

Commercial Arbitration 2018 **Korea**

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Infrastructure

1 The New York Convention

Is your state a party to the New York Convention? Are there any noteworthy declarations or reservations?

Korea signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NY Convention) on 8 February 1973, and it entered into force on 9 May 1973.

Korea made two declarations, namely, that it will apply the NY Convention to the recognition and enforcement of awards made only in the territory of another contracting state, and that it will apply the NY Convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under Korean law.

2 Other treaties

Is your state a party to any other bilateral or multilateral treaties regarding the recognition and enforcement of arbitral awards?

Korea has also ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention). Korea signed the Washington Convention on 21 February 1967, and it entered into force on 23 March 1967.

3 National law

Is there an arbitration act or equivalent and, if so, is it based on the UNCITRAL Model Law? Does it apply to all arbitral proceedings with their seat in your jurisdiction?

The Korean Arbitration Act (the Act) was first enacted in 1966, but was entirely revised as of 31 December 1999 to substantially adopt the UNCITRAL Model Law (the Model Law).

In May 2016, the Korean legislature passed extensive amendments to the Act that took effect on 30 November 2016 (the 2016 Amendments to the Act), and these amendments incorporate many key features of the 2006 UNCITRAL Model Law (the 2006 Model Law).

The Act applies to all arbitral proceedings seated in Korea. In addition, articles 9, 10, 37 and 39 of the Act will apply even if an arbitral proceeding is seated elsewhere.

4 Arbitration bodies in your jurisdiction

What arbitration bodies relevant to international arbitration are based within your jurisdiction? Do such bodies also act as appointing authorities?

The Korean Commercial Arbitration Board (the KCAB) is the only officially recognised arbitral institution in Korea.

The KCAB acts as an appointing authority for KCAB arbitrations and may act as an appointing authority in non-KCAB arbitrations seated in Korea.

5 Foreign institutions

Can foreign arbitral providers operate in your jurisdiction?

Yes. There is no restriction on the matter, and the Korean government and related institutions are actively trying to promote Seoul as a seat of arbitration for arbitral proceedings governed by the rules of foreign institutions. In this regard, the Seoul International Dispute Resolution Centre (the SIDRC), which is a hearing facility and “one-stop shop” for international dispute resolution services, hosts liaison offices for institutions such as the AAA/ICDR, HKIAC, ICC and SIAC.

6 Courts

Is there a specialist arbitration court? Is the judiciary in your jurisdiction generally familiar with the law and practice of international arbitration?

There is no specialist arbitration court in Korea. However, the courts are familiar with the law and practice of international arbitration and set up internal guidelines to maintain consistency in the recognition and enforcement of arbitral awards. The judiciary has taken an active interest in international arbitration and has proven extremely supportive of both arbitral proceedings and the recognition and enforcement of arbitral awards.

Agreement to arbitrate

7 Formalities

What, if any, requirements must be met if an arbitration agreement is to be valid and enforceable under the law of your jurisdiction? Can an arbitration agreement cover future disputes?

According to article 8 of the Act (which was recently amended), a valid and enforceable arbitration agreement must be in writing. Notably, however, Korea’s approach to the “in writing” requirement is now in line with the relaxed approach under Option 1 of article 7 of the 2006

Model Law such that an arbitration agreement shall be deemed to be in writing if its content has been recorded in any form, regardless of whether the agreement was concluded orally, by conduct or by other means. Also in line with Option 1, an agreement made by any means of electronic communication, such as email or fax, shall be deemed to be an arbitration agreement in writing.

An agreement to arbitrate can and will cover all future disputes between the parties to the agreement, to the extent that such disputes fall within the scope of the written agreement to arbitrate. Further, if one party asserts in an application or an answer that there is an arbitration agreement and the other party does not refute such assertion, a written arbitration agreement is deemed to have been made. Finally, if a contract cites a document containing an arbitration clause, that contract is deemed to contain an arbitration agreement.

It should also be noted that since an agreement to arbitrate is considered to be a waiver of an important constitutional right, ie, the right to be heard before the courts, a Korean court may view an arbitration agreement that is too vague or broad to be invalid. In this regard, a Korean court will be unlikely to uphold the validity of an arbitral agreement that provides for both parties to arbitrate all matters between them in indefinite terms.

8 Arbitrability

Are any types of dispute non-arbitrable? If so, which?

As in most jurisdictions, certain types of public law disputes relating to criminal law, family law and administrative law are not arbitrable in Korea. It has not always been clear whether certain claims related to regulatory laws (such as securities, antitrust, competition, corporate governance, environmental or intellectual property regulations) are properly subject to arbitration. Article 1 of the Act, which defines arbitration with a reference to “disputes arising under private law”, was thought to restrict the scope of the Act to disputes regarding property rights or private commercial interests and not public law-related claims. However, article 3 of the Act now defines arbitration more broadly as “a procedure to resolve disputes relating to (i) property rights or (ii) non-property rights that the parties can resolve through a settlement”. Based on this revised wording, it is expected that certain private claims such as claims for damages arising from acts of patent infringement or antitrust violations will be treated by Korean courts as arbitrable.

9 Third parties

Can a third party be bound by an arbitration clause and, if so, in what circumstances? Can third parties participate in the arbitration process through joinder or a third-party notice?

A third party may be bound by an arbitration clause as a successor (heir, assignee or trustee) to a party bound by the clause. In addition, a third party may consent in writing or give implied consent to arbitrate, such as by failure to object to the jurisdiction of the arbitral tribunal.

The Act is silent as to whether third parties can participate in the arbitration process through joinder or a third-party notice. For an arbitration to which the 2016 version of the KCAB International Arbitration Rules (KCAB Rules) apply, an arbitral tribunal may permit joinder if either (i) all of the current parties to an arbitration and the third party agree in writing to the joinder or (ii) the third party is a party to the same arbitration agreement as the parties to an arbitration, and the third party agrees to the joinder in writing. It should be noted that joinder is possible only after formation of arbitral tribunal. It is also noteworthy that only the existing parties (and not the joining party) can apply for such joinder under the KCAB Rules.

10 Consolidation

Would an arbitral tribunal with its seat in your jurisdiction be able to consolidate separate arbitral proceedings under one or more contracts and, if so, in what circumstances?

There is no provision in the Act that specifically precludes or permits the consolidation of separate arbitral proceedings. For an arbitration to which the KCAB Rules apply, an arbitral tribunal may, at a party's request, consolidate claims brought in separate but pending arbitrations if (i) such arbitration is also under the KCAB Rules, (ii) the arbitration is between the same parties and (iii) no common arbitrator has been appointed in the separate proceeding. The KCAB Rules also provide that the Secretariat may allow for the submission of claims arising under multiple contracts within a single request for arbitration if the Secretariat is satisfied that: (i) the KCAB Rules apply to each of the multiple contracts, (ii) the arbitration agreements within each of the multiple contracts are compatible and (iii) all of the claims arise out of the same transaction or series of transactions.

11 Groups of companies

Is the “group of companies doctrine” recognised in your jurisdiction?

Korean courts only recognise “piercing the corporate veil” in very limited circumstances, such as when a corporate entity is used by a company or individual in bad faith to circumvent the law or avoid liability in a grossly unfair or unjust manner. In light of this position, although there are no reported precedents on this issue in the context of international arbitration, our view is that it would be extremely difficult to “pierce the corporate veil” to reach corporate entities that are not the specific parties to an arbitration agreement.

12 Separability

Are arbitration clauses considered separable from the main contract?

Article 17(1) of the Act provides that when an arbitral tribunal is ruling on its own jurisdiction it is to treat an arbitration clause contained within a contract as independent of the other provisions of that contract. Thus, the Act recognises that the tribunal has the authority to rule on whether the contract in which the arbitration clause is found is invalid or non-existent without affecting the validity of the arbitration clause.

13 Competence-competence

Is the principle of competence-competence recognised in your jurisdiction? Can a party to an arbitration ask the courts to determine an issue relating to the tribunal's jurisdiction and competence?

Article 17 of the Act recognises the principle of competence-competence by providing that the tribunal may rule on its own jurisdiction (and any challenge to a tribunal's jurisdiction must be made before the submission of a party's answer, or the first submission in response to the claimant's request for arbitration). However, article 17 of the Act empowers the court to have the final say over whether a tribunal has jurisdiction by allowing a party to appeal a tribunal's decision as to its own jurisdiction. In other words, the final decision as to jurisdiction will be made by the courts (if a party appeals).

There are a few notable features related to competence-competence under the Act, as follows:

- If an arbitral tribunal rules on its own jurisdiction as a preliminary matter, then regardless of whether the tribunal accepts or declines jurisdiction, a party may appeal such ruling to the competent court within 30 days after having received notice of the tribunal's ruling.

This differs from the previous wording of the Act and that of the Model Law (unchanged in the 2006 Model Law), which only provided that a party may challenge an affirmative jurisdiction ruling.

- The fact that an appeal of the arbitral tribunal's jurisdictional award is pending before a Korean court does not automatically stop the arbitration proceedings, and the tribunal may continue the arbitral proceedings and even issue an award while the appeal is being heard by the court.
- If the court finds that the tribunal has no jurisdiction after an award on the merits has been issued by the tribunal, such fact will constitute a basis for setting aside the award, or may limit the award's enforceability.

The decision of the court may not be appealed.

14 Drafting

Are there particular issues to note when drafting an arbitration clause where your jurisdiction will be the seat of arbitration or the place where enforcement of an award will be sought?

As explained above, Korean courts value the right to be heard before a court, and they will carefully examine whether the parties have clearly agreed to waive their rights to be heard before a court. As long as the parties' intention to arbitrate is clear, the court will generally determine that an arbitration agreement is valid, even if certain defects are present in the arbitration agreement, such as a misspelling in the name of an institution. On the other hand, a Korean court will not view an option clause – giving parties an option to pursue arbitration or court litigation – to be a valid agreement to arbitrate. This is because it is not clear based on an option clause if the parties were intending to give up their constitutional rights. Accordingly, option clauses should not be used in arbitration agreements that provide for a seat of arbitration in Korea or that are likely to be subject to enforcement in Korea.

In addition to the above, for arbitrations seated in Korea, parties should be aware that the Act provides them with the right to appeal decisions of the tribunal to the court of competent jurisdiction with respect to challenges to an arbitrator (article 14), the jurisdiction of the arbitral tribunal (article 17) and challenges to an expert appointed by the tribunal (article 27).

With respect to the recognition and enforcement of foreign arbitral awards, Korean courts have proven very arbitration-friendly. However, in light of recent jurisprudence, if a party seeks any form of specific performance, it should clearly identify the relief sought because, even if an award of specific performance is enforceable, a court may find that it is not capable of being executed.

15 Institutional arbitration

Is institutional international arbitration more or less common than ad hoc international arbitration? Are the UNCITRAL Rules commonly used in ad hoc international arbitrations in your jurisdiction?

Institutional arbitration is much more common than ad hoc arbitration in Korea. However, ad hoc arbitration is not uncommon. Generally, parties to ad hoc arbitration use the UNCITRAL Rules.

16 Multi-party agreements

What, if any, are the particular points to note when drafting a multi-party arbitration agreement with your

jurisdiction in mind? In relation to, for example, the appointment of arbitrators.

The Act is silent on the issue of multi-party arbitration, and thus great care should be given when drafting an arbitration clause for multi-party agreements.

Commencing the arbitration

17 Request for arbitration

How are arbitral proceedings commenced in your jurisdiction? Are there any key provisions under the arbitration laws of your jurisdiction relating to limitation periods of which the parties should be aware?

Article 22 of the Act provides that, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date when the request for arbitration is received by the respondent. The request for arbitration shall identify the parties, subject matter of the dispute and contents of the arbitration agreement.

The Act contains no provisions relating to a limitations period for the filing of a request for arbitration. However, for any given cause of action, the expiration of the applicable statute of limitations may be raised as a defence in the arbitration.

Choice of law

18 Choice of law

How is the substantive law of the dispute determined? Where the substantive law is unclear, how will a tribunal determine what it should be?

Article 29 of the Act provides that the arbitral tribunal shall decide the dispute in accordance with the substantive law chosen by the parties. If there is no party agreement as to substantive law, the arbitral tribunal shall apply the law of the state which it considers to have the closest connection with the subject matter of the dispute. For KCAB arbitrations, KCAB Rules article 29 stipulates that, in the absence of party agreement, an arbitral tribunal may apply the law which it deems appropriate. Given the slight discrepancy between the standards articulated in the Act and the KCAB Rules, the KCAB Rules would take precedence because the parties agree to be bound by the KCAB Rules when they agree to KCAB arbitration. However, in practice, the elements that an arbitral tribunal would consider when determining the substantive law would be the same under either standard, eg, the subject matter of the dispute, the place of performance, the intentions of the parties when executing the agreement, etc.

Appointing the tribunal

19 Choice of arbitrators

Does the law of your jurisdiction place any limitations in respect of a party's choice of arbitrator?

The Act places no restrictions on who may serve as an arbitrator. Sitting Korean judges are not permitted to serve as arbitrators due to judicial regulations that prohibit them from engaging in any profit-making activities. Otherwise, the parties to an arbitration seated in Korea are free to appoint an arbitrator of their choosing, subject to any restrictions that the parties themselves have agreed upon in their arbitration agreement or have implicitly accepted by adopting the rules of a particular institution. Notably, there is no requirement under the Act that an arbitrator possess any law qualification.

20 Foreign arbitrators

Can non-nationals act as arbitrators where the seat is in your jurisdiction or hearings are held there? Is this subject to any immigration or other requirements?

Article 12 of the Act provides that no person shall be precluded by reason of his or her nationality from acting as an arbitrator, unless otherwise agreed by the parties. There are no special immigration or other requirements applicable to foreign arbitrators. Indeed, non-nationals can and frequently do sit as arbitrators in arbitrations seated in Korea.

21 Default appointment of arbitrators

How are arbitrators appointed where no nomination is made by a party or parties or the selection mechanism fails for any reason? Do the courts have any role to play?

Under these circumstances, articles 11 and 12 of the Act provide the default appointment mechanism for arbitrations seated in Korea.

Article 11 provides that where the parties fail to determine the number of arbitrators, the number shall be three. Article 12(3) provides that where the parties fail to agree on the procedure for appointing arbitrators, the arbitrators shall be appointed as follows:

In an arbitration with a sole arbitrator, where the parties have not agreed on the arbitrator within 30 days after a party has received a request from the other party to appoint the arbitrator, the competent court or arbitration institution designated by the competent court shall appoint the arbitrator upon either party's request.

In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall agree on the third arbitrator. If a party fails to appoint its arbitrator within 30 days of a request to do so by the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the competent court or arbitration institution designated by the competent court shall appoint the arbitrator upon either party's request.

Article 12(4) provides that where the parties have agreed on the procedure for appointing arbitrators but have failed to nominate the arbitrators, the competent court or an arbitration institution designated by the court shall appoint the arbitrator upon either party's request.

A court's decision on the appointment of an arbitrator is non-appealable.

22 Immunity

Are arbitrators afforded immunity from suit under the law of your jurisdiction and, if so, in what terms?

There are no specific provisions under the Act that provide for the immunity of arbitrators from suit in Korea. As such, theoretically, arbitrators may be liable for contractual breach or illegal action, but practitioners and scholars are of the view that such liability either does not exist or may arise only if an arbitrator has acted in bad faith.

23 Securing payment of fees

Can arbitrators secure payment of their fees in your jurisdiction? Are there fundholding services provided by relevant institutions?

There is no restriction under the Act against arbitrators securing the payment of their fees. Securing payment pursuant to institutional international arbitration is subject to the relevant arbitral institution's rules.

Challenges to arbitrators

24 Grounds of challenge

On what grounds may a party challenge an arbitrator? How are challenges dealt with in the courts or (as applicable) the main arbitration institutions in your

jurisdiction? Will the IBA Guidelines on Conflicts of Interest in International Arbitration generally be taken into account?

Article 13 of the Act provides that an arbitrator may be challenged if circumstances exist that are likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed on by the parties. Under article 14 of the Act, the parties are free to agree on a procedure for challenging an arbitrator. Failing such an agreement, the party challenging an arbitrator shall send a written statement of the grounds for challenge to the arbitral tribunal within 15 days of becoming aware of (i) the constitution of the arbitral tribunal or (ii) the grounds for challenge. Unless the challenged arbitrator withdraws, or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If the arbitral tribunal rejects the challenge, the challenging party may, within 30 days of being notified of the decision, request that the court decide on the challenge. The court's decision is final and not subject to appeal.

Here it bears mentioning that the time period set forth in article 14 has special importance because the Korean Supreme Court has held that even if circumstances existed during the arbitration proceeding that would have been likely to give rise to justifiable doubts as to an arbitrator's impartiality or independence, such circumstances do not constitute grounds for setting aside an arbitral award if they were not raised as part of a challenge within the requisite time period. Therefore, it is imperative that any challenge brought against an arbitrator be raised during the period set forth in article 14.

KCAB Rules article 14 also sets forth similar grounds for challenge and time limitations.

The IBA Guidelines on Conflicts of Interest in International Arbitration are well recognized in this jurisdiction and are often taken into account.

Interim relief

25 Types of relief

What main types of interim relief are available in respect of international arbitration and from whom (the tribunal or the courts)? Are anti-suit injunctions available where proceedings are brought elsewhere in breach of an arbitration agreement?

Interim relief is available from both courts and arbitral tribunals. Article 10 of the Act provides that any party to an arbitration agreement may, before or during the arbitral proceedings, request interim relief from a court. Types of interim relief available from the courts, however, are limited to provisional attachment of respondents' assets and preliminary injunctions.

By contrast, the types of interim measures available to arbitral tribunals are more diverse. The revised article 18 of the Act provides that, unless the parties agree otherwise, an arbitral tribunal may, at the request of a party, impose an interim measure of protection, including a temporary injunction, the preservation of assets or the preservation of evidence.

The 2016 Amendments to the Act incorporate, with only minor adjustments, many of the provisions related to interim measures found in Chapter IVA of the 2006 Model Law but not the provisions on ex parte preliminary orders in articles 17B and 17C. Among other things, the new provisions of the Act specify the criteria that a party must prove for its application for interim measures to be successful (article 18-2), they provide that a party may request recognition or enforcement from a Korean court of an interim measure granted by an arbitral tribunal (article 18-7) and they provide the limited grounds upon which Korean courts may deny recognition or enforcement (article 18-8).

The amendments make clear that an interim order made by an arbitral tribunal can be recognised and enforced by applying to the court for a decision. However, interim measures will only be enforced by a Korean court if the arbitration is seated in Korea and the order that is made by the arbitral tribunal is compatible with Korean law. In this regard, although arbitral tribunals have more discretion when considering what type of interim measures they consider necessary, a careful approach should be taken if a party intends to enforce such interim orders through the courts of Korea.

The Act does not explicitly provide for the possibility of an anti-suit injunction in relation to international arbitration. However, some scholars point out that the Korean Civil Execution Act does not limit the types of injunctions that can be sought by a party and, therefore, it may be possible for a party to successfully apply for an anti-suit injunction. That being said, the availability of anti-suit injunctions has not been tested in practice because if one party brings an action in court against another party even though they are bound by an arbitration agreement and the other party moves to compel arbitration, the court is required to dismiss the action, unless it finds the arbitration agreement to be null and void, inoperative or incapable of being performed.

26 Security for costs

Does the law of your jurisdiction allow a court or tribunal to order a party to provide security for costs?

Article 18-4 of the Act provides that an arbitral tribunal may order a party that requests an interim measure to provide security. In addition, under article 18-7, if a tribunal has not ordered a party to provide security, a court in receipt of a petition for recognition or enforcement of an interim measure may order the party that has filed such petition to provide security.

Procedure

27 Procedural rules

Are there any mandatory rules in your jurisdiction that govern the conduct of the arbitration (eg, general duties of the tribunal and/or the parties)?

The provisions of the Act are generally default provisions that apply in the absence of an agreement between the parties. Subject to only a few mandatory provisions of the Act, the parties are free to agree on the procedures for arbitration. For example, one mandatory provision of the Act is article 19, which provides that the parties shall be equally treated in the arbitral proceedings and that each shall be given a full opportunity to present its case. In addition parties may not waive article 13 of the Act, which provides that potential arbitrators must disclose any circumstance that may give rise to justifiable doubts as to his or her impartiality or independence.

28 Refusal to participate

What is the applicable law (and prevailing practice) where a respondent fails to participate in an arbitration?

The default provisions of article 26 of the Act provide that if a respondent fails to submit a statement of defence, the arbitral tribunal shall continue the proceedings without treating such failure as an admission of the claimant's allegations. If any party fails to appear at a hearing or to produce documentary evidence within a fixed period of time, the tribunal may continue the proceedings and make the award based upon the evidence before it.

29 Admissible evidence

What types of evidence are usually admitted, and how is evidence usually taken? Will the IBA Rules on the

Taking of Evidence in International Arbitration generally be taken into account?

Article 20 of the Act confers upon the arbitral tribunal the power to determine the admissibility, relevance and weight of any evidence. Evidence normally includes written documents and statements by witnesses and/or experts, and may also include inspections of sites or property that are relevant to the subject matter of the dispute. The IBA Rules on the Taking of Evidence in International Commercial Arbitration, while not binding, are generally taken into account in international arbitrations seated in Korea.

30 Court assistance

Will the courts in your jurisdiction play any role in the obtaining of evidence?

Article 28 of the Act provides that a tribunal, either on its own initiative or at the request of a party, may seek assistance in the taking of evidence from a competent court. The 2016 Amendments to the Act make it possible for the tribunal to cooperate together with the court and essentially supervise the court's taking of evidence rather than having the court gather evidence alone and later providing a report to the tribunal. Also, article 28(5) provides that the competent court may order witnesses of document holders to appear before the tribunal or produce documents.

31 Document production

What is the relevant law and prevailing practice relating to document production in international arbitration in your jurisdiction?

Aside from providing in article 27 (tribunal-appointed experts) and article 28 (court's assistance in examining evidence) that the competent court may in some instances compel document production, the Act is silent regarding the production of documents. The Korean Civil Procedure Act, consistent with the civil law tradition, provides that a claimant should build its case based on whatever documents are in its possession. In limited cases where a requested document is clearly specified and it is evident that the party to whom the request is made has such document, the court may order production of such documents.

The IBA Rules on the Taking of Evidence in International Arbitration, while not binding, are generally taken into account in international arbitrations seated in Korea. However, to ensure that standard international document production procedures are available, a party should be mindful to request that the IBA Rules on the Taking of Evidence be adopted or used as a guideline at the outset of an arbitration.

32 Hearings

Is it mandatory to have a final hearing on the merits?

No. Article 25 of the Act provides that, subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of the documentary submissions before the tribunal. Unless otherwise agreed by the parties, however, the tribunal must hold a hearing if requested by either party.

33 Seat or place of arbitration

If your jurisdiction is selected as the seat of arbitration, may hearings and procedural meetings be conducted elsewhere?

Yes. Under article 21 of the Act, the parties are free to agree on the place of arbitration. If Korea is selected as the seat of the arbitration, the tribunal may decide to conduct the hearings and procedural meetings elsewhere, unless the parties agree otherwise.

Award

34 Majority decisions

Can the tribunal decide by majority?

Yes. Article 30 of the Act provides that, unless otherwise agreed by the parties, any decision of the arbitral tribunal shall be made by a majority of all of its members. Matters of procedure may be decided alone by the presiding arbitrator, if so agreed by the parties or authorised by all members of the tribunal.

35 Limitations to awards and relief

Are there any particular types of remedies or relief that an arbitral tribunal may not grant?

The Act contains no restrictions upon an arbitral tribunal in terms of the types of remedies or relief that may be granted. However, if the tribunal grants remedies or relief that cannot be recognised or enforced under Korean law, recognition and enforcement of the arbitral award may be denied on the ground of violation of public policy. For example, an award may be denied recognition or enforcement by a Korean court if it is deemed to be ordering punitive damages, especially if the amount of damages awarded markedly exceeds the amount that would be available under Korean law. Further, article 29 of the Act provides that the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

In addition to the above, in one case, the High Court found that, even though an award was enforceable, the operative part of the decision made by the arbitral tribunal was not capable of being executed by the execution officer due to lack of specificity. In light of this finding, it is advisable to consult with a Korean law firm when drafting a request for relief that is not monetary in nature (eg, an order of specific performance).

36 Dissenting arbitrators

Are dissenting opinions permitted under the law of your jurisdiction? If so, are they common in practice?

There is no provision of the Act specifically permitting or prohibiting the issuance of dissenting opinions. In practice, there have been cases where dissenting opinions were issued, but it is not a common practice.

37 Formalities

What, if any, are the legal and formal requirements for a valid and enforceable award?

Article 32 of the Act provides that the award shall be made in writing and signed by all arbitrators. Where a minority of the tribunal has any reason not to sign the award, the award shall be effective with the signature of a majority of the arbitrators, with the reason for the failure or refusal to sign stated in the award. The award shall state the reasons upon which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms of a settlement between the parties under article 31. The award shall also state its date and place of arbitration. The tribunal shall deliver authenticated copies to each party, and, at the request of a party, the tribunal may send and deposit the original award with the competent court, along with a document verifying such delivery.

38 Time frames

What time limits, if any, should parties be aware of in respect of an award? In particular, do any time limits govern the interpretation and correction of an award?

Pursuant to article 34 of the Act, a party may request the arbitral tribunal to make a correction, interpretation or additional award within 30 days of receipt of the award, unless the parties have agreed otherwise. The tribunal shall decide on correction or interpretation within 30 days

of receipt of request, and on additional awards within 60 days of receipt of request, but may extend these periods if necessary.

Pursuant to article 36(3) of the Act, an application for the setting aside of an award may not be made after three months have elapsed from the date on which the party making the application received the duly authenticated copy of the award or the duly authenticated copy of a correction or interpretation or an additional award under article 34.

Costs and interest

39 Costs

Are parties able to recover fees paid and costs incurred? Does the “loser pays” rule generally apply in your jurisdiction?

Under the newly added article 34-2 of the Act, unless the parties have agreed otherwise, an arbitral tribunal has the explicit authority to apportion arbitration costs between the parties, having regard to all of the circumstances of the case. The “loser pays” rule generally applies, although the arbitral tribunal may decide otherwise in light of the nature of the claims and the manner in which the arbitration proceeded.

40 Interest on the award

Can interest be included on the principal claim and costs? Is there any mandatory or customary rate?

For arbitrations seated in Korea, it is customary for the claimant to seek payment or reimbursement of interest on the principal claims and related costs from the respondent, and the arbitral tribunal must decide on such claims. Under the newly added article 34-3 of the Act, arbitral tribunals have the explicit authority to award interest with regard to the circumstances of the case, unless the parties have agreed otherwise. If Korean law is the governing law, the statutory interest rates of 5 per cent under the Korean Civil Code for non-commercial claims or 6 per cent under the Korean Commercial Code for commercial claims will apply.

Parties should also consider whether to seek the much higher rate of interest of 15 per cent per annum as post-judgment interest until full payment of an award. This higher interest rate applies in domestic court litigation under the Special Act on Expedition of Litigation. In the past, the Supreme Court of Korea has enforced an award that applied such an interest rate, reasoning that application of that rate does not, in itself, constitute a breach of public policy.

Challenging awards

41 Grounds for appeal

Are there any grounds on which an award may be appealed before the courts of your jurisdiction?

Pursuant to article 36 of the Act, which is modelled on article 36 of the Model Law, recourse against an arbitral award may be made only by an application for setting aside the award to a court. Article 36 of the Act provides that an award can be set aside if: (i) a party to the arbitration agreement was under some incapacity or there was no valid arbitration agreement; (ii) there was no appropriately served notice of the selection of arbitrators or of the arbitration proceedings or, for any other reason, a party was not able to present its case; (iii) the award dealt with a matter that was not covered by the arbitration agreement; (iv) the composition of the arbitral tribunal or the conduct of the arbitration proceedings was inconsistent with the parties' agreement, which was not in conflict with a mandatory provision of the Act, or was not in accordance with the Act; (v) the subject matter of the award was a non-arbitrable matter under Korean law; or (vi) the award, if recognised or enforced in Korea, will contravene the public policy or social order of Korea.

42 Other grounds for challenge

Are there any other bases on which an award may be challenged, and if so what?

No. Article 36(1) of the Act provides that recourse against an arbitral award may be made only by an application for setting aside the award on the grounds described above.

43 Modifying an award

Is it open to the parties to exclude by agreement any right of appeal or other recourse that the law of your jurisdiction may provide?

There seems to be no law or precedent expressly allowing or prohibiting agreements to exclude a right of appeal or other legal recourse, and there is considerable debate as to whether such agreements are permitted. The general consensus is that such an agreement would be null and void, considering that the right of appeal and right to apply for a retrial cannot be waived in advance in ordinary court proceedings. However, a waiver of such rights after an award has been issued is likely to be honoured by the courts.

Enforcement in your jurisdiction

44 Enforcement of set-aside awards

Will an award that has been set aside by the courts in the seat of arbitration be enforced in your jurisdiction?

Pursuant to article 39 of the Act, the recognition or enforcement of foreign arbitral awards in Korea is determined in accordance with the NY Convention. Article V(1)(e) of the NY Convention states that the recognition and enforcement of an arbitral award may be refused, at the request of the party against whom it was invoked, if that party furnishes proof that the award has been set aside or suspended by a competent authority of the country in which, or under the law in which, that award was made. Therefore, it is unlikely that a Korean court would recognise or enforce a foreign arbitration award that has been set aside by a competent court in the seat of arbitration as long as the state that is the seat of arbitration is a party to the NY Convention, but it may depend on the reason for set aside.

Pursuant to article 39(2) of the Act, if the seat of arbitration is not a signatory of the NY Convention, the Korean court will apply the criteria set out in the applicable Korean law (ie, the Korean Civil Procedure Act and the Civil Execution Act) for setting aside foreign arbitral awards, notwithstanding the judgment of the foreign court that set aside such award.

45 Trends

What trends, if any, are suggested by recent enforcement decisions? What is the prevailing approach of the courts in this regard?

The Korean courts are reluctant to refuse recognition or enforcement of foreign arbitral awards unless there is a clear basis for such refusal. Challenges based on public policy have been numerous but almost wholly unsuccessful. The Supreme Court has held that in determining whether enforcement of the award would violate public policy, it would only review the effect of the enforcement of the award and would not seek to question whether the award had been correctly determined in fact or law. The court also stated that, in assessing the public policy challenge, it must take into account not only domestic perception of public policy but also the stability of international commercial transactions. This continues a trend of previous court precedents that are very supportive of international arbitral awards. The other main types of enforcement challenge have also been rejected by the Korean courts with few exceptions.

46 State immunity

To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

As state immunity is not a ground for resisting enforcement of arbitral awards under the NY Convention or under Korean law, it would be difficult to successfully raise such a defence to prevent the enforcement of a foreign arbitral award in Korea.

Further considerations

47 Confidentiality

To what extent are arbitral proceedings in your jurisdiction confidential?

The Act does not contain any provision relating to the confidentiality of arbitral proceedings. Thus, absent agreement of the parties or applicable arbitral rules, confidentiality of arbitral proceedings in Korea is not legally presumed. Nonetheless, in practice, arbitral proceedings in Korea have been treated in strict confidence. For KCAB arbitrations, article 57(1) of the KCAB Rules also stipulates that arbitration proceedings and the records thereof shall be closed to the public.

48 Evidence and pleadings

What is the position relating to evidence produced and pleadings filed in the arbitration? Are these confidential? Is there any way that they might be relied on in other proceedings (whether arbitral or court proceedings)?

The Act is silent on the issue of confidentiality. Thus, in practice, parties usually address this issue to the extent they can through their confidentiality agreement or the tribunal addresses the issue through an order.

49 Ethical codes

What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your jurisdiction?

Counsel in arbitrations in Korea may be members of the Korean Bar or qualified as attorneys in their home jurisdiction. There are no established professional standards or qualifications that apply to arbitrators in Korea.

As noted above, arbitrators conducting proceedings in Korea must disclose in advance if there are any circumstances that are likely to give rise to justifiable doubt as to his or her impartiality or independence, and are subject to challenge if any such circumstances exist.

50 Procedural expectations

Are there any particular procedural expectations or assumptions of which counsel or arbitrators participating in an international arbitration with its seat in your jurisdiction should be aware?

Korean court proceedings and domestic arbitrations tend to be scheduled with staggered short hearings spaced out over several weeks or months. This domestic litigation or arbitration practice may be inconsistent with international arbitration practice. Furthermore, rules on taking evidence generally accepted in Korean court litigation or arbitration are not necessarily identical to those prevailing in international arbitrations conducted outside of Korea. Therefore, if foreign counsel or arbitrators are participating in international arbitrations seated in Korea, it would be wise to discuss and agree on hearing dates and other procedural rules at the outset of the arbitration, especially where there is a Korean arbitrator on the tribunal.

51 Third-party funding

Is third-party funding permitted in your jurisdiction?

There is currently no legislative prohibition on litigation funding in Korea and, generally speaking, there are no specific restrictions on third-party funding of claims. However, there is no definitive legislative framework that specifically allows for third-party funding either. There have been no notable precedents dealing with the issue of third-party funding. Although interest in third-party funding is high in Korea, especially after the recent liberalisation efforts in Singapore and Hong Kong, Korean courts are expected to take a conservative approach to this issue, barring any legislative change. Notably, article 6 of the Trust Act prohibits the entrustment of lawsuits, so any third-party funding that is deemed to be an entrustment of a lawsuit will be deemed null and void. Contingency fees and success fees, however, have been commonly used in practice by lawyers in Korea, although the Supreme Court has recently prohibited the use of such fees in criminal cases.



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Doo-Sik Kim is a senior partner at Shin & Kim and chair of the firm's International Dispute Resolution Practice Group. A former managing partner of the 300-plus attorney firm, Mr Kim has more than 30 years of experience and has extensive experience representing clients in complex, high-value disputes related to cross-border investments, post-M&A issues, shipbuilding, construction and engineering, infrastructure, energy and projects, and military and defence procurement.

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