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Arbitration in South Korea

Benjamin Hughes and Beomsu Kim
Shin & Kim

Korean companies have enthusiastically embraced arbitration as the most favored method for resolving international and cross-border commercial disputes. For example, the most recent statistics available from the ICC show that Korean parties were involved as claimants or respondents in 30 ICC arbitrations in 2008, second only to India (31) in Asia and well ahead of China (20), Hong Kong (18) and Japan (13). Korean parties have also been increasingly active in arbitrations under the rules of the Singapore International Arbitration Centre and other regional arbitral institutions. Notably, the Korean Commercial Arbitration Board (KCAB) has seen explosive growth in the number of international arbitrations administered under its rules in Korea, with an increase of almost two thirds from 2008 to 2009. The trend of increasing utilisation of arbitration for the resolution of international commercial disputes by Korean parties is expected to continue, as Korean companies continue to expand and to develop commercial relationships with companies all over the world, spanning numerous legal jurisdictions, languages and cultures.

In addition, as Korean companies gain more leverage in their contract negotiations, we can expect to see more and more arbitrations seated in Korea, governed by Korean law, and under the rules of the KCAB. This article will serve as an introduction to the law and procedures of international arbitrations conducted in Korea and under the international rules of the KCAB, as well as the recognition and enforcement of foreign arbitral awards in the Korea.

The Korean Arbitration Act

First promulgated in 1966, the Korean Arbitration Act (the Arbitration Act or the Act) was completely overhauled in 1999 to substantially adopt the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). The Arbitration Act applies to all arbitrations seated in Korea, but also contains a few provisions that apply to international arbitrations regardless of the seat of the arbitration. These provisions are generally intended to promote and support international arbitrations both in Korea and in other jurisdictions. Article 9 of the Act provides that a Korean court shall dismiss an action where the respondent can show that the dispute is subject to an arbitration agreement in Korea or abroad. Article 10 allows a party in an arbitration in Korea or elsewhere to seek interim relief pending the outcome of the arbitration in the Korean courts. In addition to these provisions, articles 37 and 39 address the recognition and enforcement of foreign arbitral awards, which will be discussed in more detail below.

The 1999 revisions to the Arbitration Act did not adopt the Model Law in its entirety, and a few important differences between the Act and the Model Law should be pointed out. While the Model Law confers final jurisdiction upon the arbitral tribunal to determine its own jurisdiction, for example, article 17 of the Arbitration Act allows a party challenging jurisdiction to appeal the tribunal's determination that it has jurisdiction to a competent court for a final ruling. In addition, unlike the Model Law, article 27 of the Arbitration Act allows a party to challenge the tribunal's appointment of an expert, first to the tribunal but with a right of appeal to the court. Notably, the act omits the provision at article 34(4) of the Model Law which provides that a court may, where appropriate and so requested by a party, suspend its proceedings in an action challenging an arbitral award to give the tribunal an opportunity to resume the arbitral proceedings or take other action which in the tribunal's opinion may eliminate the grounds for setting aside the award. Finally, article 32 of the act requires that the original signed award be deposited with the court of competence, while the Model Law contains no such requirement. Certain differences with respect to the legal effect of the arbitral award and the procedures for enforcing or setting aside the award will be discussed in more detail below.

The Korean Commercial Arbitration Board

Established in 1970 by what is now the Ministry of Commerce, Industry and Energy, the KCAB is the only officially recognised arbitral institution in Korea. The KCAB currently handles approximately 200 cases annually, most of which are domestic arbitrations.

The Arbitration Rules of the KCAB (the KCAB Rules) have been revised several times, most recently in 2004. The KCAB Rules are the default rules for all arbitrations under the KCAB, regardless of whether the underlying disputes are between domestic Korean parties or of an international nature. However, in January 2007, the KCAB implemented a separate set of Rules of International Arbitration (the International Rules).

The International Rules were promulgated in order to encourage foreign parties to arbitrate disputes in Korea under the auspices of the KCAB, and are modeled closely on the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce (the ICC Rules). However, to date there has been only one arbitration filed under the International Rules of the KCAB. This anomaly is due to a lack of awareness of the existence of the International Rules among foreign users of the KCAB, and confusion as to whether the International Rules automatically apply to arbitrations involving a foreign party.

Article 3 of the International Rules states that the International Rules shall apply where the parties have agreed in writing to refer their disputes to international arbitration 'under the KCAB International Arbitration Rules'. Thus, the International Rules do not automatically apply to arbitrations involving a foreign party, but must be specifically designated in the arbitration agreement or by agreement of the parties. Otherwise, a reference to arbitration under the rules of the KCAB will be deemed to refer to the original KCAB Rules. The distinction is important because the two sets of rules have significant differences. To cite just one example, the default language of the arbitration under the KCAB Rules is Korean.

The International Rules of the KCAB

As the International Rules of the KCAB were introduced in 2007 but are not well known to potential users of KCAB arbitration, this article will focus on the International Rules. As noted above, the International Rules will not be unfamiliar to anyone acquainted with the ICC Rules, on which they were clearly modeled. Nevertheless, there are some important differences which should be noted. For example, the International Rules do not provide for a terms of reference (TOR) or similar document as provided for in the ICC Rules. As such, there is no bar to raising new claims after the TOR or similar procedural hearing. A party may amend or supplement its claim, counterclaim and defences at any time during the arbitral proceedings, unless the tribunal considers it inappropriate because of delay or prejudice to the other party. In addition, while the ICC Rules provide that any counterclaims shall be filed with the answer, the International Rules provide that counterclaims may be filed at a later stage in the arbitral proceedings if the tribunal determines that the delay was justified under the circumstances. These procedural differences may affect the duration and cost of the proceedings. Some of the other more significant differences are described below.

Appointment, challenge and replacement of arbitrators

Like the ICC Rules, where the parties have not specified a number, the default number of arbitrators under the International Rules is one. However, under the ICC Rules, the ICC Court may sua sponte decide, in light of the circumstances, to appoint three arbitrators (article 8(2)). Under the International Rules, the secretariat of the KCAB will appoint a sole arbitrator unless a party petitions the secretariat to appoint three. The secretariat must then weigh factors such as the size and complexity of the dispute, determine whether three arbitrators should be appointed, and notify the parties of its decision (article 11). In addition, where the arbitration agreement calls for each party to nominate an arbitrator, the International Rules provide that a respondent who fails to submit an answer or to otherwise nominate an arbitrator within the time permitted by the secretariat is deemed to have irrevocably waived the right to nominate an arbitrator (articles 9(6) and 12(2)).

The processes for challenging and replacing arbitrators under the International Rules are closely modelled on the ICC Rules. However, under the International Rules the parties are given less time (15 days as opposed to 30 days) to raise a challenge (article 13). The International Rules also add a provision that, where an arbitrator is challenged, he or she may simply withdraw as an arbitrator (with or without agreement between the parties), and that such a withdrawal does not imply acceptance of the validity of the grounds for the challenge. With respect to the replacement of an arbitrator who has been removed or withdrawn, the International Rules provide that the replacement arbitrator must be chosen by the same method applicable to the appointment of the arbitrator he or she is replacing (article 14(3)), whereas the ICC Rules allow the ICC Court the discretion as to whether to follow such procedures (article 12(3)).

Jurisdiction of the arbitral tribunal

Article 19 of the International Rules explicitly provides that the arbitral tribunal shall have the authority to rule on objections to its jurisdiction, and the existence or validity of the contract of which the arbitration agreement is a part. Like the ICC Rules, the International Rules provide that a determination by the tribunal that the underlying contract is null and void does not render the arbitration clause invalid. Despite these provisions of the International Rules, however, it should be recalled that the Arbitration Act applies to all arbitrations which take place in Korea, and that article 17 of the Act allows a party challenging jurisdiction to appeal the arbitral tribunal's decision that it has jurisdiction to the courts for a final ruling. Thus, while the tribunal will have the first opportunity to rule on its own jurisdiction, it is the courts which may have the final say.

Evidence and experts

The International Rules are more detailed and forceful than the ICC Rules with respect to the production of evidence. Typical of parties from civil law jurisdictions, Korean parties traditionally have been somewhat reluctant to produce documents voluntarily and other evidence unfavourable to them in litigation and arbitration. The International Rules are drafted to address this issue in order to ensure a level playing field with respect to the production of evidence. Article 22 of the International Rules explicitly empowers the tribunal, unless the parties have otherwise agreed in writing, to order the parties to produce documents and other evidence, and to make a property or site under its control available to the tribunal, the other party or any expert appointed by the tribunal. The tribunal is also specifically empowered to determine the admissibility, relevance, materiality and weight of any evidence.

Under article 20(4) of the ICC Rules, the tribunal may appoint an expert after consultation with the parties. Article 23 of the International Rules confers the same power, but the tribunal is not required to consult with the parties. As noted above, however, the parties have the right under the Arbitration Act to challenge the tribunal's appointment of an expert in the Korean court of competence, so as a practical matter the tribunal should consult with the parties and ensure that the expert is free of conflicts or perceived prejudices. The tribunal is empowered to require the parties to cooperate with the expert by providing relevant information and evidence, and the parties may examine and comment on the expert's report and the evidence relied upon by the expert in drafting it.

Confidentiality

Unlike the ICC Rules, article 45 of the International Rules explicitly provides that the arbitral proceedings, and the records thereof, shall be confidential. Except by consent of the parties, or where required in court proceedings or applicable law, neither the parties nor the tribunal (or the KCAB) may disclose any facts related to the arbitration learned through the arbitration proceedings.

Additional award

Unlike the ICC Rules, the International Rules contain a provision at article 37 permitting a party to petition the tribunal, within 30 days of receipt of the arbitral award, for an 'additional award' as to claims presented in the arbitral proceedings but not addressed in the award. If the tribunal agrees to hear the request, it must render any such additional award within 60 days of receipt of the request. This provision is separate from the provisions regarding the correction and interpretation of the award, which mirror the ICC Rules, and is meant to avoid challenges to the arbitral award by a party alleging that the tribunal has failed to deal with a claim raised in the arbitration. If no request is made under article 37, Korean courts will normally deem a challenge on this basis to have been waived.

Costs

Like the ICC, the KCAB bases administrative costs and arbitrators' fees upon the amount of the claims to be decided in the arbitration. KCAB arbitrations cost significantly less than ICC arbitrations, however, as both the administrative fee scale and the arbitrators' pay are lower.

The payment of advance costs can be a thorny issue, especially where there is a respondent with no counterclaims and no interest in participating in the arbitration. The ICC Rules provide that where one party refuses to pay its share of the advance costs, the other party pay this amount in order to ensure that the arbitration proceeds (article 30(3)). The International Rules go a step further, providing at article 39(5) that a party who is forced to pay the whole of the advance on costs may request the tribunal to order the other party to pay its share in the form of an enforceable interim, interlocutory or partial award.

There is quite a difference between the ICC Rules and the International Rules with respect to the allocation of costs by the tribunal at the end of the arbitration. The ICC rules consider 'costs' to include all of the administrative expenses, fees and expenses of the arbitrators (and experts appointed by the tribunal) as well as the reasonable legal and other costs incurred by the parties for the arbitration. These costs are allocated at the discretion of the tribunal. The International Rules, on the other hand, distinguish between the arbitration costs (such administrative expenses, fees and expenses of the arbitrators and experts) and the costs incurred by the parties (such as legal fees and expenses for experts and witnesses, etc). Article 40 of the International Rules provides that administrative arbitration costs shall, in principle, be borne by the losing party, subject to the discretion of the tribunal. Article 41, on the other hand, provides that the legal costs and expenses incurred by each party shall be borne by such party, again subject to the discretion of the tribunal. The parties are free to agree otherwise, of course, so it is advisable to consider this issue when drafting the arbitration clause if the International Rules will apply.

Recognition and enforcement of arbitral awards

Domestic arbitral awards

Article 35 of the Arbitration Act states that an arbitral award rendered in Korea shall have the same effect on the parties as the final and conclusive judgment of the court. It should be noted, however, that article 36 of the act provides procedures for a party wishing to apply to the court of competence to set aside an arbitral award rendered in Korea. The grounds for setting aside a domestic award in Korea are similar to the grounds for declining to recognise or enforce a foreign arbitral award, discussed below. No application to set aside an award may be made after three months from the date on which a party received a duly authenticated copy of the award, nor may any such action be entertained after a conclusive judgment of recognition or enforcement of the award has been rendered by a Korean court. There is no corresponding provision under Korean law permitting a party to apply for the setting aside of a foreign arbitral award, as article 36 of the act does not apply to foreign awards.

Foreign arbitral awards

Article 37 of the Arbitration Act sets forth only two procedural requirements for the recognition and enforcement of a foreign arbitral award. First, a party seeking enforcement must submit the original, or a duly authenticated copy of, the award and the agreement to arbitrate. If these are not in Korean, duly certified translations must also be submitted. These straightforward procedural requirements are consistent with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), to which Korea is a signatory, and Korean courts have shown themselves to be extremely friendly to foreign arbitral awards. However, it should be noted that enforcement proceedings are full adversarial court litigations which are subject to multiple appeals, so enforcement against a recalcitrant party can become a time-consuming and expensive undertaking. As noted above, as there is no procedure for setting aside a foreign arbitral award in Korea, a party wishing to resist enforcement of a foreign arbitral award will simply refuse to comply with the award and force the other party to bring an enforcement action pursuant to article 37 of the act.

Article 39 of the Arbitration Act provides that the recognition or enforcement of a foreign arbitral award which is subject to the New York Convention shall be governed by that convention, while foreign arbitral awards which are not subject to the convention shall be governed by the same procedures applicable to the recognition and enforcement of foreign court judgments. As a practical matter, however, the vast majority of foreign arbitral awards for which recognition and enforcement is sought will be subject to the New York Convention. In addition, there is little practical difference these days between the grounds for enforcement of awards subject to the New York Convention and the grounds for enforcement of foreign court judgments under Korean law.

Article V of the New York Convention sets forth the very limited grounds which may permit the refusal of recognition and enforcement of an arbitral award. Among these, the most commonly tested in Korea has been that the recognition or enforcement of the award would be contrary to the public policy of Korea (section V(2)(b) of the convention), although other grounds have also been raised. Korean courts have proven very friendly to foreign arbitral awards, taking a very narrow view of the exceptional circumstances which are required to successfully resist recognition and enforcement on any of the grounds provided under article V of the convention. The Korean Supreme Court has repeatedly held that a violation of 'public policy' giving rise to a refusal to enforce a foreign arbitral award under section V(2)(b) of the New York Convention should be restrictively interpreted in light of the need for certainty and stability in international commercial transactions, and that the 'public policy exception' to the enforcement of arbitral awards was intended to protect only Korea's most fundamental moral beliefs and social order.

SHIN&KIM

Ace Tower, 6th Floor
1-170 Sunhwa-dong, Jung-gu
Seoul, Korea 100-712
Tel: +82 2 316 4211
Fax: +82 2 316 4211

Benjamin Hughes
bhughes@shinkim.com

Beomsu Kim
bskim@shinkim.com

www.shinkim.com

Shin & Kim's international dispute resolution practice group draws upon the extensive experience of its Korean and foreign attorneys to achieve successful resolutions of disputes for our clients.

Shin & Kim's attorneys have represented both Korean and foreign clients in international arbitrations in jurisdictions all over the world and in arbitrations administered by all major arbitral institutions. We frequently represent clients in arbitrations and litigations involving complex legal issues spanning multiple jurisdictions.

Shin & Kim attorneys are experienced in all aspects of international arbitration procedure, from drafting the request for arbitration and the pleadings, the selection of arbitrators, jurisdictional objections and other threshold procedural issues, factual investigations and discovery, witness preparation and examination, oral advocacy at the hearing, and the enforcement of the arbitral award in court. This comprehensive expertise enables us to advise clients in all aspects of international arbitration and to achieve favourable results for our clients regardless of the governing law or the applicable rules of procedure.

Most recently, the Supreme Court reaffirmed in 2009 that a foreign arbitral award rendered in a jurisdiction which is a signatory to the New York Convention shall be recognised as having the same res judicata effect as a domestic Korean court judgment, unless there are grounds under the New York Convention to refuse recognition and enforcement (Korean Supreme Court Dec. No. 2006Da20290, 28 May 2009). In the same decision, the Supreme Court reaffirmed the very high bar for refusal to recognise and enforce foreign arbitral awards based upon the public policy exception in Korea.

Conclusion

Several factors seem to have converged to ensure that the utilization of international arbitration will continue to grow in Korea. Korean companies are already sophisticated and enthusiastic users of international arbitration. As their leverage and influence on the global stage increases, Korea will inevitably become the seat of an increasing number of international arbitrations, whether under the auspices of the KCAB or other international arbitral institutions. As described above, Korea has a progressive Arbitration Act modelled on the UNCITRAL Model Law, and courts which are extremely friendly to arbitration. The promulgation of the International Rules by the KCAB has also improved the environment for international arbitration in Korea. While these rules have to date been under-utilised, we expect to see more arbitrations under the International Rules as awareness grows among potential users of KCAB arbitration.

In preparation for the expected rise in international arbitrations in Korea, in 2010 the KCAB unveiled a new state-of-the-art hearing room for international arbitrations. Korean law firms are increasing the size and expertise of their international arbitration teams by hiring both Korean and foreign licensed attorneys with experience in various jurisdictions and fluency in English and other languages. It seems safe to say that the trend in favour of international arbitration for the resolution of international commercial disputes by Korean parties will continue well into the future.

About the Authors

Benjamin Hughes
Shin & Kim

Benjamin Hughes is a senior foreign legal consultant and co-chair of the international dispute resolution practice group at Shin & Kim. Mr Hughes has extensive experience as counsel in international arbitrations and cross-border litigations in Asia, Europe and the United States. He has published numerous articles on arbitration in Korea, and speaks frequently at Korean law schools and at international conferences regarding dispute resolution and international and comparative law. Prior to joining Shin & Kim, Mr Hughes practised international arbitration and federal appellate litigation at Shearman & Sterling in San Francisco and Singapore.

Mr Hughes is an arbitrator of the Korean Commercial Arbitration Board and adjunct professor at the Judicial Research and Training Institute of the Supreme Court of Korea. He is a member of the Judicial Reform Advisory Committee of the Korean Bar Association, the editorial board of the *Journal of Korean Law* at Seoul National University College of Law, and the Korean Council for International Arbitration.

Mr Hughes was educated at Trinity University (BA), Harvard University (MA), Seoul National University College of Law (MA Course) and NYU School of Law (JD). He is fluent in English, Korean and Spanish.

Beomsu Kim
Shin & Kim

Beomsu Kim is a partner at Shin & Kim and co-chair of the international dispute resolution practice group. Mr Kim joined Shin & Kim in 2000 after having studied abroad and practising law in the United States for four years. Prior to his tenure in the United States, Mr Kim served as a judge in the district courts of Korea for over nine years.

Mr Kim's primary areas of practice are international arbitration and cross-border litigation. He has been appointed as chairman and sole arbitrator in multiple arbitrations under the auspices of the Korean Commercial Arbitration Board (KCAB), and as counsel in arbitrations in various jurisdictions and under the rules of the KCAB, the International Chamber of Commerce, the Singapore International Arbitration Centre, and the London Court of International Arbitration. Mr Kim also has extensive experience in M&As, general corporate transactions and foreign investments, a background which gives him a unique understanding of the subject matter of many international disputes.

Mr Kim is the former executive director of international relations for the Korean Bar Association, a director of the Korean Council of International Arbitration and an advisor to the KCAB.

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