

Arbitrators Unbound: Contesting Arbitral Awards Based on an Error of Law in Korea

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ABSTRACT

International arbitration entails several different sets of laws. Still, as a creature of consent, the law governing the contract (substantive relationship) between the parties is most significant because arbitrators must ascertain the parties' legal rights in accordance with it. Of course, like other fields of law, international arbitration is a human process with ample room for mistakes, discretion, and incompetence. Consequentially, arbitral awards may be based on incorrect legal principles. Unlike court proceedings, however, international arbitration is typically a non-appealable, single-instance proceeding. As such, aggrieved parties can only

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seek annulment of the award at the seat of arbitration or contest enforcement under Article V of the New York Convention. To make matters worse, there is no indication that arbitrators are legally bound to apply the correct legal principles to the same extent as judges. All of this is true for Korea as well, and this Article addresses the question of whether Korean courts are likely to approve a challenge to an arbitral award on the basis of an error of law. To illustrate what constitutes an error of law, this Article examines primary and secondary sources of Korean law. Moving on, this Article finds that, as a general rule, Korean courts are unlikely to annul an arbitral award or reject its enforcement due to an error of law. Both involve the same legal analysis in Korea. Nevertheless, this Article argues that, in contrast to a simple error of law, there should be recourse if the arbitral tribunal willfully disregards or misapplies correct legal rules.

KEYWORDS

Foreign arbitral awards, Article V of the New York Convention, error of law, arbitrator misconduct, enforcement

I. INTRODUCTION

Lawyers, judges, academics, and legislators collectively establish and push the frontiers of the legal landscape within and beyond their jurisdictions. They help forge the future path of the law.¹ This is done as they carry out their respective tasks, all of which are closely connected with one another. For example, academics offer novel legal theories that lawyers develop and put in front of judges. Those judges then decide cases that lawyers diligently observe and academics teach to aspiring legal practitioners. In the meantime, legislators pass laws that, ideally, synthesize the legal atmosphere with ongoing sociopolitical events. Lawyers take special pride in the fact that they stand at the very forefront of this overarching process. This is especially so in international arbitration, where lawyers and academics take on the role of arbitrators.

Believe it or not, lawyers are not perfect.² Lawyers make mistakes and frequently take advantage of mistakes made by their opponents. In an arbitral proceeding, that may include the situation where the counterparty,

¹ See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) (“The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”).

² On a self-deprecating note, this is of course something only a lawyer would even consider in the first place. Outside of the legal world, people are far more likely to question whether a lawyer can be honest at all rather than perfect, and answer in the negative. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 147 (1977).

arbitral tribunal, or both, fail to identify or argue the correct legal principles. This causes the arbitral award to be based on an error of law. In a litigation setting, there would still be avenues for relief. After all, domestic court systems typically provide for at least two levels of appeals, and error of law is a firmly-established ground for appealing a lower court's decision. In international arbitration, however, a grave error of law could lead to disastrous ramifications for one side because most jurisdictions do not allow parties to appeal final arbitral awards.³ Nor does the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")⁴ permit courts to refuse enforcement of an arbitral award due to an error of law.⁵

This reality is no different in Korea, which acceded to the New York Convention in 1973.⁶ The legal framework in Korea does not plainly prescribe means to correct an error of law in an arbitral award. A party must challenge the arbitral award itself by seeking annulment of the award, if the arbitration was seated in Korea, or contesting its enforcement, if the arbitration was seated outside of Korea and the resulting award is therefore "foreign" or "international" from a Korean court's perspective.⁷ But do Korean courts frown upon requests to annul or refuse enforcement of arbitral awards based on an error of law? As this Article will show, that appears to be the case.

To that end, this Article first addresses whether judges may correct an error of law committed by an arbitrator by annulling or refusing

³ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 569 (6th ed. 2015) (stating that "most arbitration rules do not provide such an appeal.").

⁴ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

⁵ Generally speaking, contesting an arbitral award can take one of two forms: (1) seeking annulment of the arbitral award at the seat of arbitration, or (2) contesting its enforcement where enforcement is sought. While extremely rare, certain jurisdictions also allow parties to appeal arbitral awards. Michael Ostrove et al., *Awards: Challenges*, in THE GUIDE TO CHALLENGING AND ENFORCING ARBITRAL AWARDS 22 (J William Rowley ed., 2019).

⁶ *Contracting States*, N.Y. ARB. CONVENTION, <https://www.newyorkconvention.org/countries> (last visited Sept. 25, 2022).

⁷ Parties can only seek annulment of an arbitral award in Korea if the arbitration itself was seated in Korea, whereas they can contest enforcement as a foreign arbitral award under the New York Convention only if the arbitration was seated outside of Korea. The two possibilities are mutually exclusive. See Benjamin Hughes, *The Recognition and Enforcement of Foreign Arbitral Awards in Korea*, 1 DONG-A J. INT'L BUS. TRANSACTIONS L. 99, 101-02 (2010) (stating that "there is no procedure by which a losing party may petition a Korean court to set aside a foreign arbitral award. A party wishing to challenge the enforceability of a foreign arbitral award in Korea must therefore wait for the winning party to bring an enforcement action.").

enforcement of a foreign arbitral award. As a general rule, the answer is that they cannot, regardless of jurisdiction. Then, to illustrate what constitutes an error of law, this Article analyzes the primary and secondary sources of Korean law.

Staying within the boundaries of Korean law, this Article demonstrates that, similar to most jurisdictions, judges in Korea do not annul arbitral awards or refuse their enforcement on the basis of an error of law alone. This conclusion is unaltered by whether the law governing the arbitration is Korean law or that of another jurisdiction. Nevertheless, this Article ends on a positive note by arguing that the outcome might differ if arbitrators, due to corruption,⁸ bias,⁹ or for whatever other reason, knowingly or deliberately disregard or misapply the correct legal principles. Where that occurs, there should be grounds to contest a foreign arbitral award in Korea.

II. ARBITRATORS UNBOUND

A. *Are Arbitrators Bound by the Chains of Domestic Law?*

International arbitration is a sphere where all types of lawyers, from civil and common law systems, can cooperate and collide. It is an arena where lawyers from diverse backgrounds can put aside their respective jurisdictions of admission to both collaborate with and lock horns against one another. Further, international arbitration is fascinating because it entails a significant amount of freedom in the sense that parties themselves select laws that respectively apply to procedural and substantive matters of the arbitral proceeding.

To greatly simplify the sets of laws that apply in an international arbitration, arbitrators apply the laws of the seat of arbitration (*lex arbitri*),¹⁰ which parties specify in the arbitration agreement, to the arbitration itself.¹¹ As for substantive legal questions and the merits of the dispute, the arbitral tribunal applies the substantive law of the arbitration.¹² Where explicitly

⁸ Unfortunately, corruption or misconduct by arbitrators is difficult to uncover. CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 979 (2nd ed. 2009) (“The most serious problem with corruption as a ground for annulment is that it will, almost by definition, be kept secret from the party to whose disadvantage it operates.”).

⁹ Bias in and of itself does not amount to corruption in international arbitration. *Id.* at 978. Still, it may directly cause an arbitrator to commit an error of law.

¹⁰ The *lex arbitri* refers to the “law governing the existence and proceedings of the arbitral tribunal.” BLACKABY ET AL., *supra* note 3, at 157.

¹¹ *Id.* at 166.

¹² *Id.* at 157; SIMON GREENBERG ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE* 58-59, 100-13 (2010). In short, the arbitral tribunal bases its decision on the substantive law of the arbitration.

stated, that refers to the governing law of the contract between parties.¹³ In other words, arbitrators rule on the dispute between the parties in accordance with the law governing the contract.

For example, if parties to a hypothetical arbitration had selected Tokyo as the seat of arbitration but Korean law as the governing law of the contract between them, in the hypothetical arbitral proceeding arising from that contract, Japanese law would apply to procedural matters whereas the relevant segment of the legal spectrum of Korean law would apply to the merits of the dispute.¹⁴

But that does not necessarily mean the arbitrators in this hypothetical situation are absolutely prohibited from deviating from the correct legal principles of Korean law. This is because there is no clear indication or basis to find that arbitrators are legally bound by the otherwise binding legal principles of the selected jurisdiction in the first place. As a matter of fact, unless the applicable arbitration law explicitly states that arbitrators are obligated to abide by the binding legal principles of the governing law, they could very well presume—perhaps incorrectly—they are not. Such uncertainty is further amplified in arbitrations in which the lawyers, arbitrators, or both, are unfamiliar with the governing law and thus fail to adequately consider the jurisdiction's stance on which sources provide binding legal rules and their hierarchy.

That being the case, we can ponder whether arbitrators are in fact *bound to apply* binding legal rules in an international arbitration, or whether they can render decisions independent of the law governing the contract. Notably, it is said that unlike judges, arbitrators lack the power to create legal principles.¹⁵ Their decisions, therefore, are not incorporated into the legal system of the seat of arbitration.¹⁶ That means parties cannot cite past arbitral awards, even if publicly available, to ask the court or arbitrator to

¹³ U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985, WITH AMENDMENTS AS ADOPTED IN 2006, at 17, U.N. Sales No. E.08.V.4 (2008) ("The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.") [hereinafter UNCITRAL MODEL LAW].

¹⁴ Due to the severable nature of the arbitration agreement, the governing law of the contract may not necessarily also govern the arbitration agreement. Doug Jones, *Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties*, 26 SING. ACAD. L. J. 911, 912 (2014) (stating that per the arbitration agreement's severability, "the arbitration agreement may be governed by a different law to the governing law of the remainder of the contract.").

¹⁵ W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1092 (2012).

¹⁶ In practice, this would be unlikely to happen anyway because most international commercial arbitrations are kept confidential. BLACKABY ET AL., *supra* note 3, at 124 ("The confidentiality of arbitral proceedings has traditionally been considered to be one of the important advantages of arbitration.").

recognize their binding nature. In other words, arbitrators' decisions are not binding on successive courts or tribunals, and thereby "float" in a legal sense from any domestic legal system.¹⁷ Arbitrators applying common law seem to have much discretion because in common law jurisdictions there is a perception that arbitrators are not required to follow relevant precedents at all.¹⁸ In the U.S., courts have even held that *arbitrators are not bound by law* altogether.¹⁹ After all, commercial arbitration first emerged as an extrajudicial proceeding designed for parties to 'contract out of' lawyers and judges.²⁰ Likewise, there is no reason for arbitrators applying civil law to feel bound by the chains of civil law principles either.

To provide a crude analogy, arbitrators are like hikers dropped off in the middle of a figurative forest. If the map in their possession (*i.e.*, legal arguments put forth by the parties) is accurate, they should be able to stay on the trail (*i.e.*, correctly apply the governing law) set by the owner of the forest (*i.e.*, the forum state). But if the map gives wrong directions, they may mistakenly fall off track. Alternatively, they may intentionally choose to ignore the directions altogether. Either way, the owner of the forest has no means of forcing them to stay on track.

Fortunately, as Professor Weidemaier argues, "outside of securities disputes, there is little evidence that arbitrators render ad hoc decisions."²¹ To the greatest feasible extent, arbitrators instead seek to base their decisions on correct legal principles and sufficient authority. This is a phenomenon most pristinely observed in investment treaty arbitration, where tribunals routinely cite arbitral precedents. For example, despite the absence of *stare decisis*, tribunals usually refer to applicable precedents rendered by prior tribunals.²² Several key decisions, such as *Metalclad*²³

¹⁷ See David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 490 (2011) (stating that "arbitrators need not follow precedent and thus can flout controlling law.").

¹⁸ Weidemaier, *supra* note 15, at 1092.

¹⁹ Stephen J. Ware & Marisa C. Maleck, *Authorities Split After the Supreme Court's Hall Street Decisions: What is Left of the Manifest Disregard Doctrine*, 11 ENGAGE J. FEDERALIST SOC'Y PRAC. GRPS. 119 (2010).

²⁰ See HORWITZ, *supra* note 2, at 1427-54 (describing the rise and fall of (domestic) arbitration as an extrajudicial dispute resolution mechanism outside of the typical legal world of lawyers and judges).

²¹ Weidemaier, *supra* note 15, at 1139.

²² Cree Jones & Weijia Rao, *Sticky BITs*, 61 HARV. INT'L L.J. 357, 365 (2020) (explaining, based on *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), that arbitrators frequently base their decisions on prior investment treaty arbitration decisions).

²³ *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000). See generally Alejandro A. Escobar, *Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1): Introductory Note*, 16 ICSID

and *Maffezini*,²⁴ that respectively established legal tests for reviewing standards for indirect expropriation and how to evaluate the role of state entities,²⁵ are especially given a substantial amount of deference.²⁶ As a result, there is some basis behind the view that investment treaty arbitration is inching toward a de facto *stare decisis* regime.²⁷

Investment treaty arbitration is not wholly unique because other systems of arbitration similarly pay respect to precedents.²⁸ Per Professor Moses, this phenomenon occurs because arbitrators have an affirmative duty to render enforceable awards.²⁹ That would mean arbitrators have a strong incentive to apply the correct legal rules to make sure the awards they render are enforceable.³⁰ Thus, there is a strong presumption that arbitrators will dutifully review and cite legal rules of the governing law in rendering arbitral awards. Based on the evidence,³¹ it appears that arbitrators *voluntarily choose* to follow the law, regardless of the specific form it might take.

But lawyers are not perfect, and despite what they may believe or insist on, neither are judges and arbitrators. Lawyers can fail to identify pertinent legal rules in litigations and arbitrations. Judges and arbitrators may base their decisions on the wrong statutory provisions and judicial

REV-FOREIGN INV. L.J. 165 (2001).

²⁴ *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (Nov. 13, 2000); *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000); Jones & Rao, *supra* note 22, at 365.

²⁵ See generally Jones & Rao, *supra* note 22, at 369-70; Shixue Hu, *State Enterprises in International Investment Disputes: Focus on Actor or Action?*, 51 GEO. J. INT'L L. 323, 330-34 (2020).

²⁶ Jones & Rao, *supra* note 22, at 366.

²⁷ See Claudia Priem, *International Investment Treaty Arbitration as a Potential Check for Domestic Courts Refusing Enforcement of Foreign Arbitration Awards*, 10 N.Y.U. J.L. & BUS. 189, 217 (2013) (citing the views of Jan Paulsson, Gabrielle Kaufmann-Kohler, and ICSID tribunals).

²⁸ See generally W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1907-14 (2010).

²⁹ MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 79-80 (2008).

³⁰ See Domitille Baizeau & Tessa Hayes, *The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte*, in *INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY* 225, 234 (Andrea Menaker ed., 2017) (stating that "the enforceability of the award remains a fundamental guiding principle for arbitrators.").

³¹ See generally Pulkit Dhawan, *Application of Precedents in International Arbitration*, 87 ARB.: INT'L J. OF ARB., MED. & DISP. MGMT. 550, 554-60 (2021) (summarizing reliance on precedents in sports arbitration, investment treaty arbitration, and international commercial arbitration, and concluding that there is a de facto system of precedent within each system).

precedents or conduct a flawed legal analysis.³² Therefore, court cases and arbitrations are not always decided in accordance with the correct law.

In a domestic litigation setting, the aggrieved party could seek relief because there are usually opportunities to correct a judge's error. After all, most legal systems provide for one or more appellate courts. Furthermore, a factual or legal error is a universal ground for litigants to ask higher courts to overturn a lower court's decision.³³

Rarely, and under the right circumstances, parties may be able to also appeal an arbitral award. For example, Article 69 of the U.K.'s Arbitration Act 1996 permits parties to appeal a question of law pertaining to an arbitral award by prescribing that "a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings."³⁴ The Act is a clear outlier, however, because most domestic arbitration statutes and arbitral institutions prohibit parties from appealing arbitral awards.³⁵ As things stand, "in most jurisdictions there is no right to appeal if the arbitrators made a mistake of law or of fact."³⁶ Thus, even if an arbitrator's decision was based on a clear error of law, the arbitral award is nonetheless final and binding on the parties.³⁷ This aligns with the idea that "[b]y choosing arbitration, the parties choose, in principle, finality,"³⁸ which is accepted as one of the most significant advantages of international arbitration over litigation.³⁹

To contest an arbitral award, a party may seek annulment of the award at the seat of arbitration, or challenge its recognition and enforcement

³² According to one study, U.S. courts of appeals overturn more than ten percent of the civil cases they review. Barry C. Edwards, *Why Appeal Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1037 (2019).

³³ See Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ARB. & MEDIATION 56, 57 (2014) (stating that "when appellate courts reverse trial courts they generally do so on the ground that the trial court has erred in its findings of fact or conclusions of law."). Korea is no different, as the Civil Procedure Rules, which are set by the Supreme Court of Korea, require parties to appeal judgments by stating in their initial brief, among other things, "parts of the first instance judgment where facts were established erroneously or legal principles were applied erroneously." Minsasosonggyuchik [Civil Procedure Rules] art. 126-2 (S. Kor.).

³⁴ However, it should be noted that a party may appeal an arbitral award only if all of the other parties to the arbitration agree. Arbitration Act 1996, art. 69 (UK).

³⁵ BLACKABY ET AL., *supra* note 3, at 569, 591.

³⁶ MOSES, *supra* note 29, at 194.

³⁷ BLACKABY ET AL., *supra* note 3, at 591.

³⁸ *Id.* at 569.

³⁹ MOSES, *supra* note 29, at 193. By eliminating appeals, finality helps parties save cost and time.

in the state (or states) where enforcement is sought.⁴⁰ Article V of the New York Convention generally sets the grounds for contesting the recognition and enforcement of foreign arbitral awards in the more than 160 states that have acceded to it.⁴¹ The grounds prescribed by Article V are exclusive,⁴² meaning that parties may not contest enforcement based on arguments not covered by Article V under the New York Convention. As for annulment of an arbitral award, such efforts must be based on the laws of the seat of the arbitration.⁴³

Thus, if a party seeks to contest enforcement, they may only advance arguments expressly covered by Article V. If a party seeks to annul the award, their arguments must be based on the laws of the seat of the arbitration. More often than not, the laws for annulling an arbitral award closely mimic the language of the UNCITRAL Model Law on International Commercial Arbitration, which is a near replica of Article V of the New York Convention.⁴⁴ Article V is thus ubiquitous and unavoidable in a sense when it comes to contesting the validity or enforcement of foreign arbitral awards.⁴⁵ Yet, it is extremely unlikely that a court would uphold a request to annul or reject enforcement of a given award⁴⁶ because of the underlying respect for the parties' desire to choose finality.⁴⁷ Nevertheless, any party resisting enforcement is guaranteed to at least try.

⁴⁰*Id.* at 194 (stating that “the losing party has two opportunities to challenge an award: first, in the court of the situs and, second, in the court where the prevailing party is attempting to enforce the award against the assets of the losing party.”). These two opportunities are not mutually exclusive.

⁴¹ *Iraq accedes to the New York Convention*, N.Y. ARB. CONVENTION (Mar. 23, 2021), <https://www.newyorkconvention.org/news/iraq+accedes+to+the+new+york+convention>.

⁴² New York Convention, *supra* note 4, art. V; GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 492 (3rd ed. 2021) (“It is well-settled that the exceptions enumerated in Article V of the Convention are the exclusive grounds for denying recognition of a foreign award.”).

⁴³ MOSES, *supra* note 29, at 194 (“The applicable law in the jurisdiction where the challenge is brought defines the grounds that can be used.”).

⁴⁴ *Id.* at 193 (“In over fifty jurisdictions, the procedural law for challenging an award will be based upon the UNCITRAL Model Law, which will provide the grounds on which an award can be challenged.”); UNCITRAL Model Law, *supra* note 13, at 19.

⁴⁵ BORN, *supra* note 42, at 406 (stating that “a few courts have concluded (typically without detailed analysis) that actions to annul international awards must be limited either to the grounds specified in Article V or by more general international principles.”).

⁴⁶ MOSES, *supra* note 29, at 193 (stating that “[c]ourts rarely overturn an arbitral award.”). Contesting recognition and enforcement is equally difficult.

⁴⁷ Jessica L. Gelander, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80 MAR. L. REV. 625,

The essence of Article V of the New York Convention can be summarized as pertaining to the following issues: jurisdiction of the tribunal, procedural regularity and fairness, compliance with the arbitration agreement or laws of the arbitral seat, public policy, arbitrability, and whether the award has been annulled at the seat of arbitration.⁴⁸ Critically, Article V does not allow domestic courts to review the substance of the concerned arbitral award.⁴⁹ To that end, neither the UNCITRAL Model Law nor Article V of the New York Convention includes error of law as one of the grounds to contest an arbitral award.⁵⁰ In a sense, by agreeing to arbitrate instead of litigate, parties agree to a single-instance proceeding and accept the possibility that the arbitrator might commit an error.

If a party hopes to annul or resist enforcement of an arbitral award based on an arbitrator's mistake, the only feasible way is to rely on some level of creative lawyering. This is mainly done by crafting arguments based on what the pertinent domestic laws and the New York Convention explicitly state and tying the injury caused by the mistake to an independent, legitimate cause of action under either. Any attacks on the validity of the arbitral award must be surreptitious and oblique. For example, Article V(1)(b) states that a court may refuse enforcement if "[t]he 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."⁵¹ Pointing to this provision, a party could attempt to rephrase the tribunal's error in applying the correct law as an infringement upon its right to present its case.

Also, Article V(1)(c) permits domestic courts to refuse recognition and enforcement of an award where "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration."⁵² Specifically, Article V(1)(c) covers instances where arbitrators have acted in excess of their authority.⁵³ Applied to this situation, Article V(1)(c) might then enable a party to argue that the

626 (1997) (stating that "preserving the finality of arbitral awards" is one of the basic interests driving international arbitration).

⁴⁸ Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT'L L. 115, 124 (2018).

⁴⁹ *Id.* ("Notably, these exceptions do not permit review by a recognition court of the merits of the arbitrators' substantive decisions resolving the parties' dispute.").

⁵⁰ UNCITRAL Model Law, *supra* note 13, at 19; MOSES, *supra* note 2929, at 208 ("Under the Convention, a court cannot refuse enforcement of an award because the arbitrators got it wrong, either on the facts or on the law.").

⁵¹ New York Convention, *supra* note 4, art. V(1)(b).

⁵² *Id.* art. V(1)(c).

⁵³ See MOSES, *supra* note 29, at 211.

arbitrator exceeded his or her authority by failing to apply the correct law, which is presumably what the contracting parties had agreed to. Even if the arbitrator committed a mistake in applying the law and the parties cannot seek redress for the mistake itself, it remains true that the arbitrator technically failed to perform what the parties had entrusted him or her with. But as addressed below, courts typically reject requests crafted under the pretenses of either provision that in effect ask the court to review the merits of the award.

A party may alternatively and broadly contest the award based on Article V(2)(b), which sets out the public policy exception.⁵⁴ Like the notion of public policy in general, the boundaries of Article V(2)(b) are opaque. Public policy is a notoriously vague term, for which the New York Convention does not offer a definition.⁵⁵ Simultaneously, public policy is also known as the argument that parties raise as a last resort when all else fails.⁵⁶ Considering its nature, public policy is thus bound to strike fear into the hearts of parties who seek to enforce an arbitral award precisely because it provides courts with wide discretion without set guidelines.

Courts have offered limited guidance on what constitutes “public policy.” As is the case with the abovementioned grounds, public policy cannot be used as a front to review the merits of an arbitrator’s decision.⁵⁷ Rather, its application should be limited to “cases of clear violations of fundamental, mandatory legal rules.”⁵⁸ The U.S. Court of Appeals for the Second Circuit, for instance, famously held that Article V(2)(b) requires a violation of the “fundamental principles of the law.”⁵⁹ Meeting this standard is difficult, for not every legal rule is a fundamental principle of the law. A mistake pertaining to principles of contract law involving private parties hardly seems like a clear violation of fundamental legal principles.

Contesting an arbitral award based on an error of law is all but certain to be an uphill battle. Ideally, parties should make every effort to ensure that mistakes do not become part of the arbitral award or immediately address them before the award is final. Once an award has been rendered, retroactively convincing a court to correct such a mistake will be an extremely difficult task.

⁵⁴ New York Convention, *supra* note 4, art. V(2)(b).

⁵⁵ MOSES, *supra* note 29, at 218 (“Public policy is not defined in the Convention, and thus presents the possibility of another broad loophole for refusing enforcement.”).

⁵⁶ BLACKABY ET AL., *supra* note 3, at 641 (citing the UK case of *Richardson v. Mellish* [1824] 130 Eng. Rep. 294, 303).

⁵⁷ See BORN, *supra* note 42, at 417 (explaining that “the public policy doctrine is not a basis for reviewing the substance of the arbitrators’ award in an annulment action.”).

⁵⁸ *Id.*

⁵⁹ *Parsons & Whittemore Overseas Co. v. Societe Generale De L’Industrie Du Papier*, 508 F.2d 969, 973 (2nd Cir. 1974).

B. *The U.S. Notion of Manifest Disregard*

As seen above, parties who seek to contest an arbitral award based on an error of law have little recourse. But in the U.S., a separate legal doctrine for the annulment of arbitral awards based on an error of law exists. U.S. courts have held under limited circumstances that besides the statutory grounds stipulated by the Federal Arbitration Act (FAA), arbitral awards may also be annulled under certain common law grounds.⁶⁰ In particular, much interest has been given to what is known as the “manifest disregard” doctrine that was born out of a single footnote by the U.S. Supreme Court in the 1953 case of *Wilko v. Swan*.⁶¹

Essentially, the manifest disregard doctrine allows a court to annul an arbitral award if an arbitrator’s decision “exceeds the arbitrator’s authority or exhibits a manifest disregard for the governing law.”⁶² A simple error does not meet the manifest disregard standard, as the arbitrator must knowingly refuse to apply the law.⁶³ Considering its uniqueness, the manifest disregard doctrine is certainly relevant and worth addressing before the next section of this Article.

Much like the corresponding laws of other signatories to the New York Convention, the text of the FAA does not permit courts to overturn an arbitral award based on an error of law.⁶⁴ Under the FAA, so long as an arbitral award is “within the submission and contains the honest decisions of the arbitrators after a full and fair hearing of the parties,” a judge may not overturn it based on a simple error of law or fact.⁶⁵ Instead, the FAA only permits parties to seek annulment of an arbitral award for grounds such as arbitrators engaging in corruption, fraud, misconduct, or exceeding their arbitral authority.⁶⁶

Notwithstanding the FAA, however, the manifest disregard doctrine may provide a party on the losing end of an arbitration with another avenue

⁶⁰ These include violations of public policy as well as awards that are capricious, arbitrary, or irrational. Julio Cesar Rivera Jr., *The Review of Arbitral Awards’ Manifest Errors of Law in Annulment Actions in the United States and in Argentina*, 29 AM. REV. INT’L ARB. 397, 402 (2018).

⁶¹ *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (stating that “the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.”).

⁶² *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568 (1985) (Brennan, J., concurring).

⁶³ Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L. J. 234, 236 (2007).

⁶⁴ *Ware*, *supra* note 33, at 57.

⁶⁵ *Burchell v. Marsh*, 58 U.S. 344, 345 (1854); *Ware*, *supra* note 33, at 61.

⁶⁶ 9 U.S.C. § 10 (2002).

to contest an arbitral award, both of the domestic and foreign variety, outside of the framework of the FAA on the basis of an error of law. The prerequisite for the manifest disregard doctrine to apply is that the concerned arbitrator refused to apply the law altogether.⁶⁷ Indeed, based on the isolated and somewhat ambiguous footnote by the U.S. Supreme Court in *Wilko v. Swan*, U.S. courts have relied on the manifest disregard doctrine to annul arbitral awards.⁶⁸

Nevertheless, it is unrealistic in practice to expect an arbitral award to be overturned on the grounds of manifest disregard.⁶⁹ This is especially so in light of the U.S. Supreme Court's 2008 case of *Hall Street Associates v. Mattel, Inc.*, which cast serious doubt on the future of the manifest disregard doctrine as a non-FAA basis to annul arbitral awards.⁷⁰ In that case, the Court clarified that the grounds stated in the FAA are the *exclusive* means for parties to seek annulment of arbitral awards.⁷¹ Logically, the Court's sudden realization also jeopardized other common law grounds that previously may have been available to courts.⁷²

In light of the Court's stance, the feasibility of the manifest disregard doctrine is in peril.⁷³ To be fair, the U.S. Supreme Court did not outright declare the manifest disregard doctrine obsolete and, as a result, the various courts of appeals remain split on whether judges can annul arbitral awards based on an error of law.⁷⁴ For example, the doctrine has persisted in the Second Circuit.⁷⁵ However, on balance, the present status of the manifest disregard doctrine is "tenuous at best"⁷⁶ and, in the rare cases where it was

⁶⁷ Ware & Maleck, *supra* note 19, at 119.

⁶⁸ Jonathan J. Tompkins, 'Manifest Disregard of the Law': *The Continuing Evolution of an Historically Ambiguous Vacatur Standard*, 12 DISP. RESOL. INT'L 145, 146 (2018).

⁶⁹ Rivera, *supra* note 60, at 402 (stating that "the survival of those non-statutory grounds after the U.S. Supreme Court decision in *Hall Street Associates v. Mattel* is unclear."); Theodore J. Folkman & David Lee Evans, *Choice of Law*, in ARBITRATION OF INTERNATIONAL INTELLECTUAL PROPERTY DISPUTES 400 (Thomas D. Halket ed., 2012) (remarking that "the manifest disregard doctrine—if it exists—is a very high hurdle to a challenge of an arbitration award.").

⁷⁰ *Hall St. Assocs. v. Mattel*, 552 U.S. 576 (2018); Annie Chen, *The Doctrine of Manifest Disregard of the Law after Hall Street: Implications for Judicial Review of International Arbitrations in U.S. Courts*, 32 FORDHAM INT'L L.J. 1872, 1876 (2009).

⁷¹ *Hall St. Assocs.*, 552 U.S. 576.

⁷² Rivera, *supra* note 60, at 402.

⁷³ BLACKABY ET AL., *supra* note 3, at 594.

⁷⁴ Tompkins, *supra* note 68, at 152-54.

⁷⁵ *Schwartz v. Merrill Lynch & Co., Inc.*, 665 F.3d 444, 452 (2d Cir. 2011).

⁷⁶ Tompkins, *supra* note 68, at 162.

accepted, U.S. courts of appeals have construed the doctrine narrowly.⁷⁷ Therefore, manifest disregard cannot be deemed a reliable contingency plan to contest a valid arbitral award. At the same time, the manifest disregard doctrine has failed to venture outside of the U.S. and influence foreign courts to follow suit. It is a phenomenon restricted to the U.S. legal arena.

Another thing to point out is that manifest disregard is only a remedy to *annul* an arbitral award. The doctrine does not allow parties to contest the enforcement and recognition of a foreign arbitral award in the U.S. on its basis. Once again, in signatory states to the New York Convention, as a general principle, Article V sets the exclusive grounds to contest the recognition and enforcement of a foreign arbitral award. States are free to grant additional protection because Article V of the New York Convention is a floor, not a ceiling. However, states are highly unlikely to go leaps and bounds beyond that floor. The swift rise and apparent decline of the manifest disregard doctrine in the U.S. is thus interesting and certainly worth noting, yet once again demonstrates the sturdiness of arbitral awards.

III. WHAT CONSTITUTES AN ERROR OF LAW: THE KOREAN EXAMPLE

A. *Statutory Provisions*

Based on the discussion above, arbitral awards are largely impervious to challenges based on an error of law. But how exactly would an arbitrator commit an error of law in the context of an arbitration? To illustrate, this Article turns to primary and secondary sources of Korean law, which is increasingly used in international arbitration,⁷⁸ and examines what an error of law would be under each source.

The general framework of the Korean legal system was modeled directly after the Japanese system, which means it was indirectly influenced by the German system as well.⁷⁹ As a natural consequence, Korea observes

⁷⁷ *Id.* at 163 (stating that “the doctrine in most US Circuit Courts of Appeals has been applied both rigorously and sparingly.”). For example, United States District Court for the Western District of North Carolina vacated a domestic arbitral award for manifest disregard after finding that North Carolina law does not recognize the cause of action on which the award was based. Even then, the Court of Appeals disagreed and reinstated the arbitral award. *Warfield v. Icon Advisers, Inc.*, 26 F.4th 666, 666 (4th Cir. 2022).

⁷⁸ The number of Korean parties participating in international transactions and projects has been increasing. As one example, disputes involving South Korean parties now comprise a significant portion of the International Chamber of Commerce’s caseload. *ICC Dispute Resolution 2020 Statistics*, INT’L CHAMBER OF COM., <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf> (last visited Oct. 28, 2022). In consequence, the likelihood of Korean law being the governing law of international contracts has correspondingly increased. Benjamin Hughes & David Kim, *Nothing to Fear: Korean law as the governing law of arbitration*, SHIN & KIM, <https://www.shinkim.com/attachment/803> (last visited Apr. 3, 2022).

⁷⁹ Seung Wha Chang, *The Role of Law in Economic Development and Adjustment Process: The Case of Korea*, 34 INT’L L. 267, 276 (2000); GEORGE MOUSOURAKIS, *ROMAN LAW AND THE ORIGINS OF THE CIVIL LAW TRADITION* 300 (2015).

the civil law tradition. Thus, first and foremost, written laws serve as the primary source of Korean law.⁸⁰ The strongest appeal of written laws are that they help “establish legal unity within the boundaries of a nation-state, and develop a rational, systemized, and comprehensive legal system adapted to the conditions of the times.”⁸¹ Written laws therefore help promote stability and predictability in the application of legal principles. According to those who insist on the superiority of the civil law tradition over common law, the comparatively straightforward nature of the civil law system is its greatest asset.⁸²

There are, of course, several different sources of written laws. As a constitutional democracy, Korean law naturally starts with the text of the Constitution of Korea.⁸³ While characterized as a written constitution,⁸⁴ the Constitutional Court of Korea has confusingly held that the Constitution also includes an unwritten portion.⁸⁵ Regardless of form, the Constitution of Korea is held in high esteem in the Korean legal system and prevails whenever it clashes with any other source of law. Naturally, the Constitution of Korea is the ultimate source of law from which any deviations are to be struck down as unconstitutional. Aside from the Constitution, further written laws take the form of statutes (acts) and subordinate rules, such as ordinances and presidential decrees, that are subservient to and enacted in accordance with statutes.⁸⁶

In a civil law system like Korea, judges do not officially create written laws, or laws in general per se.⁸⁷ That task belongs to the legislative branch, which enacts new laws while also repealing and amending existing ones in tandem with and in reflection of various sociopolitical factors.⁸⁸ The 300-member unicameral National Assembly is specifically tasked with that

⁸⁰ KIPYO KIM, INTRODUCTION TO KOREAN LAW 6 (2013).

⁸¹ MOUSOURAKIS, *supra* note 79, at 287.

⁸² Robert L. Henry, *Jurisprudence Constante and Stare Decisis Contrasted*, 15 A.B.A. J. 11, 13 (1929) (arguing that civil law rules are superior compared to common law rules because they are akin to the “trunk, limbs, and branches” of a tree, which are easily identifiable, whereas common law principles resemble the many “leaves” of the tree).

⁸³ KIM, *supra* note 80, at 7.

⁸⁴ NAK IN SUNG, HUNBEOBHAK [Study of Constitutional Law] 122 (2015).

⁸⁵ In a rather infamous decision, the Constitutional Court of Korea relied on principles originally derived from German constitutional law that the designation of Seoul as the capital of South Korea constitutes customary constitutional law. Hunbeopjaepanso [Const. Ct.], Oct. 21, 2004, 2004Hunma554 (S. Kor.).

⁸⁶ KIM, *supra* note 80, at 6-7.

⁸⁷ This notion will be addressed in greater detail in a subsequent section. *See infra* Part IV.C.

⁸⁸ *See* MOUSOURAKIS, *supra* note 79, at 297.

role in Korea,⁸⁹ subject to promulgation of such acts by the President.⁹⁰ In the same manner as the Constitution, acts may restrict the rights and freedoms of Korean nationals so long as they do not encroach upon essential elements of individual rights and freedoms.⁹¹ Considering that Korea went through an extended period of military rule, the National Assembly's lawmaking function is in some ways especially appreciated in today's atmosphere.⁹²

From a practical standpoint, it is impossible for the National Assembly to legislate a sufficient number of acts to account for every single possible situation that might arise in a real-life context. Subordinate rules passed by other governmental branches are necessary for that reason. The Constitution thus grants the President of Korea the authority to directly issue presidential decrees.⁹³ Additionally, the National Assembly may partially delegate a narrow scope of its own rulemaking authority to the President, while the Prime Minister of Korea and other ministers are similarly authorized to issue certain ordinances.⁹⁴ Each category of these ordinances falls within the scope of binding "legal rules" rather than administrative guidance, which has a limited legal effect. It logically follows that any acts or subordinate rules which clash with the text of the Constitution will be deemed unconstitutional and struck down.⁹⁵ Combined, these three broad categories comprise the full body of written laws in Korea.

The civil law tradition dictates that statutory law shall take precedence over other sources of law.⁹⁶ If there is a clash between the two, the former shall prevail. Fitting for a civil law jurisdiction, written laws are therefore supreme in Korea. But of course, just as common law systems cannot exist without some degree of codification,⁹⁷ civil law systems are

⁸⁹ DAEHANMINKUK HUNBOB [HUNBOB] [CONSTITUTION] art. 52 (S. Kor.).

⁹⁰ KIM, *supra* note 80, at 8.

⁹¹ *Id.*

⁹² See Woo-young Rhee, *Partnerships for Sustainability: NGO and Community Participation in Lawmaking in South Korea*, 10 J. KOR. L. 239, 248 (2011) ("The legislative process under the representative democracy in South Korea constitutes a core part of the nation's political process in that the process sets forth as norms the perceptions of public good held by the constituents while reflecting their preferences through their representatives.").

⁹³ DAEHANMINKUK HUNBOB [HUNBOB] [CONSTITUTION] art. 75 (S. Kor.).

⁹⁴ KIM, *supra* note 80, at 10.

⁹⁵ The Constitutional Court of Korea, rather than the Supreme Court of Korea, generally performs this role. Hunbeobjaepansobeob [Constitutional Court Act] art. 2 (S. Kor.).

⁹⁶ MOUSOURAKIS, *supra* note 79, at 307.

⁹⁷ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 117 (1994) (noting that "[c]odification was a

also inoperable solely on the basis of statutory law. Rather, written laws must be influenced and augmented by other sources of law for the system to function properly.⁹⁸ As detailed in the following sections, the Korean legal system openly admits and seeks compromise with this reality. Korean law recognizes that legal rules created by other sources are necessary to some extent.

In the context of international commercial arbitrations governed by Korean law, it is fairly easy to identify the few specific statutes that are likely to be most relevant. Since international commercial arbitration principally concerns *civil* disputes, meaning disputes arising from commercial and contractual relationships, the Civil Code (Act)⁹⁹ of Korea, which covers the fields of contracts, torts, and other pertinent areas of the law, will be indispensable.¹⁰⁰ Furthermore, the Arbitration Act would also be relevant for arbitrations seated in Korea in regard of procedural issues, as well as any matters surrounding the annulment or enforcement of arbitral awards. Finally, where applicable, mandatory statutory provisions would play a role.

Arbitral tribunals that apply Korean law should apply the pertinent statutory provisions, as argued by counsel on both sides, in a correct manner. Failure to do so or to render an incorrect interpretation of statutory law would thereby constitute an error in the application of Korean law. For example, an arbitral tribunal might bungle an argument rooted in change of circumstances (hardship). The Civil Code of Korea has no direct corresponding provision for change of circumstances. This may convince arbitrators that Korean law does not recognize change of circumstances. But the truth is, the Korean Civil Code does indirectly address change of circumstances via different provisions.¹⁰¹ Thus, arbitrators would be mistaken to base their conclusions in arbitral awards on the presumption that Korean law does not recognize change of circumstances.

perennial issue in American legal history.”); RICHARD SCHAFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 49 (9th ed. 2015) (“Both systems rely on legislative codes, or statutes, as the primary source of law.”).

⁹⁸ See MOUSOURAKIS, *supra* note 79, at 296 (“The codes constitute a new point of departure in the development of the civil law, but its history obviously does not end with their enactment.”).

⁹⁹ The official title of the act (*minbeob*) is typically translated in English as either “Civil Code” and “Civil Act.”

¹⁰⁰ See Hughes, *supra* note 7, at 109 (stating that most foreign arbitral awards that parties submit or recognition and enforcement “deal with commercial matters”).

¹⁰¹ Jae-Hyung Kim, *Gyeyagui haeje/haeji, wiheombudam, sajeongbyeongyeonge gwanhan minbeobgaejeongan* [*The Proposed Amendment to the Korean Civil Code on Rescission and Termination of the Contract, Risk of Loss, and Change of Circumstance*], 55 SEOULDAEHAKGYO BEOPHAK J. 3, 7 (2014). They are: Articles 537-38 and 543-53. *Minbeob* [Civil Act] art. 537-38, 543-53 (S. Kor.).

B. *Treaties and International Law*

International law serves as an additional source of written law in Korea.¹⁰² The Constitution of Korea equates with domestic law the ‘generally recognized rules of international law,’ and international treaties the Korean government has entered into.¹⁰³ On a theoretical level, that means Korea has adopted a “monist” view toward international law and consequently imbues international law with the same legal force as domestic Korean law.¹⁰⁴ International treaties such as the New York Convention are thus, direct sources of law in Korea without the need for them to be separately implemented into the domestic legal framework.¹⁰⁵ Neither the National Assembly nor the judicial branch is required to take additional action to give legal effect to treaties because the Constitution explicitly states as such; although they may do so anyway for the purpose of providing clarification.¹⁰⁶ But as a general rule, the legal effect should be identical regardless of whether or not a treaty has been officially approved by the National Assembly.¹⁰⁷

In contrast, in “dualist” countries such as the U.K. and Canada, a treaty does not automatically become part of their domestic law.¹⁰⁸ Implementation through domestic legislation is a necessity for a treaty to have domestic legal effect.¹⁰⁹ Between the two extremes exist hybrid jurisdictions like the U.S.¹¹⁰ Provided that the Senate approves it by a two thirds vote,¹¹¹ a treaty has legal effect in the U.S. if one of two situations is true: either the Senate has “executed” a treaty via domestic legislation, or a

¹⁰² SUNG, *supra* note 84, at 122.

¹⁰³ DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 6 (S. Kor.).

¹⁰⁴ See JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 23 (2006).

¹⁰⁵ As of Dec. 31, 2020, the Korean government entered into more than 3,000 bilateral and multilateral treaties. *Treaty Making by the ROK*, MINISTRY OF FOREIGN AFFAIRS, https://www.mofa.go.kr/eng/wpge/m_5439/contents.do#part2 (last visited Apr. 30, 2022).

¹⁰⁶ The Arbitration Act of Korea, for example, prescribes that the New York Convention shall apply to all matters pertaining to the recognition and enforcement of foreign arbitral awards. See Joongjaebeob [Arbitration Act] art. 38 (S. Kor.).

¹⁰⁷ Tae-Young Jang, *Gukjeinkwonjoyakeui hyoryuk, jeokyong, haeseok* [Domestic legal effect, Application and Interpretation of International Human Rights Treaties], 42 MINSAPANRYEYONGU 1009, 1029 (2020) (S. Kor.). This is the same in other civil law jurisdictions such as the Netherlands. BORN, *supra* note 48, at 136.

¹⁰⁸ JACKSON, *supra* note 104, at 23; SCHAFFER ET AL., *supra* note 97, at 31.

¹⁰⁹ BORN, *supra* note 48, at 136.

¹¹⁰ SCHAFFER ET AL., *supra* note 97, at 31 (“Whether a treaty is self-executing or not depends on the wording and history of the treaty itself and the intent of Congress.”).

¹¹¹ U.S. CONST. art. II, § 2, cl. 2.

treaty is by its nature “self-executing.”¹¹² In the first instance, the Senate must separately enact implementing legislation.¹¹³ Alternatively, a treaty automatically becomes effective upon ratification without requiring the Senate to act if it is self-executing.¹¹⁴

A comparison between the Vienna Convention on Consular Relations, which is self-executing, and other treaties might help. With respect to the former, the concerned Senate meetings make it clear that the treaty was intended to be self-executing.¹¹⁵ The same cannot be said for the U.N. Convention Against Torture, which the U.S. signed and ratified while clarifying that a significant portion of it would require domestic implementation.¹¹⁶ Even the status of the New York Convention, including its relationship with the FAA, is subject to a great amount of debate.¹¹⁷

Korea fortunately takes a much simpler stance than dualist or hybrid states. Indeed, Korea automatically incorporates all treaties as part of its domestic laws even if they are not explicitly stated as such or separately implemented by the National Assembly. If any part of a treaty clashes with a provision of the Constitution of Korea, the outcome is obvious; upon being challenged, the Constitutional Court would strike the treaty down since the Constitution is supreme.¹¹⁸

What if there is a clash between a provision in a statute and the terms of a treaty? Since both treaties and statutes are on equal footing as binding written laws, one source of law cannot automatically take precedence over the other. Where such a clash occurs, the familiar legal maxims of *lex specialis*¹¹⁹ and the rule that the later law shall prevail are applicable. In other words, provided that the statutory provision and the international

¹¹² BORN, *supra* note 48, at 131-32. See generally Stephen P. Mulligan, *International Law and Agreements: Their Effect upon U.S. Law*, CONG. RSCH. SERV. (Sept. 19, 2018), <https://sgp.fas.org/crs/misc/RL32528.pdf>.

¹¹³ Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995).

¹¹⁴ *Cook v. United States*, 288 U.S. 102, 119 (1933) (“For in a strict sense, the Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions.”).

¹¹⁵ Sabina Veneziano, *The Right to Consular Notification: The Cultural Bridge to a Foreign National's Due Process Rights*, 49 GEO. J. INT'L L. 501, 507-08 (2018).

¹¹⁶ Michael John Garcia, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, CONG. RSCH. SERV. (Jan. 21, 2009), <https://sgp.fas.org/crs/intel/RL32276.pdf>.

¹¹⁷ See generally BORN, *supra* note 48.

¹¹⁸ Jae Ho Sung, *Hunbeobjaepangwa gukjaebeobeui jonjeung* [International Law in the Decisions of Constitutional Court], 31 STUD. AM. CONST. 175, 206 (2020) (S. Kor.).

¹¹⁹ The principle of *lex specialis* prescribes that “special law (*lex specialis*) derogates from general law (*lex generalis*), so that the more detailed and specific rule will have priority.” MALCOLM SHAW, INTERNATIONAL LAW 66 (6th ed. 2008).

treaty are entitled to have the same legal effect, the rule that is more specific or was introduced into the Korean legal system at a later date shall prevail.¹²⁰

In the meantime, what the Constitution of Korea means by ‘generally recognized rules of international law’ is less clear. This is not surprising since this notion is the subject of much uncertainty in international law in general. There is no disagreement that the notion exists per se, as evidenced by the Statute of the International Court of Justice.¹²¹ Some argue that relevant decisions rendered by international and domestic tribunals provide the clearest guidelines.¹²² Still, it is difficult, if not impossible to draw clear boundaries for the notion. Because the concept arises from both international and domestic law, there will always be disagreements over its specific scope.¹²³

In Korea, many in the academic circles argue that the notion encompasses customary international law, which are universal, unwritten, and non-negotiated rules of international law,¹²⁴ as well as widely accepted treaties, even if the Korean government has not ratified them.¹²⁵ In theory, their argument means Korea might actually and implicitly be bound by a substantial number of treaties.¹²⁶ Naturally, such view is subject to criticism. After all, it conflicts with Article 26 of the Vienna Convention on the Law of Treaties, which states that treaties are only “binding upon the parties to it.”¹²⁷ Article 26 of the Vienna Convention, therefore, explicitly prescribes that states are only bound by treaties they have executed. As such, it would be more appropriate to conclude that ‘generally recognized rules of international law’ as stated in the Constitution of Korea simply refers to customary international law.¹²⁸ Put that way, international law can give rise to unwritten laws as well.

¹²⁰ Jang, *supra* note 107, at 1028.

¹²¹ Article 38 of the pertinent statute states that the International Court of Justice shall apply, among other sources of international law, “the general principles of law recognize by civilized nations.” Statute of the International Court of Justice, art. 38.

¹²² M. Cheriff Bassiouni, *A Functional Approach to “General Principles of International Law,”* 11 MICH. J. INT’L L. 768 (1990).

¹²³ *Id.* at 771-72.

¹²⁴ Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT’L L. 563, 567 (2016).

¹²⁵ Jae Ho Sung, *Joyakgwa ilbanjueuro seungindwaen gukjebeobgyu* [Treaties and Generally Recognized Rules of International Law provided in Korean Constitution Article 6.1], 28 STUD. AM. CONST. 109, 117 (2017) (S. Kor.).

¹²⁶ *Id.* at 117-18.

¹²⁷ *Id.* at 118; Vienna Convention on the Law of Treaties art. 26.

¹²⁸ See Sung, *supra* note 125, at 118 (stating that this is the shared view of international law scholars).

In practice, unlike investment treaty arbitration, international law would most likely be irrelevant in the context of commercial arbitrations between private parties. More likely than not, the role of international law would be most pertinent in matters concerning states instead of private parties. The only exception might be the United Nations Convention on Contracts for the International Sale of Goods, which, provided that the requirements are met, only applies to “contracts of sale of goods between parties whose places of business are in different States.”¹²⁹ In the unlikely event that international law does play a role in a commercial arbitration, arbitral tribunals applying Korean law must ensure that their decisions align properly with any treaty Korea has entered into, while being allowed a greater amount of discretion when it comes to customary international law. On the other hand, noticeable deviations from such rules of international law would constitute an error of Korean law.

C. Jurisprudence Constante and Beyond: Secondary Sources of Law

Here, perceptions and expectations start to diverge from reality. Korea is identified as a civil law jurisdiction. The prevailing perception is that civil and common law traditions treat judicial precedents in contrasting ways when it comes to their legal effect.¹³⁰ As stated above, Korea is certainly a civil law jurisdiction since its Civil Code (*minbeob*) was closely modeled after the respective civil codes of Japan and Germany.¹³¹ Accordingly, Korean law does not adhere to the rule of *stare decisis*.¹³² In Korea, legal precedents are not an official source of law.¹³³ At least in theory, Korean judges are then free from the chains of precedent and their authority to render judgments of their own volition is curbed only by official sources of law.¹³⁴ For example, a lower court may openly refuse to apply relevant

¹²⁹ United Nations Convention on Contracts for the International Sales of Goods art. 1, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]. In practice, parties to an international commercial contract often choose to exclude the application of the CISG. CISG art. 6.

¹³⁰ Marko Novak, *Ensuring Uniform Case Law in Slovenia: Jurisprudence Constante, Stare Decisis, and a Third Approach*, 27 STUDIA IURIDICA LUBLINENSIA 131, 134 (2018).

¹³¹ Again, it would be more accurate to state that the Civil Code of Korea was drafted based on that of Japan, which was in turn modeled after the German civil code. Still, there is no question that the German civil code both directly and indirectly influenced Korean law. MOUSOURAKIS, *supra* note 79, at 300.

¹³² KIM, *supra* note 80, at 7.

¹³³ *Id.* at 16 (“Unlike in common law jurisdictions, case law in Korea is not deemed a source of law.”).

¹³⁴ Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L.J. 71, 78 (1997) (“Under the Korean system, a statute takes precedence over a court decision in its authority as the ‘source of law,’ and the doctrine of

prior decisions by the Supreme Court of Korea when the decision is based on sound principles of statutory law. Korean judges are only required to base their decisions on the Constitution, acts and subordinate ordinances, and their conscience.¹³⁵

However, the Constitution of Korea's inclusion of the concept of "conscience" among the other sources of law seemingly implies that Korean judges have discretion to give legal effect to judicial precedents in a de facto manner, albeit to a lesser degree than statutory or customary law. Article 1 of the Civil Code of Korea also states that *customary law* shall apply to a legal issue where no relevant statutory provisions are applicable and "sound reasoning" or nature of the case shall apply if no principles of customary law exist either.¹³⁶ Korea's stance is thus similar to Louisiana, which is a mixed civil-common law jurisdiction,¹³⁷ and especially echoes the Louisiana Civil Code's instruction for judges to resort to "equity" if neither legislation nor custom on a particular point of the law is identifiable.¹³⁸

Korean lawyers and judges pay a significant amount of respect to prior court decisions. Judges must especially understand that some level of gap filling is unavoidable.¹³⁹ But more specifically, Article 8 of the Judicial Organization Act explicitly states that decisions rendered by a higher court shall be binding on lower courts in respect of the same matter.¹⁴⁰ Similarly, the Constitutional Court of Korea can only *overrule* its own precedent by majority vote.¹⁴¹ This is somewhat perplexing because if Korean courts cannot create legal rules, there would be no need to authorize the Constitutional Court to overrule precedents.

Lower courts in civil law jurisdictions typically adhere to legal precedents by higher courts even though they are not required to do so.¹⁴²

stare decisis does not have a solid tradition. Since any court has independent legal power to interpret the law as it sees fit, judges of lower courts, at least in theory, can render a decision contrary to the ruling of higher courts.").

¹³⁵ DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 103 (S. Kor.).

¹³⁶ Minbeob [Civil Act] art. 1 (S. Kor.).

¹³⁷ Mary Garvey Algero, *Considering Precedent in Louisiana: Balancing the Value of Predictable and Certain Interpretation with the Tradition of Flexibility and Adaptability*, 58 LOY. L. REV. 113, 117-18 (2013) ("Nowhere in the Civil Code or in any other Louisiana legislature or constitutional documents are prior decisions identified as sources of law.").

¹³⁸ 18 LA. CIV. CODE ANN. arts. 1, 4 (2011); Algero, *supra* note 137, at 117.

¹³⁹ See SCHAFFER ET AL., *supra* note 97, at 49 ("Where there are gaps in the code law, the judge will draw from the code's principles and doctrine to decide a case.").

¹⁴⁰ Beobwonjojikbeob [Court Organization Act] art. 8 (S. Kor.).

¹⁴¹ Hunbeobjaepansobeob [Constitutional Court Act] art. 23 para. 2 subpara. 2 (S. Kor.).

¹⁴² MOUSOURAKIS, *supra* note 79, at 307.

Korea is no different in that aspect¹⁴³ because Korean law recognizes legal precedents as binding legal principles in a de facto capacity. While Korean judges are not legally obligated to abide by judicial precedents, they nevertheless feel compelled to do so. If they do deviate from precedents, however, their decisions are likely to be overturned upon appeal.¹⁴⁴ Even without officially recognizing *stare decisis*, this risk is enough to incentivize judges to participate in lawmaking.

The chains of precedent that bind Korean judges are perhaps invisible, but they are undeniably real. Korean courts practice de facto *stare decisis*.¹⁴⁵ Fundamentally, there are limited differences between how common law and civil law judges perform their respective roles.¹⁴⁶ As a result of the continuous interaction between civil and common law over the decades, the purported differences between the two systems are disappearing.¹⁴⁷ Having uncovered the actual practice, it should not be surprising that despite being a civil law jurisdiction, judicial precedents play an active role in the development of Korean law.¹⁴⁸

As a matter of fact, case law is not the only unwritten source of law in Korea. Setting aside the unwritten portion of the Constitution and customary international law, as noted above, Article 1 of the Civil Code explicitly allows judges to rule on the basis of customary law.¹⁴⁹ In addition, scholars accept natural law as an additional unwritten source of Korean

¹⁴³ KIM, *supra* note 80, at 16.

¹⁴⁴ See *id.* at 6 (it is obvious that in Korea “the Supreme Court decisions are regarded as the secondary source of law.”); MOUSOURAKIS, *supra* note 79, at 307 (noting the “strong tendency on the part of civil law judges to follow precedents, in particular those of the higher courts.”); Dong-heon Chae, *Letters of Credit and the Uniform Customs and Practice for Documentary Credits: The Negotiating Bank and the Fraud Rule in Korea Supreme Court Case 96 DA 43713*, 12 FLA. J. INT’L. 23, 38 (1998) (stating that while Korean law does not affirmatively recognize *stare decisis*, “in practice, precedent has a strong influence on Korean courts, particularly with regard to decisions of the Supreme Court.”).

¹⁴⁵ Similarly, Japanese judges engage in a fair amount of lawmaking. See generally John O. Haley, *The Role of Courts in “Making” Law in Japan: The Communitarian Conservatism of Japanese Judges*, 22 PAC. RIM L. & POL’Y J. 491 (2013).

¹⁴⁶ Arthur von Mehren, *The Judicial Process: A Comparative Analysis*, 5 AM. J. COMP. L. 197, 223 (1956) (noting that between the U.S., Germany, and France, “[t]oday in these three systems no marked difference exists with respect to this potential limitation on judicial lawmaking.”).

¹⁴⁷ MOUSOURAKIS, *supra* note 79, at 308 (“Few would deny that the civil law is gradually converging with the common law, at least to the extent of its growing reliance on case law.”).

¹⁴⁸ Marie Seong-Hak Kim, *Customary Law and Colonial Jurisprudence in Korea*, 57 AM. J. COMP. L. 205, 241 (2009) (“The Supreme Court supported a number of colonial laws and precedents for the sake of stability of law.”).

¹⁴⁹ Minbeob [Civil Act] art. 1 (S. Kor.).

law.¹⁵⁰ In a sense, Korean law is the product of a pragmatic compromise between the objective of the civil law tradition and reality. It acknowledges that the Constitution cannot account for every small detail or possibility. For that reason, case law is a firmly-established source of law in Korea.¹⁵¹

Legal treatises, textbooks, and articles can also be accepted as secondary sources of Korean law. They can operate by indirectly influencing court decisions and educating future legal practitioners.¹⁵² Similar to judicial precedents, legal treatises, textbooks, and articles are not legally binding on judges. Nevertheless, there is no question that some of these secondary sources are significantly valued by judges because they are viewed as correct interpretations of primary sources of Korean law. In particular, the opinions of eminent academics are highly respected in Korea, such that it might be unfair to label them as merely secondary sources of Korean law. In consideration of the above, one may question whether to label Korea as a civil law jurisdiction.¹⁵³

Consequently, Korean practitioners cite judicial decisions as well as textbooks or journal articles by eminent academics to support their respective positions. For their part, judges strive to ensure that their decisions align with what they believe to be the correct law. In conclusion, failure to abide by judicial precedents, especially those rendered by the Supreme Court of Korea, or other sources of non-statutory law that the higher court respects would be described as an error of law. At a quick glance, one might conclude that Korean courts are entitled to render “floating” decisions that exist independently of such sources of soft law. While reasonable, such a conclusion would be incorrect, as a “floating” decision would be deemed to be erroneous in the grand scale of things.

In this manner, Korean courts operate in a unique ecosystem. Despite the absence of *stare decisis*, Korean courts are highly pragmatic and flexible when it comes to the treatment of precedent. The same preference for pragmatism and flexibility helps Korean courts effectively assist the practice of international arbitration in Korea,¹⁵⁴ and it is with such attitude that they encounter and review challenges to arbitral awards.

¹⁵⁰ SUNG, *supra* note 8484, at 122 (listing natural law, customary law, and case law as the unwritten sources of Korean law).

¹⁵¹ *Id.*

¹⁵² See MOUSOURAKIS, *supra* note 79, at 304 (stating that legal scholars and academics in civil law systems “generally enjoy more prestige than judges, for the duty of the civil law judge is to apply the written law whose meaning is discovered largely through the work of academic scholars.”).

¹⁵³ See Chang, *supra* note 79, at 276 (concluding that “the question of whether the Korean legal system is based on the civil-law or common-law structure is of little significance, at least regarding economic laws.”).

¹⁵⁴ See generally Junsang Lee & Young Shin Um, *The Role of Korean Courts in*

IV. CAN KOREAN COURTS CORRECT ARBITRAL AWARDS BASED ON AN ERROR OF LAW?

A. *Contesting an Arbitral Award in Korea*

When it comes to flexibility, however, Korean courts cannot compare to arbitrators. As addressed above, even if the law and any error concerning it are clear, arbitrators are not *legally obligated to apply the correct law*. The Arbitration Act of Korea imposes no such requirement on Korean soil.¹⁵⁵ For purists, perhaps it is fortunate that judges have the final say over arbitrators.¹⁵⁶ Regardless, since the Arbitration Act of Korea does not allow parties to appeal an arbitral award, Korean courts can only encounter objections to arbitral awards—including those involving an error of law—in two possible situations.¹⁵⁷ First, as the presiding court of the seat of an arbitration, they might be asked to annul an arbitral award rendered through an arbitration seated in Korea. Second, as the court of enforcement, they might be asked to reject enforcement of a foreign arbitral award, meaning it was rendered outside of Korea. But are Korean courts in fact empowered to stop rogue arbitrators at the annulment or enforcement stage?

Before we can answer this question, we must first address what a “foreign” arbitral award is. Each jurisdiction determines what qualifies as a “foreign” arbitral award within its territory.¹⁵⁸ For that reason, we must turn to Korean law in order to set the boundaries of what qualifies as a “foreign” arbitral award in Korea. The Arbitration Act of Korea does not define the term and, famously, neither does the New York Convention.¹⁵⁹ On this point, Article 2 of the International Arbitration Rules of the Korean Commercial

International Arbitration Proceedings – Procedural Issues, 72 DISP. RESOL. J. 83, 83 (2017).

¹⁵⁵ In contrast, once again, judges must apply the law. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 103 (S. Kor.).

¹⁵⁶ The extent to which judges can control arbitrations may differ from jurisdiction to jurisdiction, but it is unanimous that they have some final say over arbitrations that fall within their sphere of influence. See William W. Park, *Determining an Arbitrator’s Jurisdiction: Timing and Finality in American Law*, 8 NEV. L. J. 135, 142-43 (2007) (comparing the role of French judges to that of U.S. judges).

¹⁵⁷ *Id.* at 142 (stating that “when arbitral jurisdiction becomes an issue in the endgame, after an award is rendered, judges exercise a remedial function, correcting mistakes that allegedly occurred earlier in the arbitral process. The validity of an award might be subject to judicial scrutiny at the arbitral seat, through motions to vacate or to confirm under local law, or to recognize an award rendered abroad under the New York Arbitration Convention.”).

¹⁵⁸ This is an inquiry which must be made on a state-by-state basis. See BORN, *supra* note 42, at 485 (stating that “the character of an award as “foreign” varies depending on the state where this question is presented”).

¹⁵⁹ Judith Gill, *The Definition of Award under the New York Convention*, 2 DISP. RESOL. INT’L 114, 114 (2008).

Arbitration Board (the “KCAB”),¹⁶⁰ defines the term “international arbitration” as an arbitration in which at least one of the disputing parties has its principal place of business or habitual residence in a state other than Korea, *or* the seat of arbitration is a state other than Korea.¹⁶¹ From this, it seems that an arbitral award rendered in Korea might still be deemed a foreign arbitral award as long as one of the disputing parties belongs to a state other than Korea. Yet, notwithstanding the KCAB’s stance, the dominant theory is that *all arbitrations seated in Korea* are domestic arbitrations from Korea’s perspective.¹⁶² This interpretation is also consistent with Article I of the New York Convention, which limits the scope of the New York Convention to “the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.”¹⁶³

Therefore, to err on the side of caution, only arbitrations seated outside of Korea should be deemed *foreign arbitrations* capable of producing *foreign* arbitral awards subject to the New York Convention.¹⁶⁴ As for the enforcement of arbitral awards rendered in Korea, no such court-made legal doctrine akin to the abovementioned manifest disregard doctrine exists in Korea. That being the case, a party seeking to contest the enforcement of a foreign arbitral award must strictly rely on what the Arbitration Act of Korea does permit.

Per Article 37 of the Arbitration Act of Korea, domestic arbitrations must be enforced unless the award has not yet become binding on the parties, has been annulled, or any grounds for refusing recognition and enforcement under Article 36 exist.¹⁶⁵ But as touched upon below, Article 36 prescribes the grounds for *annulling* an arbitral award rendered in Korea.¹⁶⁶ Put together, that means the evaluation criteria for refusing recognition and enforcement of a domestic arbitral award is, for practical purposes, identical

¹⁶⁰ The KCAB is the only arbitral institution authorized by statute to administer arbitrations. Joongjaebeob [Arbitration Act] add. 3 (S. Kor.).

¹⁶¹ KCAB International Arbitration Rules art. 2(c) (2016).

¹⁶² Sue Hyun Lim, *Enforcement of Arbitral Awards Incompatible with the Korean Procedural Framework*, 30 J. OF ARB. STUD. 67, 77 (2020).

¹⁶³ New York Convention, *supra* note 4, art. I.

¹⁶⁴ In other words, any award rendered within a state cannot be a foreign award under the New York Convention when brought in front of that state’s courts for recognition and enforcement. *Id.* art. I. That means while an arbitral award rendered in Korea would be a domestic award from a Korean court’s perspective, it would be a foreign award if enforcement is sought outside of Korea.

¹⁶⁵ Joongjaebeob [Arbitration Act] art. 37. (S. Kor.).

¹⁶⁶ *Id.* art. 36. Attempts to challenge enforcement must also be based on Article 36 or the New York Convention. Doo-Sik Kim & David Kim, *An Overview of Recognition and Enforcement in Korea: Recent Arbitration Act Amendments and Case Highlights*, 72 DISP. RESOL. J. 91, 97 (2017).

to that for annulling a domestic arbitral award; Korean courts essentially conduct the exact same analysis in both cases.

Upon closer inspection, Article 36 is essentially a Korean translation of the UNCITRAL Model Law and Article V of the New York Convention with only Article V(1)(e) of the latter left out in its entirety.¹⁶⁷ With respect to challenging the recognition and enforcement of a foreign arbitral award, Article V of the New York Convention is once again controlling. This is because Article 39 of the Arbitration Act of Korea states that foreign arbitral awards shall be recognized and enforced in accordance with Article V. In short, to either seek annulment of an arbitral award rendered in Korea or challenge enforcement of a foreign arbitral award, a party has no choice but to go through the language of Article V of the New York Convention.

Nevertheless, successfully contesting an arbitral award through either pathway on Korean soil will be difficult. With respect to the enforcement of arbitral awards, the difficulty will be especially heightened since Korea is widely deemed an arbitration-friendly, pro-enforcement country when it comes to international arbitration.¹⁶⁸ Additionally, regardless of the specific governing law of each arbitration, Korean courts are not tasked with reviewing the legal merits of an arbitral award.¹⁶⁹ In line with the spirit of the New York Convention, the norm in Korea is for courts to recognize and enforce a foreign arbitral award unless extremely exceptional circumstances exist.¹⁷⁰ Further, the Supreme Court of Korea's strong favor of enforcement means lower court judgments that reject recognition and enforcement of an award are likely to be overturned on appeal.¹⁷¹

Of course, that does not mean contestation of an arbitral award in Korea is futile or not worth the effort. On the contrary, where the situation

¹⁶⁷ This particular provision allows domestic courts to refuse recognition and enforcement if the award has not become binding or has been set aside. New York Convention, *supra* note 4, art. V(1)(e).

¹⁶⁸ KWANG HYUN SUK, KUKJE MINSASOSONGBEOB: KUKJESABEOB (JULCHA PYEON) [International Civil Procedure: Private International Law (Procedural Edition)] 555 (2012). See Grant L. Kim, *Korea's "Bali Bali" Growth in International Arbitration*, 15 PEPP. DISP. RESOL. L.J. 615, 636 (2015) (describing Korea as providing a "generally arbitration-friendly judiciary."). This is attributable to the fact that "Korean courts maintain a supportive attitude toward arbitral proceedings, and respect the parties' agreement to resolve their dispute by arbitration." See Lee & Um, *supra* note 154, at 87.

¹⁶⁹ This is detailed in the following section. See *infra* Part IV.B.

¹⁷⁰ After all, the Supreme Court of Korea "has made it clear that Korean courts should give utmost deference to foreign arbitral awards rendered in New York Convention jurisdictions." Hughes, *supra* note 7, at 108.

¹⁷¹ See Benjamin Hughes, *Enforcement and Execution of Arbitral Awards in Korea: A Cautionary Tale*, 16 ASIAN DISP. REV. 94, 97 (2014). ("The Supreme Court has an excellent track record in recognising and enforcing arbitral awards, both foreign and domestic.").

warrants, Korean courts have rejected recognition and enforcement of foreign arbitral awards.¹⁷² The same logic should apply to domestic arbitral awards as well. The ensuing question, then, is under precisely what circumstances—and under which provisions of Article V of the New York Convention—Korean courts might uphold a challenge to an arbitral award.

B. *Contesting an Arbitral Award Based on an Error of Law*

Mistakes can happen when arbitrators identify and apply the law in arbitrations. The plain text of neither the Arbitration Act of Korea nor Article V of the New York Convention offers recourse for an arbitral tribunal's error in applying the law at the annulment or enforcement stage, respectively. Once rendered, judges are prohibited as a matter of law from reviewing the merits of arbitral awards.¹⁷³ It makes no difference whether the mistake concerns Korean law or that of another jurisdiction. Either way, a Korean court may not rewrite the arbitral award and are presumably even less eager to examine an error of foreign law than Korean law.¹⁷⁴ Instead, the aggrieved party will somehow have to connect the arbitral tribunal's mistake with arguments based on the language of Article V of the New York Convention.¹⁷⁵

On first thought, a party might deem Article V(1)(b) to be relevant—if not sympathetic—to its cause. Article V(1)(b) is applicable when “[t]he party against whom the award is invoked was not given proper notice of the appointment or of the arbitration proceedings or was otherwise unable to present his case.”¹⁷⁶ Specifically, the party may claim that its ability to present its case was hampered because the correct legal principles were not

¹⁷² In one case where the Supreme Court of Korea refused to recognize and enforce an arbitral award based on public policy grounds, the concerned arbitral award had settled costs in relation to the sale of a lot in the form of a monetary sum to be paid by the party resisting enforcement. But because the amount of taxes levied on the lot had drastically decreased after the arbitral award had been rendered, the Supreme Court of Korea found that the contents of the award no longer corresponded with the substantive legal relationships between the parties, and as a result refused to enforce it. *Daebeobwon* [S. Ct.] Dec. 13, 2018, 2016Da49931 (S. Kor.).

¹⁷³ Born, *supra* note 48, at 420 (stating that “a central element of the contemporary international arbitral process is the general absence of judicial review of the merits of the tribunal’s award.”).

¹⁷⁴ Courts have generally held that the public policy exception is “not satisfied merely because foreign law or a foreign tribunal reached a different result from that provided by domestic law.” See BORN, *supra* note 42, at 510.

¹⁷⁵ To reiterate a point made above, Korean courts determine whether to annul a domestic arbitral award in Korea based on Article 36 of the Arbitration Act of Korea and not Article V of the New York Convention. Since Article 36 of the Arbitration Act of Korea is a near-replica of Article V, however, Korean courts would essentially perform the same analysis as they would when deciding whether to reject enforcement of a foreign arbitral award. See *supra* Part IV.A.

¹⁷⁶ New York Convention, *supra* note 4, art. V(1)(b).

identified or applied during the arbitral proceedings. This claim might make sense if that party argued the correct legal principles during the arbitral proceedings but the arbitral tribunal mistakenly overlooked or misapplied them.

However, this argument is virtually guaranteed to fall short in Korea. In an adversarial dispute resolution mechanism such as arbitration, the arbitrator is not tasked with identifying the correct law or raising legal arguments on behalf of either party. Doing so might be deemed to exceed his or her authority prescribed by the applicable arbitration agreement and fall under the scope of Article V(1)(c) of the New York Convention. Thus, even if parties put forth arguments based on incorrect legal principles or fail to identify the most relevant ones, the arbitral tribunal may not correct them *ex post facto*. The arbitrators must proceed with what they have, and Korean courts cannot subsequently rewrite the award to undo the error.

Moreover, it is doubtful that an error of law falls under the protective scope of Article V(1)(b) in the first place. For example, a party asserts that a tribunal infringed upon its right to defend itself by failing to correct an error made by that party's own legal counsel. In response, Korean courts would take the position that the infringement of a party's procedural rights in an arbitration must reach a "*strikingly unacceptable degree*."¹⁷⁷ Per Article V(1)(b), the role of the court is not to ensure that correct legal principles were applied during arbitration. It is "simply to decide whether there has been a fair hearing."¹⁷⁸ Unless an arbitrator directly interferes with and prevents a party from identifying and arguing the correct legal principles, there is no basis to argue that the hearing was unfair. It is telling that a party's conscious decision to refuse to participate in an arbitration, although purportedly due to economic hardship, did not pass this threshold.¹⁷⁹ A party's decision to retain poor legal counsel during the arbitration should fall short for the same reasons.

Next, a party may argue that an arbitrator exceeded the scope of arbitral authority under Article V(1)(c) of the New York Convention. Here, it is presumably true that the parties' intent and expectations regarding the governing law of the contract are that the arbitrator will apply the correct law. If the parties agree that the arbitrator may deviate from the correct legal principles, they should explicitly state such common intent.¹⁸⁰ However, as

¹⁷⁷ Kim & Kim, *supra* note 166, at 100 (citing Busan Jibangbeobwon [Busan Dist. Ct.], Oct. 26, 2011, 2011Gahap8532 (S. Kor.)).

¹⁷⁸ BLACKABY ET AL., *supra* note 3, at 628.

¹⁷⁹ Kim & Kim, *supra* note 166, at 100-01 (referring to Incheon Jibangbeobwon [Incheon Dist. Ct.], June 11, 2004, 2003Gahap10649 (S. Kor.)).

¹⁸⁰ If this is indeed what the parties agreed to, they should state as such in the arbitration agreement. See Ware, *supra* note 33, at 63 (arguing that "I generally want arbitration awards to depart from the law if that is what the parties have agreed the arbitrator should do.").

with Article V(1)(b), courts refuse to entertain attempts to disguise requests for judicial review as exceeding arbitral authority.¹⁸¹ Thus, Article V(1)(c) also cannot be utilized to challenge an arbitrator's legal conclusions.¹⁸² A simple mistake should be insufficient to establish a valid challenge under this provision as well.¹⁸³ Moreover, if the mistake pertains to only part of the award, the remainder of the award would still remain valid and subject to enforcement.¹⁸⁴

The last option a party may turn to is the public policy exception under Article V(2)(b) of the New York Convention. After all, there has to be some basis for the popularity of the provision among parties who challenge enforcement of an award.¹⁸⁵ But a high usage rate does not necessarily correlate with a high success rate and courts are unlikely to interpret the public policy exception too broadly.¹⁸⁶ Consistent with the other provisions, the public policy exception of Article V(2)(b) of the New York Convention does not serve as a detour for reviewing the merits of a foreign arbitral award.¹⁸⁷

Because the public policy exception does not allow Korean courts to review the legal reasoning behind an arbitral award, any arguments stemming from an error of law are more likely than not to fail in Korea.¹⁸⁸

¹⁸¹ As one might expect, this is the case for annulling arbitral awards under the same language. *See* BORN, *supra* note 42, at 410 (stating that “[c]ourts are particularly unwilling to accept arguments that, by misinterpreting, ignoring or refusing to give effect to the parties’ underlying contract, the tribunal exceeded its authority. It is typically held that such arguments amount to an effort to obtain judicial review of the merits of the tribunal’s decision.”).

¹⁸² *See id.* at 498 (stating that challenges to the arbitrator’s legal conclusions do not amount to a “true” Article V(1)(c) defense).

¹⁸³ The same applies to annulling arbitral awards based on the same argument under the UNCITRAL Model Law. Rivera, *supra* note 6060, at 417.

¹⁸⁴ Courts have partially recognized awards that exceeded the arbitral tribunal’s jurisdiction. *See* BORN, *supra* note 42, at 499.

¹⁸⁵ *See id.* at 508 (“One of the most frequently-invoked bases for refusing to recognize an award is the “public policy” exception.”); Hughes, *supra* note 7, at 104 (stating that the public policy exception has been “the most frequently tested ground in Korea.”).

¹⁸⁶ Perhaps public policy is better left for the legislature to decide. *See* HORWITZ, *supra* note 97, at 142 (“If law is merely a battleground over which social interests clash, then the legislature is the appropriate institution for weighing and measuring competing interests.”).

¹⁸⁷ *See* BORN, *supra* note 42, at 417 (“In almost all jurisdictions, the public policy doctrine is not a basis for reviewing the substance of the arbitrators’ award in an annulment action.”).

¹⁸⁸ *See id.* at 510 (noting that while there are cases holding otherwise, “[t]he fact that a tribunal applies a law that is different from that of the recognition forum’s laws, or

Courts worldwide have applied the same high bar in examining requests for refusing enforcement of an arbitral award under the public policy exception.¹⁸⁹ In accordance with the global trend,¹⁹⁰ Korean courts interpret the public policy exception quite narrowly.¹⁹¹ Yet again, the problematic award is far more likely than not to be upheld in these circumstances as well.

Based on the discussion above, simply put, there is no realistic or feasible way for parties to repackage a simple error of law under Article V of the New York Convention to challenge the recognition and enforcement of a foreign arbitral award in Korea.¹⁹² That means the same reality applies to requests to annul a domestic arbitral award. In consequence, where the arbitral tribunal merely made a mistake or was simply unaware of the correct law to apply, the outcome is indelible. Regardless of the mistake, the arbitral tribunal still performed its role within the parameters set by the parties' agreement, which was to apply the applicable law in a *bona fide*, good faith manner. An innocent mistake in and of itself does not change that.

This Article started out by asking whether Korean courts frown upon requests to annul or refuse enforcement of arbitral awards based on an error of law. The answer to that question is an emphatic "Yes." Indeed, Korean courts will not grant a challenge to an arbitral award simply because it was based on an error of law. But what if the arbitrator commits more than an inadvertent error? What if the arbitrator willfully misapplies or ignores the correct legal rules?

C. *Contesting an Award Based on Willful Misapplication of Legal Rules*

It is less clear if the same outcome would result where, in contrast to a simple mistake, an arbitrator willfully misapplies or disregards applicable principles of Korean law. Here, what must be addressed is no longer an error but an intentional disregard for the correct legal rules. Even if there are no grounds to find corruption or fraud, which would allow a party to challenge an arbitral award,¹⁹³ this could be independently

wrongly applies the recognition forum's laws, or reaches a result that is contrary to that which the recognition forum's courts would reach, is not a basis for a violation of public policy.").

¹⁸⁹ See *id.* (noting that courts "have underscored the narrow, exceptional character of the public policy defense in recognition proceedings.").

¹⁹⁰ MOSES, *supra* note 29, at 218 (observing that "most courts have viewed this defense narrowly, in keeping with the Convention's pro-enforcement purpose.").

¹⁹¹ Seung Wha Chang, *Article V of the New York Convention and Korea*, 25 J. INT'L ARB. 865, 869 (2008).

¹⁹² Kim & Kim, *supra* note 166, at 96 ("Korean courts have long held that an error of law or fact is not grounds for refusal to recognize or enforce a foreign arbitral award.").

¹⁹³ While not addressed in this Article, arbitral awards tainted by fraud or corruption should be challengeable. The Federal Arbitration Act, for example, allows

remediable.¹⁹⁴ But given the practical difficulties of finding the necessary evidence, what happens if the aggrieved party is incapable of uncovering evidence of corruption or fraud? Would that party still have no recourse under Korean law in this situation?

From a common-sense perspective, unlike a simple mistake, an arbitrator's willful misapplication or disregard of the correct law infers some form of misconduct committed by the arbitrator.¹⁹⁵ To be specific, this could infringe upon a party's right to plead its case under Article V(1)(b), exceed the tribunal's arbitral authority under Article V(1)(c), or contravene public policy pursuant to Article V(2)(b) of the New York Convention. Whether it is successfully actionable in front of a Korean judge is another question but, as explained below, an applicant should have an arguable case in theory.

Law is inevitably a human process and, even without corruption, heavily biased or incompetent arbitrators do exist.¹⁹⁶ It does not help that where an arbitral tribunal consists of three arbitrators, each party typically nominates one arbitrator.¹⁹⁷ Moreover, arbitrators can exercise a significant amount of discretion over the proceedings while hiding under the veil of confidentiality.¹⁹⁸ To account for this, most arbitral institutions provide for detailed rules on arbitrator impartiality and independence, augmented by the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, and allow parties to challenge arbitrator nominations if their impartiality or independence is in question.

But concrete evidence is difficult to obtain and challenges may fail since the level of bias is not always measurable.¹⁹⁹ Worse, the confidential nature of international commercial arbitration inherently breeds the

courts to vacate (annul) arbitral awards based on fraud or corruption. 9 U.S.C. § 10(a) (2002).

¹⁹⁴ See Hughes, *supra* note 7, at 112 (arguing that “there will inevitably be limits to the willingness of Korean courts to enforce certain kinds of awards.”).

¹⁹⁵ See BORN, *supra* note 42, at 505 (stating that it is “clear that an arbitrator’s lack of independence and/or impartiality is a basis for denying recognition of an award under the Convention.”).

¹⁹⁶ See Duan Xiaosong, *Criminal Liability of Arbitrators in China: Analysis and Proposals for Reform*, 23 PAC. RIM L. & POL’Y J. 343, 345 (2014) (commenting that arbitral awards are vulnerable to being “tainted by bribery” in China).

¹⁹⁷ See INT’L CHAMBER OF COM., RULES OF ARBITRATION art. 12(4) (2021); SING. INT’L ARB. CTR., ARBITRATION RULES art. 11.1 (2016).

¹⁹⁸ For example, party-appointed arbitrators might have ex parte communications with that party. Lawrence J. Fox, *The Last Thing Dispute Resolution Needs is Two Sets of Lawyers for Each Party*, 19 ALTS. TO HIGH COST LITIG. 47 (2001).

¹⁹⁹ Arbitrators may have a special relationship or financial link with one of the parties or have prejudged certain matters due to his or her biased views. WILLIAM W. PARK, ARBITRATOR BIAS 6 (2015), https://scholarship.law.bu.edu/faculty_scholarship/15/.

possibility of abuse of power as well as arbitrator bias. Where biased or incompetent arbitrators already rendered an award, aggrieved parties are only be able to turn to Article V of the New York Convention for help.

Starting with Article V(1)(b), blatant disregard for or misapplication of correct legal principles would severely hurt a party's right to present its case during arbitration. In a sense, such conduct by an arbitrator would make a party's efforts to present its case all but meaningless. This could reach the level of denial of due process under U.S. law, which has been equated with the standard for violation of Article V(1)(b).²⁰⁰ Similarly, the Supreme Court of Korea has held that Article V(1)(b) pertains to "the situation where the level of defense right infringement is too severe to tolerate."²⁰¹ Per this standard, it seems arguable, if not plausible, that Article V(1)(b) should encompass situations in which a party argued the correct, uncontested legal principles, but the tribunal knowingly disregarded them and rendered an award in the opposing party's favor.

Next, Article V(1)(c) rarely provides relief to parties that rely on it²⁰² because it sets an extremely high bar for applicants to satisfy. Nevertheless, there has to be circumstances that pass the bar in order for the provision to have meaning in the jurisprudence surrounding the New York Convention. And where an arbitrator willfully disregards or misapplies principles of Korean law, a plain text interpretation of Article V(1)(c) should allow the injured party to avoid being harmed by the concerned award.

To reiterate, unless the arbitration agreement states otherwise—such as to permit the arbitrator to rule entirely on the basis of *ex aequo et bono*—the presumptive shared intent of the parties is that the arbitrator shall apply the governing law in a correct manner. While a simple mistake in applying the law is somewhat negligible from the perspective of Article V(1)(c), willful misconduct should not be treated in the same way. Willful misapplication of Korean law most likely does not fall within the scope of the parties' agreement because *an erroneous application of Korean law is technically not an application of Korean law*. On the contrary, such an act would be objectively outside of the scope of a typical arbitration agreement. In theory, this should constitute grounds for a Korean court to entertain a request to contest the validity or enforcement of an arbitral award based on the plain language interpretation of the New York Convention. While in an

²⁰⁰ Arbitrators must "provide a fundamentally fair hearing." *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir. 2001).

²⁰¹ Chang, *supra* note 191, at 867 (citing Daebeobwon [S. Ct.], Apr. 10, 1990, 89Daka20252 (S. Kor.)). The term "defense right infringement" as used in this quote refers to the infringement caused on that party's legal right to defend itself.

²⁰² MOSES, *supra* note 29, at 212 ("Defenses based on a claim that the arbitrator acted in excess of authority rarely succeed.").

investment treaty arbitration setting, this argument has found success outside of Korea.²⁰³

However, evidence points to the opposite conclusion as well. Alarming, courts have granted enforcement even when arbitrators applied the *wrong substantive law* altogether to the arbitration.²⁰⁴ Nor are there any examples where Korean courts refused recognition and enforcement under Article V(1)(c).²⁰⁵ Still, if a court were to take issue with the arbitrators' behavior, they would surely have grounds on which to act. There is something especially nefarious about arbitrators knowingly and selectively misapplying the law. Notably, courts outside of Korea have on some occasions annulled arbitral awards where arbitrators ruled on matters beyond the scope of the arbitration agreement.²⁰⁶

Although there is no applicable case law,²⁰⁷ willful misapplication of the law by an arbitrator could also be deemed to contravene Korea's public policy under Article V(2)(b) of the New York Convention.²⁰⁸ In recent years, Korea has put forth tremendous efforts to promote and nurture the development of international arbitration through the KCAB.²⁰⁹ Among other things, the National Assembly of Korea passed a separate statute in the Arbitration Industry Promotion Act of Korea to promote the practice of arbitration.²¹⁰ Courts that allow arbitrators to willfully misapply the correct legal rules and refuse to correct them despite the opportunity to do so would be detrimental to the predictability of arbitrations governed by Korean

²⁰³ *Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (Mar. 9, 2017).

²⁰⁴ BORN, *supra* note 42, at 414 (noting that “most courts have rejected arguments that arbitrators failed to comply with the parties’ arbitration agreement by applying the “wrong” substantive law.”).

²⁰⁵ Jiyeon Choi, *Interpretation and Application of the New York Convention in the Republic of Korea*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 617, 625 (George A. Bermann, ed., 2017).

²⁰⁶ BORN, *supra* note 42, at 409 (stating that “[a]wards deciding matters outside the scope of the parties’ submissions to the arbitrators have been annulled by courts in many jurisdictions.”).

²⁰⁷ Choi, *supra* note 205, at 626.

²⁰⁸ See Hughes, *supra* note 7, at 112 (arguing that “Korean courts might be hesitant to permit the enforcement of a foreign arbitral award where it misapplies an important fundamental provision of mandatory Korean law, as enforcing such an award may be viewed as a violation of public policy.”).

²⁰⁹ Hongjoong (Paul) Kim & Sejin Kim, *Korean Government’s Vigorous Move to Nurture Arbitration “Industry,”* KLUWER ARB. BLOG (Oct. 19, 2021), <http://arbitrationblog.kluwarbitration.com/2017/12/17/korean-governments-vigorous-move-nurture-arbitration-industry/>.

²¹⁰ Joongjaesaneop jinheungae gwanhan beobryool [Arbitration Industry Promotion Act] (S. Kor.).

law.²¹¹ This would harm Korea's interest in fostering a suitable environment for international business and international arbitration since "[b]usiness functions best when law is clear and predictable."²¹²

Like any other nation, Korea has a strong public policy interest in promoting the perceived advantages of its legal system. Spreading correct knowledge of how Korean law is structured could help Korea take one step towards achieving that objective. Ensuring that arbitrators accurately apply Korean law so that arbitrations governed by Korean law are predictable could help it take another. Courts should be cognizant that to allow a thoroughly flawed award to stand would set an alarming precedent. For example, arbitrators may consciously render *ad hoc* decisions that effectively cherry pick parts of Korean law to their liking and suffer no consequences in return. This would directly affect Korea's public policy interest to a far greater extent than a completely foreign arbitral award merely enforced on Korean soil, and Korean courts should not be so lenient where the tribunal *deliberately deviated* from domestic law.²¹³

On a final note, the New York Convention's pro-enforcement bias is self-evident and reflected in the domestic laws of most states.²¹⁴ However, even a pro-enforcement bias cannot be applied in an unlimited manner. Where an arbitrator's conduct has egregiously violated the spirit of the New York Convention and contravened the laws of the pertinent state, domestic courts should be entitled to step in and annul domestic arbitral awards. An arbitral tribunal's choice to willfully disregard correct legal principles or misapply the law hurts the perception of both Korean courts and Korean law as a whole. Such conduct should be contestable under Korean Law, and Korean judges should feel entitled to act because of the broad discretion they have been given.²¹⁵

²¹¹ See Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48, 51 (2015) ("Achieving predictability of outcomes within a jurisdiction and uniformity in the law across parallel jurisdictions helps assure consistency in judicial decisions, giving people a greater sense of certainty in the way courts will resolve disputes. In this way, predictability lends strength and legitimacy to a rule-of-law system."). As an aside, *stare decisis* is similarly intended to achieve predictability. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (stating that *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles.").

²¹² SCHAFFER ET AL., *supra* note 97, at 37.

²¹³ This is in contrast to how courts tend to be lenient towards an erroneous arbitral award governed by foreign law. See generally BORN, *supra* note 42, at 510.

²¹⁴ *Id.* at 490 ("Almost all states adopt an avowedly "pro-enforcement" approach to the recognition of international arbitral awards.").

²¹⁵ Again, Korean judges are instructed to act on the basis of the Constitution, acts and subordinate statutes, and their own conscience. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 103 (S. Kor.).

V. CONCLUSION

Adjudicators (such as arbitrators and judges) apply the law in order to resolve disputes between parties. In theory, that refers to applying the *correct law*, even though ascertaining the correct law can be more challenging than expected. But willful failure or outright refusal to base decisions on the correct legal principles would be akin to a hiker arbitrarily breaking off into a path of complete darkness without any preexisting tracks or directions whatsoever. Venturing into the wilderness is required to a certain extent for future adjudicators to continue forging new paths, for the law is by its nature not static.²¹⁶ Still, it would be harmful for adjudicators to forge a path that is completely detached from and cannot be traced back to other preexisting paths.²¹⁷

Adjudicators wish to become pioneers in the law and leaders for future adjudicators to follow. They do not wish to be seen as solitary wanderers or, even worse, lost. Yet in international arbitration, the arbitrator is figuratively dropped off in a legal forest of their own. The role of counsel on both sides in presenting the correct path—as laid out by the applicable law—is especially imperative. The state itself, as the owner of the figurative forest, also has an interest in whether the arbitrator follows the correct path.

Where legal principles are omitted or misapplied simply due to counsel or arbitrators' mistake or failure to identify the correct law, international arbitration is capable of posing a unique threat to the predictability and stability of the law. Their unintended mistake or failure could create an arbitral award that floats in a vacuum of its own. This is not to say that all arbitrations potentially threaten the stability of the rule of law. The system is just so designed and agreed upon by the New York Convention's signatories that where a valid court judgment on a legal issue is neglected by virtue of an innocent mistake, there is no legal basis to annul or refuse recognition and enforcement of an arbitral award.

What arbitrators may not do is knowingly disregard correct legal principles identified by the parties to the arbitration. If arbitrators willfully disregard the correct directions to lead the parties astray despite either side's best efforts, there should be some means for the owner of the forest to bring them back to the correct path. To simply let rogue arbitrators be would harm the forest owner's interests by signaling to future travelers that they may do the same. Fortunately, willful misapplication is something Korean courts should be able to rectify if raised by the injured party.

²¹⁶ Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 359 (2007) (stating that "virtually all domestic courts alter their line of reasoning and disagree with earlier decisions over time.").

²¹⁷ The whole objective of the law may very well be to predict the conclusion that should derive from a set of facts and preexisting legal principles. See Holmes, *supra* note 1, at 461 ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

As one path leads to another, this conclusion triggers further questions. For one thing, if a state has a strong interest in ensuring that arbitrators correctly apply its laws, why is that no courts outside of the U.S. have adopted their own version of the manifest disregard doctrine? Is it simply a matter of time before other jurisdictions follow suit? Alternatively, is it because other states more strongly prefer to keep arbitration as a fast and cost-effective single instance proceeding? If so, how does one cope with the reality that at least international arbitration is now deemed costly and time-consuming?²¹⁸ These are all questions left to be answered in the future.

In sum, international arbitration could provide the best of both worlds. On one hand, lawyers must be especially alert and diligent to identify the correct legal principles because a simple mistake may turn out to be incurable. On the other hand, there is a safeguard inherently built into the system to allow Korean courts to address and correct blatant, deliberate, and harmful departures from the law by arbitrators. The thesis of this Article, then, provides one more reason for parties to choose arbitration in lieu of litigation.²¹⁹

²¹⁸ According to one survey, arbitration is now neither cheap nor fast. *Corporate choices in International Arbitration: Industry perspectives*, PRICEWATERHOUSECOOPERS (Apr. 6, 2013), <https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>.

²¹⁹ Notwithstanding the abovementioned concerns about costs and delays, arbitration is now widely considered to be the most preferred method of resolving international disputes. *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, QUEEN MARY U. LONDON (May 6, 2021), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.