Korea

The 'new' International Rules of Arbitration should encourage foreign parties to submit their disputes to the Korean Commercial Arbitration Board

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The KCAB Rules: which rules?

The Korean Commercial Arbitration Board ('KCAB') has seen explosive growth in the number of international arbitrations administered under its rules in Korea. According to statistics provided by the KCAB, the number of international cases increased by almost two thirds from 2008 to 2009. However, although the KCAB introduced an entirely new set of Rules of International Arbitration ('International Rules') in January 2007, to date there has only been one arbitration filed under the International Rules.

What accounts for this anomaly? The problem, it seems, is that few parties are aware of the fact that the KCAB has introduced a set of modern International Rules. The International Rules exist alongside the 'original' Arbitration Rules of the KCAB ('KCAB Rules'), which in fact have also been revised and updated several times, most recently in 2008. The KCAB Rules are the default rules which apply to all arbitrations under the KCAB, regardless of whether the underlying disputes are between domestic Korean parties or of an international nature.

Article 3 of the International Rules states that the International Rules shall apply where the parties have agreed in writing to refer their disputes to international arbitration 'under the KCAB International Arbitration Rules'. Thus, the International Rules do not automatically apply to arbitrations involving a foreign party, but must be specifically designated in the arbitration agreement or by agreement of the parties. Otherwise, a reference to arbitration under the rules of the KCAB will be deemed to refer to the KCAB Rules. As few parties seem to realise that the International Rules are an option, the KCAB Rules continue to apply by default to most international arbitrations. When agreeing to a KCAB arbitration, therefore, foreign parties are advised to make sure that the arbitration agreement specifically states that the International Rules shall apply to the arbitration.

The distinction is important, because the two sets of rules have significant differences. For example, unless the parties specifically agree on the language of the arbitration, the default language of the arbitration under the KCAB Rules is Korean. Under the International Rules, in the absence of an agreement between the parties, the tribunal is empowered to determine the language of the arbitration in view of the circumstances, including the language of the contract (usually English for international contracts).

Another major difference between the two sets of rules is the default mechanism for the appointment of arbitrators by the Secretariat of the KCAB. Absent an agreement between the parties, the KCAB Rules provide for the appointment of the arbitrator(s) by the list method, using candidates from the KCAB's roster of arbitrators, the vast majority of whom are Korean. Under the International Rules, appointment by the KCAB Secretariat does not employ the list method and is not limited to the KCAB's roster of arbitrators. In addition, under the KCAB Rules, if the arbitral tribunal is to be composed of three arbitrators but the parties have not agreed on the method of appointment, the KCAB Secretariat will appoint all three arbitrators. The International Rules, on the other hand, provide that each party shall have the right to appoint one arbitrator, and the two party-appointed arbitrators shall appoint the chairperson of the tribunal. Finally, under the KCAB Rules, the arbitrator's fees are fixed based upon the amount of the claims to be resolved, and are exceedingly low by international standards. This makes it very difficult to attract highly qualified international arbitrators. Under the International Rules, arbitrators are paid on an hourly basis at rates competitive with major international arbitral institutions. This may raise the cost of the arbitration, but should also vastly improve the efficiency of the arbitral procedures and the quality of the awards.

The International Rules

This article is intended to familiarise potential users of KCAB arbitration with the 'new' International Rules, which were introduced, after all, to encourage foreign parties to feel comfortable in submitting their disputes to arbitration in Korea under the auspices of the KCAB.

The International Rules of the KCAB will not be unfamiliar to anyone acquainted with the ICC Rules, on which they were clearly modelled. Nevertheless, there are some differences which should be noted. For example, the International Rules do not provide for a Term of Reference or similar document as provided for in the ICC Rules. As such, there is no corresponding deadline after which new claims are barred; a party may amend or supplement its claim, counterclaim and defenses at any time during the arbitral proceedings, unless the tribunal considers it inappropriate because of delay or prejudice to the other party. In addition, while the ICC Rules provide that any counterclaims shall be filed with the answer (Article 5(5)), the International Rules provide that the counterclaims may be filed at a later stage in the arbitral proceedings if the tribunal determines that the delay was justified under the circumstances (Article 9(4)). These procedural differences may affect the duration and cost of the proceedings. Some of the other more significant differences are described below.

Appointment, challenge and replacement of arbitrators

Like the ICC Rules, where the parties have not specified a number, the default number of arbitrators under the International Rules is one. However, under the ICC Rules, the ICC Court may *sua sponte* decide, in light of the circumstances, to appoint three arbitrators (Article 8(2)). Under the International Rules, the Secretariat of the KCAB will appoint a sole arbitrator unless a party petitions the secretariat to appoint three. The Secretariat must then weigh factors such as the size and complexity of the dispute, determine whether three arbitrators should be appointed, and notify the parties of its decision (Article 11). In addition, where the arbitration agreement calls for each party to nominate an arbitrator, the International Rules provide that a respondent who fails to submit an answer or to otherwise nominate an arbitrator within the time permitted by the Secretariat is deemed to have irrevocably waived the right to nominate an arbitrator (Articles 9(6) and 12(2)).

The processes for challenging and replacing arbitrators under the International Rules are closely modelled on the ICC Rules. However, under the International Rules the parties are given less time (15 days as opposed to 30 days) to raise a challenge (Article 13). The International Rules also add a provision that, where an arbitrator is challenged, he or she may simply withdraw as an arbitrator (with or without agreement between the parties), and that such a withdrawal does not imply acceptance of the validity of the grounds for the challenge. With respect to the replacement of an arbitrator who has been removed or withdrawn, the International Rules provide that the replacement arbitrator must be chosen by the same method applicable to the appointment of the arbitrator he or she is replacing (Article 14(3)), whereas the ICC Rules allow the ICC Court the discretion as to whether to follow such procedures (Article 12(3)).

Jurisdiction of the arbitral tribunal

Article 19 of the International Rules explicitly provides that the arbitral tribunal shall have the authority to rule on objections to its jurisdiction, and on challenges to the existence or validity of the contract of which the arbitration agreement is a part. Like the ICC Rules, the International Rules provide that a determination by the tribunal that the underlying contract is null and void does not render the arbitration clause invalid. Despite these provisions of the International Rules, however, under the Korean Arbitration Act (which applies to all arbitrations which take place in Korea), a party may appeal to the courts for a final ruling on the tribunal's jurisdiction. Thus, while the tribunal will have the first opportunity to rule on its own jurisdiction, it is the courts which may have the final word.

Evidence and experts

The International Rules are more detailed and forceful than the ICC Rules with respect to the production of evidence. Typical of parties from civil law jurisdictions, Korean parties traditionally have been somewhat reluctant to voluntarily produce documents and other evidence unfavourable to them in litigation and arbitration. The International Rules are drafted to address this issue in order to ensure a level playing field with respect to the production of evidence. Article 22 of the International Rules explicitly empowers the tribunal, unless the parties have otherwise agreed in writing, to order the parties to produce documents and other evidence, and to make a property or site under a party's control available to the tribunal, the other party, and/or any expert appointed by the tribunal. The tribunal is also specifically empowered to determine the admissibility, relevance, materiality and weight of any evidence.

Under Article 20(4) of the ICC Rules, the tribunal may appoint an expert after consultation with the parties. Article 23 of the International Rules confers the same power, but the tribunal is not required to consult with the parties. However, the parties have the right under the Arbitration Act to challenge the tribunal's appointment of an expert in the Korean court of competence, so as a practical matter the tribunal should consult with the parties and ensure that the expert is free of conflicts or perceived prejudices. The tribunal is empowered to require the parties to cooperate with the expert by providing relevant information and evidence, and the parties may examine and comment on the expert's report and the evidence relied upon by the expert in drafting it.

Confidentiality

Unlike the ICC Rules, Article 45 of the International Rules explicitly provides that the arbitral proceedings, and the records thereof, shall be confidential. Except by consent of the parties, or where required in court proceedings or applicable law, neither the parties nor the tribunal (or the KCAB) may disclose any facts related to the arbitration learned through the arbitration proceedings.

Additional award

Unlike the ICC Rules, the International Rules contain a provision (at Article 37) permitting a party to petition the tribunal, within 30 days of receipt of the arbitral award, for an 'additional award' as to claims presented in the arbitral proceedings but not addressed in the award. If the tribunal agrees to hear the request, it must render any such additional award within 60 days of receipt of the request. This provision is separate from the provisions regarding the correction and interpretation of the award, which mirror the ICC Rules, and is meant to avoid challenges to the arbitral award by a party alleging that the tribunal has failed to deal with a claim raised in the arbitration. If no request is made under Article 37, Korean courts will normally deem a challenge on this basis to have been waived.

Costs

Like the ICC, the KCAB bases administrative costs upon the amount of the claims to be decided in the arbitration. KCAB arbitrations cost significantly less than ICC arbitrations, however, as both the administrative fee scale and the arbitrators' pay are lower.

The payment of advance costs can be a thorny issue, especially where there is a respondent with no counterclaims and no interest in participating in the arbitration. The ICC Rules provide that where one party refuses to pay its share of the advance costs, the other party may pay this amount in order to ensure that the arbitration proceeds (Article 30(3)). The International Rules go a step further, providing at Article 39(5) that a party who is forced to pay the whole of the advance on costs may request the tribunal to order the other party to pay its share in the form of an enforceable interim, interlocutory or partial award.

There is quite a difference between the ICC Rules and the International Rules with respect to the allocation of costs by the tribunal at the end of the arbitration. The ICC rules consider 'costs' to include all of the administrative expenses, fees and expenses of the arbitrators (and experts appointed by the tribunal) as well as the reasonable legal and other costs incurred by the parties for the arbitration. These costs are allocated at the discretion of the tribunal. The International Rules, on the other hand, distinguish between the arbitration costs (such as administrative expenses, fees and expenses of the arbitrators and experts) and the costs incurred by the parties (such as legal fees and expenses for experts and witnesses, etc). Article 40 of the International Rules provides that administrative arbitration costs shall, in principle, be borne by the losing party, subject to the discretion of the tribunal. Article 41, on the other hand, provides that the legal costs and expenses incurred by each party shall be borne by such party, again subject to the discretion of the tribunal.

The parties are free to agree otherwise, of course, so it is advisable to consider this issue when drafting the arbitration clause if the International Rules will apply.

The KCAB: Open for International Arbitration

As demonstrated by the exponential growth in international arbitrations administered by the KCAB, there is great potential for Korea to serve as an important regional centre for the resolution of international commercial disputes. Parties entering into agreements to arbitrate in Korea under the KCAB should feel no hesitation in doing so, but should be careful to make sure the arbitration agreement specifically designates the International Rules. Perhaps more should be done to educate potential users of KCAB arbitration as to their ability to apply the International Rules rather than the default 'domestic' KCAB Rules. That said, the KCAB is ready and able to administer international arbitrations, in English and under their progressive International Rules.

Note

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Australia

The standard of reasoning in arbitral awards – an Australian perspective

There has been a lively debate in Australia over the last few years about the standard of reasoning that is required of arbitrators in a domestic Australian award. The discussion started with the infamous decision of the Victorian Supreme Court of Appeal in *Oil Basins Limited v BHP Billiton Limited* [2007] VSCA 255, in which the judges held that arbitrators in Australia are required to give reasons with the same degree of specificity to those that judges are obliged to give in Australia. Since then, two further decisions have been rendered dealing with this particular issue, albeit coming to different conclusions. The first is a judgment by the New South Wales Court of Appeal in *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57 (1 April 2010); the other, a judgment by the newly-established Arbitration List of the Supreme Court of Victoria in *Thoroughvision Pty Ltd v Sky Channel Pty Ltd & Anor* [2010] VSC 139 (22 April 2010).

As a note of caution, all three cases deal exclusively with domestic Australian arbitration under the Commercial Arbitration Act (CAA), the application of which is largely uniform throughout Australia's States and Territories. International arbitrations domiciled in Australia, which are governed by federal legislation (the International Arbitration Act 1974 (Cth)) are not (or rather not directly) affected by these decisions or discussions. However, as discussed below, the reasons and arguments advanced in some of these decisions discussed below bear the risk of being used in an international arbitration context.

The *Gordian Runoff* case: arbitrators do not have to provide reasons like judges

The Supreme Court of New South Wales took the *Gordian Runoff* case as an opportunity to distance itself from the position taken by the Victorian Court of Appeal in the *Oil Basins* case in so far as the standard of reasoning required from an arbitrator is concerned. As in the *Oil Basins* case, the issue of the standard of reasoning arose in the context of an appeal from the arbitrators' award. Under the domestic arbitration legislation, arbitral awards may be subject to an appeal on any question of law arising out of an award (section 38 CAA).

In summary, the *Gordian Runoff* case concerned an insurer and reinsurer which disagreed over certain reinsurance claims