

## Interim Measures in Arbitration and Enforcement of Arbitral Awards in Korea and China

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*In an era where the international investment and trade between Korea and China grow daily, the importance of international arbitration cannot be overstated. The Korean Arbitration Law was enacted with reference to the UNCITRAL Model Law. When the Chinese Arbitration Law was being enacted, the UNCITRAL Model Law was also referred to, but there are some discrepancies between the two. This article conducts comparative analysis based on the Korean and the Chinese Arbitration Laws, the Chinese Civil Procedure Law and the KCAB and the CIETAC arbitration rules. In order to adopt the UNCITRAL Model Law amended in 2006, Korea revised its Arbitration Law in 2016. The revised Law includes a more comprehensive legal regime regarding interim measures, emergency arbitrator, etc. In China, the enforcement of foreign-related arbitral awards and foreign arbitral awards is carried out mainly by intermediate people's courts. In China, the report system to the higher people's court for refusing the enforcement of foreign-related arbitral awards and for refusing the recognition or enforcement of foreign arbitral awards has the effect of safeguarding foreign-related arbitral awards and foreign arbitral awards in China. Both Korea and China joined the New York Convention, and domestic courts may refuse the recognition and enforcement of foreign arbitral awards according to the New York Convention.*

Key Words : Interim Measures, Emergency Arbitrator, Set Aside of Arbitral Awards, Recognition and Enforcement of Arbitral Awards, New York Convention

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## I . Introduction

Both Korea and China are continental law jurisdictions. The independence of the judiciary as well as the principle of adversarial system is quite noticeable in Korea, whereas the independence of the Chinese judiciary is in the process to develop, and it is often the case that Chinese courts employ inquisitorial systems. Thus, in international disputes between Korean parties and Chinese parties, arbitration is preferred to lawsuits. Instances where arbitration clauses are included in international contracts for disputes resolution have been gradually increasing. In an era where the international investment and trade between Korea and China grow daily, the importance of international arbitration cannot be overstated. In such situations, it is imperative to fully understand one's own arbitration law as well as the counterpart's arbitration law in order to solve disputes in an efficient and fair manner.

The Korean Arbitration Law was enacted with reference to the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as "UNCITRAL Model Law")<sup>1)</sup>. When the Chinese Arbitration Law was being enacted, the UNCITRAL Model Law was also referred to, but there are some discrepancies between the two. Most differences between the Chinese Arbitration Law and the UNCITRAL Model Law are applicable to the differences between the Chinese and the Korean Arbitration Laws. This article analyzes the differences between the two, with respect to interim measures in arbitration procedures and the enforcement of arbitral awards according to arbitration laws and rules of Korea and China.

In Korea, there are only two arbitration institutions: the Korean Commercial Arbitration Board ("KCAB")<sup>2)</sup> and the Korean Institution of Arbitration.<sup>3)</sup> The KCAB was established on 22 March 1966 based on the Korean Arbitration Law, which stipulates that the Korean Government may provide an incorporated association conducting commercial arbitration with all or part of its necessary expenses.<sup>4)</sup> The Korean Institution of Arbitration is a recently established private arbitration institution. In

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1) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006

2) [www.kcab.or.kr](http://www.kcab.or.kr)

3) [www.hjjw.co.kr](http://www.hjjw.co.kr)

4) Korean Arbitration Law, Article 40

contrast, there are numerous arbitration institutions in China. The major international arbitration institutions in China are the China International Economic and Trade Arbitration Commission (“CIETAC”)<sup>5)</sup> and the China Maritime Arbitration Commission (“CMAC”)<sup>6)</sup>.

This article conducts comparative analysis based on the Korean and the Chinese Arbitration Laws, the Chinese Civil Procedure Law and the KCAB and the CIETAC arbitration rules. In order to adopt the UNCITRAL Model Law amended in 2006, Korea revised its Arbitration Law in 2016. The revised Law includes a more comprehensive legal regime regarding interim measures, emergency arbitrator, etc. Accordingly, the KCAB International Arbitration Rules were also recently revised, and the revised Rules apply to international arbitration cases that date from 1 June 2016. The Chinese Civil Procedure Law was revised in 2012, and the CIETAC Arbitration Rules were revised in 2014.

## II. Interim Measures

### 1. Korea

#### (1) Interim Measures issued by the Arbitral Tribunal

The Korean Arbitration Law provides that the arbitral tribunal may order the interim measure that it deems necessary at the request of a party.<sup>7)</sup> The Korean Arbitration Law provides for the following four types of interim measures: (1) to maintain or restore the status quo pending determination of the dispute; (2) to take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitration proceedings themselves; (3) to provide a means of preserving assets out of which a subsequent award may be satisfied; or (4) to preserve evidence that may be relevant and material to the resolution of the dispute.<sup>8)</sup>

The KCAB International Arbitration Rules also stipulates that the arbitral tribunal may order any of the following conservatory and interim measures it deems appropriate at

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5) [www.cietac.org](http://www.cietac.org)

6) [www.cmac-sh.org](http://www.cmac-sh.org)

7) Korean Arbitration Law, Article 18(1)

8) Korean Arbitration Law, Article 18(2)

the request of a party: (1) to maintain or restore the status quo pending determination of the dispute; (2) to take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitration proceedings themselves; (3) to provide a means of preserving assets out of which a subsequent award may be satisfied; or (4) to preserve evidence that may be relevant and material to the resolution of the dispute.<sup>9)</sup> The first and the second measures are maintaining the status quo to avoid losses, and the third measure is freezing assets to accelerate future enforcement of the arbitral award. The fourth measure is about evidence.

Such interim measures are not confined to the object of the disputes. The current Korean Arbitration Law has deleted the term “with respect to the object of the disputes” from the previous provision of the Arbitration Law in order to enlarge the scope of interim measures, following the UNCITRAL Model Law amended in 2006.<sup>10)</sup>

The arbitral tribunal may grant such an interim measure subject to appropriate security being provided by the requesting party.<sup>11)</sup> Before the file is transmitted to the arbitral tribunal and in appropriate circumstances even thereafter, the parties may apply to any competent court for conservatory and interim measures.<sup>12)</sup> In Korea, a party may apply for an interim measure directly to the arbitral tribunal without applying to the courts. However, the decision of the arbitral tribunal with respect to interim measures has only *de facto* binding effect and cannot be forcefully executed.

A party can also apply for interim measures directly to the court before and during arbitration procedures. The application of a party to the court for an interim measure or for the implementation of an interim measure ordered by the arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.<sup>13)</sup>

## (2) Recognition and Enforcement of Interim Measures by the Court

The UNCITRAL Model Law provides that an interim measure issued by an arbitral

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9) KCAB International Arbitration Rules, Article 32(1)

10) Jun-Sun Park, “Recommendations for Revising the Arbitration Act of Korea regarding Interim Measures by the Arbitral Tribunal to Promote Commercial Arbitration in South Korea”, *Journal of Arbitration Studies*, Vol. 26 No. 2, 1 June 2016, p. 120

11) KCAB International Arbitration Rules, Article 32(2)

12) KCAB International Arbitration Rules, Article 32(3)

13) KCAB International Arbitration Rules, Article 32(3)

tribunal shall be recognized as binding and enforced upon application to the competent court, “irrespective of the country in which it was issued”.<sup>14)</sup> Following the UNCITRAL Model Law, Article 18-7(1) of the Korean Arbitration Law stipulates that the party who wants to get recognition of an interim measure ordered by the arbitral tribunal may apply for the recognition to the court, and the party who wants to enforce the interim measure may apply for the enforcement decision to the court. Because Article 18-7(1) of the Korean Arbitration Law omits the term “irrespective of the country in which it was issued”, Korean courts may not recognize or enforce interim measures issued in the arbitration whose seat is located outside Korea, since the seat of arbitration, which provides the *lex arbitri* (as opposed to the venue of arbitration) is the criterion to determine the applicability of national law.<sup>15)</sup> Interim measures issued in the arbitration whose seat is located in Korea are applied by the Korean Arbitration Law, and may be enforced by Korean courts according to the Korean Arbitration Law.

### (3) Preliminary Orders

The UNCITRAL Model Law provides for preliminary orders in addition to interim measures. The UNCITRAL Model Law stipulates that, without notice to any other party, a party may make an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.<sup>16)</sup> This provision means that an arbitral tribunal may issue preliminary orders on an *ex parte* basis. Such a preliminary order under the UNCITRAL Model Law shall expire after twenty (20) days from the date on which it was issued by the arbitral tribunal,<sup>17)</sup> and shall not be subject to enforcement by a court.<sup>18)</sup>

However, Korea does not follow the UNCITRAL Model Law with respect to such *ex parte* preliminary orders. Because of the principle of arbitration that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case,<sup>19)</sup> it would take a considerable time before

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14) UNCITRAL Model Law, Article 17H(1)

15) Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, p. 26, para 14

16) UNCITRAL Model Law, Article 17B(1)

17) UNCITRAL Model Law, Article 17C(4)

18) UNCITRAL Model Law, Article 17C(5)

19) Korean Arbitration Law, Article 19. UNCITRAL Arbitration Rules (as adopted in 2013), Article 17(1)

Korea would adopt such *ex parte* preliminary orders.<sup>20)</sup> For the same principle of arbitration, Korea does not allow interim measures to be issued on an *ex parte* basis,<sup>21)</sup> even though Korea has adopted interim measures issued by the arbitral tribunal.<sup>22)</sup>

## 2. China

### (1) Preservation of Property

In China, even before the arbitration procedure, a party may apply for preservation measures. Article 28 of the Chinese Arbitration Law provides that a party may apply for property preservation (财产保全) if, as the result of an act of the other party or for some other reasons, it appears that an arbitral award may be impossible or difficult to enforce. In China, preservation measures shall be limited to the scope of the claims or to the property relevant to the case.<sup>23)</sup> The Chinese Arbitration Law further provides that, if one of the parties applies for property preservation, the arbitration institution shall submit to a people's court the application of the party.<sup>24)</sup> The CIETAC Arbitration Rules also stipulate that, where a party applies for preservation measures (保全), the CIETAC shall forward the party's application to the competent court designated by that party.<sup>25)</sup>

If a party applies for a preservation measure to the arbitration institution during domestic arbitration process, the arbitration institution shall submit the application to the basic people's court or the intermediate people's court<sup>26)</sup> in the region where the

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20) Jun-Sun Park, "Recommendations for Revising the Arbitration Act of Korea regarding Interim Measures by the Arbitral Tribunal to Promote Commercial Arbitration in South Korea", *Journal of Arbitration Studies*, Vol. 26 No. 2, 1 June 2016, p. 130. Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th Edition), (Oxford University Press, 2015), para 7.22

21) Kwang Hyun Suk, Proposals for the Revision of the Korean Arbitration Act - with a Focus on International Commercial Arbitration -, *Seoul Law Journal*, Vol. 53, No.3, September 2012, p. 546

22) Korean Arbitration Law, Article 18(1)

23) Chinese Civil Procedure Law, Article 102

24) Chinese Arbitration Law, Article 28

25) CIETAC Arbitration Rules, Article 23(1)

26) In China, there are four levels of courts. At the highest level is the Supreme People's Court (最高人民法院) in Beijing. The remaining three levels of the court system consist of high people's courts (高级人民法院) at the level of the provinces, autonomous regions, and special municipalities; intermediate people's courts (中级人民法院) at the level of prefectures, autonomous prefectures, and municipalities; and basic people's courts (基层人民法院) at the level of autonomous counties,

domicile of the respondent is or where the requested property is located. As for foreign-related arbitration, if a party applies for a preservation measure to the arbitration institution, the arbitration institution shall submit the party's application to the intermediate people's court in the region where the domicile of the respondent is or where the requested property is located.<sup>27)</sup> The decision (裁定) of the people's court with respect to the preservation measure submitted by the arbitration institution may be ordered on an *ex parte* basis. As such, interim measures to accelerate future enforcement of the arbitral award is available in arbitration procedures.

However, the arbitral tribunal cannot itself order any interim measure, even though the CIETAC Arbitration Rules stipulates that a party may apply for interim measures by an arbitral tribunal after the arbitral tribunal has been formed, and at the request of a party, the arbitral tribunal may decide to order or award any interim measure it deems necessary or proper in accordance with the applicable law or the agreement of the parties.<sup>28)</sup> It is because there is a discrepancy between the CIETAC Arbitration Rules and the Chinese Arbitration Law. Under the Chinese Arbitration Law, the arbitral tribunal does not have any authority or power to execute interim measures. As a result, the CIETAC Arbitration Rules on interim measures by an arbitral tribunal can be applied only if the seat of arbitration is outside China.

According to the Interpretation of the Chinese Supreme People's Court, if a party applies for the recognition and enforcement of an interim arbitral award made by an interim arbitral tribunal outside China to the people's court, the people's court should deal with it in accordance with Article 283 of the Chinese Civil Procedure Law,<sup>29)</sup> which stipulates that the people's court shall deal with the recognition and enforcement of the interim arbitral award according to the New York Convention.<sup>30)</sup>

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towns, and municipal districts.

27) Chinese Civil Procedure Law, Article 272

28) CIETAC Arbitration Rules, Article 23(3)

29) Supreme People's Court Interpretation on the application of the Chinese Civil Procedure Law, Judicial Interpretation No. 5 [2015], Article 545. Kyu-Yong Park, Shi-Jie Xu, "A Study on the Changes and Recognition and Enforcement of Foreign Arbitration Awards System in China", *Arbitration Studies*, Vol. 25 No. 2, 1 June 2016, p. 56

30) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

## (2) Interim Measures to Maintain the Status Quo

In China, it seems that interim measures to avoid losses (i.e. interim measure to maintain the status quo) might be available in arbitration procedures according to Article 101 of the Chinese Civil Procedure Law, which stipulates that any interested party whose legitimate rights and interests would, due to urgent circumstances, suffer irreparable damage without an immediate application for preservation, may, before filing a lawsuit or submitting its request for arbitration, apply for a preservation measure to the people's court in the region where the property to be preserved is located or where the domicile of the respondent is or the people's court which has jurisdiction over the case. The applicant shall provide a security deposit. If the applicant fails to provide a security deposit, his application shall be rejected.<sup>31)</sup> The people's court shall make a ruling within forty-eight (48) hours after receiving the application, and once it rules to take a preservation measure, the ruling shall be enforced immediately.<sup>32)</sup> Where the applicant fails to file a lawsuit or submit its request for arbitration within thirty (30) days in accordance with the law after the people's court takes the preservation measure, the people's court shall rescind the preservation measure.<sup>33)</sup> Still, comparing Article 28 of the Chinese Arbitration Law and Article 101 of the Chinese Civil Procedure Law, it is unclear whether preservation measures other than preservation of property for the underlying claims are also available in arbitration.<sup>34)</sup>

## (3) Preservation of Evidence

In China, the Chinese Arbitration Law provides for preservation of evidence in arbitration procedures. In situations where there is a possibility of destruction of evidence or where it is likely that acquisition of evidence will be difficult in the future, the relevant party may claim for preservation of evidence.<sup>35)</sup> If a party applies for preservation of evidence to the arbitration institution, the arbitration institution must

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31) Chinese Civil Procedure Law, Article 101

32) Chinese Civil Procedure Law, Article 101

33) Chinese Civil Procedure Law, Article 101

34) Fan Yang, *Foreign-Related Arbitration in China - Commentary and Cases*, (Cambridge University Press 2016), para 5.71

35) Chinese Arbitration Law, Article 46



pass on the application to the court which has jurisdiction. In such cases, the arbitration institution must submit the application to the basic people's court in the region where the evidence is located.<sup>36)</sup> The CIETAC Arbitration Rules also stipulate that, if a party applies for preservation of evidence, the arbitration institution shall make a decision to pass on the application to the court in the region where the evidence is located.<sup>37)</sup>

As for requests of preservation of evidence, the basic people's court in the region where the evidence is located makes and executes the decision. The Chinese Arbitration Law stipulates that for domestic arbitration cases, the application for evidence preservation must be filed to a basic people's court.<sup>38)</sup> However, in cases of a foreign-related arbitration, if a party to the foreign-related arbitration applies for evidence preservation (证据保全), the arbitration institution must submit the application to the intermediate people's court at the location of the evidence.<sup>39)</sup>

### III. Emergency Arbitrator

#### 1. Korea

In Korea, the KCAB International Arbitration Rules provide for the emergency arbitrator system. In the arbitration where an arbitration agreement was entered into after 1 June 2016, a party in need of urgent conservatory and interim measures prior to the formation of the arbitral tribunal may apply for an emergency arbitrator.<sup>40)</sup> A party seeking conservatory and interim measures may, concurrent with or after submitting its request for arbitration but before the formation of the arbitral tribunal, apply in writing to the Secretariat of the KCAB for conservatory and interim measures by an emergency arbitrator.<sup>41)</sup>

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36) Chinese Arbitration Law, Article 46

37) CIETAC Arbitration Rules, Article 11; Beijing Arbitration Committee Arbitration Rules, Article 15

38) Chinese Arbitration Law, Article 46

39) Chinese Arbitration Law, Article 68

40) KCAB International Arbitration Rules, Article 32(4)

41) KCAB International Arbitration Rules, Appendix 3: Emergency Measures by Emergency Arbitrator, Article 1(1)

## 2. China

In China, the CIETAC Arbitration Rules also provide for the emergency arbitrator system. The CIETAC Arbitration Rules provide that a party may apply to the CIETAC for emergency relief pursuant to the CIETAC Emergency Arbitrator Procedures.<sup>42)</sup> The emergency arbitrator may decide to order or award necessary or appropriate emergency measures.<sup>43)</sup> The decision of the emergency arbitrator shall be binding upon both parties.<sup>44)</sup>

After a preliminary review on the basis of the party's application as well as the arbitration agreement and relevant evidence submitted by the party, the CIETAC shall decide whether the emergency arbitrator procedures shall apply.<sup>45)</sup> If the CIETAC decides to apply the emergency arbitrator procedures, the president of the CIETAC shall appoint an emergency arbitrator within one (1) day from the receipt of both the application and the advance payment of the costs for the emergency arbitrator procedures.<sup>46)</sup>

## IV. Enforcement of Arbitral Awards

### 1. Korea

According to Article 3(1) of the Korean Civil Enforcement Act, the execution court having jurisdiction over dispositions of enforcement shall be the district court having jurisdiction over the place to conduct the enforcement procedures.<sup>47)</sup> Arbitral awards shall be recognized, unless any ground for refusal of recognition exists. Upon a party's application, the court may make the decision to recognize an arbitral award.<sup>48)</sup> The enforcement of an arbitral award can only be carried out only if there is an application by the relevant party to the court and the court orders the decision of enforcement.<sup>49)</sup> In Korea, district courts have jurisdiction over arbitral awards.

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42) CIETAC Arbitration Rules, Article 23(2)

43) CIETAC Arbitration Rules, Article 23(2)

44) CIETAC Arbitration Rules, Article 23(2)

45) CIETAC Emergency Arbitrator Procedures, Article 2(1)

46) CIETAC Emergency Arbitrator Procedures, Article 2(1)

47) Korean Civil Enforcement Act, Article 3(1)

48) Korean Arbitration Law, Article 37(1)

49) Korean Arbitration Law, Article 37(2)

## 2. China

China differentiates court jurisdiction among domestic, foreign-related (涉外) and foreign arbitral awards. In China, the enforcement of foreign-related arbitral awards and foreign arbitral awards is carried out mainly by intermediate people's courts. The courts which have jurisdiction over the enforcement of foreign-related and foreign arbitral awards are explored in this chapter.

The Chinese Civil Procedure Law stipulates that an intermediate people's court shall have jurisdiction as courts of first instance over the following civil cases: (1) major foreign-related cases; (2) cases that have major impact in the area of its jurisdiction; and (3) cases as determined by the Supreme People's Court to be under the jurisdiction of the intermediate people's courts.<sup>50)</sup> With respect to the enforcement of foreign-related arbitral awards made by arbitration institutions in China, the intermediate people's court in the region where the domicile of the respondent is or where the property of the respondent is located has jurisdiction.<sup>51)</sup>

In addition, the Supreme People's Court mandates that five types of major foreign-related civil and commercial cases shall be judged centrally by five groups of courts of first instance.<sup>52)</sup> The five types of major foreign-related civil and commercial cases are as follows: (1) foreign-related contractual and infringement disputes; (2) letter-of-credit disputes; (3) setting aside, recognition, or enforcement of foreign arbitral awards; (4) examination of the validity of arbitration clauses in foreign-related civil and commercial cases; and (5) application for the recognition and enforcement of civil and commercial case judgments and rulings rendered by foreign courts.<sup>53)</sup> Still, trade disputes at the Chinese borders, foreign-related real estate cases, and foreign-related intellectual property cases are not covered.<sup>54)</sup>

Such foreign-related civil and commercial cases fall under the jurisdiction of the

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50) Chinese Civil Procedure Law, Article 18

51) Chinese Civil Procedure Law, Article 273

52) <Rules of the Supreme People's Court Regarding Foreign-Related Civil and Commercial Case Jurisdiction> Preamble

53) <Rules of the Supreme People's Court Regarding Foreign-Related Civil and Commercial Case Jurisdiction> Article 3

54) Vai Io Lo, Xiaowen Tian, *Law and Investment in China: The Legal and Business Environment After China's WTO Accession*, (Routledge, 2004) p. 306

following intermediate people's courts of major cities, etc. The five groups of courts of first instance are as follows: (1) people's courts approved by the State Council and established in the Economic Technological Development Zones; (2) intermediate people's courts located in provincial capitals, autonomous regional capitals, and municipalities directly under the central government; (3) intermediate people's courts located in the Special Economic Zones and the Separately Planned Cities; (4) intermediate people's courts designated by the Supreme People's Court; and (5) high people's court.<sup>55)</sup> This centralizes the decisions for such foreign-related cases to the select courts in order to lawfully protect the rights of Chinese and foreign party's rights.

If one would appeal to the judgment of the first instance given by the people's court approved by the State Council and established in the Economic Technological Development Zone, the appeal shall fall under the jurisdiction of the intermediate people's court in the same area.<sup>56)</sup> The jurisdictional boundaries of the intermediate people's courts are decided by the high people's courts.<sup>57)</sup> This rule applies to setting aside, recognition, or enforcement of foreign arbitral awards,<sup>58)</sup> and examination of the validity of arbitration clauses in foreign-related civil and commercial cases. Therefore, such cases are judged by limited intermediate people's courts in a centralized manner.

For example, in order to file for setting aside, recognition or enforcement of foreign or foreign-related arbitral awards, one must file the case to the intermediate people's court in the capital city within the province. If there are no different courts listed above, setting aside, recognition or enforcement of foreign-related and foreign arbitral awards occurring within the province will be centralized in the intermediate people's court of province capital city, which prevents judgements from varying and differing at least within the jurisdiction of the intermediate people's court.

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55) <Rules of the Supreme People's Court Regarding Foreign-Related Civil and Commercial Case Jurisdiction>  
Article 1

56) <Rules of the Supreme People's Court Regarding Foreign-Related Civil and Commercial Case Jurisdiction>  
Article 2

57) <Rules of the Supreme People's Court Regarding Foreign-Related Civil and Commercial Case Jurisdiction>  
Article 1

58) <Rules of the Supreme People's Court Regarding Foreign-Related Civil and Commercial Case Jurisdiction>  
Article 3(3)

## V. Setting Aside & Refusal of Enforcement of Arbitral Awards from One's Own Country<sup>59)</sup>

An arbitral award is final and binding by a single award. However, abiding by this principle despite a grave fault in the arbitral award might harm actual justice. So, the court is exceptionally allowed to set aside arbitral awards or to refuse the enforcement of arbitral awards. This is similar to cases where a retrial is permitted despite there being a final and conclusive judgement due to the existence of grave faults.

Setting aside foreign arbitral awards lies within the jurisdiction of the foreign court, because the court in the jurisdiction where the seat of the arbitration is located has jurisdiction over the arbitral award. Therefore, there are no instances where a Korean court would set aside foreign arbitral awards. Setting aside arbitral awards only apply to arbitral awards made in one's own state. For this reason, no laws or rules need to be provided regarding setting aside foreign arbitral awards. With respect to an arbitral award from one's own country, a court may set aside the arbitral award and refuse the enforcement of the arbitral award according to domestic arbitration law.

### 1. Korea

#### (1) Setting Aside Domestic Arbitral Awards

In Korea, there is not any distinction between domestic arbitral awards and foreign-related arbitral awards. The Korean Arbitration Law stipulates six grounds to set aside domestic arbitral awards. An arbitral award may be set aside by the court if the party making an application for setting aside an arbitral award furnishes proof that: (a) A party to arbitration agreement was under some incapacity under the law applicable to him/her; or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under Korean law; (b) A party making the application was not given proper notice of the appointment of an arbitrator or of arbitral proceedings or was otherwise unable to present his/her case; (c) The award

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59) See Chang Sup, Shin, "Research on Korean and Chinese Grounds for annulment of Arbitral Awards", Arbitration Research Book 16, 2nd edition, 2006. 8., pp. 51-88

has dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration: Provided, That if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; (d) The formation of the arbitral tribunal or arbitral proceedings were not in accordance with agreement of the parties, unless such agreement was in conflict with any mandatory provision of the Korean Arbitration Law, or failing such agreement, were not in accordance with the Korean Arbitration Law.<sup>60)</sup> These four grounds place the burden of proof upon the relevant party.

In addition, an arbitral award may be set aside by the court if the court finds on its own initiative that: (a) The subject-matter of the dispute is not capable of settlement by arbitration under Korean law; (b) The award is in conflict with the good morals and other forms of social order of Korea.<sup>61)</sup> These two grounds are subject to decision by the courts' authority.

There is a time limitation for the application of setting aside arbitral awards. An action for setting aside an arbitral award shall be raised within three (3) months from the date when the party making such application has received the arbitral award.<sup>62)</sup>

## (2) Recognition and Enforcement of Domestic Arbitral Awards

The Korean Arbitration Law stipulates almost the same contents as the New York Convention for the grounds to refuse recognition and enforcement of arbitral awards.<sup>63)</sup> There are two additional grounds to refuse the enforcement of arbitral awards in addition to the six grounds to set aside arbitral awards explained above. The court shall refuse recognition or enforcement of arbitral awards, if the relevant party is able to prove the binding effect of the arbitral award has not yet entered into effect, or if the relevant party is able to prove that the court has set aside the arbitral award.<sup>64)</sup> This lists the contents of Article V 1 (e) of the New York Convention.

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60) Korean Arbitration Law, Article 36(2)(i)

61) Korean Arbitration Law, Article 36(2)(ii)

62) Korean Arbitration Law, Article 36(3)

63) Korean Arbitration Law, Articles 36 and 38

64) Korean Arbitration Law, Article 38(1)(i)

## 2. China

### (1) Domestic Arbitral Award

In China, there are two main laws regulating arbitration: the Arbitration Law and the Civil Procedure Law. The Chinese Arbitration Law regulates the internal matters, whereas the Chinese Civil Procedure Law regulates the external legal regulations.<sup>65)</sup> The Chinese Arbitration Law and the Chinese Civil Procedure Law differentiate among domestic arbitration, foreign-related (涉外) arbitration, and foreign arbitration. A foreign arbitration refers to arbitration that occurred in a foreign state outside China. Foreign-related arbitration refers to arbitration given by an arbitration institution within China, but the subject case is a foreign related one. Foreign-related case refers to where (1) either or both of the parties are of foreign nationality, (2) legal facts that established, changed, or terminated the civil legal relationship between the parties occurred in a foreign country, or (3) where the subject matter of the dispute between the parties is situated in a foreign country. For example, if a Korean company established a corporate body in China for its Chinese business, the Chinese corporate body of the Korean company is regarded as a Chinese company established under Chinese Commercial Law. As a result, an arbitration case between the Chinese corporate body of the Korean company and a Chinese company is a Chinese domestic arbitration case, not a foreign-related arbitration.

<Table 1> Grounds to set aside arbitral awards and to refuse enforcement of arbitral awards

	Grounds to set aside arbitral awards	Grounds to refuse enforcement of arbitration awards
domestic arbitral awards	Chinese Arbitration Law Article 58 => 7 grounds	Chinese Civil Procedure Law Article 237 => 7 grounds
foreign-related arbitral awards	Chinese Arbitration Law Article 70 → Chinese Civil Procedure Law Article 274(1) => 4 grounds	Chinese Arbitration Law Article 71 + Chinese Civil Procedure Law Article 274 => 5 grounds
foreign arbitral awards	N/A	New York Convention Article V => 7 grounds

65) Kyu-Yong Park, Shi-Jie Xu, "A Study on the Changes and Recognition and Enforcement of Foreign Arbitration Awards System in China", *Arbitration Studies*, Vol. 25 No. 2, 1 June 2016, p. 50

The Chinese Arbitration Law stipulates seven grounds to set aside domestic arbitral awards.<sup>66)</sup> There is a time limitation for the application of setting aside arbitral awards. An action for setting aside an arbitral award shall be raised within six (6) months from the date when the party making such application has received the arbitral award.<sup>67)</sup>

China differentiates among the grounds to refuse the enforcement of domestic, foreign-related and foreign arbitral awards. The Chinese Civil Procedure Law stipulates seven grounds to refuse the enforcement of domestic arbitral awards.<sup>68)</sup> The seven grounds to refuse the enforcement of domestic arbitral awards are similar with the seven grounds to set aside domestic arbitral awards. The court's review to set aside or refuse the enforcement of domestic arbitral awards covers not only procedural issues but also substantive issues. It is originated from the historical background of an unwarranted prejudice against the dispute settlement system by arbitration and mistrust of Chinese domestic arbitration institutions.<sup>69)</sup>

<Table 2> Grounds to set aside & to refuse enforcement of domestic & foreign-related arbitral awards

Domestic arbitral awards	Foreign-related arbitral awards	
Grounds to set aside domestic arbitral awards <sup>70)</sup> Grounds to refuse enforcement of domestic arbitration awards <sup>71)</sup>	Grounds to refuse enforcement of foreign-related arbitration awards <sup>72)</sup>	Grounds to set aside foreign-related arbitral awards <sup>73)</sup>
The parties have not stipulated an arbitration clause in the contract or have not subsequently reached a written agreement on arbitration		
The matters decided by arbitration exceed the scope of the arbitration agreement or the authority of the arbitration institution		

66) Chinese Arbitration Law, Article 58

67) Chinese Arbitration Law, Article 59

68) Chinese Civil Procedure Law, Article 237 被申请人提出证据证明仲裁裁决有下列情形之一的, 经人民法院组成合议庭审查

核实, 裁定不予执行:

(一) 当事人在合同中没有订有仲裁条款或者事后没有达成书面仲裁协议的;

(二) 裁决的事项不属于仲裁协议的范围或者仲裁机构无权仲裁的;

(三) 仲裁庭的组成或者仲裁的程序违反法定程序的;

(四) 裁决所根据的证据是伪造的;

(五) 对方当事人向仲裁机构隐瞒了足以影响公正裁决的证据的;

(六) 仲裁员在仲裁该案时有贪污受贿, 徇私舞弊, 枉法裁决行为的。

人民法院认定执行该裁决违背社会公共利益的, 裁定不予执行。

69) Song-Za Choi, "The Annulment Procedure of Arbitral Awards in China", *Journal of Arbitration Studies*, Vol. 25 No. 2, 1 June 2016, p. 102



The formation of the arbitral tribunal or the arbitration procedure is not in conformity with legal rules of arbitration	
N/A	The defendant is not duly notified of the appointment of the arbitrators or the arbitration proceeding, or the defendant fails to express his defense due to the grounds for which he is not held responsible
The evidence based on which the arbitral award is made is falsified	N/A
The other party has concealed evidence that is sufficient to affect the impartiality of the arbitral award	
Where the arbitrators involved in any of conducts of bribery, practicing favoritism for himself or relatives, or twisting the law in rendering arbitral award.	
If a people's court determines that the enforcement of an award will contradict the social public interest	N/A

## (2) Foreign-Related Arbitral Award

The grounds for setting aside or refusal of the enforcement of foreign-related arbitral awards is fewer than the grounds of domestic arbitral awards. With respect to foreign-related arbitral awards, Article 70 of the Chinese Arbitration Law stipulates that, if a party has produced evidences to substantiate one of the four grounds stipulated in Article 274(1)<sup>74)</sup> of the Chinese Civil Procedure Law, the people's court shall verify the facts and set aside the arbitral award.<sup>75)</sup> Article 274 of the Chinese Civil Procedure Law provides for the grounds to refuse the enforcement of foreign-related arbitral awards.<sup>76)</sup>

70) Chinese Arbitration Law, Article 58

71) Chinese Civil Procedure Law, Article 237

72) Chinese Arbitration Law, Article 71; Chinese Civil Procedure Law, Article 274

73) Chinese Arbitration Law, Article 70; Chinese Civil Procedure Law, Article 274(1)

74) It was previously Article 260(1) before the revision of the Chinese Civil Procedure Law in 2012.

75) Chinese Arbitration Law, Article 70

当事人提出证据证明涉外仲裁裁决有民事诉讼法第二百六十条第一款规定的情形之一的,经人民法院组成合议庭审查核实裁定撤销。

76) Chinese Civil Procedure Law, Article 274

对中华人民共和国涉外仲裁机构作出的裁决,被申请人提出证据证明仲裁裁决有下列情形之一的,经人民法院组成合议庭审查核实,裁定不予执行:

(一)当事人在合同中没有订有仲裁条款或者事后没有达成书面仲裁协议的;

(二)被申请人没有得到指定仲裁员或者进行仲裁程序的通知,或者由于其他不属于被申请人负责的原因未能陈述意见的;

(三)仲裁庭的组成或者仲裁的程序与仲裁规则不符的;

As such, the grounds to set aside foreign-related arbitral awards and the grounds to refuse the enforcement of foreign-related arbitral awards are virtually the same with respect to the four grounds stipulated in Article 274(1) of the Chinese Civil Procedure Law. Nevertheless, for the grounds to refuse the enforcement of foreign-related arbitral awards have one more ground stipulated in Article 274(2) of the Chinese Civil Procedure Law. This ground to refuse the enforcement of foreign-related arbitral awards is stipulated in Article 274(2) of the Law. Article 274(2) of the Law stipulates that, if a people's court determines that the enforcement of an arbitral award will violate the social public interest (社会公共利益), the court shall make a ruling to refuse the enforcement of the arbitral award.<sup>77)</sup> For the first four grounds under Article 274(1), the applying party bears the burden of proof. On the other hand, for the fifth ground under Article 274(2), if the court believes the enforcement of the arbitral award violates public interest, the court may refuse the enforcement of a foreign-related arbitral award.

However, the fifth ground is not included in the grounds to set aside foreign-related arbitral awards, as Article 70 of the Chinese Arbitration Law only accepts Article 274(1) of the Chinese Civil Procedure Law as legitimate grounds. The claim that it violates the social public interest is not a ground to set aside a foreign-related arbitral award but is a ground to refuse the enforcement of a foreign-related arbitral award. (Table 2) above shows the comparison.

### (3) Report System

In China, in order to refuse the enforcement of foreign-related arbitral awards or refuse the recognition or enforcement of foreign arbitral awards, the court must gain the permission of a higher court. According to the Supreme People's Court Notice,<sup>78)</sup> where a party applies to the people's court for the enforcement of an arbitral award rendered by a Chinese foreign-related arbitration institution or for the recognition and enforcement

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(四) 裁决的事项不属于仲裁协议的范围或者仲裁机构无权仲裁的。  
人民法院认定执行该裁决违背社会公共利益的, 裁定不予执行。

77) Chinese Civil Procedure Law, Article 274(2)

78) (Supreme People's Court Notice on Several Questions in dealing with Foreign-Related and Foreign Arbitration Cases) (1995. 8. 28.) 最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知

of an arbitral award rendered by a foreign arbitral institution, if the people's court deems that the foreign-related arbitral award contains one of the grounds for refusal under Article 274 of the Chinese Civil Procedure Law or that the foreign arbitral award sought to be recognized and enforced does not comply with the New York Convention or the principle of reciprocity; before the people's court makes a decision to refuse recognition or enforcement of the arbitral award, the people's court must report the case to its higher people's court for review.<sup>79)</sup> If the high people's court agrees and deems such refusal of recognition or enforcement of the arbitral award legitimate, it must report their opinions to the Supreme People's Court. Only after waiting for the reply from the Supreme People's Court, it can decide to refuse enforcement of the foreign-related arbitral award or the recognition and enforcement of the foreign arbitral award.<sup>80)</sup> Thus, the intermediate people's court has to receive permission from the high people's court, and the high people's court has to receive permission from the Supreme People's Court. As a result, all refusal of the enforcement of foreign-related arbitral awards and refusal of the recognition or enforcement of foreign arbitral awards must go through the Supreme People's Court. This is to ensure standardized enforcement of foreign-related and foreign arbitral awards. On the other hand, in cases where a lower court enforces a foreign-related arbitral award or decides to recognize and enforce a foreign arbitral award, it does not need to receive permission from a higher court.

Since the establishment of the report system in 1995, the Supreme People's Court of China has issued more than two hundred of its Replies to the lower people's courts' reports with respect to the recognition and enforcement of foreign-related and foreign arbitration arbitral awards.<sup>81)</sup> The report system for refusing the enforcement of foreign-related arbitral awards and for refusing the recognition or enforcement of foreign arbitral awards has the effect of safeguarding foreign-related arbitral awards and foreign arbitral awards in China.

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79) 〈Supreme People's Court Notice on Several Questions in dealing with Foreign-Related and Foreign Arbitration Cases〉 Article 2

80) 〈Supreme People's Court Notice on Several Questions in dealing with Foreign-Related and Foreign Arbitration Cases〉 Article 2

81) Fan Yang, "Enforcement of South Korean Arbitral Awards in Mainland China", *Journal of Arbitration Studies*, Vol. 25 No. 3, 1 September, 2015, p. 118. See Fan Yang, *Foreign-related Arbitration in China: Commentary and Cases*, Cambridge University Press (2 Volume Hardback Set), 2015, part IV.

## VI. Refusal of Recognition and Enforcement of Foreign Arbitral Awards

### 1. Korea

A foreign arbitral award needs to be recognized by a domestic court to be enforced through a domestic court. A domestic court may refuse the recognition or the enforcement of a foreign arbitral award according to the New York Convention. Both Korea and China joined the New York Convention, which deals with recognition and enforcement of foreign arbitral awards. As signatory states to the New York Convention, both Korea and China are bound by the New York Convention. Therefore, both Korea and China are subject to the New York Convention when it comes to recognition and enforcement of foreign arbitral awards. In Korea, the New York Convention is applied to the recognition and enforcement of foreign arbitral awards according to Article 39(1) of the Korean Arbitration Law.

### 2. China

In China, the New York Convention is applied to the recognition and enforcement of foreign arbitral awards according to Article 283 of the Chinese Civil Procedure Law. If an award made by a foreign arbitration institution needs the recognition and enforcement of a people's court in China, the party shall directly apply to the intermediate people's court in the region where the party subject to the enforcement has its domicile or where its property is located.<sup>82)</sup> The people's court shall deal with the matter according to the relevant provisions of the international treaties concluded or acceded to by China including the New York Convention or on the principle of reciprocity.<sup>83)</sup>

### 3. New York Convention

Article V of the New York Convention stipulates seven grounds to refuse recognition

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82) Chinese Civil Procedure Law, Article 283

83) Chinese Civil Procedure Law, Article 283

and enforcement of foreign arbitral awards. Because Articles V 1 and 2 of the New York Convention are written out as “may be refused”, even if a ground to refuse recognition or enforcement of foreign arbitral awards exists, the court has discretion in deciding whether to do so.

<Table 3> Grounds to refuse recognition and enforcement of foreign arbitral awards under the New York Convention and the grounds to refuse enforcement of foreign arbitral awards under the Chinese Civil Procedure Law

Grounds to refuse recognition and enforcement of foreign arbitral awards in Korea and China <sup>84)</sup>	Grounds to refuse recognition and enforcement of domestic arbitral awards in Korea <sup>85)</sup>	Grounds to refuse enforcement of foreign-related arbitral awards in China <sup>86)</sup>
(a) The parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made		The parties have not stipulated an arbitration clause in the contract or have not subsequently reached a written agreement on arbitration
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case		The matters decided by arbitration exceed the scope of the arbitration agreement or the authority of the arbitration institution
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced		The formation of the arbitral tribunal or the arbitration procedure is not in conformity with legal rules of arbitration
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place		The defendant is not duly notified of the appointment of the arbitrators or the arbitration proceeding, or the defendant fails to express his defense due to the grounds for which he is not held responsible
(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made		N/A
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country		N/A
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.		If a people’s court determines that the enforcement of an award will contradict the social and public interest

Under the New York Convention, as for the first five grounds, the party must prove the existence of such grounds, in order to compel the court to refuse the recognition and enforcement of the foreign arbitral award.<sup>87)</sup> On the other hand, with respect to the last two grounds, without the request of the party, the court may refuse the recognition and enforcement of the foreign arbitral award, if the requested court decides that there is some problem with respect to arbitrability or public policy.<sup>88)</sup>

Until now, there is only one case where the Supreme People's Court of China refused the recognition and enforcement of a foreign arbitral award on the basis of the ground that it violates public policy. In 2008, the intermediate people's court in Jinan City, Shandong Province refused the recognition and enforcement of the arbitral award of the ICC (International Chamber of Commerce) on the basis of the ground that the arbitral award violates public policy.<sup>89)</sup> There was another case where the Supreme People's Court of China refused the recognition and enforcement of an arbitral award on the basis of the ground that it violates public policy, but the arbitral award was not a foreign award but an award made by the CIETAC.<sup>90)</sup>

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84) New York Convention, Article V

85) Korean Arbitration Law, Articles 36 and 38

86) Chinese Civil Procedure Law, Article 274

87) New York Convention, Article V 1

88) New York Convention, Article V 2

89) The facts are as follows. In 1955, Serbian company Hemofarm DD and Yongning (永宁) Pharmaceutical Company created a limited partnership company called Jinan Haimufamu (海慕法姆). Article 57 of the partnership agreement stipulates the applicable law as Chinese Law. Also, Article 58 stipulates that arbitration will occur at the International Chamber of Commerce ("ICC") in Paris, France. Clearly, an arbitration clause does exist. In 2002, Yongning (永宁) Pharmaceutical Company filed for a lawsuit to claim for the rent of the building against the Jinan Haimufamu (海慕法姆) Limited Partnership Company and won the lawsuit. In regards to this, Hemofarm DD filed for arbitration at the ICC in 2004. The ICC ruled that the existence of the arbitration clause within the partnership agreement nullifies the jurisdiction of the Chinese court. However, the intermediate people's court in Jinan City, Shandong Province ruled that the parties to the partnership agreement, which contains the arbitration clause, are Hemofarm DD and Yongning (永宁) Pharmaceutical Company, while the parties of the lawsuit are Yongning (永宁) Pharmaceutical Company and Jinan Haimufamu (海慕法姆) Limited Partnership Company, and therefore the arbitration clause within the partnership agreement does not apply, and that the jurisdiction lies within the Chinese court. Furthermore, the intermediate people's court ruled that the ICC arbitral award was a violation of Chinese legal jurisdiction, which in turn, was a violation of public policy under Article V 2 of the New York Convention. Through such grounding, the recognition and enforcement of the arbitral award was refused. This judgment passed through the high people's court of Shandong Province, and was ratified by the Supreme People's Court of China.

90) It was an arbitration case requested by an American company in 1997. See Kyu-Yong Park, Shi-Jie Xu, "A Study on the Changes and Recognition and Enforcement of Foreign Arbitration Awards

Comparing the grounds to refuse the recognition and enforcement of foreign arbitral awards under the New York Convention with the grounds to refuse enforcement of foreign-related arbitral awards under the Chinese Civil Procedure Law, the latter excluded from the former the two grounds of (e) not binding arbitral award and (a) incapability of arbitration. The other five grounds are common. It is said that when legislating the grounds to refuse the enforcement of foreign-related arbitral awards under the Chinese Civil Procedure Law, the New York Convention was referred to. Therefore, when interpreting the grounds to refuse the enforcement of foreign-related arbitral awards under the Chinese Civil Procedure Law, the intent of the New York Convention can be applied except the two grounds excluded.

## VII. Conclusion

In order to adopt the UNCITRAL Model Law on International Commercial Arbitration amended in 2006, Korea revised its Arbitration Law in 2016. The revised Law includes a more comprehensive legal regime regarding interim measures, emergency arbitrator, etc.

In Korea, district courts have jurisdiction over arbitral awards. On the other hand, China differentiates court jurisdiction between domestic, foreign-related and foreign arbitral awards. In China, the enforcement of foreign-related arbitral awards and foreign arbitral awards is carried out mainly by intermediate people's courts.

In China, the court's review to set aside or refuse the enforcement of domestic arbitral awards covers not only procedural issues but also substantive issues, which is originated from the historical background of an unwarranted prejudice against the dispute settlement system by arbitration and mistrust of Chinese domestic arbitration institutions

In Korea, there is no distinction between domestic and foreign-related arbitral awards. In China, the Chinese Arbitration Law and the Chinese Civil Procedure Law differentiate foreign-related arbitral awards and domestic arbitral awards with respect to the grounds to set aside or refuse the enforcement of arbitral awards. The grounds for setting aside or refusal of the enforcement of foreign-related arbitral awards is fewer than the grounds of domestic arbitral awards.

Both Korea and China joined the New York Convention, and domestic courts may

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System in China", *Arbitration Studies*, Vol. 25 No. 2, 1 June 2016, p. 64.

refuse the recognition and enforcement of foreign arbitral awards according to the New York Convention.

In China, the report system to the higher people's court for refusing the enforcement of foreign-related arbitral awards and for refusing the recognition or enforcement of foreign arbitral awards has the effect of safeguarding foreign-related arbitral awards and foreign arbitral awards in China.

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