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Enforcement of Annulled Arbitral awards in Korea: Where are We and Where Should We Go?

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Abstract

The fate of arbitral awards annulled at the seat of arbitration is unclear in Korea because neither the Arbitration Act nor the New York Convention offers any guidance for courts to follow. Rather, courts have discretion on how to proceed. To address such ambiguity this paper starts by assessing the applicable Korean legal framework, followed by a summary of the two conflicting views on how to interpret Article V(1)(e) of the New York Convention as well as pertinent court jurisprudence. Between the traditional view that annulled arbitral awards are unenforceable and the delocalisation theory which argues otherwise, this paper finds that Korean courts should adopt a two-step test centered on Article 217 of the Civil Procedure Act. Specifically, due to the principle of state sovereignty, Korean courts must first conduct a preliminary analysis under Article 217 to evaluate the effectiveness of the foreign judgment which annulled the problematic award. If the court cannot recognize the foreign judgment, then it should treat the annulled award in the same manner as any other arbitral award. If the foreign judgment must conversely be recognized, then the award no longer exists under Korean law and the court should accordingly dismiss the action.

KEY WORDS: New York Convention, recognition and enforcement, annulled arbitral award, Article V(1)(e), Article 217 of the Civil Procedure Act

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I. Introduction

International arbitration is 'fast,' 'cheap,' and 'efficient.'[1] At the very least, that is seemingly the general perception in today's global legal landscape. But is this perception necessarily true? For one thing, the perceived swiftness of arbitral proceedings could very well be an exaggeration,[2] especially when compared to the average speed of court proceedings in jurisdictions such as Korea.[3] More importantly, however, international arbitration has a fundamental weakness and complicating factor in that the prevailing party might be forced to seek the recognition and enforcement of the award at the relevant court if the losing party decides to contest the enforcement proceedings.[4] Therefore, even in international arbitration there are no practical means of entirely precluding the involvement of a national court,[5] and at times the prevailing party must file an enforcement action in a jurisdiction other than the seat of arbitration. The losing party might simultaneously pursue an action seeking to set

1) Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 Tex. Int'l L. J. 43, 44 (2002).

2) Robert C. Bird, *Enforcement of Annulled Arbitration Awards: A Company Perspective and Evaluation of a "New" New York Convention*, 37 N.C. J. Int'l L. & Com. Reg. 1013, 1018-1019 (2011) (explaining that unlike domestic arbitration, international arbitration can be costly and time-consuming compared to litigation).

3) According to statistics provided by the Supreme Court of Korea, the average number of days it took for a first instance court to render a decision in a civil case was 322.3 for cases with a panel of three judges, 187.5 days for cases with a single judge, and only 116.9 days for small claims cases during the year of 2016. 2017 *Sabeobyeongam* [Annual Judiciary Report 2017], Supreme Court of Korea (Sep. 18, 2017), www.scourt.go.kr/img/pub/jur_2017_Book6.pdf, at 573.

4) Fortunately, more often than not the losing party either voluntarily complies with the award or the parties settle after the award has been rendered. Noah Rubins, *The Enforcement and Annulment of International Arbitration Awards in Indonesia*, 20 Am. U. L. Rev. 359, 359-360 (2005).

5) Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?*, 29 ICSID Rev. 1, 3 ("[a]s long as arbitration has existed as an alternative to litigation in court, the award has been subject to some form of judicial review"). This is especially true where the award is to be enforced under the New York Convention. Rubins, *supra* note 4, at 360.

aside the award at the seat of arbitration[6] and might even succeed. This naturally raises the question of how a national court should cope with an action seeking the recognition and enforcement of an arbitral award annulled at the seat of arbitration.[7] The answer is, it depends.

As a general trend most jurisdictions tend to shy away from recognizing and enforcing annulled arbitral awards[8] and on first thought this default rule may seem a reasonable if not logical way of solving the conundrum in the absence of an applicable domestic law principle. Surprisingly, however, courts in certain jurisdictions have in fact allowed the recognition and enforcement of annulled arbitral awards.[9] Those who side with this contrary and minority view base their position on the so-called "delocalisation" theory.[10] Indeed, an award annulled at its seat of arbitration might nevertheless be enforceable in another state.[11] How is it possible that some states enforce annulled arbitral awards? For one thing, in states that have acceded to it this possibility originates from the very Article V(1)(e)[12] of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the "New York Convention"). As one might expect, Korea acceded to the New York Convention in 1973. It logically follows that the New York

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6) Bird, *supra* note 2, at 1028.

7) Throughout this paper, terms such as "annul," "vacate," and "set aside" will be used interchangeably. There is ostensibly no tangible difference with respect to the meaning of these terms. Rather, there is at most a regional preference. Simon Greenberg et al., International Commercial Arbitration: An Asia-Pacific Perspective 459 (2011).

8) *Id*.

9) Most notably, *see* van den Berg, *supra* note 5, at 17-19; Nigel Blackaby et al., Redfern and Hunter on International Arbitration 634-635 (2015).

10) *See generally* Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 Int'l. & Comp. L. Quarterly 53 (1983).

11) Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 Am. Rev. Int'l Arb. 451, 459 (2000).

12) "Recognition and enforcement of the award may be refused, at the request of the party againstwhich it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that… the award… 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." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1), Multilateral Treaty No. 471 of Feb. 19, 1973 [hereinafter referred to as "the New York Convention"].

Convention would not be of much assistance to Korean courts in answering the question of what would happen to annulled arbitral awards in Korea. Deriving a suitable answer is the aim of this paper.

To that end this paper discusses relevant provisions of Korean law before moving on to the problematic language of Article V(1)(e) of the New York Convention and its inherent ambiguity. Finding no solution in Korean law, this paper summarizes the two main theories on how to interpret Article V(1)(e) as well as critical case law from other jurisdictions. Afterwards, this paper finds that Korean courts are under no obligation to recognize the foreign judgment that annulled the arbitral award in the first place because it is no different from any other foreign judgment and there is no applicable treaty comparable to the New York Convention obligating the recognition and enforcement of foreign judgments. Blindly accepting the foreign judgment would undermine Korea's sovereignty, and as such, in accordance with the pillars of customary international law Korean courts must first determine whether to recognize the foreign judgment before turning to the award itself.

Returning to the realm of domestic law, before addressing an annulled arbitral award Korean courts should first conduct a two-step test on the foreign judgment based on Article 217[13] of the Civil Procedure Act and review public policy and other factors. If the foreign judgment cannot be

13) (1) A final and conclusive judgment rendered by a foreign court or a judgment acknowledged to have the same force (hereinafter referred to as "final judgment, etc.") shall be recognized, if all of the following requirements are met: 1. That the international jurisdiction of such foreign court is recognized under the principle of international jurisdiction pursuant to the statutes or treaties of the Republic of Korea; 2. That a defeated defendant is served, by a lawful method, a written complaint or document corresponding thereto, and notification of date or written order allowing him/her sufficient time to deffend (excluding cases of service by public notice or similar), or that he/she responds to the lawsuit even without having been served such documents; 3. That the approval of such final judgment, etc. does not undermine sound morals or other social order of the Republic of Korea in light of the contents of such final judgment, etc. and judicial procedures; 4. That mutual guarantee exists, or the requirements for recognition of final judgment, etc. in the Republic of Korea and the foreign country to which the foreign country court belongs are not far off balance and have no actual difference between each other in important points. (2) A court shall *ex officio* investigate whether the requirements under paragraph (1) are satisfied." Minsasosongbeob [Civil Procedure Act] *amended by* Act. No. 14966, Oct. 31, 2017, art. 217 (Recognition of Foreign Judgments) (S. Kor.).

recognized, then the court tasked with the enforcement action should proceed under the assumption that the arbitral award itself remains perfectly valid. If the judgment is to be recognized, then so must its effect of annulling the arbitral award. As a result, the award no longer exists under the *lex arbitri* or Korean law and cannot be enforced.

II. SETTING THE STAGE

1. Annulled Arbitral Awards under Korean Law

There wouldn't be a problem at all if Korean law provided a clear-cut answer. However, the Arbitration Act of Korea does no such thing. Where the New York Convention does not apply, the Act applies Article 217 of the Civil Procedure Act mutatis mutandis to the recognition and enforcement of international arbitral awards. Where the Convention does apply, the process of international awards is carved out of the Act, and exclusively governed by the New York Convention itself,[14] thereby creating a legal vacuum left to be filled by the courts. Thus far, Korean courts have yet to face this conundrum.[15] The closest they have gotten to is perhaps to imply that Article V(1)(e) is a discretionary ground for refusing to recognize and enforce an arbitral award.[16] One scholarly view comments that Article

14) Joongjaebeob [Arbitration Act] *amended by* Act. No. 14176, May 29, 2016, art. 39 (Foreign Arbitral Awards) (S. Kor.) provides: (1) Where the Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies to a foreign arbitral award, recognition and enforcement thereof shall be rendered under the Convention. (2) Where the Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not apply to a foreign award, article 217 of the Civil Procedure Act…shall apply mutatis mutandis to recognition and enforcement thereof.

15) Jaeseok Lee, *chuisodoen oigukjungjaepanjeongeui seungin jiphaengeul heogahan prangs, migukeui panryewa geu sisajjeom* [Cases of France and the United States that Approved the Recognition and Enforcement of Annulled Foreign Arbitral Awards and Their Implication], 45 *Sabeobnonjip* 173, 246 (2007).

16) One source points to the Supreme Court of Korea's acknowledgement that Article V(1)(e) prescribes one of the grounds for refusing to recognize and enforce an annulled arbitral awards as evidence that Korean courts take the provision to be discretionary rather than mandatory. However, it is unclear if that was the actual intent of the Supreme Court rather than merely restating the provision. Either way, this is a critical discussion point that

VII(1) or the "more favorable rights" clause of the New York Convention permits a national court to enforce an award that has been annulled at the seat of arbitration, and yet suggests that a Korean court should refuse to enforce an annulled arbitral award,[17] plausibly because, if the two comments are to be consistently reconciled, Korean national law does not confer such more favorable rights.

This attempt by itself at deciphering or reconciling the comments shows that the fate under Korean law of an annulled award is far from resolved at this point.

In contrast, the Civil Procedure Act of Korea[18] prescribes clear requirements on recognizing and enforcing foreign court judgments. The relevant provision is Article 217, which sets forth the legal standard for Korean courts to determine the effectiveness of a finalized foreign judgment. Article 217 prescribes the following requirements: (i) the foreign court had jurisdiction over the matter, (ii) the defendant was properly served, (iii) recognizing the foreign judgment would not be contrary to public policy, and (iv) there is reciprocity between Korea and the concerned foreign state.[19] In making this determination, a Korean court is allowed to review the merits of the foreign judgment within the necessary scope.[20] For the purpose of this paper, (iii) and (iv) are relevant.[21] Accordingly, only those two particular requirements will be discussed below.

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will be elaborated on in a subsequent section. *Id.* at 247; Supreme Court [S. Ct.], 2001Da77840, Feb. 26, 2003 (S. Kor.).

17) Professor Kwang Hyun Suk, one of the most eminent academics in the field in Korea, advocates the position that actions seeking the recognition and enforcement of annulled arbitral awards should be refused. KWANG HYUN SUK, KUKJE MINSASOSONGBEOB: KUKJESABEOB (JULCHA PYEON) [International Civil Procedure: Private International Law (Procedural Edition)] 556 (2012) (cited as "SUK, supra note 17" hereinafter), merely states that even though there is an ongoing debate, where there exist grounds for refusing to recognize and enforce an arbitral award under the New York Convention, it would be logical to refuse the request). In Suk, *Kukjebunjaenghaegyeoldui Aaekrakesseo Bon Kukjesangsajungjae*, [International Commercial Arbitration from the Viewpoint of International Disputes Settlement], 55 SEOUL L. J. 237, at 268, he comments that the "more favorable right" clause may permit a national court to enforce an annulled award.

18) The Civil Procedure Act is equivalent to the civil procedure code of other states.

19) SUK, *supra* note 17, at 346.

20) *Id*. at 396.

21) For a detailed discussion of the other requirements, *see Id.* at 346-373.

Starting with public policy, the Supreme Court of Korea has held that a foreign judgment may be contrary to public policy in terms of its content or the procedure of obtaining the judgment.[22] Therefore, public policy has both a substantive and a procedural dimension.[23] In order to find a violation of substantive public policy, the matter must be related to Korea.[24] Also, while failure to adhere to mandatory provisions of Korean law does not always suffice, a foreign judgment will be denied recognition if it violates fundamental principles of Korean law.[25] As for the procedural side, public policy is breached where the process leading to the rendering of the foreign judgment fell short of the basic procedural principles of Korean law, such as where the foreign court lacked independence, a party did not have an opportunity to defend itself, or where the award was obtained through fraud.[26] To clarify, a court may not conduct *de novo* review of the judgment under the pretense of reviewing whether fraud took place.[27] Further, public policy could also be breached if a parallel proceeding is pending in a Korean court.[28]

The final requirement under Article 217 is that there must be reciprocity between Korea and the foreign jurisdiction. There is no consensus on what constitutes reciprocity under Korean law,[29] but Korean courts have found reciprocity where the courts of the foreign state have recognized and enforced or can be expected to recognize and enforce Korean court judgments.[30] The Supreme Court of Korea has also found reciprocity where the foreign state's requirements for recognizing the same case are negligibly different from those set under Korean law.[31] Moreover, reciprocity can be found even in the absence of a treaty.[32] Under these requirements, Korean

22) Supreme Court [S. Ct.], 2002Da74213, Oct. 8, 2004 (S. Kor.).

23) Suk, *supra* note 17, at 375.

24) *Id*. at 375.

25) *Id*. at 374.

26) *Id*. at 390.

27) 2002Da74213, *supra* note 22.

28) Suk, *supra* note 17, at 394.

29) *Id*. at 396.

30) *Id*. at 397.

31) 2002Da74213, *supra* note 22.

32) Suk, *supra* note 17, at 397.

courts have accordingly found reciprocity between Korea and Japan, China, Germany, and several U.S. states, although it is unclear whether it also exists with the UK.[33] On a final note, a foreign judgment satisfying all four requirements is automatically recognized, although a party may file a separate action asking a court to confirm whether that is indeed the case.[34]

The basic legal framework set out above shows that Korea does not have a definitive position on how to address annulled arbitral awards. That being so, the fate of an arbitral award annulled at the seat of arbitration is uncertain and a Korean court would have no strict rule to follow if this issue were to arise in practice. Our next course of action then is to suggest an appropriate rule that reflects international legal principles, practice, and Korean law. To state the conclusion at the outset, our reflections will show that Korean courts must not mechanically refuse foreign arbitral award simply because a foreign court annulled it. They must first review the foreign court judgement to decide whether they will recognize it under Article 217 of the Korean Civil Procedure Act.

III. The Traditional View and Its Critics

1. Article V(1)(e) of the New York Convention

First, we start at the origin of the problem. The New York Convention is widely considered to be one of the most successful multilateral treaties in place,[35] perhaps due to the simplicity of its structure.[36] In short, under Article III of the New York Convention national courts must recognize and enforce foreign arbitral awards rendered in other signatory states unless one of the exceptions under Article V is applicable.[37] Meanwhile, in

33) *Id*. at 438.

34) *Id*. at 408-409.

35) Bird, *supra* note 2, at 1014; Blackaby, *supra* note 9, at 617.

36) Greenberg, *supra* note 7, at 429 ("[t]he attractiveness of the New York Convention is rooted in the simplicity of its procedures and the limited grounds afforded to national courts to refuse enforcement").

37) Stephen T. Ostrowski and Yuval Shany, *Chromalloy: United States Law and International Arbitration at the Crossroads*, 73 N.Y.U. L. Rev. 1650, 1657-1658 (1988).

addition to Article V, the New York Convention permits courts at the seat of arbitration to vacate arbitral awards under applicable national arbitration laws.[38] Even though there is a general growing convergence and harmonization toward uniformity in international arbitration[39] and many states have adopted the UNCITRAL Model Law on International Commercial Arbitration to varying degrees, a sizeable discrepancy remains among them regarding the legal grounds for annulling an award.[40] The discrepancy is especially problematic when it comes to recognizing and enforcing arbitral awards since an arbitral award is of no use until it is actually enforced.[41] This gives rise to the situation that a party seeks the recognition and enforcement of an award that was already lawfully annulled at the seat of arbitration.[42]

Worse yet, the New York Convention fails to provide any guidance at all. Whereas Article V of the New York Convention sets forth an exhaustive list of grounds for national courts to refuse to recognize and enforce an arbitral award, none are mandatory. This is because Article V explicitly states that the concerned court *may* refuse to recognize and enforce an annulled award. Among the enumerated grounds, Article V(1)(e) is especially troublesome for the international arbitration community.[43] On the other hand, Article VII(1), known as the "more favorable right" provision, states that the provisions of the New York Convention *shall not* deprive any party of any rights allowed under the laws or treaties of the country where enforcement of an arbitral award is being sought,[44] clearly

38) Drahozal, *supra* note 11, at 454; Blackaby, *supra* note 9, at 635 ("the New York Convention does not in any way restrict the grounds on which an award may be set aside or suspended by the court of the country in which, or under the law of which, that award was made").

39) Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID Rev. 16 (1999).

40) Drahozal, *supra* note 11, at 456. States could also interpret the same UNCITRAL provisions differently. Gaillard, *supra* note 39, at 29-30.

41) Jieying Ding, *Enforcement in International Investment and Trade Law: History, Assessment, and Proposed Solutions*, 47 Geo. J. Int'l. L. 1137, 1146 (2016); Greenberg, *supra* note 7, at 427.

42) Drahozal, *supra* note 11, at 454.

43) Davis, *supra* note 1, at 46; Rashda Rana, *The Enforceability of Awards Set Aside at the Seat: An Asian and European Perspective*, 40 Fordham Int'l L. J. 813 (2017).

44) "The provisions of the present Convention shall not…deprive any interested party of

demonstrating its mandatory nature, which suggests that Article V(1)(e) on the other hand was meant to be discretionary. As we will see below, where there are domestic law grounds that provide for the enforcement of annulled arbitral awards, Article VII has been invoked to overrule requests for dismissal based on Article V(1)(e).[45] In Korea, however, the Arbitration Act relegates cases under the New York Convention to the Convention itself, and does not provide any "more favorable right" for parties to take advantage of. Article VII becomes irrelevant and only Article V(1)(e) remains useful.

On first thought, it seems counterintuitive that a national court can be empowered to recognize and enforce annulled arbitral awards. It would look unquestionably ludicrous to seek the recognition and enforcement of a first instance court decision which was reversed on appeal in another jurisdiction.[46] Once again, however, the plain language of the New York Convention precisely allows for that possibility, as under Article V(1)(e) recognition and enforcement *may* be refused if the award "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."[47] Taking the permissive language at face value, national courts are seemingly left with discretion, within the limits of applicable principles of domestic or international law, on how to proceed when presented with an annulled arbitral award. Thus from its language the New York Convention sheds no light on how to

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any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law… of the country where such award is sought to be relied upon." New York Convention, *supra* note 12, art. VII(1).

45) Specifically, because courts are not obligated to refuse to enforce an annulled arbitral award, they have then relied on domestic law provisions which allow for enforcement since the latter must be applied. This is exactly what happened in the *Chromalloy* case in which Egypt had grounds for asking the court to annul the award under Article V, but the plaintiff, relying on Article VII, invoked more favorable domestic law provisions in the Federal Arbitration Act to block the application of Article V(1)(e). Ostrowski and Shany, *supra* note 37, at 1668-1669.

46) Gaillard, *supra* note 39, at 19.

47) New York Convention, art V(1)(e), *supra* note 12. This ambiguity applies to all grounds prescribed by Article V. While Article V(1)(e) might also apply to the situation where an arbitration is conducted under the substantive law of one state while seated in another, some are skeptical that this situation could arise to begin with. *See* Greenberg, *supra* note 7, at 62 (arguing that parties cannot choose a *lex arbitri* different from that of the seat of arbitration).

utilize Article V(1)(e). Ambiguous as it is, the question is instead left open and up to the discretion of national courts.[48] Such ambiguity is unfortunate considering how the New York Convention had an overall purpose of making the enforcement of arbitral awards easier and more uniform across different jurisdictions.[49]

There is no doubt that Article V(1)(e) is the source of much confusion and debate among practitioners. Accordingly, while Article V(1)(e) may have had limited significance in a practical sense,[50] nothing theoretically prevents courts from invoking Article V(1)(e) to recognize and enforce annulled arbitral awards.[51] If anything, this possibility would be perfectly appropriate considering the pro-enforcement nature of Article V.[52]

2. The Traditional Default View v. the Declocalisation Theory

Having addressed the inherent ambiguity of Article V of the New York Convention, the next step is to discuss how scholars and practitioners as well as courts have ascertained its meaning. We start with what many see as the default rule. In short, the traditional and effectively leading view is that "every private, commercial arbitration must be attached to a legal seat of arbitration."[53] In other words, an arbitral proceeding only exists under the *lex arbitri*.[54] The direct consequence is that once annulled, an arbitral

48) Bird, *supra* note 2, at 1029 ("the Convention neither compels courts not to enforce annulled awards nor provides guidance as to when enforcement or non-enforcement would be appropriate").

49) Ostrowski and Shany, *supra* note 37, at 1656.

50) Drahozal, *supra* note 11, at 455; Bird, *supra* note 2, at 1015 ("[t]he enforcement of annulled arbitral awards appears to be a narrow, almost picayune topic hardly worth more than a passing reference in the arbitration literature"); Greenberg, *supra* note 7, at 459 ("[i]t is relatively rare that state courts will enforce awards set aside in other states"); Blackaby, *supra* note 9, at 638 ("courts around the world are more likely than not to decline to enforce annulled awards"). Even Jan Paulsson himself questioned the practical relevance of the theory of delocalisation, which will be explained in detail below. Paulsson, *supra* note 10, at 57 ("I doubt this feature of international arbitration has much of an impact in practice").

51) Ostrowski and Shany, *supra* note 37, at 1682.

52) *Id.* at 1661-1662.

53) Greenberg, *supra* note 7, at 66.

54) *Id.* ("without the international arbitration law of the seat (i.e. the *lex arbitri*), which permits arbitration to take place, any arbitration would not exist legally").

award no longer exists in a legal sense.[55] The natural conclusion is that an arbitral award annulled at the seat of arbitration quite simply cannot be enforced elsewhere. Van den Berg goes as far as to deem enforcing an annulled award a "legal impossibility" because the award no longer exists according to the laws that governed it.[56]

In striking contrast to the traditional view, a group of scholars contend that annulled arbitral awards remain enforceable outside of the seat of arbitration. Summarized briefly, this view asserts that an arbitral proceeding is not absolutely bound to the seat of arbitration.[57] Instead, arbitral awards have "an independent international existence separate from the judicial system in which they were rendered."[58] At its core the delocalisation theory can be split up into the French approach and the *Chromalloy* approach,[59] the latter of which will be discussed in detail in a subsequent section. We will see later that regardless of their differences, both are firmly rooted in the same fundamental principle of customary international law in the Lotus case.[60]

In the French approach, somewhat surprisingly, the discretionary power under Article V of the New York Convention has no role at all. Coupled with the notion of an award having multiple anchors, the French approach instead relies on Article VII by providing a national law basis to create a "more favorable" right for parties seeking to enforce annulled arbitral awards.[61] The key to this delocalization view is to characterize "an

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55) Ostrowski and Shany, *supra* note 37, at 1652.

56) Van den Berg, *supra* note 5, at 17.

57) Greenberg, *supra* note 7, at 68.

58) Ostrowski and Shany, *supra* note 37, at 1684.

59) Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 Ga. J. Int'l & Comp. L. 25, 24-31 (2009).

60) While many now question its relevance in the modern context, the lingering significance of the Lotus case can neither be overlooked nor dismissed, as some have deemed it "an opinion which still constitutes the basic framework of reference for questions of jurisdiction under international law." Cedric Ryngaert, Jurisdiction in International Law 30 (2008).

61) Van den Berg, *supra* note 5, at 20 ("French law does not contain as ground for refusal of enforcement of a non-French award made outside France the ground that the award has been set aside in the country of origin"). French courts have established a general rule regarding the enforcement of annulled awards. Gaillard, *supra* note 39, at 19-24. Conversely, a

arbitral award as unattached to any legal order or any forum and having no nationality, but as one capable of being accepted and enforced throughout the world."[62] Whereas the traditional view claims that an arbitral award is anchored to its seat of arbitration,[63] the French delocalization approach raises the counterargument that the source of the award "is not exclusively the legal order of the seat of arbitration but rather the sum of all of the legal orders which, on certain conditions which they set, are willing to recognize the arbitral award, a private act,"[64] which is not dependent on the *lex arbitri*.[65] This is because an award is in fact tied to multiple states at once, including the enforcing state, and each of them may claim independent control over and a close connection to the award.

Another logical basis of the delocalisation theory is the principle of Kompetenz-Kompetenz[66] which asserts that an arbitral tribunal can have the final say on its jurisdiction without judicial interference.[67] Nevertheless, arbitral proceedings cannot be completely free of judicial intervention.[68] For that reason the principle of Kompetenz-Kompetenz does not provide for complete detachment between an arbitral proceeding and a national court in most jurisdictions,[69] and an arbitrator's decision on his or her own jurisdiction has finality only where a judge finds that the parties agreed as such. For its part, the Model Law does not support the delocalisation theory

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state could adopt a general rule of rejecting all actions for enforcing annulled awards.

62) Silberman, *supra* note 59, at 29.

63) Gaillard, *supra* note 39, at 17.

64) *Id.* at 45.

65) Paulsson, *supra* note 10, at 57.

66) Kompetenz-Kompetenz can be summarized as "the precept that arbitrators may rule on their own authority." William W. Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law*, 8 Nev. L. J. 135, 136 (2007).

67) *Id.* at 156. While in a domestic context, Horwitz gives a detailed account of how courts gradually gained control over arbitrators in the U.S. during the Eighteenth Century. Morton J. Horwitz, The Transformation of American Law, 1870-1960 149-155 (1992).

68) Drahozal, *supra* note 11, at 468 (explaining how the legal framework for international arbitration involves dual supervision of arbitral awards by the court of the seat of arbitration as well as the enforcing state); Blackaby, *supra* note 9, at 420 ("whilst any challenge to the jurisdiction of an arbitral tribunal may be dealt with *initially* by the tribunal itself, the final decision on jurisdiction rests with the relevant national court").

69) Park, *supra* note 66, at 137 ("[l]egal systems differ on whether and when an arbitrator's decision on his or her authority should foreclose judicial determination on the matter").

in full either.[70]

Meanwhile, the theoretical basis of the traditional view arises in part from the conscious and autonomous decision of the contracting parties to conduct an arbitral proceeding in a certain jurisdiction, and that the parties should be held responsible for their choice of the seat of arbitration.[71] Additionally, advocates of the traditional view derive the consequences of choosing the seat of arbitration from the arbitration agreement itself.[72] The argument continues that the parties agreed to the possibility of the national court of the jurisdiction of their choice vacating a subsequent arbitral award. Therefore, the parties willingly accepted the potential consequences of choosing the seat of arbitration.[73] It would be unfair, then, to allow one of the parties to avoid those consequences by seeking to enforce an annulled arbitral award despite having previously accepted the latent risk.

There is no question that the traditional view carries a fair amount of value with respect to its simplicity and efficiency. Both factors cannot be completely overlooked given the success the New York Convention has achieved for the enforcement of arbitral awards through its structural simplicity.[74] As for the expression of "may" in Article V(1)(3) as compared to "shall not" of Article VII,[75] proponents of the traditional view argue that the scope of the latter does not extend to the former,[76] meaning that Article VII cannot be invoked to recognize and enforce annulled arbitral awards. In other words, Article VII does not cover situations involving Article V(1)(e).

Despite its efficiency and simplicity, it is evident that the traditional view falls short on certain fronts. First, the traditional view seemingly runs contrary to the spirit of the New York Convention. Besides the plain

70) Greenberg, *supra* note 7, at 76; Blackaby, *supra* note 9, at 417.

71) Drahozal, *supra* note 11, at 472.

72) Davis, *supra* note 1, at 58.

73) Silberman, *supra* note 59, at 30.

74) Greenberg, *supra* note 7, at 429.

75) Since Article VII is mandatory, one could ask whether a court located in a jurisdiction which provides for more favorable laws must enforce an annulled arbitral award. Davis, *supra* note 1, at 57.

76) *Id.* at 58, 80.

language of its provisions,[77] the legislative history of and the content of the rest of the New York Convention strongly suggest that the possibility of dismissing an annulled award under Article V(1)(e) was intended to be discretionary.[78] What adds weight to this is the fact that courts have generally accepted their discretion over the matter as well.[79]

Furthermore, some add that to invariably tie the validity of an arbitral award to the national court of the seat of arbitration would be excessively harsh to the parties. The traditionalist assertion that the parties themselves accepted the possibility that the award could be annulled under the *lex arbitri* and then become unenforceable in other jurisdictions is a dubious presumption and leads to the logical shortcomings of the traditional view. After all, contracting parties choose the seat of arbitration and *lex arbitri* in consideration of various factors, which often include mere convenience.[80] If that is all there is, forcing them to accept the full set of consequences of a national court's decision might be against their actual intent. The traditional view could consequently even leave arbitral awards at the mercy of domestic politics.[81] The delocalisation theory predictably argues on the contrary that it is simply too harsh to subject the parties to *all* of the consequences of selecting the seat of arbitration.[82] Therefore, the arbitration agreement alone is insufficient to conclude that the parties agreed to the possibility of an award being annulled due to factors such as local favoritism. Another serious concern which will be discussed below is state sovereignty, since "[t]he country of origin may not deprive the enforcing

77) Advocates of the traditional view challenge the perception that Article V(1)(e) is ambiguous or was intended to be discretionary. While there is some controversy regarding the French version of the New York Convention, the ambiguity seems to exist in all other versions. Jared Hanson, *Setting Aside Public Policy: The Pemex Decision and the Case for Enforcing International Arbitral Awards Set Aside as Contrary to Public Policy*, 45 Geo. J. Int'l L. 825, 833 (2014). Furthermore, Gaillard argues that the French version could plausibly be read as being permissive as well. Gaillard, *supra* note 39, at 32.

78) Davis, *supra* note 1, at 60.

79) *Id.* at 62.

80) Silberman, *supra* note 59, at 30.

81) Ostrowski and Shany, *supra* note 37, at 1663.

82) Davis, *supra* note 1, at 67 ("[t]he mere happenstance of physical location should not have such extraordinary legal consequences").

court of judicial power."[83] The state in which the award was annulled should not be allowed to preempt the courts of another state from enforcing it.[84] Taking these flaws together, it is understandable that the traditional view has been criticized and has led to the emergence of an alternative theory.

IV. COURT JURISPRUDENCE

1. Matter of Chromalloy Aeroservices (Arab Republic)[85]

The delocalisation theory found success in the courts of many states other than France,[86] but in discussing the controversy surrounding Article V(1)(e) of the New York Convention and the delocalisation theory as a whole, there is no single case with greater significance to date than *Chromalloy*, and for good reason considering the lack of judicial precedent leading up to it.[87] Not surprisingly, the facts of and logic behind the holding of *Chromalloy* have been discussed in impressive detail elsewhere. Thus for the limited scope of this paper, only the relevant parts of the holding will be summarized as follows: i) the Second Circuit clearly distinguished between the discretionary and mandatory nature, respectively, of Article V and Article VII of the New York Convention,[88] ii) the annulled arbitral award was reviewed and was deemed to be valid under U.S. law,[89] iii) the parties had agreed not to appeal the arbitral proceeding,[90] iv) it would violate "U.S. public policy in favor of final and binding arbitration of commercial disputes" to recognize the foreign

83) *Id.* at 58.

84) *Id.* at 81.

85) *Matter of Chromalloy Aeroservices*, 939 F. Supp. 907 (D.D.C. 1996) [hereinafter *Chromalloy*]

86) Gaillard, *supra* note 39, at 38.

87) *See Chromalloy*, 939 F. Supp. at 912.

88) *Id.* at 909-910.

89) *Id.* at 911.

90) *Id.* at 912.

judgment,[91] and v) comity is only of several factors to be taken into account in such an analysis.[92]

The *Chromalloy* approach, while leading to the same outcome, takes a slightly different path compared to the French approach in that it is centered on the discretionary nature of Article V(1)(e).[93] The French approach, again, does not concern Article V(1)(e) and proceeds directly to Article VII.[94] This seemingly negligible difference cannot be taken lightly. While the French approach affirmatively allows for the enforcement of annulled arbitral awards by simply ignoring the existence of foreign annulment judgement and Article V(1)(e), the *Chromalloy* approach, fully aware of the discretionary power, instructs national courts to first consider the foreign court judgment which vacated the arbitral award. From there the *Chromalloy* approach is similar to the French one, as courts may enforce an annulled award based on domestic law by relying on Article VII.

To summarize the differences of these two main branches of the delocalisation theory, in France Article V(1)(e) is not considered at all and courts may treat an annulled award in the same manner as any other arbitral award. Under the *Chromalloy* approach, courts accept that they are not obligated to dismiss an annulled award under Article V(1)(e), opting instead to review the validity of the foreign judgment beforehand and then entertain the thought of enforcing an annulled award based on more favorable domestic law invoked via Article VII. The *Chromalloy* approach, however, does not resort to the discretionary power under Article V to enforce an annulled award;[95] it relies solely on Article VII for enforcing it. In that sense, courts adhering to the *Chromalloy* approach have adopted Article VII as a shield against an attack on the discretionary enforcement of the problematic award under Article V.[96]

Building closely on the *Chromalloy* approach, there is also what

91) *Id.* at 913.

92) *Id.* at 914.

93) Silberman, *supra* note 59, at 31.

94) Van den Berg, *supra* note 5, at 16.

95) *Id.* ("to my knowledge, there is not a single court that has used a discretionary power under Article V(1) of the New York Convention grating enforcement of an award set aside in the country of origin"). As we will see below, this statement is no longer true.

96) Ostrowski and Shany, *supra* note 37, at 1653.

Professor Silberman calls the "judgments solution."[97] This is the theory that "[n]ational laws on recognition and enforcement of foreign judgments could offer guidance."[98] The judgments solution is rooted in the fact that given the lack of guidance provided by the New York Convention, the court of the enforcing state could find help from applicable domestic law principles on how to cope with the foreign judgment.[99] Another factor working in favor of the judgments solution is the suggestion that perhaps the difference in framework across jurisdictions is not as extreme as one might fear.[100]

2. *Post*-Chromalloy

Even after *Chromalloy*, U.S. courts refused to recognize and enforce annulled arbitral awards in *TermoRio S.A. E.S.P. v. Electranta S.P.* and *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*,[101] but the delocalisation theory returned with a vengeance in the Second Circuit judgment of *Corporacion Mexicana de Mantenimiento Integral v. Pemex-Exploracion*.[102] Putting aside the specific facts of the case,[103] in *Pemex* the Second Circuit declined to recognize a Mexican court's judgment which had vacated the problematic award on the basis that its holding to retroactively apply legislation violated U.S. law.[104] Also, while acknowledging that the discretion to

97) Silberman, *supra* note 59, at 32-36.

98) *Id.* at 32.

99) Professor Silberman suggests that the enforcing court should enforce a foreign judgment on the basis of whether it deserves recognition under national laws. *Id.*

100) *Id.* at 33 ("[m]ost countries accept a general principle of recognition and enforcement of foreign judgments and most agree in a general way on the criteria that gives rise to exceptions to that principle").

101) *Termorio v. Electranta*, 487 F.3d 928 (D.C. Cir. 2007); *Baker Marine*, 191 F.3d 194 (2d Cir. 1999)

102) To be fair, *Pemex* was decided in accordance with Article V of the Panama Convention. As the Second Circuit pointed out, however, "[t]here is no substantive difference between the two." Corporacion Mexicana De Mantenimiento Integral v. Pemex-Exploracion Y Produccion, 832 F.3d 92, 105 (2d Cir. 2016).

103) See the following reference for a brief summary of the facts of the case and criticism of the Second Circuit's holding. Hanson, *supra* note 77, at 839.

104) *Pemex*, *supra* note 102, at 108 ("[r]etroactive legislation that cancels existing contract rights is repugnant to United States law").

enforce an annulled award is restricted by international comity,[105] the Second Circuit found that recognizing the Mexican court's judgment would be contrary to "fundamental notions of what is decent and just in the United States."[106] Meanwhile, in *Getma International v. Republic of Guinea*, a more recent case, a U.S. district court again turned down an action for enforcing an annulled award, which decision was affirmed by the Court of Appeals for the D.C. Circuit. The district court judge ruled that the grounds for choosing to enforce an annulled award must be ""narrowly" confined."[107]

Upon closer inspection, however, the decisions of the first instance and the appellate court were devoted almost entirely to analyzing the foreign court's procedure and finding why they should respect the foreign court judgment, keeping *Chromalloy* intact.

From these cases, the basic principles of the *Chromalloy* approach as applied in practice are made clear. One, national courts are not bound by the judgment of the court of the seat of arbitration. The concerned court should instead look to see whether the foreign judgment is consistent with the laws of the enforcing state. Moreover, if the judgment is contrary to the domestic law and/or the public policy of the enforcing state, then it cannot be recognized and the arbitral award, despite its status, remains enforceable.[108] From these cases van den Berg opines that "Article V(1)(e) of the New York Convention somehow requires as a preliminary step the recognition of the foreign court judgment setting aside the arbitral award."[109]

In an interesting development, the Netherlands Supreme Court recently

105) *Id*. at 27 ("[h]owever, discretion is contained by the prudential concern of international comity, which remains vital notwithstanding that it is not expressly codified in the Panama Convention").

106) *Id.* at 29.

107) Matter of Arbitration of Certain Controversies Between Getma Int'l & Republic of Guinea, 191 F. Supp. 3d 43, 49 (D.D.C. 2016), aff'd sub nom. Getma Int'l v. Republic of Guinea, 862 F.3d 45 (D.C. Cir. 2017)

108) A similar approach was adopted in *Yukos Capital SARL v. OAO Rosneft* as well. Berg, *supra* note 5, at 17-19; Silberman, *supra* note 59, at 33-34. A court may recognize but refuse to enforce an arbitral award. Blackaby, *supra* note 10, at 611.

109) Van den Berg, *supra* note 5, at 37.

went as far as to hold that Article V(1)(e) does in fact provide national courts with discretionary power to enforce annulled arbitral awards in certain exceptional cases, marking what might be the first occasion where the provision was invoked to enforce an annulled arbitral award. Summarized concisely, an arbitral award had been rendered and then set aside in Russia, but the Dutch court agreed with the claimant seeking enforcement that it retained discretionary power over whether to review whether one of the grounds under the New York Convention for refusing enforcement exist and whether to recognize an annulled arbitral award.[110] As for what could constitute such grounds, the court mentioned factors like the "fundamental requirements of due process."[111]

V. Suggesting a New Approach for Korean Courts

In essence, both the traditional and the delocalised view of how to address annulled arbitral awards proceed by attempting to tackle the issue of whether an annulled award can survive outside of the seat of arbitration and the *lex arbitri*, with the latter concluding emphatically that it can. Having established, from the more persuasive perspective of the delocalisation theory, that Korean courts are not obligated to recognize the foreign judgment which annulled the arbitral award, this paper shall return to the line drawn by the *Chromalloy* approach and the judgments solution that differentiates between the judgment that annulled the award at the seat of arbitration and the action seeking enforcement of the award.

From there, operating under the assumption that Article V(1)(e) provides national courts with discretion, the proposed approach focuses on the fact that whereas national courts are required to recognize and enforce a foreign arbitral award under the New York Convention, there is no comparable multilateral treaty for foreign judgments. To account for the

110) Joep Wolfhagen and Jorian Hamster, *Arbitral award may be enforced after annulment at seat*, International Law Office, (Feb. 22, 2018), https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Netherlands/Freshfields-Bruckhaus-Deringer-LLP/Arbitral-award-may-be-enforced-after-annulment-at-seat.

111) *Id.*

sovereignty of the enforcing state, national courts like those of Korea must then consider whether the foreign judgment is in accordance with domestic law and principles of customary international law on point before they can turn to the annulled arbitral award.

Assuming that the state in which the judgment vacating the arbitral award was rendered has also acceded to the New York Convention, Article V(1)(e) is applicable and a Korean court automatically retains discretion over how to treat the matter. From this discretion it follows that the court is under no obligation to recognize the foreign judgment. Rather, the court is only required to render a decision which conforms with Korean law and any treaties Korea has entered into. Unfortunately, since in its current state the Korean Arbitration Act does not address the issue, courts are left without any instruction or guidance. While its practical relevance may have been minimal so far, it is quite probable that this issue is only nascent and could become far more serious at some point in the future.[112] If that were to happen, what would be the appropriate course of action? In other words, what is the likely fate of annulled arbitral awards in Korea?

1. Arguments for the Traditional Theory

Between the traditional view and the delocalisation theory, it would be convenient for Korean courts to streamline the process and simply adopt the traditional view to dismiss any actions seeking the enforcement of annulled awards. Doing so would additionally put Korea in line with the majority practice among states and would be consistent with the effort to emphasize the significance of the choice of the seat of arbitration.[113] At the same time, another option might be allowing the parties to at their own will contract out of a proposed default rule that annulled awards shall not be

112) This could especially be the case when considering the rise of investor-state disputes, including those filed against Korea. Joongi Kim, *A Bellwether to Korea's new Frontier in Investor-State Dispute Settlement? The Moscow Convention and Lee Jong Baek v. Kurgyz Republic*, 15 Pepp. Disp. Resol. L. J. 549, 557 (2015).

113) Again, Davis argues that the intent of the parties to award a single jurisdiction the power to annul an award should be upheld unless it is to be limited by grounds of comity. Davis, *supra* note 1, at 84-85.

enforceable.[114] Neither approach, however, is sufficiently convincing because the former does not accurately reflect the intent behind the New York Convention while the latter would undermine its value if private parties are allowed to contract out of the discretionary language of Article V(1)(e).

For one thing, it might make more sense for Korean courts to conduct a preliminary analysis on the effectiveness of the foreign judgment in consideration of the principle of *res judicata*.[115] In other words, if the foreign judgment stands valid on Korean soil, then an action seeking the recognition and enforcement of an annulled arbitral award should be rejected given the finality of the foreign judgement.[116]

2. Sovereignty

But merely focusing on *res judicata* is still insufficient for the reason that it fails to address the most imperative issue of sovereignty. It is because of sovereignty that there is no general legal principle requiring national courts of any state automatically to give effect to foreign judgments.[117] By their nature the legal effect of national laws and acts, which can take various forms such as statutes and court judgments, cannot extend beyond the concerned state's jurisdiction. Under this logic the state in which an arbitration was seated has no means of blocking another state from enforcing an annulled award.[118] To conclude otherwise would encroach upon the sovereignty of the enforcing state and that would be impermissible unless there is a legitimate and recognized basis in international law.[119] Put differently, one state cannot force another state to

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114) *See generally* Drahozal, *supra* note 11.

115) Lee, *supra* note 15, at 250-251.

116) *Id.*

117) The protection that arbitral awards are entitled to is in fact part of what makes international arbitration attractive as a means of resolving international disputes. Greenberg, *supra* note 7, at 428 (explaining how the "transnational enforceability" of arbitral awards gives it an advantage over the enforcement of domestic judgments sought abroad).

118) Davis, *supra* note 1, at 81.

119) Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 Hastings Int'l & Comp. L. Rev. 323, 330 (2002); John H.

recognize its laws or acts.[120)]

This is made clearer by the frequently quoted U.S. Supreme Court case of *Hilton v. Guyot*. In that case the Court declared that states are not under an obligation to accept the judgment of another.[121)] This position also adheres to the spirit of the New York Convention.[122)] States are free to exercise discretion over whether to recognize a foreign judgment in accordance with its domestic law, and while it must be considered, as held by the Court, comity is not an obligation but at most an act of "mere courtesy and good will."[123)] On top of that, comity is not even widely accepted in non-common law states.[124)] The discretion to recognize a foreign judgment can be limited only by the principles of customary international law and any treaties entered into by each state.[125)] Comity is just one of many factors.[126)]

3. The Effects Principle

As a matter of fact, the roots of both forms of the delocalisation theory can be traced all the way back to the Lotus case. For instance, the French approach that multiple states can exert control over the same matter due to its "international" character draws a close parallel to the international law principle known as the "effects principle." The effects principle refers to the authority of a sovereign state to exercise jurisdiction over an activity which occurs outside of that state's territory but has or intends to have a substantial effect within it.[127)] Applied here, under the effects principle the

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Knox, *A Presumption Against Extrajurisdictionality*, 104 Am. J. Int'l L. 351, 355-356 (2010).

120) Ryngaert, *supra* note 60, at 67.

121) Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895)

122) Martin L. Roth, *Recognition by Circumvention: Enforcing Foreign Arbitral Awards as Judgments Under the Parallel Entitlements Approach*, 92 Cornell L. Rev. 573, 589 (2007) ("[i]n outlining the Article V defenses, the New York Convention balances a pro-arbitration stance with national sovereignty because nations should have the right to refuse to enforce awards that run afoul of basic notions of justice").

123) *Hilton*, 159 U.S. 113 at 143.

124) Suk, *supra* note 17, at 143.

125) Gaillard, *supra* note 39, at 39.

126) *Chromalloy*, 939 F.Supp., at 914.

127) Antonella Troia, *The Helms-Burton Controversy: An Examination of Arguments that the*

state in which enforcement is sought has valid grounds for exercising independent control over the problematic award since enforcement is expected to take place within its territory. There is little disagreement that the Lotus case, in which the Permanent Court of International Justice held that "all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty,"[128] played a critical role in developing the effects principle.[129]

Therefore, although it may seem counterintuitive at first, the delocalisation theory is firmly rooted in one of the pillars of customary international law, the fact of which adds credibility to its theoretical basis on top of relevant case law.

More fundamentally, the delocalisation theory is logically indebted to the Lotus case. As held in the Lotus case, in international law a state is free to carry out an act in the absence of a prohibitive rule.[130] That, after all, is the essence of state sovereignty. In other words, sovereign states, being equal to one another, are entitled to a presumption of freedom with respect to their sovereign acts. When it comes to the topic at hand, since there is no applicable rule in international law in the form of a multilateral treaty or a customary rule prohibiting states from enforcing arbitral awards or obligating them to recognize foreign judgments annulling arbitral awards, courts of the enforcing state retain their discretionary power to decide the fate of annulled arbitral awards.

4. Delocalisation

In the end, the notion of state sovereignty provides the most compelling reason for Korean courts to refrain from siding with the traditional view, as automatically giving effect to a foreign judgment that vacated an arbitral

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Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 violates U.S. Obligations under NAFTA, 23 Brook. J. Int'l L. 603, 643 (1997).

128) S.S. Lotus, 1927 P.C.I.J (ser. A) No. 10, at 19.

129) David J. Gerber, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 6 Hous. J. Int'l L. 287, 294 (2004).

130) An Hertogen, *Letting Lotus Bloom*, 26 Eur. J. Int'l. L. 901, 902 (2016).

award would jeopardize Korea's sovereignty.[131] A foreign judgment of that effect must thus be conceptually separated from the award, and it is a consensus under customary international law that the effect of the laws of one state cannot be forcibly imposed in the territory of another state,[132] while the principle of perfect equality between states purports that the judgment of the courts of one state does not automatically have effect in another state.[133] The opposing view would logically amount to the conclusion that the two courts are part of the same legal system or that the former is superior to the latter,[134] unless there is an applicable international treaty on the recognition of foreign judgments between the two states. Similarly, the U.S. Court of Appeals for the Second Circuit has distinguished between an arbitral award and an action filed with a court located in the seat of arbitration which seeks confirmation of the judgment.[135] For that reason, to safeguard the sovereignty of Korea, its courts must first assess the validity of foreign judgments.

5. A Two-Step Test for Korean Courts

To reiterate, there is no logical reason to treat a foreign judgment that vacated an arbitral award differently from any other foreign judgment.[136] Likewise, the state in which the arbitral proceeding took place cannot force the enforcing state to recognize its laws or accept its judgments because "extraterritorial prescriptive jurisdiction is arguably prohibited in the

131) Like the delocalisation theory, this territorial position is also firmly rooted in customary international law, as evidenced by the holding in the Lotus case that a state cannot enforce its laws in the territory of another state since sovereign states are naturally equal.

132) RYNGAERT, *supra* note 60, at 67.

133) Interestingly, one Korean scholar has pointed this out. But from there he reaches the conclusion that unless there are grounds for annulling an award under the laws of the enforcing state, courts should uphold the foreign judgment in respect of the principle of comity. Chang Seop Shin, *Chweesodwen waygukjoongjaepanjeongeui jiphaengganeungsunge gwanhan yeongu* [A Study on the Enforceability of An Annulled Foreign Arbitral Award], 59 *KORYO BEOPHAK* [Korea University Law Review] 49, 56 (2010).

134) *Id.*

135) *See generally* Roth, *supra* note 122.

136) Ostrowski and Shany, *supra* note 37, at 1681.

absence of a permissive rule."[137] The New York Convention, one of those permissive rules, imposes on the states which have acceded to it the obligation to limit their sovereignty by recognizing and enforcing arbitral awards unless one of the exceptions enumerated in Article V applies.[138] After all, as said before, the New York Convention "requires the courts of signatory states to recognize and enforce foreign arbitral awards unless one of the exceptions enumerated in Article V applies."[139] Since there is no applicable treaty akin to the New York Convention with respect to foreign judgments, each state is free to exercise discretion based on its own laws.[140] This is in line with the holding of the Lotus case that a state may carry out any act not explicitly prohibited by international law.[141] Some even argue that in the absence of an international treaty, an arbitral award has a superior status compared to a foreign judgment.[142]

The same logic is applicable to the Korean context as well because arbitral awards are continuously protected by the New York Convention. Foreign judgments, including those setting aside arbitral awards, must in contrast separately pass the test set by Article 217 of the Civil Procedure Act. In summary, as Korea has neither entered into any applicable treaties nor enacted any legislations addressing the fate of annulled arbitral awards, the relevant domestic law in the Civil Procedure Act governs the recognition of foreign judgments.[143] Therefore, before turning to the question of whether to recognize an annulled arbitral award, Korean courts must first determine the validity of the foreign judgment that vacated the arbitral award in accordance with the Civil Procedure Act.[144]

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137) Ryngaert, *supra* note 60, at 35.

138) Currently, 159 states have acceded to the New York Convention. *Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

139) Ostrowski and Shany, *supra* note 38, at 1657-1658.

140) Gaillard, *supra* note 39, at 39.

141) Hertogen, *supra* note 130.

142) Ostrowski and Shany, *supra* note 37, at 1658.

143) Suk, *supra* note 17, at 345. Despite the existence of the Uniform-Foreign Money-Judgments Recognition Act, the situation in the U.S. is no different. Ostrowski and Shany, *supra* note 37, at 1665.

144) Imposing a preliminary step in this manner would not be unprecedented as besides

Korean courts should thus perform a two-step test, first with Article 217 of the Civil Procedure Act, and second with an evaluation of whether there are other grounds for refusing recognition and enforcement of an annulled arbitral award under the New York Convention. Naturally, the next objective of this paper is analyzing just when Korean courts should move on to the second step from the first. Prior to that, it should be clarified that technically-speaking, whether the court recognizes the foreign judgment is irrelevant under Article V(1)(e) of the New York Convention.[145] Nevertheless, as national courts need guidance on how to proceed, this approach would in effect aid Korean courts with respect to when and how they should exercise the discretion provided by Article V(1)(e).

Regarding the first possibility, where a Korean court cannot recognize the foreign judgment, the arbitral award remains valid. From there, the subsequent steps should be simple and straightforward. Since the annulled award is alive and well from the perspective of the Korean court, it should be treated like any other arbitral award. Therefore, the court must subject the award to the Arbitration Act of Korea and other applicable factors such as public policy to see if there are any valid grounds under Korean law or other grounds listed in Article V[146] to refuse to recognize and enforce it. If no such grounds exist, then as obliged by Article III the court must recognize and enforce the award. Since Korea is perceived as an arbitration friendly jurisdiction,[147] depending on the specific facts of each case, it should be more likely than not that the problematic award would be enforced in Korea.

What should happen if the foreign judgment is valid and should be recognized? Here, while the court is not obligated to refuse to recognize and enforce an annulled arbitral award, as Article V(1)(e) is merely a

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Chromalloy, the court in *TermoRio* did conduct a similar analysis even though it ultimately refused to enforce the problematic award. Roth, *supra* note 122, at 575-576. Again, this approach was also adopted by the Amsterdam Court of Appeal in one of the many disputes arising out of the Yukos Saga. Silberman, *supra* note 59, at 33-34.

145) Roth, *supra* note 122, at 575-576.

146) Public policy is another discretionary basis for national courts to refuse enforcement of an arbitral award under the New York Convention. New York Convention, *supra* note 12, art V(2).

147) Suk, *supra* note 17, at 555.

discretionary basis for refusing enforcement, Korean courts should operate under the default rule that annulled arbitral awards are unenforceable for the sake of consistency and efficiency. Because the Korean court in this situation has decided to recognize the foreign judgment, its full effect including the setting aside of the award must also be recognized. The arbitral award then no longer exists under Korean law either and as a result cannot be enforced in Korea.

As stated earlier, some on the contrary suggest that the best rule would be allowing the parties to contract out of the recognition and enforcement of annulled awards,[148] but this would amount to the disturbing assertion that private parties can strip national courts of their discretionary power under the New York Convention. In a similar vein, others argue that parties cannot contract out of the authority of the courts of the seat of arbitration to annul an award.[149] The more reasonable conclusion is that national courts must retain their discretionary power at all times as a right given to them by an international treaty. The New York Convention is to act as a floor and should not be dismissible by the mutual assent of the contracting parties alone.

VI. Conclusion

The ambiguity and confusion surrounding Article V(1)(e) of the New York Convention is undeniably problematic[150] as well as the source of much confusion.[151] In recent years the issues arising from the lack of guidance have especially come under the spotlight due to the seemingly never-ending Yukos saga in which the Court of Appeal of The Hague annulled an investment treaty arbitration award exceeding $50 billion rendered against the Russian Federation.[152] An outcome like that is

148) Drahozal, *supra* note 11, at 476.

149) Greenberg, *supra* note 7, at 415.

150) Silberman, *supra* note 59, at 31.

151) Bird, *supra* note 2, at 1054.

152) For background information on the Yukos saga, *see generally* George A Bermann, *The Yukos Annulment: Answered and Unanswered Questions*, 27 Am. Rev. Int'l Arb. 1 (2016); Dmitry Gololobov, *The Yukos Money Laundering Case: A Never-Ending Story*, 28 Mich. J. Int'l L. 711

undesirable for most of the involved parties except for the legal representatives for each side. In the Korean context the same legal vacuum obviously exists, which suggests that similar issues could arise at some point in the future. Until the Korean legislature acts with decisiveness and clarity in passing a statute that directly and clearly rectifies the discretionary language of Article V(1)(e), however, Korean courts are unfortunately left to fend for themselves. Expectedly, there have been calls for Korea to enter into bilateral and multilateral treaties to simplify the process for recognizing and enforcing foreign judgments, although we have yet to see any concrete results.[153)]

Between the two conflicting approaches, considering the critical factor of state sovereignty, Korean courts should first determine the validity of the foreign judgment which annulled the arbitral award under Korean law. More precisely, Korean courts should subject foreign judgments to a two-step test built on Article 217 of the Civil Procedure Act to decide whether to recognize it. This proposal would lead to greater coherence and uniformity in the process for recognizing and enforcing annulled arbitral awards in Korea. Until the Korean legislature can offer definitive guidance, this proposed approach should be the correct path for courts to take.

(2007); Paul B. Stephan, *Taxation and Expropriation – The Destruction of the Yukos Empire*, 35 Hous. J. Int'l L. 1 (2013).

153) Suk, *supra* note 17, at 438.