GETTING THE DEAL THROUGH

Dispute Resolution

in 47 jurisdictions worldwide

Contributing editor: Simon Bushell

2012

Published by
Getting the Deal Through
in association with:

Achour & Hájek
Anderson Mōri & Tomotsune
Andreas Neocleous & Co LLC
Araújo e Policastro Advogados
Attorneys-at-law Juridia Ltd
Bharucha & Partners
Biedecki
Bonelli Erede Pappalardo Studio Legale
Bredin Prat
Cariola Diez Pérez-Cotapos
Charles Adams Ritchie & Duckworth
Condon & Forsyth LLP
ELIG Attorneys-at-Law
EnGarde Attorneys at Law
Frank Advokatbyrå AB
Fulbright & Jaworski LLP
Gan Partnership
Gilbert + Tobin
GSK Stockmann + Kollegen
Habib Al Mulla & Company
Herbert Smith LLP
Hoet Peláez Castillo & Duque
Ivanyan & Partners
Jenner & Block LLP
Jun He Law Offices
Kleyr Grasso Associés
Liedekerke Wolters Waelbroeck Kirkpatrick
Lund Elmer Sandager
MacRoberts LLP
Miller, Canfield, Paddock and Stone PLC
Moravčević Vojnović Zdravković in cooperation with Schönherr
Motieka & Audzevicius
MS Consultores
Nagy és Trócsányi Ügyvédi Iroda
Niederer Kraft & Frey AG
Odvetniki Šelih & partnerji, o.p., d.o.o.
Polenak Law Firm
Preti Flaherty Beliveau & Pachios LLP
Richards Layton & Finger PA
SCA Bulboaca & Asociatii
Shin & Kim
Sofunde, Osakwe, Ogundipe & Belgore
Specht Böhm
Tilleke & Gibbins
Werksmans Attorneys
Wiesner & Asociados Abogados
Woods LLP

GETTING THE DEAL THROUGH®

Dispute Resolution 2012

Contributing editor
Simon Bushell
Herbert Smith LLP

Business development managers
Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers
Ellie Notley
Alice Hazard

Marketing assistants
William Bentley
Zosia Demkowicz

Subscriptions manager
Rachel Nurse
Subscriptions@GettingTheDealThrough.com

Assistant editor
Adam Myers

Editorial assistant
Lydia Gerges

Senior production editor
Jonathan Cowie

Chief subeditor
Jonathan Allen

Production editor
John Harris

Subeditors
Davet Hyland
Caroline Rawson

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Dispute Resolution 2012
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

First published 2003
Tenth edition 2012
ISSN 1741-0630

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law
Business
Research

Korea

Benjamin Hughes and Seungmin Lee

Shin & Kim

Litigation

1 Court system

What is the structure of the civil court system?

The Korean civil court system is divided into three levels: district courts of first instance, high (appellate) courts and the Supreme Court. Subdivisions within the district and high courts are responsible for civil, criminal, family, juvenile, administrative, patent and bankruptcy matters.

The number of judges sitting on a civil case at the district court level will depend on size of the claims. Where the claim amount is 100 million Korean won or less, the case will be heard by a single judge. Where the claim amount is more than 100 million Korean won, the case will be heard by a panel of three judges. In the high courts, all cases are heard by a panel of three judges. Most cases before the Supreme Court are heard by a panel of three or four justices, but where the court deems the case to be of high importance the case will be heard en banc (ie, 12 justices and the chief justice). The Supreme Court comprises the chief justice and 13 justices; however, one of the justices serves in a non-adjudicatory capacity as the minister of national court administration.

In addition, there is an independent Constitutional Court, which reviews the constitutionality of laws and acts of the government and hears cases involving disputes between state agencies and/or local governments. There are nine justices on the Constitutional Court.

2 Judges and juries

What is the role of the judge and the jury in civil proceedings?

Compared to judges in common law jurisdictions, judges in Korea, in principle, play a more passive, non-inquisitorial role in civil proceedings, since the judges rely on the factual information provided to the court by the parties. In practice, however, the role of judges can vary greatly depending on the nature of the case, the presence or absence of counsel representing the parties and the personal tendencies of the presiding judge.

There are no juries in civil cases in Korea.

3 Limitation issues

What are the time limits for bringing civil claims?

The statute of limitations for bringing civil claims varies depending on the nature of the claim. For most civil claims, such as breach of contract claims, the statute of limitations is 10 years, but shorter periods apply to certain contractual relationships. Tort claims must be brought within 10 years from the date the tort was committed, or three years from the date on which the plaintiff became aware of the damage and the identity of the tortfeasor, whichever is shorter.

A party may waive its right to raise a statute of limitations defence only after such right has accrued (ie, after the statute of limitations has expired); the parties may not contractually agree in advance to waive this right. In addition, while the statute of limitations may be tolled where exceptional factors (ie, force majeure) prevented the plaintiff from filing the claim, the parties may not agree in advance to alter the statutory conditions for suspending or tolling the statute of limitations.

4 Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

With the exception of claims brought before the family court or administrative court, there are no statutory pre-action proceedings required under or provided by the relevant laws and regulations in Korea. The Korean Civil Procedure Act provides for a mechanism which allows the court, upon motion of the parties, to examine the evidence prior to the commencement of the trial. However, this mechanism is rarely used in practice due to its low success rate and inefficiency.

Plaintiffs with damage claims frequently file petitions for provisional attachments or injunctions before or concurrently with the filing of the civil suit. These are normally ex parte procedures that have the effect of preserving and securing monetary claims.

5 Starting proceedings

How are civil proceedings commenced?

Civil proceedings commence with the filing of a written complaint by a plaintiff with the competent district court. The complaint must name the parties and set forth the facts upon which the claim is based, and demand relief. Where a written complaint lacks any of these elements, the court will order the plaintiff to amend the complaint within a reasonable period fixed by the court, and dismiss the complaint if the defects are not remedied within such period. In small claims cases (20 million Korean won or less), a written complaint is not required, but a court clerk will make a record of the complaint.

On 23 March 2010, the Act on the Application of Electronic Documents in the Civil Cases (Act No. 10183) was promulgated in order to improve and streamline the civil complaint services procedure. To achieve this goal, the act set out a number of ambitious plans, perhaps none more so than the initiative to replace all paper documents with e-documents and allow for access to judicial services online. Moreover, the Electronic Case Filing System for Patent Cases was launched as an initial step in introducing the electronic case filing system (ECFS) in Korea. The ECFS for Patent Cases allows intellectual property cases to be filed electronically with the Patent Court. Because of the overwhelming success in the Patent Court, a pilot programme for the ECFS for Civil Cases was implemented on 1 May 2011. On 1 January 2012, the ECFS was expanded to include all civil cases.

6 Timetable

What is the typical procedure and timetable for a civil claim?

A civil case commences upon the filing of a written complaint by the plaintiff in the district court of competence. If the court is satisfied that the complaint satisfies the pro forma statutory requirements for a civil complaint described above, the court will serve the complaint to the defendant, whereupon the defendant has 30 days to submit his or her response. This 30-day period is frequently extended by the court upon request by the defendant. After this first round of submissions by each party, the court will hold the first hearing, and subsequent pleadings, exchanges of written submissions and hearings will follow. The schedule and time limits for these subsequent procedures will be decided by the court at its discretion, depending on the nature and complexity of the case and other factors.

7 Case management

Can the parties control the procedure and the timetable?

The procedure and timetable are controlled by the court. Although parties may request extensions of certain deadlines or submit motions to speed up the trial during the course of proceedings, the court has the full power and authority to decide on these procedural matters.

8 Evidence – documents

Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

The parties do not have a duty to preserve documents or other evidence pending trial. Generally, a party has no obligation to share documents that are contrary to its interest, as there is no common law-style discovery in Korea. Each party will submit documents in support of its case, and the court is not permitted to consider evidence that has not been submitted by a party, even where the court may have independent knowledge of a determinative piece of evidence.

However, certain documents must be produced if requested by the opposing party and ordered by the court. These include documents quoted during the course of the pleadings, documents that the requesting party has the statutory right to inspect, documents that were created for the benefit of the requesting party or documents directly relating to the legal relationship between the parties. Where a party in possession of such documents destroys or refuses to submit them, the court may draw adverse inferences against the party with respect to the issue for which the documents were requested.

9 Evidence – privilege

Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Korean civil procedure does not recognise the concept of attorney-client privilege as found in common law jurisdictions. However, certain provisions of the Korean Civil Procedure Act do provide some protection for certain attorney-client communications. Article 315 provides that when a lawyer is examined as a witness in a civil proceeding, he or she may refuse to testify about confidential information obtained in the course of providing legal services to the client. However, articles 317 and 318 of the Civil Procedure Act provide that if the court determines that there are no justifiable grounds for such refusal to testify, the court may order an attorney (who has invoked article 315) to testify. The lawyer must then testify or face penalties.

Moreover, article 315 addresses the attorneys only, and does not create an attorney-client privilege that can be invoked by a party to avoid the production of documents. Under article 349 of the Korean Civil Procedure Act, if a party fails to produce a document after being ordered to do so by the court, the court may make adverse findings against such party.

There is also a duty to maintain confidentiality under the Korean Attorney Act. Article 26 of the Attorney Act provides that an attorney may not disclose any confidential information learned in the course of performing his or her duties. However, where statutory provisions such as article 317 and 318 of the Civil Procedure Act require the disclosure of such information, they prevail over the attorney's obligations under the Attorney Act.

Whether advice from an in-house lawyer could be protected by these provisions of the Civil Procedure Act would depend entirely on the circumstances of the case and the determination by the court as to whether a party should be ordered to disclose such advice.

10 Evidence – pretrial

Do parties exchange written evidence from witnesses and experts prior to trial?

There are no statutorily mandated exchanges of written evidence or other pretrial discovery under the Korean Civil Procedure Act. Generally each party submits to the court and to the other side those documents upon which such party relies in support of its case. However, when a party intends to make a motion for examination of a witness, such party must submit a list of questions it intends to ask the witness to the court as well as to the opposing party. The list must be provided in advance (such that the opposing party will have had reasonable time to review the questions) and should not be submitted just prior to the examination date; otherwise, the court may, upon objection by the opposing party, refuse to allow the witness to be examined.

11 Evidence – trial

How is evidence presented at trial? Do witnesses and experts give oral evidence?

For the most part, evidence is presented by submissions to the court (for documentary evidence), although oral testimony (for experts and other witnesses) is also used. The court may also conduct an inspection, upon application by a party, in cases where the there may be a need for the court to visit a certain site (eg, scene of the accident, etc).

Experts and other witnesses provide oral testimony during direct examination by the party requesting the appearance of such witness, after which the opposing party is given the opportunity to cross-examine. Redirect examination may be allowed with permission from the presiding judge. With the court's permission, and subject to objection by the opposing party, witness testimony may also be presented in the form of written witness statements.

12 Interim remedies

What interim remedies are available?

The two most common types of interim measures available in Korea are preliminary attachments and preliminary injunctions. In both cases, the applicant must make a prima facie showing that it will be irreparably harmed if the injunctive relief is not granted.

These remedies are available in support of foreign court proceedings and arbitrations that are currently pending or about to be commenced. A party to a foreign proceeding may apply for injunctive relief to the Korean court having jurisdiction over the subject property. If the attachment/injunction application is successful, the court may order the applicant to lodge a security deposit with the court. Depending on the case and nature of the asset to be preserved, the court has the power to decide whether a certain portion of the deposit is to be posted in the form of a bond.

Search orders are not available in civil proceedings in Korea.

13 Remedies

What substantive remedies are available?

Korean courts may order three main types of remedies: money damages or performance, declaratory relief and constructive relief. Punitive damages are not available under Korean law.

For money judgments, interest accrues at the interest rate stipulated in the underlying contract or at the statutory default interest rate under applicable law. The statutory interest rate under the Civil Code is 5 per cent per annum. For certain commercial transactions to which the Commercial Code applies, the statutory interest rate is 6 per cent per annum. In addition, the court will apply a default interest rate of 20 per cent per annum from the day following the date the judgment was rendered until the actual date of payment (in case where the court renders a judgment in favour of the plaintiff, a default interest rate of 20 per cent per annum will be incurred from the day following the date of service of the complaint).

14 Enforcement

What means of enforcement are available?

Korean courts do not have contempt powers and generally cannot sanction a party for disobeying a court order. However, the court may impose fines (up to 5 million Korean won) or even detention (up to seven days) for witnesses who fail to appear to testify under oath. In addition, a witness who makes false testimony under oath may be punished by imprisonment of up to five years and a fine of up to 10 million Korean won. Finally, where applicable, the court may draw adverse inferences against a party refusing to comply with a procedural order such as an order to produce documents.

15 Public access

Are court hearings held in public? Are court documents available to the public?

All civil case hearings are open to the public, except where the court determines that a public hearing would be detrimental to national security, social order or social morals. Court documents such as pleadings and witness statements are generally not available to the public, and are generally considered confidential.

The current schedules and status of all legal proceedings are available on the website of the Supreme Court, and can be looked up by the case number together with the name of any party.

16 Costs

Does the court have power to order costs?

Yes. The final judgment should include a decision on the allocation of costs of the proceedings. Litigation costs include stamp duties (based on the claim amount), fees for service of process, costs incurred in examination of the evidence (ie, witness expenses, expert appraisal fees, etc) and attorneys' fees. It should be noted that attorneys' fees are reimbursed only to the extent permitted by the Supreme Court regulations. As such, full recovery of attorneys' fees is not normally possible.

Litigation costs in principle are to be borne by the losing party. In a partial victory, the court has the discretion to decide the ratio or amount of litigation costs that the respective parties must bear. Also, the court may order the prevailing party to bear all or part of the litigation costs if such costs are incurred due to the unnecessary acts of the prevailing party or are otherwise attributable to the prevailing party.

Where a plaintiff has no domicile, office or place of business in Korea, the court may order the plaintiff to provide security for the litigation costs upon request by the defendant.

17 Funding arrangements

Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Lawyers and clients are free to enter into contingent or conditional fee arrangements, including 'no win, no fee' agreements, or any other fee arrangements that are not prohibited under Korean law. However, the Korean courts have held that excessive contingency fees violate the public policy of Korea. As such, courts may reduce the contingency fee to a reasonable amount, notwithstanding the arrangement made between the parties. There is no prohibition under Korean law against the use of third-party funding, or the sharing of the risks or proceeds of litigation. However, according to the Attorney At Law Act, it is prohibited for an attorney-at-law to become an assignee of any right in dispute.

18 Insurance

Is insurance available to cover all or part of a party's legal costs?

Yes. As of 2009, Korean and foreign insurance companies began to sell insurance covering legal costs for certain types of civil and commercial cases.

19 Class action

May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

In Korea, class actions are only permitted for civil actions under the Securities Class Action Act. Specifically, individuals who have claims against certain financial institutions for violations of the Financial Investment Services and Capital Markets Act are permitted to raise class action suits. This is a recent development, as the law permitting such class actions was enacted in 2005. The first class action suit was filed in Korea in April 2009.

Joint litigation is also permitted under the Korean Civil Procedure Act in cases where the factual or legal basis of the claim is common for the co-plaintiffs.

20 Appeal

On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

In case of a civil procedure, a losing party may appeal to the high (appellate) court on either the facts or interpretation of law of the judgment rendered by the district court. The appeal must be made within 14 days from the date of service of the judgment. Once this time period has elapsed, the judgment becomes final and binding. The high court will review the district court's decision de novo, may re-examine the evidence and witnesses and is not bound by any factual or legal conclusion drawn by the lower court.

Following judgment by the high court, further appeal may be made to the Supreme Court, which is the court of last resort. Notably, the Supreme Court does not have certiorari powers to reject an appeal, which accounts for its large backlog of cases. However, the Supreme Court only reviews cases in which the interpretation of the law is in question, and generally will not revisit the evidence unless the issue on appeal relates to the misapplication of the rules of evidence by the court.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

The Civil Procedure Act and Civil Execution Act set forth the following requirements in order for a foreign judgment to be recognised by the Korean courts:
- the foreign judgment must be final and conclusive;
- the foreign court should be recognised in accordance with the principles of international jurisdiction, pursuant to the laws and subordinate statutes of the Republic of Korea or its treaties;
- proper service of process must have been made on the parties;
- the judgment by the foreign court is not contrary to the public policy or morals of Korea; and
- there must be reciprocity (ie, the foreign judgment must be from a jurisdiction that recognises and enforces Korean judgments).

Reciprocity does not require a formal reciprocal agreement between the countries. It is sufficient under Korean law if the standards by which foreign judgments are recognised and enforced in the other country are not significantly different from the standards in Korea or are not excessively onerous as compared to the standards in Korea.

22 Foreign proceedings

Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

There are no procedures by which a party to a foreign civil litigation may petition a Korean court to order the production of oral or documentary evidence for use in a case pending in a foreign court. However, a foreign court may request the cooperation of Korean courts in certain circumstances.

According to the Korean Act on International Judicial Mutual Assistance in Civil Matters, a foreign court may request the Korean courts to provide assistance in the service of court documents, or the examination of evidence (eg, the examination of witness) to be used in the foreign court proceedings. Such a request will be accepted by the Korean courts if the following requirements, among others, are met:
- a judicial cooperation treaty is concluded between the foreign court's government and Korea or there is a guarantee by the foreign court's government that it will comply with any request for judicial cooperation by the Korean courts with respect to the same or similar matters;
- such cooperation is not contrary to the public policy and morals of Korea;
- the request is made through proper diplomatic channels; and
- the foreign court's government guarantees the payment of expenses incurred in rendering the assistance requested.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The Korean Arbitration Act (the Act) was revised in 1999 to substantially adopt the UNCITRAL Model Law, albeit with some variations. The Act applies to all cases in Korea regardless of the nature of the dispute. Article 27(3) of the Act permits the parties to challenge experts appointed by the tribunal, a provision that is not found in the Model Law. In addition, the Act omits article 34(4) of the Model Law, which provides that the court may suspend its proceedings in an action challenging the award to allow the tribunal to resume its proceedings or to take measures to eliminate the grounds for setting aside the award.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The Act requires that an arbitration agreement be in writing. The agreement to arbitrate may be included in the underlying contract or as a separate document, such as a document signed by the parties or an exchange of written communications between the parties. An arbitration agreement is also in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement to arbitrate is alleged by one party and not denied by the other. However, this is not permitted under the New York Convention, to which Korea is a signatory, and the Korean Supreme Court has held that, where the New York Convention applies, this may not be the basis for holding that the parties have entered into a written agreement to arbitrate (Supreme Court Case No. 2004Da20180, 10 December 2004). Finally, a reference in the contract to another document that contains an arbitration clause constitutes a written arbitration agreement, provided the reference is such as to incorporate that clause into the contract.

Apart from the requirement that the arbitration agreement must be in writing, there are no other formal requirements for an enforceable arbitration agreement under the Act.

25 Choice of arbitrator

If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Pursuant to article 12 of the Act, the parties are free to agree on a procedure to appoint the arbitrators. If the arbitration agreement is silent, the default number of arbitrators under the Act is three. If the parties have agreed to have a sole arbitrator but are unable to agree upon an arbitrator within 30 days of a request to initiate the appointment procedures, the arbitrator will be appointed by the court of competence at the request of either party. If the parties have agreed to three arbitrators (or not agreed on the number of arbitrators), each party shall appoint one arbitrator, and the two party-appointed arbitrators shall appoint the chairperson of the tribunal. If either party fails to appoint an arbitrator within 30 days of a request to initiate the appointment procedures, or if the two arbitrators fail to appoint a third arbitrator within 30 days of their appointment, the court shall appoint the arbitrator upon the request of either party.

With respect to challenging an arbitrator, article 13 of the Act provides that an arbitrator may be challenged only if there are circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence, or if the arbitrator does not possess the qualifications agreed to by the parties. However, a party may challenge the arbitrator it has appointed only for reasons of which the appointing party becomes aware after the appointment has been made.

A party may also request the court to terminate the mandate of an arbitrator pursuant to article 14 of the Act if the arbitrator becomes unable to perform his or her functions or fails to act without undue delay.

26 Arbitral procedure

Does the domestic law contain substantive requirements for the procedure to be followed?

The parties are free to agree upon the arbitration procedures. However, certain mandatory provisions of the Act will apply notwithstanding any agreement by the parties. Article 19, for example, provides that the parties shall be treated equally in the proceedings and each party given a full opportunity to present its case. Article 28 provides that the tribunal may request assistance from the competent court in the taking of evidence. Article 31 requires the tribunal to terminate the arbitral proceedings if the parties reach a settlement, but provides that the tribunal may record the settlement in the form of an award if so requested by the parties.

27 Court intervention

On what grounds can the court intervene during an arbitration?

Article 6 of the Act states that a court may not intervene in arbitral proceedings except as provided in the Act. Where the Act provides for mandatory intervention of the competent court, the parties may not override the court's powers by agreement.

As noted above, article 28 of the Act permits the tribunal to request assistance from the courts in the taking of evidence. The Act also provides for the courts to perform several additional functions in relation to arbitral proceedings. Pursuant to article 12, the court shall appoint the arbitrators where the parties or party-appointed arbitrators cannot agree or otherwise fail to do so within the prescribed time periods. Under article 15, the court must decide on a request to terminate the mandate of an arbitrator. Finally, the court also has the power to decide, on appeal from the tribunal, on a challenge to an arbitrator (article 14), the jurisdiction of the tribunal (article 17) and a challenge to an expert appointed by the tribunal (article 27).

Additionally, the courts have jurisdiction to rule on applications for setting aside an arbitration award or for recognition or enforcement of an award.

28 Interim relief

Do arbitrators have powers to grant interim relief?

Pursuant to article 18 of the Act, unless otherwise agreed by the parties, the tribunal may, at the request of a party, order any party to take interim measures of protection as the tribunal may deem necessary with respect to the subject matter of the dispute. The tribunal is also empowered to require the parties to provide security in lieu of such interim measures.

However, as the tribunal lacks the authority to enforce such orders, the Act also provides at article 10 that a party may request interim relief from a competent court either before or during the arbitral proceedings. Korean courts routinely grant injunctive relief such as preliminary injunctions and attachments in support of arbitral proceedings in Korea.

29 Award

When and in what form must the award be delivered?

The Act is silent as to the deadline for the tribunal to deliver the award. Pursuant to article 32 of the Act, the award must be in writing and signed by all of the arbitrators (provided that if one arbitrator does not sign the award, it will take effect by the signatures of the other two). The award must state the reasons upon which it is based, unless the parties have agreed otherwise. Finally, the award must state the date of the award and the place of arbitration. An authenticated copy of the award must be delivered to each party, and the original of the award must be deposited with the competent court.

30 Appeal

On what grounds can an award be appealed to the court?

For awards rendered in Korea, a party may make an application to set aside the award to a competent Korean court under article 36 of the Act. No such application may be made after three months have elapsed from the time the party has received the duly authenticated copy of the award from the tribunal. There is no procedure available to request a Korean court to set aside a foreign arbitral award.

In practice it is uncommon for Korean courts to set arbitral awards aside. An award may be set aside by the court only if a party proves that:

- a party making the arbitration agreement was under some legal incapacity, or that the arbitration agreement is not valid under the law to which the parties have subjected it;
- the party was not given proper notice of the appointment of the arbitrators or the arbitral proceedings or was otherwise unable to present its case;
- the award deals with a dispute not contemplated by the parties or beyond the scope of the agreement to arbitrate; or
- the composition of the tribunal or the arbitral proceedings were not in accordance with the agreement of the parties or the mandatory provisions of the Act.

The award may also be set aside if the court finds on its own initiative that the subject matter of the dispute is not capable of settlement by arbitration under Korean law, or the award is in conflict with Korean public policy (good morals and social order). There are no other grounds for setting aside an arbitral award in Korea.

An action to set aside an award may be appealed from the district court (court of first instance) to the high (appellate) court and ultimately to the Supreme Court. However, an application for setting aside an award may not be made after the judgment for recognition or enforcement of the award rendered by the court becomes final and conclusive.

31 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Both domestic and foreign arbitral awards are enforced by a judgment of a Korean court. The procedural requirements for an enforcement action are minimal, however. A party applying for the recognition or enforcement of an award must submit to the court the duly authenticated original or a certified copy of the award and the arbitration agreement. These must be accompanied by duly certified translations into Korean if they are in another language. There are no other procedural requirements for the recognition or enforcement of an arbitral award under the Act.

Article 38 of the Act provides that domestic arbitral awards shall be recognised and enforced unless there are any grounds to set aside the award under article 36, as described above.

For foreign arbitral awards, article 39 of the Act distinguishes between those subject to the New York Convention and those from jurisdictions that are not signatories thereto. Awards subject to the New York Convention shall be governed by the convention. Awards from other jurisdictions will be recognised and enforced in the same manner as foreign court judgments, as described in question 21.

32 Costs

Can a successful party recover its costs?

There are no provisions under the Act with respect to the allocation or recovery of costs incurred in arbitral proceedings. However, there are no restrictions under the Act upon an arbitral tribunal's discretion to award costs to a prevailing party.

Alternative dispute resolution

33 Types of ADR

What types of ADR process are commonly used? Is a particular ADR process popular?

Court-supervised mediation is commonly used in Korea and is encouraged by the court. Such mediations are governed by the Judicial Conciliation of Civil Disputes Act and are conducted either by a single judge or a mediation committee, which may include lay persons who are industry experts. While court-supervised mediations are strongly encouraged by the courts, there is no requirement that a party agree to attempt to mediate or otherwise resolve a dispute prior to commencing litigation or arbitration in Korea, unless the parties have so agreed in writing.

Outside the courts' supervision, private mediation and conciliation proceedings are available as alternatives to litigation and arbitration. Although their use is growing, these methods are much less common than arbitration and court-supervised mediation in Korea.

34 Requirements for ADR

Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

As described in question 33, a court may order the parties to attempt to mediate before litigation. However, a recalcitrant party can ignore this mediation process by not attending the mediation session provided by the court and apply to proceed with litigation.

Miscellaneous

35 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The Korean Commercial Arbitration Board (the KCAB) is the only officially recognised arbitral institution in Korea and has administered over 300 cases in 2011. The KCAB has two sets of rules, one for domestic arbitrations and one for international arbitrations. Effective as of 1 September 2011, the KCAB revised both its domestic and international rules and this is expected to improve the quality and reputation of KCAB international arbitrations.

SHIN&KIM

Benjamin Hughes **bhughes@shinkim.com**

8th Floor, State Tower Namsan
100 Teogye-ro, Jung-gu
Seoul 100-052
Korea

Tel: +82 2316 4211
Fax: +82 2756 6226
www.shinkim.com

 ISSN 1741-0630