GAR KNOW HOW COMMERCIAL ARBITRATION

South Korea

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Infrastructure

1. Is your state a party to the New York Convention? Are there any noteworthy declarations or reservations?

Korea signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NY Convention) on 8 February 1973, and it entered into force on 9 May 1973.

Korea made two declarations, namely, that it will apply the NY Convention to the recognition and enforcement of awards made only in the territory of another contracting state, and that it will apply the NY Convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under Korean law.

2. Is your state a party to any other bilateral or multilateral treaties regarding the recognition and enforcement of arbitral awards?

Korea has also ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention). Korea signed the Washington Convention on 21 February 1967, and it entered into force on 23 March 1967.

3. Is there an arbitration act or equivalent and, if so, is it based on the UNCITRAL Model Law? Does it apply to all arbitral proceedings with their seat in your jurisdiction?

The Korean Arbitration Act (the Act) was first enacted in 1966, but was entirely revised as of 31 December 1999 to substantially adopt the UNCITRAL Model Law (the Model Law).

In May 2016, the Korean legislature passed extensive amendments to the Act that took effect on 30 November 2016 (the 2016 Amendments to the Act), and these amendments incorporate many key features of the 2006 UNCITRAL Model Law (the 2006 Model Law). Notable amendments include an expanded scope of arbitrable disputes (article 3(1)), a wider range of discretion for the arbitral tribunal in rendering interim measures (article 18(2)), and simplification of the procedure for enforcement of arbitral awards (article 37(2)).

The Act applies to all arbitral proceedings seated in Korea. In addition, articles 9, 10, 37, and 39 of the Act will apply even if an arbitral proceeding is seated elsewhere (article 2(1)).

4. What arbitration bodies relevant to international arbitration are based within your jurisdiction? Do such bodies also act as appointing authorities?

The Korean Commercial Arbitration Board (the KCAB) is the only officially recognised arbitral institution in Korea.

The KCAB acts as an appointing authority for KCAB arbitrations and may act as an appointing authority in non-KCAB arbitrations seated in Korea.

In addition to the KCAB, in early 2018, Korea also launched the Seoul Maritime Arbitrators Association (SMAA), which is similar to the London Maritime Arbitrators Association (LMAA) or Singapore Chamber of Maritime Arbitration (SCMA), in a move to facilitate maritime arbitration in Korea.

5. Can foreign arbitral providers operate in your jurisdiction?

Yes. There is no restriction on this matter and the Korean government and related institutions are actively trying to promote Seoul as a seat of arbitration for arbitral proceedings governed by the rules of foreign institutions. The introduction of the Arbitration Industry Promotion Act (the Promotion Act) in 2017 is an example of such an attempt. The Promotion Act includes provisions to expand dispute resolution facilities, cultivate experts and professionals in the area of arbitration, and support research and development in the arbitration field.

6. Is there a specialist arbitration court? Is the judiciary in your jurisdiction generally familiar with, and supportive of, the law and practice of international arbitration?

There is no specialist arbitration court in Korea. However, the courts are familiar with the law and practice of international arbitration and have set up internal guidelines to maintain consistency in the recognition and enforcement of arbitral awards. The judiciary has taken an active interest in international arbitration and has proven extremely supportive of both arbitral proceedings and the recognition and enforcement of arbitral awards.

There are only a handful of cases in which foreign arbitral awards have been refused recognition or enforcement in Korea over the past 10 years.

Agreement to arbitrate

7. What, if any, requirements must be met if an arbitration agreement is to be valid and enforceable under the law of your jurisdiction? Can an arbitration agreement cover future disputes?

According to article 8 of the Act, a valid and enforceable arbitration agreement must be in writing. Notably, however, Korea's approach to the "in writing" requirement is in line with the relaxed approach under Option 1 of article 7 of the 2006 Model Law, such that an arbitration agreement shall be deemed to be in writing if its content has been recorded in any form, regardless of whether the agreement was concluded orally, by conduct, or by other means. Also, in line with the foregoing Option 1, an agreement made by any means of electronic communication, such as email or fax, shall be deemed to be an arbitration agreement in writing.

In 2004, the Korean Supreme Court found that the following factors must be considered for a specific arbitration clause to be valid and enforceable: (i) the specific circumstances under which the parties decided to include the arbitration clause; (ii) the characteristics of the arbitration agreement; and (iii) whether the arbitration clause comports with the notion of arbitration under the Act (Supreme Court Decision 2004Da42166 dated 11 November 2004). Since the 2016 Amendments to the Act, other court cases have continued to affirm the importance of these factors.

Korean courts view optional arbitration clauses – giving parties the option to pursue arbitration or other dispute resolution procedures – as inherently invalid and unenforceable. For instance, in the same Korean Supreme Court decision mentioned above, the court stated that if the dispute resolution clause provides the option to choose either arbitration or mediation (followed by court litigation), the agreement to arbitrate shall only be valid after the opposing party has participated in the arbitration without any objection.

When there is indeed a valid and enforceable arbitration agreement, it can be deemed that the parties have decided to address in their arbitration all disputes arising from their specific legal relationship at issue, unless the parties have explicitly limited the scope of disputes to be resolved through arbitration. Thus, an agreement to arbitrate can and will cover all future disputes between the parties to the agreement, to the extent that such disputes fall within the scope of the written agreement to arbitrate. Further, if one party asserts in an application or an answer that there is an arbitration agreement and the other party does not refute such assertion, a written arbitration agreement is deemed to have been made. Finally, if a contract cites a document containing an arbitration clause, that contract is deemed to contain an arbitration agreement.

It should also be noted that since an agreement to arbitrate is considered to be a waiver of an important constitutional right (ie, the right to be heard before the courts), a Korean court may view an arbitration agreement that is too vague or broad to be invalid. In this regard, a Korean court will be unlikely to uphold the validity of an arbitral agreement that provides for both parties to arbitrate all matters between them in indefinite terms.

8. Are any types of dispute non-arbitrable? If so, which?

As in most jurisdictions, certain types of public law disputes relating to criminal law, family law, and administrative law are not arbitrable in Korea. It has not always been clear whether certain claims related to regulatory laws (such as securities, antitrust, competition, corporate governance, environmental or intellectual property regulations) are properly subject to arbitration. Article 1 of the Act, which defines arbitration with a reference to "disputes arising under private law", was thought to restrict the scope of the Act to disputes regarding property rights or private commercial interests and not public law-related claims. However, article 3 of the Act now defines arbitration more broadly as "a procedure to resolve disputes relating to (i) property rights or (ii) non-property rights that the parties can resolve through a settlement". Based on this revised wording, it is expected that certain private claims, such as claims for damages arising from acts of patent infringement or antitrust violations, will be treated by Korean courts as arbitrable.

Separately, doubts have historically been raised by Korean intellectual property (IP) law practitioners about the arbitrability of IP disputes, particularly where the validity of registered IP rights is concerned. In the context of IP disputes, questions also loom over the interplay between arbitrability and public policy, given the state's involvement in the creation, registration, and protection of IP rights. While Hong Kong and Singapore have moved toward the amendment of their laws to specifically allow the validity of registered IP rights to be arbitrable, Korea has not yet joined this trend and amended the Act. For now, it is the prevailing view in Korea that the validity of registered IP rights is an arbitrable issue as long as it has the binding effect between the arbitration parties.

9. Can a third party be bound by an arbitration clause and, if so, in what circumstances? Can third parties participate in the arbitration process through joinder or a third-party notice?

A third party may be bound by an arbitration clause as a successor (heir, assignee or trustee) to a party bound by the clause. In addition, a third party may consent in writing or give implied consent to arbitrate, such as by failure to object to the jurisdiction of the arbitral tribunal.

The Act is silent as to whether third parties can participate in the arbitration process through joinder or a third-party notice. For an arbitration to which the 2016 version of the KCAB International Arbitration Rules (the KCAB Rules) applies, an arbitral tribunal may permit joinder if either (i) all of the current parties to an arbitration and the third party agree in writing to the joinder or (ii) the third party is a party to the same arbitration agreement as the parties to an arbitration, and the third party agrees to the joinder in writing (article 21(1)). It should be noted that joinder is possible only after the formation of an arbitral tribunal. It is also noteworthy that only the existing parties (and not the joining party) can apply for such joinder under the KCAB Rules.

10. Would an arbitral tribunal with its seat in your jurisdiction be able to consolidate separate arbitral proceedings under one or more contracts and, if so, in what circumstances?

There is no provision in the Act that specifically precludes or permits the consolidation of separate arbitral proceedings. For an arbitration to which the KCAB Rules apply, an arbitral tribunal may, at a party's request, consolidate claims brought in separate but pending arbitrations if (i) such arbitration is also under the KCAB Rules, (ii) the arbitration is between the same parties, and (iii) no common arbitrator has been appointed in the separate proceeding (article 23). The KCAB Rules also provide that the Secretariat may allow for the submission of claims arising under multiple contracts within a single request for arbitration if the Secretariat is satisfied that: (i) the KCAB Rules apply to each of the multiple contracts, (ii) the arbitration agreements within each of the multiple contracts are compatible, and (iii) all of the claims arise out of the same transaction or series of transactions (article 22).

11. Is the "group of companies doctrine" recognised in your jurisdiction?

Korean courts only recognise "piercing the corporate veil" in limited circumstances, such as when a corporate entity is used by a company or individual in bad faith to circumvent the law or avoid liability in a grossly unfair or unjust manner.

We would advise clients to take these challenges into consideration when structuring transactions and specifically designate parties in contracts to safeguard their rights.

12. Are arbitration clauses considered separable from the main contract?

Article 17(1) of the Act provides that when an arbitral tribunal is ruling on its own jurisdiction, it is to treat an arbitration clause contained within a contract as independent of the other provisions of that contract. Thus, the Act recognises that the tribunal has the authority to rule on whether the contract in which the arbitration clause is found is invalid or non-existent without affecting the validity of the arbitration clause.

13. Is the principle of competence-competence recognised in your jurisdiction? Can a party to an arbitration ask the courts to determine an issue relating to the tribunal's jurisdiction and competence?

Article 17 of the Act recognises the principle of competence-competence by providing that the arbitral tribunal may rule on its own jurisdiction (and any challenge to a tribunal's jurisdiction must be raised not later than the submission of the statement of defence on the substance of the dispute). However, article 17 of the Act empowers the court to have the final say over whether a tribunal has jurisdiction by allowing a party to appeal a tribunal's decision as to its own jurisdiction. And, pursuant to an amendment to the Act in 2016, a court may now rule on both positive and negative preliminary findings of jurisdiction by arbitral tribunals.

One notable feature related to competence-competence under the Act is that the decision of the court as to the tribunal's jurisdiction may not be appealed.

14. Are there particular issues to note when drafting an arbitration clause where your jurisdiction will be the seat of arbitration or the place where enforcement of an award will be sought?

As explained above, Korean courts value the right to be heard before a court, and they will carefully examine whether the parties have clearly agreed to waive their rights to be heard before a court. As long as the parties' intention to arbitrate is clear, the court will generally determine that an arbitration agreement is valid, even if certain defects are present in the arbitration agreement, such as a misspelling in the name of an institution. On the other hand, a Korean court will not view an option clause – giving parties an option to pursue arbitration or court litigation – to be a valid agreement to arbitrate. This is because it is not clear based on an option clause if the parties were intending to give up their constitutional rights. Accordingly, option clauses should not be used in arbitration agreements that provide for a seat of arbitration in Korea or that are likely to be subject to enforcement in Korea.

In addition to the above, for arbitrations seated in Korea, parties should be aware that the Act provides them with the right to appeal decisions of the arbitral tribunal to the court of competent jurisdiction with respect to challenges to an arbitrator (article 14), to the jurisdiction of the tribunal (article 17), and to an expert appointed by the tribunal (article 27). Notably, however, a court decision on the above matters may not be appealed.

With respect to the recognition and enforcement of foreign arbitral awards, Korean courts have proven very arbitration-friendly. However, if a party seeks any form of specific performance, it should clearly identify the relief sought in a manner that is specific enough to allow it to be executed by a Korean court execution officer because, even if an award of specific performance is enforceable, a court may find that it is not capable of being executed, which will create practical difficulties in the enforcement of the arbitral award.

15. Is institutional international arbitration more or less common than ad hoc international arbitration? Are the UNCITRAL Rules commonly used in ad hoc international arbitrations in your jurisdiction?

Institutional arbitration is much more common than ad hoc arbitration in Korea. However, ad hoc arbitration is not uncommon. Generally, parties to ad hoc arbitration use the UNCITRAL Rules.

16. What, if any, are the particular points to note when drafting a multi-party arbitration agreement with your jurisdiction in mind? In relation to, for example, the appointment of arbitrators.

The Act is silent on the issue of multi-party arbitration, and thus great care should be given when drafting an arbitration clause for multi-party agreements as most arbitration clauses are drafted with two-party arbitration in mind.

This means that, as a general precautionary measure, the parties will have to draft a multi-party arbitration clause in a more detailed manner, including by:

- providing precise definition of the parties subject to the arbitration clause;
- requiring that notice of any arbitration be provided to all parties;
- providing for the power to join additional parties to the arbitration; and
- granting waivers of the right to participate in or challenge the formation of the arbitral tribunal, etc.

If it is likely that more than two parties will be involved in an arbitration relating to the multi-party agreements, consideration should be given to which institutional rules are the most suitable, as their provisions vary with respect to the issues of joinder of third parties and consolidation.

Commencing the arbitration

17. How are arbitral proceedings commenced in your jurisdiction? Are there any key provisions under the arbitration laws of your jurisdiction relating to limitation periods of which the parties should be aware?

Article 22 of the Act provides that, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date when the request for arbitration is received by the respondent. The request for arbitration shall identify the parties, subject matter of the dispute and contents of the arbitration agreement.

It is also worth noting that article 8(2) of the KCAB Rules provides that the date on which the request for arbitration is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration proceedings. However, according to article 4(5) of the KCAB Rules, before constitution of the Arbitral Tribunal, all communications between the parties or between each party and the arbitrators shall be made through the Secretariat. The Secretariat shall send copies of any written communications to the parties and the arbitrators. Therefore, unlike some institutional rules, eg, LCIA, a party to an arbitration governed by the KCAB Rules will send its request for arbitration to the Secretariat (and not directly to the potential respondent) and the date on which the Secretariat receives such request will be deemed to be the date of the commencement of the arbitration proceedings.

The Act contains no provisions relating to a limitations period for the filing of a request for arbitration. However, for any given cause of action, the expiration of the applicable statute of limitations may be raised as a defence in the arbitration. The following is a list of the major Korean statute of limitations periods in relation to contractual claims. The list is not exhaustive.

Statute of Limitations Period	Type of claims
10 Years	Contractual claims not involving "commercial activities" and contractual claims not involving "commercial" litigants
5 years	Contractual claims involving "commercial activities" and contractual claims involving "commercial" litigants
3 years	Insurance claims, tort claims, salary claims, and rent claims
1 year	Hotel fees, restaurant fees, manufacturer implied warranties (from date of delivery) and seller warranties (six months – from discovery of defect)

Choice of law

18. How is the substantive law of the dispute determined? Where the substantive law is unclear, how will a tribunal determine what it should be?

Article 29 of the Act provides that the arbitral tribunal shall decide the dispute in accordance with the substantive law chosen by the parties. If there is no party agreement as to substantive law, the arbitral tribunal shall apply the law of the state that it considers to have the closest connection with the subject matter of the dispute. For KCAB arbitrations, article 29 of the KCAB Rules stipulates that, in the absence of party agreement, an arbitral tribunal may apply the law which it deems appropriate. Given the slight discrepancy between the standards articulated in the Act and the KCAB Rules, the KCAB Rules would take precedence because the parties agree to be bound by the KCAB Rules when they agree to KCAB arbitration. However, in practice, the elements that an arbitral tribunal would consider when determining the substantive law would be the same under either standard (eg, the subject matter of the dispute, the place of performance, the intentions of the parties when executing the agreement, etc).

Appointing the tribunal

19. Does the law of your jurisdiction place any limitations in respect of a party's choice of arbitrator?

The Act places no restrictions on who may serve as an arbitrator. Sitting Korean judges are not permitted to serve as arbitrators due to judicial regulations that prohibit them from engaging in any profit-making activities. Otherwise, the parties to an arbitration seated in Korea are free to appoint an arbitrator of their choosing, subject to any restrictions that the parties themselves have agreed upon in their arbitration agreement or have implicitly accepted by adopting the rules of a particular institution. Notably, there is no requirement under the Act that an arbitrator possess any law qualification.

20. Can non-nationals act as arbitrators where the seat is in your jurisdiction or hearings are held there? Is this subject to any immigration or other requirements?

Article 12(1) of the Act provides that no person shall be precluded by reason of his or her nationality from acting as an arbitrator, unless otherwise agreed by the parties. There are no special immigration or other requirements applicable to foreign arbitrators. Indeed, non-nationals can and frequently do sit as arbitrators in arbitrations seated in Korea.

21. How are arbitrators appointed where no nomination is made by a party or parties or the selection mechanism fails for any reason? Do the courts have any role to play?

Under these circumstances, articles 11 and 12 of the Act provide the default appointment mechanism for arbitrations seated in Korea.

Article 11 provides that where the parties fail to determine the number of arbitrators, the number shall be three. Article 12(3) provides that where the parties fail to agree on the procedure for appointing arbitrators, the arbitrators shall be appointed as follows:

In an arbitration with a sole arbitrator, where the parties have not agreed on the arbitrator within 30 days after a party has received a request from the other party to appoint the arbitrator, the competent court or arbitration institution designated by the competent court shall appoint the arbitrator upon either party's request.

In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall agree on the third arbitrator. If a party fails to appoint its arbitrator within 30 days of a request to do so by the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the competent court or arbitration institution designated by the competent court shall appoint the arbitrator upon either party's request.

Article 12(4) provides that where the parties have agreed on the procedure for appointing arbitrators but have failed to nominate the arbitrators, the competent court or an arbitration institution designated by the competent court shall appoint the arbitrator upon either party's request.

A court's decision on the appointment of an arbitrator is non-appealable.

22. Are arbitrators afforded immunity from suit under the law of your jurisdiction and, if so, in what terms?

There are no specific provisions under the Act that provide for the immunity of arbitrators from suit in Korea. As such, theoretically, arbitrators may be liable for contractual breach or illegal action, but practitioners and scholars are of the view that such liability either does not exist or may arise only if an arbitrator has acted in bad faith.

Article 56 of the KCAB Rules provides that arbitrators and the Secretariat shall not be liable for any act or omission in connection with an arbitration conducted under the KCAB Rules, unless such act or omission is shown to constitute willful misconduct or recklessness.

23. Can arbitrators secure payment of their fees in your jurisdiction? Are there fundholding services provided by relevant institutions?

There is no restriction under the Act against arbitrators securing the payment of their fees. Securing payment pursuant to institutional international arbitration is subject to the relevant arbitral institution's rules.

Challenges to arbitrators

24. On what grounds may a party challenge an arbitrator? How are challenges dealt with in the courts or (as applicable) the main arbitration institutions in your jurisdiction? Will the IBA Guidelines on Conflicts of Interest in International Arbitration generally be taken into account?

Article 13 of the Act provides that an arbitrator may be challenged if circumstances exist that are likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed on by the parties. Under article 14 of the Act, the parties are free to agree on a procedure for challenging an arbitrator. Failing such an agreement, the party challenging an arbitrator shall send a written statement of the grounds for challenge to the arbitral tribunal within 15 days of (i) the

constitution of the arbitral tribunal or (ii) becoming aware of the grounds for challenge. Unless the challenged arbitrator withdraws, or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If the arbitral tribunal rejects the challenge, the challenging party may, within 30 days of being notified of the decision, request that the court decide on the challenge. The court's decision is final and not subject to appeal.

Here it bears mentioning that the time period set forth in article 14 has special importance because the Korean Supreme Court has held that even if circumstances existed during the arbitration proceeding that would have been likely to give rise to justifiable doubts as to an arbitrator's impartiality or independence, such circumstances do not constitute grounds for setting aside an arbitral award if they were not raised as part of a challenge within the requisite time period. Therefore, it is imperative that any challenge brought against an arbitrator be raised during the period set forth in article 14.

Article 14 of the KCAB Rules also sets forth similar grounds for challenges and relevant time limitations.

The IBA Guidelines on Conflicts of Interest in International Arbitration are well recognised in this jurisdiction and are often taken into account.

Interim relief

25. What main types of interim relief are available in respect of international arbitration and from whom (the tribunal or the courts)? Are anti-suit injunctions available where proceedings are brought elsewhere in breach of an arbitration agreement?

Unlike the English Arbitration Act 1996 or the Singapore International Arbitration Act 1994, which have adopted the court-subsidiarity approach (ie, the position that the power of the courts to order interim measures is subsidiary to the power of the arbitral tribunals to do the same), the Act is silent on this issue. Interim relief is available from both courts and arbitral tribunals, and the parties can make a choice depending on the circumstances of the case.

Article 10 of the Act provides that any party to an arbitration agreement may, before or during the arbitral proceedings, request interim relief from a court. Types of interim relief available from the courts, however, are limited to provisional attachment of respondents' assets and preliminary injunctions.

By contrast, the types of interim measures available to arbitral tribunals are more diverse. The revised article 18 of the Act provides that, unless the parties agree otherwise, an arbitral tribunal may, at the request of a party, impose an interim measure of protection, including a temporary injunction, the preservation of assets, or the preservation of evidence.

The 2016 Amendments to the Act incorporate, with only minor adjustments, many of the provisions related to interim measures found in Chapter IVA of the 2006 Model Law but not the provisions on ex parte preliminary orders in articles 17B and 17C. Among other things, the new provisions of the Act specify the criteria that a party must prove for its application for interim measures to be successful (article 18-2), provide that a party may request recognition or enforcement from a Korean court of an interim measure granted by an arbitral tribunal (article 18-7), and provide the limited grounds upon which Korean courts may deny recognition or enforcement of the same (article 18-8).

The amendments make clear that an interim order made by an arbitral tribunal can be recognised and enforced by applying to the court for a decision. However, interim measures will only be enforced by a Korean court if the arbitration is seated in Korea and the order made by the arbitral tribunal is compatible with Korean law. In this regard, although arbitral tribunals have more discretion when considering what type of interim measures they consider necessary, a careful approach should be taken if a party intends to enforce such interim orders through the courts of Korea.

The Act does not explicitly provide for the possibility of an anti-suit injunction in relation to international arbitration. However, some scholars point out that the Korean Civil Execution Act does not limit the types of injunctions that can be sought by a party and, therefore, it may be possible for a party to successfully apply for an anti-suit injunction. That being said, the availability of anti-suit injunctions has not been tested in

practice because if one party brings an action in court against another party even though they are bound by an arbitration agreement and the other party moves to compel arbitration, the court is required to dismiss the action, unless it finds the arbitration agreement to be null and void, inoperative or incapable of being performed.

26. Does the law of your jurisdiction allow a court or tribunal to order a party to provide security for costs?

While the Act does not expressly stipulate whether a court or tribunal can order a party to provide security for costs, it is widely interpreted that an arbitral tribunal may order a party to provide security as an interim measure pursuant to article 18 of the Act.

Procedure

27. Are there any mandatory rules in your jurisdiction that govern the conduct of the arbitration (eg, general duties of the tribunal and/or the parties)?

The provisions of the Act are generally default provisions that apply in the absence of an agreement between the parties. Subject to only a few mandatory provisions of the Act, the parties are free to agree on the procedures for arbitration. For example, one mandatory provision of the Act is article 19, which provides that the parties shall be equally treated in the arbitral proceedings and that each shall be given a full opportunity to present its case. In addition, parties may not waive article 13 of the Act, which provides that potential arbitrators must disclose any circumstance that may give rise to justifiable doubts as to his or her impartiality or independence.

28. What is the applicable law (and prevailing practice) where a respondent fails to participate in an arbitration?

In general court litigation, a Korean court may render a default judgment without receiving further written or oral pleadings if a defendant fails to submit a written answer to a complaint within a fixed time limit. In such a case, the court may render a judgment granting the claims set out by the plaintiff.

However, in arbitration, the default provisions of article 26 of the Act provide that if a respondent fails to submit a statement of defence, the arbitral tribunal shall continue the proceedings without treating such failure as an admission of the claimant's allegations. If any party fails to appear at a hearing or to produce documentary evidence within a fixed period of time, the tribunal may continue the proceedings and make the award based upon the evidence before it.

29. What types of evidence are usually admitted, and how is evidence usually taken? Will the IBA Rules on the Taking of Evidence in International Arbitration generally be taken into account?

Article 20 of the Act confers upon the arbitral tribunal the power to determine the admissibility, relevance and weight of any evidence. Evidence normally includes written documents and statements by witnesses and/or experts, and may also include inspections of sites or property that are relevant to the subject matter of the dispute. The IBA Rules on the Taking of Evidence in International Arbitration (The IBA Rules on Taking of Evidence), while not binding, are generally taken into account in international arbitrations seated in Korea. The Prague Rules provide for the arbitral tribunal's active and inquisitorial role in establishing the facts of the case. Korea is, however, a civil law jurisdiction, and thus Korean arbitrators are more likely to be familiar with civil law jurisprudence and practice, so the Prague Rules have not been widely adopted by parties to Korea-seated arbitrations thus far, based on the authors' experience.

30. Will the courts in your jurisdiction play any role in the obtaining of evidence?

Article 28 of the Act provides that a tribunal, either on its own initiative or at the request of a party, may seek assistance in the taking of evidence from a competent court. The 2016 Amendments to the Act make it possible for the tribunal to cooperate together with the court and essentially supervise the court's taking of evidence rather than having the court gather evidence alone and later providing a report to the tribunal. Also, article 28(5) provides that the competent court may order witnesses or document holders to appear before the tribunal or produce documents.

Similarly, article 37 of the KCAB Domestic Arbitration Rules stipulates that (i) the Arbitral Tribunal may, at its sole discretion or at the request of the parties, commission a court to examine evidence or request assistance from a court in examination of evidence; (ii) when commissioning a court of competent jurisdiction to examine evidence, the Arbitral Tribunal may designate in writing the items to be examined; and (iii) when examining evidence in accordance with the foregoing (ii), an arbitrator or the parties may take part upon approval of the presiding judge.

31. What is the relevant law and prevailing practice relating to document production in international arbitration in your jurisdiction?

Aside from providing in article 27 (tribunal-appointed experts) and article 28 (court's assistance in examining evidence) that the competent court may in some instances compel document production, the Act is silent regarding the production of documents. The Korean Civil Procedure Act, consistent with the civil law tradition, provides that a plaintiff should build its case based on whatever documents are in its possession. So, in general court litigation, in limited cases where a requested document is clearly specified and it is evident that the party to whom the request is made has such document, the court may order the production of such documents.

The IBA Rules on the Taking of Evidence, while not binding, are generally taken into account in international arbitrations seated in Korea. However, to ensure that standard international document production procedures are available, a party should be mindful to request that the IBA Rules on the Taking of Evidence be adopted or used as a guideline at the outset of an arbitration.

32. Is it mandatory to have a final hearing on the merits?

No. Article 25 of the Act provides that, subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of the documentary submissions before the tribunal. Unless otherwise agreed by the parties, however, the tribunal must hold a hearing if requested by either party.

33. If your jurisdiction is selected as the seat of arbitration, may hearings and procedural meetings be conducted elsewhere?

Yes. Under article 21 of the Act, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for examinations of witnesses, experts or the parties, or for inspection of goods, other property or documents, unless the parties mutually decide otherwise.

Award

34. Can the tribunal decide by majority?

Yes. Article 30 of the Act provides that, unless otherwise agreed by the parties, any decision of the arbitral tribunal shall be made by a majority of all of its members. However, matters of procedure may be decided alone by the presiding arbitrator, if so agreed by the parties or authorised by all members of the tribunal.

35. Are there any particular types of remedies or relief that an arbitral tribunal may not grant?

The Act contains no restrictions upon an arbitral tribunal in terms of the types of remedies or relief that may be granted. However, if the tribunal grants remedies or relief that cannot be recognized or enforced under Korean law, recognition and enforcement of the arbitral award may be denied on the ground of violation of public policy. For example, an award may be denied recognition or enforcement by a Korean court if it is deemed to be ordering punitive damages, especially if the amount of damages awarded markedly exceeds the amount that would be available under Korean law. Further, article 29(3) of the Act provides that the arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

In addition to the above, the Seoul High Court found in a case that, even though an award was enforceable, the operative part of the decision made by the arbitral tribunal was not capable of being executed by the execution officer due to lack of specificity. Considering this finding, it is advisable to consult with a Korean law firm when drafting a request for relief that is not monetary in nature (e.g., an order of specific performance).

36. Are dissenting opinions permitted under the law of your jurisdiction? If so, are they common in practice?

There is no provision of the Act specifically permitting or prohibiting the issuance of dissenting opinions. In practice, there have been cases where dissenting opinions were issued, but it is not a common practice.

37. What, if any, are the legal and formal requirements for a valid and enforceable award?

Article 32 of the Act provides that the award shall be made in writing and signed by all arbitrators. Where a minority of the tribunal has any reason not to sign the award, the award shall be effective with the signature of a majority of the arbitrators, with the reason for the failure or refusal to sign stated in the award. The award shall state the reasons upon which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms of a settlement between the parties under article 31 of the Act. The award shall also state its date and place of arbitration. The tribunal shall deliver authenticated copies to each party, and, at the request of a party, the tribunal may send and deposit the original award with the competent court, along with a document verifying such delivery.

In 2020, the Seoul Central District Court rejected a party's challenge to an arbitral award based on allegedly inadequate reasoning but, at the same time, noted that there could be certain instances where an arbitral award may be set aside for lack of adequate reasoning (Seoul Central District Court Decision 2019GaHap503677 dated 31 January 2020). However, citing a Supreme Court decision (Supreme Court Decision 2007Da73918 dated 24 June 2010), the court made it clear that such a challenge can only be successful (i) when the arbitral award does not state or provide any reasoning, or (ii) when the reasoning provided in the award is not clear enough to determine the factual or legal findings which the award is based on, or (iii) when the reasoning provided is self-contradictory.

Therefore, according to the Seoul Central District Court's decision, an arbitral tribunal is not required to provide a clear and detailed view of the underlying legal relationship.

38. What time limits, if any, should parties be aware of in respect of an award? In particular, do any time limits govern the interpretation and correction of an award?

Pursuant to article 34 of the Act, a party may request the arbitral tribunal to make a correction, interpretation, or additional award within 30 days of receipt of the award, unless the parties have agreed otherwise. The tribunal shall decide on correction or interpretation within 30 days of receipt of request, and on additional awards within 60 days of receipt of request, but may extend these periods if necessary.

Pursuant to article 36(3) of the Act, an application for the setting aside of an award may not be made after three months have elapsed from the date on which the party making the application received the duly authenticated copy of the award or the duly authenticated copy of a correction or interpretation or an additional award under article 34.

Costs and interest

39. Are parties able to recover fees paid and costs incurred? Does the "loser pays" rule generally apply in your jurisdiction?

Under article 34-2 of the Act, unless the parties have agreed otherwise, an arbitral tribunal has the explicit authority to apportion arbitration costs between the parties, having regard to all of the circumstances of the case. The "loser pays" rule generally applies, although the arbitral tribunal may decide otherwise in light of the nature of the claims and the manner in which the arbitration proceeded.

For enforcement actions of an arbitral award, the Supreme Court has stipulated that the applicant may be awarded legal fees by applying the standards stated in article 16(1)(a) of the Rules on the Stamps Attached for Civil Litigation (Supreme Court Decision 2020Ma7667 dated 15 October 2021).

40. Can interest be included on the principal claim and costs? Is there any mandatory or customary rate?

For arbitrations seated in Korea, it is customary for the claimant to seek payment or reimbursement of interest on the principal claims and related costs from the respondent, and the arbitral tribunal must decide on such claims. Under article 34-3 of the Act, arbitral tribunals have the explicit authority to award interest with regard to the circumstances of the case, unless the parties have agreed otherwise. If Korean law is the governing law, the statutory interest rates of 5 per cent per annum under the Korean Civil Code for non-commercial claims or 6 per cent per annum under the Korean Commercial Code for commercial claims will apply.

Parties should also consider whether to seek the much higher rate of interest of 12 per cent per annum as post-judgment interest until full payment of an award. This higher interest rate applies in domestic court litigation under the Special Act on Expedition of Litigation. Under a strict interpretation of this provision, this higher rate applies only to court judgments and therefore would not apply to an arbitral award. However, in the past, the Supreme Court of Korea has enforced an award that applied such an interest rate, reasoning that application of that rate does not, in itself, constitute a breach of public policy. Both pre- and post-award interest are commonly granted by tribunals, usually accruing until the date of final payment of the principal amount.

Challenging awards

41. Are there any grounds on which an award may be appealed before the courts of your jurisdiction?

Pursuant to article 36 of the Act, which is modeled on article 34 of the Model Law, recourse against an arbitral award may be made only by an application for setting aside the award to a court. Article 36 of the Act provides that an award can be set aside if:

(i) a party to the arbitration agreement was under some incapacity or there was no valid arbitration agreement;
(ii) there was no appropriately served notice of the selection of arbitrators or of the arbitration proceedings or, for any other reason, a party was not able to present its case;
(iii) the award dealt with a matter that was not covered by the arbitration agreement;
(iv) the composition of the arbitral tribunal or the conduct of the arbitration proceedings was inconsistent with the parties' agreement, which was not in conflict with a mandatory provision of the Act, or was not in accordance with the Act;
(v) the subject matter of the award was a non-arbitrable matter under Korean law; or
(vi) the award, if recognised or enforced in Korea, will contravene the public policy or social order of Korea.

In 2018, the Supreme Court held that, for an award to be set aside pursuant to (iv), the degree of infringement upon one's procedural rights has to be markedly serious to the extent that it is unacceptable.

In the same decision, the Court provided an interpretation of (vi), stating that it would only be applied when the result of enforcing the award would violate public policy (Supreme Court Decision 2018Da240387 dated 13 December 2018).

Further, if an argument to refuse enforcement of an arbitral award pursuant to (vi) is substantively comparable to an invocation of review of the arbitral award, such argument will not be accepted. This implies that an indirect attempt to appeal an award is precluded.

42. Are there any other bases on which an award may be challenged, and if so what?

No. Article 36(1) of the Act provides that recourse against an arbitral award may be made only by an application for setting aside the award on the grounds described above.

43. Is it open to the parties to exclude by agreement any right of appeal or other recourse that the law of your jurisdiction may provide?

An arbitral award can be set aside (or challenged) only in strictly limited circumstances under the Act and the New York Convention and will not be appealable in general. Therefore, in a general sense, a party's right to appeal in the context of arbitration will be deemed to have been waived. However, in relation to the issue of whether a party may specifically agree to waive its right to set aside (or challenge) an arbitral award, there seems to be no law or precedent expressly allowing or prohibiting such an agreement, yet the Korean courts' position for general civil litigation is that parties can agree to waive their right to appeal as long as the parties' intention to waive such right has been explicitly expressed in a written agreement. It is uncertain if this position would apply analogously with regard to the waiver of the right to set aside or challenge an arbitral award, since the right to set aside or challenge an arbitral award is already strictly limited by the Act and can be exercised only in exceptional circumstances.

Enforcement in your jurisdiction

44. Will an award that has been set aside by the courts in the seat of arbitration be enforced in your jurisdiction?

Pursuant to article 39 of the Act, the recognition or enforcement of foreign arbitral awards in Korea is determined in accordance with the NY Convention. Article V(1)(e) of the NY Convention states that the recognition and enforcement of an arbitral award may be refused, at the request of the party against whom it was invoked, if that party furnishes proof that the award has been set aside or suspended by a competent authority of the country in which, or under the law in which, that award was made. Therefore, it is unlikely that a Korean court would recognise or enforce a foreign arbitration award that has been set aside by a competent court in the seat of arbitration as long as the state that is the seat of arbitration is a party to the NY Convention, but it may depend on the reason for set aside.

Pursuant to article 39(2) of the Act, if the seat of arbitration is not a signatory of the NY Convention, the Korean court will apply the criteria set out in the applicable Korean law (ie, the Korean Civil Procedure Act and the Civil Execution Act) for setting aside foreign judgments, notwithstanding the judgment of the courts in the seat of arbitration that set aside such award. The criteria set out in the Korean Civil Procedure Act require that:

- the international jurisdiction of the foreign court (ie, arbitral tribunal) is recognised under the principle of international jurisdiction pursuant to the statutes or treaties of Korea;
- the respondent was properly served, allowing him or her sufficient time to defend, or that the respondent participated in the proceedings without the service of such documents;
- the recognition of such final judgment (ie, award) does not undermine the public policy or other social orders of Korea; and
- reciprocal guarantee of recognition exists.

45. What trends, if any, are suggested by recent enforcement decisions? What is the prevailing approach of the courts in this regard?

The Korean courts are reluctant to refuse recognition or enforcement of foreign arbitral awards unless there is a clear basis for such refusal. Challenges based on public policy have been numerous but almost wholly unsuccessful. The Supreme Court has held that in determining whether enforcement of the award would violate public policy, it would only review the effect of the enforcement of the award and would not seek to question whether the award had been correctly determined in fact or law. The court also stated that, in assessing the public policy challenge, it must take into account not only domestic perception of public policy but also the stability of international commercial transactions.

Recent Supreme Court decisions confirm this trend of not refusing recognition or enforcement of international arbitral awards except in unusual circumstances. The court has acknowledged that the principles and rules that strictly govern domestic litigation proceedings may be applied more flexibly with respect to the enforcement of international arbitral awards. For example, a Korean company recently challenged an award that ordered monetary payment for non-performance of the transfer of IP-related rights and interests to another party (with such monetary payment obligation being referred to as an indirect enforcement indemnity) by arguing that it went against the Civil Execution Act, which explicitly adopts the method of compulsory execution, instead of a monetary enforcement measure, for obligations requiring "an expression of intent" to make such transfer. Nonetheless, the court rejected the argument and found the award enforceable (Supreme Court Decision 2016Da18753 dated 29 November 2018), stating that the award cannot be deemed to counter the public order and good morals of Korea. In another decision (Supreme Court Decision 2018Da240387 dated 13 December 2018), the court upheld that the principle of disposition non ultra petita ("not beyond request"), which inhibits judges from awarding relief beyond the claimant's request, may be applied less strictly in foreign arbitral proceedings compared to in general Korean civil litigation. The other main types of enforcement challenge have also been rejected by the Korean courts with few exceptions.

46. To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

As state immunity is not a ground for resisting enforcement of arbitral awards under the NY Convention or under Korean law, it would be difficult to successfully raise such a defence to prevent the enforcement of a foreign arbitral award in Korea.

Further considerations

47. To what extent are arbitral proceedings in your jurisdiction confidential?

The Act does not contain any provision relating to the confidentiality of arbitral proceedings. Thus, absent agreement of the parties or applicable arbitral rules, confidentiality of arbitral proceedings in Korea is not legally presumed. Nonetheless, in practice, arbitral proceedings in Korea have been treated in strict confidence. For KCAB arbitrations, article 57(1) of the KCAB Rules also stipulates that arbitration proceedings and the records thereof shall be closed to the public. KCAB arbitral awards are published only after any information identifying the parties (including the names) have been redacted.

48. What is the position relating to evidence produced and pleadings filed in the arbitration? Are these confidential? Is there any way that they might be relied on in other proceedings (whether arbitral or court proceedings)?

The Act is silent on the issue of confidentiality. Thus, in practice, parties usually address this issue to the extent they can through their confidentiality agreement, or the tribunal or the court addresses the issue through an order.

49. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your jurisdiction?

Counsel in arbitrations in Korea may be members of the Korean Bar or qualified as attorneys in their home jurisdiction. There are no established professional standards or qualifications that apply to arbitrators in Korea.

As noted above, arbitrators conducting proceedings in Korea must disclose in advance if there are any circumstances that are likely to give rise to justifiable doubt as to his or her impartiality or independence, and are subject to challenge if any such circumstances exist.

50. Are there any particular procedural expectations or assumptions of which counsel or arbitrators participating in an international arbitration with its seat in your jurisdiction should be aware?

Korean court proceedings and domestic arbitrations tend to be scheduled with staggered short hearings spaced out over several weeks or months. This domestic litigation or arbitration practice may be inconsistent with international arbitration practice. Furthermore, rules on taking evidence generally accepted in Korean court litigation or domestic arbitration are not necessarily identical to those prevailing in international arbitrations conducted outside of Korea. Therefore, if foreign counsel or arbitrators are participating in international arbitrations seated in Korea, it would be wise to discuss and agree on hearing dates and other procedural rules at the outset of the arbitration, especially where there is a Korean arbitrator on the tribunal.

51. Is third-party funding permitted in your jurisdiction? If so, are there any rules governing its use?

There is currently no legislative prohibition on litigation funding in Korea and, generally speaking, there are no specific restrictions on third-party funding of claims. However, there is no definitive legislative framework that specifically allows for third-party funding either. There have been no notable precedents dealing with the issue of third-party funding. Although interest in third-party funding is high in Korea, especially after the recent liberalisation efforts in Singapore and Hong Kong, Korean courts are expected to take a conservative approach to this issue, barring any legislative change. Notably, article 6 of the Trust Act prohibits the entrustment of lawsuits, so any third-party funding that is deemed to be an entrustment of a lawsuit will be deemed null and void. Contingency fees and success fees, however, have been commonly used in practice by lawyers in Korea, although the Supreme Court has prohibited the use of such fees in criminal cases since 2015.

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Shin & Kim

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