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The Use of Virtual
Hearings in Korea-Seated
Arbitration Proceedings:
Are There Risks to
Enforcement?

COVID-19
- A Force Majeure or
Something Else?



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The Use of Virtual Hearings in Korea-Seated Arbitration Proceedings: Are There Risks to Enforcement?

By Jae Min Jeon, Arie Eernisse and Hyojung (Kelly) Shin

In 2020, the COVID-19 pandemic spawned a surplus of articles and resources about the use of videoconferencing in international arbitration and related enforcement issues. Nonetheless, little has been said about Korean courts' views of videoconferencing and how Korean courts will treat international arbitral awards rendered in Korea involving the use of videoconferencing for hearings.

This article will first explain how practitioners, arbitrators, and institutions alike have adjusted rapidly over the past year to the need for virtual (rather than in-person) proceedings in international arbitration, leading to wide-scale adoption of virtual hearings. This will be contrasted with the Korean courts' limited experience with virtual hearings and lack of precedent on the issue (at present). In light of this situation with respect to Korean courts and Korean law, the authors will explore whether international arbitral awards rendered in Korea that have involved the use of virtual hearings are at risk of set aside.

1. Adaptation to New Reality; Institutional Rule Changes and Guidance

Since early 2020, parties across the globe have faced the predicament of “going virtual” or inviting inordinate delay to proceedings. Consequently, parties, counsel, tribunals, and institutions had

adapted flexibly to the situation and have devised new and improved methods of virtual hearings for accomplishing what before was considered rather novel.

Within months of the onset of the pandemic, a spate of practical guides on the various aspects of videoconferencing in international arbitration surfaced. These included helpful resources, such as the *Seoul Protocol on Video Conferencing in International Arbitration*,¹⁾ the Chartered Institute of Arbitrators' *Guidance Note on Remote Dispute Resolution Proceedings*²⁾ and the ICC *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*³⁾ (to name just a few).

By the end of 2020 and early 2021, the major arbitral institutions had adopted new rules to facilitate the use of videoconferencing in international arbitration. The LCIA Arbitration Rules were updated as of 1 October 2020 to include “refinement and expansion of the provisions accommodating the use of virtual

1) Available at: http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024

2) Available at: <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>

3) Available at: <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>

hearings, also supporting arbitrations taking place in the new normal” and “confirming the primacy of electronic communication with the LCIA and in the arbitration, as well as confirming the facilitation of electronically signed awards.”⁴⁾

In the newly amended ICC Arbitration Rules (2021), Article 26(1) has added a sentence providing that “[t]he arbitral tribunal may decide, *after consulting the parties*, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or *remotely by videoconference*, telephone or other appropriate means of communication” (emphasis added).⁵⁾ It can be expected that other major institutions due for a rules update, such as SIAC and KCAB, will undoubtedly consider adding a similar provision when the time comes.

2. Use of Videoconferencing in Judicial Proceedings in Korean Courts

The practice of Korean courts with regard to the use of videoconferencing and relevant Korean laws could influence whether Korean courts might set aside an international arbitration award rendered by a tribunal seated in Korea on the basis that it involved a virtual hearing.

Korea introduced the use of videoconferencing in judicial proceedings relatively early compared to other jurisdictions. The Act on Special Cases Concerning Video Trials (the “Act”), a piece of legislation allowing remote video trials for certain cases, was enacted 25 years ago, in 1996.

Although video-conferencing technology has improved substantially in the last two decades, the Act has been amended only once, in 2010, and no specific amendment has been made or proposed to the Act since then, not even after the onset of the COVID pandemic.

The Act does not provide for measures to secure parties’ due process rights in virtual trials. However, it instead merely provides that where a remote virtual trial is held with counsel attending in a court other than a court where the person concerned or the defendant attends, a device that enables that counsel to converse with the person concerned or defendant privately shall be prepared (Article 6 of the Act).

More importantly, the Act does not stipulate that videoconferencing can be used in all judicial proceedings. On the contrary, it limits the use of videoconferencing to certain cases among those over which *si/gun* courts (local courts that can be established by district courts to handle some of the cases of district courts and family courts) have jurisdiction. Such cases would include but are not limited to, those involving small claim amounts, those concerning reconciliation, cases involving a demand for payment of debts and mediation, and criminal cases concerning fines not exceeding KRW 200,000 (approximately USD 180). Thus, clearly, the Act significantly limits the use of videoconferencing.

Since the COVID pandemic began, discussion about encouraging the use of videoconferencing in court proceedings has increased, and, in June 2020, the Supreme Court of Korea amended its Regulation on Civil Procedure to explicitly allow the use of videoconferencing for any court proceedings up until pre-trial conferences, even

4) Updates to the LCIA Arbitration Rules and the LCIA Mediation Rules (2020), available at <https://www.lcia.org/lcia-rules-update-2020.aspx>

5) The newly amended ICC Arbitration Rules in force from 1 January 2021, available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>

for cases that are outside the scope of the Act. Notably, however, the use of videoconferencing has only been permitted for court proceedings up until the pre-trial conference and not for trials.

As such, although Korea condoned the use of videoconferencing long ago, the actual use of videoconferencing in Korean judicial proceedings has been very limited compared to that in other jurisdictions. For example, the Seoul Central District Court, the first instance court with the highest number of civil cases in the country, only had its first remote video trial in June 2020. It was a hearing related to an application for provisional relief, and it was conducted virtually upon agreement of the parties involved. Although this virtual hearing evidenced an openness to the use of videoconferencing in Korean legal proceedings and was a positive sign, the fact remains that this was the first of its kind at Korea's busiest district court, which only serves to highlight that the use of videoconferencing in Korean judicial proceedings as of 2020-21 has not yet become commonplace and that the jury is still out, so to speak, as to whether such technology will be embraced in the future.

Also, because parties to Korean judicial proceedings and the Korean courts are not familiar with the use of videoconferencing in the legal setting, there is little to no precedent on how due process issues relating to virtual hearings would be dealt with in an enforcement setting.

3. Assessing the Prospect of an Enforcement Challenge for a Virtual Hearing

Despite lacking substantial experience in the use of videoconferencing in their own judicial

proceedings, the Korean courts will not set aside an arbitral award merely because a hearing has been conducted virtually.

Korea has adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") and, under Korea's Arbitration Act, a court may refuse to enforce an arbitral award issued in another New York Convention country on any of the grounds for a refusal to enforce found in the New York Convention. Two of the potential primary grounds for setting aside an arbitral award for which a virtual hearing has taken place would be (i) a party's inability to present its case under Article V(1)(b) of the New York Convention, or (ii) a public policy concern under Article V(2)(b) of the New York Convention.

With regard to Article V(1)(b) of the New York Convention, a party may argue that it was not able to present its case, for example, because it was not able to make oral submissions in person or because it was not able to cross-examine the other party's witness in person. However, like many other jurisdictions, the Korean courts have set a high bar for challenges of arbitral awards. For instance, in relation to the interpretation of Article V(1)(b) of the New York Convention, the Supreme Court has held that to set aside an arbitral award, the degree of breach of a party's right to due process should be "significant."⁶⁾ The Korean court will consider various circumstances in deciding whether a party's right to due process has been significantly undermined, so whether an arbitral award can be set aside depends on the facts of a specific case. However, the mere fact that all or part of the evidentiary hearing was conducted virtually or that

6) Supreme Court Decision No. 89DaKa20252 dated 10 April 1990

minor procedural irregularities arose as a result of the virtual hearing format would not amount to a significant breach of a party's right to due process.

In a case where the plaintiff argued that its right to due process had been breached because its request for re-scheduling of cross-examination of its witness was not accepted and, thus, its witness was not able to testify at the hearing, the Korean court held that the plaintiff's due process right had not been breached. In making this decision, the court considered that (i) the plaintiff made its request for re-scheduling only four days before the originally scheduled date, (ii) at the time of making its request, the plaintiff failed to clarify at which point in the future the witness could be present for cross-examination, (iii) the arbitrator allowed that another hearing could be scheduled if the witness was able to be present within seven weeks, and (iv) all of the witness statements submitted by the witness were accepted as evidence.⁷⁾ As the mere fact that the witness was not examined does not amount to a breach of a party's due process right, in the same vein, the mere fact that the witness is examined via videoconferencing will not amount to such breach.

We believe that even if only one party's witness is examined virtually while the other party's witness is examined in person, it would not amount to a breach of the party's due process rights. However, there are many other factors in the virtual hearing that can potentially give rise to a due process concern – e.g., technological hindrances without party fault, the possibility of “coaching” a witness, etc. As such, parties and arbitral tribunals should endeavor to eliminate such factors and have some flexibility in conducting the hearing to allow

the parties to sufficiently present their cases via videoconferencing.

Also, parties to a Korea-seated arbitration should be aware that if a party proceeds without making an objection to a procedural issue, a Korean court will consider that the party has implicitly consented or agreed to proceed without objection. Thus such a party would not be able to sustain an attempt to set aside an arbitral award on the basis of that particular procedural issue.⁸⁾

As for Article V(2)(b) of the New York Convention, equal treatment of the parties or the right to be heard could constitute a public policy issue that would provide grounds for a set-aside. However, the authors are unaware of any ground of public policy in Korea that could potentially prohibit conducting a hearing virtually. Rather, since Korean law explicitly allows virtual trials in certain circumstances, it is more likely that there will be no issue in admitting virtual hearings as an acceptable format for a hearing in the context of international arbitration. It should be noted that Korean courts also consider whether the proceeding has been conducted in accordance with the arbitration rules to which the parties agreed.⁹⁾ In other words, as the arbitration rules become part of the parties' agreement, if the arbitration was conducted in accordance with the arbitration rules, it can be regarded as having been conducted in accordance with the parties' mutual agreement. *Accordingly, it is likely that the court will consider the arbitral award enforceable as long as the proceeding was conducted in accordance with the applicable arbitration rules.*

7) Seoul Central District Court Decision No. 2013GaHap28556 dated 12 September 2013

8) Supreme Court Decision No. 2000Da29264 dated 27 November 2001

9) Supreme Court Decision No. 2016Da49931 dated 13 December 2018

— This should be considered an important message for arbitral institutions. Given that Korean courts take into account the issue of whether a proceeding has been conducted in accordance with the arbitration rules when enforcing an arbitral award seated in Korea, making appropriate amendments to institutional arbitration rules would be one of the primary means available for institutions to help ensure that arbitral awards rendered under their arbitration rules are enforceable in Korea. As discussed above, LCIA and ICC have amended their arbitration rules to explicitly allow conducting a hearing virtually. We believe that timely action taken by arbitral institutions could reduce the potential risk that an award involving a virtual hearing could be set aside.

— There is a growing global consensus that virtual hearings are a proper means of conducting an international arbitration hearing under the right circumstances. Many arbitral institutions endeavor to provide useful guidance for the arbitrators and parties in conducting virtual hearings, rather than discouraging them. Some arbitral institutions are even adopting rule changes to ensure greater certainty in the enforcement of arbitral awards (e.g., LCIA and ICC). The Korean courts will likely enforce arbitral awards for proceedings that have involved virtual hearings as long as those proceedings have been conducted in accordance with the applicable arbitration rules if those rules specifically allow virtual hearings.

— Furthermore, if the parties have explicitly agreed to participate in a virtual hearing (rather than an in-person hearing) or have proceeded with a virtual hearing without making any objection to a potential procedural irregularity, there will be no viable enforcement challenge on the basis of due process or public policy in relation to the virtual hearing aspect.

4. Conclusion

In order to minimize the risk of arbitral awards rendered in Korea being set aside in connection with a virtual hearing, it would be prudent for arbitral institutions to amend their arbitration rules in a manner similar to the amendments noted above to the arbitration rules of the LCIA and ICC. Arbitral tribunals and parties involved in international arbitrations seated in Korea should also attempt to reach an agreement on holding hearings virtually. However, lack of agreement will by no means lead to set aside of the relevant arbitral award. In addition, when virtual hearings are involved, arbitral tribunals and parties should take extra precautions to reduce the likelihood that procedural irregularities will arise in the first place.

International arbitration is not an immutable system. It is a living organism that evolves through the interaction of arbitrators, practitioners, parties and scholars – and through the overlapping complexities of international and national legal structures. International arbitration is moving toward a new phase where virtual hearings are becoming the “new normal,” and the Korean courts will inevitably consider this phenomenon when faced with the question of whether or not to enforce an arbitral award that is the product of a virtual hearing.



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