THE REPUBLIC OF KOREA

Comments on
the Preliminary Draft of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters[1]

1. INTRODUCTION

We are pleased to comment on the Preliminary Draft of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission on 30 October 1999 (the "Draft") from the viewpoint of Korean law.

Before commenting on the Draft, we would like to take this opportunity to express our profound gratitude to all the people who contributed to its preparation for their efforts in preparing an excellent preliminary draft after overcoming the difficulties resulting from the differences of approach and concept between common law and civil law jurisdictions. We would also like to express our deep respect to Professor Nygh and Professor Pocar for preparing such an excellent report on the Draft (the "Report"). We believe that key members of several countries who played an important role in preparing the Draft and leading the discussion at the informal meetings and at the meetings of the Special Commission deserve special thanks and recognition for their outstanding work on, and dedication to, this project.

Preparing a convention on international jurisdiction and foreign judgments in civil and commercial matters is a very important step toward worldwide judicial cooperation by ensuring the free circulation of judgments at a worldwide level. At present, Korea is not a party to any treaties or international agreements, concerning international jurisdiction or the recognition and enforcement of foreign judgements.[2] Therefore, most questions of international jurisdiction and the recognition and enforcement of foreign judgments are governed by Korean law. Given the absence of written law on international jurisdiction in Korea, Korean courts have tried to establish rules on international jurisdiction which can ensure the appropriate allocation of international jurisdiction among countries, based upon the venue provisions of the Korean Code of Civil Procedure with some consideration of the "special circumstances" of each case.

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[1] The Ministry of Foreign Affairs and Trade, Republic of Korea, has written these Comments, following consultation with the relevant authorities, including the Supreme Court and the Ministry of Justice. The following people participated in the drafting of the Comments:

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[2] With respect to the recognition and enforcement of foreign arbitral awards, Korea acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards(1958) in 1973.

Korean Courts have tended to be flexible in order to reach the appropriate conclusion in each case. The Draft as such is of great value to Korean courts as a reference in forming rules on international jurisdiction.

The recognition and enforcement of foreign judgments is expressly governed by the Korean Code of Civil Procedure. While Korean courts dealt with the issue in accordance with the principle of reciprocity, they have recently begun to take a more forward-looking attitude. A recent judgment of a lower court, which recognized the judgment of a Chinese court, could be viewed as clear evidence of this tendency. The Convention is one of the many important projects of the Hague Conference on Private International Law in which Korea is interested. In 2000 Korea also acceded to the Convention on the Service Abroad of Judicial or Extra Judicial Documents in Civil or Commercial Matters. Prompted by these recent changes, many Korean scholars and lawyers have begun to show a great deal of interest in the activities and achievements of the Hague Conference on Private International Law.

Against this background, we would like to make some comments on the Draft from the viewpoint of Korean law. However, we would like to make clear that our comments below are not conclusive in nature and do not necessarily bind Korea's future position with respect to the Draft.

2. GENERAL FRAMEWORK OF THE DRAFT

We believe that the approach of the Draft is both timely and relevant, and is superior to that of the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the “1971 Hague Convention”) in that the Draft regulates matters relating to international jurisdiction as well as the recognition and enforcement of foreign judgments. In addition, although it has not yet been finally settled, the attempt to make the Draft a “mixed Convention” rather than a “double Convention” is considered to be a pragmatic one, in order for the convention to be accepted more widely.

The Draft attempts to set limits on the “grey zone” either by setting out the qualifier of “substantial connection” as a basic criterion with respect to jurisdictional issues for distinguishing between prohibited jurisdictions and permitted jurisdictions or by compiling an illustrative list of prohibited grounds of jurisdiction. Recognizing this could compensate for the expected diminution in normativity which such “mixed convention” approach could entail, Korea would like to suggest, for better clarity of the term “substantial connection”, inserting the words “or the defendant” at the end of Article 18, paragraph 1.

A further point related to a mixed convention which requires careful consideration is whether there is consistency between the provisions that refer to “national law” as a ground for exercising permitted jurisdictions. For example, third party claims appear to be matters falling within the permitted jurisdiction of the courts of a Contracting State in accordance with Article 16 (1). However, Article 24 (Judgments excluded from

Chapter III) does not include such claims in the list of judgments excluded from recognition and enforcement under the Convention, with the unreasonable result that they could be matters falling within the required jurisdiction of a State.[3] Additionally, Article 12(5) is not clear as to whether the proceedings on the infringement of patents fall within a permitted jurisdiction or a prohibited jurisdiction because the relevant provision simply refers to "the national law." In this regard, for the sake of clarity, Korea would like to add to the end of Article 12, paragraph 5 the words "in accordance with Article 17."

Obviously, there are various provisions that are in conflict with current Korean statutes, legal precedents and scholarly opinions. However, we believe that if outstanding issues on the Draft are resolved in a satisfactory way, most of the provisions of the Draft would be acceptable to Korea.

We now turn to individual provisions of the Draft.

3. ARTICLE 4 (CHOICE OF COURT)

Article 4 of the Draft does not include a requirement that the forum chosen should have any connection with the subject matter of the dispute or the parties in dispute. Recently, in a case in which a foreign forum had been chosen by the parties, the Supreme Court of the Republic of Korea rendered a decision to the effect that "a reasonable connection" should exist in order to validate such choice of forum.

There has been, thus far, only one case in Korea, which required "a reasonable connection" as a precondition for exercising its jurisdiction. However, the Supreme Court has never dealt with a case in which a domestic forum was chosen by foreign parties. Consequently, it is not clear as to whether the decision mentioned above represents general jurisprudence on this issue. We feel it is in line with the intentions of the Drafters to have a Convention of universal application to allow the parties in dispute the autonomy to choose the forum they wish. In this regard, the position of the Republic of Korea on the choice of forum is flexible.

4. ARTICLE 6 (CONTRACTS), ARTICLE 7 (CONTRACTS CONCLUDED BY CONSUMERS), ARTICLE 8 (INDIVIDUAL CONTRACTS OF EMPLOYMENT) AND E-COMMERCE

We note that these provisions will need to be modified in order to appropriately regulate e-commerce-related jurisdictional issues as well as ordinary offline jurisdictional issues. In particular, we note that, in making the necessary modifications, the reasonable expectations of the e-businessperson should be fully considered and protected so long as he or she has made an express disclaimer and taken the necessary

[3] See a detailed account of it in paragraph 7 of this Comments.

measures in a reasonable way to ensure that transactions in violation of the disclaimer are not effected with him or her.

According to Business-to-Consumer e-Commerce Statistics published by the OECD in August 2000, although the Korean e-commerce industry is still in its infantry, total on-line sales amounted to USD 203 million for 1999, ranking 10th among OECD member states. With the rapid increase in e-commerce transactions, this total rose significantly in 2000, to about USD 950 million. As a result, Korea has begun to pay more attention to consumer protection and plans to take relevant legislative measures, including amending the current e-commerce-related statutes.

5. ARTICLE 7 (CONTRACTS CONCLUDED BY CONSUMERS) AND ARTICLE 8 (INDIVIDUAL CONTRACTS OF EMPLOYMENT)

We note that some member states are strongly opposed to the current draft provisions. Although these articles are in principle acceptable to Korea, we would be pleased to allow more flexibility to these articles in order to accommodate the concerns of those countries.

6. ARTICLE 9 (BRANCHES [AND REGULAR COMMERCIAL ACTIVITY]) AND ACTIVITY BASED JURISDICTION IN GENERAL

According to the phrase in the bracket of Article 9, a plaintiff may bring an action in the courts of a State where the defendant has carried on regular commercial activity, provided that the dispute relates directly to that regular commercial activity.

Since the informal meeting in Washington, however, members have been discussing the possibility of inserting in the white list the concept of “activity based jurisdiction” as an independent ground of jurisdiction.

Current Korean law does not recognize international jurisdiction over a foreign entity based upon its regular commercial activity or any other activity in Korea unless such commercial activity is carried on by a branch, agency or other establishment of such entity in Korea. However, this does not mean that Korea is strongly opposed to providing in the Convention for an activity based jurisdiction. It would be sensible to subject a defendant to jurisdiction if he or she does business without having a branch, agency or other establishment in Korea but the cause of action arises from or is related to the defendant’s activity in Korea. However, this position presupposes that the idea of “activity based jurisdiction” is clearly defined in the Draft so that it can be clearly distinguished from the concept of “doing business.” It further supposes that parties are able to predict with reasonable certainty whether they may be subject to the jurisdiction of the state where they have engaged in an activity in question. To this end, instead of the abstract concept of “reasonableness” in American jurisprudence, a more real and definite criterion is required for such jurisdiction to be invoked.

In this regard, if the convention is to contain a provision on an activity based jurisdiction, the Republic of Korea proposes that the grounds for exercising jurisdiction should be based on the substantial connection, not between the forum and the parties in dispute, but between the forum and the subject matter of the dispute. Otherwise, no one will be able to judge with certainty whether the nature, frequency or magnitude of his or her activity could constitute an activity subjecting him or her to the jurisdiction of a certain country. In particular, we are concerned that if not only "activity within the forum state" but also "out-of-state activity with foreseeable effects in the forum" could trigger the "activity based jurisdiction," then the "activity based jurisdiction" could be too broad. If member states successfully come up with the "activity based jurisdiction" as a comprehensive independent ground of jurisdiction, the relationship between the "activity based jurisdiction," contract jurisdiction (Article 5) and tort jurisdiction (Article 10), respectively, should also be clarified to avoid unnecessary confusion as to the scope of application of each provision.

In any case, we hope that the members will be able to reach a consensus on the specific language of the "activity based jurisdiction" through the informal meetings which are currently scheduled. We will also do our best to work with other members in order to come up with language which is acceptable to as many countries as possible.

7. ARTICLE 12 (EXCLUSIVE JURISDICTION) – INTELLECTUAL PROPERTY -

We note that further discussion will be made in due course with respect to jurisdictional issues related to intellectual property.

The Republic of Korea is a country where the infringement of patents and other registered intellectual property (other than copyright) is subject to the jurisdiction of ordinary courts, whereas their validity is subject to the exclusive jurisdiction of the Intellectual Property Office under the Government and the Patent Court. In addition, the validity of a patent and any other registered intellectual property (other than copyright) is understood to fall within the scope of public law rather than private law. Accordingly, the allocation of international jurisdiction of intellectual property law matters is a very complex issue under Korean law. We are studying these issues and still need to closely monitor the further discussions on these issues.

At present we would merely like to note that whether the court which has jurisdiction on the infringement of a patent also has jurisdiction on the validity of the patent, being an incidental question, is also related to the recognition of foreign judgments set forth in Chapter III of the Draft. Before we take any position on these issues, we should consider what effect the court's judgment on this incidental question will have in the State addressed.

8. ARTICLE 16 (THIRD PARTY CLAIMS)

Under Article 16(1), a court which has jurisdiction to determine a claim under the Convention shall also have jurisdiction to determine a claim by a defendant against a third party for indemnity in respect of the claim against that defendant, to the extent that such an action is permitted by national law, and provided that there is a substantial connection between that State and the dispute involving the third party. The Draft does not provide in the white list for direct international jurisdiction in an action on a warranty or guaranty against third party and leaves it to the national law of a Contracting State. Thus the Draft differs from the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Convention"), which *does* provide for direct jurisdiction in an action on a warranty or guaranty against a third party (Article 6 (2)). Although allowing an action on a warranty or guaranty against a third party has the advantage of resolving related disputes at once, such an action is not permitted under current Korean law, and we understand this is the case in many other countries. In this regard two questions arise.

First, an action on a warranty or guarantee is based upon the national law of a Contracting State rather than upon the Convention. Therefore, it appears to be reasonable for the state addressed to have the right to verify the international jurisdiction according to its own national laws. In other words, jurisdiction for an action on a warranty or guarantee against a third party should be a "permitted basis of jurisdiction" rather than a "required basis of jurisdiction." However, Article 24 of the Draft provides that "This Chapter shall not apply to judgments based on a ground of jurisdiction provided for by national law in accordance with Article 17," and does not refer to Article 16 (Third party claims). This appears to suggest that the ground of jurisdiction under national law, which approves jurisdiction for an action on a warranty or guarantee against a third party based upon the jurisdiction for the original proceedings against the defendant, is elevated to the ground of jurisdiction under the Convention.[4] We believe that this cannot be justified, as it is against the basic principle of the Convention that direct and the indirect jurisdiction should be determined by the same rules.

The second issue is related to the first issue. Under Article 16(1), in order for a Contracting State to have jurisdiction over an action on a warranty or guarantee against a third party, the Contracting State should have jurisdiction for the original proceedings *under the provisions of the Convention* [emphasis added]. Accordingly, for example, if a French consumer filed suit in France against a Korean distributor of Japanese products for product liability incurred in France, the Korean distributor would be able to file suit in France against the Japanese manufacturer. However, if the distributor were French rather than Korean, Article 16(1) would not apply. In such a case, however, French

[4] In this regard, the question whether such an interpretation is correct has to be clarified first, since Article 25(1) which provides for the required bases of jurisdiction refers to the jurisdiction under "Articles 3 to 13" only and does not refer to Articles 14 to 16. However, since the grounds of jurisdiction of Articles 14 to 16 are the same as those under Articles 3 to 13, jurisdiction under Articles 14 to 16 could be viewed in an indirect way as a required basis of jurisdiction.

courts would also have jurisdiction based upon the French New Code of Civil Procedure. If the distributor, either Korean or French, were to seek enforcement of the French judgment in Japan, a Japanese court would be obligated, under the Draft, to approve the jurisdiction of the French court in case of a Korean distributor, whereas it would not be so obligated where a French distributor was involved. We wonder whether there are reasonable grounds for treating these two cases differently.

In sum, we believe that Article 16 should be deleted in its entirety, and that jurisdiction on third party claims should remain in a grey area for the time being.

9. ARTICLE 17 (JURISDICTION BASED ON NATIONAL LAW)

Article 17 attempts to allow each Contracting State to assume and exercise jurisdiction based upon its national law unless Article 18 prohibits such ground of jurisdiction. This has the effect of making the Convention a "mixed convention" and therefore, as we mentioned above, it is a very practical approach to create a convention of worldwide application. However, article 17 refers only to the rules of jurisdiction under national law. As a result, it may be misinterpreted to allow each Contracting State to apply its rules of jurisdiction that are not rules of *grounds* of jurisdiction (e.g. rules of *forum non conveniens*) even where the ground of jurisdiction in a specific case is one under the Convention. Accordingly, although this is a rather technical point, for better clarity, we suggest inserting the words "grounds of" in this article so that it reads as follows:

"Subject to Articles 4, 5, 7, 8, 12 and 13, the Convention does not prevent the application by Contracting States of rules of *grounds of* [emphasis added] jurisdiction under national law, provided that this is not prohibited under Article 18."

10. ARTICLE 18 (PROHIBITED GROUNDS OF JURISDICTION)

Article 18(2) provides that jurisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the grounds listed therein. The term "solely" could be a source of disputes in the future, as is the case under the 1971 Hague Convention which adopted a similar approach (Article 2 of the Supplementary Protocol). For example, a court of a Contracting State may assume jurisdiction based upon a combination of one or more of the grounds listed therein and a ground that is not listed therein. More specifically, under Paragraph 2 (e), the courts of a Contracting State are not allowed to exercise jurisdiction solely on the basis of the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities. This provision is appropriate in the sense that it appears to set forth doing business as a prohibited ground of jurisdiction.

In this regard, we would like to draw your attention to letter of credit transactions that are quite popular in international trade. Suppose, for example, a Korean exporter exports goods to an importer in Country A under a letter of credit issued by a bank in

Country A ("Bank A"). The Korean exporter then submits the necessary documents to Bank A in accordance with the letter of credit. However, Bank A refuses, without any justifiable grounds, to make payment. The Korean exporter files suit in Korea against Bank A requesting payment under the letter of credit. Suppose Bank A has a branch in Korea, which was not involved in the letter of credit transaction at all. In such a case, Korean courts have repeatedly held that they had jurisdiction over the dispute. Technically, the basis of such decision would have been a provision of the Korean Code of Civil Procedure. However, in substance, the ground of jurisdiction would have been that Bank A was doing business in Korea through its Korean branch.

We believe that, under the Draft, Korean courts will no longer be allowed to assume international jurisdiction in the above case. This is also the position taken by the Report[5]. However, Korean lawyers might argue that the Korean court's jurisdiction is based upon the presence of the Korean branch of Bank A as well as its carrying on of commercial activities in Korea. If the Draft's current position of treating doing business as one of the prohibited grounds of jurisdiction is finally adopted, we suggest inserting the italicized phrase as shown below:

"e) the carrying on of commercial or other activities by the defendant in that State *whether or not through a branch, agency or any other establishment of the defendant* (emphasis added), except where the dispute is directly related to those activities;"

At present we cannot offer a good suggestion for replacing the word "solely" with a better expression or for otherwise improving this provision. We would like to note that there is a possibility that a substantial portion of this provision will turn out to be of no practical value even though most of the delegations believe that the Draft has succeeded in putting various grounds of jurisdiction on the black list.

With respect to Article 18(3), we feel the basic idea of excluding actions seeking civil remedies for human rights violations from the grounds of prohibited jurisdictions under paragraph 2 is appropriate and reasonable, to the extent that it aims to maintain the *status quo* in respect of the exercise of the Contracting State's jurisdiction over such cases in accordance with its domestic laws. Considering that the concept of human rights has not yet been agreed upon at the global level, the Republic of Korea, though supporting Variant one for the time being, believes that the matter requires further consideration in order to more clearly elaborate and categorize the cases which will be exempted from the prohibited jurisdictions under the Convention.

11. ARTICLE 20

Paragraph 2 in brackets seeks to authorize an exception to paragraph 1 which provides that the forum state shall consider the lawfulness and timeliness of notification to the defendant of the document instituting the proceedings, and shall, if such conditions are not met, stay the proceedings.

[5] p. 57.

The Republic of Korea has recently acceded to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the Hague Service Convention) with the reservation that a Korean court may give judgment even if no certificate of service or delivery has been received. In this context, the Republic of Korea supports the deletion of the brackets placed around in paragraph 2. Alternatively, Korea proposes that Article 37 (disconnection clause) include a provision recognizing that bilateral or multilateral treaty on service abroad of documents in force for the Contracting States, including the Hague Service Convention, shall prevail over the relevant provisions of the Convention.

12. ARTICLE 22 (EXCEPTIONAL CIRCUMSTANCES FOR DECLINING JURISDICTION)

Considering the sharp contrast of the positions in common law countries and civil law countries on the tricky issue of the doctrine of *forum non conveniens*, we are quite pleased to see in Article 22 of the Draft that the Special Commission has succeeded in overcoming difficulties and coming up with a compromise solution.

Article 22 provides that the court seised may suspend its proceedings in exceptional circumstances where "double standards" exist. This occurs when it is clearly inappropriate for that court to exercise jurisdiction, and a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute.

In this regard we note that, under Article 22, the court may decide to suspend the proceedings and, at the same time, set a time period within which, and specify the State where, the plaintiff shall bring the proceedings. However, it appears that the court would not be able to dismiss the case, either outright or on certain conditions, as the courts of some countries presently do.

Unlike Article 22, under Korean law the court seised may only dismiss the case by stating that it has no jurisdiction under the "doctrine of special circumstances."[6] Logically, therefore, Korea cannot deny that it has currently reservations about this Article. However, this does not necessarily mean that Korea is entirely opposed to the current Article 22. Korea would like to carefully follow the discussions at the informal meetings and the Diplomatic Conference, before commenting further.

13. ARTICLE 23 (DEFINITION OF "JUDGMENT") AND ARTICLE 25 (JUDGMENTS TO BE RECOGNIZED OR ENFORCED)

Under this article, decisions ordering provisional or protective measures in accordance with Article 13(1) fall under the concept of a "judgment" which may be

[6] This happens when Korean courts have jurisdiction under the venue provisions of the Korean Code of Civil Procedure, but it is not appropriate for the Korean courts to exercise jurisdiction considering the totality of the circumstances of the case.

recognized or enforced under the Draft. The majority view under Korean law is that a foreign country's decision ordering provisional or protective measures is not entitled to recognition or enforcement in Korea.

Under Article 25(2), in order to be recognized, a judgment must have the effect of *res judicata* in the State of origin. That is, the existence of the *res judicata* effect is a precondition to the recognition of foreign judgments. However, under Article 25(4), a foreign judgment which is, or may be, subject to ordinary appeal in the State of origin could be recognized under the Draft. In this respect, the Draft is different both from Korean law and from the 1971 Hague Convention mentioned above. A few questions may be raised in this regard.

First, we wonder whether there is a uniform concept of *res judicata* throughout the world. We are not sure whether *l'autorité chose jugé* in France, *die materielle Rechtskraft* in Germany, and *kipanryuk* in Korea have the same meaning.[7] Do "claim preclusion" and "issue preclusion," in the sense they are used under the laws of the United States, fall within the concept of *res judicata*?

Second, does this article mean that the scope of the effect of *res judicata* of a foreign judgment is a matter to be left to the national law of each Contracting State, or that it is a matter to be governed by the laws of the State of origin? One may argue that a judgment of a Contracting State may be recognized in another Contracting State so long as it has the effect of *res judicata* in the State of origin, while the scope of the effect of *res judicata* is a matter to be governed by the national law of the State of origin or the State addressed.

In this regard, the Report states, in the words of Professor Fragistas referring to the 1971 Hague Convention, that "a decision cannot acquire a greater effect abroad than it has in its country of origin."[8] This appears to follow the theory of "effect extension." However, it does not clarify whether the effect of the judgment of the State of origin extends to the State addressed without any limitation; or whether the effect of the judgment in the State of origin is reduced to that in the State addressed if the former is broader than the latter in its substantive scope. For example, we wonder whether the "issue preclusion" and "collateral estoppel" of a judgment of a court of the United States should be given effect in Korea under the Convention.

Therefore it would be advisable that the Draft expressly address this issue. If not, the Draft, or at least the Report, should make it clear that it is a matter to be left to the national law of the State addressed.

14. ARTICLE 28 (GROUNDS FOR REFUSAL OF RECOGNITION OR ENFORCEMENT)

Unlike the Brussels Convention and the Lugano Convention, Article 28(1)(d) does

[7] Under Korean law, a judgment which is subject to ordinary appeal cannot have the effect *of res judicata.*
[8] pp. 96-98.

not require due notice of the proceedings to be given to the defendant. However, there is a Korean Supreme Court precedent refusing recognition of a foreign judgment on the ground that the service of process to the Korean defendant was effected in violation of the International Civil Judicial Assistance Law of Korea. Accordingly, a Korean defendant who receives service of process from a foreign court in a manner not consistent with Korean law may elect not to appear in court because the resulting judgment would not be recognized in Korea, provided that the Korean defendant does not have assets in the foreign state. Under the Draft, however, the State addressed cannot refuse to recognize a foreign judgment, even if the service of process was effected in an undue manner, so long as the document instituting the proceedings was actually notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defense.

Although the Republic of Korea understands the rationale behind Article 28(1)(d) of the Draft that the service of process requirement should protect the rights of the defendant to present his case rather than the sovereignty of the state addressed, it remains to be seen whether such approach is the correct one. Under the Draft, a judgment of a Contracting State would be recognized in another Contracting State, even if the judgment were based upon grossly undue service of process (for example, under the Hague Service Convention).[9] In this regard, Korea proposes that the following *proviso* should be added:

"This paragraph shall not apply where the notification was given in such a manner as to constitute a contravention of the public policy of the State addressed, as provided in paragraph (1)(f) of Article 28."

15. ARTICLE 33 (DAMAGES)

In relation to Paragraph 2, we would like to note a court precedent involving the recognition and enforcement of a judgment rendered by the court of the State of Minnesota against a Korean defendant, ordering payment of US$500,000 as reasonable compensation for damages (including mental anguish, physical injury, consequent medical expenses, loss of earnings, etc.) arising out of the assault and rape of the plaintiff. The Korean court of first instance held that the amount of award was much higher than would be acceptable under Korean law for such damages, and thus reduced the amount of compensation that could be enforced to US$250,000, i.e., 50% of the original amount awarded by the Minnesota court. In making the judgment, the court primarily took into account the probability that ordering the payment of US$500,000 might lead to the bankruptcy of the defendant who was living in Korea. Nevertheless, the court did not neglect to take note of the fact that the plaintiff should continue to live in the State of Minnesota and receive medical treatment there. The rationale behind the court's judgment was that recognition and enforcement of the portion in excess of US$250,000 would be against the substantive public policy of Korea. The Supreme

[9] A case similar to *Volkswagenwerk Aktiengesellschaft v. Schlunk* of 1988 of the Supreme Court of the United States could be an example, assuming that the service of process in that case was against the Hague Service Convention.

Court of Korea upheld this judgment in 1997.

Having said that, several questions arise in relation to Paragraph 2. What are the guidelines which the State addressed should apply in determining the amount to be recognized? It is not clear whether guidelines other than those mentioned in this article are left to the national law of each Contracting State or whether the determination of the amount to be recognized is left to the discretion of the State addressed. In this regard, the Report states that as a general principle, "grossly excessive" is likely to mean, "grossly excessive according to the standards usually applied by the courts of the State of origin."[10] The Report goes on to state "evidence that the sum awarded greatly exceeds what is the norm in similar cases in the State addressed should not by itself suffice."[11]

However, we believe that the norms of the State addressed as well as of the State of origin should be taken into consideration in determining the amount to be recognized. This means that the criteria to determine whether the amount awarded in the State of origin is grossly excessive should be not only those of the State of origin but also those of the State addressed. It follows from this that the ultimate determination of the amount to be recognized and enforced should be within the discretion of the State addressed, subject to the minimum requirement that the amount to be recognized and enforced should not be less than that which would have been awarded in the State addressed in the same circumstances.

If this interpretation of Article 33 of the Draft is correct, we submit that the Report could be slightly misleading. Accordingly, we believe that further discussion will be necessary to clarify this point.

16. ARTICLE 37 (RELATIONSHIP WITH OTHER CONVENTIONS)

Considering that the Draft intends to create a global convention acceptable to all states around the world, the Republic of Korea supports proposal 1 in that it endeavours to accommodate not only the Brussels Convention and the Lugano Convention, but also other international instruments concerned with this subject. Therefore, if it is necessary to specify the relationship of these Conventions with the Draft Convention, it would be desirable for a relevant provision to be included at the end of paragraph 3 of proposal 1. In addition, further research needs to be conducted with respect to other regional conventions or bilateral instruments which deal with international jurisdiction and whose relationships with the Draft Convention should also be expected to be specified in the Draft.

[10] p. 114.
[11] P. 114.

17. CONCLUSION

Thus far, we have made several comments on the Draft from the viewpoint of Korean law. Although the Draft is in conflict with current Korean statutes, court precedents and legal commentators' opinions in a number of areas, we do not believe that such conflicts necessarily render the Draft unacceptable to Korea. We will closely monitor the further discussion on the Draft and we would be happy to see the Draft improved in many respects, including the provisions addressing issues of intellectual property, electronic commerce and human rights. Of course, we will do our best to ensure that Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters of the Hague Conference on Private International Law will be able to succeed in preparing a final version of the Draft acceptable to as many countries as possible.