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## The Recognition and Enforcement of Foreign Arbitral Awards in Korea: With Focus on the U.S. Matters

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## **The Recognition and Enforcement of Foreign Arbitral Awards in Korea: With Focus on the U.S. Matters**

Hon. Yong-Beum Jahng\* and Ryul Kim\*\*

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### ABSTRACT

In July 2012, the Honorable Yong-Beum Jahng—a Korean judge and a visiting scholar at the University of California, Los Angeles—wrote *The Recognition and Enforcement of Foreign Arbitral Awards in Korea: With Focus on the U.S. Matters* in Korea, in connection with his oral presentation at The 2012 US-Korean Law Day at KIA Motors America. Ryul Kim has reviewed, edited, and translated the original Korean version into an English article for publication in the 2012 US-Korea Law Journal without footnotes. In February 2015, Ryul Kim revised the 2012 English version, so as to incorporate footnotes, and has contributed this article to the Pepperdine

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Dispute Resolution Law Journal. The world of alternative dispute resolution is constantly evolving. There are new Korean cases and new issues that have been raised since the initial publication in 2012. We regret that we could not fully analyze and incorporate them into this article. We would not have produced this article but for the talent and dedication of Jonathan Yong—a 3L at Trinity Law School and a member of the editorial board for the 2015 edition of *The Laws of Korea*.

#### I. THE LAWS AND TREATIES OF KOREA ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN GENERAL

##### *Background*

The Civil Procedure Act of 1960 and the Arbitration Act of 1966 (Old Arbitration Act or Arbitration Act)

The Republic of Korea (Korea) enacted the Civil Procedure Act in 1960, in which the effect and enforcement of foreign judgments are set forth.<sup>1</sup> Korea promulgated its Arbitration Act in 1966 (Old Arbitration Act).<sup>2</sup> The Old Arbitration Act provided the specific enforcement mechanism for domestic arbitral awards, but was silent as to recognition and enforcement of foreign arbitral awards.<sup>3</sup> Nonetheless, the Korean courts applied the same

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1. Minbeob [Civil Act], Act No. 547, Apr. 4, 1966, art. 203, 476-77 (S. Kor.).
2. Minbeob [Civil Act], Act No. 1767, Mar. 16, 1966, art. 14 (S. Kor.).
3. Minbeob [Civil Act], Act Law No. 1767, Mar. 16, 1966, art. 14 (S. Kor.).

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principles and rules in dealing with the enforcement of foreign arbitration issues and domestic arbitration under the Civil Procedure Act of 1960.<sup>4</sup>

Convention on the Settlement of Investment Disputes between States  
and Nations of Other States

The International Bank of Reconstruction and Development (IBRD or the World Bank) drafted the Convention on the Settlement of Investment Disputes between States and Nations of Other States (Washington Convention) to provide an alternative to litigation and conflict resolution forum for disputes between persons from different countries arising from international investments. The Washington Convention consists of ten chapters and seventy-five articles, and was submitted by the IBRD to its member states for adoption and ratification in Washington, D.C., United States, on March 18, 1965.<sup>5</sup> The Washington Convention took effect on October 14, 1966.<sup>6</sup> At the present time, 159 nations, including the United States and Korea, are members.<sup>7</sup> As such, Korea recognizes the principles and procedures for resolving conflicts regarding international investment. The International Centre for Settlement of Investment Disputes (ICSID) was established under the IBRD as a dispute resolution authority to dispose of joint venture issues arising from transactions between developed countries' capital and resources.<sup>8</sup>

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4. *Id.*

5. International Centre for Settlement of Investment Disputes, Table of Contents, *available at* <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm>.

6. ICSID Convention, Regulations and Rules, INT'L CENTRE FOR SETT. INV. DISPS., *available at* [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf).

7. ICSID Convention, Regulations and Rules, INT'L CENTRE FOR SETT. INV. DISPS. (June 30, 2013), *available at* <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2013%20AR-%20ENG.pdf>.

8. ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, TOWARDS A UNIFORM JUDICIAL INTERPRETATION 270 (Kluwer Law Int'l ed. 1981).

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United Nations Convention on the Recognition and Enforcement of  
Foreign Arbitral Awards

The International Chamber of Commerce (ICC) adopted the first draft of the Convention on Recognition and Enforcement of International Arbitral Awards at its Lisbon General Meeting in 1954 (ICC Draft Convention).<sup>9</sup> Accordingly, the ICC's special committee—consisting of eight member countries—presented the initial draft of the ICC Draft Convention to the United Nations Education, Scientific and Cultural Organization (UNESCO).<sup>10</sup> UNESCO, with only minor modifications to the ICC Draft Convention, resolved to call the ICC Draft Convention for adoption at the international UNESCO conference on May 3, 1956.<sup>11</sup> On June 10, 1958, forty-eight representatives of UNESCO and fifteen major international organizations—including the ICC—endorsed the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards in New York (New York Convention).<sup>12</sup> This Convention took effect on June 7, 1959.<sup>13</sup> As of March 23, 2012, 146 countries—including the United States—have become signatories to this multistate treaty.<sup>14</sup> It is the most significant and favored treaty for international arbitration award enforcement because it has contributed to the practical resolution of conflict arising from international commercial dispute.

The Republic of Korea became a signatory to the New York Convention on March 4, 1964. The Korean Emergency Executive Cabinet—in place of the suspended National Assembly—adopted the Convention on February 8,

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NY\\_Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY_Convention_status.html) (last visited June 1, 2015).

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1973 and deposited its ratification with the UN Secretary.<sup>15</sup> As such, the Republic of Korea became the 42nd contracting state to adopt the New York Convention.<sup>16</sup> The New York Convention took effect as a domestic law of Korea<sup>17</sup> on May 9, 1973—ninety days from the date of deposit with the UN Secretary—in accordance with the New York Convention.<sup>18</sup>

Korea’s Amended Arbitration Act of 1999 (New Arbitration Act)

The Republic of Korea wholly amended its Old Arbitration Act by adopting the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Act, which served as the model law on international commercial arbitration, on December 31, 1999 (New Arbitration Act).<sup>19</sup> The Korean New Arbitration Act—with only minor amendments to the terms of the UNCITRAL Model Arbitration Act—took effect on January 26, 2002.<sup>20</sup> The New Arbitration Act remains the main body of Korean law expressly providing guidelines for the recognition and enforcement of foreign arbitral awards.<sup>21</sup> The New Arbitration Act in Korea is known as the “Act for the Recognition and Enforcement of Foreign Arbitral Awards.” The major provisions of Korea’s New Arbitration Act are as follows:

a. Article 7.4 related to Competent Court;

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15. Act No. 6083, Dec. 31, 1999 (S. Kor.).

16. *Chronological Table of Signatories*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status\\_chronological.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status_chronological.html) (last visited June 1, 2015).

17. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, May 9, 1973, 330 U.N.T.S. 38 [hereinafter N.Y. Convention].

18. *See id.* at art. 12.2.

19. Act No. 6083, Dec. 31, 1999 (S. Kor.).

20. Act No. 6626, Jan. 26, 2002 (S. Kor.).

21. Act No. 10207, April 28, 1978 (S. Kor.). The New Arbitration Act was partially revised for Korean linguistic translation on March 31, 2010. *Id.*

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- b. Article 39 related to Basic Procedure;
- c. Article 38 related to Domestic Arbitral Awards;
- d. Article 39.1 related to New York Convention Foreign Arbitral Awards; and
- e. Article 39.2 related to non-New York Convention Foreign Arbitral Awards<sup>22</sup>

Arbitration under KOR-US FTA (Free Trade Agreement between the Republic of Korea and the United States of America)

The Free Trade Agreement between the Republic of Korea and the United States of America (KOR-US FTA), which took effect on March 15, 2012, provides in detail a dispute resolution mechanism for resolving conflicts between private investors in Korea and the United States in regards to their investments in the other party's country.<sup>23</sup> Under the rules and procedures of the KOR-US FTA, private investors from either Korea or the United States are allowed to call for arbitration of their disputes concerning their investment in the other country under the Washington Convention and the ICSID, and can invoke the procedural rules and applicable laws of such country in resolving such dispute.<sup>24</sup> Furthermore, the KOR-US FTA specifically mandates that the countries enforce such investment arbitration awards in order to enable private investors to seek arbitral award enforcement as remedy under the Washington and New York Conventions.<sup>25</sup>

An arbitration claim so submitted under Investor-State Dispute Settlement should be deemed to arise out of a commercial relationship or transaction within the purview of Article I of the New York Convention.<sup>26</sup>

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22. Act No. 10207, April 28, 1878 (S. Kor.).

23. U.S.-South Korea Free Trade Agreement (KORUS FTA), Trade Representative, U.S.-South Korea, Mar. 15, 2012, Ch. 11.B.

24. *Id.*

25. *Id.*

26. N.Y. Convention art. I, *supra* note 17, 330 U.N.T.S. at 38.

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There is no special or additional legal mechanism provided under the Korean domestic law for enforcement of the award rendered under the above circumstances. In any event, an arbitration proceeded with Investor-State Dispute Settlement should thus follow the terms of the New York Convention.<sup>27</sup>

*Competent Court for Application for the Recognition and Execution of  
Arbitral Award: Article 7 of the Arbitration Act*

Under Article 7.4 of the New Arbitration Act, the party seeking recognition and enforcement of foreign or domestic arbitral awards may choose any one of the following available venues:

1. The court the parties agreed upon;
2. The court that has jurisdiction over the location of the arbitration;
3. The court of jurisdiction where the defendant's assets are located; and
4. The court which the defendant residence or business is located.<sup>28</sup>

The venue for the competent court providing recognition and enforcement of arbitral awards is not enumerated in order of exclusivity.<sup>29</sup> The petitioner is free to choose any one of the four selective venues. A court so chosen is deemed competent to exercise its judicial power over such cases subject to this act.<sup>30</sup>

*Mandatory Conditions Prerequisite to Recognition and Enforcement: Article*

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27. See Free Trade Agreement between the United States of America and the Republic of Korea, U.S.-S. Kor., June 30, 2007 (entered into force Mar. 15, 2012), Ch. 11B, available at <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> [hereinafter KORUS FTA].

28. Act No. 10207, Mar. 16, 1966 (S. Kor.).

29. *Id.*

30. *Id.*



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*37 of Arbitration Act and Article 2 of Arbitration Act*

Enforcement Procedure: Court Order or Court Judgment: Adversarial  
Litigation

For enforcement of foreign arbitral awards, each country has its own rules pertaining to the procedural mechanism to be employed, whether a judgment or order should be issued, and whether adversarial litigation should be used to enforce the arbitral awards.<sup>31</sup> In Korea, prior to adopting the New Arbitration Act, there was a proposal to require a court order in addition to the underlying court judgment—absent the parties’ objection—so as to expedite and ease the enforcement of arbitral awards.<sup>32</sup> Although that proposal was briefly considered, it was ultimately not incorporated into the New Arbitration Act on the grounds that a court order may not be fully effective because of a lack of enforceability and *res judicata*.<sup>33</sup> As a matter of practicality, the final version of the New Arbitration Act maintains a court judgment and adversarial litigation to enforce an arbitration award, a requirement that also existed under the Old Arbitration Act.<sup>34</sup>

Therefore, the enforcement judgment in the procedural authority is based on both the Arbitration Act and court judgment under the Korean legal principle of “Formative Judgment Theory” (형성판결설).<sup>35</sup>

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31. YOUNG-JOON MOK, *COMMERCIAL ARBITRATION THEORY* 242-57 (Pak Young Sa ed., 2001).

32. See Jahng Opinion based on YOUNG-JOON MOK, *COMMERCIAL ARBITRATION THEORY* 242-57 (Pak Young Sa ed., 2001).

33. Jahng Opinion based on YOUNG-JOON MOK, *COMMERCIAL ARBITRATION THEORY* 242-57 (Pak Young Sa ed., 2001).

34. Yong-Deuk Ha, *Arbitration Law Revision Process and Major Topics*, 295 *ARB.* 23 (2000); Supreme Court [S. Ct.], 2009Da68910, Apr. 29, 2010 (S. Kor.).

35. Sang-Won Kim, *Commentary on Civil Procedure Law (II)*, *FOREIGN JUDGMENT* 135 (2004) (partly written by Ki-Suk Seo).

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The enforcement judgment itself may on its face expressly describe the claim right in the main sentence (Joo Moon: 주문).<sup>36</sup> In such an event, the enforcement judgment operates as the basis for the enforcement source. The enforcement judgment became fully operative and effective as an authoritative source for enforcement upon confirmation or declaration of temporary execution decree.<sup>37</sup>

Under the above legal principle, the execution writ issuance is required for its intended purpose as in other judgments. According to the same principles as above, the court clerk rendering judgments in the first instance can add the execution writ at the last page of the original judgment paper.<sup>38</sup>

#### Recognition Judgment

The legislature should have both the initial responsibility and authority to make a law under which an enforcement procedure for arbitration award can operate as a separate and independent judgment.<sup>39</sup> As a matter of broad interpretation of the New Arbitration Act, the parties should not only be allowed to seek recognition of arbitral awards as an original claim, but also to raise it as a counterclaim.<sup>40</sup>

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36. The Court Administration Department, COURT PRACTICE GUIDE (Civil Procedure I) (2003).

37. There is a view that such requirement is unnecessary.

38. Minbeob [Civil Act], art. 28.2, 29.1 (S. Kor.).

39. New Arbitration Act art. 37.1.

40. KWANG-HYUN SUK, GOOKJESABEOPGWA GOOKJESOSONG [PRIVATE INTERNATIONAL LAW & INTERNATIONAL LITIGATION], VOL. I, 491-92 (Seoul: Pakyoungsa ed., 2001).

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### Affirmative Requirement

The party seeking enforcement of a foreign arbitral award is required to submit the original or certified copy of the arbitral award and the original or certified copy of the arbitration agreement.<sup>41</sup>

### *Domestic Arbitration and Foreign Arbitration: (Difference in Enforcing Domestic Arbitration Award and Foreign Arbitration Award)*

#### Territorial Criterion

Under the New Arbitration Act, the issue as to whether the arbitral awards should be determined either as domestic or foreign on the basis of territory should be adjudicated.<sup>42</sup> Therefore, (1) the domestic arbitral award should be enforced absent ground for invalidation, (2) the foreign arbitral award should follow the terms of the New York Convention, and (3) foreign arbitral awards outside the scope of the New York Convention<sup>43</sup> should be deemed equivalent to a foreign court judgment and should be enforced under the rules set forth under the Korea Civil Procedure Act and the Civil Enforcement Act.<sup>44</sup>

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41. NEW ARBITRATION ACT, art. 23.1. Under Article 23.1 of New Arbitration Act, the arbitral award written in foreign language is recognized, but an accompanying Korean translation is required. *Id.* Only an “authentication” is required, as opposed to a “certification,” as required under New York convention. *Id.*; N.Y. CONVENTION (1958). The burden is lowered so as to only certify the true copies of the original documents.

42. SUK, *supra* note 40, at 493.

43. Yong-Beum Jahng, *US-Korea Law Journal*, U.S.-KOREA L. FOUND. (2012) (highlighting the unpublished comment in the original version of the Korean draft and stating that such cases are seldom reported).

44. *Id.* (stating that there were minority views against conferring status of foreign judgment).

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*Comments & Criticism: Comments on Propriety of Territorial Criterion*

The Korean legislature has wholly amended the Old Arbitration Act and adopted the UN Model Arbitration Act as the basis for its New Arbitration Act. Nonetheless, the territorial criterion being inconsistent and deviant from the UNCITRAL Model Law was employed to determine the nature of arbitral awards being domestic or foreign. The same grounds for refusal to recognize and enforce as under the Old Arbitration Act remains unchanged under the New Arbitration Act.<sup>45</sup> Furthermore, the grounds for revocation of arbitral awards under the New Arbitration Act were drafted on the basis of the grounds for refusal to enforce foreign arbitral awards set forth under the New York Convention.<sup>46</sup> Therefore, there is no difference in essence between the New York Convention and the New Arbitration Act, at least in the cases of foreign arbitral awards.<sup>47</sup>

Nonetheless, the party seeking enforcement of non-New York Convention foreign arbitral award in Korea can be disadvantaged under the Korean Civil Procedure Act and the Civil Enforcement Act.<sup>48</sup> The disadvantage occurs because the party seeking to enforce the foreign arbitral award in such an event is obligated to carry the burden to satisfy the more restrictive conditions prescribed under the Korea Civil Procedure Act. There is no justifiable reason to disfavor non-New York Convention foreign arbitral awards over foreign awards rendered under the New York Convention that are contradictory to the legislative intent to adopt the Model Act.

Importing from the New York Convention Article 5 and Article 36 of the Model Act provides the grounds for refusal of enforcement available for any case, regardless of where the arbitral award was rendered. However, the

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45. Old Arbitration Act, art. 14.2.

46. Jahng, *supra* note 43.

47. *Id.*

48. Byung-Kun Kang, *Issues Related to Cancellation, Recognition, & Enforcement of Arbitration*, 40 COM. LAW 31-32 (2001).

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New Arbitration Act did not adopt the universal approach but territorial criterion.

Both foreign court judgments and foreign arbitral awards commonly deal with other countries' conflict resolution systems. However, there are fundamental differences in these two foreign resolution devices. The foreign court judgment stems from the state's public authority. On the other hand, foreign arbitral award results from the private consensus. For this reason, the foreign arbitral awards should not be treated in the same manner as the foreign court judgment when their recognition and enforcement are at issue in the Korean courts. The most pertinent provisions in the Civil Procedure Act and the Civil Enforcement Act referenced under Article 39.2 of the New Arbitration Act can be incorporated or adopted into Articles 36 and 37 of the New Arbitration Act. With such legislative changes as suggested above, the need to make extra legislative effort to turn to the laws outside Korean law can be eliminated and the difficulties arising from two different sets of laws can be minimized.<sup>49</sup>

Korea declared two reservations at the time it joined the New York Convention.<sup>50</sup> It is suggested as a matter of legislative policy that both "reciprocal reservation" and "commercial matter reservation" should be withdrawn, as there is no more compelling reason at the present time. It is now more desirable to establish uniformity in enforcing the non-New York Convention foreign court judgment and domestic arbitral awards. With more streamlined procedural system, arbitration can be expedited and more widely used.<sup>51</sup>

E. Recognition and Enforcement of Domestic Arbitral Awards: Article 38 of the New Arbitration Act (Domestic Arbitral Awards)

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49. SUK, *supra* note 40, at 495-96; Moon-Chul Jang, *Revised Arbitration Law Commentary*, 284 HUM. RTS & JUST. 779 (2000).

50. VAN DEN BERG, *supra* note 8, at 270.

51. Jahng, *supra* note 43.

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The party seeking to invalidate arbitral awards is required to prove one of the four grounds available under Article 36.2.1.<sup>52</sup> In the event the court finds one of the two grounds, the party is then allowed to set aside its petition for enforcement on its own motion under Article 36.2.2 as well.<sup>53</sup>

The court is bound to issue an enforcement judgment when either the respondent fails to prove—or the court does not find—the refusal grounds as provided under the above statute.<sup>54</sup> Under the New Arbitration Act, there are no express grounds enumerated for refusal of domestic arbitral awards.<sup>55</sup> Instead, the New Arbitration Act imported the same reason for invalidation ground as provided under Article 36.<sup>56</sup> This differs from the Model Arbitration Act and the New York Convention. The New Arbitration Act does not furnish the grounds for refusal that are available under New York Convention Article V.1(e) and also under Model Arbitration Act Article 36.1.a.v.<sup>57</sup>

*Recognition and Enforcement of Foreign Arbitral Awards subject to  
 Convention: Article 39.1 of the New Arbitration Act*

The New Arbitration Act adopted the New York Convention in its entirety by reference, instead of expressly setting forth its terms in the statute by incorporation. Under the Republic of Korea constitution, the international treaty takes the same legal effect as the domestic law upon promulgation.<sup>58</sup> Another reason for adoption by reference is the fact that the Korean language version of the New York Convention had already been in

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52. Jahng, *supra* note 43.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* It is unknown why the grounds for refusal were missing. It could be intentional or translational error during the legislative process.

58. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 6.1 (S. Kor.).

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existence and the concerns that adoption by incorporation would cause interpretation confusion.<sup>59</sup>

*Recognition and Enforcement of Foreign Arbitral Awards outside the New York Convention: Article 39.2 of the New Arbitration Act*

Foreign arbitral awards rendered outside the territory of Korea and outside the scope of the New York Convention are deemed equivalent to a foreign judgment. In such cases, compulsory rules and regulations under the Korean Civil Procedure Act Article 217 and the Civil Enforcement Act Article 26.1 and Article 27 are applied. This type of foreign arbitral awards must be reduced to an enforcement judgment by litigation in Korean court. The Korean courts will dismiss the lawsuit in such litigation enforcement if the conditions mandated under Civil Procedure Act Article 217 are not met.

II. SCOPE AND INTERPRETATION OF THE NEW YORK CONVENTION: BASED ON THE CASES AND SCHOLARLY COMMENTS IN KOREA

*Scope of the New York Convention*

Foreign Arbitral Awards

According to Article I.1 of the New York Convention, the New York Convention is only intended for and made applicable to foreign arbitral awards.<sup>60</sup> The New York Convention employs Anglo-American “territorial criterion” as a main guideline to determine whether arbitral awards are foreign or not. Nonetheless, that Convention also embraces continental European “nationality criterion” under the governing law principle as an

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59. Ha, *supra* note 34, at 38.

60. N.Y. Convention art. I.1, *supra* note 17, 330 U.N.T.S. at 38.

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element. Therefore, the terms of the New York Convention can be characterized as a compromised product of both criteria.

The first clause in Article I.1 of the New York Convention is representative of the “territorial criterion,” and is intended to operate as the main principle. The application of this main principle is not limited, but expanded as provided in the text, which reads: “[A] state other than the state where the recognition and enforcement of such awards are sought . . .” regardless of membership with the New York Convention. The second clause reflects the “nationality criterion” supported by European continental countries and operates to supplement the territorial criterion as its secondary measurement.<sup>61</sup>

As a result, foreign arbitral awards, which are not qualified under the “territorial criterion,” can be eligible to be treated in the same manner as under the governing law principle.<sup>62</sup> Application of the New York Convention to foreign arbitral awards itself thereby is left to the laws of the respective member countries.<sup>63</sup>

#### The Reciprocity Reservation

The first clause of New York Convention Article I.3 (the Reciprocity Reservation) provides the contracting states with an option to limit the scope of the multi-state treaty.<sup>64</sup> This particular provision is pertinent to arbitral awards rendered by courts of non-member countries to which the New York Convention does not apply. There is some criticism that the application of the New York Convention is limited because of the option for reciprocity

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61. Jahng, *supra* note 43.

62. MYUNG-KI KIM, REVIEW OF TREATY ON FOREIGN ARBITRAL AWARDS 38 (Korean Commercial Arbitration Board, V. 282 1996-2012).

63. EMMANUEL GAILLARD ET AL., FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 966 (Savage and Gaillard eds. 1999).

64. N.Y. Convention art. I.3, *supra* note 17, 330 U.N.T.S. at 38.



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reservation, although it may differ from the conventional concept of mutual reciprocity.

Both the Republic of Korea and the United States exercised the reciprocity reservation.<sup>65</sup> As of March 23, 2012, 146 countries became parties to the New York Convention.<sup>66</sup> With the exception of Taiwan, almost all of the signatories are Korea's trade partners. In practice, therefore, there is no nominal or adverse impact resulting from these two reservations that Korea declared.<sup>67</sup>

#### The Commercial Reservation

In general, the New York Convention can be applied to maritime and employment and labor arbitration matters, in addition to a conventional form of commercial arbitration. The second clause of Article I.3 under the New York Convention (Commercial Reservation) provides a potential member country with the option to limit the scope the Convention's application.<sup>68</sup> This provision allows a member country to apply the Commercial Reservation, meaning that a member state has unfettered discretionary authority to define the scope of "legal relations" in commercial matters under the New York Convention. Legal relations viewed as commercial relations under the law of one member country are not automatically viewed

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65. *Republic of Korea*, NEW YORK CONVENTION GUIDE (last visited Aug. 1, 2015), [http://www.newyorkconvention1958.org/index.php?lvl=more\\_results&look\\_ALL=1&user\\_query=\\*  
&autolevel1=1&jurisdiction=336](http://www.newyorkconvention1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=336); *United States of America*, NEW YORK CONVENTION (last visited Aug. 1, 2015), [http://www.newyorkconvention1958.org/index.php?lvl=more\\_results&look\\_ALL=1&user\\_query=\\*  
&autolevel1=1&jurisdiction=23](http://www.newyorkconvention1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=23).

66. As of August 4 2015, 156 countries are parties. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS TREATY COLLECTION (last updated Aug. 4, 2015), [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-1&chapter=22&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en).

67. Jahng, *supra* note 43.

68. N.Y. Convention art. I.3, *supra* note 17, 330 U.N.T.S. at 38.

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in the same manner under the domestic laws of another country.<sup>69</sup> Commercial Reservation may cause some concerns or difficulty if the enforcing country's laws are not known before entering into an agreement. In practical terms, this concern should not impede the New York Convention's broad scope because most of the countries' legal concepts, or their definition of commercial matters or affairs, is construed very broadly. It should be noted that both the Republic of Korea and the United States made the commercial reservation at the time of their accession to the New York Convention.<sup>70</sup>

Arbitrations for claims arising under Article 11.2—Investment and Investor and State Disputes—of the KORUS FTA are deemed claims arising from commercial relation or transaction in nature.<sup>71</sup> Thus, the scope of commercial affairs has been additionally expanded between these two countries and made more amenable to the New York Convention.

#### The Non-Exclusive Effect: Options for other Favorable Treaties

Article VII.1 of the New York Convention manifests that it is not intended to displace or exclude the terms of other treaties entered into among the contracting states.<sup>72</sup> By operation of this provision, the concerned parties may employ the laws available under applicable bilateral or other multi-state treaties.

#### *The Scope of Enforcement Proceeding*

In Korea, the court before which an arbitral award enforcement proceeding is pending is not conferred with the power to adjudicate on the

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69. *Id.* (stating that Commercial Code of the Republic of Korea defines the legal relations in the commercial matters).

70. *Republic of Korea, supra* note 65; *United States of America, supra* note 65.

71. KORUS FTA, *supra* note 23, at Ch. 1.2, art. 11.26.

72. N.Y. Convention art. VII.1, *supra* note 17, 330 U.N.T.S. at 42.

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propriety of arbitral awards; that is, as to the merits of the case.<sup>73</sup> Article V of the New York Convention expressly sets forth the grounds by means of limitation for recognition refusal and award enforcement.<sup>74</sup> It is apparent on its face that the arbitrator's findings or legal reasoning are not enumerated for such refusal grounds. However, the courts are not precluded from reviewing the subject arbitration in its entirety when the courts should determine the existence of refusal grounds available under New York Convention Article V.1.<sup>75</sup>

For example, the courts are empowered to examine the substantive aspects of the arbitration case to determine where the rendered arbitral award falls within the scope of the subject matter requested to arbitrate or under the arbitration contract under New York Convention Article V.1(c).<sup>76</sup> The same is true where the public policy violation is at issue.<sup>77</sup>

By the same token, the Korean Supreme Court held as follows:

[T]he enforcing court is not empowered to adjudicate the merits of arbitral awards. However, the court can ex officio review the case to determine as to whether or not the conditions for enforcement are satisfied or as to whether or not the existence of grounds for refusal are proved.<sup>78</sup>

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73. Civ. Enforcement Act, art. 27.1 (amended May 20, 2014).

74. N.Y. Convention art. V, *supra* note 17, 330 U.N.T.S. at 40.

75. VAN DEN BERG, *supra* note 8, at 270.

76. N.Y. Convention, art. V.1(c), *supra* note 17, 330 U.N.T.S. at 42.

77. Ho-Won Lee, *Recognition and Enforcement of Foreign Arbitral Awards*, 34 CT. ADMIN. DEP'T. 670, 671 (1986).

78. Supreme Court [S. Ct.], 84Daka1003, Feb. 9, 1988 (S. Kor.).

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*The Affirmative Requirement for Recognition and Enforcement of Foreign  
Arbitral Awards*

Definition

There are certain conditions that the party seeking enforcement of foreign arbitral awards is affirmatively required to prove. According to Article IV of the New York Convention, once the petitioning party proves the conditions, the burden of proof is shifted to the responding party to prove the defensive conditions for recognition refusal and foreign arbitral award enforcement.<sup>79</sup>

The Requirements

*Submission of Arbitral Award and Arbitration Agreement*

The party petitioning for arbitral award enforcement is required under Article IV.1 of the New York Convention<sup>80</sup> to undergo a process of “authentication,” which verifies the signature’s genuineness.<sup>81</sup> “Certification” is a process to verify the truthfulness of the copies compared to the original document.<sup>82</sup> Authentication is required to prove that the arbitral award’s contents are true and the arbitrator’s signature is valid.<sup>83</sup> Certification is required to ensure that the documents submitted as a whole are true versions compared to the original one. The authentication

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79. Supreme Court [S. Ct.], 89Daka2052, Apr. 10, 1990 (S. Kor.); Seoul High Court [Seoul High Ct.], 2003Na29311 (S. Kor.) (refusing to enforce the award due to a lack of documents required under the New York Convention Article IV).

80. N.Y. Convention art. 4.1.

81. *Id.*

82. VAN DEN BERG, *supra* note 8, at 251.

83. GAILLARD ET AL., *supra* note 63, at 970.

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requirement is designed to prove that an appropriate person with proper authority in fact created the arbitral awards.

This requirement is only applied to the original arbitral awards and not to the original arbitration agreement. The parties sometimes enter into an arbitration agreement by written communication with signatures and appear as the real parties in connection with the enforcement proceeding.<sup>84</sup> By the foregoing reason, there is no need to authenticate the documents as long as they are certified as true copies of the original. The New York Convention does not purposely set forth in detail the applicable law dealing with the authentication or certification.<sup>85</sup> The individual contracting state's courts will then have flexibility to follow the procedure of either the award rendering state or the enforcing state. As a result, enforcement of the arbitration award can be discouraged in the state where it was rendered.<sup>86</sup> At the end, the enforcing state's court will be left with the final authority to determine what suffices for authentication or certification.

As for Korea, authentication or certification deemed appropriate under the laws of Korea or the award rendering country should suffice. It will be difficult for the Korean courts to resolve this matter under the laws of foreign states. For this practical reason, it is foreseeable that the Korean consulate or embassy may perform authentication or certification.<sup>87</sup> The arbitral panel, its presiding arbitrator, or its administrator should be deemed eligible to perform authentication or certification. A notary public, regardless of whether he or she is in Korea or in the rendering state, should be qualified for the certification of copies.<sup>88</sup>

The enforcing party is required at the inception of the enforcement application to submit the documents referred in Article IV of the New York

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84. VAN DEN BERG, *supra* note 8, at 251.

85. *Cf.* N. Y. Convention (differing from the Geneva Convention article 4.1).

86. GAILLARD ET AL., *supra* note 63, at 970.

87. Lee, *supra* note 77, at 672-73.

88. Dong-Hee Seo, *Problems with Enforcement of Foreign Arbitral Awards in Korea* 298 INT'L ARB. 1, 66 (2000).

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Convention.<sup>89</sup> However, domestic courts of many contracting states treat the failure to meet this documentary requirement as a curable flaw.

The documentary rules should not operate as rigid and absolute conditions for enforcement procedure under the underlying purpose of New York Convention. By the forgoing reason, the court should not dismiss the enforcement application for failure to submit the requisite documents described in Article IV, but should allow the applicant to cure the defect within a fixed period of time.<sup>90</sup> In the same line of reasoning as above, the Korean Supreme Court held as follows:

New York Convention's main goal is to make the enforcement of arbitral awards among the contracting states practical. It is a strong global trend to avoid interpreting Article IV in a rigid fashion. Therefore, there is no justification for strict application of Article IV.1 in connection with arbitration enforcement proceeding unless the parties disagree as to the existence of arbitration agreement or the contents of arbitral awards or unless the courts on their own motion are required to rule for any compelling reason. The Article IV.1 should be strictly applicable, as a matter of proof, where the existence of arbitration agreement or the contents of arbitration award is at issue. By the same token, copies of documents which may not be properly authenticated or certified, should be sufficient to meet the conditions so imposed under the Convention as long as neither party objects to the submission of unauthenticated or uncertified documents.<sup>91</sup>

The court apparently employed less stringent standards in constructing the requirements mentioned above.

#### *Translation of Arbitral Award and Arbitration Agreement*

The Article IV.2 of the New York Convention pertains to the translation of arbitral awards and arbitration agreement.<sup>92</sup> The embassy or consulate's

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89. N.Y. Convention art. IV, *supra* note 17, 330 U.N.T.S. at 40.

90. Lee, *supra* note 77, at 672.

91. Supreme Court [S. Ct.], 2004Da 20180, Dec. 10, 2004 (S. Kor.).

92. N.Y. Convention art. IV.2, *supra* note 17, 330 U.N.T.S. at 40.

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official or sworn translators can perform a certification of translation.<sup>93</sup> There is no limitation on the nationality of embassy or consulate for certification of translation.<sup>94</sup> The Republic of Korea does not have a special system for official or sworn translator sanctioning qualifications. In practice, the Korean diplomats, such as Korean consuls located in the place of award rendering state, certify the correctness of the translation. In the same vein, the Korean Supreme Court held as follows:

The requirement that certification of translation should be administered by the official translators, sworn translators, diplomat or consul should not be interpreted in a restrictive sense. These qualified persons can merely certify that the subject document is the translated version of the arbitral award. They should not be expected to certify the correctness of the translation of the contents thereof. For this reason, the certification even without the diplomat's or consul's signature should suffice as long as the translation is related to the arbitral award.<sup>95</sup>

The Korean Supreme Court further stated in another case as follows:

In view of New York Convention's background, the party seeking recognition and enforcement of foreign arbitral awards should not be obligated to comply with the translation rules in strict manner. The court should provide the enforcing party an opportunity to cure the defects or flaws by hiring a professional translator at his expense in the event of the translation non-compliance. Therefore, the court should not deny the claim for enforcement on the ground of violation of formalities set forth under Article V.2.<sup>96</sup>

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93. *Id.*

94. *Id.*

95. Supreme Court [S. Ct.], 93Da53054, Feb. 14, 1995 (S. Kor.).

96. Supreme Court [S. Ct.], 2004Da20180, Dec. 10, 2004 (S. Kor.).

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*The Defensive Requirement for Recognition and Enforcement of Foreign  
Arbitral Awards*

Definition

There are burdens of proof that the respondent objecting to recognition and enforcement of foreign arbitral awards is obligated to carry under certain conditions. One category is the respondent's burden of proof as mandated under Article V.1 of the New York Convention.<sup>97</sup> The other category is grounds for which the enforcing court of the contracting state has discretion to exercise on its own under Article V.2.<sup>98</sup> Both Article V.1 and Article V.2 clearly acknowledge the enforcing court's ultimate discretionary authority to decide whether or not it should refuse recognition and enforcement, even where the grounds for refusal are found. Therefore, the enforcing court is still authorized to recognize and enforce in spite of findings of refusal grounds as a matter of discretion.

The Requirement

*The Grounds for Refusal under New York Convention Article V.1*

The losing (responding) party can request that the enforcing authority or court refuse the recognition and enforcement of arbitral awards.<sup>99</sup> The competent authority so requested can refuse under the circumstances as follows:

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97. N.Y. Convention art. V.1, *supra* note 17, 330 U.N.T.S. at 40.

98. *Id.* art. V.2, 330 U.N.T.S. at 42.

99. *Id.* art. V.1, 330 U.N.T.S. at 40.



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### (1) The Legal Incapacity of the Parties

The New York Convention Article V.1 (a) provides in the first clause that enforcement can be refused on the ground of a party's legal incapacity.<sup>100</sup> The New York Convention is silent as to who is qualified to raise issues of legal incapacity. The Korean jurists agree that the private international law of the enforcing country should be applied to determine the issue as to a party's legal incapacity.<sup>101</sup> Therefore, Korea will apply the law of the country as mandated under its private international law where a party's legal incapacity is at issue in connection with enforcement of foreign arbitral awards in Korean court.

### (2) Invalidly of Arbitration Agreement

New York Convention Article V.1 (a) provides in its latter part that recognition and enforcement of a foreign arbitral award can be refused when the arbitration agreement is invalid either under the laws of the state that the parties had agreed governed the agreement or under the laws of place where the arbitral award was rendered, if the parties did not have a governing law agreement.<sup>102</sup> The parties can agree as to which country's law will be applied to their transaction.<sup>103</sup> If there is no such agreement, the laws of the country where the arbitral awards are rendered should be applied to test the invalidity ground by operation of the above clause.

It should be noted that the substantive or procedural law applicable to dispose the subject matter of arbitration itself should be distinguished from the law invoked to test the validity of the arbitration agreement. The parties

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100. *Id.* art. V.1(a), 330 U.N.T.S. at 40.

101. CHUL-WON SEO, *THE ANALYSIS OF DOMESTIC CASES DEALING WITH RECOGNITION & ENFORCEMENT OF FOREIGN ARBITRAL AWARDS UNDER 1958 NEW YORK CONVENTION*, 206 (Pak Young Sa ed., Vol. 1, 1999).

102. N.Y. Convention art. V.1(a), *supra* note 17, 330 U.N.T.S. at 40.

103. *Id.*

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enter into an agreement not only by express means but also by implied conduct.<sup>104</sup> The New York Convention cannot be invoked where the arbitration agreement itself fails to meet the conditions found under Article II.<sup>105</sup> The Korean Supreme Court held as follows:

New York Convention Article IV.1 provides that the arbitration agreement should be the 'agreement in writing' as required under Article II and further explains that letters or telegrams exchanged between parties containing the arbitration agreement or arbitration clause should constitute 'an agreement in writing.'<sup>106</sup>

Another question raised is whether or not the concept of cancellation or withdrawal should be given the same effect as invalidity since they may be covered under a broader application of this term.<sup>107</sup> The Korean Supreme Court, however, further held in the aforementioned case:

There is no showing prior to or subsequent to the petitioner's arbitration application that the parties had in fact agreed to an arbitration. There is no business correspondence or papers pertinent to arbitration between the parties. The petitioner (plaintiff) applied for arbitration service at Vietnamese Arbitration Board. The respondent (defendant) did not take any actions to object to arbitration. However, the respondent's non-feasance should not be deemed as a consent to arbitration by implied conduct. Such act of non-objection should not constitute a valid arbitration agreement under New York Convention Article II.<sup>108</sup>

### (3) Infringed Right to Defend

The New York Convention Article 5.1 (b) provides grounds for refusal of enforcement of a foreign arbitral award when "the losing party was not given proper notice of the appointment of the arbitrator or of the arbitration

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104. Lee, *supra* note 77, at 675; SEO, *supra* note 101, at 207-208.

105. Lee, *supra* note 77, at 677.

106. Supreme Court [S. Ct.], 2004Da20180, Dec. 10, 2004 (S. Kor.).

107. Supreme Court [S. Ct.], 89 Daka 2052, Apr. 10, 1992 (S. Kor.) (illustrating where the issue was raised).

108. Supreme Court [S. Ct.], 89Daka2052, Apr. 10, 1992 (S. Kor.).

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proceedings or was otherwise unable to present his case.”<sup>109</sup> This due process clause reflects the procedural fairness recognized as a part of the international public order, the violation of which operates as grounds for arbitral award enforcement. The New York Convention is silent as to the applicable law to determine whether the right to defend is infringed. The protection of the parties’ right to defend in arbitration proceedings is directly related to procedural justice and also to the public order in connection with each state’s legal dispute resolution procedures. Therefore, it is appropriate to apply the procedural laws of the state where recognition and enforcement of arbitral awards is sought.<sup>110</sup>

In addition to the party’s right to be notified of the arbitration procedure, there is an open end for refusal conferred as stated in the clause “was otherwise unable to present his case.”<sup>111</sup> This clause may seemingly create an impression that any and all type or degree of infringement can operate as a ground for refusal. However, this New York Convention clause should not be construed so as to broaden, but rather narrow the scope of refusal. By considering the international legal order and Korean legal system, the refusal grounds should be limited to where the right to defend was so seriously infringed that the proceedings became unfair. Therefore, the courts should not refuse to enforce arbitral awards unless the parties were not given the opportunity to present and prove the claims and the opportunity to reply and rebut the adverse claims.

The arbitrator’s lack of fairness should also constitute an infringement on the right to defend and lead to refusal to enforce. If in fact the arbitrator’s conduct was unfair, the proceeding itself should be deemed so unfair as to violate the parties’ rights to defend. In such event, the refusal of enforcement should be justified as provided under the New York

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109. N.Y. Convention art. V.1(b), *supra* note 17, 330 U.N.T.S. at 42.

110. Lee, *supra* note 77, at 678; S. Ct., 89Daka2052, Apr. 10, 1990 (S. Kor.).

111. N.Y. Convention art. V.1(a), *supra* note 17, 330 U.N.T.S. at 40.

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Convention.<sup>112</sup> The mere fact that there was an appearance of the arbitrator's impropriety should not be sufficient to constitute a refusal ground.<sup>113</sup> However, a party who failed to take any action and failed to participate in the arbitration after being notified of the proceeding and being afforded a chance to defend should be deemed to have chosen not to exercise his right. In such event, the arbitral awards should be honored for enforcement.<sup>114</sup>

#### (4) Beyond Scope of Arbitration Matters Submitted

New York Convention Article V.1(c) provides other grounds for refusal that are "beyond scope of the submission to the arbitration."<sup>115</sup>

This particular provision only deals with the scope of the arbitrators' arbitral authority. It should be noted that New York Convention Article V.1(a) should be applied where the arbitrator has no authority to render an award. The award so rendered without authority is invalidated according to Article V.1(a).<sup>116</sup> The governing laws should be the laws that the parties have agreed to. Alternatively, the laws of the state where enforcement is sought should be applied absent the parties' mutual agreement.<sup>117</sup>

Article V.1(c) appears only applicable where arbitral awards are not relevant or are beyond the subject matter submitted, but it is only reasonable to construe this clause for expansive purposes. In other words, it applies to any arbitral award that fails to fall within the purview of either the arbitration clause or a clause *compromissorite* agreement to arbitrate beforehand, or a submission agreement or compromise agreement to

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112. Lee, *supra* note 77, at 678; S. Ct., 89Daka20252, Apr. 10, 1990 (S.Kor.).

113. Lee, *supra* note 77, at 680; MOK, *supra* note 31, at 106-109.

114. Lee, *supra* note 77, at 679; SEO, *supra* note 101, at 210.

115. N.Y. Convention art. V.1(c), *supra* note 17, 330 U.N.T.S. at 42.

116. *Id.* art. V.1(a), 330 U.N.T.S. at 40.

117. Lee, *supra* note 77, at 681.

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arbitrate afterward, and should be applied to any and all types of arbitration agreements.<sup>118</sup>

Pursuant to the above provision, an arbitration award can be recognized and enforced to the extent that the non-submitted matter can be severed from the rest. This provision is designed to keep the arbitration award from being unenforceable due to a minor points found in the award which may be deviant from the scope of arbitration matters submitted.

The court should be empowered to adjudicate on the issue of to what extent the defective portion should be severed from the award and the issue of to what extent the remaining parts should be partially recognized and enforced. Under some Korean scholars' views, the court would naturally tend to adjudicate the substantive issues underlying the arbitration subject matters unless the non-submitted issue can be clearly separated from the submitted issue, as in the collection case where interest can be easily severed from the principle. No partial enforcement should be allowed unless the non-submitted portion is clearly distinguishable under this restrictive view. Some other Korean scholars hold more liberal views in this regard.<sup>119</sup>

New York Convention Article V.1(c) was created in anticipation of partial enforcement where severance of improper portion is feasible. Therefore, partial enforcement should be more liberally permitted where severance can be done without difficulty.<sup>120</sup>

The New York Convention only deals with cases where the arbitrator lacked authority to dispose of non-submitted matters. It does not address the issues arising from the cases of *no-ruling* provided in regard to submitted

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118. Lee, *supra* note 77, at 682; SEO, *supra* note 101, at 210-11.

119. Lee, *supra* note 77, at 682; Yun-Ho Cho, *Recognition and Enforcement of Foreign Arbitral Awards Under New York Convention—Cases in U.S. and Korea*, CT. ADMIN. DEP'T. 427 (1989).

120. Sang-Kyun Chang, *Objection to Petition For Enforcement of Foreign Arbitral Awards*, KOREAN S. CT. COMMENTS. 123 (2003).

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matters.<sup>121</sup> Therefore, this is an unsettled area of law. There are no clear guidelines for the issue of whether non-ruling should operate as a ground for refusal to enforce arbitral awards. It is unclear whether non-ruling should be characterized and referred to as an occasion where the arbitrator fails to address the significant and controlling points, which the parties raised and disputed. However, the arbitrator's mere inaction to explain the reasons for ruling or failure to explain in detail the rationale should not constitute a non-ruling.<sup>122</sup>

One view in support of this lenient approach is that New York Convention Article V is intended to set forth and limit grounds for refusal and thus only violations of those reasons so expressly enumerated should be the grounds for effective refusal. Therefore, non-ruling should not be given effect to support refusal.<sup>123</sup> Under other views, non-ruling should fall within the categories under New York Convention Article V.1(d), for which enforcement can be refused.<sup>124</sup>

#### (5) Flaws with Arbitral Authority and Procedure

New York Convention Article V.1(d) provides another ground for refusal to enforce arbitral awards. It provides, "the composition of . . . the laws of the country where the arbitration took place."<sup>125</sup>

The parties may agree to the arbitration. In such event, the terms of their arbitration agreement should prevail in all aspects and in essence. When they agree to the arbitral authority, the rules and regulations of such arbitral body should control the substantive and procedural aspects of the arbitration. The Korean Supreme Court held as follows:

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121. *But see* Geneva Convention on the Execution of Foreign Arbitral Awards, art 2.1, Sept. 26, 1927, 92 L.N.T.S. 302.

122. Supreme Court [S. Ct.], 2000Da47200, Nov. 24, 2000 (S. Kor.).

123. Lee, *supra* note 77, at 683; Cho, *supra* note 119, at 429.

124. MOK, *supra* note 31, at 232-33; Kang, *supra* note 48, at 15.

125. N.Y. Convention art. V.1(d), *supra* note 17, 330 U.N.T.S. at 42.

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The parties had agreed to submit any and all disputes to London arbitration laws. Such ordinary arbitration agreement should be construed to the effect that the parties had agreed to London as place of arbitration, for an arbitration court, as authority of arbitration, and to the rules and regulations of London Arbitration Court (English Law).<sup>126</sup>

A question then should be raised as to whether flaws in arbitration procedures or composition of arbitral body that have a substantial impact on the arbitral awards should be grounds for refusal to enforce arbitral awards. In a broad sense, these procedural defects appear directly relevant to the public policy area in each contracting state's law.

Another question is raised as to whether the parties should be allowed to allege the procedural defects associated with an arbitration body or procedure at enforcement stage. The majority of Korean scholars hold the view that the parties should be precluded from invoking such procedural defects in court where the parties had been already afforded an opportunity at the earlier stage during the arbitration proceedings. One party may be precluded from selecting the arbitrator under the arbitration agreement while the other party is solely entitled to designate the arbitrator. In such event, New York Convention Article V.1(d) may not be invoked, but New York Convention Articles V.1(b) and V.2(b) may be invoked as a matter of infringement of the right to defend and as a public policy violation. Such procedural defects may violate the mandatory and affirmative law imposed on arbitration proceedings according to the laws of the place of arbitration.<sup>127</sup>

#### (6) Non-Binding Award

The first clause in New York Convention Article V.1(e) provides that the enforcement of award can be refused when "the award has not yet

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126. Supreme Court [S. Ct.], 89Daka20252, Apr. 10, 1990 (S. Kor.).

127. Lee, *supra* note 77, at 684-685.

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become binding on the parties”.<sup>128</sup> Under the old rules in the Geneva Convention, the winning party was required to secure an enforcement judgment by litigation in place of arbitration as a condition precedent to applying for enforcement in the court of the state where enforcement was sought. In order to eliminate duplicate procedures and its inefficiency, the New York Convention adopted the position that refusal for enforcement is only conditioned upon the binding effect of the award, not upon judicial confirmation of the award.<sup>129</sup>

As a result, the losing party has the burden to prove that the arbitration award has not yet become binding and that enforcement award should be refused. Shifting the burden from the moving (winning) party to the opposing (losing) party made the enforcement easier than under the old rules. The New York Convention is silent as to when arbitral awards become binding. The laws of the state where the award was rendered should be applied to determine this issue. The latter part of the New York Convention Article V.1(e) provides that the laws agreed upon by the parties or the laws of the award-rendering state should be applied in cases of revocation or suspension of arbitral awards.<sup>130</sup>

By the same token, absent the parties’ mutual agreement, the laws of the state where the award was rendered should be applied to determine the beginning of the binding effect. As a result, it should depend upon post-award procedures prescribed under the state’s law, varying from one state to another. Often arbitral awards can be appealed to higher arbitration authorities or to regular courts. Pending the appeal, the binding effect can be stayed. In such event, the award should be deemed as not having become binding yet.

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128. N.Y. Convention art. V.1(e), *supra* note 17, 330 U.N.T.S. at 42.

129. GAILLARD ET AL., *supra* note 63, at 972.

130. N.Y. Convention art. V.1(e), *supra* note 17, 330 U.N.T.S. at 42.



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However, the end result would be unreasonable if non-binding effect status is afforded by the mere fact that an arbitral awards review is pending. This is especially so where there is no time limitation on the time period within which review or appeal can be instituted.

Therefore, as a matter of interpretation, the binding effect on arbitral awards should take place immediately upon its rendition where there is no ordinary procedural venue for appeal or reconsideration of arbitral awards. The arbitral awards should be deemed fully effective and binding upon its rendition even where there is a special procedure available for revocation of arbitral awards, as there is in Korea.

Whether such protesting procedures are regular or special poses another question in relation to appellate and reconsideration mechanisms under general litigation procedures. All the factors such as protest duration, likelihood of suspension, subject matter of award, and the exceptionality in court proceeding should be taken into consideration to determine the above issue.<sup>131</sup>

Article 35 of the Arbitration Act of Korea provides, “Arbitral awards shall have the same effect on the parties as the final and conclusive judgment of the court.”<sup>132</sup>

Therefore, there is no special mechanism available for protest under Korean arbitration law, except the cases involving revocation of arbitral awards. Hence, the arbitral awards become binding immediately when they are rendered.

Another issue can be raised to determine whether interim arbitral awards should be deemed effective and binding. For example, certain cases can be bifurcated to determine the issue of liability firstly and of damages secondly, as in cases of compensation, and to determine the issue of damages for undelivered goods firstly and of damages for defective goods secondly in cases of a breach of contract.

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131. MOK, *supra* note 31, at 261.

132. Arbitration Act of Korea, art. 35 (S. Kor.).

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The interim arbitral awards for the first issues can be separately characterized in a sense final without regard to the second remaining issue. In such cases of a separable but final interim award, the Korean court should not refuse to enforce interim awards merely on the ground that Korean law is silent in this area of law. Korea should enforce interim arbitral awards in line with other contracting states as long as the New York Convention is applicable.<sup>133</sup>

A Korean trial court has held in a collection case that the ruling on the principal amount can be separated from the interest portion, and therefore the court held that enforcement of the conclusive ruling on the principal amount alone was permitted.<sup>134</sup> By the same token, the majority of Korean legal scholars support the enforcement of an interim award.<sup>135</sup> However, the majority view opposes enforcement of an interim award, the nature of which is a temporary protective order, or which fail to show an ascertainable amount for damages.<sup>136</sup>

#### (7) Revocation of Award

The latter part of New York Convention Article V.1(e) provides that recognition and enforcement may be refused where the award has been set aside or suspended by the competent authority of the state where the award was rendered.<sup>137</sup> This clause refers to the occasion where the award was set aside or suspended by operation of a special procedure in protesting the arbitral awards. To summarize, the former part of this provision related to the cases where the arbitral awards had not become binding under the general procedure in protesting arbitral awards. On the other hand, the latter

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133. Cho, *supra* note 119, at 181.

134. See Seoul Civil District Court [Dist. Ct.], 1982Ga-Hap5372, Dec. 30, 1982 (S. Kor.).

135. Lee, *supra* note 77, at 682 (noting that two other jurists concurred).

136. Cho, *supra* note 119, at 181; SEO, *supra* note 101, at 216.

137. Many Korean scholars believe that this article was not correctly translated to Korean (based on Jahng's opinion).

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part applies to the events where the binding arbitral awards in effect are set aside or suspended.

The enforcement should be refused if the protest is pending under the general protest procedure, but should be refused only when the arbitral awards was already set aside or suspended under a special protest procedure.<sup>138</sup>

The provision, “the law of which that was made” is meant to refer to the procedural laws, which should be applied to arbitration proceedings and is not meant to refer to the substantive laws that the arbitrators applied.<sup>139</sup>

The governing laws, as mentioned in the place of arbitration or procedure, are enumerated as a means of limitation for restrictive purposes. Therefore, only the courts of these states should have exclusive jurisdiction over the revocation petition or arbitral award suspension.<sup>140</sup>

Accordingly, the arbitral award enforcement should not be refused when the countries other than those with exclusive jurisdiction grant such revocation or suspension. No inquiry should be made to determine whether the reason for revocation or suspension constitutes a ground for refusal under the New York Convention. Within the extent allowed as above, the scope of refusal to enforce arbitral awards is in fact expanded, as stated below.<sup>141</sup>

#### *The Grounds for Refusal Under New York Convention Article V.2*

The competent authority of the country where enforcement is sought may refuse to enforce arbitral awards for additional grounds.

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138. SEO, *supra* note 101, at 216.

139. Supreme Court [S. Ct.], 2001Da77840, Feb. 26, 2003 (S. Kor.).

140. Lee, *supra* note 77, at 688; SEO, *supra* note 101, at 216.

141. Lee, *supra* note 77, at 688.

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(1) A lack of Arbitrability

The New York Convention Article V.2(a) provides that recognition and enforcement of arbitral awards may be refused where the subject matter disputed is not capable of being settled under the law of the enforcing country.<sup>142</sup>

It is clear from the face of this provision that the law of the country where enforcement is sought—instead of the country where award is rendered—governs the issue whether the subject matter is arbitrable or not. In any event, the recognition and enforcement can be refused if the award was invalidated under Article V.1(e).

(2) A Violation of Public Policy

New York Convention Article V.2(b) provides that recognition and enforcement of arbitral awards may be refused where the enforcing country's public policy would be violated as a result thereof.<sup>143</sup>

This provision, as with others in the Convention, was set forth with the intent to make arbitration an effective resolution for conflict arising from international transactions. Therefore, its underlying intent should be constructed only in order to counterbalance the effect resulting from Article 5, which enumerates and limits the grounds for refusal. The general purpose of the New York Convention will not be achieved, and will become meaningless, if this refusal ground for public policy should be constructed in a broad fashion for broad application.

The public policy of the country should be protected in a defensive fashion only and it should not be promoted or asserted in an affirmative manner. In other words, the public policy mentioned in New York Convention Article V.2 should be understood to enhance international public

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142. N.Y. Convention art. V.2(a), *supra* note 17, 330 U.N.T.S. at 42.

143. *Id.* art. V.2(b), 330 U.N.T.S. at 42.

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policy rather than domestic public policy. By the same reasoning, the Korean Supreme Court held as follows:

The Convention enumerated the grounds for refusal to recognize and enforce foreign arbitral award by means of limitation. However, Article V.2 (b) also provides the grounds for refusal when recognition and enforcement would violate the public policy of the country where enforcement is sought. Its underlying goal is to ensure the basic morality and social order of that country. Therefore, both domestic concerns and international order and stability should be taken into consideration. The provision should be integrated for a limited purpose. Enforcement of foreign arbitral awards can be refused if enforcement would be contrary to the good moral and customs and social order.<sup>144</sup>

(a) Objection Claim and Public Policy Violation

The losing party may make a subsequent claim to discount or invalidate arbitral awards in objection to the recognition and enforcement proceeding.<sup>145</sup>

In the objection claim cases, there is a view that opposes allowing this type of claim in connection with enforcement proceedings because the enforcing court is limited to adjudicating the satisfaction of arbitral award enforcement conditions. Therefore, in order for the court to refuse the enforcement, the objection claim should not be permitted, but rather it should be separately instituted in an independent lawsuit.<sup>146</sup>

In opposition to the above view, some jurists argue that the enforcement judgment is merely designed to operate as a part of compulsory enforcement proceedings for a binding court judgment or arbitration award. Furthermore, it is devised to affirm the claim's enforceability from the legal point of view at the present enforcement litigation, not in the past. Therefore, for the sake

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144. Supreme Court [S. Ct.], 89Daka20252, Apr. 10, 1990 (S. Kor.); [S. Ct.], 93Da53054, Feb. 14, 1995 (S. Kor.); [S. Ct.], 2000Da35795, Dec. 8, 2000 (S. Kor.); [S. Ct.], 2001Da20134, Apr. 11, 2003 (S. Kor.); [S. Ct.], 2006Da20290, May 28, 2009 (S. Kor.).

145. Civil Enforcement Act, art. 44.

146. Cho, *supra* note 119, at 427; SOON-WON BANG, CIVIL PROCEDURE (SECOND) 38 (Moon-Hwa Bosung ed., 1978).

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of judicial economy, off-set or repayment, claims that occurred subsequent to rendition of arbitral awards, should be allowed to preclude enforceability to a certain extent.<sup>147</sup> The Korean Supreme Court supports this preposition as follows:

The foreign arbitral awards can be enforced, as an enforcement judgment in our country, under our compulsory enforcement procedure law. The enforceability of arbitral awards is determined at the conclusion of the litigation. Subsequent to rendition of arbitral awards but prior to rendition of enforcement judgment, the ground for objection claim, much as debt cancellation may occur. Compulsory enforcement of arbitral awards in spite of this mitigating circumstance may violate our country's basic legal principle. Such violation may be found at the conclusion of the enforcement litigation. In such cases, the court may refuse to enforce arbitral awards on the ground of public policy violation under New York Convention Article V.2(b). It should be only reasonable and appropriate to construe the pertinent provisions so as to consolidate the proceedings for the sake of judicial economy. Allowing objection claims in connection with compulsory enforcement proceedings is consistent with our legal system under which enforcement judgments are rendered by means of litigation.<sup>148</sup>

The Korean Supreme Court accepted the objection claim as a ground for refusal to enforce arbitral awards that qualify as a public policy violation under New York Convention Article V.2(b).<sup>149</sup>

(b) Foreign Arbitration Award Obtained by Fraud; Public Policy Violations

An issue arises when a party opposing a judgment for recognition and enforcement claims that the enforcement should be refused because the award was obtained fraudulently. The Korean Supreme Court held, in dealing with this issue, as follows:

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147. Cho, *supra* note 119, at 188 (noting that five other jurists concurred).

148. Supreme Court [S. Ct.], 2001Da20134, Apr. 11, 2003 (S. Kor.).

149. See also Chang, *supra* note 120, at 107-24.

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The enforcing court is authorized to independently look into the subject matter of the arbitration, if necessary and appropriate, in order to make determination as to the existence of grounds for refusal in the cases of foreign arbitral awards subject to Article V of the Convention. Obtaining arbitral awards fraudulently may fall within the circumstance so provided under Article V.2 (b).

Nonetheless, the enforcing state's court is not permitted to adjudicate whether or not the arbitrators' fact finding and application of laws were proper. The court is not allowed to employ such broad approach as above under the justification for finding existence of fraud. Therefore, the court is not empowered to refuse enforcement of foreign arbitral awards on its purported finding of fraud. Sometimes it may be the case where it is evident from the objective evidential materials that the party petitioning for enforcement of foreign arbitral awards was engaged in punishable fraudulent acts and also that the responding party was not able to defend during the arbitration proceeding. In such cases involving fraud, the court is empowered to refuse the enforcement even without revocation or suspension procedure if the fraud has bearing on the material issue and matters.<sup>150</sup>

#### *Staying Arbitral Awards and Order for Posting Security*

Article VI of the New York Convention provides a measure to stay enforcement of arbitral awards and to post an accompanying security. The former part of Article VI provides that enforcement of arbitral awards can be adjourned. Adjournment of enforcing arbitral awards refers to the cases of dealing with the refusal issues. The enforcing court at its own discretion and by its own motion may stay the enforcement when the affirmative conditions are found to exist, but the defensive conditions are not in dealing with the refusal issues. The latter part of Article VI provides the security as a mechanism available pending the court decision.

If the enforcement normally should have been granted, the court may issue an order for suitable security, upon the parties petitioning for enforcement and where the affirmative conditions exist in favor of enforcement while there is no defensive condition to support refusal.

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150. Supreme Court [S. Ct.], 2006Da20290, May 28, 2009 (S. Kor.).

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The Korea Arbitration Act Article 34 provides the grounds for setting aside arbitral awards and it sets forth the review procedure for recognition and enforcement of arbitral awards. It is possible that two different courts may hear the same arbitral awards for reconsideration under two different procedures. Therefore, the above procedural mechanism is created to prevent “double control” and to preclude the effect of re judicata for the sake of judicial economy and efficiency.<sup>151</sup>

III. RECOGNITION AND ENFORCEMENT OF U.S. ARBITRAL AWARDS IN THE  
 KOREAN COURTS

*The Korean Court Cases Where U.S. Arbitral Awards Recognized and  
 Enforced*

Incheon District Court 2003 Ga Hap 10649 Enforcement Judgment

*Summary:*

Plaintiff:	Individual (residing in U.S.)
Defendants:	Defendant 1: Korean Corporation
	Defendant 2: Individual (Defendant 1’s Representative Director)
Filing Date:	10/24/2003
Decision Date:	6/11/2004
Confirmation Date:	7/13/2004
Result:	Plaintiff prevails (confirmed)
Arbitration Authority:	American Arbitration Association (AAA)
Place of Arbitration:	U.S.A. (Dallas, Texas)

151. HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 1101-02 (1989).



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Governing Law:	U.S.A. (Texas State Law)
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The Defendant 2, as the president and top representative of the corporate Defendant 1, entered into a contract with Plaintiff. Under the subject contract, Plaintiff reserved any and all right to use and modify the electronic audible book while Defendant 1 was to develop and manufacture the products. Plaintiff claimed that Defendant 2 wrongfully developed and manufactured the subject products and obtained patent registration under his name. Plaintiff further alleged that both Defendants illegally manufactured and sold the products without Plaintiff's consent and thus violated the contract. Plaintiff submitted its claims against both Defendants to AAA. The arbitration entity, situated in Dallas, Texas, rendered the arbitral award under the laws of Texas according to its house rules after the arbitration hearings.

*Defendant's Argument and Ruling*

(1) *Argument:* There is no arbitration agreement between Defendant 2 and Plaintiff.

*Ruling:* Defendant 2 should be deemed as a party to the arbitration agreement under the governing law-that is- the law of the state of Texas.

(2) *Argument:* Defendants did not fail to perform the contractual obligation or infringe Plaintiff's technology or cause damages. Therefore, the arbitral award is incorrect.

*Ruling:* Defendants' claims do not constitute a ground for refusal to enforce under the New York Convention.

(3) *Argument:* Defendants could not participate in arbitration in the U.S. due to economic hardship. The award was rendered absent their participation and so it is unfair.

*Ruling:* Defendants' claims are not qualified for a ground for refusal to enforce under the law of Korea. Defendant's claims are viable only when the losing parties were not properly notified of the selection of the arbitrators

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or the arbitration proceedings so that they could not defend. Their claims are not based on substantial infringement of the right to defend.

Seoul Central District Court 2004 Ga Hap 11051 Enforcement Judgment

*Summary*

Plaintiff:	French Corporation
Defendant:	Korean Corporation
Filing Date:	2/19/2004
Decision Date:	9/24/2004
Confirmation Date:	11/24/2004
Result:	Plaintiff prevails (confirmed)
Arbitration Authority:	Motion Picture Association of America (MPAA)
Place of Arbitration:	U.S.A. (Los Angeles, California)
Governing Law:	U.S.A. (California State Law)

Plaintiff and Defendant entered into a contract wherein Defendant was to distribute the movie film in Korea imported from Plaintiff. Plaintiff submitted an arbitration request to MPAA for Defendant's alleged failure to make the minimum guaranteed payment. MPAA, situated in Los Angeles, California, rendered an arbitral award according to its international arbitration rules after the arbitration proceeding.

*Defendant's Arguments and Rulings*

*Argument:* MPAA is only an association and that enforcement of its arbitral awards is not proper. The subject contract is only a tentative agreement. There was no damage incurred in connection with this agreement. Therefore, an enforcement judgment should not be granted.

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*Ruling:* the points Defendant raised are not eligible for grounds for refusal to enforce under the New York Convention.

Seoul Central District Court 2004 Ga Hap 33068 Enforcement Judgment

*Summary*

Plaintiff:	French Corporation
Defendant:	Korean Corporation
Filing Date:	4/30/2004
Decision Date:	9/24/2004
Confirmation Date:	10/22/2004
Result:	Plaintiff prevails (confirmed)
Arbitration Authority:	Motion Picture Association of America (MPAA)
Governing Law:	U.S.A. (California State Law)

A, a person in Budapest, Hungary, entered into an exclusive film distribution contract with Defendant. Plaintiff, whom A entrusted, instituted arbitration with MPAA for Defendant's failure to make the minimum guarantee payment. MPAA, situated in Los Angeles, California, rendered an arbitral award according to its international arbitration rules after the arbitration proceeding.

*Defendant's Arguments and Rulings*

(1) *Argument:* Plaintiff was entrusted solely to handle the arbitration by and on behalf of A but acted as a party to the arbitration. Such entrustment for sole purpose of handling arbitration is unlawful and against social order. Therefore, enforcement of arbitral award as in such case violates public policy and it should be refused.

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*Ruling:* There is no proof that A has entrusted the Plaintiff for the sole purpose of handling the arbitration proceeding.

(2) *Argument:* The arbitral award in the present case is conspicuously unjust and violates justice. An enforcement judgment, as sought by the plaintiff, would result in intolerable abuse of power in our society.

*Ruling:* Defendant’s mere allegation that enforcement of such arbitral awards would be contrary to our good moral or social order is baseless.

Seoul Central District Court 2006 GaHap 369243: Enforcement Judgment

*Summary*

Plaintiff:	U.S. Corporation
Defendant:	Defendant 1: Korean Corporation
	Defendant 2: Individual (Defendant 1’s Representative Director)
Filing Date:	4/28/2006
Decision Date:	11/16/2006
Confirmation Date:	12/12/2006
Result:	Plaintiff prevails (confirmed)
Arbitration Authority:	American Arbitration Association (AAA)
Place of Arbitration:	U.S.A.

Plaintiff and Defendants entered into a license contract involving molded stone products. Defendant 1, a licensee, agreed to manufacture the subject products under the terms of the above contract. Plaintiff submitted a request for arbitration to AAA against Defendants for breach of contract. The AAA’s International Arbitration Panel of International Dispute Resolution Center rendered an arbitral award according to its international dispute resolution rule.

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*Defendant’s Arguments and Rulings*

(1) *Argument:* The arbitral award contains a restraining order against Defendant 1 and its employees and officers. The scope of the arbitral award is beyond the subject matter requested for arbitration.

*Ruling:* The Plaintiff requested the arbitral authority to issue any and all necessary restraining order against Defendants. Those under Defendant’s direction or order are the persons who actually copied the Plaintiff’s products. Therefore, the restraining order issued against the non-parties falls within the scope of the subject matter of arbitration as requested by the Plaintiff.

(2) *Argument:* The arbitral award was rendered to issue a restraining order against non-parties other than Defendants, who are not ascertainable. Moreover, the Defendant was already exculpated from criminal violation of copyright. Enforcing this arbitral award, in spite of the dismissal of criminal charges, violates the public policy of Korea.

*Ruling:* A mere a copyright infringement allegation is not sufficient ground to refuse recognition of an arbitral award. This is not a case of a violation of Korea’s good moral and social order.

Seoul Western District Court 2008 GaHap 16806 Enforcement  
 Judgment

*Summary*

Plaintiff:	Korean Corporation
Defendant:	Defendant 1: Individual (Defendant 2’s Representative Director) Defendant 2: U.S. Corporation
Filing Date:	12/24/2008
Decision Date:	7/15/2010
Result:	Plaintiff prevails partially (appealed)

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Arbitration Authority:	American Arbitration Association (AAA)
Place of Arbitration:	U.S.A.
Governing Law	U.S.A. (California State Law)

Plaintiff entered into a contract with Defendant 2 wherein the plaintiff was to purchase its corporate stock. Plaintiff filed a civil lawsuit with the Orange County Superior Court of California against Defendants; the case was based on a dispute arising from the above contract. In response, Defendant’s attorney sent Plaintiff a letter claiming that the institution of a lawsuit is improper because it violates the arbitration agreement. Plaintiff’s attorney replied in writing, as shown in Evidence A-7(Gap 7), to Defendant’s attorney, “I agree to arbitration by AAA’s rules as to Defendant 1 according to Section 13.2 under the stock purchase contract.”

Plaintiff instituted a petition for arbitration proceeding against Defendant 2 at AAA.<sup>152</sup> Plaintiff’s civil lawsuit pending in the Orange County Superior Court was dismissed as to Defendant 1 for a failure of service of process.

Plaintiff instituted a lawsuit for damages against Defendant 1 for the same subject matter with the Seoul Western District Court. Defendant 1 filed an answer to the lawsuit, alleging that Plaintiff’s lawsuit is a duplicate suit because of the pending arbitration dealing with the same subject matter. Defendant 1 further asserted the existence of arbitration in his answer, which stated Defendant 1 had submitted Evidence A-7 to the arbitrator and also alleged that Defendant 1 sent Evidence A-8 to Plaintiff’s attorney.

Defendant 1 alleged that the contents of Evidence A-8 stated:

I personally agree to accept and consent to your company’s proposal for arbitration. I agree to be bound by the rulings and disposition according to the rules of AAA. My consent is being given to cover any and all present and future disputes between myself

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152. Plaintiff’s petition’s caption page does not expressly name Defendant 1 as a respondent. Plaintiff’s petition describes the claims in reference to Defendant 1.

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and Dongjin Cemichem regardless of whether being related to the contract or not. My understanding is that my consent is not based on the arbitration clause in the stock purchase contract but based on my consent and Dongjin Cemichem's letter of 6/18/2002 as exchanged. I understand that an arbitration will be so proceeded with.

After reviewing Evidence A-7 and Evidence A-8, which was exchanged, and Plaintiff's claims described in the petition for arbitration, the arbitrator ruled against the Plaintiff and in favor of Defendant 1 Sangmoon Kim that Defendant 1 was confirmed as a party to the arbitration proceeding.

Thereafter, the Plaintiff filed a request for dismissal with the Seoul Western District Court. Defendant Sangmoon Kim then filed his consent to the dismissal requested on December 8, 2004. The case pending at the above court was closed accordingly. But Defendant 1 did not serve Evidence A-8 on Plaintiff's attorney. Plaintiff's attorney received this document only after Defendant submitted Evidence A-8 to the arbitrator on November 16, 2004.

On or about December 6, 2006, Defendant 1 began to argue that he was not a party to the arbitration. The arbitrator rendered an award on July 9, 2001 against Defendant 1 in the amount of \$950,465.88 and against both Defendant 2 and Defendant 1, jointly, in the amount of \$944,696.46. The arbitrator found that Defendant Sangmoon Kim is an alter ego of the corporate Defendant and, thus, that he should be also held responsible for the breach of the subject contract.

#### *Plaintiff's Argument and Ruling*

Plaintiff argued that an arbitration agreement was formed during the point when Plaintiff received Document A filed with arbitrator containing the Defendant's agreement to arbitration and the point when Plaintiff filed a request for dismissal with the Seoul Western District Court upon the arbitrator's confirming Defendant 1 as a party to arbitration. Even if the arbitration agreement above does not qualify under the New York Convention, Defendant 1 should be barred from taking inconsistent positions after unfavorable arbitral awards were rendered. Defendant 1's allegation

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that he is not a party to the arbitration violates the principles of good faith and exclusion of inconsistent statements.

*Ruling:* the Document A is a mere duplicate copy. Defendant Sangmoon Kim raised an issue as to the document. Therefore, this document cannot be deemed acceptable since it was not authenticated or certified as required under New York Convention Article IV.1. There is no document submitted by the Plaintiff in response to Document A. A's request for dismissal filed with the Seoul Western District Court was not submitted either and there was no express reference to an arbitration agreement.

Therefore, there is no finding to prove Defendant consented to the arbitration agreement. The arbitrator's ruling to confirm Defendant 1 as a party to arbitration itself is insufficient to prove the party's intent to arbitrate. The Plaintiff had failed to submit to the court the requisite original copy or properly certified copy of the arbitration agreement. Absent proof of the a written arbitration agreement's existence, Defendant 1 should not be deemed to violate the principle of good faith in spite of his inconsistent positions.

#### IV. CONCLUSION: COMMENTS ON KOREAN COURTS' RULINGS ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

In general, the Korean courts tend to construe the documentary requirements for enforcement judgments in a less stringent fashion. Furthermore, the Korean courts' policy is to abstain from adjudicating the merits of the case in order to avoid de facto reconsideration with the intent to honor arbitration agreements and foreign arbitral awards. In general, Korea implements the original contents of the New York Convention in their entirety and complies with the international standard. The Korean courts are inclined to construe the scope of the grounds for refusal of recognition and enforcement of arbitral awards or for revocation of arbitral awards narrowly.



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Therefore, the Korean courts can be viewed as friendly in terms of recognition and enforcement of foreign arbitral awards.

The Korean courts have indicated on some occasions that foreign arbitral awards may not be enforced on the public policy violation grounds or by objection claims made after rendition of arbitral awards under certain circumstances. In reality, there is no single Korean case reported wherein foreign arbitral awards were not enforced due to a public policy violation. In any event, a formal litigation procedure should be instituted as a condition for reducing the arbitral awards to enforcement judgment. There is no specific provision expressly pertaining to the enforcement judgment in cases of arbitral awards in Korea.

There are several venues available for such enforcement judgments in the arbitral awards cases and they are selective for petitioners under the current Korean laws. There is no special court or appellate court other than regular civil courts designated to handle such enforcement cases arising from arbitral awards. As a result, the time for actual enforcement is delayed from the time for enforcement lawsuit is initiated and thus that the enforcing parties may incur more undue costs. This is a problem area that is subject to further discussion.<sup>153</sup>

There is also some criticism that the requirement for written arbitration agreement is relatively a strict standard compared to the global trend which is not so.<sup>154</sup>

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153. Tae-Hee Lee, *Comments on Efficient Enforcement and Invalidation of Arbitration Award*, 314 *ARB. INT'L* 1, 8 (2004).

154. Tae-Hak Nho & Ja-Hun Koo, *Revision UNCITRAL Model Arbitration & Domestic Law: The Requirement for Written Arbitration Agreement and Interim Remedy*, 17 *HANRIM L. FORUM* 1, 23 (2006).