Improving standards

To address a growing demand for international arbitration, the *Korean Commercial Arbitration Board (KCAB)* has proposed legislative changes to better meet the needs of foreign parties. Hyun Suk Oh, the KCAB's director of arbitration promotion, and Benjamin Hughes, partner and co-chair of international dispute resolution, *Shin & Kim*, explain the amendments.

The Korean Commercial Arbitration Board (KCAB) has seen tremendous growth in the number of international arbitrations administered under its rules in Korea. In 2009, for example, the KCAB administered 318 arbitration cases, of which 78 were international arbitrations. This is an increase of almost two thirds in the number of international cases over the prior year.

In order to address the needs of foreign parties in Korea, the KCAB has proposed some much-needed changes to its administration of international arbitrations, including amendments to the KCAB Rules of International Arbitration (the International Rules), increases in arbitrator compensation, and the introduction of expedited procedures. These changes have been submitted for review and approval by the Supreme Court after careful study by the KCAB, and approval is expected in early 2011.

Application of the International Rules

In order to accommodate the increasing number of international arbitrations, the KCAB introduced an entirely new set of Rules of International Arbitration (the International Rules) in January 2007. The International Rules are similar to those of other institutions such as the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC).

Currently, however, it seems that few parties outside of Korea are aware of the fact that the KCAB has introduced a set of modern International Rules. In addition, under the current regime, the International Rules do not automatically apply to arbitrations involving a foreign party, but must be specifically designated in the arbitration agreement or by agreement of the parties. If the parties fail to specifically designate in writing that the International Rules shall apply, the "original" Arbitration Rules of the KCAB (the KCAB Rules) will apply.

The distinction between the two sets of rules is important because they do have significant differences. To cite just one example, the default language of the arbitration under the KCAB Rules is Korean, while under the International Rules it is English.

The KCAB has recognised these problems and is taking steps to address them. Among the proposed revisions to the International Rules is the elimination of the restriction under Article 3, which requires the parties to international arbitrations to specifically designate the International Rules. In its place, the KCAB has proposed a provision which makes the International Rules the default rules where either party to the arbitration is not Korean. The current KCAB Rules will be referred to as the KCAB Domestic Arbitration Rules.

This alone would bring about a huge change in the way international arbitrations are conducted under the auspices

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of the KCAB. If this simple revision had been in effect in 2009, for example, 78 cases would have been administered under the International Rules. The KCAB has received substantial feedback regarding the conduct of international arbitrations under the original KCAB Rules, and have found that these rules do not adequately address the concerns or meet the needs of foreign parties. This is primarily due to procedures which may be familiar to Korean practitioners but are not familiar to foreign parties or their counsel. We are confident that the application of the International Rules would eliminate this problem.

Appointment and compensation of arbitrators

Currently, the KCAB maintains a Roster of Arbitrators, from which it selects arbitrators for appointment when it is called upon to do so by the parties, their arbitration agreement, or by the applicable arbitration rules. The KCAB has proposed several changes to its appointment procedures as well as to the level of compensation for those serving as arbitrators.

First, the standards for entry into the Roster will be raised, and the KCAB will actively recruit qualified arbitrators to join the panel in order to raise the standards of service the institution can provide. Like any arbitral institution, the quality of KCAB arbitrations depends largely on the quality of its arbitrators. Until now, the KCAB has reviewed applications as they are received on an ad-hoc basis, without clear published standards for acceptance. The KCAB plans to introduce clear guidelines for admission to its Roster, which will be published on its website. Applications will be reviewed by an international arbitration committee, which will include Korean and foreign practitioners appointed by the KCAB.

Second, for international arbitrations, the KCAB Secretariat will consult with its international arbitration committee prior to making such appointments. The KCAB feels that input from an international committee could assist in ensuring that the arbitrators meet the highest standards and are impartial and well-regarded in the international legal community.

Finally, the KCAB has recognised that the compensation currently offered to arbitrators in international arbitrations under the KCAB is significantly lower than that of the ICC, SIAC, HKIAC and other major arbitral institutions. As such, the KCAB has proposed significant increases in the level of compensation for arbitrators. Although still not at the level of ICC compensation, the remuneration for arbitrators will be comparable to institutions such as the HKIAC, and will be up to five or ten times the compensation available for arbitrators in domestic cases. The KCAB believes this will help to attract highly qualified and internationally recognised arbitrators from around the Asian region and even globally.

Expedited procedures and costs

Taking a cue from SIAC and the International Centre for Dispute Resolution (ICDR), the KCAB has proposed expedited procedures in order to save time and costs where

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appropriate. The proposal envisions the application of such expedited procedures either by consent of the parties, or by default where the amount in dispute is less that KRW 200 million (about US$175,000). Under these procedures, the tribunal will be required to render its award within three months of the date of the constitution of the tribunal. Proceedings based entirely on documentary evidence, without an oral hearing, will be permitted under such procedures where agreed by the parties and/or deemed appropriate by the tribunal.

In addition to saving time, these procedures will also save on costs. As more and more smaller and medium size companies become involved in international transactions in the global economy, the KCAB is concerned with providing access to arbitration to both foreign and domestic parties where the disputes may be smaller than typical international commercial disputes. As such, the KCAB is also proposing to exempt filing fees and reduce its administrative fees for smaller cases, as well as allowing the Secretariat to adjust arbitrator fees where appropriate in light of the amount in dispute. It is hoped that this will provide a cost-effective and efficient venue for the resolution of international disputes for parties who may not have otherwise had access to such a venue.

Introduction to the KCAB International Rules

As most arbitration practitioners are familiar with the ICC Rules, this introduction will focus on a comparison of the International Rules and the ICC Rules. The International Rules were drafted based in part on the ICC Rules, but there are some differences which should be noted. For example, the International Rules do not provide for a Terms of Reference (TOR) or similar document as provided for in the ICC Rules. While the KCAB understands the potential merits of such a procedural requirement, it was determined that requiring such a document may cause additional expense and delay in many cases. In this regard, the SIAC has also recently eliminated its requirement for a Memorandum of Issues, similar to the TOR, largely for the same reason.

Some of the other more significant differences between the ICC Rules and the International Rules are described below:

(i) Appointment, challenge and replacement of arbitrators

Like the ICC Rules, where the parties have not specified a number, the default number of arbitrators under the International Rules is one. However, under the ICC Rules, the ICC Court may sua sponte decide, in light of the circumstances, to appoint three arbitrators (Article 8(2)). Under the International Rules, the Secretariat of the KCAB will appoint a sole arbitrator unless a party petitions the secretariat to appoint three. The Secretariat must then weigh factors such as the size and complexity of the dispute, determine whether three arbitrators should be appointed, and notify the parties of its decision (Article 11).

The processes for challenging and replacing arbitrators

By Hyun Suk Oh, ***KCAB*** and Benjamin Hughes, ***Shin & Kim***

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.

(ii) 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. Like the ICC Rules, the International Rules provide that a determination by the tribunal that the underlying contract is null and void does not render the arbitration clause invalid. Despite these provisions of the International Rules, however, 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.

(iii) Evidence and experts

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/or any expert appointed by the tribunal. The tribunal is also specifically empowered to determine the admissibility, relevance, materiality and weight of any evidence.

Under Article 20(4) of the ICC Rules, the tribunal may appoint an expert after consultation with the parties. Article 23 of the International Rules confers the same power, but the tribunal is not required to consult with the parties. As noted above, however, the parties have the right under the Arbitration Act to challenge the tribunal's appointment of an expert in the Korean court of competence, so as a practical matter the tribunal should consult with the parties and ensure that the expert is free of conflicts or perceived prejudices.

(iv) 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.

(v) 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.

(vi) 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. This will remain true even after the introduction of the KCAB's recently proposed increases to compensation for arbitrators.

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) and the costs incurred by the parties (such as legal fees and expenses for experts and witnesses, etc.). Article 40 of the International Rules provides that administrative arbitration costs shall, in principle, be borne by the losing party, subject to the discretion of the tribunal. Article 41, on the other hand, provides that the legal costs and expenses incurred by each party shall be borne by such party, again subject to the discretion of the tribunal. The parties are free to agree otherwise, of course, so it is advisable to consider this issue when drafting the arbitration clause if the International Rules will apply.

Conclusion

As demonstrated by the exponential growth in international arbitrations administered by the KCAB, there is great potential for Korea to serve as an important regional centre for the resolution of international commercial disputes. Parties entering into agreements to arbitrate in Korea under the KCAB should feel no hesitation in doing so. Until the recently proposed changes regarding the application of the International Rules are enacted, the parties should be careful to make sure the arbitration agreement specifically designates the International Rules. With the implementation of the proposed changes, the KCAB should join the ranks of SIAC and HKIAC as one the premier regional centers for international arbitration in Asia.

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