suit on grounds of *forum non conveniens*.\(^8\) If a party initiates litigation in a foreign state in order to evade a contract specifying the US courts, the party wishing to preserve US jurisdiction may seek an anti-suit injunction (enjoining the opposing party from maintaining the foreign suit).\(^9\) Such injunction requests have enjoyed a degree of success based on the view that “irreparable harm” is shown when a party incurs the expense and risk of foreign litigation. Countervailing concerns for international comity, however, dictate that such injunctions against foreign legal proceedings should be used “sparingly.”\(^10\)

In the United States, when it comes to enforcement there is no edge given to arbitration clauses over forum clauses selecting courts.\(^11\) It is sometimes urged that federal law “favors” arbitration, but a closer reading of the authorities shows the presumption in favor of arbitration does not apply to disputes concerning whether an arbitration clause or a competing court selection controls.\(^12\) Thus, at the threshold point of determining whether there is an effective agreement to arbitrate, or in situations where there are competing forum selection clauses involving the same parties, normal principles of contract interpretation will be applied to determine what the parties intended, and therefore which forum will prevail.\(^13\)

Careful drafting is critical to the enforceability of a forum selection clause. In the case of contracts between sophisticated parties in the international context, what matters most is that the forum selected be mandatory and exclusive. Problems arise when there is ambiguity over the scope of the clause, or where there is a provision for alternative forums depending on the nature of the dispute. Such ambiguities of breadth, or qualifications as to the exclusiveness of jurisdiction invariably lead to protracted, expensive fights at the outset of litigation, with uncertain results. These jurisdictional squabbles defeat the basic purposes of contractual forum selection. Examples are legion:

- Where the parties provide alternative sites, depending on which party asserts a claim, or at the election of a party;\(^14\)

\(^8\) Typically the motion would be brought in federal court under Rule 12(b), Fed. R. Civ. Proc., because by definition, 28 U.S.C. § 1404(a) is inapplicable to transfer the case to another US district court. In the case of matters filed in the state courts, the motion would be brought under the applicable state procedural statute, which in California is C.C.P. §418.10(a)(2).

\(^9\) *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 993 (9th Cir. 2006)(Injunction against Ecuadorian court action granted in light of contractual agreement to a California forum); *Applied Medical Distribution Corporation v. Surgical Company, BV*, 587 F.3d 909, 921 (9th Cir. 2009)(Injunction granted against competing litigation in Belgium).

\(^10\) *Applied Medical Distribution Corp. v. Surgical Co. BV*, 587 F.3d 909, 920 (9th Cir. 2009).

\(^11\) Compare *The Bremen*, 407 U.S. 1, supra, with *Scherk*, 417 U.S. 506, supra.

\(^12\) *Applied Energetics, Incorporated, v. NewOak Capital Markets, LLC*, 645 F.3d 522, 526 (2d Cir. 2011)(Where a subsequent forum clause selecting the New York courts was in clear conflict with a previous arbitration clause between the same parties on the same subject matter, the later forum clause superseded and displaced the former arbitration clause, notwithstanding the federal policy “favoring” arbitration).

\(^13\) In an oft-quoted opinion dealing with the “related” issue of a choice-of-law clause in an international contract, the California Supreme Court reasoned: “We seriously doubt that any rational businessperson, attempting to provide by contract for an efficient and business-like resolution of possible future disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship.” *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 469 (1992). This quoted logic has been applied to reject claims that multiple *forums* were intended for a single contract-based dispute. *See also Olinick v. BMG Entertainment*, 138 Cal. App. 4th 1286, 1300 (2006)(“*Nedlloyd’s* rationale with respect to the scope of the choice-of-law provision is equally applicable to the scope of the forum selection clause.”).

\(^14\) *Polimaster v. RAE Systems*, Inc., 623 F.3d 832, 841 (9th Cir. 2010)(Divided Ninth Circuit panel held that arbitration clause requiring arbitration “at defendant’s site” was unambiguous and required separate arbitrations in the US and Belarus for the parties’ opposing claims, despite the obvious inefficiency and
Where the parties agree to alternative forums depending on the nature of the dispute;\textsuperscript{15}

Where the parties fail to specify how “gateway” jurisdictional disputes will be decided;\textsuperscript{16}

Where the parties enter multiple, inconsistent forum agreements.\textsuperscript{17}

Where, in arbitration clauses, the parties designate no arbitration administrator or rules of procedure.\textsuperscript{18}

The above examples are just a few of the language and drafting issues that creep into the forum clause language of international contracts. Experienced US litigators may seize on these ambiguities to fight the forum selection with great intensity.

In the US, it is possible to select from the various federal and state courts, as well as numerous domestic and international arbitration forums. The US has a strong, time-tested statutory scheme enforcing contractually-approved arbitration, as do most of the states.\textsuperscript{19}

Although disputes regarding patent infringement issues are not frequently resolved in arbitration, such claims are arbitrable if agreed to by the parties.\textsuperscript{20} In addition to the usual cost/benefit analysis associated with arbitration as opposed to litigation, one drawback of arbitration in the patent context is the loss of the right to appeal to the Federal Circuit. However, the opportunity to select an arbitrator with a particular technical expertise—or agree in advance to certain qualifications—may provide the parties some additional comfort regarding resolution of the claim construction issues. In addition, although Section 294 provides that arbitration awards are enforceable as to the parties, there is a significant open question as to whether an award may have any collateral estoppel or res judicata effect as to any third party.\textsuperscript{21} As a result, it is unclear whether patent arbitration awards regarding the validity of a patent may be binding against the patent holder in subsequent proceedings.

potential for conflicting outcomes); \textit{but see} \textit{China National Metal Products v. Apex Digital, Inc.}, 379 F.3d 796, 803 (9th Cir. 2004)(Ninth Circuit ruled that an arbitration award by CIETAC must be given recognition under the limited review allowed by the New York Convention, despite CIETAC having held the arbitration in Beijing contrary to claimant’s election of Shanghai under the arbitration clause).

\textsuperscript{15} \textit{Oracle America, Inc., v. Myriad Group, A.G.}, 724 F.3d 1069 (9th Cir. 2013)(Parties provided for arbitration of disputes concerning technology licenses, with carve-out that either party could bring action in courts for disputes relating to their intellectual property rights, whose jurisdiction would be “exclusive.” District Court denied motion to compel arbitration, reasoning in part that the grant of exclusive jurisdiction meant the court, not arbitrators determined arbitral jurisdiction. Reversing, the Ninth Circuit held that the parties’ contractual incorporation of the UNCITRAL arbitration rules was clear and unmistakable evidence that they intended the arbitrator to decide arbitral jurisdiction).

\textsuperscript{16} \textit{Id.; see also Momot v. Mastro}, 652 F.3d 982 (9th Cir. 2011)(Courts decide the gateway issue of arbitral jurisdiction absent clear and unmistakable agreement by parties to delegate the issues of arbitral jurisdiction to the arbitrator; in this case the Ninth Circuit held the contract language was sufficiently clear and unmistakable to grant to the arbitrator the power to determine the breadth of arbitral jurisdiction).

\textsuperscript{17} \textit{Applied Energetics, Incorporated v. NewOak Capital Markets LLC, supra.}

Such an arbitration clause is sometimes said to create an "ad hoc" arbitration. This may lead to lengthy, costly disputes over who will administer the arbitration, and what rules will govern the procedure. It is preferable to designate a recognized arbitral provider, such as the ICDR (AAA), the ICC International Court of Arbitration, the HKIAC (Hong Kong), SIAC (Singapore), CAA (Taiwan), among others. All these regimes provide rules of procedure which may be incorporated by reference.

\textsuperscript{18} \textit{See generally} 35 U.S.C. § 294(a); As to ITC investigations, \textit{see} 19 U.S.C.§ 1337(c): “[T]he commission may, by issuing a consent order or on the basis of an agreement between the private parties to the investigation, including an agreement to present the matter for arbitration, terminate any such investigation, in whole or in part, without” determining if there has been a violation of section 337."

\textsuperscript{21} 35 U.S.C. § 294(c) (noting “An award by an arbitrator shall be final and binding between the parties to the arbitration but shall have no force or effect on any other person.”)
2. **Taiwan**

Forum selection agreements are recognized in Taiwan. While there is no specific provision relating to international commerce, generally speaking, except as otherwise proscribed by law, the parties are free to agree on the forum governing a particular transaction.

However, there is debate whether a forum selection agreement can effectively exclude the jurisdiction of the Taiwanese courts. The Supreme Court of Taiwan has in recent judgments stated that, while the parties are free to agree on forum it must be explicit. If it is not explicit in that the agreed forum has exclusive jurisdiction or that the jurisdiction of the Taiwanese courts is excluded, the Taiwanese court may nevertheless imply coexisting jurisdiction over the dispute. Thus it is important to clearly state that the selected forum is exclusive.

The parties have equal freedom to agree to arbitration in Taiwan. Except in matters related to securities transactions and for matters that are considered not arbitrable, international arbitration clauses are recognized in Taiwan. While the Chinese Arbitration Association ("CAA," not to be confused with CIETAC, its leading counterpart in the PRC) is the recognized arbitration forum in Taiwan, the parties are free to select other arbitration forums. An arbitral award has the same force as a final judgment of a court in Taiwan.

Generally speaking, the Taiwanese courts will enforce arbitration agreements. If a party to the arbitration agreement nevertheless initiates an action in court, the court may order the plaintiff to submit the dispute to arbitration.

Disputes often arise from ambiguous wording in arbitration agreements. For example: "The parties may submit the dispute to arbitration." Taiwanese courts tend to hold such clauses valid. However, such a
clause would not be considered mandatory. In the event one party to such a clause initiated arbitration while the other initiated litigation, the Taiwanese courts tend to favor the forum where action was first initiated.\textsuperscript{31}

Therefore, as in the US it is important to state that arbitration is mandatory and exclusive. In practice, a model arbitration clause provided by the arbitral forum is best to ensure enforceability.

\section*{C. Forum Selection When a Dispute Arises}

At some point in many international deals, the “abstraction” of a future dispute becomes the immediate reality. One party decides it is time to wage war. This is another forum selection decision point. The array of available options will, of course, initially depend on 1) whether the parties have incorporated a forum selection or arbitration clause in their contract, and 2) whether the opposing party or others have already initiated related litigation in a forum of their own preference.

\subsection*{1. Where There is No Forum Selection Clause}

If there is no pre-dispute forum selection agreement, a broad range of forum selection issues will face the legal strategist in the US or Taiwan. A thorough discussion of all these factors is beyond the scope of this paper. However, a few broad points warrant mentioning in the scenario of no pre-dispute agreement.

\subsubsection*{(a) United States}

First, there has been rapid change over recent years in the US as to amenability to jurisdiction and ease of service. US courts have now adopted a low bar to subject foreign companies to service of process in the US, even where the slow processes of the Hague Convention have not been followed. For example, foreign corporations who do not do business \textit{directly} in the US but have subsidiaries or affiliates operating here, may be found to have been adequately served through service of the affiliate.\textsuperscript{32}

Second, while US courts have eased the standards for service of process, the question of when a foreign entity is sufficiently “present” in the US to warrant the exercise of \textit{in personam} jurisdiction in US courts remains volatile and uncertain.\textsuperscript{33} The US Supreme Court has very recently sent a sharp message that so-called “general jurisdiction” may not be invoked to bring a case in the US where there is little or no factual nexus to the US forum, and where neither the plaintiff nor defendant are residents, even though the defendant company may have sufficient contacts with the US forum to invoke “specific” jurisdiction in an appropriate case.\textsuperscript{34}

Third, US courts have increasingly perceived themselves over-burdened and under-funded with greater pressure on the judges and staff from heavy dockets. This sense of over-burden has more impact when the events being litigated seem remote from US shores, or the witnesses and evidence appears to be

\textsuperscript{31} See Taiwan High Court Legal Conference on Civil Matters No. 23 for year 1995; Supreme Court Judgment Tai-Shang-Tze No. 1491 (year 2007).


\textsuperscript{33} In \textit{Daimler AG v. Bauman}, 134 S.Ct. 746 (2014)), the Supreme Court unanimously reversed the Ninth Circuit Court of Appeals, ruling it had erred in exercising jurisdiction over the defendant German corporation where the Argentinian plaintiffs’ claims (arising out of the so-called “Dirty War” in Argentina) neither occurred nor had significant impact in California. Eight of nine justices joined in the majority opinion, finding that the Ninth Circuit’s ruling violated federal due process. Justice Sotomayor concurred in result, but opined that jurisdiction should have been reversed on narrower grounds, and predicted that the majority’s decision would raise new questions about US jurisdiction over foreign entities doing business in the US. \textit{Id. at} 764 (Sotomayor, dissenting).

\textsuperscript{34} \textit{Id. at} 757.
largely overseas. As budget and volume pressure has mounted, US courts have more frequently declined to exercise jurisdiction, again on grounds that the US forum is less logical or convenient than a foreign forum for the fair adjudication of the dispute. In a related trend, US courts have more frequently declined to exercise jurisdiction over disputes where to do so would appear to “export” US laws and standards, overstep the norms of international comity, or arguably invade the “sovereignty” of another country.

Fourth, US courts remain alone at the top when it comes to the scale of costs, risks and potential rewards of litigation. There has been some evidence that the invasiveness of US discovery, and the risks of e-discovery especially have moderated in recent years, but this is debatable.[37] The risks of “runaway” jury verdicts, punitive and treble damages awards remain significant in tort and intellectual property cases.

Finally, while it is difficult to generalize, US courts may be more advantageous than foreign courts when it comes to the availability of interim and “equitable” remedies such as injunctions, lis pendens, receivers, attachments and replevin.

In addition to pursuing claims in federal court, parties may also have the option of asserting certain types of claims in the United States International Trade Commission (“USITC”) under Section 337 of the Tariff Act. In particular, the USITC has become an extremely popular venue for patent infringement claims, and one of the distinct advantages of the USITC is that Section 337 provides for in rem jurisdiction over allegedly infringing products once they are imported as opposed to demonstrating minimum contacts. Although litigating in the USITC offers many parallels to district court actions, there are many significant differences in the procedures and remedies available to a USITC complainant as opposed to a district court plaintiff:

- **Limited to Imported Products:** A patent holder can only seek relief in the ITC where the allegedly infringing products, or infringing components of those products, are imported, sold for importation, or sold after importation into the US.  

- **No Damages:** The ITC offers two types of remedies to complainants able to prove a violation of Section 337. First, a patent holder may obtain an exclusion order whereby infringing products are seized and denied entry into the US. Such orders are typically limited to the infringers named as respondents in the ITC investigation and can be limited to just the specifically accused products that are actually litigated in the investigation (these are generally referred to as “limited exclusion orders”), although a general

37 In *In re Pradaxa (Dabigatran Etexilate) Products Liab. Litig.*, MDL 2385, 2013 WL 6486921 (S.D. Ill. Dec. 9, 2013) order rescinded sub nom. (Imposing $931,500 in fines against defendants for multiple failures in e-discovery); *Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494, 499 (S.D.N.Y. 2013) (imposing adverse inference instruction for failure to timely order litigation hold, among other failures); *Gabriel Technologies Corp. v. Qualcomm Inc.*, 2013 WL 410103 (S.D. Cal. Feb. 1, 2013) (Awarding $12.4 million in fees to defendant as sanctions after finding that plaintiff’s patent claims showed subjective bad faith and were objectively baseless; $2.8 million resulted from use of predictive coding algorithm to produce 12 million documents responsive to plaintiff’s e-discovery).
39 See, e.g., *Sealed Air Corp. v. Int’l Trade Comm’n*, 645 F.2d 976, 985 (C.C.P.A. 1981). Although this article addresses the USITC in the context of patent infringement claims, Section 337 also provides that trademark infringement and trade secret misappropriation claims can be asserted in the USITC. See 19 U.S.C. § 1337(a)(1)(A), (C); see also TianRui Group Co. Ltd v. U.S. Int’l Trade Comm’n, 661 F.3d 1322 (Fed. Cir. 2011) (product manufactured outside the United States with the assistance of a stolen trade secret can be barred from importation under section 337).
exclusion order that extends beyond the named respondents is available in limited circumstances, such as where it is difficult to identify the source of the infringing products. Because general exclusion orders are exceptionally rare, the complainant may be faced with the choice of suing some of its own existing or prospective customers or foregoing a significant portion of the remedy it wants to obtain from the ITC against the primary respondent. Second, a patent holder may obtain a cease and desist order preventing the sale of infringing products that have already been imported into the US. The ITC cannot award monetary damages for patent infringement. As a result, a party filing a complaint with the ITC will typically file a parallel complaint in district court to seek monetary damages. Such district court cases can be stayed by the defendant as a matter of right until the ITC proceedings are completed.

• **The “Domestic Industry” Requirement:** Unlike a district court plaintiff who need not practice or commercialize its own patent to pursue a claim for patent infringement in district court, the ITC requires that a complainant prove that “an industry in the United States, related to the articles protected by the patent . . . exists or is in the process of being created.” This is typically shown by proving that the patent holder has commercialized a domestic product that also practices the patent. This “domestic industry” requirement has two components: (1) a technical prong, which can be satisfied by demonstrating the patentee’s product practices its own patent; and (2) an economic prong, which can be satisfied by demonstrating an investment in US facilities, equipment, labor, or capital related to the manufacture of the patentee’s product. However, the domestic industry requirement also can be satisfied by a substantial investment in the exploitation of the patent, such as research and development or licensing activities. This is significant for patentees such as universities, who typically do not commercialize any products and therefore may have difficulty obtaining an injunction in district court after the Supreme Court’s decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). However, those same institutions can continue to seek injunctive relief through the ITC.

• **Heightened Pre-Filing Requirements:** Although a plaintiff in district court must only satisfy the Federal Rules’ general pleading requirements and undertake a “reasonable inquiry” regarding the accused products, the ITC requires a significantly more detailed factual investigation before it will institute an investigation under Section 337. Among other things, the complainant must typically provide detailed patent claim charts showing how the allegedly infringing products practice at least one claim of each patent at issue in the complaint.

• **Faster Time to Trial?:** The ITC can be an attractive venue for patentees because litigation can often be concluded faster than in district court. ITC proceedings can be

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48 See *In the Matter of Certain Semiconductor Chips With Minimized Chip Package Size & Products Containing Same*, USITC Inv. No. 337-TA-432, Order No. 13 (Jan. 24, 2001) (noting 1988 amendments to Section 337 were intended to “encompass universities and other intellectual property owners who engage in extensive licensing of their rights to manufacturers.”). This provision has also opened the doors of the ITC to non-practicing entities who have sufficient licensing activities to satisfy the domestic industry requirement.
49 See Fed. R. Civ. P. 8, 11; see also *Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994).
50 The requirements for initiating an action in the ITC are set forth fully in 19 C.F.R. § 210.12.
concluded approximately twelve to eighteen months after an investigation is instituted, though the proceedings have often been extended in recent years due to the high caseload in the USITC.\(^{51}\) In addition, ITC litigation typically proceeds at a much faster pace. For example, discovery responses are due within ten days after service of the requests as opposed to the thirty days permitted under the Federal Rules of Civil Procedure.\(^{52}\)

- **No Attorneys’ Fees:** District courts may award attorneys’ fees to the prevailing party under 35 U.S.C. § 285 “in exceptional cases.” There is no such attorneys’ fees provision in the ITC. As a result, attorneys’ fees are not recoverable in ITC investigations.

All these factors must be carefully weighed when considering forum selection where there is no pre-dispute agreement.\(^{53}\) Absence of a forum agreement may frequently result in a “race to the courthouse” with the adversaries attempting to get advantage by being the first to file a claim in the preferred forum of each. Hence, this may lead to protracted, expensive jurisdictional contests at the outset, and the potential for competing cases, or even conflicting decisions.

(b) **Taiwan**

Following the European model, Taiwan is a civil law nation. In addition to statutes, the Supreme Court regularly selects important decisions as binding precedents. Other decisions rendered by higher courts are commonly followed as precedent.

Taiwan has no distinction between state and federal courts. Depending on the nature and subject matter, the judicial system of Taiwan is divided into civil, criminal and administrative courts, and cases being adjudicated are likewise separated.

There are no jury trials in Taiwan. Civil and criminal cases are allowed up to three trials by three instances (levels) of the courts.\(^{54}\)

Taiwan has a Code of Civil Procedure which provides for matters regarding standing of the parties, jurisdiction, and service of process. Speaking broadly, in comparison to the US, obtaining jurisdiction and service is easier for domestic parties and more difficult as to foreign parties.

There is no real counterpart in Taiwan for discovery as used in the US system. In Taiwan, if a party requests the opposing party to produce evidence, the party needs to rely on the so-called “evidence investigation mechanism” under which the parties to the litigation may apply to the court for investigation related to the matter in dispute.\(^{55}\) A party applying for an evidence investigation needs to demonstrate why the investigation is necessary. This will limit the scope of such investigations in most cases.

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51 See USITC Performance and Accountability Report for Fiscal Year 2013, at 11, 48-49 (noting average length of a Section 337 investigation was 19.7 months in FY 2013).

52 Also noteworthy that ITC investigations may well be affected by arbitration provisions in related contracts. 19 U.S.C. 1337(c) specifically permits the ITC to terminate an investigation where there is an agreement between private parties to arbitrate. Further, the gateway question of whether ITC claims are arbitrable may be found to have been delegated to the arbitrators. See, e.g., Qualcomm, Inc. v. Nokia, 466. F.3d 1366 (Fed. Cir. 2005); Interdigital Communications, LLC v. International Trade Commission, 718 F.3d 1371 (Fed. Cir. 2013)

53 These considerations also come into play when the prudent strategist negotiates a forum clause.

54 Administrative litigations are allowed up to two trials by two instances of the courts. For example, in a civil litigation, the case is tried in the first instance at a district court. Those who may benefit from appealing the first instance decision may appeal to the court of second instance, generally the High Court, for any reason.

55 Except where the court believes that the requested investigation is unnecessary or where the requested evidence is irrelevant to the matter at dispute, the court will conduct an investigation pursuant
In a case involving expert opinions, the court may by motion from either party or on its own initiative designate an independent expert on the matter, and the expert fees are borne by the party who calls for the witness or who bears the burden of proof.

In the event that the court cannot render its conclusion based on the evidence introduced by the parties, the court may conduct an investigation on its own initiative. If a party disobeys a court order without justification, the court may take as true the opposing party’s allegation. If the witness refuses to take the witness stand, the court may arrest such witness to force him/her to testify. If anyone other than the parties to the lawsuit intentionally gives false answers to court’s inquiry or produce false documents, such person might be subject to criminal penalties. Nevertheless, if anyone other than the parties to the lawsuit simply refuses to comply with the court order regarding the evidence investigation, there is no immediate penalty.

The time and cost spent in evidence investigation proceedings in Taiwan normally is quite small in comparison to discovery in the US. For the same reason, the invasiveness and the information obtained are typically much reduced in comparison to discovery under the US system.

All materials submitted by a party to court are accessible to the other party. While Taiwan does not have the equivalent of the protective order mechanism as in the US (with the exception of the IP court discussed below), a party may nevertheless apply to the court to restrict or prohibit the other party from access to materials involving its trade secrets pursuant to CCP Article 242. The extent and scope of such restriction or prohibition would depend on the judge on a case-by-case basis.

Special IP Court. Since intellectual property matters, especially patent related matters, require specialized expertise, Taiwan established an intellectual property court in 2008. The “Intellectual Property Court Organization Act” and the “Intellectual Property Case Adjudication Act” came into force at the same time. Accordingly, civil litigations involving intellectual property matters are to be adjudicated by the intellectual property court (“IP Court”). However, according to the “Rules Governing the Intellectual Property Case Adjudication Act,” the IP Court does not have exclusive jurisdiction over litigation involving intellectual property matters. Although currently there is only one IP Court located in New Taipei City, nevertheless, it is clear from the statistics that parties generally prefer to have their cases tried by judges of the IP Court with expertise in intellectual property.

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56 Article 242 of the Code of Civil Procedure provides that: “A party may apply to the court clerk for inspection of, copying of, or photographing the documents included in the dossier, or for a written copy, photocopy, or excerpted copy thereof with expenses advanced. Where a third party files the application provided in the preceding paragraph with the parties’ consent, or with a preliminary showing of his/her legal interests concerned, the court must decide the application. Where the documents in the dossier involve the privacy or business secret of the party or a third person and a grant of the application provided in the two preceding paragraphs will likely result in material harm to such person, the court may, on motion or on its own initiative, render a ruling to deny the application.”

57 Parties to a civil litigation involving intellectual property matters may, by virtue of Articles 24 and 25 of the Code of Civil Procedure of Taiwan or by not objecting to the jurisdiction of a court other than the intellectual property court, agree to submit to the jurisdiction of a district court as the competent court of first instance.

58 Based on statistics published by the Judicial Yuan of Taiwan, for the period commencing from July 1, 2008 to November 30, 2013, the total number of civil cases involving intellectual property matters filed with courts other than the IP Court is 634, while the total number filed with the IP Court is 1,562.
The IP Court in Taiwan does not follow the “three trials by three instances of the courts” regime. As to the IP Court, there has been controversy about the fairness of having judges within the same court adjudicating the same case at different levels. In response to these concerns, the IP Court adjusted its internal organization in January 2011, to ensure the independence of the judges from each other. The result is that the IP Court of second instance has proven more effective and efficient in reviewing the judgments rendered by the court of first instance.

With the establishment of the IP court, Taiwan adopted the use of protective orders. Article 11 of the “Intellectual Property Case Adjudication Act” clearly provides that a party to the litigation or a third party may, in respect to its trade secret, apply to the court for the issuance of a protective order against the other party to the litigation, its attorney, any party providing assistance thereto and/or other interested parties of the litigation. Article 35 of the same Act further stipulates that violation of a protective order may result in criminal liability, and a fine may be imposed thereon. Perhaps due to the potential for criminal liability, since the establishment of the IP court, there have only been forty-four applications for issuance of protective orders, and only eight applications granted, fourteen in part. Alternatively, some judges in the IP court ask the parties to enter into confidentiality agreements in lieu of a protective order.

In terms of remedies in Taiwan, there is a significant difference worth mentioning: In Taiwan, no punitive damages are available in tort law while they can be imposed under contract law. The US legal system generally takes the opposite position. This difference not only affects the substantive rights of parties but also relates to the enforcement of foreign judgments (discussed below).

2. Where the Parties Have Made a Forum Agreement.

Where there is a pre-dispute forum selection clause, some of the above considerations may be moot for strategic purposes. However, these considerations and others may still drive a party’s decision whether to attempt to circumvent a forum clause, or whether to waive application of the clause where the opposing party has commenced litigation in a forum other than the one contractually agreed.

(a) United States

The IP Court in Taiwan is the only court that has the jurisdiction to adjudicate civil, criminal and administrative cases at the same time. For civil cases, the IP Court served as the court of first instance and as the court of second instance. For criminal cases, the IP Court served as the court of second instance. For both civil and criminal cases, the Supreme Court served as the court of third instance.

The High Court (or the 2nd instance civil division in IP Court), as the court of second instance, will try the case on its own in respect to factual issues as well as legal issues; however, in case there are significant flaws in the litigation proceeding in the court of first instance, the court of second instance may reverse the original judgment and remand the case to the original court. Generally speaking, the court of third instance handles only disputes in relation to the application of the law; however, if the facts alleged by the court of second instance are found to be in violation of customs, legal doctrines or evidentiary principles, it is also considered under the jurisdiction of the court of third instance. If the appeal is considered legitimate and with valid grounds, the court of third instance will overrule the original judgment, and remand the case to the original court.

Article 11 of the Intellectual Property Case Adjudication Act provides that: “Where any one of the following situations occurs with respect to trade secrets held by a party or a third party, the court may, upon motion along with preliminary proof by such party or third party, issue a confidentiality preservation order upon the other party [details not included here]. The person subject to a confidentiality preservation order shall not use the trade secrets for purposes other than those related to the case, nor shall he disclose said trade secrets to those not subject to the order.”

Article 35 of the Intellectual Property Case Adjudication Act provides that: “One who violates a confidentiality preservation order under this Act shall be subject to a sentence of imprisonment not more than three years, detention, or in lieu thereof or in addition thereto, a fine of not more than NT$100,000. Prosecution for an offense described in the preceding paragraph may be instituted only upon complaint.”
In the US, the existence of a mandatory forum agreement is by far the most important factor in deciding where the dispute will be heard. However, once again, even where a forum selection clause has been incorporated into the parties’ deal, variations and ambiguities in contract language will predictably lead to lengthy fights over the “gateway” issue of the proper forum. More examples include:

- Did the parties fail to specify that the designated forum was the “exclusive jurisdiction” and “mandatory forum”?\[^{63}\]
- Did the agreement provide for a hybrid or “carve-out provision” for forum selection, such as courts for intellectual property disputes, but arbitration for other disputes?\[^{64}\]
- Did the agreement fail to specify who would decide gateway disputes over the scope of the forum’s jurisdiction?\[^{65}\]
- Did the agreement fail to incorporate language showing an intent to sweep in all claims, including quasi-contract, tort and statutory claims involving the same transactions or relationship?\[^{66}\]
- Did the parties leave a choice of forums at the option of the claimant, or to be determined by the site of the “defendant”?\[^{67}\]
- Did the parties specify that the decision of the forum would be binding?\[^{68}\]
- Did the parties attempt to construct an extraordinary form of appeal, or try to bar all review even on statutory grounds under the FAA?\[^{69}\]
- Did the parties enter into different forum selections at different times, and if so are they conflicting or “complementary”?\[^{70}\]
- Did the parties clearly agree to arbitration, but fail to agree on who would decide whether procedural conditions to arbitration had been met?\[^{71}\]

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\[^{64}\] Oracle America, Inc., v. Myriad Group A.G., supra at 1076.
\[^{65}\] Id.; Momot v. Mastro, supra at 988.
\[^{66}\] Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 721 (9th Cir. 1999) (Where clause calls for arbitration of claims arising “in connection with” the contract, the claim need only “touch matters” covered by the contract to be arbitrable.); but see Mediterranean Enterprises, Inc., v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983) (Arbitration clause containing the phrase “arising hereunder” was not designed to cover any dispute between the parties, but rather, only those relating to the interpretation and performance of the contract itself); See also Olinick v. BMG Entertainment, 138 Cal. App. 4th 1286, 1300-01 (2006).
\[^{68}\] Clientron Corp. v. Devon IT, Inc., case no. 2:13-cv-05634-MMB (ED Pa).
\[^{69}\] In re Wal-Mart Wage and Hour Employment Practices Litigation, 737 F.3d 1262, 1267 (9th Cir. 2013) (“Just as the text of the FAA compels the conclusion that the grounds for vacatur of an arbitration award may not be supplemented, it also compels the conclusion that these grounds are not waivable, or subject to elimination by contract.”); Hall Street Associates, L.L.C., v. Mattel, Inc., 552 U.S. 576, 583 (2008) (FAA statutory grounds for vacatur or modification of arbitration award may not be modified or supplemented).

Query: Does the Hall Street rule apply to International awards subject to the New York Convention? In this regard it will be noted that the grounds for refusing to enforce an arbitral award are different and somewhat narrower under the New York Convention, Article V, than under the FAA, 9 U.S.C. §§10,11.

\[^{70}\] Compare Applied Energetics, Inc. v. NewOak Capital Markets, LLC, supra, with Bank Julius Baer & Co., Ltd., v. Waxfield, Ltd., 424 F.3d 278 (2d Cir. 2005). These two opinions illustrate an important point, where there are two separate forum selection agreements between the same parties at different times, and arguably covering the same subjects. In Bank Julius Baer the Second Circuit concluded the two forum agreements could be read as complementary, not conflicting, and therefore enforced the earlier arbitration clause. In Applied Energetics, the same Circuit more recently held that a later clause selecting New York courts could only be read as in conflict with an earlier arbitration clause. The court therefore enforced the later clause as superseding the former clause under established principles of contract interpretation, and in doing so ruled that the federal presumption “favoring” arbitration does not apply in determining the gateway issue of whether there existed an applicable arbitration agreement.
D. Forum Selection for Enforcement of Judgments or Awards

Forum selection (and the legacy of previous forum selection decisions) may arise again as an issue after a final award or judgment has been obtained in the selected forum, which now must be enforced in other countries. In the present context, this means the recognition and enforcement of a US judgment or award in Taiwan, or, conversely, the recognition of a Taiwanese judgment or award in the US.

1. United States

Fortunately, in the US, the legal complexity and difficulty of cross-border recognition and enforcement is not as daunting as it may first appear—at least with respect to monetary judgments between commercial parties.

At the outset, it should be recognized that there is no international convention in effect which facilitates enforcement of judgments rendered pursuant to a contractual forum selection clause. The US has not yet ratified the Hague Convention on Choice of Courts Agreements which, if ratified, will require the US courts to recognize and enforce a judgment issued by a court of another contracting country designated the exclusive forum by agreement of the parties. Further, as there is no other applicable federal statute, enforcement of foreign judgments in the US, including in federal courts, remains controlled by the law of the forum state. The lack of clear uniform federal laws or multilateral treaties governing recognition of foreign judgments is a problem bemoaned by practitioners and commentators alike.

California, as well as most other states has adopted the uniform law on recognition of foreign money judgments. This uniform law allows expedited domestication of foreign money judgments under fairly liberal standards. A good example of this liberality of recognition under the uniform law is the recent Ninth Circuit decision in Ohno v. Yasuma, where the Court of Appeals enforced a Japanese court's money judgment against a religious institution over objections that it violated the Free Exercise Clause of the US Constitution and was otherwise repugnant to US public policy.

The 2004 California case of Chou v. Shieh indicates that Taiwanese court money judgments normally will be enforced in the US. In that case, the California appellate court enforced the subject Taiwan judgment, applying the uniform law's standards. The court held the defendant had not shown that the Taiwan court system had failed to provide fair notice, or was otherwise fundamentally flawed. While the

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71 In BG Group PLC v. Republic of Argentina, ___ U.S. ___, 2014 WL 838424 (March 5, 2014), the Supreme Court grappled with the question of who decides whether a treaty requirement of local litigation in the Argentine courts before arbitration had been fulfilled or waived? A divided court held that, while courts normally decide in the first instance a question of arbitral jurisdiction, it is for the arbitrators to decide such a procedural interpretation of the treaty's intent. The court decided the issue explicitly as if it were a question of contract interpretation in an international arbitration subject to the New York Convention.

72 Taiwan likewise is not a contracting party to this Convention, and will likely remain excluded.


74 See Uniform Foreign-Money-Judgments Recognition Act, which has been adopted in over 30 states, and in California at C.C.P §§1713-24.

75 Ohno v. Yasuma, 723 F.3d 984, 1000 (9th Cir. 2013).

record in the case was thin, it appears that the judgments of Taiwan courts will be enforced just as say, the courts of Japan examined in the Ohno case.

The enforceability of foreign arbitral awards in the US is, if anything, more predictable and assured than foreign money judgments, due to the United States’ membership in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). The enumerated grounds for refusal to enforce an international arbitration award are narrower than the grounds for attacking a foreign money judgment. Nevertheless the enforcement of foreign arbitral awards under the New York Convention is not a mere formality, and there may be significant risk of refusal depending on the facts. The issue is further complicated by the emergent view in the US that there are two different regimes for review of international arbitral awards, depending on whether the award was made in the US or subject to US law.

Taiwan has been excluded from membership in the New York Convention, but on analysis of the authorities and practical realities, this exclusion does not appear to inhibit enforcement of Taiwan’s arbitral awards in the US. The New York Convention has not been interpreted to preempt recognition of arbitral awards from non-member states. This liberal treatment of awards from non-member countries is apparently based on broader US public policy favoring contractually agreed arbitration, international comity and the principles underlying the uniform state laws for enforcing foreign judgments.

An interesting pending case in the federal courts in Pennsylvania may provide further support of the willingness of US courts to enforce arbitration awards from Taiwan. In that case a Taiwanese corporation seeks to have an arbitral award of US $6.5 million confirmed into a US judgment against a Pennsylvania company. They were parties to an agreement calling for arbitration of disputes in Taiwan. Plaintiff in the case places emphasis on Taiwan’s Arbitration Law which provides that a final award is non-appealable and equivalent to a final judgment in the courts.

Enforcement of foreign injunctions and “equitable”-type relief, as differentiated from monetary judgments and awards, presents a special challenge in the US. While a thorough analysis of this issue is beyond the scope of this paper, the Supreme Court of the United States has said that “judgments of foreign courts awarding injunctive relief, even as to private parties, let alone sovereign states, are not generally entitled to enforcement.” This problem is attributable in part to the fact the Uniform Law on Recognition of Foreign Money Judgments has no parallel provisions supporting equitable or injunctive foreign

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78 See, e.g., Polimaster v RAE Systems, supra.
79 See First Investment Corporation of the Marshall Islands v. Fujian Mawei Shipbuilding, Limited, 703 F.3d 742 (5th Cir. 2013) and case cited at 748 (if in the US or subject to US law, the full panoply of FAA remedies is available).
82 Consideration should also be given to the bilateral treaty between the US and Taiwan called the US-Republic of China Treaty of Friendship, Commerce and Navigation, which has been held to remain in full force after the de-recognition of Taiwan in 1979. New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc., 954 F.2d 847, 854 (2d Cir. 1992). Article VI, paragraph 4 of the treaty specifically provides for judicial recognition of arbitration and arbitral awards involving the nationals of the US and Taiwan. While the treaty does not expressly call for US recognition of awards where Taiwan was the situs, it may be persuasively be argued that the general language and purpose of the treaty supports reciprocal enforcement of awards originating in the other country.
There are very few precedents where US courts have accorded comity to foreign injunctive decrees, and where they are found, they appear attributable to unique or extenuating circumstances. By contrast, there may be more optimism about US court confirmation and enforcement of injunctive-type arbitration awards issued abroad. This is because of the consensual nature of arbitration, and because the enumerated standards under the New York Convention as implemented in the US at 9 U.S.C. §§201-210 are not materially more stringent, and arguably even less so, than the standards for domestic awards. However, there are no good statistics supporting claims made by various international arbitration providers that their non-monetary awards are enforced in the US, and the information publicly available tends to be self-serving and anecdotal. Injunctive-type awards may also be subject to challenge on such grounds as “finality” or public policy.

2. Taiwan

According to Taiwan law, the Taiwanese courts will recognize and enforce a foreign judgment if:

1. The foreign judgment is a final and binding judgment;
2. The foreign court has jurisdiction over the matter pursuant to the laws of Taiwan;
3. The service of process has been duly made pursuant to the laws of Taiwan;
4. The judgment is not contrary to the public policy or morals of Taiwan (generally decided on a case-by-case basis); and
5. There exists mutual recognition (reciprocity) between the foreign country and Taiwan.

See fn. 34, supra.


For cases generally on this subject, see, e.g., Publicis Commc’n v. True N. Commc’ns, Inc., 206 F.3d 725, 731 (7th Cir. 2000)(finding that an interim order was “final” and could be confirmed under the Convention); Indus. Risk Insurers v. MANGutehoffnungschute GMBH, 141 F.3d 1434, 1440 (11th Cir. 1998)(“The purpose of the New York Convention . . . is to encourage the recognition and enforcement of international arbitration awards, [and to] . . . relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation.”)


If a defendant is located in Taiwan, the service on a party in Taiwan must be made through a letter of rogatory submitted to the Taipei Economic and Cultural Office with competent jurisdiction. The jurisdiction is determined based on the consular districts as decided by the Ministry of Foreign Affairs (please visit http://www.boca.gov.tw/content.asp?mp=1&Cultem=2309 for a list of consular districts in the North America Area).

In the past, Taiwanese courts adopted a strict interpretation regarding the principle of reciprocity enforcing only judgments rendered by courts those countries who have entered into a treaty of reciprocity with Taiwan or who have had precedents of enforcing the judgments of Taiwan. In recent years, however, the Taiwanese courts tend to take a more relaxed approach -- unless the foreign country has previously denied the recognition and enforcement of a judgment rendered by the courts of Taiwan, the Taiwanese courts would tend to take the initiative of recognizing and enforcing the foreign judgment. See Supreme Court Civil Ruling Tai-Shang-Tze No. 1364 (year 2006); Supreme Court Civil Judgment Tai-Shang-Tze No. 582 (year 2007); Supreme Court Civil Ruling Tai-Shang-Tze No. 1367 (year 2013); Taiwan High Court Taichung Branch Civil Judgment Chung-Shang-Guen-(1)-Tze No. 23 (year 2007).
Taiwan is not a signatory of the Hague Conventions or the New York Convention, and there have been no official diplomatic relations with the United States since 1979. Still, the Taiwanese courts have tended toward a more liberal approach of recognizing and enforcing judgments rendered by the US courts.

On a literal analysis of Article 402, the recognition and enforcement of foreign judgments in Taiwan would seem quite straightforward. However, the requirement that only final and binding judgment will be recognized, and the types of the service of process recognized in Taiwan may often impose difficulties for foreign plaintiffs. In addition, an action for the recognition and enforcement of a foreign judgment is a civil action. Hence, it is possible for the defendant to appeal the decision rendered by the Taiwan court to recognize and enforce the foreign judgment all the way from District Court to the Supreme Court, which normally will take at least two years.

Likewise, it is not always easy to predict whether a foreign judgment will be ruled “contrary to the public policy or morals” of Taiwan. The courts of Taiwan have not set a clear definition of the so-called public policy or morals of Taiwan. The courts have indicated that mere differences of law between a foreign country and Taiwan do not necessarily mean that a foreign judgment based on a different law is contrary to Taiwan’s public policy or morals. But frequently this objection does arise. For example, since the law of Taiwan does not allow punitive damages it is well established that a US judgment awarding punitive damages is not enforceable. On the other hand, the Taiwan court once indicated that if the law of Taiwan has a similar statute allowing treble damages, then a US judgment for treble damages is enforceable.

In principle, foreign injunctions are recognized and enforced in the same way as other foreign judgments. It has been established that, regardless of whether the decision made by the foreign court is in the form of a judgment, ruling, award or order, as long as the decision seeks to solve the dispute between the parties regarding their rights and obligations, Article 402 would apply. However, in practice the enforcement of foreign injunctions is problematical and uncertain. For example, if there is any indication of a follow-up proceeding that could change the result of the injunction, then it may not be enforced in Taiwan.

Taiwan also recognizes and enforces foreign arbitral awards. While, as noted above, Taiwan is not a signatory party to the New York Convention, Articles 47 to 51 of Taiwan’s Arbitration Law have set out the rules on which foreign arbitral awards will be enforced in Taiwan.92

In interpreting the reciprocity provision of Article 49, the Supreme Court of Taiwan specifically pointed out that “this principle of reciprocity does not mean that the country where the arbitral award is made or whose laws govern the arbitral award must first recognize and enforce Taiwan arbitral awards before Taiwan recognizes and enforces its arbitral awards.”93 In any event, there is little real issue regarding the reciprocity between Taiwan and the US. A bilateral treaty between the United States and Taiwan, the US-Republic of China Treaty of Friendship, Commerce and Navigation that was entered into prior to the de-recognition of Taiwan by the United States in 1979, remains in full force and effect to date in Taiwan. Reciprocity is embodied in this treaty.

92 Pursuant to Article 47 of the Arbitration Law, “A foreign arbitral award is an arbitral award which is issued outside the territory of the ROC or issued pursuant to foreign laws within the territory of the ROC. A foreign arbitral award, after an application for recognition has been granted by the court, shall be enforceable.” Article 49 provides: “The court shall issue a dismissal with respect to an application submitted by a party for recognition of a foreign arbitral award, if such award contains one of the following elements: (1) Where the recognition or enforcement of the arbitral award is contrary to the public order or good morals of the Republic of China; (2) Where the dispute is not arbitrable under the laws of the Republic of China. The court may issue a dismissal order with respect to an application for recognition of a foreign arbitral award if the country where the arbitral award is made or whose laws govern the arbitral award does not recognize arbitral awards of the Republic of China.” Article 50 of the Arbitration Law provides further grounds for discretionary refusal to enforce foreign awards similar to those found in the New York Convention.

93 See Taiwan Supreme Court Ruling 75-Tai-Kang-Tze No. 335 (year 1986); Taiwan High Court Civil Ruling Fei-Kang-Tze No. 72 (year 2011); Taiwan High Court Kang-Tze No. 433 (year 2005).
E. Recommendations and Takeaways

Lawyers rarely agree on everything, but here are a few points upon which all the contributors agree:

- Remember above all that the existence of a strong forum agreement is the single most important factor in determining where the dispute will be heard.

- Always expressly provide that the forum selected is exclusive and mandatory; failure to be explicit on this will open the door to argument the forum clause was merely a consent to one option for disputes, but that other forums are not excluded.

- Use conventional, formulaic language to insure the greatest breadth of coverage, whether selecting courts or arbitration; normally such conventional language will sweep in all claims – contract, tort and statutory – which “touch” the parties’ agreement.

- With increasing frequency, where there is a strong agreement selecting a non-US forum for disputes, US courts will dismiss complaints in deference to that forum even where personal and subject matter jurisdiction can be established in the US.

- Avoid multiple or hybrid forum clauses, and “carve-outs” unless your objective is to create jurisdictional battles and consequent delay, expense and uncertainty.

- Conventional wisdom to the contrary, there is no federal “favor” of arbitration clauses over forum clauses selecting courts; this is true in both domestic and international contracts; the so-called policy favoring arbitration is at bottom a policy favoring enforcement of contracts.

- Avoid ad hoc arbitration clauses, which will lead to disputes and delays over the proper administration and proper procedure for dispute resolution.

- In the case of arbitration clauses, consider whether you have provided for who will decide jurisdictional disputes; in the US, the traditional answer is that in the absence of a “clear and unmistakable” agreement by the parties to submit jurisdiction to the arbitrator, arbitrability is for the court to decide; in recent years, however, the courts have ruled that adoption of arbitration rules incorporating a provision empowering arbitrators to decide their own jurisdiction is sufficient to give arbitrators the power to determine their own jurisdiction.

- Remember that in the view of many courts, no "rational businessperson" would want to have divided forums for potentially competing and conflicting litigations in the same commercial relationship; so, if this is your objective, it should be made very definitive in the agreement.

- Expect a major fight over the proper forum at the outset of the dispute, if the forum agreement is not crystal clear.

- Consider and be prepared for the cost consequences of your forum selection versus the alternatives – the variations are immense. Both the US and Taiwan have specialized forums for certain types of patent and IP disputes that warrant consideration.

- Consult with an experienced practitioner familiar with the proposed forum before selection.

F. Conclusion

With contractual, intellectual property and competition litigation between companies operating globally a fact of life, careful forum selection has never been more important. Where possible, decisions should be made with advice from seasoned lawyers with practical experience and currency in the best practices and the options available in each country.

Attention to the “lowly” issue of forum selection turns out to be one of the most important of all deal points for successful outcomes.