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South Korea





South Korea

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A. Legislation and rules

A.1 Legislation

In 1999, comprehensive amendments were made to the Korean Arbitration Act (the “Arbitration Act”) based on UNCITRAL Model Law 1985. On 30 November 2016, long-awaited amendments to the Arbitration Act entered into force. The new Arbitration Act adopts the UNCITRAL Model Law 2006 more closely, which seeks to modernize various aspects of the law and make Korea a more attractive venue for international arbitration. Some of the key features of the amendments include: (i) adoption of Option I of Article 7 of the 2006 Model Law, alleviating the “writing” requirement for arbitration agreements; (ii) adoption of the 2006 Model Law regime on interim measures allowing enforcement of interim measures issued in arbitration seated in Korea; and (iii) simplification of the recognition and enforcement of arbitral awards.

A.2 Institutions, rules and infrastructure

The Korean Commercial Arbitration Board (KCAB) is the only authorized institution in Korea statutorily empowered to settle any kind of commercial disputes under the Arbitration Act. A standard set of KCAB Arbitration Rules came into effect on 15 January 2005, with the focus on domestic arbitration. In January 2007, the KCAB introduced its first set of “International Arbitration Rules” to better address the demands of parties to arbitration of an international character, which were subsequently revised in September 2011. On 1

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June 2016, the KCAB further revised its international rules to bring KCAB’s International Arbitration Rules in line with international standards and increase the efficiency and fairness of its international arbitration proceedings.⁴ Further, the KCAB introduced a Code of Ethics for Arbitrators and has established Arbitrator Management Committees, comprising 18 external personnel. The Code of Ethics, which came into force on 1 June 2016, was prepared with reference to the International Bar Association Guidelines on Party Representation in International Arbitration and international standards regarding arbitrator ethics.

In 2013, the Seoul International Dispute Resolution Centre (“Seoul IDRC”), which has adopted a similar model to Singapore’s Maxwell Chambers, was established. The Seoul IDRC offers multipurpose hearing rooms with the state-of-the-art facilities and the support of experienced staff. More than 75 hearings have been successfully held at Seoul IDRC since its establishment.

B. Cases

As the global presence of Korean companies has led to more international transactions and projects, and hence more disputes, there was a remarkable spike in the use of international arbitration by Korean parties. Accordingly, in the last 10 years, the Korean courts have seen a significant growth in cases seeking enforcement of foreign arbitral awards, as well as general civil cases where the existence of an arbitration clause has been disputed. The Korean courts have maintained their arbitration-friendly tendency. Among the court decisions made in the past 10 years (2007 to 2016), the following are notable.

⁴ The main features of the amendments include: (1) the introduction of a procedure whereby the Secretariat of the KCAB confirms the appointment of an arbitrator; (2) the simplification of the joinder and consolidation claims to enable multiparty arbitrations to take place more easily; and (3) provision of an emergency arbitrator system to facilitate interim relief prior to the constitution of the arbitral tribunal.



B.1 Enforcement and execution of arbitral awards

In January 2013, in a widely reported decision, the Seoul Southern District Court refused to enforce an UNCITRAL award rendered in Seoul because the relevant specific performance relief was not clear or specific enough to be converted into a Korean judgment and carried out under Korean laws.⁵

This case involved a dispute between a UK-based software provider and a Korean broadcaster. The UK-based software provider sought declaratory relief, asserting that the agreement between the parties had been terminated. The Korean broadcaster argued that the agreement remained in force and claimed damages from deprivation of its right to use the software. The arbitral tribunal determined that the agreement had been terminated and ordered the Korean broadcaster to perform its termination obligation under the agreement, giving no further details on how this obligation was to be met.

In January 2014, the Seoul High Court overturned the lower court's decision, stating that, even if the arbitral award lacked requisite specificity for execution, the prevailing party still had an interest in seeking enforcement of the arbitral award, as the enforcement judgment would encourage parties to voluntarily comply with the arbitral award without the execution of the arbitral award. The Seoul High Court further stated that a conclusive enforcement judgment would also preclude the parties from seeking to set aside the arbitral award under the Arbitration Act.⁶ This case signified the court's willingness to recognize the validity of an arbitral award even if the arbitral award cannot be practically executed.

⁵ Seoul High Court Decision No. 2013Na13506 dated 17 January 2014.

⁶ Under Article 36(4) of the Arbitration Act, an enforcement judgment limits applications to set aside the award and precludes any challenges against it.

B.2 The Korean court's strict interpretation of grounds for refusal of foreign awards

In 2013, the Korean court refused to enforce an arbitral award involving a dispute between a Korean company and a joint investment company. Enforcement of an arbitral award rendered in favor of the joint investment company was refused by the Seoul Central District Court on the ground that it was contrary to public policy, because it violated certain mandatory provisions of the Asset-Backed Securitization Act of Korea.⁷ On appeal, the Seoul High Court adopted a different reason for refusing to enforce the arbitral award. The Seoul High Court cited the lack of a valid arbitration agreement between the parties as the basis for its decision.⁸

The case was brought before the Supreme Court, which remanded the case to the Seoul High Court, concluding that the Seoul High Court had erred in holding that a valid arbitration agreement did not exist.⁹ Subsequently, the Seoul High Court followed the Supreme Court's position and held that there was a valid arbitration agreement, and went further to hold that a breach of a domestic mandatory provision would not necessarily be found a violation of public policy under Article V(2)(b) of the New York Convention unless the provision is recognized as international public policy.¹⁰

Considering that the Korean courts had rarely refused enforcement of foreign arbitral awards before, this case attracted the attention of the international arbitration community, especially since enforcement was refused twice on different grounds. The case has yet to be concluded, the existence of an arbitration agreement and violation of the public policy having been intensively disputed at the court for more than six years. Many arbitration practitioners commented that Korea was stepping backward from its pro-arbitration tendency. However, the

⁷ Seoul Central District Court Decision No. 2011Gahap82815 dated 27 September 2012.

⁸ Seoul High Court Decision No 2012Na88930 dated 16 August 2013.

⁹ Supreme Court Decision No. 2013Da74868 dated 29 October 2015.

¹⁰ Seoul High Court Decision No. 2015Na29277 dated 25 October 2016.



latest court decision has affirmed that the Korean court has not departed from its pro-arbitration position. This case is currently on appeal before the Supreme Court.

B.3 Narrow interpretation of public policy exception

The Supreme Court overturned the lower court's decision, which refused to enforce an ICC award on the ground that the arbitral award was procured through fraud and is thus against public policy under Article V(2)(b) of the New York Convention.¹¹

This case involved a dispute arising from a woodchip supply agreement between a US supplier and the Korean buyer executed in both Korean and English. The US supplier sought damages against the Korean buyer for breach of a minimum purchase requirement. The agreement drafted in Korean included a provision severely restricting the US supplier's ability to bring an action for damages. The English version of this agreement, signed 50 days after the execution of the Korean original, did not include the restrictive provision. In the arbitration, the US supplier claimed that the English version of the agreement was an amended version of the Korean agreement. The Korean buyer, on the other hand, claimed that the English version of the agreement was a sham agreement that the parties had prepared solely for the purpose of securing bank loans. The arbitral tribunal found that the English version of the agreement was valid and enforceable, and rendered an arbitral award favorable to the US supplier. Subsequently, the US supplier sought enforcement of the arbitral award in Korea. In the meantime, there was a conviction for forgery in criminal proceedings against the CEO of the US supplier, effectively recognizing the validity of the Korean agreement. The Korean buyer argued that the arbitral award was obtained by forgery and that the court should refuse enforcement.

In 2006, the Busan High Court reviewed the arbitral award *de novo*, including the arbitral tribunal's finding of fact. It held that if a

¹¹ Supreme Court Decision No. 2006Da20290 dated 28 May 2009.

claimant submitted false arguments and tampered with evidence to obtain a favorable arbitral award, such conduct falls within the scope of fraud under Korean Criminal Code and enforcement of such fraudulent award is against public policy under Article V(2)(b) of the New York Convention.¹²

In 2009, however, the Supreme Court overturned the Busan High Court's decision and held that the arbitral award was not in violation of public policy. Furthermore, the Supreme Court held that the Busan High Court improperly reviewed the arbitration tribunal's decision *de novo* and erred in denying enforcement. The Supreme Court explained that while courts may independently review the merits of arbitral awards in deciding whether to deny their enforcement under Article V of the New York Convention, this review must be limited in scope. The Supreme Court concluded that a court may not refuse to enforce an arbitral award that was allegedly procured by fraud and in violation of public policy unless the losing party can: (i) establish fraud with clear and convincing evidence; (ii) establish that the fraudulent conduct was not discoverable upon the exercise of due diligence before or during the arbitration, and that it was consequently unable to defend itself against that fraudulent conduct; and (iii) demonstrate that the fraudulent conduct was related to a material issue in the arbitration.

This case shows that the Korean courts maintain that the court interference making *de novo* review of the substance of the arbitral award will only be allowed in limited and exceptional circumstances. Their tendency to interpret narrowly the refusal grounds under the New York Convention is in line with their pro-arbitration stance.

C. Trends and observations

Although Korea was barely visible in the international arbitration community 10 years ago, it has emerged as one of the major players. In recent years, the use of alternative dispute resolution procedures

¹² Busan High Court Decision No. 2003Na12311 dated 16 February 2006.



and their sophistication has grown in Korea with the increase of both inbound and outbound cross-border transactions involving Korean parties.

C.1 Court's attitude to arbitration

While arbitral awards are generally enforced in Korea, two lower court decisions that refused to allow enforcement of international arbitral awards in 2013 have been the subject of considerable controversy.¹³ However, the decisions in the two cases were reversed in the upper courts, reinforcing Korea's position as an arbitration-friendly jurisdiction.

C.2 Government's support for arbitration

As evidenced by the recent opening of the Seoul IDRC, Korea aspires to become a regional hub for international arbitration, including disputes that do not involve Korea. In August 2015, the Ministry of Justice proposed the enactment of the Arbitration Industry Promotion Act, to promote the use of arbitration in resolving domestic and international disputes and to attract more international arbitration cases to Korea.¹⁴

C.3 KCAB's overseas expansion

The number of cases handled by KCAB is steadily increasing, totaling 413 cases in 2015. The year 2016 marked the 50th anniversary of the KCAB. The board held seminars in various locations such as the United States, Europe and the Middle East to promote KCAB's new International Arbitration Rules 2016, the Code of Ethics and KCAB itself. KCAB opened its first overseas branch in Los Angeles in September 2016. Within Korea, the KCAB plans to play a major role in supporting the Seoul ADR Festival, in which multiple events are

¹³ See B.1 and B.2 above.

¹⁴ Under the Arbitration Industry Promotion Act, the Minister of Justice is required to establish and execute basic plans for the promotion of arbitration industry every 5 years. The Act also ensures the independence and autonomy of arbitral institutions and cultivation of arbitration experts.

hosted by ADR-related organizations to highlight Seoul's strengths as an international arbitration hub.

C.4 Future developments

Korea is on the road to becoming known as one of the most active international arbitration communities in Asia, which bodes well for the future development of Korea as a hub for international arbitration. With support from the Korean courts and government, as well as the education of the international community, it may not be long before Seoul emerges as a strong contender.