

## Enforcement of Arbitral Awards Incompatible with the Korean Procedural Framework

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*This paper examines the current enforcement regime of Korea and provides an overview of the same with focus on the changes before and after the 2016 revision of the Korean Arbitration Act. It briefly studies the pro-arbitration bias of the New York Convention, as well as the Korean judiciary's stance on the enforcement of foreign arbitral awards. Some of the substantial issues discussed in the paper include the major procedural changes brought about by the 2016 amendment with respect to the enforcement of arbitral awards. The paper also discusses the rare instances where the Korean judiciary refused to recognize or enforce an arbitral award, and the reasoning behind the refusal. The paper discusses and analyzes four court judgments that reflect the Korean judiciary's position on the enforcement of foreign and domestic arbitral awards in Korea. It focuses on the NDS v. KT Skylife case, where the court of first instance refused the enforcement on grounds that the relief granted by the arbitral tribunal was not specific enough for enforcement. Ultimately, the appellate court, although agreeing on the specificity requirement, reversed the ruling and granted an enforcement judgment on grounds that the application for enforcement had the legal interest to request an enforcement judgment.*

Key Words : International Arbitration, Enforcement, Arbitral Awards, New York Convention Article III, Korean Arbitration Act, Requirement for Specificity of Relief, Incompatibility with Procedural Rules of the Enforcing Courts

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## I. Introduction

Arbitration, in simple words, can be described as a private dispute settlement procedure under which parties have the autonomy to decide on the rules of procedure, place, and language of the dispute settlement procedure. It acquires an international character when the parties to the dispute belong to different states<sup>1)</sup>. Unlike a court, where the proceedings end upon the pronouncement of the judgement, an arbitration proceeding is concluded when the tribunal issues an award. Such an award is considered final and binding and cannot be appealed at a court of law on matters of law or matters of fact. The enforcement of an award so issued is ensured by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the New York Convention). All the member states have an obligation to enforce arbitral awards under international law.

This paper studies the pro-enforcement bias of Article 3 of the New York Convention against the backdrop of judicial interpretation by Korean courts with respect to the recognition and enforcement of arbitral awards. It further examines the role of other provisions of the Convention, and those of the Korean Arbitration Act, in preventing challenges to awards and rejection of awards. Although Article 5 provides a limited and exhaustive list of conditions to be satisfied in order to refuse the enforcement of an award, there have been a few instances wherein courts have relied on reasons outside the sphere of Article 5 to reject the enforcement of an award. This paper will attempt to answer the question of whether the obligation to enforce in accordance with the procedural rules under Article 3 provides a backdoor to limiting enforceability by introducing grounds for refusal that lay beyond the scope of Article 5.

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1) This subject will be discussed in more detail under section III.

Further, this article scrutinises the interpretation of “in accordance with the rules of procedure” from Article 3 in various texts and judgments by the Korean judiciary, and explains in a concise manner, the major changes in the amended Korean Arbitration Act, 2016. Finally, the implications of the judgment in *NDS v. KT Skylife*, a much-discussed Korean court judgment on the enforceability of awards, is discussed in detail.

## II. Enforcement Regime Under The New York Convention

Article 3 of the New York Convention is a mandatory provision that deals with the recognition and enforcement of arbitral awards. It sets down the obligation to recognize arbitral awards as binding and enforce them. Often touted as the “pro-arbitration biased” provision of the convention, Article 3 gives the prevailing party the *prima facie* right to enforce its award in a relevant jurisdiction, irrespective of whether the other party has assets in that jurisdiction. Although not mentioned expressly under the provision, Article III also lends a *res judicata* effect to arbitral awards, as evidenced by awards enforced by national courts across various countries.<sup>2)</sup>

There are three steps leading to enforcement of awards: recognition, execution and recovery.<sup>3)</sup> Only when the prevailing party effectively navigates all three steps can an arbitration be said to have concluded successfully. Recognition refers to the acknowledgement of the award by the court at the place of enforcement. Either subsequently to, or simultaneously with the recognition judgment, the local authorities at the place of enforcement execute the award so recognized by the enforcement judgment. The final step involves the recovery of funds upon execution. The arbitration proceedings would be rendered meaningless if the party were to fail to get through any of these steps. The enforcement of an award takes place in accordance

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2) *American Express Bank Ltd. v. Banco Español de Crédito S.A.*, Southern District Court of New York, United States of America, 13 February 2009, 1:06-cv-03484-RJH. See also *Gulf Petro Trading Company Inc., et al. v. Nigerian National Petroleum Corporation, et al.*, Court of Appeals, Fifth Circuit, United States of America, 7 January 2008, 06-40713.

3) The Enforcement Chimera, Cameron Ford, Kluwer Arbitration Blog, May 10, 2018.

with the rules of procedure of the state where the enforcement is sought.

### 1. Interpretation Of “In Accordance with the Rules Of Procedure”

The rules of procedure applicable to the recognition and enforcement of arbitral awards in a territory are not specified in the Convention. States have the discretion to define the rules of procedure applicable to the recognition and enforcement of arbitral awards in their territory. It is the general understanding that the rules of procedure of the state where the enforcement is sought, will be applied.<sup>4)</sup> Such rules of procedure are the national procedural rules in practice in the state where the award is sought to be recognized and enforced. These national procedural rules are not to be confused with the procedural rules of the seat of arbitration, or place of hearing, which will not be applicable if the place of enforcement is different from the seat of arbitration.

The rules of procedure are also different from the conditions governing the recognition and enforcement of foreign arbitral awards. The former refers to the national procedural rules, while the latter refers to the conditions exclusively listed in the New York Convention. Although states have the autonomy to decide on the rules of procedure to be followed, courts have interpreted the meaning of the term “rules of procedure” quite narrowly, and hence, they cannot differ vastly from common practice. The framers of the rules of procedure are expected to take cognizance of the fact that the rules are “intended to interface with a variety of legal traditions”<sup>5)</sup>. However, the wide discretion afforded to states presents a very obvious issue of forum shopping, for an award that cannot be enforced in one state due to its non-compliance with the rules of procedure of that state may stand a chance of being enforced in another state with a different set of procedural rules with which the award conforms.

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4) See, e.g., William W. Park, *Respecting the New York Convention*, 18(2) ICC Bull. 65, 70 (2007).

5) *Yugraneft Corporation. v. Rexx Management Corporation*, Supreme Court, Canada, 20 May 2010, 2010 SCC 19.

## 2. Scope of Local Procedural Requirements That Provide Reasons to Reject Recognition or Enforcement Despite Not Being Listed as Reasons for Refusal Under the New York Convention

Article 5 of the New York Convention lays down the sole grounds for rejection of enforcement of an award. These grounds are exhaustive and are meant to be interpreted narrowly for the purpose of rejection of an enforcement claim. In rare cases, courts may rely on exceptions not specified under Article V to reject the recognition of an award. For instance, although there are form requirements with respect to arbitration agreements, there are none when it comes to arbitral awards. However, there is no provision in the New York Convention prohibiting contracting states from making form requirements for arbitral awards. Article 5 does not include any exception based on a failure to satisfy formal requirements. One way of interpreting this lacuna is, the New York Convention does not look favorably upon contracting states imposing form requirements radically different from those frequently used. The framers possibly thought if there is no provision governing form requirements the contracting states would be hesitant to make discriminatory or peculiar form requirements.<sup>6)</sup>

Several national laws contain mandatory form requirements for international arbitral awards such as having a written award, containing the reasoning behind the award, the dated signatures of some or all of the arbitrators, and so on. Such form requirements are modifiable only in some cases. However, all these requirements are general in nature and do not reflect any distinct requirements of that particular country.

In some countries, the national arbitration law prescribes formal defects as a ground for annulment. Formal defects include failure to sign an award, failure to provide reasons, failure to comply with other requirements for an award, such as mentioning the date and place, and so on. On the other hand, in some jurisdictions such formal

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<sup>6)</sup> UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

defects may not constitute grounds for annulment, and in some cases, may even be waived. There is a general consensus among the states with well-developed arbitration legislations, that courts should refrain from taking the position of non-recognition on basis of formal defects in an award, and that a pro-arbitration stance must prevail as the default mode. While the New York Convention provides for formal defects with respect to annulment provisions, none of the provisions of Article V even remotely mention formal defects as a ground for non-enforcement. Hence, it can be said that the failure to raise the issue of formal defects in annulment proceedings may be construed as a waiver of such objections at later stages of the enforcement proceedings. Thus, it is clear that the grounds for refusing an award that are beyond the scope of Article 5 are quite narrow, and not encouraged by courts.

### 3. The Venom and the Antidote: Articles 3 and 5 of the Convention

It is evident, even from a cursory reading of Articles III and V of the New York Convention, that the provisions impose an obligation on the domestic courts of the Contracting States to recognize and enforce foreign arbitral awards. Article 3 states that, “Each Contracting State shall recognize arbitral awards as binding”, and Article 5 provides that “recognition and enforcement of the award may be refused...*only if* one of the specified exceptions apply to the case at hand.” The use of terminology such as “shall” and “only if” make the intent of the framers very clear. The provisions were meant to convey, without a shadow of doubt, the mandatory obligation of the Contracting States to enforce the awards and allow rejection of enforcement only on the narrowest of grounds.<sup>7)</sup>

An interesting aspect of the New York Convention is the absence of a provision mandating denial of recognition of awards. This aspect practically seals the Convention’s

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7) While Article 5 allows refusal of enforcement of awards in cases where due process was not properly ensured, even those cases are construed narrowly. For example, U.S. courts when reviewing challenges on grounds of evidentiary matters, largely defer to the arbitral tribunal’s discretion on how evidence is presented and evaluated. Jung Won Jun, “U.S. Courts’ Review of Article 5(1)(b) under the New York Convention for the Enforcement of Foreign Arbitral Awards” *Journal of Arbitration Studies*, Vol.24, No. 3, 2014, pp.97-101.

pro-arbitration bias. Unlike national courts wherein the courts may take *suo moto* cognizance of glaringly incongruent issues, in international arbitration, the tribunal only acts upon the parties' wishes. Thus, the absence of a provision mandating denial of recognition of awards means even if there is a valid reason to reject the enforcement of an award, the court need not do so if the parties do not request it.

#### 4. Possible Abuse of Enforcement Conditions Under Article 3 of the Convention

The wide discretion afforded to domestic courts under Article 3, the crux of which is, "in accordance with the rules of procedure of the territory", has led to peculiar reasoning by parties and courts in some cases. As mentioned in an earlier section, parties sometimes rely upon formal defects to contest the enforcement of an award. In a case before the Hague Court of Justice<sup>8)</sup>, the losing party contended that the award was not binding on the parties as it was not dated. The arbitral award did not contain the date on which it was rendered. However, in this case the President declared that the prevailing party had provided sufficient evidence at the session held in the court, and since the award was signed by all the arbitrators, it was deemed to have been effectively rendered. The court steered the argument towards the public policy compliance requirement under Article 5, and declared that the fundamental principles of Dutch national public policy were not violated as dating of an arbitral award is not a pre-requisite under Dutch law on civil procedure.

Another common contention by parties for non-enforcement of an arbitral award is the ambiguity in the operative part of an award. In a US federal court case<sup>9)</sup>, the respondent argued that the final award rendered by the tribunal was ambiguous in the matter of apportionment of costs, and hence was not capable of being enforced. However, the court disagreed and held that even if the award was ambiguous, it does not have the power to vacate the award. Moreover, it declared that the ambiguity reflected in the award section of the final award can be clarified by referring to the

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8) Judgment of 25 April 1973, IV Y.B. Comm. Arb. 305 (Hague Rechtspraak) (1979).

9) *BSH Hausger- ate GmbH*, 291 F. Supp. 3d at 444, 445.

records and the tribunal's final award opinion. The presiding judge in this case was of the opinion that the parameters for refusing enforcement are "rigidly circumscribed" under the New York Convention, and a state may refuse to enforce the award only on the grounds specified under Article 5 of the Convention. In conclusion, the court held that since ambiguity is not a ground "explicitly set forth" under Article 5, it cannot act as a ground for non-enforcement.

The US Federal courts, in a trilogy of cases<sup>10)</sup>, refused to enforce foreign arbitral awards citing reasons of lack of adequate jurisdiction. In *Base Metal*<sup>11)</sup> and *Glencore Grain*<sup>12)</sup>, the court held that it did not have personal jurisdiction over the foreign respondent, and hence was barred from enforcing the awards. In *Monegasque de Reassurances*<sup>13)</sup>, the court invoked the *forum non conveniens* doctrine and held that it was an unsuitable forum to claim the recognition of the award. It relied upon the "rules of procedure" under Article 3 to justify its reasoning that the court was not the suitable forum to judge on the enforcement of the award. In the upcoming sections, we will discuss cases in which the Korean judiciary considered procedural deficiencies not falling under the scope of Article 5 of the New York Convention to refuse the enforcement of arbitral awards.

### III. Enforcement Regime in Korea

In the sections above we discussed the overall regime of Article 3 and the range of discretion it provides to courts of the member states. In the following sections we discuss and analyze arbitral awards, the recognition and enforcement of which was sought in Korean courts, but faced the risk of being denied (and in some instances

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10) William W. Park, "Convention Violations and Investment Claims", *Arbitration International*, 29<sup>th</sup> Issue, 2013, pp. 175-186.

11) *Base Metal Trading, Ltd. v. OJSC 'Novokuznetsky Aluminum Factory'*, 283 F.3d 208 (4<sup>th</sup> Cir. 2002).

12) *Glencore Grain Rotterdam B. V. v. Shivnath Rai Harnarain Co.,* 284 F.3d 1114, 1122&n.5 (9<sup>th</sup> Cir. 2002), upholding a district court decision refusing to recognize an award made against an Indian rice exporter deemed not to be present in or having assets in the district.

13) *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 E3d 488, 498-501 (2d Cir. 2002).



was denied) recognition or enforcement for reasons not expressly listed under the Korean Arbitration Act or the New York Convention. We will also discuss incompatibility (or potential incompatibility) of awards with Korean litigation procedural requirements that may lead to the refusal of recognition or enforcement of awards.

For a better understanding of this topic, it would be prudent to first understand (i) the legal effects conferred on an arbitral award under Korean law, or other applicable legal sources in the absence of recognition and enforcement applications, and (ii) the recognition and enforcement mechanism under Korean court system with special focus on the 2016 revisions to the Korean Arbitration Act. As a preliminary issue, it is also useful to understand the criteria for distinguishing between domestic and foreign awards, since different legal sources apply to the two categories of awards.

We also delve deep into categories of cases where the relief granted by the arbitral tribunal was incompatible (or potentially incompatible) with Korean procedural requirements, thus risking its enforceability. Based on the outcome of these cases, we attempt to assess the Korean courts' position on the relevant issues

## 1. Arbitration Law of Korea

Korea is a signatory to the New York Convention of 1958. It was also one of the early adopters of UNCITRAL Model Law in Asia, and the arbitration law currently in use is modeled after the UNCITRAL Model Law of 2006.<sup>14)</sup> It is often said that the treatment of domestic and foreign awards is substantially the same under Korean law. Therefore, there is little practical need to distinguish foreign awards from domestic arbitral awards. The track record of the Korean court decisions suggests this may be the case as both foreign and domestic awards are recognized and enforced consistently.<sup>15)</sup> There are known to be very few, if any, instances of rejection of

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14) Young Joon Mok, Seung Jae Choi, *Commercial Arbitration Law*, Pakyoungsa Publishing, 2019, pp. 14-17, 22

15) Court judgments in Korea are not considered to be part of the law but are treated as persuasive interpretations of the codified statutes. As such Korean courts do not publish the full text of all lower court judgments. Instead, the court periodically selects noteworthy cases, and publishes them in an anonymized format without the pleadings. Hence there are no official statistics which exhaustively cover all the arbitration related cases reviewed by the court. However, the rare cases where international arbitral awards were set aside or refused enforcement (whether seated in Korea or elsewhere) rarely go unnoticed by the arbitral community, as they are almost always

awards by the courts.

However, while both domestic and foreign awards are treated equally and favorably, there are different legal provisions that apply to such awards. Korea has only one statute for arbitration, and the provisions distinguish foreign from domestic awards. For precision, it is important to understand the criteria for distinction between domestic and foreign awards, and the different provisions or legal sources that apply to them.

## 2. Determining Whether an Arbitral Award Is a Domestic or Foreign Award

Article 2 of the Korean Arbitration Act states “This Act Shall apply to cases where the place of arbitration under Article 21 is Korea; provided that Articles 9 and 10 shall apply in cases where place of arbitration is undecided, and Articles 37 and 39 shall apply to cases where the place of arbitration is outside of Korea.” From the text of Article 2 of the Korean Arbitration Act, it is clear that all the provisions under the Act, with the exception of Article 9, 10, 37 and 39, apply only to cases where the place of arbitration is Korea.

The text of Article 2 suggests that the seat of arbitration is the only criteria for determining the nationality of an arbitral award. This leads to the inference that arbitral awards arising from international arbitration cases, even those which have no factual or legal connection to Korea, should be classified and treated as Korean domestic awards under Korean law if the arbitration is seated in Korea.<sup>16)</sup>

Considering the seat of arbitration is often a choice made on the basis of convenience, and without any necessary relation to the substance of a dispute, such categorization might appear superficial. Article 38 of the Korean Arbitration Act, captioned “Domestic Arbitral Awards” refers to “arbitral awards made in Korea” as domestic arbitral awards. Meanwhile, Article 39, captioned “Foreign Arbitral Awards”, provides that the recognition or enforcement of foreign arbitral awards is “subject to the Convention on the Recognition and Enforcement of Foreign Awards.” In relation to

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widely publicized by the counsel and parties involved.

16) Kwang Hyon Sok, *International Law of Civil Procedure - Private International Law (Procedure)*, Pakyounsa Publishing, 2012, p. 546

this, Article I (1) of the New York Convention provides, “the Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.” The Convention, in a similar fashion to the Korean Arbitration Act, puts forth as its first criteria (for determining the applicability of convention) the territory where the arbitral award was made, thus pointing to the seat of arbitration.

There are some conflicting theories as to whether arbitral awards, as long as the arbitration is seated in Korea, should be categorized as domestic awards, regardless of the international elements involved. The prevailing theory responds in the affirmative.<sup>17)</sup> This view adheres strictly to the language of Articles 2, 38 and 39 of the Korean Arbitration Act. According to this, an award from an arbitration seated in Korea can only classify as a domestic award, regardless of the internationality the dispute. A minority view<sup>18)</sup>, but still a compelling view, takes into consideration the second sentence of Article I (1) of the Convention, and Article 2(2) of the Korean Arbitration Act, and asserts that the Korean court has the discretion to determine whether an award need not be considered a domestic award. Under this view, international arbitral awards, even if seated in Korea, may be classified as foreign awards depending on the choice of the parties.<sup>19)</sup>

And as discussed in Section II above, New York Convention gives discretion to member states to determine the criteria for awards to be considered domestic awards.

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17) Id., Kap-you Kim et al., *Arbitration Law in Korea*, 2016; Sung Woo Lim, *International Arbitration*, Pakyoungsa Publishing, 2016, p. 34;

Ho-won Lee, *Issues on Arbitration Law*, Pakyoungsa Publishing, 2020, pp.111, 112.

18) Mok & Choi, *Supra*, at pp. 311, 312.

19) The issue of distinguishing between domestic awards and foreign awards is a separate issue from the distinction between international arbitration and domestic (local) arbitration, and this may be a matter picked up by arbitral institutions. For example, Article 2 of the KCAB International Rules provides the definition for international arbitration. This is separate from the determination of nationality of awards under the Korean Arbitration Act. Cases categorized as international arbitration under the institutional rules are handled by a separate Secretariat specialized in international cases. The separation of case management authority allows the KCAB to administer international cases in a manner closely attuned to the expectations and requirements of international parties and disputes that involve multinational elements.

The Korean Arbitration Act in Articles 38 and 39 elected to make the seat of the arbitration the determining criteria, rather than the nationality of the parties or the international elements of the dispute. The NDS v. KT Skylife case (discussed below), despite all the international elements involved in the dispute, was seated in Korea and consequently qualified as a domestic award and was treated as such.

But as can be seen below, being categorized as a domestic award does not subject the award to stricter national standards, nor does being a foreign award exempt the award from satisfying conditions or mandatory requirements under the Korean legal system.<sup>20)</sup> The effect of an award, or the requirements for enforcement and recognition, are substantially the same and many a time identical, regardless of the nationality of the award.

### 3. Legal Effects Conferred Upon an Arbitral Award Under Korean Law

#### (1) Res Judicata Effect

##### 1) Effect under Article 35 of the Korean Arbitration Act

Article 35 of the Korean Arbitration Act provides that “Arbitral awards shall have the same effect on parties as a final and conclusive judgment of the court. Provided however, that this will not be the case if the award is refused recognition and enforcement as per Article 38.”

The often-cited legal effects of a final and conclusive judgment of a court are res judicata and enforceability.<sup>21)</sup> Following are the notable differences between court judgments and arbitral awards: (1) while a final and conclusive court judgment has the effect of being enforceable as soon as it is rendered, arbitral awards do not gain the enforceability effect until the court from which enforcement is sought renders an enforcement judgment;<sup>22)</sup> and (2) while a final and conclusive court judgment is no

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20) One possible exception is the definition of public order under Korean law, which may be different from the New York Convention; but that is an issue beyond the scope of this paper.

21) There is another category of legal effect mentioned in the New York Convention, which is that an award is “binding on the parties.” It is often viewed to refer to res judicata.

22) Here, the term enforceability effect (*jinhaeng-ryuk*) refers to the legal effect from the perspective of the court. To lack the enforceability effect means that the award cannot be compulsorily enforced

longer subject to challenge, arbitral awards can be challenged by means of set aside or refusal of recognition and enforcement applications.<sup>23)</sup>

Because of this difference, the interpretation of Article 35, in particular the phrase “same effect on parties as a final and conclusive judgment of a Korean court” gave rise to significant commentary among Korean jurists prior to the 2016 revision of the Korean Arbitration Act.<sup>24)</sup> This debate has been partially settled by the 2016 amendment of the Korean Arbitration Act. In the amended Act, the second sentence reads, “Provided however, that this will not be the case if the award is refused recognition and enforcement”. This was added as a proviso to Article 35, and it clarifies that the finality and conclusiveness conferred on an arbitral award is not unconditionally identical to a court judgment, but rather conditional to the absence of grounds for refusal as enumerated in Article 38.<sup>25)</sup>

Furthermore, and as well be discussed further in the following sections, the prevailing view is that an arbitral award in itself cannot be enforced without the intervention of the court, but requires a separate enforcement judgment under Article 38. This makes it clear that this final conclusive effect does not refer to the same type of enforceability as a final and conclusive court judgment.<sup>26)</sup>

That leaves us with the other effect, *res judicata*. The prevailing view, and one that is supported by various court decisions, is that finality and conclusiveness referred to in Article 35 includes *res judicata*.<sup>27)</sup> At this stage it is worth looking closely at the effect of *res judicata*. *Res judicata* refers to the limitation that the same parties may not dispute the same subject matter. As a result, the losing party is barred from starting a separate litigation or new arbitration, seeking a finding that is inconsistent or conflicting with the existing arbitration award. A party to the arbitration cannot claim

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by the enforcement agency without going through the enforcement application in the courts. This is different from the usage of the term “enforceability” which the inherent feature commonly attributed to arbitral awards.

23) Mok & Choi, *Supra*, at pp. 245- 250.

24) Ho-won Lee, *Supra*, at p. 135-143.

25) Mok & Choi, *Supra*, at p. 314.

26) Minority view: Mok & Choi, *Supra*, at pp. 245- 250, latent enforceability; Majority view: Sung Woo Lim, Kwang Hyeon Seok, Yong Gil Kim, Sumi Kang, Bong Seok Kim et al., Seol Ah Park, “Enforcement of Foreign Arbitral Awards – Focus on Enforceability”, *Korean Forum on International Trade and Business Law*, Korea International Trade Law Association, 2018, 27<sup>th</sup> Issue, p. 77.

27) Mok & Choi, *Supra*, at pp. 245- 250; Seol Ah Park, *Supra*, at p. 75; Kap-You Kim et al., *Supra*, p. 244.

the existence or non-existence of the cause of action in a new arbitration or a court litigation to the extent it conflicts or contradicts the arbitral award.

Res judicata effect is created as an inherent effect of the arbitral award. Therefore, even if the winning party does not file for, or obtain a recognition order of the arbitral award, the award already has res judicata effect.<sup>28)</sup> In that instance, the losing party may not ask the court or a subsequent tribunal to make rulings that contradict the award made previously, and can only challenge the award under the very limited grounds and the specific procedures allowed under the Korean Arbitration Act, namely Article 36 (set aside) and Article 38 (grounds for refusing enforcement of domestic arbitral award).

## 2) Non-Applicability of Article 35 on Foreign Arbitral Awards

In terms of application of specific statutory provisions, the difference between domestic and foreign awards is probably most noticeable in the case of applicability of Article 35 of the Korean Arbitration Act. There is no separate provision in the New York Convention that corresponds to Article 35 of the Korean Arbitration Act, and the effect of Article 35 only pertains to awards seated in Korea.<sup>29)</sup> However, although Article 35 only applies to arbitration awards seated in Korea, this does not mean foreign arbitral awards, at least in the eyes of the Korean courts, do not have the same binding effect on the parties.

As discussed in Section II, all discussions on this topic seem to be in agreement on the fact that foreign arbitral awards also have final and conclusive binding effect on the parties and this is regardless of the applicability of Article 35 of the Korean Arbitration Law.

## (2) Automatic Recognition

Article 37 applies to both foreign and domestic arbitral awards. Interestingly, Article 37 features an automatic recognition of awards, whether foreign or domestic. Prior to the revision in 2016, Article 37 read, “the recognition and enforcement of an arbitral award should be done through a court judgment recognizing and enforcing the

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28) See below the discussions on automatic recognition.

29) Ho-won Lee, *Supra*, At pp. 111-112.

award.”<sup>30)</sup> Prior to the 2016 Revision of the Korean Arbitration Act, there was a theoretical debate as to whether recognition of awards was possible in the absence of a separate recognition judgment, i.e., whether automatic recognition was possible, and also whether this was applicable to foreign awards.<sup>31)</sup>

In the 2016 Act, Article 2 expressly states that Article 37 applies to foreign awards, and Article 37 expressly references Article 39 (enforcement of foreign awards). More importantly, Article 37 of the 2016 Act also states that awards should be recognized and enforced as long as there are no grounds for refusal, and that parties may, at their election, seek a recognition order. In other words, the effect of an award is acknowledged in the eye of the court, even without a recognition order as long as there are no grounds for refusal. A recognition order would usually be sought by the winning party if there is a challenge by a losing party. In the absence of a challenge, the award stands as a valid, conclusive and final decision on the legal dispute between the parties and the losing party bears the obligation to comply with the award.<sup>32)</sup>

### (3) Enforceability Derived Directly from Arbitral Awards?

Foreign awards are subject to the New York Convention, and Article III of the Convention lays down the specific procedure of enforcement to the procedural rules of the courts of the territory upon which the award is relied upon.<sup>33)</sup> The prevailing view appears to be that the applicable law for enforcement of an award is the *lex fori*, be it a foreign or domestic award. For foreign awards, the courts have the obligation to enforce under their own rules, which must be in compliance with the conditions of

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30) Seol Ah Park, *Supra*, at p. 75.

31) The Korean court’s position on foreign judgments (for example, Supreme Court Judgment dated April 29, 2010 Case no. 2009 Da 68910) appear to be that the Korean courts acknowledge the final effect of a foreign judgment, and that an enforcement procedure in Korea is merely a process to decide whether the foreign judgment is enforceable in Korea. The same logic could apply to foreign arbitral awards. Ho-won Lee, “A Study on the Meaning, Effects and Procedure of Recognizing Arbitral Awards” *Journal of Arbitration Studies*, Vol.22, No. 1, 2013, pp.8-10.

32) Another effect of a recognition and enforcement order is, it restricts the initiation of a set aside action. That is, a domestic award can no longer be subject to a set aside action in the Korean courts if the court has rendered a recognition order. (Korean Arbitration Act, Art. 36(4)).

33) Article I of the New York Convention presupposes an obligation to enforce a conclusive and final award. Thus, interim awards are not eligible for enforcement. Korean Arbitration Law was revised in 2016 to allow court enforcement of interim awards, but that is not as part of Korea’s obligation under the New York Convention, but rather a legislative decision to adopt the 2006 Model Law.

Article V of the New York Convention.

While court judgments inherently have enforceability, an arbitral award<sup>34)</sup> does not by itself have enforceability. More specifically, Korean court judgments derive their enforceability from a *jiphaengmun*<sup>35)</sup> issued by the competent agent within the court<sup>36)</sup>. On the other hand, domestic arbitral awards only earn enforceability upon obtaining a court order of enforcement.

Since arbitral tribunals lack the power to compel parties, the award itself cannot be said to have enforceability prior to obtaining an enforcement order issued by the court. Further, there are no examples of legislations anywhere in the world that confer automatic enforceability on arbitral awards. Therefore, an award becomes enforceable only after a recognition order is obtained. Meanwhile, since the recognition order itself is not sufficient to determine the existence or scope of the claim, the arbitral award and the court order together as a whole, forms the *jiphaengkwonwon*, or the “enforceable legal right.”<sup>37)</sup>

In order for an application for enforcement to be proper, the subject matter must satisfy the requirements of a *jiphaengkwonwon*. If the subject matter is not does not satisfy the requirements, the application should be dismissed for lack of procedural requirements.

According to the national courts operation manual (“Practice Manual of the Court”), in order for an applicant to be successful in enforcement, the application must have eligibility as the subject of enforcement, and to be eligible, the subject of enforcement must meet two conditions:<sup>38)</sup> (i) The contents must be eligible for compulsion; and (ii) The category, content and scope of the deliverable or consideration that is to be compelled, must be expressed directly and specifically.

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34) despite Article 35, which endows upon the award the same effect as a judgment of a court.

35) Order of enforcement.

36) Civil Execution Act 28-1.

37) Minority view: Mok & Choi, *Supra*, at pp. 245- 250, latent enforceability; Majority view: Sung Woo Lim, Kwang Hyeon Seok, Yong Gil Kim, Sumi Kang, Bong Seok Kim et al., Seol Ah Park, “Enforcement of Foreign Arbitral Awards – Focus on Enforceability”, Korean Forum on International Trade and Business Law, Korea International Trade Law Association, 2018, 27<sup>th</sup> Issue, p. 77.

38) Seol Ah Park, *Supra*, At p. 93; Practice Manual of the Court, Civil Enforcement [1], Court Administration Department, 2014.



#### 4. Recognition and Enforcement Mechanisms and Changes Brought by the 2016 Revision

Article 37 of the Korean Arbitration Act applies to both domestic and foreign awards. Both types of awards must obtain an enforcement order from the court. Together, the arbitral award and the enforcement order become a *jiphaengkwonwon*, which is the court document proving an enforceable legal right. Since obtaining the court's enforcement order is required under Article 37, whether it be a domestic award, or a foreign award, and the application for enforcement order must satisfy same procedural requirements as any other application process seeking enforcement by the court, then having an enforcement order that meets those procedural requirements is required for both domestic awards and foreign awards. To understand the current recognition and enforcement framework, it is necessary to understand the revisions of 2016.<sup>39)</sup>

##### (1) Change of Form: Decision v. Order

The litigation system in Korea differentiates between (i) procedures seeking a court judgment in the form of a “decision” and (ii) procedures seeking a court judgment in form of an “order.”

A decision is rendered in cases that require full-fledged hearings and fully reasoned written rulings. An order is given to matters that require speed and often relate to matters of procedure.<sup>40)</sup> It involves a more simplified process that does not require a hearing, although a hearing may be held at the discretion of the court (instead of a hearing, the court convenes the parties to an interrogatory session), as a more simplified challenge process, and result in a court order and not a decision which can present the reason in summary.

Prior to the revision of the Korean Arbitration Act in 2016, an award recognition and enforcement procedure had to be rendered in the form of a decision, which required mandatory hearings and the other attendant formalities. After the revision, awards are recognized and enforced through a court order, and not a decision. This change in the court process is expected to shorten the overall timeframe and avoid unnecessary delay.<sup>41)</sup>

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39) Kap-You Kim, *Supra*, At p. 300-316.

40) Shi Yoon Lee, *the New Korean Civil Procedure Code*, 2018, p. 606-607

(2) Specific Changes in the Korean Arbitration Act of 2016

The procedural changes in the amended Act are as follows<sup>42)</sup>:

- 1) Commencement of the procedure: Instead of filing a complaint and initiating a formal litigation, a successful claimant may apply for a recognition and enforcement order to the court.
- 2) Mode of pleadings: As in other procedures seeking an order, the court has the discretion not to hold a hearing, and in that case, it must instead convene an interrogatory session with the participation of all the parties.
- 3) Form of the ruling: This follows the form of an order, and not a decision.
- 4) Effect of barring a set aside action: Article 36 (4) of the Korean Arbitration Act provides that “after an order for recognition and enforcement of the relevant award is rendered and confirmed by the Korean court, no action for setting aside the award may be raised.”<sup>43)</sup>
- 5) Challenge against the recognition and enforcement order: As in case of other court orders, the method of challenge is through an immediate appeal. Immediate appeals have a shorter application period compared to the regular appeals, and do not have the effect of staying the enforcement.

(3) Procedural Requirements for Lodging an Application for Order

Regardless of the changes above, the obtaining of a court order is a local procedure and with that, it is still bound to meet the given procedural pre-requisites. Even in its simplified form, an application must meet the necessary procedural formalities seeking a court order. Failure to meet the necessary procedural formalities results in an order to dismiss for lack of procedural requirements.<sup>44)</sup> If the respondent (defendant)

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41) Ho-won Lee, *Supra*, p. 263; Kwang Hyeon Seok, *Private International Law and International Litigation*, p. 714.

42) Ho-won Lee, *Supra*, p. 272.

43) Another way to bar a set aside action is to allow the time limit of 3 months to lapse. In that manner, a respondent cannot raise set aside grounds after that time limit during the enforcement stage. This is an issue that appears to be different in each jurisdiction, as seen in the PT First Media v. Astro case in front of the Singaporean Courts. Ji-Min Sur, “Refusing Enforcement of Arbitral Awards and Passive Remedy: Focused on PT First Media TBK v. Astro Nusantara International BV and others” *Journal of Arbitration Studies*, Vol.28, No. 4, 2018, pp.149-510.

44) This is referred to as a “*gak-ha*” ruling, or a dismissal on grounds of procedures.

successfully proves the existence of any of the grounds of refusal under Article 38 or 39 of the Korean Arbitration Act (i.e., the same conditions of refusal found in Art. V of the New York Convention), then the application for order will be dismissed for lack of merit.<sup>45)</sup> Orders must include reasons for the conclusion, but in cases where there are no hearing sessions, the order may contain a summary form of the reasons. For example, jurisdiction of the court on both matter and person, standing of the parties to bring suit, appropriateness as a subject of an enforcement order, and the legal interest to file suit.

## 5. Examples of Possible Incompatibility With Korean Procedural Requirements

### (1) Supreme Court Judgment dated 13 December 2018, Case no. 2018 Da 240387: Relief Granted in Violation of the Principle of Disposition

The principle of disposition is civil law jurisdiction principle, which roughly corresponds to the *non ultra petita* rule in the common law system. It is a procedural principle that a court is confined to acting on the issues submitted by the parties and cannot rule on issues beyond the scope of the submissions of the parties.<sup>46)</sup> Lower court decisions that are in violation of this basic procedural principle can be appealed before the judgment becomes final, and can be subsequently remanded, thus making the judgment unenforceable until the error is corrected.

In the case of Supreme Court Judgment 2018 Da 240387, the court reviewed a set aside action on an award containing a relief allegedly violating the principle of disposition. During the arbitration, the claimant had asked the tribunal to order the defendant, an asset management company, to manage an asset in a specific manner as provided in their contract. The tribunal, instead of ordering a specific performance, rendered a declaratory order, confirming that the defendant has the contractual obligation to manage the assets in a specific manner, as provided in their contract, but

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45) This is referred to as a “*gi-gak*” ruling. Together with the term “*gak-ha*”, “*gi-gak*” is often translated as “dismissal”, but the two have different legal effects and should be distinguished.

46) Shi Yoon Lee, *Supra*, At, p.317

that the defendant was in violation of this contractual obligation. In the subsequent set aside action, the defendant alleged that the award was null and void because the tribunal violated the principle of disposition and that this was in turn a violation of public order.<sup>47)</sup>

However, when reviewing whether to enforce an arbitral award, the court found that while the principle of disposition is a fundamental principle in Korean Civil Procedure, in the context of setting aside arbitral awards, this does not amount to a violation of public order.

(2) Seoul High Court Judgment, Case no. 2015 Na 78423: Relief Granted in a Manner Impermissible under Korean Procedural Law

The types of reliefs that can be granted by a court or arbitral tribunal differ depending upon the jurisdiction. In Korea, ordering specific performances under a contract, or prohibiting a certain action is legally permissible. In these circumstances, while the court may not physically force the defendant to perform a certain act, or physically deter the defendant from doing something, the court may order payment of penalties for the duration of the non-compliance in the form of indirect compulsion. However, a judgment ordering the defendant to make a declaration of intent, unlike specific performances or prohibitions, cannot be compelled through indirect compulsion.<sup>48)</sup> To summarize, types of orders that can be enforced include: order for monetary payment, order to pay penalties in case of violation of order of specific performance, or order prohibiting certain actions. Meanwhile, types of orders that cannot be enforced include order forcing declaration of intent and indirect compulsion aimed at forcing a certain declaration of intent.<sup>49)</sup>

In this case, the defendant argued that the enforcement of the award must be refused because the arbitral tribunal ordered indirect compulsion on the respondent with the aim of forcing them to make a certain declaration of intent (the intent to

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47) Byeong Chul Yoon, "2018 Field-wise Analysis of Important Judgments", Legal Newspaper, 2019.6.5

48) This case involved a license dispute between a Dutch company and a Korean company, involving a patent covering a heat exchange machine. The case was heard in front of a tribunal seated in Netherlands. Tribunal ordered Korean company to transfer the patent to the Dutch company (which involved making a declaration of its intent to transfer). The Tribunal ordered the payment of penalties for the duration of the incompliance.

49) Korean Civil Execution Act, Article 389(2), 389(3), 260, 261, 263.

transfer the disputed patent to the claimant.) The arbitration was seated outside of Korea, and in a jurisdiction that allowed indirect compulsion of a declaration of intent.

In reviewing the respondent's argument against enforcement, the court although affirming that the tribunal's order of indirect compulsion was against Korean law, did not find that enforcing indirect compulsion as ordered by the arbitral tribunal was in violation of public order. The parties appealed and the Supreme Court Judgment delivered a judgment supporting the views of the high court.<sup>50)</sup>

(3) Seoul High Court Judgment dated 17 January 2014, Case no. 2013 Na 13506 (NDS v. KT Skylife<sup>51)</sup>): Specific Performances Not Specific Enough for Enforcement under Korean Procedural Law

In ascertaining the contents and scope of the tribunal's order, the Korean court reviewing the application for an enforceable legal right is not limited only to the dispositive part, but it also looks to the reasoning of the award if the relief section is not specific enough. For example, in the Seoul High Court Case 2015 Na 78423 case, dispositive part of that award (the specific patent that was ordered to be transferred to claimant) required the court to look into the reasoning section in order to ascertain the scope of the order.

It is when the content and scope of the relief is not determinable, even together with the reasoning, that matter becomes problematic. In such instances, the court must go beyond the award, and look into the underlying exhibits and pleadings to determine the scope of the order, and the question is whether this sort of inspection is allowed.

Sometimes referred to as the most heavily scrutinized court decision in this area, the NDS v. KT Skylife case raised this issue of specificity.<sup>52)</sup> As a preliminary matter, this arbitral award was considered a domestic award as it was rendered in an arbitration seated in Seoul, despite the fact that it was an international arbitration. But as

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50) 2016 Da 18753

51) SIDRC Publication of Arbitration Related Court Decisions, based on a translation by Kim & Chang. Note on the fact that the Seoul District Court decision is not available and description of the lower court decision is reliant on the description provided in the Seoul High Court Judgment.

52) Joongi Kim, *International Arbitration in Korea*, Oxford University Press, 2017, pp. 275-281; Seong Woo Lim, "Analysis on Recent Court Judgments Regarding the Right to Suit in an Arbitration Enforcement Procedure," *Journal of Arbitration Studies*, Vol 314, Issue 4, 2014

discussed above, this categorization did not result in imposing a heavier burden on the claimant seeking enforcement. The same procedural requirement would have been applicable even if the award had been classified as a foreign award.

The Seoul Southern District Court, which was the court of first instance, found that the arbitration award merely ordered KT Skylife to perform its obligation under Article 14(2) of the agreement. It did not mention the content, object, and scope of the obligation under the agreement. Nor was the content, object, and scope of the obligation identifiable through the other parts of the arbitral award. The first instance court agreed with KT Skylife that NSD's application for an enforceable legal right lacked the legal interest to file suit.

NDS appealed. The appellate court affirmed the principle that guided the lower court which was that "an enforcement judgement, in conjunction with the arbitration award form an enforceable legal right. Hence, the arbitration award which forms a part of an enforcement judgment must carry a certain level of specificity in order to be performed." It further affirmed that "the granting of an enforceable legal right and the actual execution by an execution agency are separate from each other. Therefore, the enforceable legal right in itself must be specific and self-sufficient to enable the execution agency to execute the order without having to investigate the existence or contents of the parties' rights. The fact that the parties themselves are aware of what is being sought through this enforcement process is not sufficient to deem the arbitral award has sufficient level of specificity.<sup>53)</sup>

However, though the high court agreed with the lower court's finding regarding the need to meet the procedural requirement of specificity, it disagreed with the lower court's finding that NSD lacked the legal interest to request an enforcement judgment.

The High Court found that the fact that an arbitral judgment cannot be enforced due to lack of specificity does not negate the claimant's legal interest to seek an enforcement judgment. It reasoned that enforcement judgments have a dual purpose: they (i) confer enforceability to the award to allow compulsory execution, and (ii) protect the award from being set aside. In this manner, an arbitral award is comprehensively protected when the enforcement judgment of the award is rendered.

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53) The High Court also noted that the Claimant, represented by the same counsel as the arbitration, when applying for provisional order, took a very detailed approach in listing down the exact scope of the performances that must be taken by Respondent.

Even when an order of an arbitral award lacks specificity for execution, a legal interest to request enforcement judgment of such award shall be recognized regardless of whether it can be executed. This is due to the existence of legitimate interest.

Findings of a court are framed depending on how the parties present their argument. Skylife, in seeking dismissal, argued that NDS's application for enforcement had to be dismissed for lack of legal interest on grounds that the arbitral award was not specific enough to be enforced. In response, the first instance court agreed that the award was not specific enough and therefore claimant lacked the legal interest to make this application.

In contrast, the appellate court held there was legal interest despite the lack of specificity. However, despite finding in favor of NDS, the high court confirmed that the award did not have enough specificity to be enforced. More interestingly, and unlike other successful enforcement applications, the court appellate declined to order the provisional execution of the award, reinforcing its view that the arbitral award could not be enforced, even with an enforcement judgment.

By finding that it impossible to enforce the arbitral award, but still accepting NDS's application for enforcement, the high court left the issue in a state of ambiguity. What does it mean to render an enforcement decision and yet declare that due to award's failure to meet the specification requirement, it is impossible to enforce the it?

NDS appealed this decision to the Supreme Court, but later withdrew the appeal before the Supreme Court could rule on this issue.

- (4) Seoul District Court Judgment dated 7 December 2017, Case no. 2017 Kahap 270: Inutile awards that face factual impossibility in execution

There may be cases where an arbitral award having legal effect does not fall under any of the reasons to not enforce, and meets the procedural requirements of the jurisdiction where it seeks enforcement, but the enforcement is impossible as a factual matter. A classic example is where there is a clear and simple monetary relief granted in an award, but the defendant does not have enough assets in that jurisdiction. This is a case of an award that is simply inutile, despite the court's order to enforce.

A recent case of an inutile award was considered in the Seoul District Court

Judgment dated 7 December 2017, Case no. 2017 Kahap 270.<sup>54)</sup> This case dealt with an arbitration resolving a dispute between two Korean companies, Company A and Company B. Company A, which has a sales and marketing presence in India, contracted with Company B, a manufacturer of certain health products that Company A intended to sell in the Indian market. The contract in question required Company B, which established a subsidiary incorporated in India, to transfer part of the shares in the Indian subsidiary to Company A.

In the arbitration in question, the tribunal ordered as follows: (1) Company B shall make a declaration of intention that it will transfer certain shares to Company A; and (2) Company B shall hand over the share certificates to Company A. These two steps reflected the method of how shares are transferred under the Korean Commercial Act.

However, at the enforcement stage, Company B asserted the method as ordered by the arbitral tribunal does not fit with the method of transferring shares of an Indian subsidiary. Thus, even if Company B performed in accordance with the tribunal's order, those actions would not result in the transfer of shares to Company A, which was the purpose of the arbitration.

This was a case where the arbitral award was factually inutile. However, the Seoul District Court issued an enforcement order, stating that this impediment was only a factual impossibility and not a legal impossibility, and that in itself does not deter the successful application for an enforcement order.

The Seoul District Court appeared to take the stance that the mere fact of factual impossibility does not negate the legal right to apply for enforcement.

This is because the legal right of enforcement is a legal interest, and not a factual interest. Therefore, just because the satisfaction of an award is factually impossible does not mean there is no legal interest or that the enforcement judgement should be denied on the ground that there is no legal interest.

From the standpoint of the Korean courts, as long as international jurisdiction over the matter is satisfied, the fact that factual execution is impossible, and that the award is inutile, is merely a factual risk that must be borne by the claimant in the arbitration,

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54) Unlike the other cases aforementioned, this judgment was rendered after the Korean Arbitration Act was amended, and was issued in the form of an order instead of a decision.



## 6. Discussions

As can be seen in the cases above, the Korean court has not been shy about allowing enforcement of arbitral awards, despite the apparent incompatibility issues, such as the violation of principle of disposition, or an impermissible form of a relief. Of the four types of possible cases of incompatibility with Korean litigation procedural requirements, specificity appears to be the most controversial as shown in the *NDS v. KT Skylife* case. Arbitral awards presume voluntary performance due to the consensual nature of the dispute resolution mechanism. Therefore, as long as the specificity of the award is such that the parties can voluntarily comply with the order, the fact that it does not meet the procedural requirements under Korean litigation does not make the award invalid.

For instance, there is nothing to stop the parties from resolving the ambiguity by agreeing on the specific scope of obligation under the contract, which was ordered by the tribunal. That should suffice to make it an effective award. However, to borrow the hand of a court and deploy the compulsory powers of an enforcement mechanism, would require stricter adherence to the general procedural requirements.

Because the arbitral award and the enforcement judgment together form an enforceable legal right, and to obtain an enforceable legal right, certain procedural requirements (such as specificity of the order) must be satisfied, the arbitral award must satisfy such requirements. The enforcement order cannot supplement to the enforceable legal right, what is not obvious from the arbitral award.

Considering that the function of the enforceable legal right is to make possible a mechanical implementation of an execution devoid of any secondary evaluation of the contents; and also considering the possible confusion caused in the court system due to the an enforcement order of a non-specific enforceable legal right; there is no reason to exempt arbitral awards from meeting the procedural requirements that is required of all other types of enforceable legal rights.

Therefore, when seeking enforcement of an arbitral award, it is not only necessary to meet the conditions of Article 5 of the New York Convention or Article 38 of the Korean Arbitration Act (i.e., must not have grounds for refusal), it is also necessary to meet the procedural requirements that are required when seeking an enforceable legal

right, particularly the requirement that the dispositive order is specific enough.

In fact, this approach may be closer the spirit of the New York Convention, which frowns upon the practice of national courts attempting to review the substance of the award and instead requires that the court refraining from adding or changing the contents of the arbitral award. The Seoul High Court, while affirming that the arbitral award in question did not fall under any of the categories of rejection under Article 38 of the Korean Arbitration Act, agreed with the lower court that it was impossible to ascertain the contents and scope of what specific performance was ordered by the Tribunal to the Respondent.

At this point, it may be observed that the appellate court, in practical terms, rendered a recognition order, and not an enforcement order. By acknowledging the effect of the arbitral award, the appellate court conferred the effect of barring further set aside action by the respondent, and confirmed that the award was binding on the parties. While it is not clear from the judgment, it can be said that instead of granting the requested remedy (i.e. enforcement of the award), the court adopted the application into a different remedy (i.e., recognition of the award). By doing so, it managed to avoid the confusion of triggering an enforcement procedure of an award that could not be enforced, but still conferred the best possible decision on the prevailing party.

## IV. Conclusion

When the Skylife lower court decision was first made known to the Korean arbitration community, there were views that warned of the dangers of adding new requirements not expressed in the New York Convention or the Korean Arbitration Act, and some even speculated that this was the end of the pro-arbitration inclination of the Korean judiciary.

However, considering the discretion given to the enforcing court under the New York Convention, requiring an application for enforcement to meet local procedural rules is within the bandwidth of the acceptable standards.<sup>55)</sup> This is particularly true if

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55) Applying local procedural requirements may lead to additional burden on the counsel and tribunal

a court, if pressed to enforce an award merely for the sake of enforcing something, must guess the specific contents and scope of the relief granted by the tribunal.

Specific performance ordered by the tribunal which cannot be determined either from the dispositive section of the award, or its reasoning, put the enforcement agency in a position where it must either presume or even assume that the scope of the obligation as alleged by one of the parties is correct, over the objection of the other party.

If it does so, the court must re-interpret the contents of the tribunal's decision, which may result in second guessing of the factual assessments. This crosses the line of the function of the court of enforcement, which should limit its role to enforcing an award as it is made, as long as it is satisfied that none of the grounds of rejection under the Convention or Articles 36 or 38 of the Korean Arbitration Law apply to the award. Going beyond that is a dangerous game, and a game that the Korean courts have refused to play, as shown in the *Skylife* matter.

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to study the rules of procedure of the enforcing state beforehand, and considering the diversity of jurisdictions and laws involved in an international arbitration, this may be an inevitable burden. To the extent it is possible to predict the enforcing state, from practical perspective it may be advisable to get involved earlier on, either an arbitrator, counsel or arbitral institution with knowledge on the basic procedural requirements of the enforcing state.

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