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A. Legislation and rules

A.1 Legislation

In recent years, Korea has taken great strides to develop and promote international arbitration. Most significantly, in 2016, the Korean legislature enacted long-awaited amendments to the Korean Arbitration Act (the “Arbitration Act”), which adopted many of the 2006 amendments to the UNCITRAL Model Law, along with other changes. In 2017, Korea began to see the benefits of these amendments, and the revised Arbitration Act has been well-received in the arbitration community.

Following on the heels of the revised Arbitration Act, a new law came into force that is dedicated to improving and promoting arbitration in Korea — the Arbitration Industry Promotion Act (the “Promotion Act”).⁴ This law is significant because it reflects the Korean government’s recognition that arbitration is an important industry, and it signals the legislature’s commitment to investing in arbitration. This commitment is apparent in the text of the Act itself, which states its purpose as encouraging the use of arbitration, and attracting more international arbitration to Korea.⁵ It is no secret that Korea has set its sights on becoming a hub for international arbitration in the Asia Pacific region. Although Singapore and Hong Kong are considered the arbitration powerhouses in Asia, there is not yet any well-established

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⁴ The Korean legislature enacted the Promotion Act on 27 December 2016, and it came into force on 28 June 2017.

⁵ Article 1 of the Promotion Act.

hub in north-east Asia, where case numbers are rising, and where the legal systems are rooted in the civil law tradition. Korea hopes to fill that niche.

To that end, the Korean legislature intends to increase the level of promotion and government support for the arbitration industry. Although the Korean government has already invested in the arbitration industry, the Promotion Act mandates the Ministry of Justice to take an even more prominent and proactive role. The Ministry's primary directive under the new Act is to develop and implement a "master plan" every five years to support the arbitration industry. This plan will include wide-ranging projects aiming to attract more international arbitration to Korea, to enhance the education and development of arbitration practitioners, to invest in arbitration infrastructure, and to improve marketing efforts and public relations.⁶ In one of its first projects under the new act, the Ministry of Justice announced plans to construct a large state-of-the-art arbitration complex in Seoul. The center, which will be modeled after Maxwell Chambers in Singapore, will house several hearing rooms of different sizes, and provide office space for arbitrators, arbitral institutions, law firms, transcription companies, and other professionals. This highly anticipated center is expected to improve the administration of arbitrations in Seoul for international parties by providing access to high-quality facilities and services.

A.2 Institutions, rules and infrastructure

Consistent with Korea's goal of becoming an arbitration hub, the Korean Commercial Arbitration Board (KCAB) has also initiated efforts to expand its international reach. Three months after the launch of its first office abroad in September 2016 in Los Angeles, the KCAB opened a second international office in Shanghai. The KCAB is also taking steps to establish a separate unit to administer its international arbitrations, similar to the model set by the AAA and the ICDR. By separating its international and domestic divisions, the KCAB's newly

⁶ Article 3 of the Promotion Act.



established unit will cater to the needs and expectations of international parties, while retaining an approach that is more familiar to Korean parties for domestic matters.

B. Cases

One of the most important 2016 amendments to the Arbitration Act aimed to simplify the process for recognition and enforcement of foreign awards in Korea. The amendment authorizes the courts to recognize and enforce awards by issuing an enforcement decision rather than a judgment. As a matter of Korean civil procedure, judgments require a hearing. The hearing requirement means that it takes the courts longer to render a judgment than an enforcement decision in most cases. Since the Arbitration Act went into force, Korean courts have considered 10 cases seeking enforcement of foreign awards, most of which the courts found enforceable under the New York Convention. On average, it took 6-8 months for the court of first instance to issue an enforcement decision, which is significantly shorter than the average time required to obtain an enforcement judgment. The time reduction indicates that some parties have already benefited from the revised Arbitration Act, and the revised Arbitration Act has contributed to the facilitation of recognition and enforcement of foreign arbitral awards in Korea.

Korean courts also adjudicated a number of cases seeking annulment of arbitral awards in 2017. However, they granted annulment in only very few cases; two noteworthy decisions are described below. We also discuss a case in which the Korean court took part in selecting the presiding arbitrator in an ad hoc arbitration seated in Korea.

B.1 Annulment based on a defect in the constitution of the arbitral tribunal⁷

One annulment decision involved the application of the wrong set of institutional arbitral rules that resulted in a defect in the constitution of

⁷ Seoul Central District Court Judgment No. 2016Gahp564421 dated 13 December 2016; Seoul High Court Judgment No. 2017Na2002449 dated 9 June 2017.

the arbitral tribunal. The underlying dispute arose out of a guarantee agreement between a dual citizen of Korea and Russia and a Korean trustee company for the Korean-Russian citizen to provide a guarantee for a debt obligation owed by a Russian company. The agreement contained an arbitration clause referring all disputes to KCAB arbitration, and the Korean trustee company commenced arbitration against the guarantor seeking payment of the guarantee. When the KCAB served the Korean-Russian citizen (the guarantor) with the request for arbitration, it also requested that he indicate his preference for the selection of the presiding arbitrator by numbering in order of preference a list of candidates provided by the KCAB, in accordance with the KCAB's domestic arbitration rules. The respondent returned the completed list to the KCAB, and the KCAB subsequently appointed the presiding arbitrator and notified the parties.

After the constitution of the tribunal, the guarantor raised a jurisdictional objection in its answer claiming that the tribunal should have been constituted under the KCAB's international arbitration rules. Unlike the domestic rules, the international arbitration rules do not call for the KCAB to provide a roster of candidates when it selects the presiding arbitrator. In the final award, the tribunal agreed that the international rules should have been applied, and acknowledged that there was an irregularity in the constitution of the tribunal. However, the tribunal concluded that the respondent had waived his objection by failing to object immediately.

After receiving the award, the respondent initiated an annulment action at the Seoul Central District Court based on the defect in the constitution of the arbitral tribunal. The court agreed that the international rules should have been applied because the respondent's habitual residence was in Russia, not Korea. Although the respondent had used a Korean address in the notice clause of the agreement, he resided in Russia for business for more than 200 days a year, and the address listed in the recitals of the agreement was in Russia. As for the waiver issue, the court concluded that the objection to the constitution of the tribunal was a procedural objection rather than a jurisdictional



objection and therefore should have been raised immediately under Article 5 of the Arbitration Act. However, the court found that the respondent's objection was not late because he was unaware of the defect prior to submitting the answer. The court therefore granted the respondent's request to annul the award.

On appeal, the Seoul High Court upheld the annulment, but its reasoning differed from the lower court's decision with respect to the waiver issue. The Seoul High Court concluded that an objection to the formation of the tribunal does fall within the scope of a jurisdictional rather than procedural challenge and, therefore, an objection is timely so long as it is raised prior to or within the respondent's answer. This case is currently on appeal before the Supreme Court of Korea.

B.2 Annulment based on an arbitration clause in a standard form contract⁸

In another noteworthy case, a Korean court annulled a KCAB arbitral award on the ground that the arbitration clause was voidable under Korea's Act on the Regulation of Terms and Conditions ("ARTC"), which regulates the use of standardized terms in commercial and consumer contracts.

The underlying dispute arose out of an agency agreement between a medical product seller and its agent when the seller terminated the agreement. The agent claimed that the termination was not valid and the seller, in response, commenced a KCAB arbitration claiming for overdue payments based on the termination. During the arbitration, the agent asserted a jurisdictional challenge on the ground that the arbitration clause was null and void under Article 3 of the ARTC. Article 3 requires a business that uses a standard-form contract to provide its customer with an opportunity to understand the important terms by explaining those terms. The tribunal rejected this argument on the ground that the contract at issue was not a contract of

⁸ Seoul Central District Court Judgment No.2016Gahap528323 dated 17 March 2017; Seoul High Court Judgment No. 2017Na2022139 dated 20 October 2017.

standardized terms and conditions and, therefore, the ARTC did not apply.

After receiving the final award, the respondent successfully obtained an annulment from the Seoul Central District Court. The court disagreed with the tribunal's conclusion that the agreement was not a standardized contract because the agreement had been pre-drafted for the purpose of entering into agreements with multiple unspecified customers, and there was no evidence showing that any terms and conditions had been negotiated, aside from the special terms. The court then found that the arbitration clause was null and void under Article 3 of the ARTC because the seller failed to explain the arbitration clause to the agent. The court focused on the following factors in reaching its conclusion: the arbitration clause was a material clause in the agreement; the agreement was a lengthy contract and even though the parties had renewed the agreement every year, it did not mean that the agent fully understood the implications of the arbitration clause; and the ARTC also applied to cases where the customer was a company rather than an individual. The Seoul High Court upheld the lower court's decision. The case is currently on appeal before the Supreme Court.

B.3 Court involvement in the arbitrator selection process⁹

Article 12 of the previous version of the Arbitration Act provided that when parties fail to appoint a sole arbitrator or a presiding arbitrator, the court shall appoint the arbitrator if requested by one party. In 2017, a Korean court was requested under Article 12 to appoint a presiding arbitrator after two party-appointed arbitrators had failed to reach an agreement. The previous version of the Arbitration Act applied in this case because the arbitration had been initiated before the effective date of the amended act.

The case was an ad hoc arbitration seated in Korea between a Korean company and a Canadian company, and the parties disputed whether

⁹ Seoul Central District Court Decision No. 2016Bihap30170 dated 19 July 2017.



the presiding arbitrator had to be a person of a neutral nationality in order to assure the arbitrator's impartiality and independence. The court rejected the neutral nationality argument and explained that under the Arbitration Act, it was not necessary to appoint a chair of neutral nationality. Instead, various factors should be considered as a whole, including nationality, residence, language, legal background and practice area. Applying that standard to the case at issue, the court considered several of those factors, including that although the governing law was Korean law, English legal practice could have been relevant to some issues, and the fact that one party had requested an arbitrator with a civil law background, while the other party requested a person of neutral nationality who understood English law principles. Ultimately, the court selected a Japanese arbitrator who had studied in the United States.

This case is notable because the court requested a list of recommendations from the KCAB, and appointed the arbitrator from that list. By doing so, the court sought assistance from the KCAB through a procedure that was not provided for in the Arbitration Act. In other words, the Korean court was willing to rely on assistance from arbitral institutions even without an explicit basis for such a practice in law. In doing so, it is possible that the court was guided by amended Article 12, even though the revised Arbitration Act did not apply in this case. Although the previous version of Article 12 permitted only courts to appoint arbitrators, the amended version of Article 12 is broader and also gives arbitration institutions that are designated by a court the authority to make appointments. In light of the court's approach in this case, we anticipate that under the revised Arbitration Act, the KCAB will play a bigger role in the constitution of tribunals in ad hoc arbitrations seated in Korea.

C. Funding in international arbitration

In recent years, third-party funding has emerged as a prominent issue for discussion in the Korean arbitration community. Several commentators have opined that the time is ripe to develop the market

in order to keep up with regional developments.¹⁰ The Korean arbitration community has been engaging in robust discussions in seminars and publications to consider how third-party funding might operate in the current legal landscape.¹¹ However, third-party funding is still in its infancy in Korea, and no definitive answers have yet emerged.

It remains to be seen whether third-party funding is permissible under current law. We are unaware of any litigation or arbitration that has proceeded with third-party funding, and no Korean court cases have addressed the issue. Korean statutory law does not provide significant guidance. No statute, including the Arbitration Act, expressly addresses third-party funding in either arbitration or litigation. Unlike Hong Kong and Singapore, Korea lacks the common law doctrines of champerty and maintenance that traditionally prohibited third-party funding.

Despite Korean statutory law lacking any outright prohibition of third-party funding, Korean courts could construe a few provisions as prohibiting or limiting certain forms of third-party funding arrangements. For example, Article 6 of the Korean Trust Act, which is the closest equivalent to the doctrines of champerty and maintenance under Korean law, is intended to prevent the involvement of uninterested third parties in legal actions. Under Article 6, a trust arrangement is forbidden when the main purpose of the trust is to enable the trustee to proceed with legal actions in the place of the trustor (settlor). However, this article only applies in cases of a trust arrangement or a claim assignment and probably only in cases where the trustee or assignee actively pursues the underlying claims in the place of the original party. As a result, Korean courts are unlikely to construe Article 6 as a barrier to third-party funding so long as the original party retains the claim and pursues the case in its own name.

¹⁰ For example, the two major arbitration hubs in Asia, Hong Kong and Singapore, recently introduced legislation allowing third party-funding in arbitration.

¹¹ For example, in late 2016, the KCAB hosted a conference on third-party funding in international arbitration in Seoul.



Article 34(5) of the Korean Attorney-at-Law Act provides another potential limitation. This statute states that “*no fees or other profits earned through services that may be provided only by attorneys-at-law shall be shared with any person who is not an attorney-at-law.*” The concern is that if a client successfully recovers in a case as a result of its lawyer’s services, the recovery might be considered “*fees or other profits*” that the lawyer may not share with any third party. However, this prohibition is limited to lawyers and does not preclude a client from sharing a portion of its own recovery with a third party.

In addition, Korean courts could potentially interpret the Interest Limitation Act as limiting the returns available to a funder. That statute limits interest rates for loan agreements to a certain percentage.¹² In light of the broad definition of “interest” under the Act, which includes all monetary amounts a creditor receives in connection with a loan,¹³ it is possible that the expected return of a funder could fall within the limitation prescribed by this statute. On the other hand, if a funder’s investment is considered more akin to an equity investment in which the funder shares a proportion of the party’s damages, the third-party funding arrangement is unlikely to fall within the scope of the Interest Limitation Act.

Despite these potential concerns, many practitioners expect that Korean courts and the Korean legislature will support third-party funding. Although third-party funding is still a novel concept in the Korean legal community, the Korean market is accustomed to contingency fee and success fee arrangements. Both types of fee arrangements are permitted in Korea, and success fee arrangements in particular are commonly used by Korean law firms in litigation and arbitration. However, until the legislature clarifies whether third-party funding is permissible, parties considering a third-party funding arrangement should proceed with caution in light of the lack of legislative or judicial guidance.

¹² The interest limit at the time of publication was 25% per annum. Article 2(1) of the Interest Limitation Act.

¹³ Article 4(1) of the Interest Limitation Act.