

SOUTH KOREA

Public policy as ground for refusal of enforcement of an arbitral award ex officio

By Hun Mook Lee

The Republic of Korea is a contracting country to the New York Arbitration Convention of 1958, which shall be applied to the case where recognition and enforcement of a foreign arbitral award is sought. Article V(2) of the Convention provides that 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country' and, this provision was incorporated in the Arbitration Act and came into effect.

Of the above two requirements the public policy test has been under a lot of discussion because its meaning is not clear and, furthermore, there is no statutory provision defining its meaning.

The function of a public policy provision is basically to be the guardian of the fundamental moral convictions or policies of the forum. However, the fundamental degree of moral conviction or policy is conceived differently for every country. The distinction between domestic and international policy has been accepted by the Korean courts and, according to this distinction, the number of matters considered to fall under public policy in international cases is smaller than that in domestic cases. In Korea the leading case is the Supreme Court decision in '2003. 4. 11. decision 2001da20134.'

The Supreme Court case

In this case sewing machines supplied by a Respondent to a Claimant were found to be defective. For this reason, the Claimant submitted to the Vietnam Commercial Arbitration Forum which had been agreed as an arbitral institute in the contract. The Claimant sought a recognition and enforcement of an

arbitral award which had been awarded in favour of it by the Vietnam Commercial Arbitration Forum. The Respondent paid US\$17,010.88 and provided new machines for replacement according to the arbitral award. Nevertheless, the Claimant refused to accept the replacement and filed a suit against the respondent to a Korean court to seek a recognition and enforcement of the arbitral award.

The Supreme Court held that 'New York Arbitration Convention of 1958 shall be applied to the arbitral award by the Vietnam Commercial Arbitration Forum'. In that the Article V(2)(b) of the convention provides that the recognition and enforcement of the award may be refused where the recognition and enforcement of the award would be contrary to the public policy of the forum country and the purpose of it is to protect fundamentals of moral conviction and public order of the forum country, 'Public Policy' in the provision should not be interpreted to as broad as the domestic public policy. Accordingly, only when the specific result of the recognition and enforcement the award would violate public order, it may be refused.

Despite the fact that Respondent granted replacement of new machines to the Claimant, its obligation to replace the machines is not completed since the claimant does not accept them. Consequently the recognition and enforcement of the award is not contrary to the public policy.

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Law Firm Pureun

28/F Samil Building

Gwanchul-Dong 10-2

Jongro-Gu, Seoul, Korea

Tel: (82) 2 775 1560

Fax: (82) 2 319 3900

Email: pureun@pureunlaw.com

hmlee@pureunlaw.com

www.pureunlaw.com