Enforcing Foreign Litigation and Arbitration Decisions

Some pointers on what multinational companies need to know before entering into a contract with a Taiwan party or starting litigation.

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With an increasing number of litigation and arbitration cases being brought against Taiwan parties in jurisdictions overseas for commercial, intellectual-property, tort, and other matters, it's important to consider how to make future judgments enforceable in Taiwan. Given Taiwan's unique diplomatic isolation, it can be helpful to get legal advice at a couple of key junctures: before entering into a contract with a Taiwan party and before commencing litigation against a Taiwan party. Not planning ahead and not taking into account the close economic connections between Taiwan and China can severely limit your options later on.

When a U.S. company is putting together a contract with a Taiwanese counterpart, it has the opportunity to specify the geographic location (the country or even the city), venue (a specific court or arbitration or mediation organization), law to be applied, and other useful details upfront. The usual textbook approach is to specify one's own laws and jurisdiction or arbitral tribunals to handle any disputes that may later arise under a contract, on the assumption that overseas courts may give an unfair "home court" advantage to the local company. If things go sour and you need to use the courts to try to urgently stop misbehavior by a contract counterparty, however, it will be discomforting to realize that the U.S. jurisdiction selected to handle "any and all disputes arising under this contract" does not have much power over people sitting 12 or 13 time zones away. It also doesn't help if you try to take urgent local action in Taiwan, China, or one of the many other countries where Taiwanese companies manufacture goods and the counterparty is able to produce a contract specifying, say, that the "state courts of New York" are the designated venue where the two companies are supposed to resolve their legal differences.

Depending on the contract and what might be at stake in a dispute, it can make sense to give up the "home court" advantage and to consider setting the venue for litigation or arbitration in Taiwan. While it may be smart to stay out of relatively undeveloped court systems that have a history of anti-foreigner prejudice, the Taiwan legal system is generally cleaner and more straightforward than those of the PRC and many other jurisdictions in the region – and depending on the goals of the litigation, it offers many advantages with regards to speed. Unlike most American courts, the Taiwan legal system does not entail extensive pre-trial review and discovery of documents, which can save a lot of time and money. On the other hand, the Taiwan system tends to award lower damages, and the lesser examination of evidence also means that it can be harder to build a case for compensation for past harm.

Because of the extensive economic contacts between Taiwan and other manufacturing centers in Southeast Asia and the PRC, it's important not to limit jurisdiction and venue clauses so tightly that you cannot take action. Companies entering into contracts with Taiwan parties are well advised to keep in mind and keep straight the tangled webs of manufacturing, marketing, and other entities that are often used as part of Greater China business operations. Sometimes these serve legitimate tax or administrative functions, but they can also

be used to seek to avoid litigation liability. We have frequently come across companies with a mix of entities with highly similar Chinese and Romanized names – and cases where contracts were signed by the "wrong" entity. Aside from knowing who's who in a contract, it's important to be aware that when criminal activity is afoot, overly restrictive jurisdiction clauses may be waved about by your contract counterparty's manufacturing plants in Southeast Asia or China as a way of getting rid of police or other government officials you've mobilized.

Many local officials will not be very helpful if they think they can avoid lots of work by pointing to a contract you signed that specified "the exclusive jurisdiction of the state courts of New York for any and all disputes," in any contractual matter where dispute might need injunctive-type or emergency relief (particularly where significant trade secrets or other intellectual properties are involved). It will therefore often be advisable to keep open the option, at the foreign company's sole election, of using the criminal, civil, and administrative laws of any jurisdiction worldwide necessary to protect its intellectual property or confidential information, and to reserve the foreign jurisdiction for the truly commercial issues of quality, on-time delivery, improper packaging, and payment.

Pre-litigation considerations

The Taiwan Code of Civil Procedure (CCP) allows for the enforcement of "irrevocable" foreign judgments (i.e., final judgments) but states in Article 402 that a judgment will not be valid if: 1) the foreign court has no jurisdiction under Taiwan law; 2) the losing party has not "responded" to the action – except where service of process is accomplished in that foreign country or served via judicial assistance in Taiwan; 3) the judgment or the procedure is incompatible with public order or good morals; or 4) there is no reciprocal recognition from the foreign court for Taiwan judgments. Practically speaking, the Taiwan courts do not find many jurisdictional or public order/good morals problems – the lion's share of problems arise in evaluating service of process and reciprocity.

Service of process (the delivery of the relevant court documents to the defendant) matters, particularly if it is likely that a Taiwan party will not "respond" in the foreign court. Once a Taiwan defendant has "responded," the foreign plaintiff is in good shape and can proceed without worrying about following the usual Taiwanese service method via the court system. But precisely what constitutes "response" seems not to have yet been clarified by any Taiwan court opinions, and only a few legal scholars have ventured to put thoughts on paper, briefly suggesting that it should be interpreted to include "appearances" (e.g., the filing of pleadings or the actual physical presence of a Taiwan party's counsel in a courtroom) even for the purpose of arguing jurisdictional issues.

In a trade-secrets case in the Western District of New York federal district court a few years back, a Taiwanese manufacturer accused of stealing some highly confidential machine blueprints from a major U.S. company was thought likely to be a no-show in court. The Taiwanese company had retained counsel in New York, but all pre-trial discussions had indicated that the U.S. company might have to go to the trouble and expense of translating all the complaint documents into Chinese and sending them through the U.S. State Department to the Taiwan government in a procedure called "judicial assistance" (essentially the U.S. judge asks his Taiwanese judge counterparts at the Judicial Yuan to assist).

The night before the first hearing, however, the Taiwanese company faxed to the court a one-page document from one of the company's directors that in effect stated: "You have no jurisdiction over our company. And we didn't steal anything, either!" The company thus unwittingly filed arguments both on jurisdictional matters and on the merits to the U.S. court and opened itself up to future enforcement within Taiwan.

As foreign parties cannot always count on a Taiwan company's representatives being available to accept service of process in the country where the litigation will be brought, we often recommend using a two-pronged method in which documents are served upon the company in Taiwan first by registered mail or personal delivery (with affidavit of service), followed by service using the judicial assistance procedure if the party does not make an appearance in court. Some expla-

nation to the court may be necessary, as some American judges may be hesitant to stop proceedings already underway just to move forward with a judicial assistance request for service of process.

Reciprocity then becomes the next major hurdle. Before launching into overseas litigation against a Taiwan party, it's often a good idea to research whether that jurisdiction has a particularly favorable or unfavorable history with regard to recognizing Taiwan court decisions. The United States has a long track record of such favorable precedents. However, even countries without history on their side can put together alternative documentation and/or expert opinions showing that their courts should have no problems with accepting and enforcing a valid Taiwan decision. If a situation involves possible eventual enforcement into China, it is also worth keeping in mind that the PRC does not have a good record yet for enforcement of U.S. decisions, although arbitration might be a useful option.

Pre-arbitration considerations

Owing to the realities of the "one China" policy situation, Taiwan is not a member of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the "New York Convention"), but Taiwan's Arbitration Law lays out fairly workable rules for enforcement of foreign arbitral awards into Taiwan. One useful factor for companies doing business in cross-Strait situations is that while Taiwan is not a member of the New York Convention, the PRC is.

The Taiwan Arbitration Law's Article 49 stipulates similar requirements for foreign arbitral awards to the ones that CCP Article 402 has for litigation decisions. They allow for dismissal of a request for enforcement where: 1) the recognition or enforcement of the arbitral award is contrary to public order or good morals; 2) the dispute is not arbitrable under Taiwan laws; or 3) the country where the arbitral award is made or whose laws govern the arbitral award does not recognize Taiwan's arbitral awards.

In the course of our own enforcement of arbitral decisions into Taiwan, the procedure has been fairly straightforward and significantly easier on the issue of default judgments and service of process than the requirements of the CCP for foreign court judgments. Because arbitration notices are normally handled via courier services, registered mail, personal delivery, or similar commercial means, for example, the use of "judicial assistance"-style procedures is not necessary for service of foreign arbitration documents. Taiwan courts will normally look at whether the documents went to the right person, were delivered to the correct address, and whether the delivery method was among those allowed by the arbitration institution handling the dispute.

Problems commonly arise when the Taiwan counterparties' Chinese names are unknown or have changed, where the Taiwan counterparty has moved addresses, or when the counterparty is given the opportunity to refuse to accept international courier deliveries. It can be useful in contracts with Taiwan parties to ensure that the section covering the means for "notice" between the parties requires the parties to keep such address information updated and to include the "notice" provision among the items that shall be deemed to survive the termination of the agreement. It can be tempting to speed forward into arbitration where you know the other party is being unresponsive, but it can hurt later enforcement of the decision not to take a step back and make sure that documents have in fact been delivered.

It can also be helpful to think creatively in a challenging delivery situation so that an otherwise "international" package looks more innocently "local." With sufficient background information, quality investigation firms can often locate a Taiwan counterparty's Chinese name and registered/domicile address, at which point delivery can be accomplished through a variety of means.

Reciprocity is normally not hard to establish, although it can be worth running checks to ensure that there is no obvious negative history. Taiwan is not a major player in international arbitration, and so there is not much history of foreign countries' enforcement of Taiwanese arbitral decisions. Again, as with litigation, there is a good past record of enforcement for decisions from the United States, and in many other situations an opinion from a suitable court official or expert academic will go a long way in ensuring that a particular jurisdiction will not block enforcement of a Taiwanese arbitral decision.

Conclusions

Before entering into a contract with a Taiwan-based company or commencing overseas litigation or arbitration against a Taiwan-based party, it would be prudent to consult with counsel experienced in handling and advising on these issues. If injunctive relief in Taiwan is important, it may be a good idea to be ready to take action locally or to reserve those rights if the matter involves a contract. If legal action against a Taiwan party in an overseas jurisdiction is necessary, there are still many things that can be done to speed up service of process and to lay the groundwork for an enforceable foreign decision.

Once overseas litigation or arbitration is underway, there are also many ways by which counsel can help provide litigation support, including locating defendant assets, providing legal opinions, working with investigators, and even monitoring relevant Chinese-language media.

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