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Arbitration in South Korea

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Since its rapid development beginning in the 1960s, Korea has emerged as one of the world's most advanced and sophisticated economies. But Korea's spectacular economic achievements were not attained in a vacuum; rather, they came about as a result of Korea's deliberate and vigorous interaction with the developed free market economies of the world, such as the United States and Europe. Since Korea joined the ranks of these developed economies, Korean companies have also turned their attention to the developing economies in Asia and elsewhere to sustain their growth and secure their future as market leaders. Korea's economic status in the global economy is thus inextricably linked to its vibrant commerce with countries all over the world, spanning numerous legal jurisdictions, languages and cultures.

Inevitably conflicts will arise in any business relationship, but this is even more likely when factors such as distance, language and culture are factored into the mix. As international arbitration has emerged as the favoured method for resolving cross-border commercial disputes, it should come as no surprise that Korea is one of the most active users of international arbitration. The International Chamber of Commerce (ICC), for example, reports that in 2008, Korea was third in Asia only to China and India in the number of participants in ICC arbitrations. If Chinese parties were counted separately from Hong Kong and Macau, Korean parties would be second only to Indian parties in use of ICC arbitration, and only by one. This is remarkable given the relative size of these countries' populations and economies.

As Korean companies gain more leverage in their contract negotiations, we can expect to see more and more arbitrations seated in Korea, governed by Korean law, and under the rules of the Korean Commercial Arbitration Board (KCAB). In addition, given the likely continued rise in the number of Korean parties, it is likely that foreign and Korean parties will increasingly be seeking enforcement of foreign arbitral awards in Korea. This article is intended to serve as an introduction to the law and procedures of international arbitrations conducted in Korea and under the international rules of the KCAB, as well as the recognition and enforcement of foreign arbitral awards in the Korean courts.

The Korean Arbitration Act

First promulgated in 1966, the Korean Arbitration Act (the Arbitration Act or the Act) was completely overhauled in 1999 to substantially adopt the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). The Arbitration Act applies to all arbitrations seated in Korea, but also contains some provisions which apply to international arbitrations seated elsewhere. For example, article 9 provides that a Korean court shall dismiss an action where the respondent can show that the dispute is subject to an arbitration agreement in Korea or abroad, and article 10 allows a party in an arbitration in Korea or elsewhere to seek interim relief such as preliminary injunctions or attachments in the Korean courts. Both of these provisions are intended to promote, rather than interfere with, international arbitrations both at home and abroad. Articles 37 and 39 address the recognition and enforcement of foreign arbitral awards, which will be discussed in more detail below.

The 1999 revisions to the Arbitration Act did not adopt the Model Law in its entirety, and a few important differences between the Act and the Model Law should be pointed out. While the Model Law confers final jurisdiction upon the arbitral tribunal to determine its own jurisdiction, for example, article 17 of the Arbitration Act allows a party to appeal the tribunal's decision on its jurisdiction to a competent court for a final ruling. In addition, unlike the Model Law, article 27 of the Arbitration Act allows a party to challenge the tribunal's appointment of an expert, first to the tribunal but with a right of appeal to the court. Finally, article 32 of the Act requires that the original signed award be deposited with the court of competence, while the Model Law contains no such requirement. Certain differences with respect to the legal effect of the arbitral award and the procedures for enforcing or setting aside the award will be discussed in more detail below.

The Korean Commercial Arbitration Board

The KCAB is the only officially recognised arbitration institution in Korea. Following the 1999 revisions to the Arbitration Act, the KCAB also amended its commercial arbitration rules (the KCAB Rules), although these revisions were not as sweeping as the complete overhaul of the Act. The KCAB Rules apply to all arbitrations under the KCAB, regardless of whether the underlying disputes are between domestic Korean parties or of an international nature. However, in 2007, the KCAB implemented an entirely separate set of Rules of International Arbitration (the International Rules), which now exists alongside the KCAB Rules. The International Rules were promulgated in order to encourage foreign parties to arbitrate disputes in Korea under the auspices of the KCAB, and are modeled closely on the Rules of Arbitration of the ICC (the ICC Rules).

This situation can create confusion, however, as the International Rules do not automatically apply to arbitrations involving a foreign party, but must be specifically designated. Many foreign parties have agreed to 'arbitration under the KCAB Rules' in the mistaken belief that they were agreeing to the International Rules, when in fact they were designating the original KCAB Rules. This distinction is important because the two sets of rules have significant differences. For example, the default language of the arbitration under the KCAB Rules is Korean, and the default method for selecting arbitrators is entirely different. Given the rapid growth in both domestic and international arbitration, it may make sense in the future for the KCAB to handle domestic disputes in Korean and under the KCAB Rules, while an international arbitral institution modeled on the Singapore International Arbitration Centre (SIAC) or the Hong Kong International Arbitration Centre (HKIAC) could be established in Korea to handle international arbitration cases. This might go a long way towards both alleviating the confusion which currently arises by having two sets of arbitral rules under the KCAB, and encouraging foreign parties to agree to resolve

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their disputes in Korea under the rules of a truly international arbitral institution.

The KCAB International Arbitration Rules

As the International Rules are most likely to be of relevance to readers of this publication, this article primarily addresses the International Rules of the KCAB. Most foreign parties to international arbitrations under the auspices of the KCAB will choose the International Rules. As noted above, however, this choice must be explicit. Article 3 of the International Rules states that they shall apply where the parties have agreed in writing to refer their disputes to international arbitration 'under the KCAB International Arbitration Rules.' Otherwise, a reference to arbitration under the rules of the KCAB will be deemed to refer to the original KCAB Rules. When agreeing to a KCAB arbitration, therefore, foreign parties are advised to be sure that the arbitration agreement specifically states that the International Rules shall apply to the arbitration.

As noted, the International Rules will be familiar to anyone acquainted with the ICC Rules. Nevertheless, there are some differences which should be noted. For example, 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)). In most cases this will be of little practical import: a tribunal operating under the ICC Rules is unlikely to dismiss a counterclaim simply because it is a little late (or the grounds for the counterclaim were reasonably discovered after the filing of the answer), and a tribunal operating under the International Rules may require reasonable justification for any significant delay in filing the counterclaim. However, it is important to keep these procedural differences in mind as they may affect the duration and cost of the proceedings. Below are some additional areas of more significant difference between the International Rules of the KCAB and the ICC Rules.

Appointment of arbitrators

Like the ICC Rules, where the parties have not specified a number, the default number of arbitrators 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)). In most other respects, the International Rules track the ICC Rules fairly closely with respect to the appointment of arbitrators.

Challenge and replacement of arbitrators

The processes for challenging and replacing arbitrators under the International Rules are closely modeled 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)).

Procedural timetable; new claims

After consulting with the parties, the tribunal is required to produce and forward a provisional timetable to the KCAB Secretariat within 30 days of the constitution of the tribunal (article 15). However, the International Rules do not provide for a Terms of Reference (TOR) or similar document as provided for in the ICC Rules. As such, there is no bar to raising new claims after the TOR, and 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. However, a party may not amend its claim or counterclaim to include matters outside the scope of the arbitration agreement (article 17).

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 the existence or validity of the contract of which the arbitration agreement is a part. A determination by the tribunal that the underlying contract is null and void does not render the arbitration clause invalid. Article 19 also provides that any jurisdictional objections should be raised no later than the date of the filing of the answer (or, with respect to a counterclaim, the reply to the counterclaim), and that while the tribunal should generally rule on a plea concerning its jurisdiction as a preliminary matter, it may do so in the final award as well.

Despite these provisions of the International Rules, it should be recalled that the Arbitration Act applies to all arbitrations which take place in Korea, and that article 17 of the Act allows a party to 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 say.

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 its control available to the tribunal, the other party, and 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. This power

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is subject to article 27(1) of the Arbitration Act, however, which permits the tribunal to appoint an expert unless the parties have otherwise agreed. In addition, as noted above, 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 does 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. While the International Rules do not provide for the participation of the expert in the hearing, article 27(2) of the Arbitration Act provides that the expert may participate in the hearing (unless the parties have agreed otherwise), whereupon the parties shall have the right to question the expert appointed by the tribunal as well as present their own expert witness to testify on the points at issue.

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.

Time limit for award

Under the ICC Rules, the tribunal must render its award within six months from the date of the TOR (article 24), though in practice this deadline is frequently observed in the breach. Under article 33 of the International Rules, unless the parties agree otherwise, the arbitral award must be rendered within 45 days of the date the hearings are closed or final submissions are made, whichever is later. This deadline may be extended by the Secretariat of the KCAB upon request from the tribunal or on its own initiative. Thus, like the ICC deadline, this time limit is more aspiration than practice. However, setting the time limit from the date of the last submissions or the close of the hearing is a more sensible and realistic alternative than the ICC procedure of fixing a deadline six months from the TOR, as many unforeseen events may make this deadline immediately and obviously unattainable.

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 and arbitrators' fees 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 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 administrative expenses, fees and expenses of the arbitrators and experts) on the one hand and the costs incurred by the parties (such as legal fees and expenses for experts and witnesses, etc) on the other. 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 Recognition and Enforcement of Arbitral Awards

Domestic arbitral awards

Article 35 of the Arbitration Act states that an arbitral award rendered in Korea shall have the same effect on the parties as the final and conclusive judgment of the court. It should be noted, however, that article 36 of the Act provides procedures for a party wishing to apply to the court of competence to set aside an arbitral award rendered in Korea. The grounds for setting aside a domestic award in Korea are similar to the grounds for declining to recognise or enforce a foreign arbitral award, discussed below. No application to set aside an award may be made after three months from the date on which a party received a duly authenticated copy of the award, nor may any such action be entertained after a conclusive judgment of recognition or enforcement of the award has been rendered by a Korean court. There is no corresponding provision under Korean law permitting a party to apply for the setting aside of a foreign arbitral award, as article 36 of the Act does not apply to foreign awards.

Foreign arbitral awards

Article 37 of the Arbitration Act sets forth only two procedural requirements for the recognition and enforcement of a foreign arbitral award. First, a party seeking enforcement must submit the original, or a duly authenticated copy of, the award and the agreement to arbitrate. If these are not in Korean, duly certified translations must also be submitted. These straightforward procedural requirements are consistent with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), to which Korea is a signatory, and Korean courts have shown themselves to be extremely friendly to foreign arbitral awards. However, it should be noted that enforce-

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ment proceedings are full adversarial court litigations which are subject to multiple appeals, so enforcement against a recalcitrant party can become a time-consuming and expensive undertaking. As noted above, as there is no procedure for setting aside a foreign arbitral award in Korea, a party wishing to resist enforcement of a foreign arbitral award will simply refuse to comply with the award and force the other party to bring an enforcement action pursuant to article 37 of the Act.

Article 39 of the Arbitration Act provides that the recognition or enforcement of a foreign arbitral award which is subject to the New York Convention shall be governed by that Convention, while foreign arbitral awards which are not subject to the Convention shall be governed by the same procedures applicable to the recognition and enforcement of foreign court judgments. As a practical matter, however, the vast majority of foreign arbitral awards for which recognition and enforcement is sought will be subject to the New York Convention. In addition, there is little practical difference these days between the grounds for recognition and enforcement of awards subject to the New York Convention and foreign court judgments under Korean law.

Article V of the New York Convention sets forth the very limited grounds which may permit the refusal of recognition and enforcement of an arbitral award. Among these, the most commonly tested in Korea has been that the recognition or enforcement of the award would be contrary to the public policy of Korea (section V(2)(b) of the Convention), although other grounds have also been raised. Korean courts have proven very friendly to foreign arbitral awards, taking a very narrow view of the exceptional circumstances which are required to successfully resist recognition and enforcement on any of the grounds provided under article V of the Convention. The Korean Supreme Court has repeatedly held that a violation of 'public policy' giving rise to a refusal to enforce a foreign arbitral award under section V(2)(b) of the New York Convention should be restrictively interpreted in light of the need for certainty and stability in international commercial transactions, and that the so-called 'public policy exception' to the enforcement of arbitral awards was intended to protect only Korea's most fundamental moral beliefs and social order.

Most recently, the Supreme Court reaffirmed in 2009 that a foreign arbitral award rendered in jurisdiction which is a signatory to the New York Convention is recognised as having the same res judicata effect as a domestic Korean court judgment, unless there are grounds under the New York Convention to refuse recognition and enforcement (Korean Supreme Court Dec. No. 2006Da20290, 28 May 2009). While this demonstrates the supportive attitude of Korean courts toward arbitration, as a practical matter it also serves to underscore the distinction between 'recognition' and 'enforcement'. An award which is recognised for its legal effect in Korea may still have to be enforced against an uncooperative party, and absent a final enforcement judgment from a Korean court under the procedures of article 37 of the Act, it may be difficult to force a party to comply with an arbitral award against it.

Conclusion

Korea will inevitably become the locus of an increasing number of international arbitrations, whether under the auspices of the KCAB or other well established arbitral institutions. Korean companies are sophisticated users of international arbitration, and their increased leverage and influence on the global stage will create a demand for first rate international arbitration services in Korea. The promulgation of the International Rules by the KCAB has improved the environment for international arbitration in Korea, but it is only the first step. Perhaps the Korean government should consider taking a page from the playbook of Singapore, which has given full support to SIAC as a truly international centre for dispute resolution. Notably, the board of SIAC is comprised of well-known arbitrators and practitioners from around the world, and SIAC conducts its affairs in English. Korea may be well advised to establish a Korean International Arbitration Center, based upon the work that the KCAB has already done (and perhaps as a spin-off or associated institution of the KCAB), in order to handle international arbitrations.

Korea already has much to offer, however. In addition to the International Rules of the KCAB and the Arbitration Act based upon the Model Law, the Korean courts are extremely supportive of arbitration. They generally do not interfere with arbitral proceedings, and support such proceedings with interim relief, dismissals of cases where there is an arbitral agreement, and final rulings on issues such as jurisdiction (usually in favour of arbitration) where required under the Arbitration Act. No doubt these factors bode well for the future development of Korea as a regional centre for international arbitration.

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