
Foreign Judgment Recognition and Enforcement System of Korea

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Abstract

This article provides a brief survey of the foreign judgment recognition and enforcement system of Korea in perspective of the evolution of Korean legal system's international compatibility. It could be rightly said that the international compatibility of Korean legal system has continuously increased through judicial and academic efforts, and one important example is the evolution of the foreign judgment recognition practices. In Korea, Civil Procedure Act, Civil Execution Act, and Arbitration Act govern the recognition and enforcement of most foreign civil (including family matter) judgments and other equivalents including arbitral awards. Of course, there might be some inevitable limits to this trend such as "good morals" or "public policy" which is central concept in Korean legal system. At least the existence of "mutual guarantee" or "reciprocity" requirement seems against the evolving trend of Korean legal system typically found in the opinions of the Supreme Court of Korea, and it is hoped that this requirement should be deleted. However, we may well still expect affirmatively that the international compatibility of Korean legal system will increase on and on through the unending judicial and academic efforts.

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I. Introduction

“Recognition” is the *sine qua non* precondition for both the “*res judicata*” and the “enforcement” of a foreign judgment. Thus, without a domestic “recognition,” a foreign judgment neither has *res judicata* effect nor enforcement power domestically. Judgments granting injunctions, declaring rights or determining status, and judgments arising from attachments of property, are not generally entitled to “enforcement,” but may be entitled to “recognition” for “*res judicata*.”

Suppose that a plaintiff won her judgment against a defendant in the court of a country, C_1 . Now the plaintiff wants to enforce the judgment against the defendant’s asset in another country, C_2 . The judgment at issue is “foreign” to the court of C_2 in the sense that it was not rendered by the court of C_2 but by the court of C_1 . Thus, the court of C_2 should deal with the above judgment differently from her own judgments rendered in C_2 . Therefore, C_2 ’s additional authorization is needed for making C_1 ’s judgment the same as C_2 ’s before the court of C_2 . Generally, this additional authorization is called “recognition.”

This article provides a brief survey of the foreign judgment recognition and enforcement system in the Republic of Korea (hereinafter Korea) in perspective of Korean legal system’s continuously increasing international compatibility. It could be rightly said that the international compatibility of Korean legal system has continuously increased through judicial and academic efforts, and one important example is the evolution of the foreign judgment recognition practices.

The most popular explanation for the nature of foreign judgment recognition has been “comity.”¹⁾ In addition to comity, various policies are supposed to be relevant to the analysis of foreign judgment recognition.²⁾ However, even the most comprehensive policy analysis will not be able to eradicate the necessity for “comity” completely.³⁾ Comity is one of the important instruments to advance the

1) *Hilton v. Guyot*, 159 U.S. 113 (1895): “Comity is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”

2) Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and A Suggested Approach*, 81 HARV. L. REV. 1603 (1967-1968)

3) *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir., 1984): “Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the

rule of law among nations.⁴⁾ Especially it is an important ground for the court's decision on how to respond to each behavior of the international litigants.

Comity, however, is not absolute. The recognized foreign judgment should not be contrary to the core of the legal system of the recognizing country, namely, should not exceed the limits of the recognizing country's international compatibility. There lies the main difficulty of the institution of the foreign judgment recognition: balancing the comity and the international compatibility.

At the Hague Conference on Private International Law,⁵⁾ Korea is also participating in the on-going negotiations on the provisions of Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.⁶⁾ However, there is no bilateral treaty or multilateral convention in force between Korea and any other country dealing with the recognition and enforcement of judgments. Therefore, the following content will be centered on the survey of the interpretational practices about some provisions in the three Korean domestic laws, namely Civil Procedure Act, Civil Execution Act, and Arbitration Act of Korea.

duties it imposes are inherently uncertain.”

4) *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 235 U.S. App. D.C. 207 (D.C. Cir. 1984): “Comity is a necessary outgrowth of our international system of politically independent, socio-economically interdependent nation states. As surely as people, products and problems move freely among adjoining countries, so national interests cross territorial borders. But no nation can expect its laws to reach further than its jurisdiction to prescribe, adjudicate, and enforce. Every nation must often rely on other countries to help it achieve its regulatory expectations. Thus, comity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations.”

5) The Hague Conference on Private International Law is the preeminent organization in the area of private international law. The Conference held its first meeting in 1893, on the initiative of T.M.C. Asser (Nobel Peace Prize 1911). It became a permanent inter-governmental organization in 1955, upon entry into force of its Statute. The purpose of HCCH has been to “work for the progressive unification of the rules of private international law.” It has pursued this goal by creating and assisting in the implementation of multilateral conventions promoting the harmonization of conflict of laws principles in diverse subject matters within private international law. <http://www.hcch.net/>

6) Korea became a member of the HCCH 20 Aug. 1997. Korea is also a party to the Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents and the Convention of 15 November 1965 on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters.

II. Civil Procedure Act on Foreign Judgment Recognition

1. General

In Korea, Civil Procedure Act Article 217⁷⁾ governs the recognition of all kinds of foreign civil (including family matter) or commercial judgments.⁸⁾ Korean statute on foreign judgment recognition is somewhat similar to that of Japan at first sight.⁹⁾

7) Civil Procedure Act (most recently amended 21 Feb. 2006, Act No. 7849) Article 217 (Effect of Foreign Judgment) Before the whole amendment of 26 Jan. 2002 by Act No. 6626, it was Civil Procedure Act Article 203 that governed the issue of foreign judgment recognition.

Article 217 (Effect of Foreign Judgment)

A final and conclusive judgment by a foreign court shall be acknowledged to be valid, only upon the entire fulfillment of the following four requirements:

1. That the international jurisdiction of such foreign court is recognized in the principles of an international jurisdiction pursuant to the Acts and subordinate statutes of the Republic of Korea, or to the treaties;
2. That a defeated defendant received, pursuant to a lawful method, service of summons or a document equivalent thereto, and a notice of date or an order, with a time leeway sufficient to defend (excluding the case pursuant to a service by public notice or similar service), or that he responded to the lawsuit even without being served;
3. That such judgment does not violate good morals and other social order of the Republic of Korea; and
4. That there exists a mutual guarantee.

8) For general explanations about Korean foreign judgment recognition system written in Korean language, Choe, Kong Woong, *The Effects of a Foreign Judgment*, 18 COLLECTIONS OF JUDICIAL PAPERS 325 (1987); Han, Choong Su, *The Recognition and Enforcement of Foreign Judgments*, 30 LAWYERS 173 (2000); Lee, Sung Hoon, *The Recognition and Enforcement of Foreign Judgments*, 98 BUSINESS LAW 48, 53 (May. 2002), 99 BUSINESS LAW 50, 60 (Jun. 2002), 100 BUSINESS LAW 49, 58 (Jul. 2002), 101 BUSINESS LAW 46, 51 (Aug. 2002), 102 BUSINESS LAW 42, 50 (Sep. 2002), 103 BUSINESS LAW 53, 61 (Oct. 2002), 104 BUSINESS LAW 45, 52 (Nov. 2002), 105 BUSINESS LAW 52, 56 (Dec. 2002), 106 BUSINESS LAW 40, 45 (Jan. 2003), 107 BUSINESS LAW 39, 44 (Feb. 2003), 108 BUSINESS LAW 60, 63 (Mar. 2003), 109 BUSINESS LAW 61, 65 (Apr. 2003), 110 BUSINESS LAW 43, 46 (May. 2003), 111 BUSINESS LAW 46, 51 (Jun. 2003), 112 BUSINESS LAW 33, 36 (Jul. 2003), 113 BUSINESS LAW 35, 38 (Aug. 2003); Lee, Sung Hoon, *A Law and Economics Approach to the Reciprocity in Foreign Judgment Recognition*, 38 COLLECTIONS OF JUDICIAL PAPERS 657 (2004). For general explanations about Korean transnational litigation and conflicts of law matters, SUK, KWANG HYUN, *PRIVATE INTERNATIONAL LAW AND TRANSNATIONAL LITIGATION I* (2001), II (2002), III (2004).

9) Code of Civil Procedure (most recently amended 15 Dec. 2006, Statute No. 109) Article 118 (Effect of A Final Judgment Rendered by Foreign Court)

A final judgment of a foreign court shall be valid only if all of the following conditions are met:

1. That the jurisdiction of the foreign court is acknowledged by laws and orders or treaty;
2. That the losing defendant has received service of summons or other order necessary to commence the proceedings by other than a public notice; or, has appeared without receiving service of such summons or other

However, there are some subtle differences in the more detailed interpretation of the statute in the dimensions of the case laws. Moreover, the German statute is not the same with Korean system despite its academic influences on the Korean academics, as the Korean system does not explicitly establish the specific exceptions for the reciprocity in family matter cases.¹⁰⁾ Switzerland's Federal Code on Private International Law of December 18, 1987, which abolished the requirement of reciprocity, and preempted the laws of those cantons that have retained that requirement.¹¹⁾¹²⁾ Chinese statute is more ambiguous and unpredictable than Korean

order;

3. That the content of the judgment is not contrary to the public order or good morals in Japan;
4. That there is mutual guarantee.

<http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>, as of 1 Feb. 2007.

Before the amendment of 26 Sep. 1996, Code of Civil Procedure Article 200 (same content as now) governed this issue.

10) ZPO § 328 [Recognition of Foreign Judgments (Anerkennung Ausländischer Urteile)]

(1) The recognition of the judgment of a foreign court is excluded:

1. Where the courts of the country to which the foreign court belongs has no jurisdiction under German law;
2. Where the defendant, who has not appeared in the proceedings and relies on that fact, was not duly served with the document instituting the proceedings or was not served within sufficient time to enable her to arrange for her defense;
3. Where the judgment is irreconcilable with a judgment rendered here, or with an earlier foreign judgment which is entitled to recognition, or where the proceeding which gave rise to the foreign judgment is irreconcilable with a proceeding instituted earlier here;
4. Where the recognition of the judgment would produce a result which would be manifestly irreconcilable with fundamental principles of German law, especially where the recognition is irreconcilable with basic constitutional rights;
5. Where reciprocity is not guaranteed.

(2) The provision contained in sub-paragraph 5 shall not prevent recognition of the judgment where that judgment relates to a non-pecuniary claim and the German courts had no jurisdiction under German law, or where a matter concerning the status of children (§ 640) or the status of partner-in-life pursuant to § 661(1) 1, and 2 is at issue.

See <http://bundesrecht.juris.de/bundesrecht/zpo/index.html>, as of 9 Sep. 2005

11) Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AMERICAN JOURNAL OF COMPARATIVE LAW 1, 33 (1988).

12) Articles 25 and 27 of Swiss Federal Code on Private International Law of December 18, 1987 (as amended July 1, 2004) provide concerning the foreign judgment recognition as follows:

Article 25

A foreign decision shall be recognized in Switzerland:

- a. If the judicial or administrative authorities of the State in which the decision was rendered had jurisdiction;
- b. If no ordinary appeal can be lodged against the decision or the decision is final; and

statute.¹³⁾

2. Requirement of “Judgment”

Korea’s Civil Procedure Act Article 217 itself does not limit the kinds of the judgments to be recognized on its face. The foreign judgments need not be monetary. Therefore, a foreign judgment of a specific performance can be recognized. Judgments on family matter can be recognized as well. In a sense, they constitute the most frequent and important usages of foreign judgment recognition recently.

By judicial and academic interpretations, criminal judgments, administrative

c. If there are no grounds for refusal under Article 27.

Article 27

A foreign decision shall not be recognized in Switzerland if such recognition would be manifestly incompatible with Swiss public policy (*ordre public*).

2. A foreign decision shall likewise not be recognized if a party establishes:

- a. That he was not duly summoned, either according to the law of his domicile or according to the law of his place of habitual residence unless he had proceeded to the merits without contesting jurisdiction;
- b. That the decision was rendered in violation of fundamental principles of Swiss procedural law, in particular that he was denied the right to be heard;
- c. That a lawsuit between the same parties and concerning the same causes of action had already been brought or decided in Switzerland or that the lawsuit had proceeded to judgment in a third State and that judgment can be recognized in Switzerland.

3. Except as herein provided, the foreign decision is not subject to review on the merits.

13) Civil Procedure Law of the People’s Republic of China (9 Apr. 1991)

Article 267. If a legally effective judgment or order made by a foreign court requires recognition and enforcement by a people’s court of the People’s Republic of China, the party concerned may directly apply to the intermediate people’s court of the People’s Republic of China which has jurisdiction over the case for recognition and enforcement, or the foreign court may, in accordance with the provisions of the international treaties concluded or acceded to by the People’s Republic of China or on the principle of reciprocity, request recognition and enforcement by a people’s court.

Article 268. If a people’s court of the People’s Republic of China, after its review in accordance with the international treaties concluded or acceded to by the People’s Republic of China or on the principle of reciprocity, considers that the legally effective judgment or order of a foreign court which requires recognition and enforcement does not contradict the basic principles of the law of the People’s Republic of China nor violates the state and social, public interest of China, it shall render an order on the recognition of its force.

Where an execution is necessary, a writ of execution shall be issued and enforced in accordance with the relevant provisions of this Law; if it contradicts the basic principles of the law of the People’s Republic of China or the state and social, public interest of China, the people’s court shall refuse its recognition and enforcement.

See <http://en.chinacourt.org/public/detail.php?id=2694>, as of 9 Sep. 2006

judgments, and tax judgments are excluded from the applicable scope of Article 217. Korean courts may recognize and enforce not only money judgments but also foreign judgments awarding their forms of relief, however, the relief must be of a type that can be awarded by Korean courts.¹⁴⁾

The court of a foreign “country” should have rendered the foreign judgment to be recognized. Therefore, the decision of the international organization, which is not a foreign country, would hardly be included in the category of “judgment” in this context. Whether the judicial decisions of the North Korea could be also included as “foreign judgments” is an issue. As for now, there is no precedent on this matter.

3. Requirement of “Finality”

A foreign judgment to be recognized should be final and conclusive. A foreign judgment is final only when there exists no possibility of any future appeal. The party seeking recognition of the foreign judgment has to prove either that no further appeal is possible or that the period for filing appeal has passed. Therefore, foreign provisional orders, foreign interlocutory judgments, or foreign interim awards cannot be recognized under Article 217 of Civil Procedure Act.

In this regard, even if a foreign judgment that contains a pronouncement of the provisional execution pending an appeal is enforceable in the foreign country, it cannot be recognized in Korea as long as it is not final.

4. Requirement of “International Jurisdiction”

The second requirement is that the “international jurisdiction” of such foreign court should be recognized in the principles of an international jurisdiction pursuant to the Acts and subordinate statutes of the Republic of Korea, or to the treaties on international jurisdiction. Even though Korea ratified neither bilateral nor multilateral treaty on international jurisdiction, one provision of the Private International Act

14) Korean courts can grant three forms of relief by the judgment in civil cases. A judgment ordering the delivery of property including money or the performance or non-performance of a certain act; a judgment confirming the existence or non-existence of certain rights or legal relationships; and a judgment creating or changing certain rights or legal relationships. In order for a foreign judgment to be enforced, the foreign judgment should be of one form among these three.

Article 2 governs the matter of international jurisdiction.¹⁵⁾ It states that where a party or a case in dispute is substantively related to the Republic of Korea, Korean courts shall have international jurisdiction.¹⁶⁾ In such cases, Korean courts shall follow reasonable principles that are compatible with the ideal of the allocation of international jurisdiction, in judging the existence of the substantive relations.¹⁷⁾ Korean courts shall judge whether or not a foreign court has international jurisdiction in light of the jurisdictional provisions of Korean laws and shall undertake a full consideration of the unique nature of international jurisdiction in light of the legislative intent of the former provisions.¹⁸⁾

The Supreme Court of Korea provided criteria to determine whether there is international jurisdiction in the case of 2002 *Da* 59788.¹⁹⁾ In determining international jurisdiction, the court must follow the basic ideal that equity between the parties, propriety, swiftness, and economy of the trial be promoted. Specifically, the court should consider not only private interests such as fairness, convenience, and predictability for the litigating parties, but also public interests in propriety, swiftness, efficiency of the trial and effectiveness of the judgment. Which interest will be protected among these various interests should be determined reasonably based on the material relation between the forum and the party in the specific cases and the material relation between the forum and the subject matter at issue.²⁰⁾

The natural and relevant time for determining the existence of a foreign court's international jurisdiction required for recognition is not when the case is brought to the foreign court or when the judgment has become final in the foreign country, but when the foreign judgment is examined in a Korean court for recognition.

15) For a general and comprehensive analysis of international jurisdiction especially in terms of comparative law in Korean language, see SUK, KWANG HYUN, INTERNATIONAL JURISDICTION TO ADJUDICATE: BASIC THEORY AND ISSUES ON GENERAL JURISDICTION IN CIVIL AND COMMERCIAL MATTERS, Thesis for Ph. D. Degree of Seoul National University (2000).

16) Private International Act (2001, Act No. 6465) Art. 2.

17) *Id.* at Art. 2 (1)

18) *Id.* at Art. 2 (2)

19) Decision of 27 Jan. 2005, 2002 *Da* 59788 (Korean Supreme Court).

20) *Id.*

5. Requirement of “Lawful Service of Documents”

The defeated defendant of the judgment to be recognized, should have received, pursuant to a lawful method, a service of summons or a document equivalent thereto, and a notice of date or an order, with a time leeway sufficient to defend (excluding the case pursuant to a service by public notice or similar service), or he should have responded to the lawsuit even without being served. The purpose of this requirement is to protect due process. The defeated defendant does not need to be a Korean, since ‘due process’ should be protected irrespective of the parties’ nationality.

In the decision of 92 *Da* 2585,²¹⁾ the Supreme Court of Korea held that according to the Civil Procedure Act Article 203.2, it was required that if the defeated defendant was a Korean citizen, the defendant must be served a summons or an order required for the procedure to begin, not by public notice, or plead as to the merits of a case even without service, and that the service meant neither supplementary service nor service by mail, but the service of regular way, and the service must be legal. The Court found as follows:

“The Vienna Convention on Consular Relations Article 5 (j)²²⁾ provides that the consul can transmit judicial or extra-judicial documents for the courts of the sending state, but it is possible only to the citizens of sending state. It is international comity not to serve the defendant directly by the consul of the sending state if the defendant is not the citizen of the sending state, and even for a member state of this convention, if that state has clearly expressed

21) Decision of 14 Jul. 1992, 92 *Da* 2585 (Korean Supreme Court). In this case, the foreign judgment at issue was rendered by Taipei court of Taiwan.

22) Vienna Convention on Consular Relations and Optional Protocols of 24 Apr. 1963, U.N.T.S. Nos. 8638-8640, vol. 596, 262-512.

Article 5 (Consular Functions)

Consular functions consist in:

(Omitted)

(j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;

(Omitted)

See <http://www.un.org/law/ilc/texts/consul.htm>

objection to this type of service, it cannot be done.

Korea had dealt with international judicial assistance on the bases of Court Sub-regulation on International Judicial Mutual Assistance (Civil Litigation Sub-regulation No 85-1), and following the above court sub-regulation, and enacted the Act on International Judicial Mutual Assistance in Civil Matters.²³⁾

This act provided that the entrustment of service by a foreign country, having passed through the diplomatic route, shall fall under the jurisdiction of the court of the first instance²⁴⁾ which has jurisdiction over the place where service is made. By this enactment, at least in the case that the receiver is not a citizen of sending state, it could be interpreted that Korea already expressed objection to direct service by the consul set forth in the above Vienna Convention.

Therefore, when the court of sending state directly served a Korean citizen or corporation by its consul without passing the diplomatic route required to obtain judicial assistance from Korea, this was a violation against the power of judicial administration of Korea.²⁵⁾

In this regard, Supreme Court of Korea held that the service at issue in this case was not effective as legal service, and that the requirement of Civil Procedure Act Article 203.2 (present Article 217.2) was not satisfied.²⁶⁾

6. Requirement of “Good Morals and Other Social Order”

The foreign judgment should not violate “good morals and other social order” of Korea. This requirement corresponds to the requirement of “public policy” in the UFMJRA. There is no statutory definition of “good morals and other social order.” Therefore, defining “good morals and other social order” needs careful interpretation of the whole legal system and the various opinions of the courts in Korea.

In Korean legal system, the phrase “good morals and other social order” appears several times. The most important usage of this phrase is found in the Civil Act. If a

23) Act on International Judicial Mutual Assistance in Civil Matters (1991, Act No. 4342).

24) Court of the first instance is the concept corresponding to that of trial court.

25) Decision of 14 July 1992, 92 *Da* 2585 (Korean Supreme Court).

26) Decision of 14 July 1992, 92 *Da* 2585 (Korean Supreme Court). See Sohn, Kyung Han, *Service as a Requirement for the Recognition of Foreign Judgments*, 2 PRIVATE INTERNATIONAL LAW INQUIRY 613 (1997), available only in Korean language.

contract has the object that is contrary to “good morals and other social order,” then the contract is null and void.²⁷⁾ For example, the claim which a person who does an act of inviting, seducing, helping or forcing someone to prostitute, or an act of inviting, seducing, helping, or forcing someone to be a customer of prostitution, an act of providing a place for prostitution, and an act of asking, receiving or promising to receive money, valuables, or other property benefits from a prostitute or her customer for profit or who cooperates with him in such deeds has on someone with whom he has a relation in the business of the prostitution, shall be invalidated irrespective of the form of the contract,²⁸⁾ and a prostitute may not claim the payment of the money promised for the prostitution.²⁹⁾ It is because these acts are contrary to “good morals and other social order.”³⁰⁾

Furthermore, under the Civil Act, if a person granted property or rendered service for an illegal cause, he or she may not demand the return of benefits resulting from it, unless such illegal cause exists only on the part of the person enriched.³¹⁾ The “illegal cause” here, means the cause contrary to “good morals and other social order” provided in the Civil Act Article 103.³²⁾ Therefore, the person who granted money for the contract about prostitution may not demand the return of the money granted.³³⁾

If a contract does not violate “good morals and other social order,” then it is free in principle. If the parties to a contract have declared an intention that differs from any provisions of Acts or subordinate statutes, which are *not concerned with good morals or other social order*, such intention shall prevail.³⁴⁾ If there is a custom that differs from any provisions of Acts or subordinate statutes that are *not concerned with good morals or other social order*, and if the intention of the parties to a legal

27) Civil Act (2002, Act No. 6591) Article 103 (Juristic Acts Contrary to Social Order) A juristic act which has for its object such matters as are contrary to good morals and other social order shall be null and void.

28) Prevention of Prostitution etc. Act (2002, Act No. 6801) Article 20.

29) It may seem contradictory, however, that the money to be paid for the prostitution can be an object to be protected by the Criminal Act irrespective of the effectiveness of cause. If a person deceived a prostitute and avoided the payment of money promised for the prostitution, then it could constitute the crime of Fraud under the Criminal Act. Decision of Oct. 23, 2001, 2001 *Do* 2991 (Korean Supreme Court).

30) Decision of Sep. 3, 2004, 2004 *Da* 27488, 27495 (Korean Supreme Court).

31) Civil Act (2002, Act No. 6591) Article 746.

32) Decision of Nov. 27, 2003, 2003 *Da* 41722 (Korean Supreme Court).

33) Decision of Sep. 3, 2004, 2004 *Da* 27488, 27495 (Korean Supreme Court).

34) Civil Act (2002, Act No. 6591) Article 105.

act is not clear, such custom shall prevail.³⁵⁾

Therefore, “good morals and other social order” is a crucial concept in determining legal validness of transactions. Even though the meaning can vary depending upon the context where the phrases are used, this principle is also applied, with possible variations, to the area of the effectiveness of the legal act based on the foreign law. Under the Private International Act, in the case where a foreign law governs the act, if the application of provisions of the foreign law clearly violates “good morals and other social order” of the Republic of Korea, the foreign law shall not be applied.³⁶⁾

An agreement on the exclusive international jurisdiction could be declared invalid if it is contrary to the Civil Act Article 103. In order for an agreement on exclusive international jurisdiction that excludes the jurisdiction of Korean court to be valid, the case at issue should not fall under the exclusive jurisdiction of Korean court, and the designated foreign court should have a reasonable connection with the case at issue under that foreign law. If an agreement on exclusive international jurisdiction is outrageously unreasonable and unfair, then it will violate the “good morals and other social order,” therefore null and void.³⁷⁾

Whether a U.S. punitive damage award can be recognized in Korean court is a controversial issue in the recognition system analysis. This issue is viewed in Korea as a matter of public policy or “good morals and other social order,” not as a matter of reciprocity, since the nature of this issue is the institutional compatibility of U.S. punitive damages with Korean legal system.

93 *Ga Hap* 19069³⁸⁾ is the first case that dealt with the issue of recognition of a U.S. punitive damage award. Plaintiff, who had dual nationalities of the U.S. and Korea, sued in the State of Minnesota County Court, defendant, a Korean student, to get an un-liquidated damage award ordering payment of reasonable amount over \$50,000 based on assault and rape. The defendant received a copy of the complaint

35) Civil Act (2002, Act No. 6591) Article 106.

36) Private International Act (2001, Act No. 6465) Article 10.

37) Decision of Mar. 25, 2004, 2001 *Da* 53349 (Korean Supreme Court), however, there is a strong criticism that this “reasonable connection” test is unreasonable considering international litigation practices. Suk, Kwang Hyun, *The Requirements for the Validity of an Exclusive Agreement on International Jurisdiction*, 3270 THE LAW TIMES 27 (May 27, 2004), available only in Korean language.

38) Decision of Feb. 10, 1995, 93 *Da Hap* 19069 (East Branch of Seoul District Court); Kang, Tae Won, *The Recognition of Foreign Judgments including Punitive Damages I*, 454 JUDICIAL ADMINISTRATION 26 (1998).

and summons which clearly stated that the plaintiff should submit an answer in 20 days after the receipt of the complaint and that if the defendant did not submit an answer the court would give the remedy the plaintiff sought. The defendant, however, came back to Korea without submitting any response. The plaintiff requested a default judgment. The default judgment made by the referee, Ann Norton, on 7 January 1993, ordered an award of the damages of \$500,000 (ten times of the original award) against the defendant. The court clerk, J.E. Gockowski, entered the judgment on 25 January 1993. The plaintiff filed the complaint for execution of judgment at the Eastern Branch of Seoul District Court, based on this default judgment.

The court pointed out that a punitive damage award is rendered for the purpose of punishment and deterrence of illegal activities in addition to the compensatory damages, especially in the case where there is an intention or other subjective bad situations on the offender, as a kind of common law remedies. The court held that because a punitive damage award has a feature of criminal sanction, it is prohibited in our civil law system which only allows compensatory damages for torts. This might violate Korean “good morals and social order.” The Court rendered a judgment of execution that recognized only the half amount of the payment, \$250,000, ordered by the U.S. judgment at issue, considering the degree of domestic country relationship and the principle of proportionality. Actually, even though the plaintiff has both U.S. and Korean nationalities, both parties have at least Korean nationality in common, and compared with the average tort damages in similar Korean cases, a damage award of \$500,000 was an extreme amount in Korea.

However, the Seoul High Court, the court of appeal, denied the holding that the U.S. judgment at issue was a punitive damage award, and held that it was unliquidated damage award and therefore compensatory,³⁹⁾ and the Supreme Court of Korea accepted High Court’s opinion.⁴⁰⁾ Therefore, in this case, the Supreme Court of Korea did not deal directly with the issue of punitive damages recognition.

In 96 *Da* 47517,⁴¹⁾ Supreme Court of Korea held, because the U.S. judgment at issue was created through the due process required for an un-liquidated damages award and direct summons to the defendant, it satisfied the requirements for

39) Decision of Sep. 18, 1996, 95 *Na* 14840 (Seoul High Court).

40) Decision of Sep. 9, 1997, 96 *Da* 47517 (Korean Supreme Court).

41) *Id.*

recognition of foreign judgment set forth in Civil Procedure Act Article 203 (now Article 217). The Court also held that if the right of defense of the losing defendant, a citizen of Korea, had been outrageously violated in the process through which the judgment was made, it would violate the good morals and social order of Korea, therefore the judgment could neither be recognized nor enforced in Korea. In this case, however, the Court found the plaintiff did not initiate the suit against a defendant who was in Korea, but filed a suit against the defendant who was residing in the U.S., and served the complaint and summons on the defendant in the U.S., who came back to Korea and submitted no response without any special pleading, which caused the abandonment of the right of defense. Therefore, Supreme Court of Korea held that the U.S. judgment at issue did not violate good morals and other social orders of Korea.

In 2002 *Da* 74213,⁴²⁾ Supreme Court of Korea took even more generous an approach towards the foreign judgment recognition. This decision expanded the scope of recognition even wider than before.

The Court held the fact that the foreign judgment was obtained in such a fraudulent way as by utilizing the forged or altered document, or by utilizing the perjury, in principle, cannot constitute a defense against recognition and enforcement.⁴³⁾ In other words, the Court held that even though a foreign judgment was obtained by fraud, this fact could not constitute the defense against recognition and enforcement at least in principle. However, considering Civil Procedure Act Article 451(1) 6, 7, and 451(2),⁴⁴⁾ the Court also held that if it were impossible for the

42) Decision of Oct. 28, 2004, 2002 *Da* 74213 (Korean Supreme Court).

43) "Judgment obtained by fraud" is not listed as one of defenses to recognition in the Civil Procedure Act (2002, Act No. 6626) Article 217

44) They set forth the grounds for retrial:

Article 451 (Grounds for Retrial) of Civil Procedure Act (2002)

(1) A petition for a retrial against the final judgment which has become conclusive may be made when falling under any one of the following subparagraphs: Provided, That the same shall not apply when a party has alleged such grounds by an appeal, or has not alleged them even while he became aware thereof:

(Omitted)

6. When a document or any other article used as evidence for the judgment has been forged or fraudulently altered;

7. When the false statements by a witness, an expert witness or an interpreter, or those by a sworn party or legal representative have been adopted as evidence for the judgment;

(Omitted)

(2) In the case of paragraph (1) 4 through 7, a lawsuit of retrial may be instituted only when a conviction or a

defendant to argue such fact before the court which rendered the judgment in the forum state, and if there is a high degree of proof such as conviction judgment about the fraudulent activity, the defendant can deny the recognition and enforcement of the foreign judgment even without any additional proceeding to annul the foreign judgment in that forum state.”

This attitude of Supreme Court of Korea can be compared with other countries' approaches. As mentioned earlier, Korean legal system and academics have been deeply influenced by Japanese and German legal systems and academics, and the responses of Japanese and German courts on the issue of “punitive damages” recognition, could provide suggestions regarding the various but similar evolution of the foreign judgment recognition systems.⁴⁵⁾

It should be noted that the public policy requirement arises from the needs of the institutional compatibility in each country, not from a demand for reciprocity or retaliation. As a consequence of institutional evolution, businesses of each country will meet different business environments in each country. If U.S. businesses feel disadvantaged by the punitive damages, then the U.S. government should improve the business environment for them, not the foreign supreme courts.⁴⁶⁾

judgment to impose a fine for negligence has become final and conclusive against the punishable acts, or when it is impossible to render a final and conclusive conviction or a final and conclusive judgment to impose a fine for negligence, on account of other grounds than the lack of evidence.

45) For German cases, Judgment of June 4, 1992, BGHZ, reprinted in 1992 ZIETSCHRIFT FÜR WIRTSCHAFT UND INSOLVENZPRAXIS 1256 (F.R.G.). see Joachim Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 COLUM. J. TRANSNAT'L L. 641 (1992); Judgment of May 28, 1991, Oberlandesgericht Düsseldorf, reprinted in 1991 RECHT DER INTERNATIONALEN WIRTSCHAFT 594 (F.R.G.), Case 119/90; Judgment of April 12, 1990, Landesgericht Düsseldorf, 13 O 456/89; Judgment of June 4, 1992, BGHZ; Judgment of July 25, 2003, BVerfGE, 2 BvR 1198/03.

See http://www.bundesverfassungsgericht.de/entscheidungen/rs20030725_2bvr119803, Judgment of Federal Constitutional Court (BverfGE) 91, 335 (F.R.G.), the court had earlier issued a preliminary injunction halting service. BVerfGE, 1994 NJW 3281 (F.R.G.); Judgment of Federal Constitutional Court (BverfGE), 2004 WM 1402 (1402-03) (F.R.G.).

For Japanese case, Judgment of July 11, 1997, Heisei 5 (O) 1762, this case is also famous as “Northcon case” or “Mansei case” among international practitioners. Kerry A. Jung, *How Punitive Damages Awards Affect U.S. Businesses in the International Arena: The Northcon I v. Mansei Kogyo Co. Decision*, 17 WIS. INT'L L. J. 489 (1999).

46) In terms of “fair competition” and “consumer benefit,” the proposition that whoever wins the profit in a market, should be responsible for the harm to the market arising from its merchandise remains still persuasive. However they are not necessary contradictory to “comity.” A country's maximization of “fair competition” and “consumer benefit” does not necessarily coincide with global maximization of “fair competition” and “consumer benefit.” Comity is necessary for the coordination of these two independent criteria.

Some scholars would argue that even the threat of “reciprocity” would be necessary for the non-recognition based on the “good morals” or “public policy” by the foreign courts.⁴⁷⁾ However, “reciprocity” cannot be a meaningful threat for the non-recognition based on the “good morals.” As seen above, “good morals” requirement is deeply rooted at the core legal value of a legal system. “*Good morals*” cannot be founded as a strategy by governmental design but only found as a spontaneous order by socially embedded culture. In this regard, “good morals” should be noted and differentiated from the “reciprocity” which is essentially a strategy.

A foreign judgment seeking recognition may conflict with a prior judgment of a domestic or foreign court in some cases. It might, also, deal with a matter that is currently the subject of litigation in the forum. Korean courts have considered this question in the context of the “good morals and other social order,” namely, the public policy requirement.

If a Korean judgment becomes final and conclusive firstly, and a foreign judgment on the same subject matter among the same parties is rendered secondly, then the foreign judgment is in conflict with the *res judicata* of the Korean judgment, thereby contrary to the good morals and other social order of Korea. Therefore, the foreign judgment becomes void and null, lacking the requirement provided by the Civil Procedure Act Article 217.3 (then Article 203. 2).⁴⁸⁾

III. Special Requirement of “Mutual Guarantee” or “Reciprocity”

1. Special Meaning

The last requirement is “mutual guarantee” or reciprocity (Gegenseitigkeit).

47) Susan L. Stevens, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115, 158 (2002-2003), “What is clear from foreign judgment recognition and enforcement jurisprudence is that it is the time for the U.S. to stop honoring foreign judgments without receiving some judicial respect in return. The adoption of a federal foreign judgment recognition and enforcement statute that requires reciprocity in accordance with the procedure currently laid out in Draft No. 3, may be just the lever the U.S. needs to ensure its judgment creditors have a voice abroad.” Draft No. 3, here, means the ALI’s draft No. 3 of the federal foreign judgment recognition statute.

48) Decision of May 10, 1994, 93 *Meu* 1051, 1068 (Korean Supreme Court).

Recognition of foreign judgments should not be “one-sided” but “reciprocal.” This requirement is special in the sense that to determine whether there exists reciprocity or not, the court should look at not only the foreign judgment at issue but also the foreign legal system as a whole. Lack of “reciprocity” is a typical statutory ground for non-recognition of foreign judgments in many countries. However, the legal meaning of “reciprocity” is not clear and most countries lack a specified legal definition for the term.⁴⁹⁾ In the following, the requirement of reciprocity will be analyzed in light of the comparative law.

2. Germany

Reciprocity was firmly established as a prerequisite for the recognition of foreign money judgments in Germany.⁵⁰⁾ However, there is no clear definition of “reciprocity” in it.⁵¹⁾ In 1907, the German Imperial Court decided that because reciprocity was not assured with California, it could not enforce default judgments obtained from California courts by parties damaged in the 1906 San Francisco earthquake.⁵²⁾ The court found that the California statute in force at that time granted California courts broader review powers than German courts possessed.⁵³⁾ However, even at that time, commentators criticized the court’s narrow view because the court overstretched the reciprocity requirement by tacitly demanding that foreign enforcement procedures be identical to, and not merely mostly the same as, their

49) Cf. Committee on Foreign and Comparative Law, Association of Bar, City of N.Y., Survey on Foreign Recognition of U.S. Money Judgments (July 2001).

50) Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT’L L. 175, 187 (2005).

51) ZPO § 328 [Recognition of Foreign Judgments] (1) 5 only remarks “Gegenseitigkeit,” that is reciprocity, but there is no definition of it.

52) Decision of Imperial Court on Civil Affairs (Entscheidungen des Reichsgerichts in Zivilsachen) [RGZ] [Imperial Court] 70, 434 (435) (F.R.G.)

53) California amended its Code of Civil Procedure after the earthquake to allow for recognition and enforcement of foreign judgments. See *Cal. Civ. Proc. Code 1915* (West 1907) “A final judgment of any other tribunal of a foreign country having jurisdiction, according to the laws of such country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state.” The provision was repealed in 1974 because it was “largely ignored by the courts” and “failed to achieve its basic historical purpose when in 1909 the Imperial Court of Germany refused to permit the execution of California judgments rendered by default against German insurance companies.” *Cal. Civ. Proc. Code 1915* (West 2004) (comment of the Law Revision Commission regarding the 1974 repeal)

German counterparts.

The criticisms of the legal scholars have become the majority opinion and the strong call for the abolition of the reciprocity requirement has become stronger over the years. However, despite these criticisms, the German legislature continues to require reciprocity.⁵⁴⁾ Nevertheless German courts have relaxed the application of reciprocity requirement by interpreting the notion of reciprocity more broadly. Today, German courts may assume reciprocity without demanding a specific guarantee that the rendering state will recognize German judgments, or have already recognized a German decision. Furthermore, German courts have changed course since the 1907 decision of the Imperial Court, and no longer require that the rendering state enforce German judgments under the same conditions required by German law, so long as the approach is generally similar.

Additionally, reciprocity may be determined solely within a particular field of law or based on the type of judgment at issue. If the rendering state recognizes German judgments based on certain rules of jurisdiction (such as territorial jurisdiction) or types of judgments (such as final judgments rendered in adversarial proceedings), partial reciprocity is assured for foreign judgments based on similar jurisdiction rules or types of judgments.⁵⁵⁾

Although some commentators had raised objections to the assumption that reciprocity existed with regard to Mississippi and Montana, there are no recent decisions in German courts denying the enforcement of U.S. money judgments for the lack of reciprocity.⁵⁶⁾

3. U.S.

In *Hilton v. Guyot*, 159 U.S. 113 (U.S., 1895), the Supreme Court held that a foreign judgment was recognized as a matter of international comity. There was no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application was admitted only from considerations of utility and the mutual convenience of states — *ex comitate, ob reciprocam utilitatem*. The

54) Wolfgang Wurmnest, *supra* note 50, at 187.

55) BGHZ 141, 286, 300-301 (F.R.G.) (assuming partial reciprocity despite the rendering state's refusal to recognize asset-based jurisdiction).

56) Wolfgang Wurmnest, *supra* note 50, at 188.

Supreme Court, however, found that the general comity, utility and convenience of nations had established a usage among most civilized states, by which the final judgments of foreign courts of competent jurisdiction were reciprocally carried into execution.

In this case, judgments rendered in France, or in any other foreign country, by the laws of which United States' judgments could be reviewed upon the merits, were found not entitled to full credit and conclusive effect when sued upon in this country, but *prima facie* evidence only of the justice of the plaintiffs' claim.

The slight majority opinion (5-4) of *Hilton* has been criticized frequently.⁵⁷⁾ Dissenting opinion of Chief Justice Fuller pointed that "the application of the doctrine of *res judicata* regarding the French judgment does not rest in discretion ..."⁵⁸⁾ However, *Hilton* majority created a new federal general common law on this matter despite the state common law on this matter. In addition, since *Hilton* was a diversity jurisdiction case, the scope of its holding was very narrow.

After *Hilton* and before *Erie*, only two Supreme Court decisions appear to have made any direct holding on the effect of foreign judgments. In *Hapai v. Brown*, 239 U.S. 502 (1916), the *res judicata* effect of an *in rem* judgment of the Kingdom of Hawaii was recognized.⁵⁹⁾ In *Ingenohl v. Olsen & Co.*, 273 U.S. 541 (1927), judgment for costs arising out of trademark litigation in a British court in Hong Kong was recognized in a Philippine (U.S. Territorial) Court. However, neither decision mentioned reciprocity.⁶⁰⁾

Perhaps, under this situation, it might have been natural for the states courts to choose not to follow *Hilton*. The leading case, which directly departed from *Hilton*, was *Johnston v. Compagnie Generale Transatlantique*, 152 N.E. 121, 123-24 (N.Y.

57) Arthur Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical — Critical Analysis*, 16 LA. L. REV. 465, 472 (1955-1956).

58) *Hilton v. Guyot*, 159 U.S. 113, 234 (dissenting opinion) (1895).

59) In this case, one of the defenses was *res judicata*. The proceeding relied upon as having decided the relative rights of the parties was a bill brought in November, 1871, by the plaintiffs' predecessors against Paakuku and others, alleging title in Keaka during her life; a devise by her to her heirs, followed by joint possession on the part of the plaintiffs and of Paakuku as quasi trustee; and waste, a wrongful sale and a wrongful lease by Paakuku. (*Hapai v. Brown*, 239 U.S. 502 (1916)) Therefore, even though the Kingdom of Hawaii was overthrown in 1896 and Hawaii was already a territory of the U.S. in 1916, this case was about the recognition of *res judicata* effect of the foreign judgment.

60) Courtland H. Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220, 233 note 87 (1972).

1926). In this case, the New York Court of Appeals held that New York courts and state courts in general were not bound by the reciprocity rule announced in *Hilton*.⁶¹⁾ Therefore, even before *Erie*, the issue of the foreign judgment recognition became one of state law, and most state courts rejected the *Hilton* rule which mandates reciprocity for a foreign judgment to be recognized.

Finally, the scope of the federal common law was greatly cut off by the doctrine of *Erie Rail Road Co. v. Tompkins*, 304 U.S. 64 (U.S., 1938). In this case, Supreme Court held that except in matters governed by the U.S. Constitution or by acts of Congress, the law to be applied in any case was the law of the state. The Court declared that there is no federal general common law, and also held that Congress has no power to declare substantive rules of common law applicable in a state, whether they are local in their nature or general, be they commercial law or a part of the law of torts.

Since *Erie*, federal courts exercising diversity jurisdiction should apply state law, whether it be statute or common law, to the issue of foreign judgment recognition.⁶²⁾ Here, *Erie* rule raised a problem of inconsistency in recognition practices among states. In 1962, the National Conference of Commissioners on Uniform State Laws (NCCUSL), together with the ABA, produced the Uniform Foreign-Country Money Judgments Recognition Act (UFMJRA), 13 U.L.A. 261, in order to secure consistency.⁶³⁾ At present, 30 states,⁶⁴⁾ Washington D.C. (1996), and the U.S. Virgin Islands (1992) adopted the UFMJRA.⁶⁵⁾ Since the majority of the states have adopted the UFMJRA, it could be said that the practices of foreign judgment recognition are mainly under the scope of the UFMJRA.

The UFMJRA set forth several requirements for a foreign judgment to be recognized: to be a judgment of a country,⁶⁶⁾ to be final,⁶⁷⁾ to have jurisdiction over

61) Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 250 (2004).

62) *See, e.g. Somportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972).

63) http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/ufmjra62.htm as of Sep. 1. 2006.

64) Alaska (1972), California (1967), Colorado (1977), Connecticut (1988), Delaware (1997), Florida (1994), Georgia (1975), Hawaii (1996), Idaho (1990), Illinois (1963), Iowa (1989), Maine (1999), Maryland (1963), Massachusetts (1966), Michigan (1967), Minnesota (1985), Missouri (1984), Montana (1993), New Jersey (1997), New Mexico (1991), North Carolina (1993), North Dakota (2003), Ohio (1985), Oklahoma (1965), Oregon (1977), Pennsylvania (1990), Texas (1981), Virginia (1990), Washington (1975).

65) http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufmjra.asp last visited Mar. 1. 2006.

the defendant⁶⁸⁾ and the subject matter,⁶⁹⁾ to be made by the competent foreign court,⁷⁰⁾ to be made under due process,⁷¹⁾ not to be obtained by fraud,⁷²⁾ not to conflict with the public policy of the U.S.,⁷³⁾ not to conflict with another final and conclusive judgment,⁷⁴⁾ and not to be contrary to an agreement of settlement.⁷⁵⁾

However, some states have adopted the UFMJRA subject to their own variations. For example, Florida⁷⁶⁾ and Michigan⁷⁷⁾ have amended the Act to include foreign domestic judgments within the definition of foreign money judgments. Furthermore, the recognition of foreign judgments is governed by state common law in states that have not adopted the UFMJRA. While the *Hilton* rule influenced these state common laws deeply, it is unclear whether reciprocity is also mandated in these states.⁷⁸⁾

66) Section 1 of the UFMJRA of 1962.

67) Section 2 of the UFMJRA of 1962.

68) Section 4 (a) (2) of the UFMJRA of 1962; The foreign judgment shall not be refused recognition for lack of personal jurisdiction if (1) The defendant was served personally in the foreign state; (2) The defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him; (3) The defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved; (4) The defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state; (5) The defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or (6) The defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such operation. Section 5 (a) of the UFMJRA of 1962.

69) Section 4 (a) (3) of the UFMJRA of 1962, in either case, non-recognition is mandatory under the UFMJRA. However, Section 482 of Restatement of Foreign Relations (1986) finds the lack of personal jurisdiction as mandatory ground for non-recognition but the lack of subject matter jurisdiction as discretionary one. Restatement 3rd of the Foreign Relations Law § 482 (1986).

70) Section 4 (a) (1) of the UFMJRA of 1962

71) Section 4 (b) (1) of the UFMJRA of 1962

72) Section 4 (b) (2) of the UFMJRA of 1962

73) Section 4 (b) (3) of the UFMJRA of 1962

74) Section 4 (b) (4) of the UFMJRA of 1962

75) Section 4 (b) (5) of the UFMJRA of 1962

76) Fla. Stat. § 55.602 (2) (2004) provides that “foreign judgment” means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine, or other penalty.

77) MCLS § 691.1151(b) (2004) provides that “foreign judgment” means any judgment of a foreign state granting or denying recovery of a sum of money, including a judgment for support in matrimonial or family matters, but not including a judgment for taxes, a fine or other penalty.

78) Cedric C. Chao, Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States*

The rule of reciprocity was not intended as a part of the UFMJRA, but it does exist in the several states. Florida, Georgia, Idaho, Massachusetts, Ohio, and Texas have included a reciprocity requirement. The effect of a lack of reciprocity is also different among these states: discretionary denial for Florida, Idaho, Ohio, and Texas, while mandatory denial for Georgia, Massachusetts.⁷⁹⁾ Thus a foreign judgment that can be recognized by other state courts might be denied as lacking in reciprocity in these states. In summary, when otherwise required by local statute, the great majority of state and federal courts have extended recognition to foreign judgments regardless of reciprocity.⁸⁰⁾

Generally, it might be called the “current consensus” that the recognition of foreign nation judgments is governed by state law and that under the doctrine of *Erie*, a federal court must apply the rule of the state in which it sits. Except when otherwise required by local statute, the great majority of state and federal courts have extended recognition to judgments of foreign nations without regard to any question of reciprocity.⁸¹⁾

However, there have been various criticisms on this unstable “current consensus.” As a result, in contrast to the attitudes of most countries including China,⁸²⁾ Germany,⁸³⁾ Japan,⁸⁴⁾ and Korea,⁸⁵⁾ the recent final draft of the proposed federal law of the ALI (April 11, 2005) stated the proposition of the reciprocity requirement very clearly.⁸⁶⁾

Even though the NCCUSL appears to take the opposite position to the ALI’s

Couts: A Practical Perspective, 29 PEPP. L. REV. 150 (2001-2002).

79) *Id.* at 152.

80) Comment f to § 98 of Restatement 2nd of Conflict of Laws.

81) Comment f to § 98 of Restatement 2nd of Conflict of Laws.

82) Civil Procedure Law of the People’s Republic of China (9 Apr. 1991) Article 267 only remarks “the principle of reciprocity, but there is no definition of reciprocity.

83) ZPO § 328 [Recognition of Foreign Judgments] (1) 5 only remarks “reciprocity,” but there is no definition of it.

84) Code of Civil Procedure (25 May 2005, Statute No. 50) Article 118 (Effect of A Final Judgment Rendered by Foreign Court) 4 only remarks “reciprocity,” but there is no definition of it.

85) Civil Procedure Act Article 217 (Effect of Foreign Judgment) 4 only remarks “mutual guarantee,” but there is no definition of it.

86) Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, Proposed Final Draft (April 11, 2005), submitted by the Council to the members of the American Law Institute for discussion at the 82nd annual meeting on May 16, 17, and 18, 2005.

approach,⁸⁷⁾ the ALI's final draft seems to exercise more influence in future practices.

§ 7. Reciprocal Recognition and Enforcement of Foreign Judgments

- (a) A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.
- (b) A judgment debtor or other person resisting recognition or enforcement of a foreign judgment in accordance with this section shall raise the defense of lack of reciprocity with specificity as an affirmative defense. The party resisting recognition or enforcement shall have the burden to show that there is substantial doubt that the courts of the state of origin would grant recognition or enforcement to comparable judgments of courts in the United States. Such showing may be made through expert testimony, or by judicial notice if the law of the state of origin or decisions of its courts are clear.
- (c) In making the determination required under subsections (a) and (b), the court shall, as appropriate, inquire whether the courts of the state of origin deny enforcement to
- (i) judgments against nationals of that state in favor of nationals of another state;
 - (ii) judgments originating in the courts of the United States or of a state of the United States;
 - (iii) judgments for compensatory damages rendered in actions for personal injury or death;
 - (iv) judgments for statutory claims;
 - (v) particular types of judgments rendered by courts in the United States similar to the foreign judgment for which recognition or enforcement is sought; The court may also take into account other aspects of the recognition practice of courts of the state of origin, including practice with regard to judgments of other states.
- (d) Denial by courts of the state of origin of enforcement of judgments for punitive, exemplary, or multiple damages shall not be regarded as denial of reciprocal enforcement of judgments for the purposes of this section if the courts of the state of origin would enforce the compensatory portion of such judgments. Courts in the United States may enforce a foreign judgment for punitive, exemplary, or multiple damages on the basis of reciprocity.
- (e) The Secretary of State is authorized to negotiate agreements with foreign states or groups of states setting forth reciprocal practices concerning recognition and enforcement of judgments rendered in the United States. The existence of such an agreement between a foreign state or group of foreign states and the United States establishes that the requirement of reciprocity has been met as to judgments covered by the agreement. The fact that no such agreement between the state of origin and the United States is in effect, or that the agreement is not applicable with respect to the judgment for which recognition or enforcement is sought, does not of itself establish that the state fails to meet the reciprocity requirement of this section.

87) Prefatory note of the Draft for Approval of the Uniform Foreign Money Judgment Recognition Act (200_), the 114th year meeting of NCCUSL, Pittsburgh, Pennsylvania, 22-29 Jul. 2005, "In the course of drafting this Act, the drafters revisited the decision made in the 1962 Act not to require reciprocity as a condition to recognition of the foreign-country money judgments covered by the Act. After much discussion, the drafters decided that the approach of the 1962 Act continues to be the wisest course with regard to this issue. While recognition of U.S. judgments continues to be problematic in a number of foreign countries, there was insufficient evidence to establish that a reciprocity requirement would have a greater effect on encouraging foreign recognition of U.S. judgments than does the approach taken by the Act. At the same time, the certainty and uniformity provided by the approach of the 1962 Act, and continued in this Act, creates a stability in this area that facilitates international commercial transactions."

Additionally, even now, Florida, Georgia, Idaho, Massachusetts, Ohio, and Texas have included a reciprocity requirement. The effect of a lack of reciprocity is also different among these states: discretionary denial for Florida, Idaho, Ohio, and Texas, while mandatory denial for Georgia, Massachusetts.⁸⁸⁾ It means that a foreign judgment that can be recognized and enforced by other state courts might be denied as lacking in reciprocity in these states.

4. Korea

Civil Procedure Act Article 217 provides the requirement of reciprocity that there exists a “mutual guarantee.” There is no statutory formal definition of the mutual guarantee or reciprocity. However, there have been two academic opinions about the criterion when there exists a mutual guarantee or reciprocity.⁸⁹⁾

One opinion is that it would be enough when the foreign country has recognized or will probably recognize a Korean judgment under such requirements as are equal to or more lenient than those of Korean foreign judgment recognition system provided under Civil Procedure Act Article 217.

The other opinion is that it would be enough when the respective recognition requirements in the foreign system and Korean system do not substantially differ so as to lose balance extremely as a whole, and both requirements are identical in important respects, even if the recognition requirements of the foreign country should be neither equal to nor more lenient than those of Korea in every single aspect.

The latter opinion provides a more flexible criterion emphasizing the “unsubstantial difference” than the former opinion. In perspective of the “increased international compatibility” of Korean legal system, the latter opinion would be more suitable.

The attitude of the Supreme Court of Korea on this matter was originally near to the former opinion. However, it seems that the Supreme Court has changed its

<http://www.law.upenn.edu/bll/ulc/ufmjra/2005annmtgdraft.htm> last visited Mar. 1. 2006.

88) Cedric C. Chao, Christine S. Neuhoff, *supra* note 78, at 152.

89) For more discussion, Oh, Yun Deok, *Recognition of Foreign Judgment*, 407 BUIJO 100-101 (Aug. 1990); Suk, Kwang Hyun, *The Recognition and Enforcement of Foreign Judgments — An Opinion about the Revision Draft of the Civil Procedure Act (Article 217) and the Enactment Draft of the Civil Execution Act (Articles 25, 26)*, 271 HUMAN RIGHTS AND JUSTICE 8 (1999)

attitude to the latter opinion in an “implicit way” since its decision of Sep. 9, 1997, 96 *Da* 47517,⁹⁰⁾ by acquiescing the judgment on this matter of 93 *Ga hap* 19069⁹¹⁾ which clearly chose the latter opinion.⁹²⁾ The Supreme Court of Korea has not yet declared the “explicit change” of attitude on this matter by *en banc* judgment, but this “implicit change” has been sustained recently.⁹³⁾

The first Korean Supreme Court decision that dealt with the issue of reciprocity was decision of Oct. 22, 1971, 71 *Da* 1393.⁹⁴⁾ In this case, the plaintiff submitted a complaint to the Seoul District Court, seeking a judgment of execution granted to enforce a judgment rendered by U.S. Court of Appeals for the 8th Circuit that ruled the divorce between the plaintiff and the defendant. In this case, reciprocity between the U.S. and Korea was denied under the first view. However, this decision was criticized heavily. One of the most important errors in 71 *Da* 1393 was the direct comparison between the federal U.S. and Korea. Since there was *Erie* doctrine, the Supreme Court of Korea should have looked into the foreign judgment recognition system of Nevada only to determine the existence of reciprocity.⁹⁵⁾

In 93 *Ga hap* 19069,⁹⁶⁾ the Court held that while a requirement of “mutual guarantee” or “reciprocity” was set forth to promote equity in international relationships, considering the point that the legal institutions of Korea and foreign countries are different and that transnational relationships are remarkably developing and expanding in the international society, requiring the foreign law’s requirements for judgment recognition to be perfectly the same as those of Korea would make the scope of the foreign judgment recognition extremely narrow. Therefore, it would be reasonable to regard that the requirement of the “mutual guarantee” of Civil Procedure Act Article 203.4 was satisfied if the foreign judgment recognition requirements between Korea and the foreign countries did not lose balance extremely, and were mutually identical in the respective important points, or the

90) Decision of Sep. 9, 1997, 96 *Da* 47517 (Korean Supreme Court).

91) Decision of Feb. 10, 1995, 93 *Ga Hap* 19069 (The East Branch of Seoul District Court).

92) Suk, Kwang Hyun criticizes the attitude of the Supreme Court of Korea that preferred the “implicit change” approach on this matter (Suk, Kwang Hyun, *supra* note 89, at 17-18).

93) Decision of Oct. 28, 2004, 2002 *Da* 74213 (Korean Supreme Court).

94) Han, Man Su, *An Inquiry on Mutual Guarantee as a Requirement of Foreign Judgment Enforcement*, 490 LAWYERS ASSOCIATION JOURNAL 86 (1997), available in Korean language.

95) *Id.*

96) Decision of Feb. 10, 1995 93 *Ga Hap* 19069 (The East Branch of Seoul District Court).

foreign law's recognition requirements do not overburden those of Korea as a whole and have no substantial difference." Therefore, the Court found that the reciprocity requirement was satisfied. This approach can be interpreted as the second view.

Here, the Court rendered the judgment of execution, which recognized only the partial amount of the payment ordered by the U.S. judgment at issue, considering the degree of domestic country relationship and the principle of proportionality.⁹⁷⁾ This partial recognition implies that partial reciprocity might be possible.

In this case, the Supreme Court of Korea found that there was no error in granting reciprocity in the decision of 93 *Ga hap* 19069. Therefore, since decision of Sep. 9, 1997, 96 *Da* 47517,⁹⁸⁾ the Supreme Court of Korea seems to have adopted the second view at least implicitly.

2002 *Da* 7421⁹⁹⁾ adopted the second view, holding that the reciprocity requirement is satisfied if the respective recognition requirements in the foreign system and Korean system do not substantially differ so as to lose balance extremely as a whole and both requirements are identical with each other in important respects, even if the recognition requirements of the foreign country should neither be equal to nor be more lenient than those of Korea in every single aspect. However, it was not *en banc* decision.

It is interesting that the existence of reciprocity is not recognized consistently among countries. At least one Korean court found the existence of mutual guarantee between China and Korea.¹⁰⁰⁾ And many Korean courts found the existence of mutual guarantee between China and Korea.¹⁰¹⁾ However, reciprocity is not recognized between China and Japan mutually under their laws respectively.¹⁰²⁾

Such mutual guarantees can be recognized sufficiently if they are recognized by the comparison of the requirements through the statute, case law, and custom; a treaty between the foreign country and Korea is not necessarily needed. Even though

97) *Id.*

98) Decision of Sep. 9, 1997 96 *Da* 47517 (Korean Supreme Court).

99) Decision of Oct. 28, 2004, 2002 *Da* 74213 (Korean Supreme Court).

100) Decision of Nov. 5 1999, 99 *Ga Hap* 26523 (Seoul District Court).

101) Decision of Oct. 17, 1968, 68 *Ga* 620 (Seoul Civil District Court).

102) For Japanese negative opinion on the reciprocity between China and Japan, see Judgment of April 9, 2003, Osaka High Court, Heisei (Ne) 2481. For Chinese negative opinion on the reciprocity between China and Japan, see Judicial Interpretation of 26 Jun. 1994 by Liaoning Higher People's Court to the question of Dalian Intermediate People's Court on the recognition of Japanese judgment.

the foreign country has never specifically recognized Korean judgments of the same kind, it would be sufficient if it were expected that the foreign country would recognize the Korean judgment. The fact that there is reciprocity between Korea and a foreign country at issue falls within the facts that the court must investigate *ex officio*, irrespective of the burden of persuasion and proof.¹⁰³⁾

In the situation of lacking information, reciprocity is found very conservatively. When legal information was lacking about a foreign legal system and a foreign judgment recognition system of a country at issue, Korean courts took a very conservative approach on the matter of reciprocity. However, Korean judiciary has made great efforts to catch up with the global trend of the world wide legal theories and practices in order to make Korean legal and judicial system more internationally compatible. One effort could be exemplified by the fact that, annually, over 50 judges and around 2-6 court clerks are dispatched over the world to study and research the foreign legal systems with the budgetary support of the Supreme Court of Korea. In this context, reciprocity is being found very generously these days.

Essentially, it is thought that the requirement of reciprocity itself is against the evolving trend of the institution of the foreign judgment recognition. Overall, the reciprocity requirement has been criticized more and more heavily. Now the majority opinion of Korean academics calls for the abolition of the reciprocity requirement.¹⁰⁴⁾ It is hoped that this requirement be deleted.

IV. Civil Execution Act on Foreign Judgment Enforcement

1. General

In Korea, Civil Execution Act Articles 26, 27 govern the execution of all kinds of foreign civil (including family matter) or commercial judgments and other

103) Decision of Sep. 3, 2004, 2004 *Da* 27488, 27495 (Korean Supreme Court).

104) Choe, Kong Woong, *The Effects of a Foreign Judgment*, 18 COLLECTIONS OF JUDICIAL PAPERS 325 (1987); Han, Man Su, *An Inquiry on Mutual Guarantee as a Requirement of Foreign Judgment Enforcement*, 490 LAWYERS ASSOCIATION JOURNAL 86 (1997); Han, Choong Su, *The Recognition and Enforcement of Foreign Judgments*, 30 LAWYERS 173 (2000); Suk, Kwang Hyun, *supra* note 89, at 8; Lee, Sung Hoon, *A Law and Economics Approach to the Reciprocity in Foreign Judgment Recognition*, 38 COLLECTIONS OF JUDICIAL PAPERS 657 (2004).

equivalents of foreign judgments including some arbitral awards.¹⁰⁵⁾

All foreign judgment holders and some arbitral award holders must obtain a “judgment of execution” in Korean court for enforcement. A compulsory execution based upon the judgment of a foreign court may be conducted only if a court of the Republic of Korea has made a declaration of its legality by means of a judgment of execution.¹⁰⁶⁾

A lawsuit seeking a judgment of execution shall be under the jurisdiction of the district court located at the debtor’s general forum, and if there exists no general forum, it shall be under the jurisdiction of the court having jurisdiction over a lawsuit against the debtor under the provisions of Article 11 of the Civil Procedure Act.¹⁰⁷⁾

Importantly, a judgment of execution shall be made without making any examination as to whether the judgment is right or wrong.¹⁰⁸⁾ Therefore, so-called “*révision au fond*” or “*review de novo*” is prohibited.¹⁰⁹⁾ However, a lawsuit seeking a judgment of execution shall be dismissed (1) when it has not been proved that the judgment of a foreign court has become final and conclusive, or (2) when the foreign judgment fails to fulfill the conditions under Article 217 of the Civil Procedure Act.¹¹⁰⁾ Therefore, all requirements of recognition provided in Article 217 are

105) Civil Execution Act (most recently amended 27 Jan. 27, 2005 by Act No. 7358)

Article 26 (Compulsory Execution by Foreign Judgment)

(1) A compulsory execution based upon the judgment of a foreign court may be conducted only if a court of the Republic of Korea has made a declaration of its legality by means of a judgment of execution.

(2) A lawsuit seeking a judgment of execution shall be under the jurisdiction of the district court located at the debtor’s general forum, and if there exists no general forum, it shall be under the jurisdiction of the court having jurisdiction over a lawsuit against the debtor under the provisions of Article 11 of the Civil Procedure Act.

Article 27 (Judgment of Execution)

(1) A judgment of execution shall be made without making any examination as to whether the judgment is right or wrong.

(2) A lawsuit seeking a judgment of execution shall be dismissed if it falls under any of the following subparagraphs:

1. When it has not been proved that the judgment of a foreign court has become final and conclusive; and
2. When the foreign judgment fails to fulfill the conditions under Article 217 of the Civil Procedure Act.

106) Civil Execution Act Article 26 (1).

107) *Id.* Art. 26 (2).

108) *Id.* Art. 27 (1).

109) Suk, Kwang Hyun, *supra* note 89, at 8.

110) *Id.* Art. 27 (2).

mandatory for enforcing the foreign judgments.

2. *Foreign Family Judgments*

There have been hot debates on whether the judgment of execution is needed for the enforcement of foreign family judgment or not. As for now, the general rule is roughly that the judgment of execution is not needed for the enforcement of foreign divorce judgments,¹¹¹⁾ but is needed for that of other foreign family judgments such as the declaration of nullity or the annulment of marriage, that of divorce, etc.¹¹²⁾ This is somewhat odd in the sense that there is no sufficient justification to differentiate the foreign divorce judgment from the foreign declaration of nullity or the annulment of marriage, however it has been established in the area of the family registration practices.¹¹³⁾

V. Recognition and Enforcement of Foreign Arbitral Awards in Korea

1. *General*

On the recognition and enforcement of foreign arbitral awards, Korean Arbitration Act sets forth some special provisions reflecting the fact that Korea is also a member state of the multilateral international convention on the matter.¹¹⁴⁾

Civil Procedure Act and Civil Execution Act are not provided as the “judgment of

111) Decision of Oct. 22, 1971, 71 *Da* 1393 (Korean Supreme Court).

112) Decision of May 15, 2001, 2000 *Ga Hap* 7771 (Seoul District Court); Decision of Jul. 21, 2005, 2003 *Ga Hap* 7022 (Busan District Court), etc. Most cases are about the enforcement of Japanese family judgments.

113) Family Registration Precedents No. 1-200, 1-336, 2-220, 3-535, 4-163, etc.

114) Arbitration Act (most recently amended Jan. 26, 2002, Act No. 6626)

Article 39 (Arbitral Award in Foreign Country)

(1) Recognition or enforcement of a foreign award which is subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, shall be governed by that Convention.

(2) The provisions of Articles 217 of the Civil Procedure Act and 26 (1) and 27 of the Civil Execution Act shall apply *mutatis mutandis* to the recognition or enforcement of a foreign award which is not subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

recognition” other than the “judgment of execution.” However, Arbitration Act sets forth not only the “judgment of execution” but also the “judgment of recognition.”¹¹⁵⁾

2. *Arbitral Award Covered by the New York Convention*

The “Convention” cited Article 39 (1) above, means the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958.¹¹⁶⁾ Korea acceded to the New York Convention in 1973. If a foreign arbitral award is subject to the New York Convention under the Article 1 (1) of the New York Convention,¹¹⁷⁾ a plaintiff should submit duly authenticated original documents (the arbitral award and the arbitration agreement), or duly certified copies thereof, accompanied by certified translations under the New York Convention.¹¹⁸⁾ When the plaintiff submits those documents, Korean courts should promptly render a judgment of execution unless the defendant proves that there exists a ground of non-recognition provided at Article 5 of the New York Convention.¹¹⁹⁾

There was a dispute about the meaning of the second sentence of Article 4.2. of the New York Convention. Even though there was an argument that the translation should be certified by an “official or sworn translator,” the Supreme Court of Korea

115) Arbitration Act Article 37 (1).

116) http://www.mofat.go.kr/mofat/mk_a005/mk_b030/mk_c056/mk_d155/mk05_02_sub06_02.jsp, which is the official website of the Ministry of Foreign Affairs and Trade, Korea.

117) Article I of the New York Convention

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

118) Article 4 of the New York Convention

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) the duly authenticated original awards or a duly certified copy thereof;
- (b) the original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

http://www.mofat.go.kr/mofat/mk_a005/mk_b030/mk_c056/mk_d155/mk05_02_sub06_02.jsp

119) Article 5 of the New York Convention

held that any translation certified by a “Korean embassy or consular agent” met the requirements provided at Article 4.2 of the New York Convention, in the decision of Feb. 14, 1995, 93 *Da* 53054. The attitude of the Supreme Court of Korea is evaluated very desirable for the efficient practices of the foreign arbitral award recognition and enforcement.¹²⁰⁾

The New York Convention limited grounds to refuse enforcement of awards to the ones listed under the provision of Article 5, and among them, Paragraph 2 Item (b) of Article 5 provides that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the “public policy” of that country. Such ground for refusal is provided to the effect that recognition and enforcement of a foreign arbitral award does not

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1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) the award deals with a difference not contemplated by or not falling within the term of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
 - (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

http://www.mofat.go.kr/mofat/mk_a005/mk_b030/mk_c056/mk_d155/mk05_02_sub06_02.jsp

120) Suh, Dong Hee, *Some Problems Related to the Enforcement of Foreign Arbitral Awards*, 298 KOREAN COMMERCIAL ARBITRATION BOARD, ARBITRATION, 65-66 (2000).

negatively influence fundamental moral norms and social order of the enforcing country so that they shall be preserved as unharmed.

However, the Supreme Court of Korea held that a court of law should consider not only internal circumstances of the enforcing country, but also the aspect of ensuring the stability of international transactions in rendering a judgment to refuse recognition and enforcement. Accordingly, the Court held that grounds for refusing recognition or enforcement must be narrowly interpreted, and that, thus, recognition and enforcement of an arbitral award shall be refused only if concrete results of its recognition would be contrary to good public morals and social order of the enforcing country.¹²¹⁾

A judgment of execution provides legality to a foreign arbitral award so that a compulsory execution procedure under the Korean laws is made available to an execution of a foreign arbitral award, and a judgment for or against the legality of a foreign arbitral award be rendered necessary after hearings. Therefore, where a ground for “Lawsuit of Demurrer against Claims” under the Civil Execution Act Article 44,¹²²⁾ such as the extinguishment of an obligation, occurred after a foreign arbitral award had been issued, enforcement of the foreign arbitral award may be refused as being contrary to “public policy” as provided by Paragraph 2 Item (b) of Article 5 of New York Convention if arguments heard in the hearing revealed that allowing a compulsory execution procedure merely based on the arbitral award would be against the fundamental principles of Korean laws.¹²³⁾

3. Arbitral Award Not Covered by the New York Convention

If a foreign arbitral award is not subject to the New York Convention, the

121) Decision of Apr. 11, 2003, 2001 Da 20134 (Korean Supreme Court).

122) Civil Execution Act Article 44 (Lawsuit of Demurrer against Claims)

(1) If a debtor intends to raise any objection against the claims which has become final and conclusive by a judgment, he shall file a lawsuit of demurrer against the claims before the court of first instance which rendered such judgment.

(2) For the demurrer under paragraph (1), any grounds therefore shall be those which have arisen subsequently to a closure of pleadings (in the case of a judgment without holding any pleadings, it shall be subsequent to a declaration of judgment).

(3) If there exist many kinds of grounds for a demurrer, they shall be alleged simultaneously.

123) Decision of Apr. 11, 2003, 2001 Da 20134 (Korean Supreme Court).

provisions of Articles 217 of the Civil Procedure Act and 26 (1) and 27 of the Civil Execution Act shall apply mutatis mutandis to the recognition or enforcement of the foreign arbitral award.¹²⁴⁾ An arbitral award made in Korea shall be recognized or enforced, unless any ground of setting aside is found.¹²⁵⁾

However, it should be noted that sometimes the New York Convention may be applied to the arbitral award made even in Korea, under Article 1 (1) of the New York Convention. If all the factors related to the dispute are “foreign,” then the arbitral award from the arbitration even made in Korea, can become a “foreign” arbitral award which the New York Convention applies. Therefore, the plaintiff who seeks the enforcement of the arbitral award like this, can have the option for the enforcement pursuant to Arbitration Act or that pursuant to the New York Convention.

VI. Recognition and Enforcement Abroad of Korean Judgments

Another interesting issue on the foreign judgment recognition would be the cases in which the recognition and enforcement of Korean judgments were dealt with. Although the comprehensive survey on this matter cannot be provided in this article, there are interesting cases reflecting the evaluation of Korean judgment in the foreign country at issue.

In *Korea Water Resources Corp. v. Lee*,¹²⁶⁾ the California Court of Appeal held that a Korean judgment that was remanded by Supreme Court of Korea was not conclusive. Based on a tort theory, the creditor, Korea Water Resources Corp. obtained a judgment against the debtor from a trial court in Korea.¹²⁷⁾ The creditor, Korea Water Resources Corp. brought an action in California for the recognition of the Korean judgment. The trial court initially ordered issuance of an attachment and stayed the recognition action pending the outcome of appellate proceedings¹²⁸⁾ in Korea.

124) Arbitration Act Article 39 (2).

125) Arbitration Act Article 38.

126) *Korea Water Resources Corp. v. Lee*, 115 Cal. App. 4th 389 (Cal. Ct. App., 2004).

127) Decision of Apr. 7, 1998, 96 *Ga Hap* 24029 (Suwon District Court).

128) Decision of Feb. 2, 1999, 98 *Na* 22989 (Seoul High Court).

However, after Korean Supreme Court rejected the creditor's tort theory of liability, entered a reduced provisional execution order, and remanded for a retrial,¹²⁹⁾ the trial court found that the Korea judgment was not "conclusive" within the meaning of Cal. Code Civil Procedure § 1713.2 of the UFMJRA. The trial court granted the debtor summary judgment. The Court affirmed. The use of the conjunctive phrase "final and conclusive and enforceable" in the statute contemplated the possibility that some judgments, although final and enforceable, might not be sufficiently conclusive to warrant California recognition. The court agreed that the Korean judgment, given its procedural posture, was not conclusive in Korea so as to have warranted recognition in California, and found that summary judgment was proper.

In the case of *Sik Choi v. Hyung Soo Kim*,¹³⁰⁾ Appellant judgment holder did business with a property owner who gave appellant a promissory note and a notarized deed which included a compulsory execution clause so that appellant could obtain a judgment if the property owner failed to pay on the note. This all took place in Korea, where the note was executed and where appellant obtained an order of execution once the property owner defaulted on the note. Appellees, parties who held various property interests, were all in the United States and claimed interests in the same property for which appellant held a foreign order of execution. Appellant brought an action and sought to have her foreign judgment recognized and to establish thereby her rights to the property in question. The trial court refused to recognize the foreign judgment and appellant challenged that ruling. On appeal, the court affirmed. The court found that because due process was not provided to the original property owner in the form of notice, once appellant acted upon the order of execution, the judgment could not have been recognized even though the judgment was from a country that was considered a "sister country" to the United States.

In *Daewoo Motor Am. v. GMC*,¹³¹⁾ Plaintiff alleged that defendants' actions caused *de facto* termination of the distribution agreement, destroyed business opportunities, and caused plaintiff to fail to meet its contractual obligations with its U.S. dealers.

Defendants sought to dismiss all claims on principles of comity. As an initial

129) Decision of Jan. 11, 2002, 99 *Da* 16460 (Korean Supreme Court).

130) *Sik Choi v. Hyung Soo Kim*, 50 F.3d 244 (3rd Cir., 1995).

131) *Daewoo Motor Am. v. GMC*, 315 B.R. 148 (D. Fla., 2004).

matter, the court rejected plaintiff's contention that the Korean Bankruptcy Court's orders violated the stay under 11 U.S.C.S § 362, which was automatically put in force when plaintiff filed for bankruptcy in the United States. The Korean Court's orders approving the Master Transaction Agreement and the reorganization plan did not affect the distribution agreement, which was property of plaintiff's bankruptcy estate.

The court granted comity to the Korean Court proceedings to preserve an orderly and systematic distribution of the Korean manufacturer's assets. The court concluded that granting comity was proper because any differences between Korean and U.S. bankruptcy law were minimal and did not offend U.S. notions of due process and because plaintiff had notice and a full and fair opportunity to participate in the Korean bankruptcy process.

The important point of the UFMJRA recognition is that the UFMJRA does not prevent the recognition or non-recognition of a foreign judgment in situations not covered by the UFMJRA.¹³²⁾

In the case of *Jeong Suk Bang v. Joon Hong Park*,¹³³⁾ Plaintiff, Jeong Suk Bang, a resident of Chungmu, Korea, was the former wife of defendant, Joon Hong Park, a resident of Grand Blanc, Michigan. Two sons were born of their marriage. They were divorced in 1964, in Busan, Korea. Defendant was ordered to pay plaintiff, over a period of time, the sum of \$ 50,000, part of which was for "solatium". When defendant defaulted, plaintiff filed a complaint for a money judgment in the sum of \$ 45,100, plus interest, costs and attorney fees, and for equitable relief in the Genesee Circuit Court. Defendant filed a motion for summary judgment. The court, Ollie B. Bivins, Jr., J., granted summary judgment for defendant, holding that the Korean judgment sued upon was for support in a matrimonial or family matter and was not enforceable under the Uniform Foreign Money-Judgments Recognition Act. Plaintiff appealed. The court held that while the Korean judgment fell within the exclusion of the UFMJRA, Mich. Comp. Laws § 691.1151, et seq. (Mich. Stat. Ann. § 27.955(1) et seq.,) *it remained enforceable under the principles of comity*.

Recently, a Japanese court recognized a divorce order rendered by Seoul Family Court, Korea.¹³⁴⁾ The defendant who had Korean nationality filed for a divorce order

132) Section 7 of the UFMJRA of 1962.

133) *Jeong Suk Bang v. Joon Hong Park*, 116 Mich. App. 34 (Mich. Ct. App., 1982).

134) Yokohama District Court H. 11. 3. 3. Civil Affairs Division 7, Hanrei Times No. 1065 (Sep. 2001).

against the plaintiff who had Japanese nationality, and got a divorce order for her from Seoul Family Court. The Family Court order became final on June 30, 1990. With the permission of the mayor of Hukuzawa city, the divorce between the plaintiff and the defendant based on that Korean Family Court order was registered in the family registration book in which the plaintiff was the family head.

The plaintiff, arguing that the above Korean Family Court order did not exist at all or that it could not be recognized under Japanese Code of Civil Procedure Article 118, filed for a judgment of declaration that the divorce at issue was not valid.

Yokohama District Court pointed out that if a divorce judgment rendered in a foreign court satisfies the requirements prescribed by Japanese Code of Civil Procedure Article 118, then a judgment of execution is not needed for the execution of the family registration practices.

VII. Conclusion

A judgment could be seen as a legal software program working in its own unique legal operating system.¹³⁵⁾ If legal bases justifying a judgment are all essentially “compatible” with a foreign legal system, then the judgment could be accepted into the foreign legal system, or more precisely, “recognized” on the basis of “comity” in that foreign country. Thus, it could be rightly said that if we are to measure the international compatibility of one legal system, we should look at the practices of foreign judgment recognition in that country.

From the interpretations concerning Civil Procedure Act, Civil Execution Act, and Arbitration Act, it could be rightly said that the global compatibility of Korean legal system has continuously increased through judicial and academic efforts and one important example is the evolution of the foreign judgment recognition practices.

Of course, there might be some inevitable limits to this trend such as “good morals” which is a crucial concept in Korean legal system. At least the existence of “mutual guarantee” or “reciprocity” requirement seems against the evolving trend of Korean legal system typically found in the opinions of the Supreme Court of Korea, and it is hoped that this requirement be deleted. However, we may well still expect affirmatively that the international compatibility of Korean legal system will increase

135) Lee, Sung Hoon, *Game of Foreign Judgment Recognition*, 3-2 ASIA LAW REVIEW, 102 (Dec. 2006).

gradually through the unending judicial and academic efforts.

KEY WORDS: Foreign Judgment, Recognition, Enforcement, Comity, Reciprocity