

Asset Recovery

Contributing editors

Jonathan Tickner, Sarah Gabriel and Hannah Laming



2018

**GETTING THE
DEAL THROUGH** 

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DEAL THROUGH 

Asset Recovery 2018

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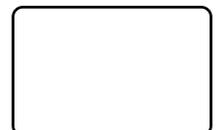


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CONTENTS

Global overview	5	Kazakhstan	80
Jonathan Tickner, Sarah Gabriel and Hannah Laming Peters & Peters Solicitors LLP		Yerzhan Manasov and Ratmir Abdrashitov Linkage & Mind LLP	
Australia	9	Korea	87
Tobin Meagher, Andrew Moore and Alice Zheng Clayton Utz		Michael S Kim, Robin J Baik and S Nathan Park Kobre & Kim Yoon-Hee Kim and Jae Hwan Lee Shin & Kim	
Bermuda	16	Liechtenstein	93
Kevin Taylor, Nicole Tovey and Kai Musson Taylors (in association with Walkers)		Thomas Nigg and Eva-Maria Rhomberg Gasser Partner Attorneys at Law	
British Virgin Islands	21	Monaco	99
Tim Prudhoe and Alexander Heylin Kobre & Kim		Donald Manasse Donald Manasse Law Offices	
Canada	28	Nigeria	105
Maureen Ward and Nathan Shaheen Bennett Jones LLP		Babajide O Ogundipe and Cyprian Nonso Egbuna Sofunde, Osakwe, Ogundipe & Belgore	
Cayman Islands	35	Qatar	110
Jalil Asif QC, James Corbett QC and Pamela Mitchell Kobre & Kim		Fouad El Haddad Lalive in Qatar	
Cyprus	41	Serbia	114
Andreas Erotocritou and Antreas Koualis AG Erotocritou LLC		Tomislav Šunjka Law Office of Tomislav Šunjka	
Greece	48	Switzerland	121
Ilias G Anagnostopoulos and Alexandros D Tsagkalidis Anagnostopoulos		Marc Henzelin, Sandrine Giroud and Maria Vinogradova Lalive	
Hong Kong	54	United Arab Emirates	129
Nick Gall and Ashima Sood Gall		Ibtissem Lassoued Al Tamimi & Company	
Ireland	60	United Kingdom	134
Gavin Smith and William Greensmyth Walkers		Jonathan Tickner, Sarah Gabriel and Hannah Laming Peters & Peters Solicitors LLP	
Italy	65	United States	144
Roberto Pisano, Valeria Acca and Chiara Cimino Studio Legale Pisano		Carrie A Tendler, Jef Klazen and Michael A Sanfilippo Kobre & Kim	
Jersey	74		
Simon Thomas and William Redgrave Baker & Partners			

Korea

Michael S Kim, Robin J Baik and S Nathan Park Kobre & Kim

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Civil asset recovery

1 Legislation

What are the key pieces of legislation in your jurisdiction to consider in a private investigation?

The key pieces of legislation in Korea to consider in a private investigation include:

- the Korean Civil Procedure Act (KCPA);
- the Civil Execution Act; and
- the Personal Information Protection Act.

As a general matter, private investigation without any court involvement is fairly limited. In particular, obtaining financial information from banks and other financial institutions without court permission is permitted only in a very limited set of exceptional circumstances and through strictly regulated institutions, such as credit rating agencies.

2 Parallel proceedings

Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

There are no restrictions on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter. A plaintiff, however, should carefully consider whether to wait until the conclusion of the criminal proceedings first before commencing any civil proceedings. On one hand, a conviction against a defendant in a criminal proceeding may assist the plaintiff in proving civil liability of the defendant. On the other hand, there may be situations in which the plaintiff needs to move quickly (eg, making an application to freeze and seize assets).

3 Forum

In which court should proceedings be brought?

Civil proceedings should be brought to the district courts, which are located in most major municipalities across Korea. Generally speaking, proceedings should be brought in the district court of the region in which a defendant debtor or a tortfeasor is located. The KCPA also provides that civil proceedings involving property right disputes can be brought in the district court in which the relevant property is located.

4 Limitation

What are the time limits for starting civil court proceedings?

For most civil claims (eg, breach of contract), the statute of limitations is 10 years. However, shorter periods apply for certain contractual disputes. For example, the statute of limitations for claims in commercial contract disputes is five years.

Tort claims must either be brought (whichever is earlier) within 10 years from the date the tort was committed, or within three years from the date the claimant became aware of the damage and the identity of the tortfeasor.

5 Jurisdiction

In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?

District courts are the courts of general and original jurisdiction. They try all civil and criminal cases at first instance.

In deciding the jurisdiction of a Korean court, the parties' relationship or the connection of the subject matter with the territory through various points of contact, comparable to the criteria used by the modern American long-arm statutes, is of primary importance. It should also be noted that the doctrines of in rem and quasi in rem jurisdiction have not gained a foothold in civil law countries, including in Korea. The presence of a defendant's assets forms a basis for jurisdiction in Korea, but this basis allows the courts to render an in personam, not in rem, judgment.

At trial, the parties can challenge the court's jurisdiction or apply for dismissal based on grounds such as lack of standing or lack of capacity. However, article 34 of the KCPA prescribes the court not to dismiss a lawsuit that lacks jurisdiction; rather, it must transfer such lawsuit by its ruling to the competent court, so that the plaintiff is relieved of detriments. Furthermore, the act allows the court to adjudicate the case instead of transferring if the court deems it proper to do so.

6 Admissibility of evidence

What rules apply to the admissibility of evidence in civil proceedings?

The KCPA does not provide discovery similar to that afforded by US laws. A party in civil litigation may only obtain evidence from the other party through the court. The court may, upon a request of the parties, examine evidence prior to the commencement of a civil proceeding (ie, the service of complaint on the defendant).

The court may grant a party's request for pretrial examination of evidence if the court finds potential undue hardship in examining evidence later in the trial. See article 375 of the KCPA. The pretrial examination in such a case may include witness testimony, production of documents, or inspection of the actual site of controversy.

Above all, neither the KCPA nor the Criminal Procedure Act has provisions on relevance in Korea. Next, while article 308-2 of the KCPA expressly prescribes that any evidence obtained in violation of the due process shall not be admissible, the KCPA does not have any provisions on limiting the admissibility of collected evidence. Therefore, civil proceedings do not have limitations on the admissibility of documents even created after initiation of a lawsuit, let alone hearsay evidence. As the case law is no different, except the cases in which evidence was found inadmissible based on the illegality of the taking of evidence (eg, in violation of privacy law or trade secret law), it is difficult to find a civil case in which the admissibility of evidence was limited.

7 Publicly available information

What sources of information about assets are publicly available?

The following sources of information about assets are publicly available (for free or for a fee):

- land registration;
- companies and business registration;
- intellectual property (patents, trademarks) registration;
- securities registration;
- vehicle registration; and
- factory foundation registry and mine foundation registry.

There are also private companies that can run collective searches for various assets.

8 Cooperation with law enforcement agencies

Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

In the course of the proceedings and also during trial, the court, at its own discretion or upon request by an interested party (including victims of the underlying fraud), may order law enforcement and regulatory agencies (and other public bodies) to provide or deliver documents deemed necessary for the court's final decision. In addition, private persons may file an information disclosure request with the relevant government agencies. Such information requests are, however, subject to close scrutiny and complex requirements, and are often denied if there is a pending trial.

9 Third-party disclosure

How can information be obtained from third parties not suspected of wrongdoing?

A party can request the court to issue an order to produce specific documents that are in the possession of the other party or any third party. Specifically, under article 344 of the KCPA, a party can file an application for an order for document production under any of the following circumstances:

- the other party possesses the document that it cited in the action;
- the applicant is legally entitled to request for the document holder to deliver or make the document available for inspection; or
- the document has been prepared for the benefit of the applicant, or prepared as a result of the legal relationship between the applicant and the document holder.

A party's application for production of documents must clearly indicate the following (article 345 of the KCPA):

- the document requested;
- the contents of the requested document;
- the document holder;
- the fact to be proved by the document; and
- the grounds on which the document should be produced.

10 Interim relief

What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

In order to maintain the status quo of a tortfeasor's or a debtor's assets, a claimant can apply for one or all of the following provisional reliefs:

- provisional attachment order;
- provisional prohibition order from asset disposal; or
- provisional injunction.

A creditor may apply for these reliefs *ex parte*.

A provisional attachment order is invoked by a creditor with a monetary claim against a debtor and it covers personal properties as well as real properties (article 276 of the Civil Execution Act). Provisional attachments are effective even if the assets were disposed to third parties. The creditor must identify in his or her application the specific assets the debtor owns or possesses. After the claimant wins the lawsuit, he or she can enforce his or her right through the court auction.

A creditor who has a non-monetary claim may apply for a provisional prohibition order from asset disposal in order to obtain delivery of personal property, transfer of accounts receivable or bank account, or registration of real property (article 300 of the Civil Execution Act). The order prevents the owner or holder of the property from delivering

possession of or assigning the property to a third party, or encumbering the property. Like a provisional attachment order, a provisional prohibition order from asset disposal is effective against third parties.

A creditor who is seeking to prohibit certain actions (eg, unfair competition), seeking to dismiss directors or to appoint a provisional representative of debtor corporation, or seeking to copy financial documents of debtor corporation may file a petition for a provisional injunction (article 304 of the Civil Execution Act). The court usually reviews the petition and supporting evidence without witness testimony and has discretion as to the issuance of the order and the necessary undertakings to protect the parties' interest.

11 Right to silence

Do defendants in civil proceedings have a right to silence?

Defendants in a civil proceeding do not have a right to silence. If a defendant chooses to remain silent, an adverse inference may be drawn by the court.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Korean courts have limited contempt powers and generally do not sanction a party for disobeying a court order. The court may impose fines (up to 5 million won) or detention (up to seven days) for witnesses who fail to appear to testify under oath. In addition, a witness who makes false testimony under oath may be punished for perjury by imprisonment for up to five years and a fine of up to 10 million won.

Finally, when applicable, the court may draw adverse inferences against a party refusing to comply with a procedural order, such as an order to produce documents.

13 Obtaining evidence from other jurisdictions

How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

Information can be obtained through courts in other jurisdictions under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970, to which Korea is a party.

Korea is also a party to several multi- or bilateral legal assistance treaties with foreign nations that concern the sharing of evidence.

14 Assisting courts in other jurisdictions

What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

Assistance with service of process

South Korea is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. In accordance with the Convention, service of process is conducted by the Ministry of Court Administration at the Supreme Court, which is the designated central authority for processing the service of documents from other contracting states. Documents from other contracting states are served on a South Korean resident according to the method prescribed by the KCPA.

Taking evidence from a witness in South Korea

South Korea is a party to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Under the Convention, a request to take evidence from a witness in South Korea can be sent through a letter of request to the South Korean central authority, which will then transmit the letter to the relevant South Korean court. If accepted, the court will conduct an in-court witness examination in accordance with the KCPA.

Enforcing foreign judgments

A judgment obtained in a jurisdiction outside Korea can be recognised and enforced by the Korean courts. To enforce a foreign judgment, a party must request and obtain an enforcement judgment from a South Korean court (article 26 of the Civil Execution Act). The recognition of

a foreign judgment is subject to certain requirements (article 217 of the KCPA), including:

- the judgment is final and conclusive;
- the court that rendered the judgment has jurisdiction under the principles of international jurisdiction laid down in South Korean law or treaties;
- the defendant was properly served with the complaint or summons in advance to allow sufficient time for preparation of his or her defence, or the defendant responded to the suit without having been served;
- the effect of the judgment is not contrary to South Korean public policy; and
- a guarantee of reciprocity exists.

15 Causes of action

What are the main causes of action in civil asset recovery cases, and do they include proprietary claims?

Under Korean law, a party injured by fraud may file a suit under at least two legal theories: breach of contract or tort under the Civil Act. The particulars of the case and other considerations such as the statute of limitations should dictate with which of the two legal theories to present the case. The amount of damages from either action is the same and there are no punitive damages available under Korean law.

In certain limited circumstances, fraudulent transfer suits are allowed against third parties who received the property or benefit from the debtor with knowledge. Proprietary claims are allowed subject to strict showing of chain or flow of interests from the original rightful owner claimant to the debtor or third party.

16 Remedies

What remedies are available in a civil recovery action?

South Korean courts can order the following:

- performance of specific obligations (eg, delivery of certain property);
- seizure;
- restitution;
- damages; and
- injunctions.

As to damages, punitive or treble damages are not allowed.

17 Judgment without full trial

Can a victim obtain a judgment without the need for a full trial?

Default judgment exists in Korea. However, it is distinguished from summary judgment, as default judgment requires a separate procedure. In cases without significant disputes, if the plaintiff asks for a cash payment and requests an order for such payment, the case proceeds based only on written submissions and without oral arguments. In addition, although interlocutory judgment is allowed under article 201 of the KCPA, it is rarely practised in Korea.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

The main post-judgment reliefs available to successful claimants include:

- the appointment of a receiver, in a case in which an insolvent debtor otherwise meets the requisite elements under insolvency and debtor rehabilitation law;
- the examination of judgment debtors in identifying the whereabouts of the assets of the judgment debtors;
- the attachment or garnishment of debtors' assets; and
- the discovery of judgment debtors' assets held by third parties (eg, banks) through a separate court application.

19 Enforcement

What methods of enforcement are available?

Methods of enforcement include seizure and sale of assets, garnishee orders and insolvency proceedings.

20 Funding and costs

What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

There are currently no legal restrictions to third-party litigation funding in Korea. The Attorney-at-Law Act, however, prohibits a lawyer from becoming an assignee of any rights in dispute.

Contingency fees for representation in civil matters are permitted under Korean law and are frequently used in practice. Nonetheless, parties and attorneys are advised to exercise caution with regard to contingency fee arrangements. For instance, a court may reduce an excessive contingency fee to a reasonable level if the fee amount is found to violate public policy.

Insurance is available to cover all or part of a party's legal costs for certain types of civil and commercial cases.

With respect to costs, a final court judgment includes a decision on the allocation of costs of the proceedings. The losing party bears litigation costs in principle (article 98 of the KCPA). In a partial win, the court has the discretion to decide the ratio or amount of litigation costs that the respective parties must pay.

Criminal asset recovery

21 Interim measures

Describe the legal framework in relation to interim measures in your jurisdiction.

Korean law prescribes the act of disguising proceeds of crime as legitimately acquired or concealing such proceeds (ie, money laundering) and recovers assets based upon relevant laws including the Criminal Act, the Act on Regulation of Punishment on Criminal Proceeds Concealment and the Act on Special Cases of Confiscation and Forfeiture of Assets Acquired through Corrupt Practices. Korean law also governs concealment or disposition of properties with a 'preservation order for the purpose of confiscation', which allows freezing of assets prior to conviction or indictment under certain specific statutes.

22 Proceeds of serious crime

Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

A criminal investigation is initiated by the prosecutor following a criminal complaint against certain persons, information submitted to the Prosecutor's Office by another authority, or even information that has come to the attention of the Prosecutor's Office through the press or other sources.

23 Confiscation – legal framework

Describe the legal framework in relation to confiscation of the proceeds of crime, including how the benefit figure is calculated.

The Criminal Act (article 48) and the Act on Regulation of Punishment of Criminal Proceeds Concealment (articles 8 to 10) provide the general framework for confiscation of proceeds of crime, as well as properties, equipment and instruments used or planned to be used in corruption offences, with due protection of the rights of bona fide third parties. Additionally, there are confiscation provisions in the Act on Special Cases of Confiscation and Forfeiture of Assets Acquired through Corrupt Practices (articles 3 to 6) and the Act on Special Cases Concerning Forfeiture for Offences by Public Officials (articles 3 to 6). Criminal proceeds include income derived from such proceeds. Value-based confiscation is also possible. The value of the property is determined by the court based on the prosecution's evidence.

Update and trends

Korean courts have seen an increasing number of cross-border disputes and ensuing asset-tracing and recovery efforts within the country. Judges are now more knowledgeable and flexible in dealing with cross-border cases. Upon counsel's proper explanation and with the provision of relevant support, some judges have ruled on certain procedural issues or described certain procedural steps that they would not have in pure domestic litigation contexts, mainly to alleviate a party's burden to fight collateral attacks on the procedural points that may occur at a future date in a foreign court unfamiliar with Korean procedural rules. For example, process service is rarely an issue in Korean domestic litigation because it is completed through the court and postal office. In some instances, however, judges affirmatively find that the service was completed in accordance with the applicable rules, which mainly ensures that its judgment will not be subject to a collateral attack in a foreign court. This trend will likely continue to develop, ultimately further accommodating cross-border litigants more effectively.

Korea's regulatory authorities are becoming more active in taking their investigations abroad and seeking cooperation from their counterparts in other countries. Korea Deposit Insurance Corporation, for example, recently established its first-ever international outpost in Phnom Penh, Cambodia, to trace and seize assets of certain Korean debtors known to hide assets there. In July 2017, Korea's Public Prosecutor's Office successfully traced and repatriated Ponzi scheme proceeds that were diverted to China, marking the first time Korea's law enforcement repatriated criminal proceeds from China. With the new Moon Jae-in administration prioritising anti-corruption efforts, we expect Korea's regulatory authorities to become even more active in conducting international investigation and making repatriation efforts for crimes and transactions with connections to Korea.

The above laws, together with the Act on Reporting and Use of Certain Financial Transaction Information, address the identification, freezing or seizure of criminal proceeds and instruments.

24 Confiscation procedure

Describe how confiscation works in practice.

Typically, law enforcement authorities seize the proceeds and the instruments used to commit crime to preserve them as evidence, pursuant to search-and-seize warrants during an investigation, and keep them during the trial. Once the court decides that the seized property should be confiscated, the prosecutor will enforce the court's confiscation order and the property will belong to the government.

In cases of cash proceeds, the prosecutor will deposit the proceeds with the treasury. For instruments with value, the prosecutor will sell them through a public auction and deposit the proceeds with the treasury.

A legitimate owner of the confiscated property (eg, a bona fide third party who had no knowledge of the crime) can request the return of such property or its proceeds (if it has already been sold at an auction).

25 Agencies

What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?

The agencies responsible for tracing and confiscating the proceeds of crime are:

- the Public Prosecutor's Office (under the supervision of the Supreme Prosecutor's Office);
- the Ministry of Justice;
- the police; and
- the Financial Services Commission.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Yes. Several Korean laws, including the Act on Special Cases concerning Forfeiture for Offenses of Public Officials and the Act on Special Cases of Confiscation and Forfeiture of Assets Acquired through Corrupt Practices, provide prosecution with the authority to confiscate secondary proceeds.

27 Third-party ownership

Is it possible to confiscate property acquired by a third party or close relatives?

Yes. Several Korean laws, including the Criminal Law (article 48) and the Act on Special Cases of Confiscation and Forfeiture of Assets Acquired through Corrupt Practices, provide that proceeds of crime transferred to a third party may be confiscated if the third party knew of the crime at the time of acquisition.

28 Expenses

Can the costs of tracing and confiscating assets be recovered by a relevant state agency?

Yes. When confiscating from the criminal perspective, the person upon whom a judicial decision is being executed must bear the execution costs under article 493 of the Criminal Procedure Act. Such costs must be paid concurrently with the execution. Therefore, costs arising from asset recovery and confiscation must first be paid out of the asset that is being confiscated. However, costs arising from asset tracing, other than those arising from legal procedures, constitute investigation expenses.

29 Value-based confiscation

Is value-based confiscation allowed? If yes, how is the value assessment made?

Yes. If the exact property cannot be confiscated, the value of the property will be subject to confiscation. The value of the property will be determined by the court based on the prosecution's evidence.

30 Burden of proof

On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?

As a general matter, the burden of proof is on the prosecution. Under the Criminal Act, no provision alleviates the burden of proof regarding confiscation in general. However, certain special acts have provisions on the burden of proof regarding the calculating or proving of illegal profits or illegal assets.

31 Using confiscated property to settle claims

May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?

Yes, partially. Under recent laws, the property of the victim of a predicate offence, which has been confiscated or an equivalent value of which has been collected, must be returned to the victim.

32 Confiscation of profits

Is it possible to recover the financial advantage or profit obtained though the commission of criminal offences?

Yes. Particularly under recent laws on redemption of proceeds of crime, the scope of assets that could be confiscated or redeemed is extensive, which allows for confiscating the secondary proceeds derived from proceeds of crimes. Article 48 of the Criminal Act prescribes that only a thing that has been used or was sought to be used in the commission of a crime, produced by or acquired by means of criminal conduct, and received in exchange for such a thing can be subject to confiscation. However, various statutes extend the scope of confiscation to include proceeds of crime or assets obtained as fruits to such proceeds.

33 Non-conviction based forfeiture

Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.

Article 48 of the Criminal Act provides for confiscation of a thing (in whole or in part) used or sought to be used in the commission of a crime, produced by or acquired by means of criminal conduct, and received in exchange for such a thing. Article 49 provides for confiscation even

when a conviction has not been achieved when the requisites of confiscation in article 48 have been met.

34 Management of assets

After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?

In principle, the prosecution manages confiscated assets. However, upon the transfer of ownership rights to the government, which causes the assets to become government property, Korea Asset Management Corporation manages such assets under the supervision of the Ministry of Strategy and Finance. Once the assets become national property, no more taxes or maintenance costs arise. The duty of Korea Asset Management Corporation is to sell the obtained personal and real properties, and it may lease such personal and real properties until sold.

35 Making requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.

Under the Act on International Judicial Mutual Assistance in Criminal Matters, a prosecutor seeking mutual assistance prepares and sends a written request for mutual assistance to the Minister of Justice. If the Minister of Justice deems it reasonable, he or she will send it to the Minister of Foreign Affairs, who will then send it to the foreign country. Such requests may be made for assistance in relation to:

- investigation into the whereabouts of a person or object;
- provision of documents and records;
- service of documents, etc;
- gathering of evidence, seizure, search and verification;
- transfer of objects, such as evidence; and
- hearing of statements and other measures to make any person testify or cooperate with an investigation in the requesting country.

36 Complying with requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.

Under the Act on International Judicial Mutual Assistance in Criminal Matters, a foreign request for legal assistance in a criminal matter should be directed to the Minister of Foreign Affairs, who will then send the written request to the Minister of Justice, along with related materials and his or her opinion. Such requests may be made for assistance in relation to:

- investigation into the whereabouts of a person or object;
- provision of documents and records;
- service of documents;
- gathering of evidence, seizure, search and verification;
- transfer of objects, such as evidence; and
- hearing of statements and other measures to make any person testify or cooperate with an investigation in the requesting country.

Any request for mutual assistance shall be made in writing specifying the following matters:

- the agency taking charge of the investigation or the trial related to the request for mutual assistance;

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- a summary of the case for which mutual assistance is requested;
- objectives and descriptions of a request for mutual assistance; and
- other matters necessary for providing mutual assistance.

In a recent case, Korean law enforcement and the Ministry of Justice assisted US government agencies to execute a US confiscation judgment against debtors' assets located in Korea. Also, Korea's National Assembly recently ratified a bilateral treaty with the United States that would assist US enforcement of the Foreign Account Tax Compliance Act by automatically exchanging financial data. This reflects the trend of broader assistance by the Korean government, expanding the cooperation from traditional information-gathering to assistance in seizure and recovery of assets.

37 Treaties

To which international conventions with provisions on asset recovery is your state a signatory?

Korea is a signatory to several international conventions, including:

- the Council of Europe, Convention on Mutual Assistance in Criminal Matters;
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 17 December 1997;
- the UN International Convention against Corruption, New York, 31 October 2003; and
- the UN Convention against Transnational Organized Crime, New York, 15 November 2000.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Private prosecution does not exist in Korea.

This article was written as a collaborative project between Shin & Kim and Kobre & Kim. Shin & Kim contributed summaries of Korean law. Kobre & Kim contributed thoughts on strategy in judgment enforcement and asset recovery matters.

Getting the Deal Through

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