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Korean Supreme Court's Recent Recognition of Treble Damages: Implications for the Enforcement of Arbitral Awards

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Introduction

Until recently, there was no definitive Korean court decision on whether a foreign award that includes an award of exemplary (or punitive) damages should be recognized and enforced (1) in its entirety or (2) only partially (i.e. without the award of exemplary damages).¹⁾

On 11 March 2022, this issue was conclusively decided by the Korean Supreme Court, which found that an award of treble damages by a Hawaii court ("Hawaii Court") is enforceable in the Republic of Korea ("Korea").

The Korean Supreme Court's decision is positive news for parties seeking enforcement of an award of exemplary damages from an arbitral tribunal. However, as explained below, parties should be mindful that not all awards of exemplary damages are likely to be enforced by the Korean courts. The court's decision will depend largely on whether the awarded exemplary damages fall within the increasingly broad scope of exemplary damages under Korean statutory law.

Korea Historically Rejected Punitive Damages

The Korean civil law system initially recognized only awards of actual damages that were intended to compensate victims for proven injuries sustained. Thus, Korean courts had the power to refuse to recognize a foreign court award or an arbitral award that grants exemplary damages.

In Korea, [Article 217 of the Korean Civil Procedure Act](#) addresses the effect of foreign court judgments in Korea. Article 217-2(1) states as follows: "[w]here a final judgment, etc. on compensation for damages gives rise to a result being markedly against the basic order of the Acts of the Republic of Korea or international treaties entered into by the Republic of Korea, a court shall not approve the whole or part of the relevant final judgment, etc." Thus, Korean courts may recognize and enforce foreign court judgments as long as the awarded reliefs fall within the scope of what Korean courts may award and do not conflict with Korea's public policy.

In the context of arbitration, Article 39 of [Korea's Arbitration Act](#) ("Arbitration Act") states that the recognition and enforcement of arbitral awards in Korea is governed by the [United Nations](#)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). If an arbitral award is recognized under the New York Convention, the prevailing party must submit the original arbitral award and arbitration agreement to the Korean court.²⁾ The Korean court will then issue what is known as a “judgment of execution,” enabling the party to collect upon its award.

While the New York Convention generally requires member states to recognize and enforce arbitral awards issued in other member jurisdictions, Article V(2)(b) allows member states to refuse recognition and enforcement when the arbitral award goes against the public policy of that country. Article 39 of the Arbitration Act, in line with Article V(2)(b), mandates that arbitral awards from other member states will not be recognized when “*the award is in conflict with the good morals and other forms of social order in the Republic of Korea.*” This gives Korean courts the power to refuse to recognize an arbitral award that grants exemplary damages where such damages would not be recognized under Korean statutory law.

Landmark Korean Supreme Court Case

On 11 March 2022, the [Korean Supreme Court recognized a judgment by the Hawaii Court](#), which awarded the plaintiffs treble damages under Hawaii’s Unfair or Deceptive Acts or Practices (“UDAP”) statute.³⁾ Finding that each of the two plaintiff companies sustained actual damages of USD 200,000 and USD 381,000, respectively, the Hawaii Court found that the plaintiffs were each entitled to three times these amounts under the UDAP.

The two plaintiffs then sought recognition and enforcement of the Hawaii Court’s judgment in a Korean district court against the defendant. While the district court granted the plaintiffs’ application, this decision was overturned on appeal. The Korean appellate court (Seoul High Court) limited the plaintiffs’ damages to the actual losses suffered in the sums of USD 200,000 and USD 381,000, on the basis that Korea’s civil law system has historically rejected punitive damages.

On further appeal by the plaintiffs, the Korean Supreme Court allowed the plaintiffs to enforce the full award. The Korean Supreme Court reasoned that Korea’s laws on damages originally only permitted recovery for actual losses sustained by the plaintiff. However, there have been changes to these laws over time. Since 2011, various laws enacted, such as antitrust laws, labor/employment laws, intellectual property laws, privacy laws and more, allow exemplary damages of up to three to five times the actual losses suffered. This increased recognition of exemplary damages under Korean statutory law meant that in certain circumstances, a foreign court’s granting of such damages would not be contrary to Korea’s damages laws. On that basis, the Korean Supreme Court found that the award of treble damages under the UDAP was not contrary to the principles underlying Korea’s damages laws, given that treble damages are also allowed under the corresponding Korean statute, i.e. the Korean Fair Trade Act.

Implications for Enforcing Arbitral Awards that Award Treble Damages

The Korean Supreme Court’s decision is positive news for parties seeking to enforce arbitral awards containing treble or other forms of exemplary damages in Korea. When the foreign law that the arbitral award is based on has a similar counterpart under Korean law that allows exemplary damages, the successful plaintiff will have a better chance of obtaining a judgment of execution from the Korean courts that covers the full award. This is because the respondent will have greater

difficulty in persuading the court that the award goes against Korea's public policy.

However, even then, it may be possible for the respondent to successfully argue that the exemplary damages awarded should be capped at what is allowed under the relevant Korean statute. For example, some Korean statutes allow exemplary damages of up to three times the actual losses suffered – if the arbitral award grants damages that are five times the actual losses suffered, the Korean court may cap the quantum of the award being enforced at three times the actual losses suffered.

Concluding Remarks

While Korea has historically not recognized exemplary damages, it has increasingly allowed such damages over the last decade through statutory revisions. The Korean Supreme Court has acknowledged that courts can no longer automatically refuse recognition and enforcement of awards of exemplary damages, given that some of these awards would fall within the scope of exemplary damages allowed under Korean law. This is a space to watch as subsequent case precedent will further clarify and define the limits of the Korean Supreme Court's decision.

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- ?1
- ?2 Article IV.
- ?3 Case Number 2018Da231550.

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