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Analysis, Recognition and Enforcement Procedures of Foreign Arbitral Awards in the United States

Byung Youn Chang*
David L. Welch**
Yong Kil Kim***

Korean businesses, and their legal representatives, have observed the improvements of enforcement of commercial judgments through arbitration over traditional collections litigation in U.S. Courts—due to quicker proceedings, exceptional cost savings and more predictable outcomes—in attaching assets within U.S. jurisdictions. But how are the 2016 interim measures implemented by the Arbitration Act of Korea utilized to avoid jurisdictional and procedure pitfalls of enforcement proceedings in the Federal Courts of the United States? Authors examine the necessary prerequisites of the U.S. Federal Arbitration Act as adopted through the New York Convention, to which Korea and the U.S. are signatories, as distinguished from the Panama Convention. Five common U.S. arbitration institutions address U.S. "domestic" disputes, preempting U.S. state law arbitrations, while this article focuses on U.S. enforcement of "international" arbitration awards. Seeking U.S. recognition and enforcement of Korean arbitral awards necessitates avoiding common defenses involving due process, public policy or documentary formality challenges. Provisional and conservatory injunctive relief measures are explored. A variety of U.S. cases involving Korean litigants are examined to illustrate the legal challenges involving non-domestic arbitral awards, foreign arbitral awards and injunctive relief.

* Byung Youn Chang, Attorney at Law (U.S.A.); Ph.D. in Business Administration, BEE, Ex-Arbitrator, Vice-Chairman of the Korean Association of Arbitration Studies in Korea (First Author).
** David L. Welch, Judge/Federal ALJ, Mediator, Adjunct Professor of Indiana University in U.S.A (Co-Author).
*** Yong Kil Kim, Professor of WonKwang University School of Law, Ph.D. in Law, Arbitrator, Elected Chairman of the Korean Association of Arbitration Studies in Korea (Correspondence Author).

Suggestions aimed toward further research are focused on typical Korean business needs such as motions to confirm foreign arbitration awards, enforce such awards or motions to compel arbitration.

Key Words : Arbitration, Recognition, Enforcement, Arbitral award, Korean case in the United States, Federal Arbitration Act

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Ⅰ. Introduction

Arbitration market is getting better and tending to grow gradually to resolve issues of parties' disputes because it is fair procedures in private and lighter burdensome than court proceedings, and also lead time of arbitration proceedings and cost are much better than traditional proceedings of court. It is usually shorter than normal proceedings of court and lower fees than the court proceedings.

Many of foreign parties including Korean individuals or corporations that have international arbitral awards from commercial disputes bring the awards to a court of the United States to enforce because a losing party of arbitration has a business entity, assets, or properties in the United States and the court process of enforcement is prompt as confirmed the awards, unless otherwise happens such as defenses, under the applicable rules.

Because of that reasons, it is necessary to research what is recognition and enforcement of international arbitral awards in the United States that come from disputes with foreign parties. Thus, the purpose of this research is to analyze cases and applicable rules and procedures of enforcement of international arbitral awards in the United States, and which approach is good for the party that is sought the recognition and enforcement of the awards. To achieve this purpose, available articles, journals, cases, and other materials along with applicable laws and rules are reviewed

and utilized for analysis.

Therefore, this research consists of 4 chapters. The chapter 1 is introduction part of this research why this research is necessary, what is the purpose of the research, and what materials are used for this research to achieve the purpose. The chapter 2 is to show applicable laws and rules to get into the recognition and enforcement procedures, and it will be studied appropriate cases with the procedures. The chapter 3 is the case analysis that come from foreign arbitral awards, especially including one of the arbitration party that is a person Korean individual or Korean multinational corporations in the United States. The chapter 4 is conclusion part of this research. It will show results of this research and indicate further research. Based on the results of this research, the outcome will be helpful for a party to establish a right approach to enforce the arbitral awards in the United States whether it is non-domestic or foreign arbitral awards.

Ⅱ. Recognition and enforcement of arbitral awards

1. The FAA and the New York Convention

The United States has been developed arbitration law on the level of states and federal law through the modification of statutes and common law to meet global trends. On the results of international arbitrations, the United States has applied the Federal Arbitration Act (FAA) to resolve the disputes arising out of a foreign party in an arbitration agreement. The FAA is the supremacy of the state laws. Based on a contract of both parties containing an arbitration clause what they agreed in writing, "the Federal Arbitration Act allows, indeed favors: to use the streamlined efficiency, informality, and low costs of arbitration to resolve any disputes that might arise"[1] between both parties.

Therefore, the provisions of FAA will be reviewed and analyzed in this chapter with proper cases, especially focusing on the recognition and enforcement matters that come from foreign arbitral awards. The FAA that has been applied to arbitration

1) National Labor Relations Board v. Alternative Entertainment, Inc., — F.3d —, 2017 WL 2297620, at *12 (6th Cir. May 26, 2017).

matters of a foreign party broadly in the United States is not adopted the United Nations Commission on International Trade Law (UNCITRAL) as is itself that is called the UNCITRAL model law. However, the FAA implemented the New York Convention[2] and the Panama Convention[3] into the clauses of each provisions of the FAA that was ratified based on treaties of the Conventions.

The FAA consists of 3 chapters. Chapter 1 is general provisions that has 16 sections for seat of domestic and international arbitrations in the United States.[4] To establish scope of an arbitration agreement even commercial disputes or no contracts,[5] the chapter 1, section 1 (9 U.S.C. § 1) stated the meaning of commerce that it "means commerce among the several States or with foreign nations, …, or between any such Territory and any State or foreign nation, …, or any other class of workers engaged in foreign or interstate commerce."[6]

In an agreement of the parties, "an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract."[7] Therefore, "[a] decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause."[8] At section 2 of the chapter 1 (9 U.S.C. § 2), it stated that to enforce the arbitration agreements, "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter …, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[9] It supports that an award of the arbitration decision from an arbitral tribunal where the award was rendered shall be "final[10] and binding[11] on the parties"[12]

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2) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations (New York, 10 June 1958) [hereinafter New York Convention].

3) The Inter-American Convention on international commercial arbitration. Concluded at Panama City on 30 January 1975 (United Nations — Treaty Series, Vol. 1438,1-24384, 1986) [hereinafter Panama Convention].

4) 9 U.S.C. §§ 1-16 (1990).

5) *See* 9 U.S.C § 202 (1990) (Agreement or award falling under the Convention).

6) 9 U.S.C. § 1 (1990).

7) UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), section III (Arbitral proceedings), article 23 (Pleas as to the jurisdiction of the arbitral tribunal), paragraph 1, United Nations (New York, 2014) [hereinafter UNCITRAL Arbitration Rules].

8) *Id.*

9) 9 U.S.C. § 2 (1990) (Validity, irrevocability, and enforcement of agreements to arbitrate).

and dispositive to confirm[13] the award for the recognition and enforcement of the award at a court. In a partial claim of all claims of the arbitration, "a United States District Court held that notwithstanding the absence of an award that finally disposes of all the claims that were submitted to arbitration, an award that 'finally and definitely disposes of a separate independent claim'[14] could be considered as binding."[15] Considering those provisions in the chapter 1 of the FAA, accordingly, the provisions of the chapter 1 can be applied to the domestic or non-domestic arbitral awards which made in the United States.

The chapter 2 title of the FAA is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards that consists of 8 sections.[16] Chapter 2 is called the New York Convention that is implemented the recognition and enforcement of foreign arbitral awards made in a foreign country other than the U.S. and "arising

10) *See* a supporting clause: An arbitral award is final in Korea. The Arbitration Act, article 35 (Effect of Arbitral Awards) [Effective Date Nov. 30, 2016.] [Act No.14176, Partially Amended on May 29, 2016]: An arbitral award shall have the same effect on the parties as a final and conclusive judgement of a court: Provided, That the foregoing shall not apply where recognition or execution is denied under Article 38. (refer to article 38 (Domestic Arbitral Awards) of the Arbitration Act of Korea: Arbitral awards made in the Republic of Korea shall be recognized or enforced, unless any of the following grounds exists: (Amended by Act No. 14176, May 29, 2016) •••) [hereinafter Arbitration Act of Korea].

11) *See generally* New York Convention, *supra* note 2, article V (1) (e).

12) UNCITRAL Arbitration Rules, *supra* note 7, section IV (The Award), article 34 (Form and effect of the award), paragraph 2.

13) *See* 9 U.S.C. § 9 (1990) (Award of arbitrators; confirmation; jurisdiction; procedure) (This is for confirmation of domestic arbitral awards at court); 9 U.S.C § 207 (Award of arbitrators; confirmation; jurisdiction; proceeding) (This is for confirmation of non-domestic and foreign arbitral awards at court).

14) *See* Hall Steel Co. v. Metalloyd Ltd., 492 F. Supp. 2d 715, 718 (E.D. Mich. June 7, 2007) (quoting "an 'interim' award that finally and definitively disposes of a separate independent claim may be confirmed notwithstanding the absence of an award that finally disposes of all the claims that were submitted to arbitration." Island Creek Coal Sales Co. v. City of Gainesville, 729 F.2d 1046, 1049 (6th Cir.1984); *see also* Egan Jones Ratings Co. v. Pruette, 2017 WL 345633, at 2-3 (E.D. Pa. 2017); Daum Global Holdings Corp. v. Ybrant Digital Limited et al., 2014 WL 896716, at 2 (S.D.N.Y. 2014) (quoting Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 283 (2d Cir.1986)); *see generally* UNCITRAL Arbitration Rules, *supra* note 7, section IV (The Award), article 34 (Form and effect of the award), paragraph 1.

15) UNCITRAL Secretariat, Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), (2016 ed. 2016), at 216 (Travaux préparatoires on article V (1) (e) as adopted in 1958, the analysis to the chapter of the Guide on article V (1) (e), para.17) [hereinafter Guide].

16) 9 U.S.C. §§ 201-208 (1990).

out of differences between persons, whether physical or legal."[17] It is for applying foreign arbitral awards from international arbitrations. "It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."[18] It means non-domestic arbitral awards involving a foreign party in the United States can be also applied to the chapter 2 of the FAA that adopted the New York Convention. In the Convention, the meaning of arbitral awards is stated that it "shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."[19] Therefore, "courts have found that only those decisions made by arbitrators that determine all or some aspects of the dispute, including jurisdiction,"[20] "in a final and binding manner, can be considered 'arbitral awards' within the meaning of the New York Convention."[21]

Because "Each Contracting State shall recognize an agreement in writing"[22] it defined that the "agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."[23] The terms of recognition and enforcement are not defined in the FAA or the Conventions. However, "commentators are in broad agreement that 'recognition' refers to the process of considering an arbitral award as binding but not necessarily enforceable, while 'enforcement' refers to the process of giving effect to an award."[24] Courts of "the United States have held that recognition can be sought separately from enforcement."[25] Therefore, those terms should be followed by the rule of court.

Chapter 3 of the FAA has 7 sections,[26] that is the Inter-American Convention on International Commercial Arbitration. It is called the Panama Convention. Thus, the chapter 2 and 3 in the FAA are applicable to the foreign arbitral awards that come

17) New York Convention, *supra* note 2, article I (1).
18) New York Convention, *supra* note 2, article I (1).
19) *Id.* article I (2).
20) Guide, *supra* note 15, Travaux préparatoires, article I (1), para. 21 (citing *see* the chapter of the Guide on article I, paras. 28-32).
21) *Id.* (citing for a discussion of the effect of article I (2) and the notion of arbitral award within the meaning of the New York Convention, *see* the chapter of the Guide on article I , paras. 65-68).
22) New York Convention, *supra* note 2, article II (1).
23) New York Convention, *supra* note 2, article II (2).
24) Guide, *supra* note 15, Travaux préparatoires, article I (1), paragraph 8 (citation omitted).
25) *Id.* paragraph 12 (citation omitted).
26) 9 U.S.C §§ 301-307 (1990).

from the international arbitration awards other than the United States because those Conventions that are prescribed the provisions into the chapters 2 and 3 are rectified by the United States.

2. Arbitration institutions

Generally in the United States, to arbitrate commercial disputes according to an arbitration agreement of both parties, first they have to select out a proper institution that is usually used to resolve disputes matters among domestic institutions such as 1) the International Centre for Dispute Resolution (ICDR) at the American Arbitration Association (AAA) applying to its Commercial Arbitration Rules and Mediation Procedures, 2) the International Institution for Conflict Prevention and Resolution (CPR) that provides the 2007 CPR Non-Administered Arbitration Rules, 3) Judicial Arbitration & Mediation Services (JAMS) under the JAMS Comprehensive Arbitration Rules & Procedures, and 4) The International Centre for Settlement of Investment Disputes (ICSID) under the ICSID regulations and rules that come from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which was initiated by the World Bank, or 5) other international institutions such as ICC International Court of Arbitration of the International Chamber of Commerce (ICC).

When a party selected out one institution for arbitration process and had an arbitral award from the arbitration decision, the receiving party of the arbitral award must be processed next step to enforce the award through a court unless otherwise any defenses of the arbitration awards.

3. Procedures and rules at court

To be reached out the recognition and enforcement rightfully, the arbitral award should be confirmed by the court. With respect to the confirmation of arbitral award, the U.S. federal courts have always respected for the arbitral award and confirmed the award generally by documents based on the procedures to grant an order confirming the arbitral award.[27] Thus, the court is recognized the arbitral award by papers filed

27) *See* 9 U.S.C § 13 (1990) (Papers filed with order on motions; judgment; docketing; force and effect;

with an order for the confirmation of arbitral award if there are no defenses such as due process[28] or public policy,[29] and then the party who is granted an order of the confirmation of the arbitral award from the court within the prescribed period[30] in the FAA "for an order confirming the award"[31] can be processed the enforcement of arbitral award through the court system promptly. However, when "one of the grounds for refusal or deferral of recognition or enforcement of the award"[32] exists to conform the foreign arbitral award, such as violation of public policy that be recognized generally by the U.S. court that "in situations where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought,"[33] the court shall not confirm the arbitral award[34] based on public policy that it is construed by laws.[35]

These procedures and rules for the recognition and enforcement of the arbitral awards[36] are generally well designed at federal courts as adopted the enforcement of

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enforcement).

28) *See* New York Convention, article V (1) (b); New York Convention, article V (1) (b); *see generally* 9 U.S.C § 4, §9, § 10, § 12 (1990); Parsons & Whittemore Overseas Co v Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 975 (2d Cir. 1974).

29) *See* 9 U.S.C §§ 9-12, § 207, § 304 (1990); New York Convention, article V (2) (b).

30) *See* 9 U.S.C. § 9 (1990) (at any time within one year after the award is made); *see also* 9 U.S.C. § 207 (1990) (within three years after an arbitral award falling under the Convention is made).

31) 9 U.S.C. § 9, § 207 (1990).

32) 9 U.S.C § 207 (1990) (Award of arbitrators; confirmation; jurisdiction; proceeding).

33) Comment c of the U.S. Restatement (Second) of Conflict of Laws, § 117 (1971) (*see* Restatement (Second) of Conflict of Laws, § 98 Recognition of Foreign Nation Judgments: A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned) (*see also* cases that described concerning the violation of public policy "only where enforcement would violate the forum state's most basic notions of morality and justice." Bayer CropScience AG v. Dow Agrosciences LLC, 2017 WL 788321, at *6 (Fed. Cir. March 1, 2017). "Courts of appeals have construed the New York Convention's public-policy exception narrowly." *Id.*; "In Parsons & Whittemore Overseas Co. v. Société Generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974), the Second Circuit stated that, in accordance with general international choice-of-law principles, the exception applies "only where enforcement would violate the forum state's most basic notions of morality and justice." … (citing 1 Restatement (Second) of the Conflict of Laws § 117 cmt. c, at 340 (Am. Law Inst. 1971))" *Id.*).

34) *See* 9 U.S.C § 207 (1990).

35) *See generally* the general provision of public policy that is in article V (2) (b) of the New York Convention; § 4 (c) (3) of the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA) (noting at UFCMJRA §13, the Uniform Foreign Money-Judgments Recognition Act 1962(UFMJRA) is repealed); comment c of the US Restatement (Second) of Conflict of Laws, § 117 (1971).

36) *See* New York Convention, *supra* note 2, art. III-art. V; *See also* 9 U.S.C §§ 9-13, § 207, § 304, §

the Conventions and actively processed the arbitral award based on the FAA that preempts the state arbitration laws under the section 15 of the FAA[37] unless otherwise any contrary agreements between the parties. Therefore, cases of the foreign arbitral awards are established under the FAA to apply for the recognition and enforcement of foreign arbitral awards. Those legal framework is to show rules and procedures to confirm an arbitral award at a federal court for the recognition and enforcement of arbitral awards in the United States.

4. Remedy: interim measures or provisional relief

In many cases of arbitration matters, this research is focused on analysis of rules and procedures of the recognition and enforcement of arbitral awards and its cases, and it also includes a party of Korean and cases that come into the United States.

In the analysis, it is reviewed provisions of current Arbitration Act of Korea[38] that implemented interim measures[39] as remedy in 2016 such as UNCITRAL model law,[40] that gives broad powers[41] to the arbitral tribunal like the FAA as adopted the New York Convention. The interim measures at the arbitral tribunal are provided to a claimant of the arbitration upon request of a party with an emergency relief against an opponent party of the arbitration that is a respondent. The arbitral tribunal or courts can require the claimant party a posting of security to protect the opponent party prior to place an interim order that is a final order of temporary relief[42] to allow

307 (1990) (These articles are for rules and procedures for the recognition or enforcement of arbitral awards including a prima facie evidence and grounds for refusal at courts).

37) *See generally* 9 U.S.C § 15 (1990) (Inapplicability of the Act of State doctrine).

38) *See* Arbitration Act of Korea, *supra* note 10.

39) *See* Arbitration Act of Korea, *supra* note 10, chapter III-2, art. 18-art. 18-8 (Interim measures).

40) *See* UNCITRAL Arbitration Rules, *supra* note 7, section III, article 26, paragraphs 1 through 9 (Interim measures in arbitral proceedings).

41) *See* UNCITRAL Arbitration Rules, *supra* note 7, section III, article 23, paragraph 1 (The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement).

42) *See* Companion Property and Cas. Ins. Co. v. Allied Provident Ins., Inc, 2014 WL 4804466 (S.D.N.Y. 2014) (citing Banco de Seguros del Estado v. Mut. Marine Offices, Inc, 334 F.3d 255, 259-62 (2d Cir. 2003); reciting Banco de Seguros del Estado v. Mut. Marine Offices, Inc, 230 F. Supp. 2d 362, 369 (S.D.N.Y. 2002); Yasuda Fire & Marine Ins. Co. of Europe v. Continental Casualty Co., 37 F.3d 345, 347-48 (7th Cir. 1994); Island Creek Coal Sales Co. v. City of Gainesville, 729 F.2d 1046, 1049 (6th Cir. 1984)).

enforcement of interim injunctive relief at courts.[43]

In Korea, the interim measures implemented in 2016, and it gives a relief promptly to a party that the enforcement is sought at court prior to the final awards of arbitration at the arbitral tribunal. The chapter of interim measures of Korea consists of 8 sections from Article 18 through Article 18-8 of the Arbitration Act of Korea. The sections of interim measures are satisfied the UNCITRAL model law that prescribed interim measures in article 26, paragraphs 1 through 9 and the New York Convention, articles V for grounds for refusal to meet the international treaty of the United Nations.[44] Some jurisdictions have used terms of provisional and conservatory measures instead of interim measures. To support this, "[c]ommentators have confirmed that national courts' jurisdiction to order provisional measures does not breach the New York Convention as it does not prejudice the merits of the dispute."[45] Article II (3) of the New York Convention stated that "[t]he court of a Contracting State, …, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[46] Thus, "[t]he duty to refer the parties to arbitration does not extend to provisional and conservatory measures, except if the arbitration agreement itself refers to such measures."[47] However, "[m]ost courts exercise jurisdiction to order interim or provisional relief in support of arbitration upon application by a party notwithstanding the presence of an arbitration agreement."[48] Although the FAA is not stated interim measures or provisional remedies even in the New York Convention, some courts have granted preliminary injunctive relief such as provisional remedy in the United States.[49]

The provision of Interim or provisional measures is a temporary injunctive relief. On the remedy, most of parties seek first money damages, interest, and cost of arbitration including attorney's fees, even though there are other remedies like declaratory relief,

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43) *See Id.*; *See also* UNCITRAL Arbitration Rules, *supra note 7, section III, article 26, paragraph 6.*

44) *See* UNCITRAL Arbitration Rules, *supra* note 7, section III, article 26, paragraphs 1 through 9 (Interim measures in arbitral proceedings); *see also* Arbitration Act of Korea, *supra* note 10, art. 18-art. 18-8 (Interim measures).

45) Guide, *supra* note 15, Travaux préparatoires, article II (3), paragraph 76 (citation omitted).

46) New York Convention, *supra* note 2, article II (3).

47) Guide, *supra* note 15, Travaux préparatoires, article II (3), paragraph 74.

48) *Id.* (citation omitted).

49) *See* Dana H. Freyer, *The United States Federal Arbitration Act and the UNCITRAL Model Law: How and Why are They Different?*, September 2006 IPBA J. 29, 31 (2006) (citation omitted).

adverse inferences, injunctive relief before and after the seat of arbitration, based on the arbitration agreement of the parties that provides for substantive law and applicable rules of arbitration. To get into the remedy properly, above all, the procedure that is for the recognition or enforcement of arbitral awards at courts is an important part to enforce the awards.

Thus, the confirmation of arbitral awards at a court is a key factor for the recognition and enforcement of the awards completely in the process of especially foreign arbitral awards.

5. Enforcing an arbitration award

After a party has an arbitral award from the arbitral tribunal, the party will proceed the recognition and enforcement of the arbitral award at a court in domestic or international locations where the enforcement is sought based on applicable laws of a designated court. When the party brings the arbitral award to a court in one of signatory countries of the New York Convention for enforcement of the award, the court will apply the New York Convention or applicable laws that adopted the Convention to confirm the arbitral award in their procedures prior to the enforcement of the award through their legal system. Korea and the United States are one of signatories of the New York Convention. Therefore, they will follow the provisions of the Convention. In the United States, the FAA that adopted the Convention applies to domestic, non-domestic, and foreign arbitral awards to recognize or enforce the awards at a federal court. The section 201 in the chapter 2 of the FAA stated that "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."[50] The provision of 9 U.S.C. §201 is made a basis of reasons to apply the Convention to foreign arbitral awards that bring a case to a court of the United States. Also, the section 208 of the chapter 2 that titled chapter 1 and residual application stated that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."[51] This provision is supported to apply the chapter 1 of the FAA at a

50) 9 U.S.C. § 201 (1990).

court of the United States in cases of non-domestic arbitral awards that brought from a foreign party in a state.

Thus, in the United States, to recognize and enforce the arbitral awards from international arbitrations, the enforcement proceedings that brought by the party who the enforcement is sought at a court of the United States should be followed by the FAA that is to apply for enforcing awards, defenses of the awards such as the grounds of refusal, due process, or public policy, and documentary formalities to meet the enforcement procedures of the court such as confirming the arbitral awards.

Ⅲ. Analysis of Korean cases in the States

Here, the following cases from Korean or Korean corporations brought to a court of the United States will be analyzed through the applicable laws such as the provisions of the FAA.

In Korea, at that time when they seek the recognition and enforcement of the arbitral awards in the United States, a temporary relief like interim measures of the Arbitration Act of Korea that was amended in May 29, 2016 and effective November 30, 2016 was not set-up completely through the arbitration tribunal system or courts to recognize or enforce the arbitral awards by documentary procedures.

The available cases will be analyzed upon each provisions of the FAA mostly why the courts in the United States granted or denied the arbitral awards from a foreign party, Korean or Korean corporations. Based on analysis of the cases, effective ways in practice will be suggested if necessary.

Thus, to analysis the cases efficiently, it will be separated by an arbitration award that is named as a foreign arbitral award and a non-domestic award for a foreign party. Therefore, to achieve analysis efficiently under the purpose of this research, the case analysis is focused on mainly a foreign arbitral award. However, for further research, cases of the non-arbitral award are listed here.

51) 9 U.S.C. § 208 (1990).

1. Cases of non-domestic arbitral award

The following is the cases concerning a non-domestic arbitral award issued in the United States that is related with Korean or Korean corporations. These are for further researches.

1) The cases seeking to confirm an arbitration award are: (1) Verasonics, Inc. v. Alpinion Medical Systems Co. Ltd., 2017 WL 2215781 (W.D. Wash. May 19, 2017) (unopposed motion to confirm arbitration award); (2) Daesang Corp. v. Nutrasweet Co., 55 Misc.3d 1218(A), 2017 WL 2126684 (Table) (Sup. Ct. New York County May 15, 2017); (3) Daum Global Holdings Corp. v. Ybrant Digital Ltd., 2014 WL 896716 (S.D.N.Y. Feb. 20, 2014); (4) SK Shipping Co. Ltd. v. Cetrotek Holding Ltd., 2009 WL 4884097 (S.D.N.Y. Dec. 16, 2009); and (5) In re Arbitration Between Interdigital Communications Corp. and Samsung Electronics Co. Ltd., 528 F.Supp.2d 340 (S.D.N.Y. Dec. 4, 2007).
2) The case seeking injunctive relief are: (6) Integr8 Fuels Inc. v. Daelim Corp., 2017 WL 1483326 (S.D.N.Y. April 25, 2017) (Plaintiff's motion for a preliminary injunction and temporary restraining order); and (7) Jalee Consulting Group, Inc. v. XenoOne, Inc., 908 F.Supp.2d 387 (S.D.N.Y. Sept. 29, 2012). Also, the following cases each stated one arbitration matter to put into evidence among fact findings: Apple Inc. v. Samsung Electronics Co. Ltd., 2015 WL 3863249 (N.D. Cal. June 19, 2015) (see Samsung internally discussed the terms of Apple's license with Ericsson in preparation for Samsung's arbitration with Ericsson); Apple Inc. v. Samsung Electronics Co. Ltd., 2014 WL 12596470 (N.D. Cal. Jan. 29, 2014) (see extensive discovery to obtain those terms. … a. its negotiations and arbitrations with Ericsson); and Apple Inc. v. Samsung Electronics Co. Ltd., 2013 WL 12146742 (N.D. Cal. Nov. 8, 2013) (see Samsung's wrongful use of the disclosed … in preparing for: a. its negotiations and arbitrations with Ericsson).

2. Cases of foreign arbitral award

The following cases are related with Korean or Korean corporations for the recognition and enforcement of a foreign arbitral award at courts.

Some cases are from the arbitral awards of the Korean Commercial Arbitration Board (KCAB) that held decisions of arbitration through an arbitration tribunal system in Korea which is a signatory of UNCITRAL and the New York Convention. The courts in the states confirmed or considered the arbitral awards of the cases based on the FAA.

1) The cases seeking to confirm a foreign arbitral award issued by KCAB are: (1) Korean Trade Insurance Corp. v. Eat It Corp., 2015 WL 1247053 (E.D.N.Y. March 16, 2015); (2) E. Land Retail Ltd. v Sky Mart Global LLC, 2014 WL 6635018, (D.N.J. Nov. 21, 2014); (3) Republic of Korea v. Trident Autotech Corp., 2014 WL 12607672 (C.D. Cal. March 14, 2014); and (4) Andrew Kim v. Jeong Ji-Hoon, 2013 WL 12131262 (C.D. Cal. 2013) (stated in the Superior Court).
2) The case seeking to enforce a foreign arbitral award issued by KCAB is: (5) Seng Woo Lee v. Imaging3, Inc., 283 Fed. Appx. 490, 2008 WL 2485406 (9th Cir. 2008).

3. Cases analysis: summary

Among the cases, in this research, several cases of commercial arbitration that are related with or come from the arbitration tribunal of the Korean Commercial Arbitration Board (KCAB) are analyzed in detail to show Korean petitioners and Korean corporations what procedures are required for the recognition and enforcement of foreign arbitral awards in the United States; which laws and rules have to be applied for enforcing the awards; what is effective ways to enforce arbitral awards of KCAB in the United States; and what is a best approach to resolve an issue of foreign arbitral awards at a court of the United States.

Prior to analyze claims and procedures of each case narrowly, among cases that were raised a dispute of both parties under a commercial agreement the parties agreed, the following cases relating to arbitration of KCAB are summarized here briefly to introduce claims and results of each proceedings at a court of the United States and show key points of the case in practice.

The first case is *E. Land Retail Ltd. v. Sky Mart Global LLC*[52] that E. Land Retail Ltd. (E Land), a Korean corporation brought "unopposed Motion to Confirm Arbitration

52) *See* E. Land Retail Ltd. v Sky Mart Global LLC, 2014 WL 6635018 (D.N.J. Nov. 21, 2014).

Award"[53] against Sky Mart Global LLC (Sky Mart) to the United States District Court for the District of New Jersey (D.N.J.) in 2014. Pursuant to 9 U.S.C. § 207 of the FAA, the district court granted in favor of E Land seeking to confirm the foreign arbitral award from KCAB and ordered against Sky Mart for enforcing the arbitral award in the United States.

This is a typical case to apply the FAA as adopted the New York Convention in the United States to confirm a foreign arbitral award that was rendered by KCAB in Seoul, Korea.

"The FAA provides that a district court must grant a motion to confirm an arbitration award if four conditions are met[,]"[54] because "[t]he Supreme Court has repeatedly instructed that the FAA 'embod[ies] [a] national policy favoring arbitration.' "[55] Also, the Supreme Court held that in *BG Group PLC v. Republic of Argentina*,[56] "primary responsibility for interpretation and application of local court litigation requirement lay with arbitrators, such that court, on competing motions to confirm and vacate arbitration award, had to grant appropriate deference to arbitrators' decision,"[57] where "[b]oth sides sought review in federal district court: BG Group to confirm the award under the New York Convention and the Federal Arbitration Act (FAA), and Argentina to vacate the award, in part on the ground that the arbitrators lacked jurisdiction under the FAA."[58] In the BG Group case, "[t]he District Court confirmed the award, but the Court of Appeals for the District of Columbia Circuit vacated."[59] However, the Supreme Court reversed.

When a party brought before a court a motion to "confirm the arbitration award, and enter judgment pursuant to the Federal Arbitration Act ('FAA')"[60] against another party

53) E. Land Retail Ltd. v Sky Mart Global LLC, 2014 WL 6635018, at *1 (D.N.J. Nov. 21, 2014).

54) Robinson v. PNC Bank and Linden Volkswagen, 2017 WL 2399082, at *2 (D.N.J. June 2, 2017) (citing 9 U.S.C. § 9) (described 4 conditions under 9 U.S.C. § 9, however, an applicable case of the New York Convention such as a foreign arbitral award from an arbitration tribunal of signatory should be under 9 U.S.C § 207); *see also* 9 U.S.C § 207 (1990).

55) Agnes Xiaohong Xie v. JPMorgan Chase Short-Term Disability Plan, 2017 WL 2462675, at *8 (S.D.N.Y. June 7, 2017) (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346 (2011) (second alteration in original) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)).

56) BG Group PLC v. Republic of Argentina, 134 S.Ct. 1198, 188 L.Ed.2d 220, 82 USLW 4166 (2014).

57) *Id.*

58) *BG Group PLC,* 134 S.Ct. at 1201, 188 L.Ed.2d 220, 82 USLW 4166.

59) *BG Group PLC,* 134 S.Ct. at 1201, 188 L.Ed.2d 220, 82 USLW 4166.

60) Robinson v. PNC Bank and Linden Volkswagen, 2017 WL 2399082, at *1 (D.N.J. June 2, 2017).

that "does not oppose the motion"[61] to the court, "[t]he [c]ourt has considered the parties' submissions and proceeds to rule without oral argument"[62] and will "confirm the arbitration award, and enter judgment."[63]

The second case is *Seng Woo Lee v. Imaging3, Inc.* that Seng Woo Lee and Gil Soo Ryu are on the part of petitioners-appellees (Medison) for Medison Co., Ltd. a Korean corporation, and Imaging3, Inc. is a California corporation, previously called Imaging Service, Inc., on the part of defendant-appellant (Imaging3).[64] This case is for enforcing the arbitral award of KCAB in the United States that was brought action by petitioners to the United States District Court for the Central District of California (C.D. Cal.). Based on the petitioners' action "seeking to enforce an arbitration award issued by"[65] KCAB in Seoul, Korea, the district court granted summary judgment against Imaging3 and confirmed the arbitral award from KCAB to enforce in favor of petitioners Medison. But, Imaging3 appealed concerning confirmation of the foreign arbitral award of the district court. However, the United States Court of Appeals for the Ninth Circuit (9th Cir.) affirmed the district court's decision that confirmed the arbitration award of KCAB, pursuant to 9 U.S.C. § 207 of the FAA, and thus, at the Ninth Circuit, "[t]he Court of Appeals held that arbitration award could not be disturbed."[66]

This case indicated that seeking to enforce a foreign arbitral award is one action to process enforcement of the award with confirming the foreign arbitral award at a district court of the United States under the FAA. It shows that this is one motion to enforce a foreign arbitral award against another party in the court that does "not require … [petitioner] to seek confirmation of foreign arbitral award before the award could be enforced by district court,"[67] because "[t]he New York Convention and Chapter 2 of the FAA require only that the award-creditor of a foreign arbitral award file one action in a federal district court to enforce the foreign arbitral award against

61) *Id.*
62) *Id.*
63) *Id.*
64) *See* Seng Woo Lee v. Imaging3, Inc., 283 Fed. Appx. 490, 2008 WL 2485406 (9th Cir. 2008).
65) Seng Woo Lee v. Imaging3, Inc., 283 Fed. Appx. 490, 2008 WL 2485406 (9th Cir. 2008).
66) *Id.*; *see generally BG Group PLC, supra* note 59 (see foreign arbitration award from arbitrators: opinion of the Supreme Court upon petitioner's cross-motion to confirm arbitration award at the state court).
67) CBF Industria de Gusa S/A v. AMCI Holdings, Inc., 850 F.3d 58 (2d Cir. March 2, 2017).

the award-debtor."[68]

Therefore, we can find that "{t}he FAA cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]'—that is, about what it takes to enter into them."[69] An agreement of both parties "to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts"[70] under the FAA. Thus, "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries[,]"[71] and to process accordingly the recognition and enforcement in the United States, "both the New York Convention and its implementing legislation in Chapter 2 of the FAA 'envision a single-step process for reducing a foreign arbitral award to a domestic judgment.' "[72] Accordingly, enforcing a foreign arbitral award at a federal court is to be one motion to enforce a foreign arbitral award because "[u]nder the New York Convention, this process of reducing a foreign arbitral award to a judgment is referred to as 'recognition and enforcement.' "[73]

4. Cases analysis: details

(1) E. Land Retail Ltd. v. Sky Mart Global LLC

In *E. Land Retail Ltd. v. Sky Mart Global LLC,*[74] both parties made "purchasing contracts contained an arbitration clause stating, "all claims which cannot be amicably settled between Sellers and Buyers shall be settled by arbitration in Seoul, [Republic of Korea], in accordance with the international commercial arbitration rules of the Korean Commercial Arbitration Board ('KCAB') whose award shall be final and binding upon Sellers and Buyers."[75] Because Sky Mart did not deliver goods or quality goods under

68) *AMCI Holdings, Inc.,* 850 F.3d at 74 (citing *See* Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 22 (2d Cir. 1997)).

69) Kindred Nursing Centers Ltd. Partnership v. Clark, — S.Ct. —, 2017 WL 2039160, at *2 (May 15, 2017) (citing 9 U.S.C. § 2).

70) Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-520, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270 (1974).

71) *AMCI Holdings, Inc.,* 850 F.3d at 71-72 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449 [(1974)] (citations omitted)).

72) *CBF Industria de Gusa S/A, supra* note 70, at 72 (citing Amicus Curiae Memorandum Br. at 6).

73) *Id.*

74) E. Land Retail Ltd. v Sky Mart Global LLC, 2014 WL 6635018 (D.N.J. Nov. 21, 2014).

the contracts. E Land brought this case to KCAB to recover their damages on June 18, 2013 and received an arbitral award on April 18, 2014 from KCAB that is an arbitral tribunal in Korea "[a]fter numerous failed appearances by Sky Mart to appear at the initial oral hearing."[76] In the United States, Sky Mart was served "to answer E Land's motion to confirm arbitration award."[77] However, Sky Mart did not answer the E Land's motion. Based on these facts, the federal district court has reviewed subject matter Jurisdiction under 9 U.S.C. § 203; venue pursuant to 9 U.S.C. § 204; confirmation of foreign arbitral awards under 9 U.S.C. § 207; the New York Convention, article IV; and 9 U.S.C. § 201.

The court found that E Land has met the requirements of those provisions of the FAA that adopted the New York Convention. "Once the requirements are complied with, the district court's role in reviewing a foreign arbitral award is limited: 'The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition specified in the said Convention.' "[78] Sky Mart did not invoke any grounds for refusal or opposition of confirming the arbitral award.

Thus, the federal court granted E Land's motion[79] to confirm the arbitral award from KCAB pursuant to 9 U.S.C. § 207 and ordered money damages including interest and arbitration cost in favor of E Land on November 21, 2014.

(2) Seng Woo Lee v. Imaging3, Inc.

KCAB had resolved contract dispute matters between two corporations and issued an arbitral award of the case of *Seng Woo Lee v. Imaging3, Inc.*[80] that brought enforcing the arbitral award to the United States Court of Appeals, Ninth Circuit. The court

75) *Id.* at 1.
76) *Id.* at 1.
77) *Id.* at 1.
78) *Id.* at 1 (citing 9 U.S.C. § 207; Admart AG v. Stephen & Mary Birch Found., Inc., 457 F.3d 302, 307 (3d Cir. 2006)).
79) *See Id,* at 1 n. 1 (citing "in domestic arbitration 9 U.S.C. § 6 provides that applications for relief under the United States Arbitration Act shall be made by motion …. This provision has been incorporated into proceedings under 9 U.S.C. § 201 et seq. through the provision of 9 U.S.C. § 208") (citation omitted).
80) Seng Woo Lee v. Imaging3, Inc., 283 Fed. Appx. 490, 2008 WL 2485406 (9th Cir. 2008) (Seng Woo Lee on the part of petitioners-appellees is a co-receiver for Medison Co. Ltd. a Korean corporation with Gil Soo Ryu, as co-receiver for Madison Co. Ltd. a Korean corporation; Image3, Inc is a California corporation, f/k/a Imaging Services, Inc. as defendant-appellant).

affirmed the summary judgement of the United States District Court for the Central District of California that granted the confirmation of arbitration award of KCAB to enforce the arbitral award because Imaging3, Inc (Imaging3) did not make affirmative defenses under the New York Convention and 9 U.S.C. § 207 that "are limited to the seven grounds listed in Article V of the New York Convention."[81] Basically, Imaging3 did not provide "compelling reason for the panel to doubt the applicability of the arbitration clause"[82] in the contract. Even though Imaging3 argued that the "contract was between Imaging3 and 'Medison Econet,' not 'Medison,' and that Medison breached its contract with Imaging3,"[83] the court stated that "those issues were considered by the KCAB and are not subject to reconsideration here."[84]

Additionally, the court stated that "[i]ncapacity is a basis on which the district court could refuse to enforce an arbitration award under the New York Convention, but incapacity 'at the time of the hearing' is not a true incapacity defense to the consummation of a contract."[85] Imaging3 argument was "not at the time of the signing of the underlying contract, but at the time of the hearing, based on its catastrophic fire loss."[86] Thus, "Imaging3's defenses present no reason for the panel to disturb results of the arbitration hearing."[87]

Also, the court found that "[t]he district court correctly determined that the counterclaims were barred by res judicata[ ]"[88] that is known as claim preclusion to "refer to the effect of a judgment on the merits in barring a subsequent suit between the same parties or their privies that is based on the same claim[,]"[89] because "[a]n arbitration

81) *Imaging3, Inc.,* 283 Fed. Appx. at 492 (citing *See* China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc., 379 F.3d 796, 799-800 (9th Cir.2004) ("Our review of a foreign arbitration award is quite circumscribed. Rather than review the merits of the underlying arbitration, we review de novo only whether the party established a defense under the Convention.") (citations and internal quotation marks omitted)).

82) *Imaging3, Inc.,* 283 Fed. Appx. at 492-93.

83) *Imaging3, Inc.,* 283 Fed. Appx. at 493 (citing See China Nat. Metal Prod., 379 F.3d at 799-800; 9 U.S.C. §§ 201, 207).

84) *Id.*

85) *Id.*

86) *Id.*

87) *Id.*

88) *Id.*

89) McDonald v. City of West Branch, Mich., 466 U.S. 284, 287 n. 5, 104 S.Ct. 1799, 1801, n. 5, 80 L.Ed.2d 302, 115 L.R.R.M. (BNA) 3646, 34 Empl. Prac. Dec. P 34, 290 (1984) (citing See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, n. 5, 99 S.Ct. 645, 649, n. 5, 58 L.Ed.2d 552 (1979)).

decision can have res judicata or collateral estoppel effect."[90] Collateral estoppel is known as issue preclusion that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."[91] Collateral estoppel is also applied in this case because "Imaging3 seeks to use the counterclaims to re-litigate the entire contract dispute with Medison on the same issues presented to the KCAB."[92]

The court finally stated that "Imaging3 cannot disturb that result merely because it is unhappy with the result from the arbitrator."[93] Likewise, the FAA, "[f]ederal law permits a party who was victorious in a recognized foreign arbitration proceeding to seek confirmation of the award in the United States under the New York Convention, and the statute gives the courts little discretion when considering such petitions"[94] for enforcing the foreign arbitral awards. The key factors to enforce the award are in the provisions of the FAA, mostly 9 U.S.C. § 201 and §207 to confirm the foreign arbitration awards and against the opponent's defenses such as grounds of refusal in referring to article V of the New York Convention for refusal of the recognition and enforcement of the arbitral award.

In practice, the most key factors exist at initial stage when both parties make a contract. These factors should be included in the arbitration clauses and the agreement in writing to cover provisions of the New York Convention for avoiding any defenses from opponents with respect to an arbitration award that is given at an arbitration tribunal and preventing disputes of both parties concerning the arbitral award that is to enforce the award at a court.

Ⅳ. Conclusion

This research has been focused on the recognition and enforcement of arbitral awards in the United States relating with Korean or Korean corporations and its cases,

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90) *Imaging3, Inc.,* 283 Fed. Appx. at 493 (citing C.D. Anderson & Co., v. Lemos, 832 F.2d 1097, 1100 (9th Cir.1987) (citation and alteration omitted)).

91) Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980) (citing Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210.5 [(1979)]).

92) *Imaging3, Inc.,* supra note 83, at 493.

93) *Id.*

94) *Imaging3, Inc.,* 283 Fed. Appx. at 492.

especially for foreign arbitral awards. A motion for the recognition and enforcement of foreign arbitral awards should be brought to federal courts of the United States under the Federal Arbitration Act (FAA) as adopted the New York Convention.

Thus, this research has been reviewed what is recognition and enforcement of international arbitral awards in the United States that come from disputes with foreign parties; and analyzed cases, applicable rules, and procedures of enforcement of international arbitral awards in the United States; and which approach is proper to seek the recognition and enforcement of the awards.

In this research, at the chapter 1 introduction, it stated necessity of this research, the purpose of the research, and utilization of materials for this research. At the chapter 2, it reviewed applicable rules and laws to analyze the recognition and enforcement procedures, and appropriate cases with the procedures were studied. At the chapter 3, available cases in the United States were analyzed for the recognition and enforcement of foreign arbitral awards, especially an arbitral award issued by the Korean Commercial Arbitration Board (KCAB), including one of the arbitration party that is Korean or Korean corporations. Finally, the chapter 4 is conclusion part of this research. It indicates findings of this research. Also, it shows the results of this research and suggests further research of arbitration. The results of this research will be helpful for a party to seek a right approach to enforce a foreign arbitral award in the United States.

Upon the research, it finds that the FAA and the New York Convention are right applicable rules seeking a relevant motion for the recognition and enforcement of the awards. Also, the analysis of cases shows us what approach is proper ultimately to enforce the awards at a court even it depends on each case. It is that getting a clear and unmistakable order of foreign arbitral award from an arbitration tribunal is right approach to seek an unopposed motion to confirm the arbitral award for enforcing the arbitration award at court. Additionally, it finds that enforcing a foreign arbitration award at federal courts is one step process that does not require another motion to confirm the foreign arbitration award. Therefore, based on research of the cases, we found that there are several types of motion typically in foreign arbitration cases that are a motion to confirm foreign arbitration award, a motion to enforce foreign arbitration award, and a motion to compel arbitration.

Under the review of each cases narrowly under the FAA and the New York Convention, it found that at initial stage, a motion of each parties that rightfully stated claims or defense is important to achieve a decision of the court favoring my allegations. In addition to right allegations in a motion, prior to receiving an arbitration award at an arbitration tribunal, a party should know that there are the most important things from the beginning of business negotiations to make an agreement or contract as containing an arbitration clause. Therefore, it found that in practice, the most key factors exist at initial stage when both parties make a contract.

These factors should be included in the arbitration clauses and the agreement in writing to cover provisions of the New York Convention for avoiding any defenses from opponents with respect to an arbitration award that is given at an arbitration tribunal and preventing disputes of both parties concerning the arbitral award that is to enforce the award at a court.

Thus, in the analysis of cases, we found that it is also important an attorney role that should know at least business and law to make an agreement or contract including an arbitration clause that must clearly fall within scope of the arbitration. When dispute is raised by both parties in the arbitration agreement, a participated attorney of one party to resolve a dispute of the party in arbitration must have knowledge of business and/or engineering and law upon the case for right approach to receive clearly and unmistakably an arbitration award of arbitration tribunal within that is subject to arbitration or defense petitioner's claims and thereafter, bring an unopposed motion to confirm the arbitration award, an action to seek enforcement of the foreign arbitration award, or right allegations to a court in the United States. Accordingly, results of this research show us which rules and laws must be applied for enforcing the foreign arbitral awards; what is effective ways to enforce arbitral awards of KCAB in the United States; and what is a best approach to resolve an issue of foreign arbitral awards at a court of the United States.

This research was mainly focused on the recognition and enforcement of foreign arbitral awards that issued by KCAB and its cases for Korean and Korean corporations in the United States. Thus, further research is remained to analysis of non-domestic awards of Korean and Korean corporations in the United States.

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