



법무법인
율촌

First court decision allowing enforcement of arbitral award which orders indirect compulsory performance penalty in Korea

Yulchon successfully represented Euro Apex B.V. ("Apex"), a Dutch manufacturer of proprietary heat exchangers, in an arbitral award enforcement proceeding in Korea against a Korean Company ("Defendant"), a Korean manufacturer of similar products.

In the proceedings before the Korean court, Apex sought to obtain an enforcement judgment for an arbitration award rendered under the Netherlands Arbitration Institute (NAI) Arbitration Rules, which ordered Defendant to transfer all of the patents it acquired using Apex's technology, and also to pay indirect compulsory performance penalty if it fails to transfer the patents.

Central to the dispute was whether an arbitral tribunal can order indirect compulsory performance penalty, and whether such penalty can be enforced under Korean law. In the Korean proceedings, Defendant not only argued that the indirect compulsory performance penalty is against Korean Civil Execution Act and thus cannot be enforced, it went so far as to argue that the award which orders such penalty is in violation of public policy rendering a basis for a refusal to enforce a foreign arbitral award under Section V(2)(b) of the New York Convention. Defendant additionally argued that the accrued amount of penalties is ten times the amount of actual damages awarded and therefore the Tribunal erred in calculating the proper amount of penalty.

The Incheon District Court, however, ruled in favour of Apex finding that Civil Execution Act cannot be construed in a way to prevent indirect compulsory performance penalty from being enforced, and that such penalty may be allowed in arbitration awards if the tribunal deems it necessary to order as such to secure the performance of debts which performance cannot be provided by a third party. The Court also noted that such penalty cannot be deemed excessive just because the accrued amount is higher than the damages awarded since this was attributable to the failure on Defendant's part to voluntarily comply with the arbitration award.

This is the very first decision in which the court allowed the enforcement of an indirect compulsory performance penalty ordered in an arbitration award. If affirmed by appellate courts, the decision would significantly change the landscape of arbitration practice in Korea.

Mr. Young Seok Lee, Ms. Jeong Hye Ahn and Ms. So Young Jeong of Yulchon's International Dispute Resolution Team represented Apex in this case.