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Taking Depositions of Korean Witnesses for Litigations or Arbitrations Abroad

Depositions are a common feature of litigation in the U.S. and other foreign (especially common law) jurisdictions. A deposition is a pre-trial discovery mechanism by which one party's counsel questions the factual witnesses of the other party outside of court. The deposition is conducted under oath and is recorded in a transcript (and sometimes audio and/or video recorded) for use in the proceedings. The responses of the witness are taken as testimony in the proceedings and are admissible as evidence therein, subject to certain limitations.

Depositions are not common in Korea litigation, however. Article 297 of the Korean Civil Procedure Act ("CPA") provides that a court may undertake to an examination of witness evidence outside the court, if deemed necessary. In addition, Article 376 of the CPA provides that a party may submit a motion for the preservation of evidence, which could be used to examine a witness under appropriate circumstances. In practice, however, depositions are not frequently used in Korean litigation.

It is often the case, however, that parties to litigation in foreign jurisdictions such as the United States wish to take depositions of the factual witnesses in Korea. In addition, while depositions are not common in international arbitration, the parties may agree to have witness depositions if they so desire. For example, our firm was recently asked to advise in a large international arbitration (seated in the United States) in which the parties had agreed to allow each side to take ten sworn depositions!

How should a party to a litigation abroad seeking to depose a witness in Korea proceed? If the witness is a citizen of the country in which the litigation is taking place, an oath may be

administered by a local consular official and the deposition may proceed in accordance with the procedures of that jurisdiction, provided they do not violate Korean public policy or conflict with any mandatory provisions of Korean law. However, the deposition of a Korean citizen in Korea will require the assistance of the Korean courts.

Any request for judicial assistance will be governed by the laws of the relevant jurisdiction and any applicable treaties. Korea is a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Convention"), and therefore a request for assistance in the taking of a deposition will be governed by the Convention, (assuming the litigation is taking place in the jurisdiction of another signatory, or Contracting State), as supplemented by the Korean Act on International Mutual Judicial Assistance in Civil Matters (the "Judicial Assistance Act"). A request for judicial assistance from courts in jurisdictions which are not party to the Convention will be governed solely by the Judicial Assistance Act.

Under Article 1 of the Convention, a judicial authority of a Contracting State may request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act, in civil or commercial matters. The Convention requires each Contracting State to designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State, and to transmit them to the authority competent to execute them. Korea has designated the Korean National Court Administration as its Central Authority for the purposes of the Convention.



A Letter of Request with respect to a deposition must be in writing, and must specify the court authority requesting the deposition (and the court requested to conduct it, if known); the names and addresses of the parties to the proceedings (and their representatives, if any); the nature of the proceedings for which the deposition is required; the name and address of the person to be examined; the questions to be put to the person to be examined or a statement of the subject-matter about which he or she is to be examined; and any requirement that the deposition is to be taken under oath (and any special form to be used). The Letter of Request must be translated into Korean.

Pursuant to the Convention, Korean law will apply as to the methods and procedures of the deposition. However, to the extent not contrary to Korean law, the foreign judicial authority may request that certain procedures be followed. An examination of a witness under oath in Korea must be conducted before a judge, and is normally conducted in a courtroom for this reason.

The Judicial Assistance Act requires that the Contracting State of the judicial authority requesting the deposition must guarantee the payment of expenses needed for conducting the deposition. Normally, the party requesting the deposition is required to post a deposit to the court in the Contracting State to cover these expenses. For example, if a Korean party requests judicial cooperation in another Contracting State, such party must pay the related expenses to the Korean court in advance. These funds will be used to guarantee and reimburse the expenses incurred by the court in the Contracting State.

After these formalities have been satisfied, the Korean court will assist the parties in the conduct of the deposition. The deposition will be conducted more or less as it would in the

Contracting State, with an oath administered by the Korean judge in attendance.

Even if the requesting judicial authority is not from a state which is a signatory to the Convention, assistance is available pursuant to the Judicial Assistance Act if the requesting state's judiciary guarantees that it will comply with requests for judicial cooperation from the Korean courts with respect to the same or similar matters. The provisions of the Judicial Assistance Act mirror those of the Convention.

The above discussion has focused on litigation, in which the courts of a foreign country request judicial assistance from the courts of Korea. But what about depositions taken in Korea for a foreign arbitration? As neither the Convention nor the Judicial Assistance Act contain any provisions with respect to assistance in the taking of evidence for arbitral proceedings, how might a party obtain such assistance?

In the context of arbitration, a party seeking to depose another party's witness would still require the assistance of the courts in the jurisdiction of the seat of the arbitration. In such cases, the parties would need to petition the court in the seat of the arbitration, either directly or through the arbitral tribunal, for assistance in transmitting a formal Letter of Request to the National Court Administration in Korea. Generally, such a request is more likely to be successful if it comes from the arbitral tribunal rather than the parties directly, as the courts in most jurisdictions are reluctant to intervene in arbitral proceedings (except for review of applications for interim relief and recognition and enforcement of awards) unless assistance is requested from the tribunal. The parties are best advised, therefore, to request the tribunal to request the assistance in the local court in the seat of the arbitration in seeking assistance from the courts in Korea.

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