

THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN KOREA

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I . INTRODUCTION

Korea ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention” or the “Convention”) on February 8, 1973, and it entered into force on May 9 of the same year. Since then, Korea’s rapid economic development and participation in international commerce has inevitably led to a steady increase in the appearance of Korean parties in international arbitrations. According to the International Chamber of Commerce (ICC), Korean companies were parties in 30 ICC arbitrations in 2008, third in Asia only to China (including Hong Kong and Macau) and India.¹ Korean parties have also been increasingly active in arbitrations under the rules of the London Court of International Arbitration, the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre, and other arbitral institutions. This trend looks to continue into the foreseeable future due to rising investment both in Korea by foreigners and by Korean companies overseas.

As Korean companies participate more frequently in international arbitrations, both as claimants and respondents, it is only natural that

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1. ICC Bulletin, Vol. 20, No. 1, 2009.

Korean courts have been called upon more and more often to enforce foreign arbitral awards in Korea. This article examines the statutory framework and procedural requirements for the recognition and enforcement of foreign arbitral awards in Korea, examines the important Korean court decisions in this area, and discusses some practical procedural considerations for a party wishing to enforce (or resist enforcement) of a foreign arbitral award in Korea. As will be seen, Korean courts are very receptive to the recognition and enforcement of foreign arbitral awards, in particular where the award hails from a jurisdiction which is a signatory to the New York Convention. Most recently, as discussed in more detail below, the Korean Supreme Court in 2009 has held that foreign arbitral awards from New York Convention jurisdictions have the same *res judicata* force and effect as a final court decision.² Thus, although in practice the recognition and enforcement of foreign arbitral awards may take time, Korea is not a jurisdiction which is in any way hostile to foreign arbitral awards, regardless of whether such awards are being enforced against a Korean or a foreign party.

II. The Korean Arbitration Act

In 1999, the Korean Arbitration Act (the “Arbitration Act” or the “Act”) was amended to substantially adopt the UNCITRAL Model Law. Most provisions of the Arbitration Act are intended to apply only to domestic arbitrations, and are beyond the scope of this paper. However, Article 2 of the Act provides that Articles 9, 10, 37 and 39 shall apply to foreign arbitrations (i.e., where the seat of the arbitration is outside of Korea).³ All four of these Articles are intended to facilitate foreign arbitrations, rather than to interfere with or limit them.

Article 9 provides for the dismissal of a court action where there is a valid arbitration agreement. This is intended to prevent a party who has signed a valid arbitration agreement from circumventing that agreement to litigate in the Korean courts. Any party to the arbitration agreement may obtain the dismissal of litigation commenced in Korea

2. Korean Supreme Court Dec. No. 2006Da20290, 28 May 2009.

3. In limited circumstances, other Articles of the Act do apply to foreign arbitral awards. For example, as discussed below, Article 7 applies to determine the proper court of jurisdiction for seeking the recognition and enforcement of a foreign arbitral award.

by making a prima facie showing of a valid agreement to arbitrate the subject matter of the dispute in Korea or any other jurisdiction. It should be noted, however, that, as in many other jurisdictions, a party bringing a litigation in Korea on the merits in spite of a valid agreement to arbitrate may be deemed to have waived its right to arbitrate the same dispute in subsequent proceedings.

Article 10 provides that a party to an arbitration may request interim measures from a Korean court. This provision mirrors the provisions of the rules of the ICC and other arbitral institutions, as well as the UNCITRAL Model Law, and is intended to allow a party to seek injunctive relief in order to maintain the status quo pending the resolution of the dispute by the arbitral tribunal, without waiving the right to arbitrate its claims by virtue of resort to the courts. It is often necessary for a party to go to court to seek a preliminary attachment or enjoin a counterparty from disposing of assets which are in dispute. Arbitral tribunals are normally empowered under the applicable rules of the arbitration to grant such relief, but of course are not available prior to the filing of the arbitration or formation of the tribunal. The tribunal also lacks the power to enforce its injunctive orders, so resort to the courts is permitted during the arbitration as well.

The articles of the Arbitration Act relevant to the recognition and enforcement of foreign arbitral awards are Articles 37 and 39, which contain provisions regarding the procedural requirements for obtaining recognition and enforcement of a foreign arbitral award, and the standards for determining whether a foreign arbitral award will be enforced in Korea, respectively.

Before discussing these two Articles, however, it should be noted that there is no procedure under the Arbitration Act by which a party which has lost an arbitration may file an action to set aside a foreign arbitral award in Korea. The Arbitration Act does in fact provide procedures for the setting aside of an arbitral award, in Articles 36 and 38 of the Act, but these apply only to domestic and not to foreign arbitral awards. Thus, a foreign arbitral award can be enforced in Korea in accordance with the provisions of Articles 37 and 39 of the Act, but there is no procedure by which a losing party may petition a Korean court to set aside a foreign arbitral award. A party wishing to challenge the enforceability of a foreign arbitral award in

Korea must therefore wait for the winning party to bring an enforcement action. This is a full adversarial litigation, however, during which both parties will have the opportunity to present their case before the court. Of course, depending on the seat of the arbitration, it may be possible to bring an action to set aside the award in that jurisdiction.

Pursuant to Article 37 of the Act, which sets forth the procedural requirements for obtaining recognition or enforcement of a foreign arbitral award, a party applying to a Korean court for such recognition or enforcement must submit (i) the duly authenticated original or a duly certified copy of the arbitral award and (ii) the duly authenticated original or a duly certified copy of the arbitration agreement. If these documents are not in Korean, a duly certified translation must also be submitted. These provisions mirror the provisions of Article IV of the New York Convention, and are the only procedural requirements for the recognition and enforcement of a foreign arbitral award in Korea.

While these procedural requirements are not at all burdensome for a party seeking to enforce an arbitral award in Korea, it should be noted that Section 37(1) of the Act provides that the recognition or enforcement of a foreign arbitral award shall be granted by the judgment of a court. Thus, absent a judgment from a Korean court granting enforcement, a foreign arbitral award may have no practical legal effect in Korea. In addition, the enforcement proceedings may take a substantial amount of time if the losing party is resisting enforcement, and are subject to appeal all the way to the Supreme Court. However, as noted above and discussed in more detail below, the Korean Supreme Court has recently held that a foreign arbitral award to which the New York Convention applies has the same *res judicata* effect as a final judgment of a Korean court, introducing some ambiguity as to the effect of an award prior to a final recognition or enforcement order by a Korean court.⁴

Article 39 of the Act states that the recognition and enforcement of a foreign arbitral award to which the New York Convention applies shall be granted in accordance with the Convention. Foreign arbitral awards from jurisdictions which are not parties to the New York Convention shall be recognized and enforced in accordance with Article 217 of the Code of Civil Procedure and Article 26(1) and 27

4. Korean Supreme Court Dec. No. 2006Da20290, 28 May 2009.

of the Civil Execution Act, which are the provisions applicable to the recognition and enforcement of foreign court judgments.

Because most developed countries are signatories to the New York Convention, this article will focus on the recognition and enforcement of foreign arbitral awards to which the New York Convention applies, but will also discuss the standards for recognition and enforcement under the Code of Civil Procedure and the Civil Execution Act. Finally, some practical procedural considerations will be discussed.

III. Foreign Arbitral Awards to which the New York Convention Applies

As Korea is a signatory to the New York Convention, and as provided in Article 39 of the Arbitration Act, Korean courts review applications for the recognition and enforcement of foreign arbitral awards to which the Convention applies in accordance with the provisions of the Convention. Korea's application of the New York Convention is not without limit, however. When Korea became a party to the Convention in 1973, it made two express limitations to its application. First, Korea stated that it would apply the Convention only with respect to arbitral awards made in the territory of another jurisdiction which was party to the Convention. Second, Korea limited the application of the Convention to commercial disputes, as determined by Korean law. Therefore, the New York Convention does not apply in Korea to arbitral awards rendered in countries which are not also parties to the Convention, nor does it apply to arbitral awards rendered with respect to disputes which are not commercial in nature.

In fact, the vast majority of foreign arbitral awards presented for recognition and enforcement in Korea are rendered in a country which is a party to the Convention, and concern commercial matters. As such, the New York Convention does apply to most foreign arbitral awards considered by the Korean courts, and these awards will be recognized and enforced in accordance with the Convention.

Article V of the New York Convention sets forth the very limited grounds which may permit the refusal of recognition and enforcement of an arbitral award. Pursuant to Subsection (1) of Article V, a party

may successfully resist recognition and enforcement if such party can prove that: (a) the parties were under some legal incapacity, or that the agreement to arbitrate is not valid under applicable law; (b) the party was not given proper notice of the appointment of the arbitrator or of the proceedings, or was otherwise unable to present its case; (c) the award exceeds the scope of the agreement to arbitrate; (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the seat of the arbitration; or (e) the award has not yet become binding on the parties, or has been set aside in the country in which, or under the law of which, the award was made. Subsection (2) of Article V provides that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the dispute is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country. Importantly, an error of fact or law by the tribunal is not grounds for refusal to recognize or enforce a foreign arbitral award under the Convention.

Of the grounds for refusing recognition or enforcement of an award, the most frequently tested ground in Korea has been that provided under Section V(2)(b) of the Convention, i.e., that the recognition or enforcement of the award would be contrary to public policy (under the moniker of “good morals and social order”), although other grounds have also been raised, including lack of proper notice of the arbitral proceedings under Section V(1)(b) and others. Korean courts have proven very friendly to foreign arbitral awards, taking a very narrow view of the exceptional circumstances which are required to successfully resist recognition and enforcement on any of the grounds provided under Article V of the Convention.

With respect to the so-called public policy exception, the Korean Supreme Court in a seminal case in 1990, almost a decade before the revision of Korea’s Arbitration Act, adopted a rather restrictive interpretation of “public policy” for the purposes of refusing to recognize and enforce an arbitral award.⁵ An arbitral tribunal sitting in London had ordered a Korean company to pay damages in a contractual dispute, and the British party brought enforcement

5. Korean Supreme Court Dec. No. 89Daka20252, 10 April 1990.

proceedings in Korea. The Korean party (appellant) argued that enforcement of the award would be contrary to public policy under Section V(2)(b) because, among other things, (i) it was not present during the arbitration proceedings, (ii) the award did not specify the reasons for the decision, and (iii) the award used US rather than UK default interest rates despite the contract being governed by UK law. The appellant also argued that the award should not be enforced pursuant to Section V(1)(b) of the Convention because the respondent did not receive proper notice of the arbitral proceedings.

The Supreme Court took a rather dim view of these arguments. For example, with respect to Section V(1)(b), the appellant had argued that it had closed its London office prior to the notice of the arbitration and had therefore not been served with proper notice. It transpired, however, that the British party was able to produce several communications regarding the possibility of a settlement sent by representatives of the appellant from the address of its London office after the arbitration had commenced. Moreover, as the appellant was in fact aware of the proceedings, it suffered no prejudice. The Supreme Court held that Section V(1)(b) of the Convention was intended to apply only where there was an egregious and intolerable violation of a party's right to defend itself in the arbitration.

With respect to the respondent's public policy arguments, the Supreme Court held that a violation of "public policy" giving rise to a refusal to enforce a foreign arbitral award under Section V(2)(b) of the New York Convention should be restrictively interpreted in light of the need for certainty and stability in international commercial transactions. The Court stated that the so-called "public policy exception" to the enforcement of arbitral awards was intended to protect only the most fundamental moral beliefs and social order in the enforcing country. None of the arguments raised by the respondent reached this standard.

In a subsequent case, in 1995, a Dutch company brought proceedings in the Korean courts to enforce an award rendered in Zurich against a Korean respondent in an arbitration governed by Dutch law.⁶ The respondent argued, among other things, that enforcement of the award would be against public policy in Korea because the 30-year statute of limitations under Dutch law was much

6. Korean Supreme Court Dec. No. 93Da53504, 14 February 1995.

longer than under Korean law, where the claim would have been barred. However, the Supreme Court again held that such considerations did not rise to the level of being contrary to public policy. Citing the case discussed above, the Court reaffirmed that Section V(2)(b) of the New York Convention should be narrowly interpreted, with due regard for the stability of international commerce, and should be invoked only to protect Korea's most basic moral beliefs and social order. Importantly, the Court held that even when foreign laws applied in an arbitration are in violation of the mandatory provisions of Korean law, this does not constitute a reason to refuse enforcement of the award in Korea on the basis of public policy. Only where the actual result of recognizing and enforcing such an award would be contrary to the fundamental morals and basic concepts of justice in Korea should enforcement be refused.

These two cases established an extremely high bar for a party wishing to challenge the recognition and enforcement of a foreign arbitral award on public policy grounds. However, both cases arose from arbitrations which applied foreign law. While the Supreme Court held that the public policy exception would not apply to bar recognition and enforcement simply because the application of foreign law would result in a conflict with mandatory Korean law, it did not address the question of whether Korea has an inherent public policy interest in ensuring the proper application of mandatory Korean law within Korea.

More recently, however, the Seoul High Court addressed this issue, ruling that the same standard should apply even where Korean law is the governing law of the arbitration.⁷ The High Court stated that recognition and enforcement cannot be refused simply on the basis that implementation of the arbitral award may violate a mandatory provision of law, and emphasized that in considering public policy, not only domestic considerations but also the stability of international commercial transactions should be considered. In reaching this conclusion, the High Court cited the Supreme Court cases discussed above, but made no distinction between the application of this principle to arbitrations governed by Korean or foreign law. The Supreme Court subsequently upheld this decision, but on grounds different than were raised on appeal.⁸

7. Seoul High Court Dec. No. 2003Na5513, 5 December 2003.

8. Korean Supreme Court Dec. No. 2004Da2649, 27 May 2005.

In May 2009, the Supreme Court rendered an important decision regarding at least the recognition, if not the enforcement, of a foreign arbitral award. The decision was significant because it was handed down in the context of a lawsuit regarding the establishment of creditor claims in a corporate reorganization, and not in a proceeding brought specifically for the recognition and enforcement of a foreign arbitral award. The Supreme Court held that a party may establish a claim as a creditor in a corporate reorganization proceeding on the basis of a foreign arbitral award to which the New York Convention applies.⁹ The trustee for the Korean company under reorganization had persuaded the Busan High Court that the claim based upon the arbitral award should not be recognized or enforced because the claimant had obtained the award by fraudulent means (submitting false evidence and testimony to the tribunal). The Supreme Court reversed the Busan High Court on the ground that a foreign arbitral award to which the New York Convention applies has the same legal effect as a final and confirmed judgment of a Korean court. As such, it has the effect of *res judicata*, and, unless there are grounds for refusal of recognition and enforcement under Article V of the Convention, the court hearing the corporate reorganization lawsuit should issue a judgment confirming the claim based upon the foreign arbitral award, without reviewing the merits of the case again as the Busan High Court had done.

Importantly, the claimant in this case never brought a separate action for the recognition and enforcement of the foreign arbitral award, and was not required to do so in order to receive the recognition of its claims in the corporation reorganization suit. While Article 37 of the Arbitration Act requires that the recognition or enforcement of an arbitral award be done through the judgment of a court, it does not specify which court or in what context. In this case, the Supreme Court appears to have held that a claimant may obtain the recognition of a foreign arbitral award by submitting the award to the competent court in the context of other litigation, rather than being required to bring a separate action for the recognition and enforcement of the award, and that the court should confirm the award unless there are grounds for refusal under Article V of the Convention.

The decision does create some ambiguity, however. The Supreme

9. Korean Supreme Court Dec. No. 2006Da20290, 28 May 2009.

Court admonishes the lower court for failing to recognize the claimant's claim on the basis of the *res judicata* effect of the foreign arbitral award, but states that a foreign arbitral award to which the Convention applies has the same effect as a final court award—unless there are grounds under Article V of the Convention to refuse recognition and enforcement. This is somewhat circular, but it may reflect the subtle difference in Korea between recognition as opposed to enforcement of a foreign arbitral award. While the Supreme Court did state that a foreign arbitral award to which the New York Convention applies has the same legal effect as a final court judgment, it was addressing this legal effect in the context of *res judicata*, which goes more to the question of recognition than enforcement. In the context of corporate reorganization proceedings, the recognition of the arbitral award only serves to establish that the claimant is a creditor and has a valid claim which must be respected in the reorganization. Where a party is seeking payment of damages or some other remedy in Korea pursuant to a foreign arbitral award, it is more likely that an enforcement action would be brought.

In any event, the Supreme Court has made it clear that Korean courts should give utmost deference to foreign arbitral awards rendered in New York Convention jurisdictions, refraining from conducting a full reexamination of the case on the merits, and refusing recognition and enforcement only in those rare and exceptional cases in which Korea's most basic moral values or social order would be threatened by recognition or enforcement of the award.

IV. Foreign Arbitral Awards to which the New York Convention Does Not Apply

As noted above, Article 39 of the Arbitration Act provides that the recognition and enforcement of foreign arbitral awards to which the New York Convention does not apply shall be determined in accordance with the provisions of Article 217 of the Code of Civil Procedure and Article 26(1) and 27 of the Civil Execution Act, which deal with the recognition and enforcement of foreign court decisions. Thus, foreign arbitral awards rendered in countries which are not signatories to the New York Convention, or which deal with disputes which are not commercial in nature, will be addressed pursuant to the

relevant provisions of Korean law and not the New York Convention. As previously indicated, however, the vast majority of foreign arbitral awards submitted for recognition and enforcement in the Korean courts come from jurisdictions which are parties to the Convention and which deal with commercial matters. In fact, to date there has been no published case of which this author is aware testing the recognition and enforcement of a foreign arbitral award pursuant to the Korean Code of Civil Procedure and the Civil Execution Act. Of course, Korean courts have frequently been petitioned to recognize and enforce foreign court decisions, so by extrapolation we may see how they would treat a foreign arbitral award to which the New York Convention does not apply.

First, it should be noted that the grounds for refusing to recognize or enforce a foreign court judgment under Korean law are quite similar to the grounds for refusing to recognize or enforce a foreign arbitral award under the Convention. Article 217 of the Code of Civil Procedure (“Effect of Foreign Judgment”) provides that a final judgment by a foreign court shall be recognized and enforced provided that it had jurisdiction over the subject matter of the disputes, that the party contesting recognition or enforcement received adequate notice of the proceedings and was able to present its case, and that the judgment does not violate the good morals or social order of Korea. An additional requirement, which is not found in the grounds for enforcement of foreign arbitral awards under the New York Convention, is that there must exist a “reciprocal guarantee”, which was for many years taken to mean that the courts in the jurisdiction in which the judgment was rendered must recognize and enforce Korean court judgments by standards which are not substantially different from those provided under the Korean Code of Civil Procedure and other relevant laws. However, this view has been relaxed in subsequent years, and Korean courts are generally inclined to enforce foreign court judgments as long as procedural fairness is assured and there are no public policy concerns. Article 26(1) of the Civil Execution Act requires a judgment of execution by a Korean court in order to execute a foreign award, much like the requirement for a judgment of recognition and enforcement for an arbitral award under Article 37(1) of the Arbitration Act. Article 27 of the Civil Execution Act provides that such a judgment of execution shall be made without an examination of the merits of the case, and that a suit seeking execution shall be dismissed only where the judgment has

not been proven to be final and conclusive, or where it fails to fulfill the conditions of Article 217 of the Code of Civil Procedure. These requirements are very similar to the provisions of the New York Convention.

In theory, then, it would appear that Korean courts would be likely to apply a similar standard to the recognition and enforcement of foreign arbitral awards of a commercial nature, regardless of where the award was rendered. As long as the jurisdiction in which the award is made can ensure procedural due process, and recognizes Korean judgments in accordance with reasonable standards, then it would seem that such foreign arbitral awards would enjoy the same deference as awards rendered in jurisdictions which are parties to the Convention. The same deference would probably not be afforded, however, to arbitral awards to which the New York Convention does not apply due to the subject matter of the dispute. Korea specifically excluded non-commercial arbitral awards from its application of the Convention due to concerns of sovereignty and the non-arbitrability of certain matters under Korean law. Procedural due process and mutual recognition of judgments would not be relevant to such concerns.

V. Some Procedural Considerations

As a practical matter, a foreign party seeking recognition or enforcement of a foreign arbitral award in Korea will most likely have in hand an arbitral award in English (or some language other than Korean), rendered in a New York Convention jurisdiction, which awards damages in some form (most likely monetary) against a Korean party.

Such a party has ten years from the date of the arbitral award to bring an action for the recognition and enforcement of the award, but of course will want to bring the action as soon as possible to obtain the benefits of its hard-fought victory in the arbitration. The first thing the petitioner must do is to obtain a certified translation of the arbitral award and the arbitration agreement pursuant to which the arbitration was conducted. This must be submitted to the court of competent jurisdiction along with the petition seeking recognition and enforcement. As arbitral awards can be quite lengthy and use legal and

technical language, translating the award can be costly and time-consuming.

Next, the petitioner will need to determine which court in Korea is the proper court of jurisdiction over the recognition and enforcement action. Article 7(4) of the Arbitration Act provides that an application for the recognition or enforcement of an arbitral award under Articles 37 through 39 (which includes all foreign arbitral awards) shall be under the jurisdiction of (i) the court designated by the arbitration agreement, (ii) the court with jurisdiction over the place of arbitration, (iii) the court with jurisdiction over the place where a respondent's property is located, or (iv) the court with jurisdiction over a respondent's place of residence or business or place of abode (or last known, if these cannot be determined). Normally, the parties will not have designated a particular court of jurisdiction in the arbitration agreement, and of course if the arbitration is a foreign arbitral award, then by definition there is no court in Korea with jurisdiction over the place of arbitration. Most of the time, the court with jurisdiction over the property of a respondent and the court with jurisdiction over the place of business or residence are the same court, but not always. And most international arbitrations, especially larger cases, involve a party which is subject to jurisdiction in Seoul. In such cases, it is advisable to bring the petition for recognition and enforcement before the Seoul Central District Court, which has a great deal of experience in dealing with foreign arbitral awards, and has proven very faithful to the ideals of the New York Convention.

After the petition for recognition and enforcement to the appropriate court of jurisdiction, the respondent (i.e., the losing party in the arbitration, against whom enforcement is sought) will be notified of the petition and given the opportunity to respond. As noted above, recognition and enforcement proceedings are full adversarial litigation proceedings, and, if the respondent resists enforcement, the court of first instance can take eight to twelve months to render its decision. This decision is subject to appeal by either side to the relevant High Court, where the case will be reviewed *de novo*, and then to the Supreme Court. The process can be quite time consuming and expensive, sometimes taking two or three years (or more), despite the fact that the eventual decision by the Korean courts will most likely be in favor of the party seeking enforcement of the arbitral award. One incentive which keeps losing parties from

resisting enforcement by raising and maintaining futile appeals all the way to the Supreme Court, however, is that such respondents may be often ordered to pay the costs incurred by the petitioner seeking enforcement of the arbitral award.

Once a Korean court has entered a final judgment recognizing and enforcing the arbitral award, the petitioner may enforce the award against the respondent's assets in Korea, just as it could with a final court order from a Korean court.

VI. Conclusion

The Korean Supreme Court's recent decision in May 2009 is only the most recent in a series of decisions which have established Korea as an extremely friendly jurisdiction for the recognition and enforcement of foreign arbitral awards. Absent strong grounds under Article V of the Convention, Korean courts may be expected to recognize and enforce foreign arbitral awards to which the Convention applies. The same may be said, at least in theory, with respect to arbitral awards rendered in jurisdictions which are not party to the Convention, provided they meet minimum requirements of procedural due process and recognize Korean judgments by reasonable standards. However, there will inevitably be limits to the willingness of Korean courts to enforce certain kinds of awards. For example, while the Supreme Court has established that the recognition and enforcement of an award will not be refused simply because the award applies foreign or even Korean law in a way which is contrary to mandatory Korean law, Korean courts might be hesitant to permit the enforcement of a foreign arbitral award where it misapplies an important fundamental provision of mandatory Korean law, as enforcing such an award may be viewed as a violation of public policy.

In addition, as noted above, parties should also be aware that the recognition and enforcement proceedings may take considerable time if challenges are raised by the party losing the arbitration. Nevertheless, as we have seen, Korea is an extremely arbitration-friendly jurisdiction, and Korean courts pay due deference to foreign arbitral awards, especially where the New York Convention applies. One would be hard-pressed to successfully resist recognition or

enforcement of a foreign arbitral award absent some egregious breach of procedural due process by the tribunal, or an award which violated the most basic moral values or social order of Korea.

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SUMMARY

Korean courts have been very receptive to the recognition and enforcement of foreign arbitral awards. This article examines the statutory framework and procedural requirements under the Korean Arbitration Act and the New York Convention for the recognition and enforcement of foreign arbitral awards in Korea, examines the important Korean court decisions in this area, and discusses some practical procedural considerations.

The Arbitration Act sets minimal procedural requirements for the recognition and enforcement of foreign arbitral awards. Awards to which the New York Convention applies shall be recognized and enforced in accordance with the Convention. This includes any foreign arbitral award which is commercial in nature and rendered in a jurisdiction which is a signatory to the Convention. Awards to which the Convention does not apply are recognized and enforced in accordance with the provisions of Korean law applicable to the recognition and enforcement of foreign court judgments. An application for recognition or enforcement of a foreign arbitral award must be accompanied by the arbitral decision and the arbitration clause, which must be translated into Korean. There are no separate procedures under Korean law for the setting aside of a foreign arbitral award.

The most frequent challenged raised by parties attempting to resist the recognition or enforcement of foreign arbitral awards in Korea has been that the award would be contrary to public policy (“good morals and social order”), as provided under Section V(2)(b) of the New York Convention. Korean courts have taken a very narrow view of the exceptional circumstances which are required to successfully resist recognition and enforcement on this or any of the other grounds listed under Article V of the Convention.

The Korean Supreme Court has consistently held in a series of cases that the “public policy” exception to the recognition and enforcement of arbitral awards was intended to protect only Korea’s most fundamental moral beliefs and social order, and should be very restrictively interpreted in light of the need for certainty and stability in international commercial transactions. Even where the award is in violation of mandatory Korean law, the award should be recognized

and enforced unless the result would be contrary to the fundamental morals and basic concepts of justice in Korea.

Recently, the Supreme Court has confirmed this position, and stated that a foreign arbitral award to which the New York Convention applies has the same *res judicata* effect as a final Korean court decision.

For a discussion of some practical considerations in the recognition and enforcement of foreign arbitral awards in the Korean courts, please refer to Section V.

Keywords: Korea, Recognition and Enforcement, Foreign Arbitral Awards, International Arbitration, New York Convention