RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN ASIA

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Country Report
SOUTH KOREA

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A INTRODUCTION

1 This report details the rules for recognition and enforcement of foreign judgments in South Korea. The recognition and enforcement of foreign judgments is governed by the relevant provisions in the Civil Procedure Act1 (“CPA”) and the Civil Enforcement Act2 (“CEA”). Articles 217 and 217bis of the CPA and Articles 26 and 27 of the CEA allow the recognition and enforcement of foreign judgments respectively, on the theoretical basis of providing the finality of dispute settlement achieved by foreign judgments and preventing conflicting legal relationships between the same parties.

2 South Korea has not entered into any bilateral or multilateral treaties regarding the recognition and enforcement of foreign judgments.3 Accordingly, it is the relevant provisions in the CPA and the

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* This report is based upon this reporter's previously published article on the same subject: “Recognition and Enforcement of Foreign Judgments in the Republic of Korea” (2013/2014) 15 Yearbook of Private International Law 421. However, that article has been updated in order to reflect court precedents and legislative efforts since the date of publication. This reporter would like to express sincere thanks to Messrs Jong Hyeok Lee and Ji Ung Park for providing assistance in preparing this report.
1 Act No 12882, 30 December 2014.
2 Act No 13286, 18 May 2015.
3 South Korea has concluded bilateral treaties with Australia, China, Mongolia, Uzbekistan and Thailand on judicial assistance in civil and commercial matters, which includes service of judicial documents and taking of evidence: Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Korea and Australia; Treaty between the Republic of Korea and the People's Republic of China on Judicial Assistance in Civil and Commercial Matters; Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of (continued on the next page)
CEA which are applicable in respect of the question of the recognition and enforcement of foreign judgments.\textsuperscript{4}

3 In addition, South Korea does not currently appear to have any intention of acceding to the Hague Convention of 30 June 2005 on Choice of Court Agreements ("HCCCA") in the near future.

\section*{B REQUIREMENTS FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS}

4 Pursuant to Articles 26 and 27 of the CEA, a plaintiff must obtain an enforcement judgment (\textit{exequatur}) from a South Korean court to enforce a foreign judgment. In order to obtain such an enforcement judgment, the following conditions for recognition under Article 217 of the CPA must be satisfied:

\begin{itemize}
  \item[(a)] the judgment must be final, conclusive and no longer subject to ordinary review;
  \item[(b)] the foreign court must have had international jurisdiction to adjudicate the case in question;
  \item[(c)] the defendant who lost the case must have been served with the complaint and the summons or any orders in a lawful manner in advance so that he had sufficient time to prepare his defence;
  \item[(d)] the recognition of the judgment must not be contrary to the public policy of South Korea; and
  \item[(e)] there must be a guarantee of reciprocity between South Korea and the foreign country to which the foreign court belongs.
\end{itemize}

5 In principle, while deciding whether to recognise and enforce a foreign judgment, South Korean courts are prohibited from reviewing

\textsuperscript{4} The Supreme Court’s decisions have strong precedent value. Its decisions are binding on the specific case being reviewed. For other cases, the lower courts follow those decisions, since their judgments are most likely to be overturned in the appeal process if they stray from the Supreme Court’s rulings.

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the merits of the foreign judgments. South Korean courts may only review the merits of the case to the extent necessary to determine whether the conditions for the recognition and enforcement of the foreign judgment are satisfied. By way of example, a South Korean court considered the merits of the case in deciding whether a US judgment awarding punitive damages was consistent with the public policy of Korea.5

6 South Korean civil procedure law does not distinguish between in rem judgments and in personam judgments. In principle, if a foreign judgment fully satisfies the conditions under the CPA and the CEA, the judgment will be recognised and enforced, whether it is against a person (in personam) or against a property (in rem). However, a person rather than a property must be the party in the enforcement proceeding before a South Korean court – in rem judgments will not be recognised or enforced in South Korea if this requirement is not satisfied. There is no additional requirement for the recognition and enforcement of in rem judgments, such as a requirement that the property should be located in the jurisdiction of the foreign court.

7 Since all the CEA conditions for the recognition of foreign judgments are related to the national interests of South Korea, as well as the personal interests of the concerned parties, South Korean courts should examine the compliance with such conditions ex officio.6

i Finality of the foreign judgment

8 If a foreign judgment is to be recognised and enforced in South Korea, the judgment must be final, conclusive and no longer subject to ordinary review.

5 2007Gahap1076 (Pyeongtaek Branch of the Suwon District Court) (24 April 2009).

6 “Ex officio” requires South Korean courts to actively examine the foreign judgments’ compliance with all the conditions for recognition and enforcement, without the party's application on such issue.
9 The term “judgment” refers to judicial decisions relating to civil and commercial matters concerning the legal relationships between private parties, rendered by judicial organisations. In order to be enforceable, it should be rendered by a competent foreign judicial organisation with jurisdiction, the proceedings must guarantee cross interrogations between the parties and the contents of the case must be appropriate for coercive performance (for example, contain concrete contractual obligations). The name, form and so forth regarding the decision do not matter.

10 South Korean courts must refuse to recognise and enforce a foreign judgment if an appeal against it is pending before a higher court in the foreign court system or the time to file an appeal has not yet lapsed. Other examples of non-final judgments include orders for provisional measures such as provisional attachments and provisional injunctions.

11 Foreign judgments which are final, irrespective of whether they are money judgments or non-money judgments, including declaratory orders, orders of specific performance or permanent injunctions (excluding orders for preliminary injunctions), can be recognised and enforced in South Korea so long as the conditions for recognition are satisfied. Controversially, South Korean courts cannot allow the recognition and enforcement of foreign asset-freezing orders (known as “Mareva injunctions” in some common law jurisdictions) against assets in the territory of South Korea so long as the orders are provisional measures.9

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8 For commentary on the enforcement of awards of compensatory damages, see paras 46–51 below. Interest on monetary judgments can be recognised and enforced in South Korea if the interest is stated as payable in the judgment or it is clearly allowed under the law relevant to the judgment: Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at p 352.

12 The Supreme Court has held that a confession judgment\textsuperscript{10} under the Code of Civil Procedure of the State of California\textsuperscript{11} does not constitute a foreign judgment entitled to recognition in South Korea, because the confession judgment cannot be viewed as a judgment of the court and the parties were not guaranteed an opportunity to conduct cross interrogations in the proceedings.\textsuperscript{12} However, the Supreme Court has also held that the discharge effect resulting from a court’s approval of a rehabilitation plan in a US bankruptcy proceeding could be recognised in South Korea if the conditions for the recognition of foreign judgments are satisfied.\textsuperscript{13} This reporter is critical of the latter decision on the basis that (a) the recognition of a foreign bankruptcy proceeding does not occur automatically, but requires a decision of a South Korean court under the relevant provisions of the Debtor Rehabilitation and Bankruptcy Act\textsuperscript{14} of South Korea, which has been modelled on the UNCITRAL Model Law on Cross-Border Insolvency of 1997; and (b) in the latter case, the US court’s decision to commence the bankruptcy proceeding, which obviously precedes the approval of the rehabilitation plan, had not been recognised in South Korea.

\section*{ii Jurisdiction of the foreign court}

\subsection*{a Application of jurisdiction requirement}

13 If a foreign court did not have the jurisdiction to hear the case, the South Korean courts must refuse to recognise and enforce the foreign judgment. The South Korean courts determine the jurisdiction of the foreign court according to the rules of South Korea. This is because Article 217(1) of the CPA explicitly provides that the foreign court must have had international jurisdiction under the principles of international
jurisdiction laid down by Korean law or treaties. “Korean law” refers to Article 2 of the Private International Law Act\(^\text{15}\) ("PILA") and the rules on international jurisdiction in Korean law,\(^\text{16}\) whereas “treaties” refer to those to which Korea is a party, such as the Hague Protocol to the Warsaw Convention 1955\(^\text{17}\) and the 1999 Montreal Agreement\(^\text{18}\) concerning international carriage by air. In other words, South Korean courts will recognise foreign judgments only when the international jurisdiction of the rendering foreign court over the case ("indirect jurisdiction") is found to exist on the basis of the same criteria that the South Korean courts would apply in determining jurisdiction in a similar cross-border action brought before them ("direct jurisdiction").

14 In June 2014, the Ministry of Justice of Korea ("MOJ") established an expert committee ("Committee") to prepare a draft amendment to the PILA (the term of the Committee expired on 31 December 2015).\(^\text{19}\) As of 12 June 2017, however, an official draft of the amended PILA has not been published. The MOJ is now in the process of completing the remaining works and is expected to publish the official draft during the

\(^{15}\) Act No 13759, 19 January 2016.

\(^{16}\) The Civil Procedure Act (Act No 12882, 30 December 2014) ("CPA") contains the venue provisions (ie, the domestic jurisdiction provisions) on the distribution of judicial power among the various courts within South Korea: Arts 2–25 and 29–31. However, the CPA does not contain any specific provisions on the international jurisdiction of South Korean courts. Instead, principles on international jurisdiction have been developed by past judicial decisions. The Private International Law Act (Act No 13759, 19 January 2016) ("PILA") amended in 2001 introduced three articles on international jurisdiction. Article 2 of the PILA lays down general rules on international jurisdiction and states that detailed and refined rules on international jurisdiction should be developed by consulting the CPA’s venue provisions. Thus Art 2 of the PILA requires judges to establish detailed and refined rules on international jurisdiction by considering the special characteristics of international jurisdiction instead of mechanically assuming that rules on international jurisdiction are equivalent to the CPA venue provisions. In addition, Arts 27 and 28 introduced special rules on international jurisdiction to protect consumers and employees, respectively.

\(^{17}\) Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed at Warsaw on 12 October 1929; done at The Hague on 28 September 1955).

\(^{18}\) Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999).

\(^{19}\) This reporter was a member of the Committee.
course of 2017. Accordingly, this reporter believes that the detailed and refined rules on international jurisdiction in the amended PILA will take effect by the end of 2018 or 2019 at the latest. The references in this report to the amended PILA are of the tentative draft which the MOJ prepared in June 2017, which has not been officially released to the public and is subject to further change.

b Specific criteria for determining jurisdiction

15 The specific criteria in the CPA that South Korean courts apply in determining the question of jurisdiction when they are presented with cross-border actions are mentioned in the following paragraphs.

I Defendant’s domicile

16 The CPA provides that an action is subject to the jurisdiction of the court located at the place where the defendant has its domicile (in the case of a natural person) or the principal place of business (in the case of a juridical person).\(^\text{20}\) It is generally recognised that this rule (actor sequitur forum rei) also applies to international jurisdiction.\(^\text{21}\)

17 The Committee agreed that a provision expressly setting forth the actor sequitur forum rei rule will be included in the amended PILA.

II Place of branch

18 Article 12 of the CPA, a venue provision, provides that an action against a person (both natural and judicial) maintaining an office or a place of business in South Korea can be brought in the court located in that place only if the action concerns the business affairs of such office or such place of business. It is generally recognised internationally that such a rule also applies with regards to international jurisdiction.\(^\text{22}\) However,

\(^{20}\) Civil Procedure Act (Act No 12882, 30 December 2014) Arts 2–3 and 5.
the CPA also provides that the general forum for a foreign juridical person shall be the place in South Korea where it has an office or a place of business.\textsuperscript{23} It is not material for the exercise of jurisdiction by the court whether such an office or a place has any relation to a particular action involving the foreign corporation. While the relationship between Articles 5(2) and 12 is not clear, controversially South Korean courts tend to apply Article 5 in determining international jurisdiction.\textsuperscript{24} Accordingly, if a foreign corporation establishes a branch office or a place of business in South Korea, it will be subject to South Korean jurisdiction generally without regard to whether the particular cause of action is connected with the operation of the South Korean branch. However, it is not clear whether the Supreme Court still adheres to this view, because it did not follow this approach in a similar dispute in 2010.\textsuperscript{25}

19 The Committee agreed that an article along the lines of the following will be included in the amended PILA:

An action against a person having an office or establishment in Korea and related to the activities of that office may be filed in Korea.

III JURISDICTION BASED ON ACTIVITY OF THE DEFENDANT

20 There is currently no provision on this head in respect of international jurisdiction. However, the Committee agreed to include an article along the lines of the following in the amended PILA:

An action against a defendant may be filed in Korea where the defendant has continuously and systematically carried on commercial or business activity in, or towards, Korea; provided that the dispute relates to that commercial or business activity.

21 This provision was influenced by the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

\textsuperscript{23} Civil Procedure Act (Act No 12882, 30 December 2014) Art 5(2).
\textsuperscript{24} 98Da35037 (Supreme Court) (9 June 2000).
\textsuperscript{25} 2010Da18355 (15 July 2010).
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adopted in 1999\textsuperscript{26} (“Preliminary Draft”) and the Japanese Code of Civil Procedure.\textsuperscript{27}

IV PLACE OF PERFORMANCE

22 Article 8 of the CPA provides that an action concerning property rights may be brought before the court located in the place of abode or the place of performance. In a case involving payment of contractual obligations, the Supreme Court held, in 1972, that Article 8 could be a basis for international jurisdiction.\textsuperscript{28} Although Article 8 does not seem to be limited to the performance of a contractual obligation, influential views\textsuperscript{29} maintain that the provision should not apply to non-contractual obligations. It is not clear whether the Supreme Court still adheres to the position expressed in 1972, because in a recent case, the Supreme Court took a slightly different approach by comprehensively considering various factors related to international jurisdiction, such as fairness and efficiency of the process, rather than simply referring to the venue provision.\textsuperscript{30}

23 Under the proposed provision of the amended PILA, the South Korean courts will have international jurisdiction in matters relating to the supply of goods, if the goods were supplied in South Korea or in matters relating to the provision of services, if the services were provided in South Korea. This would mean that the place of performance of a

\begin{itemize}
\item \textsuperscript{27} Code of Civil Procedure (Law No 109 of 26 June 1996) (Japan) Art 3-3(v). Article 3-3(v) states “an action against a person that conducts business in Japan (including a foreign company (meaning a foreign company as prescribed in Article 2, item (ii) of the Companies Act (Act No 86 of 2005)) that continually carries out transactions in Japan”. An unofficial English translation of the Japanese Code of Civil Procedure was taken from the Japanese Law Translation Database System which can be accessed at http://www.japaneselawtranslation.go.jp/law/detail?id=2834&vm=04&re=02&new=1 (accessed August 2017).
\item \textsuperscript{28} 72Da248 (20 April 1972).
\item \textsuperscript{29} Kwang Hyun Suk, \textit{International Civil Procedure Law} (Korea: Pakyoungsa, 2012) at p 92.
\item \textsuperscript{30} 2006Da71908, 71915 (29 May 2006).
\end{itemize}
contractual obligation could only be a ground of international jurisdiction in very limited circumstances. The decision as to whether the place of performance of a contractual obligation could continue to constitute a head of international jurisdiction has not yet been concluded.

V PLACE OF TORT

24 Under Article 18 of the CPA, an action for tort may be brought before the court of the place where the tortious act occurred. It is generally recognised that Article 18 should also apply in determining the question of international jurisdiction. Where the tortious act occurred in one place and the consequence of the injury occurred in another, each of them could constitute a ground of international jurisdiction over the same tort case. However, this reporter considers that the persuasive view is that such places should be determined rationally from the viewpoint of international jurisdiction and that, particularly in cases of product liability, the defendant's reasonable foreseeability should be taken into account. The Supreme Court in a product liability case has expressly endorsed this view.

25 The Committee agreed that an article along the lines of the Brussels I bis, the Preliminary Draft and the Japanese Code of Civil Procedure will be included in the amended PILA. The “mosaic rule”, as in the Shevill case of the European Court of Justice, is not

32 82Daka1533 (Supreme Court) (22 March 1983).
33 93Da39607 (21 November 1995). This judgment was apparently influenced by the idea of “reasonable foreseeability” and “purposeful availment” appearing in the decisions of the Supreme Court of the United States (World-Wide Volkswagen Corp v Woodson 444 US 286 (1980) and Asahi Metal Industry Co v. Superior Court 480 US 102 (1987)).
36 (Law No 109 of 26 June 1996) Art 3-3(8).
37 Shevill v Presse Alliance C-68/93; ECLI:EU:C:1995:61.
contemplated. There will be no separate rules on special types of tort, such as product liability or defamation, etc.

VI PLACE OF PROPERTY

26 Under Article 11 of the CPA, an action concerning property rights against a person who does not have a domicile in South Korea may be brought before the court of the place in Korea where the subject matter of the claim, the subject matter of security or any attachable property of the defendant is located. This provision appears to confer jurisdiction merely on the grounds of the location of any specified subject matter or property, and the Supreme Court admitted, in 1988, that Article 11 may be applied to international jurisdiction. However, this reporter considers that the persuasive view is that the application of the provision is restricted only to those cases where the defendant has had property in South Korea for a certain period of time (being enough time to establish some real connection to South Korea) and its value is sufficient to cover the plaintiff's claim. Looking at its recent decision in 2014, the Supreme Court appears to be departing from its previous position in that it has comprehensively considered various factors related to international jurisdiction rather than simply looking at the place of property to confer international jurisdiction (i.e., the Supreme Court now appears to be in agreement with the persuasive view).

27 There was much discussion in the Committee as to whether the presence of the defendant's property could constitute a ground of international jurisdiction for an action relating to property rights in general that is unrelated to that property. The conclusion was that the presence of a property could constitute a ground of international jurisdiction for an action relating to property rights if the property can be the subject of arrest or seizure; provided, however, the foregoing shall not apply where the value of the property is significantly small or Korea has no connection at all, or only a slight connection, with the case.

38 87Daka1728 (25 October 1988).
VII JURISDICTION AGREEMENT

28 In practice, the parties’ agreement on international jurisdiction plays a very important role. Although the CPA does not contain any express provision regarding the effectiveness of the parties’ agreement on international jurisdiction, South Korean courts generally recognise the effectiveness of such an agreement and give effect to it. Accordingly, if a foreign judgment is rendered in breach of an agreement for the settlement of the dispute, the courts of South Korea would refuse to recognise and enforce the foreign judgment on the basis it lacks jurisdiction. However, the Supreme Court held in 1997 that, in order for a jurisdiction clause conferring exclusive jurisdiction upon a foreign court to be valid, the following conditions must be met:

(a) the case does not fall under the exclusive jurisdiction of South Korea;
(b) the designated foreign court has valid international jurisdiction under its law;
(c) the case should have a reasonable relationship with the designated foreign court; and
(d) the jurisdiction agreement is not grievously unreasonable or unfair. The Supreme Court maintains its position despite legal commentators’ criticisms of condition (c).

29 With regard to requirement (c) mentioned above, the Committee has agreed not to follow the Supreme Court’s position. In addition, taking into consideration the entry into force of the HCCCA, the Committee decided to set out its position in the amended PILA as follows:

A Korean court shall dismiss proceedings where there is an exclusive choice of court agreement in favour of a foreign court, unless (i) the

39 Eg. 91Da14994 (Supreme Court) (21 January 1992) and 96Da20093 (9 September 1997).
40 See paras 33–34 below.
41 96Da20093 (9 September 1997).
43 Eg, 2010Da28185 (26 August 2010).
agreement is null and void under the law (including choice of law rules) of
the State of the chosen court; (ii) a party lacked the capacity to conclude
the agreement; (iii) giving effect to the agreement would be manifestly
contrary to the public policy of South Korea; or (iv) the chosen court has
decided not to hear the case or there is a situation in which the agreement
cannot properly be performed.

VIII APPEARANCE

30 Even if a person is not otherwise subject to the international
jurisdiction of the South Korean courts, if he appears before a South
Korean court and responds to the merits without reserving his objection
against the jurisdiction of the South Korean court, the court will assume
international jurisdiction over him since he can be deemed to have
consented to the international jurisdiction of the South Korean courts. 44

IX PROTECTION OF SOCIO-ECONOMICALLY WEAKER PARTIES

31 The PILA sets forth special rules on international jurisdiction
in respect of passive consumer contracts and individual employment
contracts, 45 which are modelled on the Brussels Convention, 46 and the
Preliminary Draft. 47 In short, whereas a consumer’s habitual residence is
relevant in consumer contracts, the place where the employee habitually
performs his work is relevant in individual employment contracts.

X RELATED JURISDICTION

32 The CPA contains a provision allowing an action against several
persons or an action involving several claims to be brought before the
court having jurisdiction over one of the defendants or one of the

46 Convention of 27 September 1968 on jurisdiction and the enforcement of
judgments in civil and commercial matters, Arts 13–15.
47 Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil
and 8.
XI EXCLUSIVE INTERNATIONAL JURISDICTION

33 The CPA does not contain provisions on the exclusive international jurisdiction of the South Korean courts. However, it is considered by legal commentators that the South Korean courts have exclusive international jurisdiction in the following cases:

(a) in proceedings concerning rights in rem in immovable property if the property is situated in South Korea;

(b) in proceedings concerning the validity of the constitution, nullity or dissolution of companies or the validity of the decisions of their organs, if the company has been established under South Korean law;

(c) in proceedings concerning the validity of entries in public registers, if the register is kept in South Korea; and

(d) in proceedings concerning the registration or validity of patents, trademarks, or other similar rights required to be registered, if the registration has been applied for or has taken place in South Korea.

This is very similar to the list of exclusive jurisdiction provided by the CPA. However, there was a dispute as to whether proceedings in which a South Korean plaintiff required a Japanese defendant to transfer and register the transfer of patents registered in Japan pursuant to a contract between the parties were subject to the exclusive jurisdiction of Japan or not. The Supreme Court of Japan decided that the proceedings did not fall under the exclusive jurisdiction of Japan, because the principal subject matter of the dispute was the interpretation of the contract and the rights and obligations of the parties under the contract. The judgment was welcomed by legal commentators in South Korea: see Ju Sang Kim, “Recognition and Enforcement of Foreign Judgments” (1975) 6 SABEOPNONJIP 485 and In Jae Lee, “Agreement on International Jurisdiction” (1989) 20 SABEOPNONJIP 646.
jurisdictions under the Brussels I Regulation.\textsuperscript{51} Therefore, if a foreign judgment relates to a matter which falls within the exclusive jurisdiction of the South Korean courts, it would not be recognise and enforced by the South Korean courts due to a lack of international jurisdiction.

34 Although the Committee has not resolved the question as to whether the articles dealing with exclusive jurisdiction shall be in the respective related chapters or in Chapter 1, the rules on exclusive jurisdiction will be included in the amended PILA.

XII \textit{FORUM NON CONVENIENS}

35 There is a split in opinion amongst legal commentators in Korea as to whether or not the doctrine of \textit{forum non conveniens}, under which South Korean courts may refuse to exercise international jurisdiction even if they have international jurisdiction according to the standard established by the PILA, is permitted. In the past, South Korean judges had some flexibility as they could resort to the so-called “special circumstances theory” modelled on Japanese court precedents, in which the courts would deny the existence of international jurisdiction in light of special circumstances, even if international jurisdiction would seem to exist when looking at the venue provisions of the CPA.\textsuperscript{52}

36 The Committee has decided to include an express article permitting the \textit{forum non conveniens} doctrine in the amended PILA. The purpose is to give South Korean judges some discretion in individual cases in exercising international jurisdiction after considering the totality of the circumstances of the case in question. That said, if a foreign judgment was rendered by a foreign court which has indirect jurisdiction according to South Korea’s private international law rules, but in circumstances where South Korean courts would have refused to hear the case due to \textit{forum non conveniens}, this reporter considers it likely that South Korean


\textsuperscript{52} Kwang Hyun Suk, \textit{International Civil Procedure Law} (Korea: Pakyoungsa, 2012) at p 74.
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courts would recognise such foreign judgment, since the foreign court had international jurisdiction.

iii **Lawful and timely service of process**

37 Article 217(1)(b) of the CPA provides that:

[T]he defendant who has lost the case must have been served with the complaint (or equivalent document) and the summons or any orders in a lawful manner (other than public notice or similar methods) in advance so as to allow sufficient time for preparation of his defence, or the defendant must have responded to the suit without having been served.

38 Whether the service of process is lawful should be decided on the basis of the concerned foreign law since service of process is a procedural matter in principle; provided, however, that the service of process should not infringe on the sovereignty of South Korea.53

iv **Existence of Reciprocity**

39 According to Article 217(1)(d) of the CPA, one of the conditions for the recognition of foreign judgments is the existence of reciprocity between South Korea and the relevant foreign country. South Korean courts must refuse to recognise and enforce a foreign judgment if the courts of the foreign jurisdiction do not or would not recognise and enforce similar decisions made by the courts of South Korea. Reciprocity need not necessarily be guaranteed by a treaty or convention, it is sufficient if reciprocity is assured by law or regulation, customary law, court decisions or prevailing practices. The expectation of receiving reciprocal treatment is sufficient, even if there have been no actual cases extending reciprocity to South Korean judgments. Conversely, the mere

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53 If the service of process is effected through means that are not prescribed by the South Korean statutes or international treaties to which South Korea is a party, it would be considered an infringement on the sovereignty of South Korea, so long as the service is effected in Korea.
existence of a foreign law or regulation providing for reciprocal treatment is not sufficient if such reciprocity is not implemented in practice.54

40 The reciprocity condition would be satisfied if the applicable foreign courts would recognise South Korean judgments under conditions similar to those set out in the CPA.55 In 1971, the Supreme Court held in a case involving the recognition and enforcement of a divorce decree from a court of the State of Nevada in the US that there is reciprocity only if the concerned foreign courts recognise South Korean judgments under the same or more generous conditions than those applicable in South Korea.56 However, the Supreme Court changed its position in 2004 and now maintains the more liberal approach described above.57 Article 217(1)(d) amended in 2014 expressly adopted the more liberal approach.

41 The existence of reciprocity should be determined by comparing the conditions for recognition of the same kind of foreign judgment in the foreign country and South Korea. Accordingly, the fact that a foreign court has recognised a non-monetary judgment (such as a divorce judgment) of a South Korean court will not be sufficient to demonstrate that there exists reciprocity between South Korea and the foreign country for a monetary judgment. The Supreme Court Judgment of 2004 mentioned above made this point clear by stating that in comparing the conditions for recognition of foreign judgments of the two countries, the focus should be on the same kind of judgments.

42 In respect of the countries to which this report applies (the ASEAN countries and Australia, China, India and Japan), the South Korean courts have held that there is reciprocity between South Korea

56 71Da1391 (22 October 1971).
57 2002Da74213 (28 October 2004).
and Japan, China and Hong Kong, at least in so far as money judgments are concerned.  

43 On the other hand, the Supreme Court denied the existence of reciprocity to an Australian judgment ordering the payment of damages rendered by a court in New South Wales.  

However, since Australia added, in 1999, the courts of South Korea to the list of courts in respect of which Australia is willing to afford reciprocity, South Korean courts are reasonably expected by this reporter to acknowledge in the future the existence of reciprocity between South Korea and Australia.  

44 Given a lower court decision which acknowledged the existence of reciprocity between South Korea and England, South Korean courts could be expected to acknowledge the existence of reciprocity between South Korea and other Commonwealth countries (other than Australia) which follow the English approach. However, the issue as to whether reciprocity exists between South Korea and England (and therefore also other Commonwealth countries) needs a more thorough analysis.

v Public policy  
a General meaning of the test  

45 Article 217(1)(c) of the CPA provides that “the recognition of the foreign judgment must not be contrary to the good morals or other social order of South Korea considering its substantive aspects as well as the procedural aspects”.  

58 For information, the South Korean courts have also held that there is reciprocity between South Korea and Germany, England, Argentina, Ontario (Canadian Province) and various States of the US which have adopted the Uniform Foreign-Country Money Judgments Recognition Act 1962, again in so far as money judgments are concerned.  

59 85Dika1767 (28 April 1987).  

60 Foreign Judgments Regulations 1992 (Aust) Schedule.  

61 2009Gahap477 (Tongyeong Branch of the Changwon District Court) (24 June 2010).  

62 For the purposes of this report, these would be Brunei, India, Malaysia and Singapore.
b Substantive aspects of public policy

46 In connection with the recognition and enforcement of a foreign arbitral award, the Supreme Court held in 1990 that in determining whether or not to recognise a foreign arbitral award, the South Korean courts should take into account the need for the stability of international transactions, as well as the domestic situation.63 This statement is also relevant in the context of the recognition of foreign judgments.64 Accordingly, it is generally accepted that South Korean courts would interpret the public policy test to refer to “international public policy”, rather than “domestic public policy”.

47 In determining the question of public policy, South Korean courts may examine the reasons for the foreign decision, although the South Korean courts should adhere to the principle that they should not re-examine the merits of a case.65 In other words, the révision au fond is prohibited, although the South Korean courts may review the merits of the foreign judgments in so far as such review is necessary to determine whether the conditions for recognition are satisfied or not.66

48 Foreign judgments ordering punitive or non-compensatory damages are not uniformly refused recognition and enforcement in South Korea. The question of public policy is applicable in respect of a foreign judgment awarding punitive damages, treble damages or grossly excessive damages.

49 South Korean law does not permit punitive damages or multiple damages if they are not related to the actual damage suffered by the victim. Moreover, the compensatory damages permissible under South Korean law are calculated in proportion to the degree of the actual damage suffered by the victim. In addition, in cases where a tort is governed by foreign law under the PILA, damages arising from the tort

63 89Daka20252 (10 April 1990).
65 Civil Enforcement Act (Act No 13286, 18 May 2015) Art 27(1).
66 94Daka1003 (Supreme Court) (9 February 1988). This case is concerned with the recognition of a foreign arbitral award.
shall not be awarded by a South Korean court if damages is clearly not appropriate to compensate the injured party or if the extent of the damages substantially exceeds appropriate compensation to the injured party.67 Accordingly, the courts have indicated that the recognition of foreign judgments awarding punitive damages could violate the public policy of Korea.68 The same principle would apply to foreign judgments awarding treble damages in so far as the amount exceeds the actual damage suffered by the victim. However, the concept of treble damages was introduced in 2011 into the Act on Fairness of Subcontracting Transactions69 and subsequently into other statues. The impact this change has on South Korean courts with regard to the recognition and enforcement of foreign judgments ordering payment of treble damages has not yet been settled.

50 As regards grossly excessive damages, the recognition of a foreign judgment awarding damages for an amount grossly greater than one that would be awarded by a South Korean court in a similar case may be considered to be contrary to the public policy of South Korea. In a case, in 1995, involving the recognition and enforcement of judgment of the court of the State of Minnesota against a South Korean defendant ordering payment of US$500,000 as damages (including compensation for mental anguish, physical injury, consequent medical expenses, loss of earning, etc), plus reasonable compensation for damages arising out of the assault and rape of the plaintiff, the Eastern Branch of the Seoul District Court found that the amount of the award was much higher than what would be acceptable under South Korean law for such damages. Thus, the court reduced the amount of compensation that could be enforced in Korea to 50% of the original amount, on the ground that recognition and enforcement of the portion in excess of US$250,000 would be against the public policy of Korea.70 The judgment was upheld by the Supreme Court in 1997. Since then various lower courts have followed this approach, and it is generally considered that the South Korean courts can

68 2007Gahap1076 (Pyeongtaek Branch of the Suwon District Court) (24 April 2009).
69 Fair Transactions in Subcontracting Act (Act No 14143, 29 March 2016).
70 93Gahap19069 (10 February 1995).
recognise only part of a foreign judgment ordering payment of grossly excessive damages based upon the public policy exception.\footnote{99Gahap14496 (Southern Branch of the Seoul District Court) (20 October 2000); 2009Na3067 (Busan High Court) (23 July 2009).}

\section*{c Procedural aspects of public policy}

52 Recognition of a foreign judgment will be refused if the judgment is contrary to the procedural public policy of South Korea, which corresponds to the concept of due process. In other words, if the fundamental procedural principles of South Korean law, which should be
carried out in the foreign courts as well, have been violated in the judicial
procedure conducted in the foreign country, then the foreign judgment
cannot be recognised in South Korea. Article 217(1)(c) of the CPA
amended in 2014 expressly requires the courts to consider the judicial
procedure which the foreign judgment has passed through.

53 Recognition of a foreign judgment would be contrary to the public
policy of South Korea if the concerned foreign court did not provide the
defendant with opportunities to defend himself, or if the defendant was
not properly represented by an attorney during the trial. However, the
mere lack of reasoning in the foreign judgment would not be against the
procedural public policy of South Korea.

54 The Supreme Court has held that the recognition and enforcement
of a foreign judgment is not allowed on the ground that it is contrary to
the procedural public policy of South Korea if the foreign judgment was
acquired by a procedural fraud such as false evidence, false statements
and intentional suppression of important evidence. The Supreme Court
set some conditions to the scope of this by declaring that the recognition
and enforcement of a foreign judgment may be refused only when the
defendant could not allege the existence of fraud in the foreign court and
the existence of a punishable fraud has been proven with high certainty
in a South Korean court.74

55 If a foreign judgment conflicts with a judgment involving the same
parties and the same subject matter rendered by the court of South
Korea, the South Korean courts should refuse to recognise and enforce
the foreign judgment. There is no explicit provision in this regard.
However, the Supreme Court declared, in a case not concerning property
rights, that a foreign judgment incompatible with the judgment of the
South Korean courts could not be recognised as it would be contrary to
the procedural public policy of South Korea.75 If a South Korean court is
faced with two conflicting foreign judgments, each of which is entitled to

74 2002Da74213 (28 October 2004).
75 93Meu1051/1068 (10 May 1994).
recognition and enforcement in its own right, the prior foreign judgment should prevail and be recognised.\footnote{Kwang Hyun Suk, \textit{International Civil Procedure Law} (Korea: Pakyoungsa, 2012) at p 394.}