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RECOGNITION AND ENFORCEMENT OF JUDGMENTS BETWEEN CHINA, JAPAN
AND SOUTH KOREA IN THE NEW ERARECOGNITION AND ENFORCEMENT OF JUDGMENTS BETWEEN CHINA, JAPAN
AND SOUTH KOREA IN THE NEW ERA: SOUTH KOREAN LAW PERSPECTIVE*Kwang Hyun SUK**

Abstract This article discusses the rules for recognition and enforcement of foreign judgments in the Republic of Korea (hereinafter referred to as “South Korea” or “Korea”). Articles 217 and 217-2 of the Civil Procedure Act of Korea and Articles 26 and 27 of the Civil Enforcement Act of Korea provide for the recognition and enforcement of foreign judgments respectively. Korea has not entered into any bilateral or multilateral treaties regarding the recognition and enforcement of foreign judgments and is not a party to the Convention on Choice of Court Agreements. The article also considers the current undesirable status of recognition and enforcement of judgments in the region consisting of China, Japan and South Korea (hereinafter referred to as “Region”) and suggests a course of action to be taken to improve the situation. The author believes that the experts of the Region should embark upon a project to improve the current situation and that the first step should be to exchange and gather information on the current legal regime of the countries in the Region on the recognition and enforcement of judgments. The author looks forward to future cooperation among the experts in the Region on this topic and is confident that the reciprocity requirement, which currently is a major obstacle to the mutual recognition and enforcement of foreign judgments in the Region, will be overcome in the near future.

Keywords recognition, foreign judgments, reciprocity, jurisdiction

INTRODUCTION 172

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This article is based on my presentation on December 19, 2017 at the Seminar on “Recognition and Enforcement of Judgments between China, Japan and South Korea in the New Era” held at Renmin University, Beijing, China. For more information on the recognition and enforcement of foreign judgments in Korea, please refer to Kwang Hyun Suk, *Recognition and Enforcement of Foreign Judgments in the Republic of Korea*, 15 Yearbook of Private International Law, 421 *et seq* (2013/2014), and Kwang Hyun Suk, *Country Report: South Korea*, in Adeline Chong ed. *Recognition and Enforcement of Foreign Judgments in Asia*, The Asian Business Law Institute (Singapore), at 179 *et seq* (2017).

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INTRODUCTION

This article discusses the rules for recognition and enforcement of foreign judgments in the Republic of Korea (hereinafter referred to as “South Korea” or “Korea”). The recognition and enforcement of foreign judgments is governed by the relevant provisions in the Civil Procedure Act of Korea¹ (hereinafter referred to as “KCPA”) and the Civil

¹ Civil Procedure Act (Act No. 12882, Dec. 30, 2014).

Enforcement Act² (hereinafter referred to as “KCEA”). In order to give finality to a dispute settlement achieved by foreign judgments and prevent conflicting legal relationships between the same parties, Articles 217 and 217-2 of the KCPA and Articles 26 and 27 of the KCEA provide for the recognition and enforcement of foreign judgments respectively. Korea has not entered into any bilateral or multilateral treaties regarding the recognition and enforcement of foreign judgments³. Accordingly, it is the relevant provisions in the KCPA and the KCEA that are applicable to the issue of recognition and enforcement of foreign judgments. Korea is not a party to the Hague Convention on Choice of Court Agreements (hereinafter referred to as “Choice of Court Convention”), and currently it does not appear to have any intention of acceding to the Choice of Court Convention in the near future.

Since the Judgment Project of the Hague Conference on Private International Law (hereinafter referred to as “Hague Conference”) is still in development, China, Japan and South Korea should also look for other ways to improve the situation of the recognition and enforcement of judgments among them. With this in mind, in addition to explaining the Korean law regime on the issue, this article also discusses the current status of recognition and enforcement of judgments among the three countries, and lastly suggests a course of action to be taken to improve the current situation.

I. KOREAN LAW REGIME ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

A. Conditions for Recognition and Enforcement of Foreign Judgments

Pursuant to Articles 26 and 27 of the KCEA, a plaintiff must obtain an enforcement judgment (*exequatur*) from a Korean court to enforce a foreign judgment. In order to obtain an enforcement judgment, the following conditions for recognition under Article 217 of the KCPA must be satisfied: (i) The judgment must be final, conclusive and no longer subject to ordinary review; (ii) the foreign court must have had international jurisdiction to adjudicate the case in question; (iii) the defendant who lost the case had to 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 for his defense; (iv) the recognition of the judgment must not be contrary to the public policy of Korea; and (v) there must be a guarantee of reciprocity between Korea and the foreign country to which the foreign court belongs. These conditions are discussed below in more details.

In principle, while deciding whether to recognize and enforce a foreign judgment, Korean courts are prohibited from reviewing the merits of the foreign judgments. Korean

² Civil Enforcement Act (Act No. 13286, May 18, 2015).

³ Korea has concluded bilateral treaties with Australia, China, Mongolia, Uzbekistan and Thailand regarding judicial assistance in civil and commercial matters, which include service of judicial documents and taking of evidence but not recognition and enforcement of foreign judgments.

courts may only review the merits of the case to the extent necessary to determine whether the conditions for the recognition and enforcement have been satisfied. By way of example, a Korean court considered the merits of the case in deciding whether a U.S. judgment awarding punitive damages was consistent with the public policy of Korea.⁴

1. Judgments Entitled to Recognition. — If a foreign judgment is to be recognized and enforced in Korea, the judgment must be valid (or effective), final, conclusive and no longer subject to ordinary review. Under Korean law, a judgment becomes no longer subject to ordinary review when the time for filing a notice of appeal has lapsed or the remedy of appeals has been exhausted in the state of origin. This concept has been taken from the concept of “*rechtskräftig* (确定)” under the German CPA.^{5&6} This requires a stricter condition than a mere effectiveness of a foreign judgment under the laws of the state of origin.⁷

A trickier issue under Chinese law is whether a retrial (再审) can be considered an ordinary review or not. The KCPA allows for the retrial of a judgment which is otherwise final, conclusive and no longer subject to ordinary review, if there is a very serious ground (for example, when a judge who is ineligible to take part in the relevant judgment pursuant to the provisions of the KCPA has nonetheless participated therein; when a judge who took part in the judgment has committed a crime related to his official duty in respect of the case; or when a document used as evidence for the judgment has been found as having been forged or fraudulently altered). An application for a retrial shall be

⁴ Judgment of Apr. 24, 2009, 2007Gahap1076 (the Pyeongtaek Branch of the Suwon District Court).

⁵ § 723 (2) of the German CPA provides “Das Vollstreckungsurteil ist erst zu erlassen, wenn das Urteil des ausländischen Gerichts nach dem für dieses Gericht geltenden Recht die Rechtskraft erlangt hat. Es ist nicht zu erlassen, wenn die Anerkennung des Urteils nach § 328 ausgeschlossen ist.” (The enforcement judgment is to be issued only after the judgment of the foreign court has acquired *res judicata* effect under the law applicable to that court. It shall not be issued if the recognition of the judgment under § 328 is excluded.)

⁶ Art. 4 of the Convention of February 1, 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters provides as follows:

“A decision rendered in one of the Contracting States shall be entitled to recognition and enforcement in another Contracting State under the terms of this Convention —

(1) if the decision was given by a court considered to have jurisdiction within the meaning of this Convention, and

(2) if it is no longer subject to ordinary forms of review in the State of origin. In addition, to be enforceable in the State addressed, a decision must be enforceable in the State of origin.”

Art. 8(4) of the Choice of Court Convention also provides as follows:

“4. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired.”

⁷ Art. 8(3) of the Choice of Court Convention provides “A judgment shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.” From this text, I understand that the phrase “a foreign judgment is effective” means that a foreign judgment is not null and void. Hartley & Dogauchi Report of the Convention at para. 171 states “Having effect means that it is legally valid and operative. If it does not have effect, it will not constitute a valid determination of the parties’ rights and obligations.”

filed within 30 days from the time when the retrial plaintiff becomes aware of the grounds for a retrial and within 5 years from the time when the original judgment has become final, conclusive and no longer subject to ordinary review at the latest. In addition, the application for a retrial may be filed only if the grounds for a retrial could not be argued by appeal in the preceding trial. A retrial is not an ordinary review. Therefore, even if there is a possibility that the grounds for a retrial could be revealed in the future, the judgment could be regarded as being final, conclusive and no longer subject to ordinary review.

However, I understand that under the Civil Procedure Act of China (hereinafter referred to as “CCPA”), the grounds for a retrial are much broader compared to those under the KCPA and there is no limit to the period in which an application for a retrial can be filed. For this reason, there is a view in Korea that the retrial under the CCPA may be regarded as an ordinary review unlike the retrial under the KCPA.

The term “judgment” refers to judicial decisions relating to civil and commercial matters concerning the legal relationships between private parties, rendered by judicial organizations.⁸ In order to be enforceable, it should be rendered by a competent foreign judicial organization with jurisdiction, the proceedings must guarantee cross interrogations between the parties and the contents of the case must be appropriate for coercive performance (*e.g.* contain specific contractual obligations). The name, form and so forth regarding the decision do not matter.

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

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 recognized and enforced in Korea so long as the conditions for recognition are satisfied.

The Supreme Court of Korea (hereinafter referred to as “Supreme Court”) held that, under the KCPA and the KCEA, a US confession judgment⁹ does not constitute an enforceable judgment in Korea.¹⁰ After reviewing §§ 1132 through 1134 of the former

⁸ With regard to the scope of judgment for the purpose of the recognition and enforcement under the KCPA and the KCEA, the issue of whether consent orders, confession judgments, judicial settlements, and waivers of plaintiff’s claims stated in protocols can be considered judgments is still debated.

⁹ A confession judgment is an “acknowledgment by a debtor of a claim and consent that a judgment may be entered usually without notice or hearing for the amount of the claim when it is due and unpaid.” See “Confession of Judgment.” See Merriam-Webster.com, available at <https://www.merriam-webster.com/legal/confession%20of%20judgment> (last visited Jun. 13, 2017).

¹⁰ Judgment of Apr. 29, 2010, 2009Da68910.

Civil Execution Act of California (took effect on January 1, 2003) the Supreme Court held as follows:

Upon the Plaintiff's application for a confession judgment, the law clerk merely reviews the Defendant's statement approving his obligation and the Defendant's attorney's affidavit, and registers them as the judgment without undergoing a litigation procedure. There is no judicial scrutiny. There are no opportunities for a hearing [cross-examination] between the parties during the legal process. Thus, even though it has a title that includes "judgment," and has effects similar to a formal judgment, and the Defendant agrees to waive his own procedural rights and to use the confession judgment procedure intentionally and voluntarily prior to the litigation procedure, the confession judgment cannot meet the definition of "a foreign judgment" which requires a judicial procedure, with opportunities for cross-examinations, conducted by a foreign court.

If a confession judgment cannot be viewed as a judgment, could it be regarded as a judicial settlement? Then how should a judicial settlement be treated under Korean law? For reference, in the context of the Choice of Court Convention, the Hartley & Dogauchi Report states as follows:¹¹

A judicial settlement is different from a consent order in the common-law sense (an order made by the court with the consent of both parties), since a consent order is a judgment and may be recognized and enforced as such under Article 8 of the Convention.

However, the Supreme Court has also held that the discharge effect resulting from a court's approval of a rehabilitation plan in a U.S. bankruptcy proceeding could be recognized in Korea if the conditions for the recognition of foreign judgments are satisfied.¹² I am critical of the latter decision because (i) the recognition of a foreign bankruptcy proceeding does not occur automatically, but requires a decision of a Korean court under the relevant provisions of the Act on Debtor Rehabilitation and Bankruptcy of Korea, which has been modeled on the UNCITRAL Model Law on Cross-Border Insolvency of 1997, and that (ii) in the latter case, the U.S. court's decision to commence the bankruptcy proceeding, which obviously precedes the approval of the rehabilitation plan, had not been recognized in Korea.

2. Jurisdiction Requirement. —

(1) Application of Jurisdiction Requirement

The jurisdiction requirement is specified in Article 217(1) in such terms that "the foreign court should have had international jurisdiction under the principles of international jurisdiction laid down in Korean law or international treaties." This means that Korean courts would recognize foreign judgments only when the international jurisdiction of the foreign court rendering the judgment over the case ("indirect international jurisdiction") is found to exist on the basis of the criteria that Korean courts would apply in determining the jurisdiction when a similar cross-border action is brought

¹¹ Hartley & Dogauchi Report on the Choice of Court Convention at para. 207.

¹² Judgment of Mar. 25, 2010, 2009 Ma1600.

before it (“direct international jurisdiction”). This is because Article 217(1) of the KCPA explicitly provides that the foreign court must have had international jurisdiction under the principles of international jurisdiction laid down by Korean law or treaties.

Although the KCPA contains provisions on distribution of judicial power among the various courts within Korea (Articles 2 to 25, Articles 29 to 31; hereinafter referred to as “KCPA Venue Provisions”), the KCPA does not contain any specific provision on direct international jurisdiction of Korean courts. The principles on international jurisdiction had been developed by court decisions in the past. However, the Private International Law of Korea (hereinafter referred to as “KPILA”) which has been amended in 2001 has introduced three articles on international jurisdiction. Article 2 in the General Provisions laying down general rules on international jurisdiction states that detailed and refined rules on international jurisdiction should be developed by consulting the KCPA Venue Provisions regarding civil or commercial matters. The idea underlying Article 2 requires judges to establish detailed and refined rules on international jurisdiction after considering the special characteristics of international jurisdiction instead of mechanically assuming that “the rules on international jurisdiction are equal to the KCPA Venue Provisions.” In addition, Articles 27 and 28 have introduced special rules to protect consumers and employees, respectively.

Influenced by the introduction of § 2, the judgment of January 27, 2005 of the Supreme Court¹³ which is the leading case on international jurisdiction held as follows:

In determining the international jurisdiction the courts should follow the basic ideas of fairness to the parties, justice, promptness and economy of trial; more specifically, the courts should consider not only the interests of individuals such as fairness, conveniences and predictability of the litigating parties but also the interests of the courts and the state such as justice, promptness, efficiency and effectiveness of court decisions. In determining which of the various interests need to be protected, the courts shall follow in individual cases the reasonable principles in conformity with the objective test, i.e. a substantial connection between the parties and the forum, and a substantial connection between the dispute and the forum.

Thereafter, Korean courts tend to employ a case-by-case analysis based upon such general guidelines. However, determining whether Korean courts have international jurisdiction in concrete cases is not clear enough because sometimes Korean courts exercise too much discretion. Therefore, legal commentators strongly suggest that detailed and refined rules on international jurisdiction be added to the KPILA.

In June 2014, the Ministry of Justice of Korea (hereinafter referred to as “MOJ”) established an expert committee (hereinafter referred to as “Committee”) to prepare a draft amendment to the KPILA (the term of the Committee expired on December 31, 2015).¹⁴ As of December 19, 2017, when I gave a presentation based on this article, the

¹³ Docket No. 2002 Da59788.

¹⁴ I was a member of the Committee.

official draft of the amended KPILA had not yet been published. However, by January 19, 2018, the MOJ completed the remaining works and published the official draft. I reasonably believe that the detailed and refined rules on international jurisdiction in the amended KPILA will take effect by the end of 2018 or 2019 at the latest. The references in this report to the amended KPILA are of the tentative draft which the MOJ had prepared in November of 2017 and not officially released to the public.¹⁵ In this article, I will not discuss the contents of the official draft. Korea will insert in the KPILA the rules on international jurisdiction regarding not only property law matters, but also family law and succession law matters, in parallel with the existing rules on applicable law. In other words, Korea differs from both Japan and China in that Korea plans to insert detailed rules on international jurisdiction in the Private International Law Act rather than the Civil Procedure Act, whereas both Japan and China have inserted detailed (in the case of Japan) or brief (in the case of China) rules on international jurisdiction in their respective civil procedure acts.

(2) Specific Criteria for Determining Jurisdiction

The specific criteria that the Korean courts may apply in determining the question of jurisdiction when they are presented with cross-border actions are generally as follows.¹⁶

a) Defendant's Domicile

The KCPA 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) (Articles 2, 3 and 5). It is generally recognized in Korea that this rule (*actor sequitur forum rei*) also applies to international jurisdiction. The Committee agreed that a provision expressly setting forth the *actor sequitur forum rei* rule will be included in the amended KPILA.

b) Place of Branch

Article 12 of the KCPA, a venue provision, provides that an action against a person (both natural and judicial) maintaining an office or a place of business in 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 recognized internationally that such a rule also applies with regard to international jurisdiction. However, the KCPA also provides that the general jurisdiction for an action against a foreign juridical person shall be the place in Korea where it has an office or a place of business (Article 5(2)). 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

¹⁵ On the occasion of the "HCCH Asia Pacific Week 2017" held on July 4, 2017 in Seoul, I made a presentation entitled "Proposed Amendments of the Private International Law Act of Korea: With a Focus on the Rules of International Jurisdiction."

¹⁶ For more details, see Kwang Hyun Suk, 国际民事诉讼法 (*International Civil Procedure Law*), Pakyoungsa (Seoul), at 67 *et seq.* (2012) and the presentation mentioned above, see *id.*

relationship between Articles 5(2) and 12 is not clear, controversially Korean courts tend to apply Article 5 in determining international jurisdiction.¹⁷ Accordingly, if a foreign corporation establishes a branch office or a place of business in Korea, it will be subject to Korean jurisdiction generally without regard to whether the particular cause of action is connected with the operation of the 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 2010.¹⁸

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

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.

c) Jurisdiction Based on the Activity of the Defendant

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 KPILA:

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.

This provision was influenced by the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters published in 1999¹⁹ (hereinafter referred to as “Preliminary Draft”) (Article 9) and the Civil Procedure Act of Japan (hereinafter referred to as “JCPA”) (Article 3-3(5)).²⁰

d) Place of Performance

The KCPA provides that an action concerning property rights may be brought before the court located in the place of abode or the place of performance (Article 8). In a case involving payment of contractual obligations, the Supreme Court held in 1972 that Article 8 could be a basis for international jurisdiction.²¹ Although Article 8 does not seem to be limited to the performance of a contractual obligation, influential views maintain that the provision should not apply to non-contractual obligations. It is not clear whether the

¹⁷ Supreme Court Judgment of the international jurisdiction requirement and the due service requirement are not expressly mentioned in the text of the CCPA. Jun. 9, 2000, 98Da35037.

¹⁸ Judgment of Jul. 15, 2010, 2010Da18355.

¹⁹ Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. Its text and the report, available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=3494&dtid=35>. (last visited Jan. 26, 2018).

²⁰ JCPA (Act No. 109, Jun. 26, 1996) Article 3-3(5) 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 JCPA was taken from the Japanese Law Translation Database System, available at <http://www.japaneselawtranslation.go.jp/law/detail/?id=2834&vm=04&re=02>. (last visited Jan. 26, 2018).

²¹ Judgment of Apr. 20, 1972, 72Da248.

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.²²

Under the proposed provision of the amended KPILA, Korean courts will have international jurisdiction in matters relating to the supply of goods, if the goods were supplied in Korea or in matters relating to the provision of services, if the services were provided in Korea.

This would mean that the place of performance of a 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.

e) Place of Tort

An action for tort may be brought before the court of the place where the tortious act occurred (Article 18 of the KCPA). It is generally recognized that Article 18 of the KCPA 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.²³ However, 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,²⁴ which was influenced by the idea of "reasonable foreseeability" and "purposeful availment" appearing in the decisions of the Supreme Court of the U.S.²⁵

The Committee agreed that an article along the lines of the Brussels I Recast (Article 7(2)), the Preliminary Draft (Article 10) and the JCPA (Article 3-3(8)) will be included in the amended KPILA. The "mosaic rule," as in the *Shevill* case of 1995 (C-68/93) of the European Court of Justice, is not contemplated. There will be no separate rules on special types of tort, such as product liability or defamation, etc.

f) Place of Property

An action concerning property rights against a person who does not have a domicile in 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 (Article 11 of the KCPA). This provision appears to confer jurisdiction merely on

²² Judgment of May 29, 2006, 2006Da71908, 71915.

²³ Supreme Court Judgment of Mar. 22, 1983, 82Daka1533.

²⁴ Judgment of Nov. 21, 1995, 93Da39607.

²⁵ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987).

the grounds of the location of any specified subject matter or property, and the Supreme Court has also admitted in 1988 that Article 11 may be applied to international jurisdiction.²⁶ However, the persuasive view among Korean legal commentators is that the application of the provision is restricted only to those cases where the defendant has had property in Korea for a certain period of time (being enough time to establish some real connection to 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 considered comprehensively 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).

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 specific 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.

g) Jurisdiction Agreement

In practice, the parties' agreement on international jurisdiction plays a very important role. Although the KCPA does not contain any express provision regarding the effectiveness of the parties' agreement on international jurisdiction, Korean courts generally recognize the effectiveness of such an agreement and give effect to it.²⁷ Accordingly, if a foreign judgment is rendered in breach of an agreement for the settlement of the dispute, the courts of Korea would refuse to recognize and enforce the foreign judgment on the basis that 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: (i) The case does not fall under the exclusive jurisdiction of Korea; (ii) the designated foreign court has valid international jurisdiction under its law; (iii) the case should have a reasonable relationship with the designated foreign court; and (iv) the jurisdiction agreement is not grievously unreasonable or unfair.²⁸ The Supreme Court maintains its position despite legal commentators' criticisms of condition (iii).²⁹

With regard to requirement (iii) mentioned above, the Committee has agreed not to

²⁶ Judgment of Oct. 25, 1988, 87Daka1728.

²⁷ For example, Supreme Court Judgment of Jan. 21, 1992, 91Da14994, Judgment of Sep. 9, 1997, 96Da20093.

²⁸ Judgment of Sep. 9, 1997, 96Da20093.

²⁹ For example, Judgment of Aug. 26, 2010, 2010Da28185.

follow the Supreme Court's position. In addition, taking into consideration the entry into force of the Choice of Court Convention on October 1, 2005, the Committee decided to follow the approach of the Convention.

h) Appearance

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

i) Protection of Socio-Economically Weaker Parties

The KPILA sets forth special rules on international jurisdiction in respect of passive consumer contracts and individual employment contracts (Articles 27 to 28), which are modeled on the Brussels Convention (Articles 13 to 15), and on the Preliminary Draft (Articles 7 and 8). In short, as for the consumer contracts, the habitual residence of the consumer is relevant, and as for the individual employment contracts, the place where the employee habitually performs his work is relevant.

j) Related Jurisdiction

The KCPA 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 claims (Article 25). Some legal commentators take the view that the provision could be applicable to cross-border actions as well as domestic actions.

k) Exclusive International Jurisdiction

The KCPA does not contain provisions on the exclusive international jurisdiction of the Korean courts. However, it is considered by legal commentators that the Korean courts have exclusive international jurisdiction in the following cases: (i) in proceedings concerning rights *in rem* in immovable property if the property is situated in Korea; (ii) 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 Korean law; (iii) in proceedings concerning the validity of entries in public registers, if the register is kept in Korea; and (iv) 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 Korea. This is very similar to the list of exclusive jurisdictions under the Brussels I (Article 22), which refers to the "Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters." Therefore, if a foreign judgment relates to a matter which falls within the exclusive jurisdiction of the Korean courts, it would not be recognized and enforced by the Korean courts due to a lack of international jurisdiction.

With regard to (iv) above, there was a dispute whether the proceeding in which the Korean plaintiff requires the Japanese defendant to transfer and register the transfer of the patents registered in Japan pursuant to the contract between the parties is subject to the exclusive jurisdiction of Japan or not. While the Supreme Court admitted that the proceeding in which the subject matter is the validity or existence of patents generally fall under the exclusive jurisdiction of the country of registration, the Supreme Court held that the proceedings in question did not fall under the exclusive jurisdiction of Japan, because the principal subject matters of the dispute were the interpretation of the contract, and the rights and obligations of the parties under the contract.³⁰ The judgment was welcomed by legal commentators.

Articles dealing with exclusive jurisdiction will be included in Chapter 1 of the amended KPILA.

l) Family Matters

As to the case of family matters, the Supreme Court held in its leading case of 1975 that (i) in principle, considering the fairness of court proceedings and the idea of justice, the domicile of the defendant should be located in Korea in order for Korean courts to have jurisdiction, because the *forum rei* principle is also valid for family matters including divorce cases, and that (ii) by way of exception, however, the Korean courts may have jurisdiction even if the domicile of the defendant is located outside of Korea, in case where refusal to entertain the action could amount to a denial of justice.³¹ As examples of such situations, the Supreme Court expressly mentioned the cases where the defendant is missing or a comparable situation exists, or the defendant actively responds to the action.

However, it is not clear whether the Supreme Court still maintains this position after the amendment of the KPILA in 2001, because a judgment of the Supreme Court³² did not mention the foregoing jurisdictional rules. Lower courts appear to make efforts to establish the jurisdictional rules on a case-by-case analysis based upon § 2 of the KPILA instead of following the old jurisdictional rules established by the Supreme Court.

m) Forum non Conveniens

There is a split in views among Korean legal commentators as to whether or not the doctrine of forum non conveniens, under which Korean courts may refuse to exercise international jurisdiction even if they have international jurisdiction according to the standard established by the KPILA, is permitted. In the past, Korean judges had some flexibility as they could resort to the so-called “special circumstances theory” modeled on the Japanese court precedents, in which the courts would deny the existence of international jurisdiction in light of special circumstances, even if international

³⁰ Docket No. 2009Da19093, Apr. 28, 2011.

³¹ Docket No. 74Meu22, Jul. 22, 1975.

³² Docket No. 2005Meu884, May 26, 2006.

jurisdiction would seem to exist when looking at the venue provisions of the KCPA.

The Committee has decided to include an express article permitting the *forum non conveniens* doctrine in the amended KPILA. The purpose is to give 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 Korea's private international law rules, but involves circumstances in which Korean courts, if the case came before them, would have refused to hear the case on the grounds of *forum non conveniens*, the Korean courts, in my opinion, would recognize such a foreign judgment, since the foreign court had international jurisdiction.

3. *Service of Process*. — As one of the conditions for recognition of foreign judgments, the KCPA stipulates that “the defendant who has lost the case was 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 defense, or the defendant responded to the suit without having been served” (Article 217(1)(b)). Even where a Korean defendant was not served with the process, the KCPA's condition would be satisfied if he had voluntarily responded to the action.

(1) Lawfulness and Timeliness of Service of Process

In order to satisfy the above-mentioned condition, the service of process should be lawful. Whether the service of process is lawful should be decided on the basis of the concerned foreign law since service of process is basically a matter of procedure; provided, however, that the service of process should not infringe on the sovereignty of Korea.³³ The KCPA expressly requires that the process should be served so as to allow the defendant sufficient time to prepare for his defense. The lawfulness and timeliness of service of process requirement was modeled on the Brussels Convention.³⁴ However, it should be noted that the lawfulness requirement has been deleted in the Brussels I.³⁵

(2) Manner of Service of Process

As mentioned above, the process should be served in accordance with the laws of the rendering jurisdiction. Accordingly, service upon an agent appointed by the defendant will be viewed by Korean courts as satisfying the condition as long as such service is recognized as lawful under the laws of the rendering jurisdiction. The Supreme Court

³³ If the service of process is effected through means that are not prescribed by the Korean law or international conventions to which Korea is a party, it would be considered an infringement on the sovereignty of Korea, so long as the service is effected in Korea.

³⁴ Art. 27. The convention refers to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

³⁵ Art. 34. This is also the case with Art. 45(1) of the Brussels I Recast, which refers to the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

expressly supported this view in the judgment of July 22, 2010.³⁶ In that case, the Supreme Court refused to recognize a default judgment rendered by a court of the State of Washington on the grounds that the relevant service of summons was not made strictly in conformity with the requirements of the State of Washington. In the case in question, the plaintiff has inadvertently served the form of summons which is designed to be used for residents of the State of Washington, although the defendant was not a resident. The plaintiff should have served the form of summons designed to be used for non-residents. The difference of the two forms is that the form for residents states that the defendant is given 20 days of period before the default judgment is rendered, whereas the form for non-residents states that the defendant is given 60 days of period. The Supreme Court pointed out this irregularity and held that the service of process was not lawful under the laws of the State of Washington. I do not support the position of the Supreme Court, because the primary purpose of the service of process requirement is to ensure that the defendant who has lost the case had an adequate opportunity to defend against the action, and such an opportunity had not been lost in that case, because the defendant was actually given a period of 60 days before the default judgment was rendered and the defendant intentionally decided not to respond to the action believing that the court of the State of Washington lacked international jurisdiction.

The methods similar to public notice include services by means of a mere display of process on the notice board of the concerned court or by publication in a newspaper, *remise au parquet* under French law or a mere dispatch of service by a court official according to which the notice is deemed as having been delivered to its addressee even if it has not been actually delivered. Korea is a signatory to the Hague Service Convention of 1965 and has designated the Ministry of Court Administration of the Supreme Court as the central authority. Therefore, a service of process from a Contracting State of the Service Convention can be effected pursuant to the Convention. At the time of the accession, Korea objected to the use of the methods of service referred to in Article 8 and sub-paragraphs (a), (b) and (c) of Article 10 of the Service Convention.

(3) Cure of Defective Service of Process

The question of whether a defective service of process may be regarded as having been cured can arise when the defendant has actually accepted a defective service and had no difficulty in making preparations for the action. In such a case, it would seem appropriate to recognize the service of process as valid since the primary purpose of the KCPA condition is to ensure that the defendant should have had an adequate opportunity to defend against the action. However, Korean courts would not accept the cure of a defective service where the defective service itself resulted in or implied an infringement of Korean sovereignty (such as service of process by a foreign court upon a Korean national in Korea through the consul of that country in Korea).

³⁶ Docket No. 2008 Da31089.

4. Public Policy Test. —

(1) General Meaning of the Test

The specific language used in Article 217(1)(c) of the KCPA regarding the public policy test is that the recognition of the foreign judgment should not be contrary to the good morals or other social orders of Korea, with respect to its substantive aspects as well as the procedural aspects. Accordingly, it is clear that the public policy here includes not only the substantive aspects of public policy, but also the procedural aspects.

(2) Substantive Aspects of Public Policy

In connection with the recognition and enforcement of a foreign arbitral award, the Supreme Court stated in 1990 that in determining whether or not to recognize a foreign arbitral award, the Korean court should take into account the need for the stability of international transactions, as well as the domestic situation.³⁷ This statement may be considered to be relevant to the recognition of foreign judgments as well. Accordingly, it is generally accepted that Korean courts would interpret the public policy test to refer to “international public policy,” rather than “domestic public policy.” In determining the question of public policy, a Korean court may examine the reasons of the foreign decision, although Korean courts should adhere to the principle that they should not re-examine the merits of a case (KCEA, § 27(1)). In other words, the *révision au fond* is prohibited; provided, however, that the Korean courts may review the merits of the foreign judgments insofar as such review is necessary to determine whether the conditions for recognition have been satisfied or not.³⁸

Foreign judgments ordering punitive or non-compensatory damages are not uniformly refused recognition and enforcement in Korea. The question of public policy is applicable in respect of a foreign judgment awarding punitive damages, treble damages or grossly excessive damages. In principle, 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 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 KPILA, damages arising from the tort shall not be awarded by a 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 (Article 32(4) of the KPILA). Accordingly, the Korean courts have indicated that the recognition of foreign judgments awarding punitive damages could violate the public policy of Korea.³⁹ The majority of legal commentators takes the position that the recognition of foreign judgments awarding

³⁷ Judgment of Apr. 10, 1990, 89Daka20252.

³⁸ Supreme Court Judgment of Feb. 9, 1988, 94Daka1003. This case is concerned with the recognition of a foreign arbitral award.

³⁹ Judgment of Apr. 24, 2009, 2007Gahap1076 (the Pyeongtaek Branch of the Suwon District Court).

punitive damages would be denied on the ground of public policy. The same principle could apply to foreign judgments awarding treble damages insofar 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 Transactions⁴⁰ and subsequently into other statutes. The impact of this change has on Korean courts with regard to the recognition and enforcement of foreign judgments ordering payment of treble damages has not yet been settled.

As regards grossly excessive damages, the recognition of a foreign judgment awarding damages for an amount grossly greater than the one that would be awarded by a Korean court in a similar case may be considered to be contrary to the public policy of Korea. In a case in 1995 involving the recognition and enforcement of judgment of the court of the State of Minnesota against a 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 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.⁴¹ 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 Korean courts can recognize only part of a foreign judgment ordering payment of grossly excessive damages based upon the public policy exception.⁴²

However, the impact of the introduction of Article 217-2(1) of the KCPA on the recognition and enforcement of a foreign judgment ordering payment of grossly excessive damages should also be considered. Article 217-2(1) inserted in 2014 expressly provides that a Korean court may not recognize a foreign judgment in part or in whole, if the foreign judgment concerning damages leads to a result that is manifestly incompatible with the basic principles of the laws of Korea or the treaties to which Korea is a party. Article 217-2(2) also provides that in cases where a Korean court applies Article 217-2(1), regard is to be had to whether the scope of damages rendered by the foreign court encompasses legal costs such as lawyers' fees. It is understood that Article 217-2 has been inserted to protect those Korean companies which are ordered by foreign courts to pay huge amounts of compensation to foreign companies. I have thought that the purpose of Article 217-2 was to set forth clearer criteria than those under the public policy test, rather than introducing new stricter requirements for the recognition of foreign judgments.

⁴⁰ Act on Fairness of Subcontracting Transactions (Act No. 14143, Mar. 29, 2016).

⁴¹ Judgment of Feb. 10, 1995, 93Gahap19069.

⁴² Judgment of Oct. 20, 2000, 99Gahap14496 (The Southern Branch of the Seoul District Court); Judgment of Jul. 23, 2009, 2009Na3067 (The Busan High Court).

However, the Supreme Court has recently held that Article 217-2 is applicable to foreign judgments ordering payment of punitive damages, while it is not applicable to those ordering the compensation for the actual damages, regardless of the extent of the damages.⁴³ These decisions have caused controversy as to whether they are consistent with the genuine purpose of Article 217-2.

(3) Procedural Aspects of Public Policy

Recognition of a foreign judgment will be refused if the judgment is contrary to the procedural public policy of Korea, which corresponds to the concepts of due process. In other words, if the fundamental procedural principles of 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 recognized in Korea. Article 217(1)(c) of the KCPA amended in 2014 expressly requires the courts to consider the judicial procedure which the foreign judgment has passed through.

For example, recognition of a foreign judgment would be contrary to the public policy of 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 Korea.

The Supreme Court has held that the recognition and enforcement of a foreign judgment is not allowed on the grounds that it is contrary to the procedural public policy of 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 proved with high certainty in a Korean court.⁴⁴

If a foreign judgment conflicts with a judgment involving the same parties and the same subject matter rendered by the court of Korea, the Korean courts should refuse to recognize 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 Korean courts could not be recognized as it would be contrary to the procedural public policy of Korea.⁴⁵ If a Korean court is faced with two conflicting foreign judgments, each of which is entitled to recognition and enforcement in its own right, the prior foreign judgment should prevail and be recognized, although there is no court precedent directly on point.

⁴³ Judgment of Oct. 15, 2015, 2015Da1284 on the recognition and enforcement of judgment of the State of Texas of the US; Judgment of Jan. 28, 2016, 2015Da207747 on the recognition and enforcement of judgment of the State of Kentucky of the US.

⁴⁴ Judgment of Oct. 28, 2004, 2002Da74213.

⁴⁵ Judgment of May 10, 1994, 93Meu1051/1068.

5. *Reciprocity Requirement.* — According to Article 217(1)(d) of the KCPA, one of the conditions for the recognition of foreign judgments is the existence of reciprocity between Korea and the relevant foreign country. Korean courts must refuse to recognize and enforce a foreign judgment if the courts of the foreign jurisdiction do not or would not recognize and enforce similar decisions made by the courts of Korea.

Reciprocity needs 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 reasonable expectation of receiving reciprocal treatment is sufficient, even if there have been no actual cases extending reciprocity to Korean judgments. The first instance court of Korea which recognized a Chinese judgment for the first time in 1999 took this approach by comparing the conditions of the recognition of foreign judgments in Korea and China. This is different from the position which appears to be shared by Chinese professors that “only if Chinese judgments have already been recognized or enforced in a foreign country can the judgments from that particular foreign country be recognized and enforced in China.”⁴⁶ If both countries stick to the same position, the reciprocity requirement can never be satisfied unless one country first makes a concession by giving up its position.⁴⁷

Conversely, the mere existence of a foreign law or regulation providing for reciprocal treatment is not sufficient if such reciprocity is not implemented in practice.

The reciprocity requirement has been criticized by some legal commentators on the grounds that it has a retaliatory element and is not conducive to the protection of justified claims. As a matter of interpretation of the current law, however, the reciprocity requirement should be respected. This is also the case with family matters including divorce and adoption.

It is sufficient if the concerned foreign courts recognize Korean judgments under conditions which are not substantially different from the KCPA conditions in any material respect. Although the Supreme Court held in a 1971 case involving the recognition and enforcement of a divorce decree of a Nevada state court that there is reciprocity only if the concerned foreign courts recognize Korean judgments under the same or more generous conditions than those applicable in Korea, the Supreme Court has changed its position in 2004⁴⁸ and now maintains the more liberal approach. Article 217(1)(d) amended in 2014 expressly adopted the more liberal approach. I understand that the German courts as well as the Japanese courts take this position.

⁴⁶ Bélig Elbalti, *Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark But Not Much Bite*, 13(1) Journal of Private International Law, 202 (2017); it cites various Chinese sources. The international jurisdiction requirement and the due service requirement are not expressly mentioned in the text of the CCPA.

⁴⁷ According to Professor Elbalti, China is the country which adopts one of the most restrictive reciprocity systems; see *id.* at 201.

⁴⁸ Docket No. 2002Da74213, Oct. 28, 2004.

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 Korea. Accordingly, the fact that a foreign court has recognized a non-monetary judgment (such as a divorce judgment) of a Korean court will not be sufficient to demonstrate that there exists reciprocity between 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. Unfortunately, however, the Supreme Court does not appear to follow that principle consistently.⁴⁹

Korean courts have held that reciprocity exists between Korea and the State of New York,⁵⁰ Germany,⁵¹ Japan,⁵² China,⁵³ England,⁵⁴ Ontario (Canadian Province),⁵⁵ Argentina,⁵⁶ and Hong Kong of China,⁵⁷ respectively. It is well established that there is reciprocity between Korea and the states of the US which have adopted the Uniform Foreign (or Foreign Country) Money Judgment Recognition Act, at least insofar as money judgments are concerned.

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.⁵⁸ However, since in 1999 Australia added the courts of Korea to the list of courts in respect of which Australia is willing to afford reciprocity in the Regulations under the Foreign Judgments Act 1991, Korean courts are reasonably expected to acknowledge in the future the existence of reciprocity between Korea and Australia.

Given a lower court decision which acknowledged the existence of reciprocity between Korea and England,⁵⁹ Korean courts could be expected to acknowledge the existence of reciprocity between Korea and other Commonwealth countries (other than Australia) which follow the English approach. However, I believe that the issue as to whether reciprocity exists between Korea and England (and therefore also other Commonwealth countries) needs a more thorough analysis.

B. Examination of Conditions for Recognition

Since all of the KCPA's conditions for the recognition of foreign judgments are

⁴⁹ Docket No. 2012Meu66, Feb. 15, 2012.

⁵⁰ Docket No. 88Meu184,191, Mar. 14, 1989.

⁵¹ Seoul High Court Judgment, Docket No. 84Na3733, Aug. 20, 1985.

⁵² Seoul District Court Judgment, Docket No. 68Ga620, Oct. 17, 1968.

⁵³ Seoul District Court Judgment, Docket No. 99Gahap26523, Nov. 5, 1999.

⁵⁴ Changwon District Court Tongyoung Branch, Docket No. 2009 Gahap 477, Jun. 24, 2010.

⁵⁵ Docket No. 2009 Da 22952, Jun. 25, 2009.

⁵⁶ Seoul Central District Judgment, Docket No. 2008Gadan363951, Apr. 23, 2009.

⁵⁷ Seoul Central District Judgment, Docket No. 2008Gahap64831, Mar. 27, 2009.

⁵⁸ Judgment of Apr. 28, 1987, 85Daka1767.

⁵⁹ Judgment of Jun. 24, 2010, 2009Gahap477 (the Tongyeong Branch of the Changwon District Court).

related to the national interests of Korea, as well as the personal interests of the concerned parties, as is expressly set forth in Article 217(2), Korean courts should examine the compliance with such conditions *ex officio*.

C. Effects of Recognition of Foreign Judgment

1. *Automatic Recognition and General Effects of Foreign Judgment.* — Foreign judgments that comply with the KCPA conditions for recognition are “automatically” recognized. Therefore, a foreign judgment should take effect as from the time when it took effect in the jurisdiction in which it was rendered, rather than just from the time when its recognition is confirmed in Korea where its enforcement is sought. This is also the case with the JCPA, whereas a court decision is necessary for recognition under the CCPA. Whether to accept automatic recognition of foreign judgments is a matter of policy decision. Under Korean law, for example, a foreign judgment declaring bankruptcy of a person can be recognized only upon a decision of a Korean court. This is also the position adopted by the UNCITRAL Model Law on Cross-Border Insolvency of 1997. The timing of recognition of foreign judgments may be important because the majority view in Korea gives priority to the earlier foreign judgment, where there are two or more foreign judgments that satisfy the requirements of recognition under the KCPA.

A foreign judgment which complies with the KCPA conditions for recognition has the same effects in Korea as the ones given to it in the rendering jurisdiction, except that its enforcement is subject to an enforcement judgment to be obtained in Korea. There are, however, minority views maintaining that a foreign judgment should have the same effects as those given to a corresponding Korean judgment or that the effects given in both jurisdictions (that is, in Korea and in the concerned foreign jurisdiction) should be compared in favor of the more restrictive effects.

2. *Res Judicata Effect.* — Under the KCPA, a final and conclusive Korean judgment has the effect of determining the rights of the parties only with respect to the matters covered in the tenor as distinguished from the reasoning (Article 216(1)).

If one takes the minority view that a foreign judgment should have the same effects as those given to a corresponding Korean judgment, the effects of a final and conclusive foreign judgment will extend to the matters covered in the tenor even though the relevant law of the foreign country is different. However, under the majority view that a foreign judgment satisfying the KCPA conditions for recognition has the same effects in Korea as those given to it in the foreign country, the principle prevailing in the relevant foreign country will apply. In addition, under the KCPA, the effects of a final and conclusive judgment extend to the parties to the action, their successors coming into existence after the conclusion of oral hearings and a third party who holds the subject matter of the litigation (Article 218).

The doctrine of *res judicata* is generally understood in Korea to prevent not a new suit *per se* but a new judgment which conflicts with an earlier judgment; provided, however,

that a party who has won the case is not allowed to file a new suit on the same cause of action since in such case it is not worth granting him the same judgment again. The prevailing view in Korea seems to be that the doctrine of *res judicata* in this sense should also apply to foreign judgments even though the doctrine has a different effect in the foreign country. There is a Supreme Court judgment which can be construed as supporting the same view.⁶⁰

3. *Partial Recognition of Foreign Judgment*. — When a foreign judgment deals with more than one claim, recognition may cover only part of the judgment. In addition, the amount for a judgment for one claim may be recognized only partially in terms of amount. An example is to recognize a judgment for excessive damages only to the extent consistent with the public policy of Korea by reducing the amount of the judgment.

D. Enforcement of Foreign Judgment

1. *Prerequisites for Enforcement Judgment (Exequatur)*. — Korean law distinguishes between recognition and enforcement with regard to foreign judgments. While a foreign judgment is “automatically recognized” if the conditions for recognition are satisfied (KCPA, Article 217), it can be enforced only when an enforcement judgment (exequatur) is obtained from a Korean court (KCEA, Articles 26–27). This is because the enforcement of a foreign judgment, which involves an exercise of State power, has a greater impact on the legal status quo in Korea than the recognition of a foreign judgment does.

In order to obtain an enforcement judgment, it is necessary to establish that the KCPA conditions for recognition are satisfied. Review of the merits of the case is expressly prohibited under the KCEA (Article 27(1)).

2. *Procedure for Enforcement Judgment*. — An action for enforcement judgment should be brought to the court having general jurisdiction over the judgment debtor (Article 26(2)). In the absence of any court having such general jurisdiction, an action for enforcement judgment may be brought to a court having jurisdiction over the assets of the judgment debtor. The plaintiff in an action for enforcement judgment should be the person designated as the entitled claimant in the foreign judgment or his successor, and the defendant should be the named judgment debtor or his successor.

Proceedings for an ordinary action apply to proceedings in an action for enforcement judgment. The amount of award stated in a foreign judgment need not be converted into Korean currency (Won), since such conversion is made at the rate of exchange prevailing at the time of actual execution (Civil Code, § 378). If the plaintiff’s action is sustainable, the court would render an enforcement judgment expressly referring to the concerned foreign judgment and permitting its enforcement.

There is a dispute as to whether the defendant in an action for enforcement judgment can raise as a defense the fact that the claim affirmed in the foreign judgment has been

⁶⁰ Docket No. 88Meu184, 191, Mar. 14, 1989.

discharged by performance, set-off or the like after the foreign judgment was rendered. The negative view refers to KCEA (Article 44) for a separate action for objection to a claim affirmed in a final and conclusive judgment and argues that in light of this provision, the judgment debtor in such an action should not be allowed to object to the same action on the grounds of post-judgment discharge. The affirmative view, however, may be considered to be more conducive to the efficient and economical resolution of judicial disputes. In a case where the defendant raised a defense on the grounds of post-arbitral award discharge, the Supreme Court has expressly supported the affirmative view.⁶¹ Korean courts are expected to apply the same principle to an action for enforcement judgment based upon a foreign judgment.

II. CURRENT STATUS OF RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AMONG CHINA, JAPAN AND SOUTH KOREA

A. Between South Korea and Japan

As far as the recognition and enforcement of foreign judgments is concerned, there are no problems between South Korea and Japan.

The requirements for recognition and enforcement of foreign judgments under Article 118 of the JCPA, which was also influenced by the German ZPO, are similar to those under Article 203 of the KCPA, which was the precursor of the current Article 217 of the KCPA. Article 118 of the JCPA requires the same five conditions as the KCPA: the final judgment requirement, the jurisdiction requirement, the service requirement, the public policy requirement and the reciprocity requirement.

In determining whether there exists reciprocity with a foreign country the Japanese courts take a more liberal approach by reviewing whether the relevant foreign courts would recognize Japanese judgments under the conditions substantially similar to those set out in the JCPA.⁶² In addition, I understand that the Japanese courts strictly comply with the rules set forth by the JCPA and the JCEA in recognizing and enforcing foreign judgments. Accordingly, there is no doubt in Korea and Japan that there exists reciprocity between Korea and Japan. In fact, there are some lower court precedents in Korea confirming the existence of reciprocity between the two countries.

However, since Korea made a few amendments to the KCPA and KCEA in 2001 and 2014, respectively, there are some minor differences between the KCPA and the JCPA which can be described as follows.

First, in referring to the foreign judgment which can be recognized in Korea, Article 217(1) of KCPA expressly refers to not only a judgment (判決 or *Urteil* in German) but

⁶¹ Docket No. 2001Da20134, Apr. 11, 2003.

⁶² The position has been taken by a landmark decision of June 7, 1983 of the Supreme Court of Japan. For more information on the reciprocity requirement under the JCPA, see Elbalti, fn. 46 at 191 *et seq.*

also other decisions which have the same force as a judgment (裁判 or *Entscheidung* in German).

Second, Article 217(1) expressly provides that the criteria of indirect jurisdiction are the same as those under Korean law. In addition, Article 217(1) refers to jurisdiction (管辖权 or *Zuständigkeit* in German), whereas Article 118 of the JCPA refers to “*facultas jurisdictionis*” (裁判权 or *Gerichtsbarkeit* in German).

Third, as to the service requirement, Article 217(1) expressly sets forth lawfulness and timeliness of the service of process.

Fourth, in referring to the public policy requirement, Article 217(1) expressly refers to the public policy in light of the substantive aspects as well as the procedural aspects of such final judgments, etc.

Fifth, the KCPA has a separate article, Article 217-2, dealing with the recognition of a foreign judgment concerning damages.

Sixth, with regard to the reciprocity requirement, Article 217(1) expressly provides to the effect that the reciprocity requirement is deemed satisfied if the requirements for recognition of final judgments, etc. of Korea and the relevant foreign country are not far off balance and are not substantively different on critical points.

Seventh, Article 217(2) expressly provides that the Korean courts should examine *ex officio* the compliance with the requirements or conditions under paragraph 1.

However, these differences do not change the conclusion that there exists reciprocity between Korea and Japan.

B. Between South Korea and China

As to the recognition and enforcement of foreign judgments there are some problems between South Korea and China.

1. Current Situation. — Unlike Korea and Japan where the conditions for the recognition and enforcement of foreign judgments are expressly set forth by the KCPA and the JCPA, respectively, the conditions for the recognition and enforcement of foreign judgments in China are not clear enough for foreigners. I understand that under Articles 281 and 282 of the CCPA, the conditions for recognition of foreign judgments in China could be described as follows:⁶³

i) foreign judgments must be legally effective;⁶⁴

⁶³ The international jurisdiction requirement and the due service requirement are not expressly mentioned in the text of the CCPA. ZHANG Wenliang, *Recognition of Foreign Judgments in China: The Essentials and Strategies*, 15 Yearbook of Private International Law, 332 (2013/2014); it describes the third and fourth conditions as defenses.

⁶⁴ I understand that under Chinese law this requirement is equivalent to the Korean concept of being “*rechtskräftig* (确定),” although such interpretation appears to be different from the plain meaning of the term “effective.”

- ii) there must be a reciprocal relationship between the state of origin and China;
- iii) recognition of a foreign judgment does not contradict the basic principles of Chinese law; and
- iv) recognition of a foreign judgment is not contrary to the Chinese public policy.

To my knowledge, there are three Korean judgments recognizing Chinese judgments on property law matters, while a Chinese court rejected a Korean judgment. Two of the Korean judgments⁶⁵ and one Chinese judgment are introduced below.

(1) Judgment of the Seoul District Court in 1999 Which First Recognized a Chinese Judgment

The Seoul District Court recognized in its judgment of November 5, 1999⁶⁶ the judgment of the Weifang City Intermediate People's Court in Shandong Province, China in a property law case.

The plaintiff, Korea Export Insurance Corporation, filed a suit against a Chinese commercial bank before the Intermediate People's Court in Weifang City seeking payment of a letter of credit, which the plaintiff acquired from a Korean insured by way of subrogation or assignment of its contractual claim, and lost the case. Afterwards, the plaintiff filed the same suit again before the Seoul District Court seeking payment of the letter of credit. The Seoul District Court dismissed the plaintiff's claim on the grounds that the judgment of the Chinese court has *res judicata* effect. In this case, since the plaintiff which lost the case before the Chinese court filed the suit again in Korea, only the issue of recognition, namely the extension of *res judicata* effect was raised and the issue of enforcement was not raised.

After comparing the legal regimes on the recognition of foreign judgments between Korea and China (Articles 267 and 268 of the CCPA at that time), the Seoul District Court affirmed the existence of reciprocity between the two countries, based on the finding that there are no significant differences between the relevant provisions of the two countries, and hence recognized the Chinese judgment.

The plaintiff argued that the recognition of a Chinese judgment violates the procedural public policy of Korea, because it is unclear whether the judiciary and the judges in China are independent and it is doubtful whether the trials are carried out on the basis of justness and fairness. On the basis of Article 126 of the Chinese Constitution at that time, which set forth the independence of the judiciary, and Articles 2, 6 and 8 of the CCPA, which stipulate the independence of the judges and the equality of the parties, the Seoul District Court held that the Chinese judgment could not be said to be contrary to the procedural public policy of Korea. The court further held that even if the social status of Chinese judges is considered low and laymen other than lawyers participate in

⁶⁵ I do not explain the other Korean judgment since it simply expresses the conclusion without giving any meaningful reasons for the conclusion.

⁶⁶ Docket No. 99Gahap26523.

rendering the judicial decisions, such situations alone were not enough to conclude that the Chinese judgment contravened the procedural public policy of Korea.

At the end of its judgment, the Seoul District Court added the following:

However, if in the future there are cases where Chinese courts refuse to recognize or enforce Korean judgments on the basis of lack of reciprocity with Korea, even after the Chinese judgment has been recognized by a Korean court, it is difficult for Korean courts to maintain the view that there is reciprocity with China.

The court's addition of such rather unusual words appears to be due to the psychological burden of the judges of the Seoul District Court who affirmed the existence of reciprocity between the two countries for the first time.

(2) Judgment of the Shenzhen City Intermediate People's Court in Shenzhen, Guangdong Province, China in 2011

Regrettably, in a case where the plaintiff, a Korean company (Spring Comm., "Spring Commons Co., Ltd."), sought recognition and enforcement of the judgment of the Western Branch of the Seoul District Court, December 14, 2010 (which ordered the Korean defendant to pay the plaintiff a certain amount of compensation for damages), the Shenzhen City Intermediate People's Court in Guangdong Province, China of December 30, 2011 dismissed the claim. The Chinese Court did not explain in detail the reason for its holding but merely stated that there was no relevant treaty between the two countries and therefore there was no reciprocity between China and Korea. It is not clear whether the judgment of the Korean court that has already recognized the Chinese judgment mentioned above was actually submitted, but I understand from the Korean attorney who was involved in the case that it was submitted to the Chinese Court. The position of the Shenzhen City Intermediate People's Court is clearly inconsistent with the follow-suit model as advocated by some Chinese professors.

Although the Shenzhen City Intermediate People's Court in Guangdong Province does not represent the Chinese courts, in the aftermath of the above Chinese judgment, it was reasonable to say that Korean courts would most probably refuse to recognize and enforce a Chinese judgment if anyone seeks before a Korean court recognition and enforcement of a Chinese judgment. It was not easy to expect the Korean courts to show patience and to affirm once again the existence of reciprocity despite the above Chinese judgment.

(3) Judgment of the Ansan Branch of the Suwon District Court in 2015 Which Recognized a Chinese Judgment

However, on December 24, 2015⁶⁷ the Ansan Branch of the Suwon District Court affirmed again the existence of reciprocity between Korea and China, and recognized and approved enforcement of a Chinese judgment. The plaintiff and defendant in this case were both Koreans, and the plaintiff sought compensation of damages from the defendant

⁶⁷ Docket No. 2015Gahap936.

arguing that the defendant misappropriated the plaintiff's investment funds while operating golf courses in Qingdao, China. The Qingdao City Intermediate People's Court in Shandong Province, China rendered a judgment in favor of the plaintiff, and the plaintiff filed a suit before the Ansan Branch of the Suwon District Court, seeking an enforcement of the Chinese judgment. The above Chinese judgment was finalized after its first sentence was appealed, remanded and re-appealed. It took 8 years from the time the suit was first filed before the court of first instance (June 4, 2007) in China to the rendering of the enforcement judgment of the Korean court (December 24, 2015).

In this case, the Korean judges in charge of the case did not mention the Chinese judgment which denied the existence of reciprocity at all, probably because they did not know of the Chinese judgment and the attorneys of the defendant did not argue the existence of the Chinese judgment. This is very regrettable. Anyway, since a decision of the lower court of Korea affirming the existence of reciprocity between Korea and China has been rendered in 2015 again after 1999, the Chinese court now must affirm the existence of reciprocity between Korea and China if the issue were raised before a Chinese court. If the Korean judges had known the position of the Chinese courts which refused to recognize a Korean judgment, they would have also refused to recognize the Chinese judgment in question.

2. *Evaluation of the Chinese Judgment and the South Korean Judgments on the Existence of Reciprocity and Proposal for Future.* — Considering the relevant provisions of the CCPA on the recognition and enforcement of foreign judgments, if the Chinese courts were to carry out in accordance with the CCPA, we would probably affirm the existence of reciprocity between Korea and China. However, it is my understanding that Chinese courts do not in practice recognize the existence of reciprocity in the absence of a treaty in spite of the provisions of the CCPA.⁶⁸ If this is the case and such practice continues in the future, it is doubtful whether the conclusion of the Seoul District Court judgment affirming the existence of reciprocity was persuasive. At any rate, the Chinese court's decision to refuse to recognize the Korean judgment, despite the judgment of the Korean court that recognized the Chinese decision, cannot be justified. Under such circumstances, it is difficult to expect Korean courts to continue to recognize and enforce a Chinese judgment in the future. If a Korean court were requested again to recognize and/or enforce a Chinese judgment, the Korean court would most likely refuse to recognize and enforce the Chinese judgment. If that situation were to really take place, the Sino-Korea relationship would follow reciprocal non-recognition as is the case with the current Sino-Japan relationship.

For now, it is desirable for Chinese courts to change their position toward recognizing and enforcing Korean judgments. If so, there will be no practical difficulty in recognizing the existence of reciprocity between Korea and China, although it would still be

⁶⁸ See Elbalti, fn. 46 at 201; it takes the same view.

somewhat controversial in theory. In order to do this, the practice of the Chinese courts must first be changed. To facilitate this change, it is desirable that the Supreme People's Court of China publishes a judicial interpretation. If it is difficult under the current law in China, Chinese legislators will need to amend the CCPA to clarify the requirements for the recognition and enforcement of foreign judgments like the KCPA and the JCPA.

In the long run, it is desirable to amend the relevant Korea-China Bilateral Treaty to include provisions on the recognition and enforcement of foreign judgments. However, it is first necessary for the experts of Korea and China to make efforts to better understand the PILAs and the CPAs of China and Korea. Furthermore, it is necessary to examine the ways of guaranteeing the recognition and enforcement of foreign judgments by concluding a tripartite treaty among China, Japan and Korea. Along with these efforts, the three countries should positively examine the possibility of joining the Choice of Court Convention adopted under the auspices of the Hague Conference. Furthermore, if another convention is adopted as a result of the Judgment Project currently under discussion at the Hague Conference, it is necessary to positively consider joining it after a thorough review.

C. Between China and Japan

The recognition and enforcement of foreign judgments between China and Japan is in a very undesirable situation. I understand that at present Japanese judgments are not recognized or enforced in China due to the lack of reciprocity and Chinese judgments are not recognized or enforced in Japan due to the lack of reciprocity. I understand that this situation has been triggered by the *Gomi Akira* case, where the Dalian Intermediate People's Court refused in 1994 to recognize and enforce a judgment of a Japanese court.⁶⁹ This situation clearly shows the drawbacks of the reciprocity requirement. I also understand that the reasons for the current situation and the future course of action to improve the current situation will be discussed in depth in separate articles by experts of China and Japan. Accordingly, I would like to refrain from further discussing these issues here.

III. COURSE OF ACTION TO BE TAKEN TO FURTHER RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AMONG CHINA, JAPAN AND SOUTH KOREA: SOUTH KOREAN LAW PERSPECTIVE

There are various ways by which China, Japan and South Korea can improve the current situation on the recognition and enforcement of foreign judgments in the region consisting of China, Japan and South Korea (hereinafter referred to as "Region").

⁶⁹ For more information on the above case and the situation between China and Japan, see Elbalti, fn. 46 at 202.

A. Options Available

At present the three countries require the existence of reciprocity for the recognition and enforcement of foreign judgments. The most drastic way would be for China, Japan and Korea to abolish this requirement. This is possible in theory, and in fact, some legal commentators argue that the reciprocity requirement, which is primarily concerned with national interests, cannot be justified, because it unduly prejudices the interests of the party who has won the case in a foreign country and could cause a limping legal relationship. For example, the Private International Law Act of Switzerland does not require reciprocity for recognition and enforcement of foreign judgments. However, as a practical matter, the three countries are very unlikely to abolish the reciprocity requirement from their respective civil procedure acts. However, if the three countries were to succeed in entering into a tripartite treaty in the future, the reciprocity requirement would no longer be necessary or the reciprocity requirement would be deemed to be satisfied so long as the treaty is in force.

Besides entering into a tripartite treaty, there are other ways for China, Japan and Korea to improve the current situation. China might want to consider making some unilateral efforts to clarify to the other countries its rules and practices regarding recognition and enforcement of foreign judgments to better ensure reciprocity. China and Korea could work together on improving the existing bilateral treaty between the two. Lastly, the first step to achieving more efficient recognition and enforcement of judgments among the three countries is to share important information on each country's legal regime on recognition and enforcement of judgments.

B. Unilateral Action by China

From Korea's point of view, the source of uncertainty is the position of Chinese law or the actual practice of Chinese courts. The first step for China to ameliorate the current situation would be a unilateral action by China.

An example of such unilateral action is for China to introduce clearer rules on the recognition and enforcement of foreign judgment in the CCPA or the interpretation of the Supreme People's Court. Another option available is for Chinese courts to change their positions and accept the view that the expectation of receiving reciprocal treatment in the future is sufficient, even if there have been no actual cases extending reciprocity to Chinese judgments.

Additionally, an example of actions on a bilateral level is for Korea and China to introduce clearer rules on the recognition and enforcement of foreign judgment in the existing bilateral treaty between Korea and China which took effect in 2005. The current bilateral treaty does not deal with the recognition and enforcement of foreign judgments. Accordingly, the bilateral treaty could be amended to include the recognition and enforcement of foreign judgment. If this course of action is taken, a similar bilateral

treaty would be necessary between China and Japan.

C. Execution of Treaty among China, Japan and South Korea

Lastly, the three countries may consider becoming parties to a treaty dealing with the recognition and enforcement of foreign judgments. This is an example of actions on a multilateral level. There are two ways of achieving this goal.

First, the three countries may consider entering into a tripartite treaty on the recognition and enforcement of foreign judgments independent of the Judgment Project of the Hague Conference. The Judgment Project is still in development, and a multilateral treaty on such a scale takes a long time to enter into force even after its adoption. Moreover, the Judgment Project's scope is somewhat limited as a result of constant compromising among many different legal systems. Therefore, it would be beneficial for the three countries to form a separate tripartite treaty in order to improve the current situation on the recognition and enforcement of judgments more efficiently and to come up with an instrument that has broader scope of application.

Second, if the Judgment Project of the Hague Conference, is successful and is accepted by the countries of the Region, the resulting convention would significantly contribute to the development of the legal regime of the recognition and enforcement of foreign judgments in Region. However, I would like to underline that, even in that case, the "Hague plus" approach is desirable for the Region. So long as the countries in the Region are parties to the future convention of the Hague Conference, this convention could provide a basis for further improvements. The countries, through joint efforts, should try to build upon that basis and add something more by introducing uniform or harmonized rules in addition to the Hague convention. Although having a multilateral agreement such as the future convention of the Hague Conference would definitely help improving the situation, since a multilateral agreement is a product of a compromise among many countries with different legal systems, a tripartite treaty that reflects the peculiar needs of the three countries would further harmonize the rules on the recognition and enforcement of judgments among them.

D. Prerequisites: Necessity and Importance of Exchange of Information in the Region

I believe that in order to achieve more efficient recognition and enforcement of foreign judgments in the Region we should exert as much efforts as possible on the unilateral, bilateral and multilateral levels.

To that end, I firmly believe that the first step we should take is to exchange information on the current regime of the recognition and enforcement of foreign judgments. In order for us to determine whether there exists reciprocity between one country and another in the Region, we should definitely have more information on the recognition and enforcement regime of the related countries. Once a wrong decision as to whether there exists reciprocity is made due to a lack of correct information of a foreign country, that

decision would cause courts of the relevant foreign country to come to the conclusion that there exists no reciprocity with the country of origin. I suspect that this is currently the case between China and Japan.

Once experts in the Region have gathered and shared sufficient information on the regime of recognition and enforcement of foreign judgments and the actual practice of civil procedure law in the countries of the Region, the three countries will be able to make the needed efforts. Those efforts could be built on the premises that recognition and enforcement of foreign judgments in the Region is desirable and even essential for the common prosperity of the Region.

CONCLUSION

The KCPA and the KCEA set forth the conditions for the recognition of foreign judgments and the general procedures to be followed for the enforcement of foreign judgments, respectively. There are still unsettled issues regarding the interpretation and application of such conditions and procedures. The number of court decisions which can serve as the authoritative precedents is continuously increasing. In this article, I have made efforts to convey more information on the current status of Korean law on recognition and enforcement of foreign judgments. In particular, I have focused on the relationship between Korea and China. I have also suggested courses of action which the countries in the Region will need to consider in the near future to improve the situation. Given the current situation of the recognition and enforcement of foreign judgments in the Region, it is time for the experts of the Region to embark upon a project to improve the current situation. I believe that the first step should be to exchange and gather information on the current legal regime and to try to understand the legal regime of the other countries in the Region. Based on this understanding, I look forward to future cooperation among the experts in the Region on this topic. I am personally confident that the reciprocity requirement which currently is a major obstacle to the mutual recognition and enforcement of foreign judgments in the Region will be overcome in the near future. Then, the violation of public policy will emerge as the most subtle and tricky obstacle, which will require case specific analyses.

Finally, turning to the “Hague plus” approach, I hope that the countries in the Region pay more attention first to the Choice of Court Convention. Accordingly, I welcome China’s recent signing of the Convention. I also hope that the ongoing Judgment Project would be successful so that the international community could have a reasonable and comprehensive global convention in the near future, and that the countries in the Region would pay more attention to that convention as well. Once one or both of those Hague Conventions have taken effect in the Region, separate cooperation with respect to the recognition and enforcement of foreign judgments among the three countries will not be urgently needed as now. However, this does not mean that there is no room left for them to further strengthen their cooperation among themselves.