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Case Study of Korean-French Companies' Dispute at the Arbitration Stage in the ICC Arbitral Tribunal and at the Enforcement Stage in the Korean Court

국제중재판정 및 집행판결 과정에서의 쟁점들에 관한 사례연구

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Key Words : International Arbitration, New York Convention, Secrecy Agreement, Enforcement Judgement

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Ⅰ. Introduction

An arbitral award is deemed to be foreign when it has not been made in the territory in which it is to be enforced.[1] National law usually requires certain provisions to be applied to international proceedings, different from those applicable to purely domestic matters. In this article, the author presents an international arbitral award case at the enforcement stage in Korean court. At the present case, the place of arbitration which both parties agreed when they entered into the Secretary Agreement is Paris in France, ICC. Since the arbitral award was foreign and subject to the New York Convention, the Korean Arbitration Act Article 39(1) expressly stipulates that an international arbitral award which is subject to the New York Convention shall be enforced and recognized according to the provisions of the New York Convention.

Furthermore, unlike a local arbitral award involving parties domiciled in that country, when requested to render an enforcement judgment of a foreign arbitral award, the local court usually abstains from conducting a substantive review of that award according to the local laws. This abstention is mainly due to international comity or due to the existence of international convention where the country of the local court is a signatory thereof, such as the New York Convention.

Due to this specific prohibition of substantive review at the enforcement stage of the award in case of New York Convention, the review of each ground for refusal of the enforcement under the New York Convention becomes critical. In this Article, the author will focus upon the meaning and application of each ground for refusal by analyzing the present case.

Ⅱ. Geneva Convention vs. New York Convention

In contrast to the Geneva Convention of 1927, in 1953, the International Chamber of Commerce (ICC) proposed a new treaty to regulate the enforcement of foreign arbitral awards. The draft modeled after the Geneva Convention by the United Nations Economic and Social Council (ECOSOL) was eventually adopted in 1958 as the New York

1) Schaffer, Erik, "The Use of Arbitration and Mediation For Protecting Intellectual Property Rights: A German Perspective." 94 *Trademark Reporter* (2004) p. 695, at p.707.

Convention.

The major differences between two conventions are as follows: First, in case of the Geneva Convention, due to the process of the double exequatur, a party seeking enforcement of an arbitral award had to submit a leave for enforcement in the court at the site of the arbitration. Then, this process had to be repeated in the country where enforcement was sought. On the other hand, the New York Convention streamlined enforcement by allowing a party to seek enforcement abroad without first seeking it in the nation of origin.[2)]

Second, while the Geneva Convention places the burden of proving the requirements for the enforcement on the party seeking enforcement, the New York Convention places the burden of proving the exceptions on the party seeking to block enforcement. Under the New York Convention, foreign courts in signatory states must enforce arbitral awards from other signatories unless the limited exceptions enumerated in Article V of the Convention apply.[3)] Regarding the Claimant's burden of proof, the Claimant has to satisfy the conditions for the enforcement of the arbitral award as follows. Article IV of the New York Convention provides:

"(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 award 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 agents."

The conditions mentioned in Article IV are the only conditions with which the party seeking enforcement of a Convention award has to comply. Then, the other party has to prove the existence of any one of the grounds specifically set out in Article V(1) of the New York Convention in order to block the enforcement of the arbitral award. This principle of Article IV has been affirmed by several courts.[4)]

In the present arbitration case, Korean consular's certification that a sworn translator's

2) Steele, Brette, "Enforcing International Commercial Mediation Agreements As Arbitral Awards Under The New York Convention," 54 *UCLA Law Review* (2007) p. 1385 at p. 1390.

3) See supra note 1 at 1385.

4) E.g., Areios Pagos, decision no. 926 of 1973 (Greece no.3); *Corte di Appello of Rome*, September 24, 1973, *Intercommerce v. Menaguale* (Italy no.9).

affidavit to the effect that French ICC's arbitral award written in English is correctly translated into Korean is enough to satisfy the translation requirement. This is in conformity with court practice of many countries, including Korean Supreme Court [13, Korean Supreme Court decision 1995.2.14.93 da 53054].

Ⅲ. Applicability of the New York Convention, and Procedure for Enforcement of the Arbitral Award

The New York Convention is limited to the recognition and enforcement of a foreign award. It does not apply in the country in which that award was rendered (the "country of origin"). This Convention becomes applicable when the country of origin is different from the country of enforcing the award. Thus, a United States Court of Appeals correctly did not apply the New York Convention to an award made in New York between a United States corporation and a Norwegian shipowner involving an international transaction.[5)]

In the present arbitration case, the arbitration was rendered in France at ICC, while the country where the enforcement of the arbitration was sought is Korea. Accordingly, Korean court was supposed to apply the New York Convention to an award made in Paris, France between a French corporation and a Korean company involving an international transaction.

Article III of the New York Convention provides: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is replied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

The rules of procedure for the enforcement of an arbitral award falling under the New York Convention are determined by the law of procedure of the country where the enforcement is sought. The rules of procedure are not concerned with the conditions of enforcement which are exclusively governed by the Convention. Article III can be considered as the basis for the application of the law of procedure of the forum to those aspects incidental to the enforcement which are not regulated by the Convention (e.g.,

5) U.S. Court of Appeals (2nd Cir.). May 24, 1974, *National Metal Converters Inc. vs. I/S Stavborg* (U.S. no.2).

attachment, set-off, bankruptcy, etc.). In this present case, if the arbitral award sought to be enforced in Korean court was not subject to the New York Convention, then in order to obtain the enforcement judgment, the Claimant would have the burden of proof to satisfy the requirements under Korean Civil Procedure Act Article 217 and Civil Execution Act Articles 26 and 27 according to the Korean Arbitration Act Article 39(2).

Ⅳ. General Case Description of the Arbitral Award Sought For Enforcement in the Korean Court

1. Overview of the Disputed Transaction

K company is a Korean pharmaceutical company which manufactures and commercializes pharmaceutical products or sale in the Korean market. On the other hand, F company is a French pharmaceutical company which owns all the rights of ownership, use and exploitation of a medicinal product called Med. Arranged by an import broker of medication and pharmaceutical products in Korea, there were several meetings held between K and F companies for discussing the possible distribution and marketing of Med in Korea by K company within the scope of a license, the content of which was to be discussed later. In light of their discussions, K and F companies concluded a Secrecy Agreement signed in 1995.

The main provisions of the Secrecy Agreement are as follows:

"WHEREAS

(1) F has rights on a novel and valuable pharmaceutical hereinafter referred to as Med.

(2) K has indicated its interest in evaluating Med and its chances to obtain registration in South Korea, as well as the market potential in such country, hereinafter referred to as the Territory.

(3) F is willing to disclose to K in such information on Med on which F has a proprietary interest, part of which is confidential having been developed in its research laboratories and not been made public, hereinafter referred to as the Information.

(4) The disclosure is required solely for the purpose referred to in clause 2, viz. evaluation and determination of K's interest in obtaining necessary registration(s).

Main Terms of the Agreement:

(1) K undertakes to maintain the Information strictly secret, to hold it in confidence and to use it solely for the purpose of evaluation in terms of clause 2 above. The Information shall not be disclosed to a third party, and not be used for any other purpose.

(2) K undertakes to make the Information available only to those of its officers and employees who are directly concerned with the evaluation, and to impose on them the same obligation as stipulated in clause 1 here above.

...

(4) Irrespectively of whether a license or agency agreement will be concluded by the parties pursuant to this agreement, the limitations upon the right to use the information, or to pass it on to third parties, shall remain in force for TEN YEARS from the date of signature of the present Secrecy Agreement by both parties.

...

(7) In the event of K's informing F of its lack of interest, or in the event of K's failing to send any notification to F by the expiry of three months period (or extension thereof) referred to in clause 2 hereinabove, the complete information received here under by K shall be returned promptly to F, whereby this agreement shall be considered terminated.

(8) Nothing stated in this agreement shall be construed as a grant of rights by F to K in respect of the Product or in respect of the right to use the Information passed here under, nor as any obligation by F to granting any future rights to K in subsequent agreement to the Product.

(9) The provisions of the present agreement shall be governed and construed in accordance with French Law.

All disputes arising in connection with the present contract shall be finally settled under the Rules of conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Any such arbitration will occur in Paris and shall be held in French and/or in English.

In 1995, K company received from F company some of the dossier for Med designed for obtaining the registration of license from Korean Food and Drug Administration. The first documentation was regarding the marketing documentation of Med. Then, later K received the documents necessary for the application of specification/testing of methods, and of the safety and efficacy of drugs. About 2 years later, in the course of further

meetings between two companies, K took a different position regarding the content of a future Med license agreement. K exposed reasons against importing Med as a finished product, and underlined the advantages of having the product manufactured locally. In response, F company responded that whatever the decision on the strategy would be, F's intention was in any case to register Med as an imported finished product only. Thereafter, in the middle of exchanging different positions between two companies, without informing F of K's intention to apply, K applied and then 5 months later obtained a license to manufacture its own Med product under the different name with Korean Food and Drug Administration. Upon finding that K obtained manufacturing license, F demanded that K shall send a copy of the license to F, which K refused. Several years later after resorting to Korean court litigation, in 2001, F filed its Demande d'arbitrage with the ICC International Court of Arbitration (hereinafter, the "ICC Court").

2. Arbitral Tribunal's Jurisdiction

Whether the ICC Arbitral Tribunal had a jurisdiction to hear the arbitration case regarding the Petitioner's claims, F company as a Petitioner and K company as Respondent argued and the Tribunal opined as to the jurisdiction as follows:

(1) Petitioner's Claims

F company contends that K company violated its contractual obligations under the Agreement by using confidential information transmitted pursuant to the Agreement to K company for the purpose of the pharmaceutical registration in Korea of Med:

(a) to obtain its benefit from the Korean authorities a license to manufacture for Med instead of seeking the pharmaceutical registration of Med in Korea (in violation of Article 1 and 8 of the Secrecy Agreement);

(b) to develop the manufacture of the medicinal product by limitation of Med (in violation of Article 1 of the Secrecy Agreement);

and (c) to appropriate for its benefit access to the Korean market of Med.

(2) Respondent's Arguments

K company argues that a claim will "arise in connection with" the Secrecy Agreement, only if the facts forming the basis of the claim have arisen either (1) in performance of

the Agreement or (2) as a direct result of performance or failed performance under the Agreement. On that basis, K company considers that the five claims brought by F company are outside the scope of the Agreement. In particular, for claims (a),(b) and (c), it is K company's position that such claims have not "arisen in connection with" the Agreement for the following reasons:

- Factually, F company's claims (allegations) do not concern the use of confidential information communicated under the Secrecy Agreement. The Agreement was terminated by its own terms when the Parties completed the evaluation phase during the course of spring 1995. Thus, the communication arose under the alleged oral partnership agreement. In April 1995, F company disclosed all the documents and information required under the Agreement. There was no further disclosure of any allegedly confidential documents until January 1996, at which time the parties had completed the evaluation for which the Agreement had been concluded.

- Further, under French law, unless the alleged tortious conduct arose directly from malperformance of the contract and the breaching party committed gross negligence or fraud, the arbitrators have no jurisdiction to judge tort claims including claims of unfair competition.

Accordingly, it is K company's position that F company's claims are of a tortious nature, and therefore outside the jurisdiction of the Arbitral Tribunal, because they cannot be based on any contractual breach, as the facts alleged by F company as constituting a breach of contract arose after the Agreement had been performed by the parties and all contractual relations between them were terminated.

(3) The Arbitral Tribunal's Finding

The Arbitral Tribunal first noted that this Secrecy Agreement has an 'in connection with' arbitration clause. The Tribunal reasoned that the jurisdiction of the Arbitral Tribunal is derived from Article 9 of the Agreement which provides as follows:

"9 ..... All disputes arising in connection with the present contract shall be finally settled under the Rules of conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. Any such arbitration will occur in PARIS and shall be held in French and/or in English.

Thus, the Arbitral Tribunal held that it is competent and has jurisdiction to hear all claims arising in connection with the Agreement and has the power to determine the

extent of its jurisdiction.

The Arbitral Tribunal shall thus be able to determine to what extent F company's claims have arisen 'in connection with' the Agreement. It is settled law that the ambit of an arbitration clause will be construed broadly when the clause uses a comprehensive expression, such as 'in connection', rather than a narrower wording, such as 'arising in the performance of the contract.' As Derains/Schwartz wrote with respect to the ICC recommended arbitration clause: "it is also broadly worded in order to embrace 'all disputes arising out of or in connection with' the contract, which will confer the widest possible jurisdiction on the Arbitral Tribunal. Other phrases (such as references to disputes 'arising under' the contract) may be construed more narrowly and preclude the arbitration of matters that the parties might otherwise have wished to be arbitrated ..." 6)

In the present arbitration case, the actions of the Parties after the Secrecy Agreement was concluded were clearly set in motion by the Agreement and therefore can be construed within the contractual matrix of the Agreement. The Agreement did not only cover the evaluation stage, but also the registration stage, since it was concluded with view to having K company determine its interest in obtaining necessary registration(s) (Clause 4 of the "Whereas" recitals of the Agreement). The Parties did exchange views on the merits of entering into a License Agreement at least until the 24th October 1996 meeting in Seoul. By that time, F company had transmitted several batches of documentation to K company and K company had not returned any such documentation to F company. The Agreement was to be considered as terminated only upon such return (Article 7 of the Agreement). Moreover, irrespective of whether a license or agency agreement was concluded, the limitation upon the right to use the information or to pass it to third parties was to remain in force for ten years as of the date of execution of the Agreement (Article 4 of the Agreement). F company predicated its claims on the use of such information, and they were of necessity connected to the Secrecy Agreement.

Accordingly, K company's assertion that all acts by the Parties after April 1995 fell outside the scope of any contractual relationship was rejected. The Tribunal held that the claims brought by F company in this arbitration are of contractual nature, because they clearly arise 'in connection with' the Agreement. Therefore, the Arbitral Tribunal was held to have jurisdiction to hear such claims.

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6) Derains, Y. and Schwartz, E.A., A Guide to the New ICC Rules of Arbitration (Kluwer Law International, 1998), at p. 377 (ICC Guide).

3. Final Arbitral Award in ICC

The arbitral Tribunal held that:

K company breached the Secrecy Agreement;

F company did not take sufficient measures to mitigate its damages;

K company is prohibited from manufacturing and/or marketing and/or exploiting the medicinal product of Med, under any direct or indirect form, whether for the Koran territory or the rest of the world;

the destruction of the stocks of Med in possession of K company was ordered;

K company was prohibited from using, in any manner whatsoever, the Information which was provided to it by F company;

K company was ordered to pay to F company for certain damages compensation;

provisional enforcement and execution of this Award was ordered notwithstanding any appeal or setting aside proceedings, except for the costs.

13) All other claims of the Parties are dismissed.

4. Provisional Enforcement of the Arbitral Award

In its submissions, F company claims that the Arbitral Tribunal orders the execution of the award notwithstanding any appeal, as early as the notification of the award. On the other hand, K company argues that this request must be denied, "as Claimant has patently failed to demonstrate the necessity or urgency."

Article 28.6 of the ICC Rules states: "Every Award shall be binding. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." Further, French law provides for the possibility for the arbitrators to declare provisional enforcement of awards in international commercial arbitrations (Articles 515 and 516 of the French New Code on Civil Procedure). According to French law, the arbitrators may order the provisional enforcement of the award if they deem it necessary and compatible with the nature of the matter, but not for the costs. The urgency is not a condition under French law to grant the enforcement notwithstanding the appeal of an award.

Therefore, the Arbitral Tribunal decided that it was appropriate to order provisional

enforcement and execution of this Award notwithstanding any appeal or setting aside proceedings in France, except for the costs, as it was clearly in the spirit of Article 28.6 of the ICC Rules.

V. Grounds for Refusal of Enforcement according to the New York Convention

1. Main Features of the Grounds for Refusal of Enforcement (Article V)

One of the main features that the respondent has the burden of proof to show the existence of the grounds for refusal enumerated in Article V(1) of the New York Convention is a remarkable improvement as compared to the Geneva Convention. Another improvement is that the grounds mentioned in Article V are exhaustive. Enforcement may be refused "only if" the party against whom the award is invoked is able to prove one of the grounds listed in Article V(1), or if the court finds that the enforcement of the award would violate its public policy according to Article V(2). Additional feature of the grounds for refusal is that no review of the merits of the arbitral award is allowed. The grounds for refusal of enforcement are restricted to causes which may be considered as serious defects.

The opening lines of both the first and the second paragraph of Article V use a permissive rather than mandatory language: enforcement 'may' be refused. Therefore, even if a party against whom the award is invoked proves the existence of one of the grounds for refusal of enforcement, the court still has a discretionary power to overrule the defense and to grant the enforcement of the award. Such overruling would be appropriate, for example, in the case where the respondent's invoking the ground for refusal can be considered as unfair.

2. No Review of the Merits of the Arbitral Award

Internationally recognized interpretation of the New York Convention is that the court

before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention, the role of the enforcement judge is limited to verifying whether an objection to a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the pubic policy of the law of the judge's country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration.[7]

This principle that the court may not review the merits of the arbitral award under the New York Convention does not mean that it will not look into the award when necessary to find out whether a ground for refusal of enforcement mentioned in Article V is present. Thus, if the party against whom the award is invoked asserts that enforcement should be refused because of Article V(1), because the award handles with a dispute not contemplated by the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, or because the award violates public policy as provided in Article V(2), then the court has to investigate the award in order to evaluate the appropriateness of such an assertion. However, the court's review of the award is strictly limited to ascertaining whether the award contains matters which may cause a refusal of enforcement on one of the grounds mentioned in Article V. Thus, the court is not supposed to evaluate the arbitrator's findings.

3. Grounds for Refusal of Enforcement to be Proven by the Respondent (Article V(1))

(1) Ground a: Invalidity of the Arbitration Agreement

Article V(1)(a) of the Convention provides: "Recognition and enforcement of an 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

7) Landgericht of Zweibrucken, January 11, 1978 (F.R. German no.16).

the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."

One of the matters of invalidity of the arbitration agreement under the law applicable to it could be the lack of consent due to misrepresentation, duress, fraud, or undue influence. Defense of lack of consent for the arbitration agreement will be difficult to succeed if the arbitration agreement complies with Article II(2) of the Convention. As Article II(2) poses fairly demanding requirements for the form of the arbitration agreement, it can be argued that in most cases its compliance absorbs the questions of the lack of consent. Further, if the contract including the arbitral award is signed by both parties, it will not be easy to argue that it is concluded under misrepresentation, duress, fraud or undue influence. Thus, very few cases which the ICC court reported have the defense of lack of consent for the arbitration agreement been made.[8)]

In the present arbitration case, K Korean company argued that the Secrecy Agreement should be considered as terminated only upon returning all the documentation of clinical data to the F French company in accordance with Article 7 of the Agreement. However, the limitation upon the right to use the information or to pass it to third parties was to remain in force for ten years as of the date of execution of the Agreement according to the Article 4 of the Agreement. Therefore, the Korean company's argument in accordance with ground a (Invalidity of Arbitration Agreement) of the Article V(1) was held groundless by the Arbitral Tribunal.

(2) Ground b: Violation of Due Process

Article V(1)(b) of the Convention provides: "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 recognition and enforcement is sought, proof that: (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."

Reviewing the court decisions on the New York Convention, the defense of a violation of due process is one of the most frequent defenses used under the Convention. However, the defense has rarely been successful. Despite the broad wording of Article V 1(b), the courts appear to accept a violation of due process in very serious cases only, thereby

8) P. Sanders, "Consolidated Commentary Vols. III and IV," in Yearbook Vol. IV (1979) p.231 at p.247.

applying the general rule of interpretation of Article V that the grounds for refusal of enforcement are to be construed narrowly. The narrow interpretation of Article V(1)(b) becomes particularly evident where the courts hold that a violation of domestic notions of due process does not necessarily constitute a violation of due process in a case where the award is foreign.[9]

In the present arbitration case, on March 28, 2001, the F French company filed its 'Demande d'arbitrage" with the ICC International Court of Arbitration. On June 25, 2001, the K Korean company filed its Answer to the Request for Arbitration with the ICC Court. Therefore, the K Korean company actually voluntarily participated in the arbitral proceeding, and had full opportunity to be involved in the arbitral proceeding.

(3) Ground c: Excess by Arbitrator of His Authority

Article V(1)(c) of the Convention provides: "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 (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision 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."

Ground c can be divided in half. The first half is concerned with the award which contains decisions in excess of the arbitrator's authority. The second half deals with the possibility of a partial enforcement of an award which contains both decisions within the arbitrator's authority and decisions outside that authority.

The excess of authority by the arbitrator as provided by Article V(1)(c) is not applicable where the arbitrator had no competence at all because of the lack of a valid arbitration agreement. Article V (1)(c), on the other hand, applies to the case where the arbitration agreement may be valid, but the arbitrator has given decisions which are not contemplated by or not falling within the scope of the arbitration agreement and the questions submitted to him by the parties. Even if the court at the enforcement proceeding begins to review the question whether an arbitrator has exceeded his authority, this review

9) E.g., U.S. District Court of New Jersey. May 12, 1976, Biotronik *Mess-und Therapiegerate G.m.b.H. & Co. v. Medford Medical Instrument Company* (U.S. no. 8); L. Quigley, "Convention on Foreign Arbitral Awards," 58 *American Bar Association Journal* (1972) p.821 at p.825.

should not lead to a re-examination of the merits of the award.

This interpretation was clearly stated in the United States Court of Appeals decisions. The Court of Appeals stated that "Article V(1)(c) basically allows a party to attack an award predicated upon arbitration of a subject matter not within the agreement to submit to arbitration. This defense to enforcement of a foreign award should be construed narrowly. Once again a narrow construction would comport with the enforcement-facilitating thrust of the New York Convention. In addition, the case law under the similar provision of the Federal Arbitration Act strongly supports a strict reading."[10]

In the present arbitration case, according to the holding of the ICC Tribunal, the Secrecy Agreement provides in its Article 1 that the K Korean company undertakes to maintain the Information strictly secret, to hold it in confidence and to use it sorely for the purpose of evaluation. The Information shall not be disclosed to a third party, and not be used for any other purpose." The Information is defined in Clause 3 of the 'Whereas' recitals to the Agreement, which reads as follows: The F French company is willing to disclose to the K Korean company such information on the Product on which the F French company has a proprietary interest, part of which is confidential, having been developed in its research laboratories and not been made public. An examination of the Secrecy Agreement makes it clear that it covers documents transmitted by the F French company for the registration of the Product and is not only limited to the Product's marketing documents, as asserted by the K Korean company. Further, the evidence shows that the parties simply agreed to include the registration process of the Product, or at least the first step of this process, into the evaluation process.

The above holding of the ICC Tribunal was also confirmed by the Korean court at the stage of the enforcement of the arbitral award. In addition, the Korean Court reasoned that the Whereas Clause (2) of the Secrecy Agreement is interpreted to mean the process or the motive to enter into the Secrecy Agreement, and not to mean that the scope of the Information which is protected under this Secrecy Agreement is only limited to the marketing documents for evaluating market potential.

(4) Ground d: Irregularity in the Composition of the Arbitral Tribunal or the Arbitral Procedure

Article V(1)(d) of the New York Convention provides: "Recognition and enforcement of

10) See also *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 United States Supreme Court Reports 593 (1960).

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:

(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.

Few courts have dealt with this provision of the Convention, because in the case of an agreement of the parties on the composition of the arbitral tribunal, it rarely occurs that the tribunal is not constituted in accordance with their agreement. As far as the agreement on the arbitral procedure is concerned, which agreement is usually embodied in arbitration rules of a specific arbitral institution, such an agreement generally affords wide discretionary powers to arbitrators as to the conduct of the arbitral procedure. It therefore rarely happens that the arbitral procedure has not been conducted in accordance with the agreement of the parties.[11]

In the present arbitration case, on March 28, 2001, the F French company filed its "Demande d'arbitrage" with the ICC International Court of Arbitration. On June 25, 2001, the K Korean company filed its Answer to the Request for Arbitration with the ICC Court. On May 15, 2001, the F French company nominated Prof. Eric Loquin as coarbitrator, the K Korean company nominated Mr, Jan Paulsson as coarbitrator on June 22, 2001. The joint nomination of Dr. Laurent Levy as Chairman of the Arbitral Tribunal by the coarbitrators was confirmed, pursuant to Article 9.2 of the ICC Rules of Arbitration, by the Secretary General of the ICC Court on September 12, 2001. During a preliminary hearing held in Paris on October 23, 2001, the parties and the Arbitral Tribunal finalized and signed the Terms of Reference. By letter of its Chairman dated November 5, 2001, the Arbitral Tribunal laid down the procedural rules applicable to the proceedings and established a Provisional Timetable. Therefore, the composition of the arbitral authority or the arbitral procedure was in fact in accordance with the agreement of the parties.

(5) Ground e: Award Not Binding or Set Aside

Article V(1)(e) of the Convention provides: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party

11) P. Sanders, 'The New York Convention," in *International Commercial Arbitration* Vol. II (The Hague 1960) p. 293 at p. 317.

furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(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."

According to the first part of Article V(1)(e), enforcement of the award may be refused if the respondent can prove that the award has not yet become binding on the parties.

(a) Meaning of the term "binding"

The intent of the drafters to eliminate the so-called "double exequatur" by the term "binding" in Article V(1)(e) has been almost unanimously affirmed by the courts. For example, a French court rejected the objection by the French respondent to the request for enforcement of an award made in Germany that no leave for enforcement had been issued by a German court, holding that, as the Convention has done away with the system of the "double exequatur," it does not require a leave for enforcement from the country in which the award is made.[12] Furthermore, the courts have unanimously held that the party against whom the enforcement is sought has to prove that the award has not become binding.

In dealing when the award can be considered binding, according to the prevailing judicial interpretation, this question seems to be determined under the law applicable to the award. The law applicable to the award is according to Article V(1)(e), the law of the country in which, or under the law of which that award was made (the country of origin).

In the present arbitration case, according to the arbitration clause in the Secretary Agreement (Article 9), the parties have agreed to aide by the award as being finally binding and enforcement regarding the matters submitted to the arbitrators. Furthermore, the ICC Arbitration Rules, according to which the arbitration has been conducted, provide in Article 24 that the arbitral award shall be final.

(b) Award Set Aside or Suspended

The ground for refusal of enforcement in the second part of Article V(1)(e) 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 has scarcely been invoked, and was hardly successful.

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12) Tribunal de grande instance (Commerce Chamber) of Strasbourg, October 9, 1970, *Animalfeeds International Corp. v. S.A.A. Becker et Cie* (France no 2.).

Article V(1)(e) of the New York Convention unequivocally lay down the principle that the court in the country in which, or under the law of which, the award was made has the exclusive competence to decide on the action for setting aside the award. Further, the "competent authority" as mentioned in Article V(1)(e) for entertaining the action for setting aside the award is virtually always the court of the country in which the award made. The ground for refusal in the second part of Article V(1)(e) applies only if the award has been effectively set aside in the country of origin.

The division of judicial control over the award as provided by the New York Convention is such that if a party desires to challenge a badly reasoned award, he should go to the courts of the country in which the award is made and, there, request the setting aside of the award. If the courts in the country of origin, indeed, set aside the award because the arbitrator has proceeded in a grossly negligent manner, then the courts of the other Contracting States may refuse enforcement of the award by virtue of the second part of Article V(1)(e) of the Convention.

In the present case, K Korean company did not go to the court of the country where the award was made, i.e., the French court in order to request the setting aside of the award. Instead, K company filed a lawsuit in a Korean court requesting for the confirmation judgement to the effect that the obligations K company was held to be subject to did not exist. However, this lawsuit is actually deemed to invalidate or set aside the arbitral award rendered in the ICC Court in France. However, setting aside the arbitral award is possible only in the court of the country where that award was made (i.e., French court) according to the New York Convention Article V(1)(e) ("...set aside ...by a competent authority of the country in which ... that award was made."). Further, in the present case, the New York Convention takes priority over Korean law in the enforcement of the foreign arbitral award because Korean Arbitration Act Article 39 (1) expressly stipulates that an international arbitral award which is subject to the New York Convention shall be enforced and recognized according to the provisions of the New York Convention.

The second part of Article V(1)(e) mentions also as ground for refusal of enforcement that the award has been "suspended" by the court in the country of origin. According to Article VI, a court may adjourn its decision on enforcement if the respondent has applied for the suspension of the award in the country of origin. Although it is not entirely clear what the drafters of the Convention exactly meant by the suspension of an award, it refers

presumably to a suspension of the enforceability or enforcement of the award by the court in the country of origin.

In order for the suspension of the award to be a ground for refusal of enforcement of the award, the respondent must prove that the suspension of the award has been effectively ordered by a court in the country of origin. This rule is clearly laid down by the text of Article V(1)(e) as it states "has been ..... suspended by a competent authority. ..." The automatic suspension of the award by operation of law in the country of origin therefore is not sufficient.

In the present arbitration case, the respondent has not yet obtained the suspension of the award ordered by a French court in the country of origin, which is France.

4. Grounds for Refusal of Enforcement Due to the Violation of the Public Policy (Article V(1)(b))

Article V(1)(a) ground for refusal is invoked more in the form of lack of jurisdiction or Article V(1)(c) ground. The Public Policy ground defense which was raised by K company in the enforcement proceeding will be reviewed as follows.

In defining the standard for a violation of public policy, many courts worldwide make a distinction between domestic and international public policy. For example, in Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier(RAKTA), the case setting out the U.S. standard for a public policy violation, the court stated that public policy cannot be equated with national public policy., but must be given a supranational emphasis.[13] According to the court, enforcement of a foreign arbitral award may be denied on the basis of public policy only where enforcement would violate "the forum state's most basic notions of morality and justice."[14]

The court held that the public policy exception must be given a narrow reading and invoked with caution, lest foreign courts frequently accept it as a defense to enforcement of awards rendered in the United States.[15] Thus, the court held that public policy would not be violated by enforcing as award rendered against a U.S. based company for failing to complete a project in Egypt following a break in diplomatic relations between the

13) 508 F.2d 969,974 (2d Cir. 1974).
14) Id See. *Waterside Ocean Navigation Co. v. International Navigation Ltd., 737 F.2d 150,152 (2d Cir. 1984).*
15) *Parsons & Whittemore,* 508 F.2d at 974.

United States and Egypt and suspension of U.S foreign aid to finance the project as a result of the Six-Day War between Egypt and Israel.[16]

In the enforcement proceeding, K company argued that ICC Court's arbitral award to the effect that K company is prohibited from manufacturing and/or marketing and/or exploiting the medicinal product of Med, under any direct or indirect form, whether for the Korean territory or the rest of the would is too broad and limitless, and thus excessively infringes K company's freedom of trade. Thus, K company alleged that this portion of the arbitral award is in violation of Korea's public policy and thus the enforcement thereof shall be refused according to the New York Convention Article V(2)(b).

The Korean Court reasoned that since Article V(2)(b) is designed to prohibit the enforcement and recognition of a foreign arbitral award from violating the enforcing country's basic moral belief and social order, the public policy exception be given a narrow reading considering domestic environments and stability of international transaction order (Korean Supreme Court 1995. 2.14. 93 da 53054 decision, 2003.4.11. 2001 da 20134 decision). Therefore, the Korean Court reasoned, Article V(1)(b) becomes applicable to the present enforcement case only where the specific result due to the portion of the award is deemed unbearable because of violating Korea's good moral and social order. However, considering that K company has entered into the Secrecy Agreement, and then K company has enjoyed economic benefit as license holder by selling the product of Med for several years in Korea, the Korean court held[17] that the specific result due to the enforcement thereof cannot be considered as unbearable because of violating Korea's good moral and social order.

Ⅵ. Conclusion

Uniformity of enforcement and efficient remedial process in the course of international transaction will become a driving force of worldwide trade especially in Korea where the economic growth is heavily dependent upon international trade. For the legal protection of international trade, it is also necessary to be aware of how to draft and interpret specific

16) Id. at 971-72.

17) Enforcement Proceeding of Arbitral Award, 2005.10.21. 2004 gahab 3145.

wording of international agreement and to claim before international arbitration court.

As reviewed herein, most of arbitrators' reasoning in reaching the arbitral awards are not usually based upon specific countries rules or precedents. Rather, such reasoning is based upon arbitrators' common sense in interpreting the evidence produced from both parties. Moreover, when such an international arbitral award is being litigated in Korean court for enforcement of the award, even the Korean court judges did not pay much attention to the substance of the award unless the process of rendering the international arbitral was against due process or international public order. Thus, in order to effectively protect Korean companies interests in international commercial setting, rather than focusing on the defense against the enforcement proceeding, it is much more important to prepare for how to produce favorable evidence and argue before the international arbitral tribunal to persuade the tribunal to the effect that the submitted evidence has logical connections to the claims of the case, and how to counterattack the opposing party's evidence.

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국문요약

국제중재판정 및 집행판결 과정에서의 쟁점들에 관한 사례연구

신 승 남

한국 기업과 프랑스 기업 간에 한국기업이 프랑스기업으로부터 의약품의 임상자료 등에 관한 비밀정보(Confidential information)를 받아서 한국식품의약품안전청에 의약품 제조허가를 받기위해 활용하는 과정에서 체결한 비밀유지계약 (Secrecy Agreement)의 위반행위 여부의 분쟁이 발생하였다. 이 분쟁은 비밀유지계약 내의 중재조항에 의거하여 프랑스기업에 의해 프랑스 파리 소재 국제중재 판정부 (ICC Court Arbitral Tribunal)에 회부되었고 한국기업이 응소하여 중재판정부에서 분쟁 사실들에 관한 양 당사자 회사들의 전문가들의 증언, 준비 서면들을 검토하여 비밀유지계약 각각의 조문의 해석을 통해 중재판정이 내려졌다. 이 중재판정은 '외국중재판정의 승인 및 집행에 관한 뉴욕협약'에 의거하여 중재판정 집행지국인 우리나라의 법원에서 집행판결을 거치게 되었다. 이때 한국법원에서는 뉴욕협약상의 집행거부 사유들에 관한 판단을 한 후 프랑스기업의 일부 승소의 집행판결을 내렸다.

본 사례연구의 시사점을 보면, 중재조항에 의거한 ICC 중재판정부의 심사절차는 각 나라 고유의 판례나 규정보다는, 중재인들의 건전한 상식에 근거하여 중재판정이 내려졌다는 것이다. 우리나라 법원 역시 중재인의 건전한 상식에 근거를 둔 중재판정의 세부적 내용에 대하여 중재권한, 국제적 공공질서 상의 심각한 문제점이 존재하지 않은 점을 고려하여 일부분을 제외하고는 외국중재판정을 그대로 집행함을 인용하는 판결을 내렸다는 점이다. 따라서, 한국기업들이 국제분쟁에 대비하기 위해서는 중재판정이 내려진 후 집행단계에서 중재판정 내용을 바꾸려는 노력을 하기 보다는, 중재 절차 진행단계에서 한국 기업에게 객관적으로 입증할 수 있는 유리한 증거들을 중점적으로 적극 활용하여 중재인들의 건전한 상식에 바탕을 둔 중재판정을 유리한 방향으로 내리도록 유도하는 것이 더욱 바람직한 것이다.

주제어 : 국제중재, 뉴욕협약, 비밀유지계약, 집행판결