KOREAN ARBITRATION REVIEW

Third Issue
November 2013

In This Issue

ISSN 2288-5684

The Korean Commercial Arbitration Board

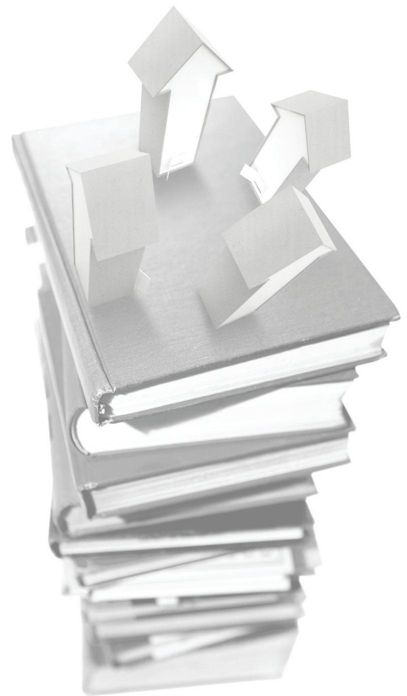
www.kcab.or.kr

agreements should be treated as having an independent effect and existence.

Hence, while Eder J may have taken the appropriate step of considering the independent question of whether the parties reached consensus on an arbitration agreement and possibly arrived at the right conclusion, the sweeping language he used in his opinion may provide fodder for parties to challenge the separability doctrine where before they would not. At a minimum, it will be worth watching what the Court of Appeal does and the attitude of the courts generally to any forthcoming cases where an arbitral award is challenged on the ground that there was no consensus in the underlying agreement.

Mel Andrew Schwing

Mel Andrew Schwing is a senior foreign attorney with Yulchon LLC in Seoul, Korea. A former Am Law 50 law firm litigation counsel and Assistant United States Attorney, Mr. Schwing specializes in international litigation, arbitration, investigations, and strategic counseling. Mr. Schwing is a graduate of Stanford Law School and is licensed to practice in Florida, California, the District of Columbia, and a variety of U.S. federal courts.



Interview

Interviewee : Professor Hi-Taek Shin,
Seoul National University School of Law
Interviewer : David Kim, Shin & Kim

For those unfamiliar with investment arbitration, what is the main role of investor-state dispute resolution provisions?

The main role of investor-state dispute resolution provisions is to protect foreign investors against political risks that are associated with foreign investment. By allowing the investor to recover damages directly from the host state in a neutral international forum, such provisions could alleviate unnecessary tensions between the host state and the home state of the investor. In the past, the mode of dispute resolution was state-to-state where the states dealt directly with each other on the basis of diplomatic protection under public international law, which could exacerbate tensions in a much bigger scale than what is actually required in settling an investment dispute. I believe that, in a sense, such a mechanism depoliticizes the dispute resolution process and allows the state and investor to focus only on compensation issues.

With investment arbitration very much in the spotlight, what do you believe is the biggest misconception regarding investment arbitration?

I think the biggest misconception is that investor-state arbitration is often painted as a means for powerful multinational corporations from developed countries to pressure or obstruct the legitimate public policies of the less-developed or developing countries, and as such, it is misperceived as a means through which investors from developed countries prey on developing countries. The primary purpose of investment arbitration is to provide the investors a meaningful remedy without involving the investor's state in order to depoliticize the dispute resolution process. However, the current debate in some parts of the world seems to over-politicize what was originally intended to depoliticize the process.

In fact, the reality could not be farther from the truth. If you look at recent statistics published by the United Nations Conference on Trade and Development ("UNCTAD") and ICSID, the number of cases filed by investors from developing countries against developed countries or other developing countries is on a steady increase. This means that investor-state arbitration is being established as an option for many investors, and not just for investors from the developed world.

The second biggest misconception is the notion that the powerful multinational corporations are invincible when it comes to investor-state arbitration, and that this imposes a huge financial burden on the developing countries. On the contrary, if you look at the UNCTAD and ICSID statistics, states win some 40% of the cases, while investors win a lesser percentage of about 30% of the cases, with a large portion of that 30% being only partial victories. So I think the figures clearly show that investors do not always win, and their invincibility is a misconception.

Another great misconception is that the arbitrators are always biased in favor of the powerful corporations and investors. Many seem to believe that there are way too few arbitrators, and they are all from the so-called "first world", and that they are almost always pro-investor. This is not true. If all arbitrators were pro-investor, the investors would always win. But clearly, that is not the case. I think part of the reason that these misconceptions exist is that people like to frame the issue as "state's public policy against investor's rights," and also assume that the state public policies are always based on good intent and should thus always be protected.

However, even public policies with the best of intentions may be judged illegal in a domestic court or a domestic constitutional court, and may also be overturned or corrected as they are sometimes found to be inconsistent with the relevant law or unconstitutional. So the real issue to be presented to the investment arbitration is not a black-and-white question of "public policy versus investor rights," but whether the state's public policy was compatible with the state's commitment in a bilateral investment treaty in form and substance and whether it was executed in due process. It is a very complicated, fact-specific determination.

A good example is a state's environmental policy. For state environmental policies to be legal under domestic law, there must be due regard for private property in accordance with the constitution and the overall legal system, due process in its formulation and execution, and absence of undue discrimination or arbitrariness. Constraints to state action built into bilateral investment treaties ask questions that are essentially similar to the questions of constitutionality and legality that are asked in national court systems. So, I think it's a very dangerous misconception to look at the issues in a simplistic black-and-white fashion.

Prior to the ratification of the Korea-US Free Trade Agreement ("KORUS FTA"), many Koreans were not familiar with investment arbitration. Now, we see investment arbitration frequently appearing in the media. This sudden increase of interest in investment arbitration is intriguing, given the fact that Korea has entered into over 90 bilateral investment treaties (BITs) and numerous free trade agreements, nearly all of which contain investor-state dispute resolution provisions. What caused this sudden surge of attention?

First, in the past, BITs in the 1960s, 1970s, and even early 1990s were viewed as part of a general diplomatic framework before entering into more meaningful economic exchanges. So Korea's BITs with China or Russia, entered into in the early 1990s, were viewed at that time as parts of an overall framework establishing the diplomatic relationship. I don't think many people at the time expected that it would actually become a legal basis for claims. But by the time the KORUS FTA was negotiated, there was increasing public awareness regarding the potential legal risks involved for the state because of the many claims and cases being brought by investors based upon investment treaties around the globe, especially after the Argentine economic crisis.

When questions regarding the investment dispute settlement mechanism in the KORUS FTA were publicly raised in 2006, the Korean government organized a special task force committee composed of civilians and government officials to address such questions. I was the co-chairman of that task force committee representing the civilian side. The committee extensively reviewed the potential risks and benefits of including the investor- State dispute settlement mechanism in the KORUS FTA, and concluded that the dispute resolution mechanism should be retained in the FTA.

Why, then, did tensions arise surrounding the investment dispute resolution clauses in the FTA during the ratification stages? I think politics played some part in creating such friction. I also think that many people were concerned because it was the United States we were dealing with, whose investors are generally known to be litigious. This, together with the fact that America is by far the nation that has the most investments in Korea, caused some Korean politicians and civil societies to perceive the investor-State arbitration provisions as the single most objectionable feature in the entire KORUS FTA, and demanded that the Korean government renegotiate the KORUS FTA to eliminate the investor-State arbitration mechanism in its entirety.

In my personal opinion, renegotiating the KORUS FTA which was signed in 2007 to eliminate the investor-State arbitration provisions would have sent an undesirable and misleading message to the international investment community regarding the soundness of Korea's investment policies. Also, even if the investment arbitration clauses were removed from the KORUS FTA, it would do very little to prevent American investors from bringing investment arbitration claims. Korea currently has some 86 BITs and nine free trade agreements in effect, most of which contain some type of clause that enables investors to bring investment arbitration claims.

We need to remember that, in reality, cross-border investments are not always made directly. They often employ intermediate investment vehicles set up in third countries for various reasons such as tax concerns; therefore, if an American investor wanted to bring an investment arbitration against Korea, it could easily find a way - even in the absence of an arbitration clause in the KORUS FTA - by invoking one of the existing BITs to base their claims on. In other words, it made little sense to close the main door while having many side doors open and unattended. So, for those reasons, I personally believed that we did not have much to gain from opening such a dialogue on the arbitration clauses at such a late stage.

I believe that the more strategic and meaningful way to manage risks associated with such FTAs is to prepare for future investment disputes by increasing our knowledge and our capabilities to respond to such claims, as well as preempt possible disputes; thereby enhancing our investment climate in general and not hindering a good reputation that we have built among global investors.

The first ever ICSID case involving Korea is now under way. Why do you think Korea has not been involved in various Investor-State dispute cases under investment protection treaties?

In my personal opinion, since early 1960s when Korea launched its first five-year economic development plans and other successive plans, Korea adopted a policy of attracting foreign investment. There was a very strong political will to improve and maintain a favorable investment climate, and the Korean government has been trying very hard to keep their promises to foreign investors. Then, from the late 1980s our political process went through democratization, and we saw great improvements in our administrative and judicial procedures.

We have been working hard to establish a transparent process by which the government officials must adhere to when the government takes measures affecting the rights of its citizens, as well as an independent and depoliticized judiciary. Because we have reasonable and objective administrative/judicial processes available, many foreign investors were able to bring their claims to the Korean courts, and there are many cases where they prevailed. This helped cultivate an investment-friendly climate, which in turn lowered the possibility of getting involved in serious investment disputes.

One of the efforts the Korean government made to improve the investment climate for foreign investors was the establishment of an "Ombudsman Office" in the late 1990s through which foreign investors were able to proactively resolve any grievances regarding their investments in Korea. We still have a foreign investment ombudsman office within the Korea Trade-Investment Promotion Agency. Much effort was made to identify potential problems and issues with foreign investment at an early stage and to resolve any potential disputes before they escalated to a legal dispute; this played a great part in preventing Korea from being involved in many investment disputes.

Finally, Korea's lack of substantial foreign investment in the natural resources sector also played a part. The natural resource industry is perhaps most prone to investor-state arbitration. Since Korea has very little natural resources, Korea did not receive much foreign investment in this area, and this naturally prevented foreign investment disputes.

So, while there is a combination of many factors, the single greatest reason Korea has seen little foreign investment arbitrations is its sincere efforts to create and maintain a climate that is friendly to foreign investment and the efforts of the government officials to keep the promises regarding investments.

Do you believe the floodgates will open and that such disputes will become commonplace in the future?

No. I do not believe so in the foreseeable future. According to the UNCTAD figures, we have seen a record-high number of 62 new cases that were initiated last year; however, this number is far from what could be called a flood. According to the government statistics, the total number of foreign investment projects in Korea is more than 100,000, and Korea annually receives more than ten billion dollars in foreign direct investment, and yet, we have seen only one investor-State dispute case so far. While we cannot say we have no new cases, but we certainly do not - and will not - have a flood of cases in the near future.

Since arbitration - especially investor-state arbitration - is a relatively new mechanism, there are only a handful of legal professionals who are active in this new area of arbitration as arbitrators, and some have called for a need to increase the pool of people deciding investment treaty disputes both in terms of number and nationality. How important is it that we maintain the diversity of arbitrators?

Of course, increasing the number and diversity of arbitrators is indeed necessary so that the mechanism might avoid challenges regarding bias and legitimacy. Maintaining a proper balance between diversity and quality of arbitrators could be a very important and challenging task.

Arbitration in Korea has undergone a huge transformation and growth in the past decade. For example, you recently became chief operating officer of the newly opened Seoul International Dispute Resolution Center. Although Hong Kong and Singapore are widely regarded as the leading centers for international arbitration in Asia, how close do you believe Korea is in becoming a viable alternative to Hong Kong or Singapore?

It will certainly take time for Korea to catch up to Hong Kong and Singapore in the arbitration field. We must start with a very modest objective of offering one more option of physical hearing venues in the Northeastern corner of Asia for international arbitrations. At the initial stage, our main target would likely be hosting international arbitration cases involving Korean parties. But our mid-to-long-term goal would be to attract even those international arbitration cases between parties from non-Korean, third countries. An ideal client could include Japanese or Chinese parties who have international commercial disputes between themselves or with parties of third countries. Given that the parties will desire a neutral place which is conveniently located for the parties, it will be quite logical and practical for them to designate Seoul as a physical hearing venue, regardless of the legal venue for arbitration.

But our ultimate goal would be to promote Seoul as a legal venue for arbitrations, and hopefully with the international arbitration rules of the Korean Commercial Arbitration Board ("KCAB") I think that we will be able to achieve that. This would, of course, call for continuous effort on the KCAB's part to reform, innovate, and keep in line with the latest developments in international commercial arbitration, both in terms of its rules of arbitration and its infrastructure. Rules would need to be ceaselessly updated, and IT-savvy hearing facilities would need to be offered. Other important factors include improvement of national arbitration laws reflecting the development in major jurisdictions and the nurturing the arbitration-friendly position of our national courts. If this could be done, it is certainly possible for Korea to rise to the level of Hong Kong or Singapore in terms of arbitration and give the parties worldwide one more option when selecting a physical or legal venue for arbitrations.

As with commercial arbitration, recognition and enforcement becomes a critical issue for Investor-State arbitrations, which has an added twist of one party being a sovereign nation. Because of their sovereignty, investors may face enforcement issues. With Korea emerging as an active investor in the world economy, what would be some enforcement issues to consider for Korean investors, and what recourse would they have?

I think it's a very important question, but it must be seen from a broader context and perspective. It is not easy for an investor to recover damages from a state - that's the nature of the problem. But in investor-state arbitrations, especially ICSID arbitrations, parties to the Washington Convention agreed to a special treatment for pecuniary damages awards. States are, therefore, expected to honor these treaty obligations and there are many state respondents who complied with the Washington Convention in complying with the awards rendered by tribunals. In this regard, ICSID arbitration has merits for the investor when it comes to recognition and enforcement of awards against a respondent state.

For other arbitrations, investors will have to go through all of the common procedures of international commercial arbitration, such as recognition and enforcement based on the New York Convention or the national laws of the country where such recognition and enforcement is sought. So the issue of enforcement is not new in investor-state arbitration. Rather, investor-state arbitration has improved the enforcement mechanism. If a respondent state refuses to pay damages or awards, enforcement mechanisms allow the investor to enforce arbitral awards in third countries, although issues regarding sovereign immunity may arise. So, the burden is on the investor to locate properties which are not subject to sovereign immunity, although it is by no means an easy task.

You had a very distinguished career in private practice as a lawyer at a top-tier law firm in Korea. What made you decide to go into academia?

I surprised quite a number of people when I decided to go from being a senior partner of a leading Korean law firm to a full time law school professor. I made the decision to go into academia because I felt that I had a duty to help lay the groundwork for the new American-styled law school system that I helped design in the past. During the Kim Dae-Jung administration, I was a member of a ten-member "New Education Committee" that reviewed the proposal to adopt a new professional law school system modeled after the American J.D. course. The adoption of the law school system was officially approved by our National Assembly in July 2007. The decision to initiate this new era of legal education also brought with it much confusion, and I wanted to help establish the system properly. After 27 years of active practice of law, I also wanted to give back to the next generation of lawyers by taking what I have accumulated from my private practice to the students in the class. Some of my colleagues at the law firm were initially disappointed in my sudden decision to leave, but they understood in time and gave their full blessing.

I am very happy that I joined the academia, and I see myself as a sowing farmer who is tilling the fields for a good harvest. I wish to train the students well and send them out to society so that they could contribute in building the rule of law in our society.

How did working in private practice prepare you for working as a professor at Seoul National University?

The subject I teach at SNU Law School is cross-border investment and dispute settlement arising from such cross border investments. So my experience in private practice was very relevant to the subject matter I teach, and certainly helpful. Also, as we now have a professional law school system, we also emphasize the practical aspects of law as compared to purely academic and theoretical teaching. Since the subject matter I teach is a very practical one, my private practice prepared me very well for teaching those subjects.

While in private practice, you specialized in mergers and acquisitions and foreign direct investment. With such a background, was the transition into arbitration a natural one?

There was a very natural progression. I started out my career as a transactional lawyer, specializing in mergers and acquisitions ("M&A"), and foreign investment, both inbound and outbound. In reality, once an investment is made or an M&A is closed, disputes follow. From an investor's point of view, arbitration is only one of many different methods of dispute resolution. So, in my practice I had to consider these many different avenues of dispute settlement, including arbitration and litigation. I was involved in quite a number of international commercial arbitration cases as legal counsel to the parties. Thus, I was very naturally directed into resolution of international disputes related to cross-border investments.

How is it that you became involved in investment arbitration?

When I started my JSD degree at Yale Law School in the early 1980s, my topic of interest was cross-border investment and its international legal framework. So even at that time, when investment arbitration was not well known, I studied international investment agreements including BITs, and ICSID mechanisms. So, I naturally became very familiar with the concept of investment dispute settlement. But in the early 1980s I never expected that I would be sitting in an ICSID tribunal in the future because at the time there were no treaty arbitrations yet. At that time, it was generally viewed as a method for investors to claim damages based upon investment contracts, but not investment treaties.

You served as co-chairman of the commission to review investor-state arbitration provisions in the KORUS FTA negotiations. How valuable was that experience?

It was very valuable, and it was also very challenging. To review the provisions of the investment chapters in the KORUS FTA with many different issues in mind was a difficult but worthwhile task.

Do you have a favorite place to arbitrate?

Seoul, definitely. (laughing).

If there is one piece of advice you could give to law school students entering the legal market, what would it be?

I would like to convey a rather simple message to students: Do not be just another member of the herd - try to pursue what you like most or what motivates you, rather than just following your peers. Go into an area of the law that excites you, and motivates you to stay up all night studying and researching on your own. Then, you will become competitive and you will easily find a way to establish yourself among other professionals. On the other hand, if you instead get into what others tell you is mainstream, perhaps based solely on prestige or sometimes on money and without a firm conviction, you will never be victorious over someone who is actually passionate about the work they do.

Students often ask me how they can discover what they are passionate about. I think you can easily discover even from taking law school exams. You have certain subjects or courses that you enjoy studying and voluntarily study in greater depth than what is necessary for the exam, while on other subjects you will not. Whether you are passionate about a certain area of the law is absolutely worth spending many nights up in deep contemplation. I think people tend to feel safe and secure when they follow others and do what others also do, and I find this to be particularly true in Korea; but, try to find what you are passionate about, and delve into it.

I would also tell the students to aim high. Being in close proximity with the students, I can sometimes tell that their morale isn't very high, given the dry job market and the looming bar exam. I firmly believe that even though your beginnings may be small and modest, if you aim high and go confidently, it will lead you to great results. This is especially true in this great time of change in the legal market. I have seen over the years what great changes have occurred in the legal profession. Your generation will see even greater changes in the years and decades to come. Also, I think there is great growth potential for the Korean legal market, given that it is still very underdeveloped.

I joined Kim & Chang in 1980, and at that time, the firm only had about ten lawyers. Thirty years have passed since then, and I would have never imagined that the firm would grow to be what it is now. When Kim & Chang was a small firm of ten lawyers, prestigious

Wall Street law firms had about 200, perhaps 100 for the smaller ones. We wondered when we would grow to such a size, and tried to benchmark successful American law firm practices. Thirty years after, Kim & Chang now has some 600 lawyers, and has grown to become one of the most prestigious and sought-after firms in all of Asia. Those Wall Street firms grew to be about 600 to 800 in size, and some of them grew to have more than 2,000 lawyers, and it's interesting that some people thought that the American legal market was already saturated back in the 1980s. So, I expect more growth and expansion to follow, and you will someday be where I am now telling the exact same tale.

What do you like to do in your free time?

I like to be active in my free time. I don't like to sit down with a book. When I am abroad, I prefer to stay away from museums and historical sites, because they are a relic of the past. I much prefer to see how actual people live in those places. So I like to explore and walk around, visiting and getting lost in the alleyways.

I also enjoy a good film with my wife in my free time. Most recently, I went to see The Great Gatsby. I have to say I prefer Robert Redford over Leonardo DiCaprio. Maybe it's a generation gap?

If you had a choice to start a whole new career, is there anything else you would like to have done besides law?

I think I would have become a musician. When I was young, I took violin lessons, and my teacher at the time told my mother that I had great musical talent and encouraged my mother to get me to be classically trained in music. My mother immediately stopped the violin lessons because, back in the 1960s, it was very difficult for musicians to succeed socially and financially. So my brief career in music stopped then, but I have always had a great appreciation for the violin. Even now I am very fond of violin music. So, if I could have a second profession, I would choose music. Of course, I really don't know how much talent I actually have. But, since it was a road not taken, I would like to believe that I do.

Professor
Hi-Taek Shin

Professor Hi-Taek Shin is a Professor of Law at Seoul National University School of Law and the Director of the Center for International Economic & Business Law at Seoul National University. Prior to joining the law faculty at Seoul National University, Professor Shin was a partner at the leading Korean law firm of Kim & Chang where he specialized in mergers and acquisitions, foreign direct investment, and resolution of disputes arising from cross-border investment projects. He is currently serving as the Chairman of the Executive Committee of Seoul International Dispute Resolution Center launched in May 2013. He is on the panel of arbitrators of ICSID (International Centre for Settlement of Investment Disputes) as well as the Korea Commercial Arbitration Board. Professor Shin received the LL.B and LL.M degrees from Seoul National University, and LL.M and J.S.D degrees from Yale Law School.

David Kim

David Kim is a foreign attorney and a member of the firm's International Dispute Resolution Practice Group at Shin & Kim. Mr. Kim has acted as counsel in arbitration cases before the ICC, SIAC, HKIAC, KCAB, and LCIA as well as in ad-hoc arbitrations under the UNCITRAL rules. He is also an adjunct professor at the Judicial Research and Training Institute of the Supreme Court of Korea and a member of the Asia Chapter of the Regional Coordinating Committee of the ICC Young Arbitrators' Forum. Prior to joining Shin & Kim, Mr. Kim practiced at Miles Davison LLP in Calgary, Canada. He is a member of the Law Society of Alberta, the Canadian and the Calgary bar associations. Mr. Kim was educated at the University of Alberta (B.Sc.) and the University of Calgary (LLB). He is fluent in English and Korean.