AN OVERVIEW OF RECOGNITION AND ENFORCEMENT IN KOREA: RECENT ARBITRATION ACT AMENDMENTS AND CASE HIGHLIGHTS

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I. INTRODUCTION

Korea became a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("N.Y. Convention") on May 9, 1973. Korea's Arbitration Act ("Arbitration Act" or "Act") was wholly revised on December 31, 1999 to largely adopt the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration of 1985 (the "UNCITRAL Model Law"). The Arbitration Act was recently amended again, effective as of November 30, 2016, to bring the Act more in line with the 2006 amendments to the UNCITRAL Model Arbitration Act.

The Arbitration Act sets out a relatively straightforward process for seeking recognition or enforcement of an arbitral award depending on the seat of the arbitration. The recent amendments will make the process more convenient and will likely reduce the time it takes to obtain an enforceable award (see section II).

Korean courts have long applied narrowly the limited grounds on which the recognition or enforcement of foreign arbitral awards may be refused under the N.Y. Convention and on which domestic arbitral awards may be set aside or refused recognition or enforcement under the Arbitration Act. Recent cases demonstrate that the Korean courts maintain a continuing commitment to the presumption of enforceability except in rare circumstances (see section III).

Overall, the Korean recognition and enforcement regime functions smoothly, and companies can generally rest assured that the recognition and enforcement of arbitral awards in Korea will be similar in character to that of other leading arbitral jurisdictions.

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II. KOREAN LEGAL REQUIREMENTS RELATED TO THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS IN KOREA

The Arbitration Act provides for separate requirements for arbitral awards rendered within Korea and those rendered in foreign jurisdictions. The requirements for foreign awards are further distinguished depending on if they were rendered in N.Y. Convention jurisdictions ("N.Y. Convention Awards") or in non-N.Y. Convention jurisdictions ("Non-N.Y. Convention Awards").[1]

Specific requirements related to the recognition and enforcement process related to (i) domestic awards, (ii) N.Y. Convention Awards and (iii) non-N.Y. Convention Awards will each be discussed in turn below, along with some practical considerations on procedural issues in light of the recent amendments to the Arbitration Act.

A. Domestic Arbitral Awards

With the number of international cases being heard by the Korean Commercial Arbitration Board ("KCAB") on the rise, it has become increasingly likely that non-Korean companies will find themselves seeking recognition and enforcement in Korea of an arbitral award rendered in Korea. Indeed, one of the recent seminal Korea-related arbitration cases (the *NDS* case discussed below) involved an award in an arbitration seated in Seoul involving one foreign and one Korean party.

Article 38 of the Act provides that a domestic award shall be recognized or enforced unless any ground referred to in Article 36(2) exists. These grounds are substantively very similar to those listed in Article V of the N.Y. Convention, with the exception that (like Article 34(2) of the UNCITRAL Model Law) Article 36(2) of the Act, which is focused on *domestic* awards, does not include an equivalent of Article V(1)(e) of the N.Y. Convention, which deals with refusal to recognize or enforce *foreign* awards that have been set aside at the seat of arbitration.[2]

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[1] The main reason for this distinction is that, pursuant to the reciprocity reservation, Korea only applies the N.Y. Convention with respect to arbitrations seated within other N.Y. Convention states.

[2] Article V(1)(e) of the N.Y. Convention provides that recognition and enforcement may be refused by the competent authority if "[t]he award has not yet become binding on the

Specifically, Article 36(2) states the following:

> (2) An arbitration award may be set aside by the court only if:
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> 1. The party making an application for setting aside an arbitral award furnishes proof that:
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> (a) A party to arbitration agreement was under some incapacity under the law applicable to him/her; or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the Republic of Korea;
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> (b) A party making the application was not given proper notice of the appointment of an arbitrator or of arbitral proceedings or was otherwise unable to present his/her case;
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> (c) The award has dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration: Provided, That if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
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> (d) The composition of the arbitral tribunal or arbitral proceedings were not in accordance with the agreement of the parties, unless such agreement was in conflict with any mandatory provision of this Act from which the parties cannot derogate, or in the absence of such agreement, were not in accordance with this Act;
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> 2. The court finds on its own initiative that:
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> (a) The subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Korea;
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> (b) The award is in conflict with the good morals and other forms of social order of the Republic of Korea.

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parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”

In addition to serving as defenses against an award creditor's action for recognition or enforcement, the grounds laid out in Article 36(2) of the Act also serve as the grounds upon which the losing party in an arbitration may file an independent action for setting aside the award, pursuant to Article 36(1).

Pursuant to Article 36(3) of the Act, if an action for set aside is to be filed by the award debtor, it must be filed within three months of the date on which the party making such an application has received the duly authenticated copy of the award or the duly authenticated copy of a correction or interpretation or an additional award. In such a case, the party seeking enforcement would be put on the defensive and would typically file a counterclaim for recognition or enforcement. As a practical note, most applications for recognition and enforcement and set-aside are decided in the same court proceedings.

B. N.Y. Convention Awards

As most of the companies with which Korean companies engage in business hail from states that are parties to the N.Y. Convention, the way in which N.Y. Convention Awards are recognized and enforced – or denied such recognition and enforcement – is crucially important to the success of Korea's overall enforcement regime. These standards, as set out in Article 39(1) of the Act, are quite straightforward in that they simply state that the recognition and enforcement of N.Y. Convention Awards "shall be governed by that Convention."

As confirmed by the Supreme Court, the set aside procedure set out in Article 36 of the Act is only applicable to a party seeking to resist recognition or enforcement of *domestic* arbitral awards.[3] Thus, an award debtor seeking to resist recognition or enforcement in Korea of a N.Y. Convention Award must await the award creditor's recognition or enforcement action, and then present its grounds for objection based on the grounds listed in Article V of the N.Y. Convention. As the criteria upon which a party may resist recognition or enforcement are not listed in the Act, reference must be made to the text of the N.Y. Convention itself.

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[3] Supreme Court Judgment 2001Da77840, February 26, 2003 (S. Kor.).

C. Non-N.Y. Convention Awards

Efforts to recognize or enforce Non-N.Y. Convention Awards are not very common in Korea, and, based on public court records, it seems that not even one reported judgment relating to the recognition or enforcement of a Non-N.Y. Convention Award has been sought.

Pursuant to Article 39(2) of the Act, Non-N.Y. Convention Awards are treated the same as foreign court judgments in terms of their recognition and enforcement in Korea. As such, Article 217 of the Civil Procedure Act and Articles 26(1) and 27 of the Civil Execution Act shall apply *mutatis mutandis* to such awards.

D. Procedural Updates

Prior to the 2016 amendments to the Act, Article 37(1) provided that an award creditor seeking recognition or enforcement of its award must bring an action before the competent Korean court to obtain a *judgment*. If a challenge to recognition or enforcement has been made, obtaining a judgment in a Korean court of first instance usually involves appearing in court and engaging in the full process of an adversarial litigation, which can take up to a year, or even longer if the initial judgment is appealed. Pursuant to newly amended Articles 37(1) and (2), however, recognition or enforcement of an arbitral award is to be made by a *decision* rather than a *judgment* of the court. Obtaining a decision is usually more efficient because, when rendering a decision rather than a judgment, the court has discretion not to hold hearings. In addition, under amended Article 37(5), a court that has not held hearings may issue a summary (rather than detailed) statement of its reasons.

Unlike its predecessor, amended Article 37(1) provides that an arbitral award shall be recognized automatically unless there are grounds for refusal of recognition pursuant to Article 38 (for domestic awards) or Article 39 (for foreign awards). Therefore, an award creditor seeking to declare that a contract has been terminated, for instance, is no longer required to submit an application for a recognition judgment to a Korean court to give judicial imprimatur to such award.[4]

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[4] This amendment is in accord with the holding in the notable 2009 "Woodchips" case, in which the Supreme Court found that a party may rely on an arbitral award that has not been the subject of an action for recognition or enforcement to establish a claim as a

The amended Act also loosens the requirements on what documents a party must submit in a recognition or enforcement action. Specifically, the party seeking enforcement is no longer required to submit the arbitration agreement. Instead, pursuant to Article 37(3) of the Act, the party initiating a recognition or enforcement action is only required to submit the original award or a copy thereof (consistent with Article 35(2) of the 2006 amendments to the UNCITRAL Model Law), together with a Korean translation of the award if it is in a language other than Korean.

These amendments to Article 37 of the Act should in many cases reduce the time it takes to obtain recognition or enforcement of arbitral awards in Korea and make the initial stages less administratively burdensome.

III. APPLICATION OF RECOGNITION AND ENFORCEMENT STANDARDS IN KOREAN COURTS

The Korean courts' approach to recognition and enforcement of arbitral awards has long been to respect the limited nature of the grounds for refusing recognition or enforcement of an arbitral award under the N.Y. Convention (or its nearly equivalent domestic law incarnation, Article 36(2) of the Act).[5] In addition, Korean courts have long held that an error of law or fact is not grounds for refusal to recognize or enforce a foreign arbitral award.[6]

The public policy ground in Article V(2)(b) of the New York Convention (or Article 36(2)(2)(b) of the Act) has been one of the most frequently tested grounds, and, as such, has received relatively greater scholarly attention.[7] For this reason, we will focus on a selection of grounds that have been invoked other than public policy, with special attention paid to the most seminal recent cases.

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creditor in a corporate reorganization proceeding. *See* Benjamin Hughes, *The Recognition and Enforcement of Foreign Arbitral Awards in Korea*, 2010 DONG-A J. I.B.T. L. 99, 107 [hereinafter Hughes, *Foreign Arbitral Awards*] (summarizing Supreme Court Judgment 2006Da20290, May 28, 2009 (S. Kor.) (i.e., the "Woodchips" case)).

[5] Junsang Lee, *Korean Courts' Attitude and Practice in Relation to Arbitration*, 1 KOREA ARB. REV. 26, 27.

[6] Hughes, *Foreign Arbitral Awards*, at 104.

[7] *See, e.g.,* Hughes, *Foreign Arbitral Awards*.

A. Enforcement Challenges Based on Non-N.Y. Convention Grounds

The Korean Supreme Court has rarely, if ever, refused recognition or enforcement based on grounds not specified in Article V of the N.Y. Convention or Article 36(2) of the Act. One important, and relatively recent, example of this is the case of *NDS Ltd. V. KT Skylife Co., Ltd.*, in which an attempt to resist recognition and enforcement of an arbitral award for reasons outside the grounds articulated in Article V of the N.Y. Convention succeeded at a lower court but ultimately failed at the appellate level.[8] This case has garnered much interest in the arbitration community.[9]

In *NDS*, a UK-based software and technology provider, NDS Ltd. ("NDS"), had been licensing its proprietary technology to a Korean satellite broadcaster, KT Skylife Co. Ltd. ("Skylife"), pursuant to an agreement ("Agreement"). NDS sought to terminate the Agreement under the contractual termination provisions, and a dispute arose concerning the purported termination. Pursuant to the arbitration clause of the Agreement, Skylife commenced an arbitration seated in Seoul in which it sought declaratory relief that the Agreement remained in effect, along with damages. NDS filed a counterclaim seeking a declaration that the Agreement had been terminated, along with damages. In July 2012, the Tribunal rendered a partial award in favor of NDS, declaring the Agreement terminated and ordering Skylife "to comply with its obligations under Article 14.2 of the . . . Agreement." Specifically, Article 14.2 stated:

> Upon the termination of this Agreement, the license to the Licensed Software shall terminate and [Skylife] shall immediately cease using any part of the NDS' Licensed Software, Intellectual Property Rights and Confidential Information licensed pursuant to this Agreement. [Skylife] shall return to NDS the originals and all copies of the Licensed Software (including Viewing Cards) . . . .

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[8] Seoul High Court Judgment 2013Na13506, January 17, 2014.

[9] *See, e.g.,* Benjamin Hughes, *Enforcement and Execution of Arbitral Awards in Korea: A Cautionary Tale*, ASIAN DISPUTE REVIEW, April 2014, at 94-97; Richard Menard, *Enforcement of arbitral awards in South Korea: update on* NDS v. KT Skylife, IBA ARBITRATION NEWS, March 2015, at 31-32; Sapna Jhangiani and Gloria Kang, *Enforcing international arbitration awards in the courts of South Korea: we set the record straight*, IBA ARBITRATION NEWS, February 2016, at 34-36.

Skylife failed to comply with the award, and NDS initiated a recognition and enforcement proceeding in the Seoul Southern District Court. The District Court refused recognition and enforcement of the award on the grounds that the same formal requirements of specificity required of a court judgment also apply to an arbitral award, and the award at issue was not specific enough to allow a court officer executing the enforcement judgment to execute the award without having to refer to any other documents besides the judgment.[10]

On appeal, the Seoul High Court found that, although the award lacked the level of specificity required of a court judgment under Korean law, NDS nonetheless had a legal interest in requesting recognition and enforcement that must be respected. The court stated that an award could be refused recognition or enforcement only on the grounds enumerated in Article 36(2) of the Arbitration Act.[11] As the Seoul High Court found that none of those grounds was applicable, it issued an enforcement judgment. Although the judgment did not allow NDS to execute the award, the High Court's decision not to refuse enforcement on grounds outside the scope of Article 36(2) was a welcome development. It signaled that Korea's judiciary remains committed not to expand the potential grounds for refusal to enforce arbitral awards beyond those listed in Article 36(2) (for domestic awards) and Article V of the N.Y. Convention (for N.Y. Convention Awards).

B. Enforcement Challenges Based on Invalidity of the Arbitration Agreement

Article V(1)(a) of the N.Y. Convention provides that recognition and enforcement of an arbitral award may be refused if proof is furnished by the party against whom the award has been issued that "[t]he parties to the agreement referred to in Article II [of the N.Y. Convention] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." Article 36(2)(1)(a) of the Arbitration Act is substantively identical. Korea interprets this exception narrowly and generally rejects challenges

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[10] Seoul Southern District Court Judgment 2012Gahap15979, January 1, 2013 (S. Kor.).

[11] Seoul High Court Judgment 2013Na13506, January 17, 2014 (S. Kor.).

brought on such grounds, as can be seen in the sample case described below, which is considered another recent important enforcement case.

In *LSF-KDIC Investment Company Ltd. v. Korea Resolution & Collection Corporation*, the Supreme Court reversed the Seoul High Court, which had refused enforcement of an arbitral award on the ground that there was no valid arbitration agreement between the parties.[12] The *LSF-KDIC* case involved a shareholders' agreement under which LSF-KDIC Investment Company Ltd. ("LSF-KDIC") had authorization to remit freight terminal asset sale proceeds to shareholders. That agreement included an arbitration clause providing that any disputes arising "out of or in connection with" the agreement shall be submitted to the International Chamber of Commerce in Tokyo. A subsequent commitment letter between the same parties regarding the return by shareholders of excess advance payments did not contain an arbitration clause. A dispute arose relating to the return of excess advance payments.

After LSF-KDIC won an award for approximately US$35 million, it sought to enforce that award in the Korean courts. The Seoul Central District Court refused enforcement on the grounds that the underlying transaction violated Korean public policy.[13] Next, the Seoul High Court also refused enforcement, but on the basis that the commitment letter lacked an arbitration clause (or that the arbitral award dealt with matters beyond the scope of the arbitration agreement).[14] Finally, the Supreme Court reversed and remanded the Seoul High Court's determination to refuse enforcement on the specified grounds, finding instead that the commitment letter constituted a subsequent agreement for the implementation of the Shareholders' Agreement and that the dispute thus arose out of or in connection with the Shareholders' Agreement. As a result, the dispute was properly governed by the arbitration clause in the Shareholders' Agreement. Although the Supreme Court rejected the Seoul High Court's determination on N.Y. Convention Article V(1)(a) (and (c)), it remanded other challenges on public policy and procedural irregularities back to that court.

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[12] Supreme Court Judgment 2013Da74868, October 29, 2015 (S. Kor.).

[13] Seoul Central District Court Judgment 2011Gahap82815, September 27, 2012 (S. Kor.).

[14] Seoul High Court Judgment 2012Na88930, August 16, 2013 (S. Kor.).

C. Enforcement Challenges Based on Infringement of Right of Defense

Article V(1)(b) of the N.Y. Convention provides that recognition and enforcement of an arbitral award may be refused if proof is furnished by the party against whom the award has been issued that it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." This provision is substantively identical to Article 36(2)(1)(b) of the Act. As with other exceptions, Korea imposes stringent limitations on the use of this exception to recognition and enforcement, as can be seen in the sample cases described below.

In *Dongkuk Steel v. Yoon's Marine*, the Busan District Court held that the purpose of Article V(1)(b) of the N.Y. Convention "is not to apply to all situations such as the one above where a party was not able to present its case, but is limited to situations where the right to present one's case has been infringed to a *strikingly unacceptable degree*."[15] The *Dongkuk Steel* court found that the defendant's hiring of an attorney showed it was "clearly aware that the arbitral proceedings were ongoing." Further, the court found that the fact that the defendant's Japanese lawyer resigned before the hearing, and that the defendant's representative director could not enter Japan due to visa issues, did not rise to the level of being "unable to present its case." As the court noted, "the defendant could have appointed another attorney or could have sent an employee as a representative to sufficiently present its position at the arbitral proceedings but relinquished these rights and therefore cannot argue that the right to present its case was infringed."

In another arbitration seated in Dallas, Texas, involving a U.S. plaintiff and Korean defendants, an award was rendered in spite of the defendants' lack of participation.[16] The defendants alleged that the award was unenforceable because they could not participate in the arbitration due to economic hardship. However, the tribunal rejected

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[15] Busan District Court Judgment 2011Gahap8532, October 26, 2011 (S. Kor.) (emphasis added).

[16] *See* Yong-Beum Jahng and Ryul Kim, *The Recognition and Enforcement of Foreign Arbitral Awards in Korea: With Focus on the U.S. Matters*, 15 PEPP. DISP. RESOL. L.J. 567, 606 (2015) (summarizing Incheon District Court Judgment 2003Gahap10649, June 11, 2004 (S. Kor.)).

these claims, finding that they were not based on substantial infringement of the right to defend.

IV. CONCLUSION

As discussed above, the Arbitration Act sets out a straightforward regime for recognition and enforcement of both foreign and domestic arbitral awards, with foreign awards being treated differently depending on whether the arbitral tribunal is seated within a N.Y. Convention state. Korean courts have been, and continue to be, faithful in upholding the limited nature of the grounds available for refusing recognition and enforcement. Cases such as *NDS*, *LSF-KDIC* and the others described above demonstrate that Korean courts will only refuse recognition and enforcement in rare circumstances and only based on the narrow grounds available in Article V of the N.Y. Convention or Article 36(2) of the Arbitration Act.