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The KCAB's Expedited Procedure:

Problems and Proposals for Reform



Introduction

The International Arbitration Rules (“International Rules”) of the Korean Commercial Arbitration Board (“KCAB”), which took effect on 1 September 2011, introduced many improvements to the KCAB’s previous arbitration regime. Most importantly, the changes ensured that the International Rules would apply as the default arbitration rules of the KCAB where at least one of the parties to the arbitration agreement is not a Korean party. Previously, unless the parties had specifically referenced the International Rules, the KCAB’s Domestic Arbitration Rules (“Domestic Rules”) would apply. This led to many complaints from foreign parties, as the procedures of the Domestic Rules are generally not familiar to practitioners of international arbitration, and the default language of the Domestic Rules is Korean. These and other changes to the KCAB’s rules were most welcomed by both foreign and Korean counsel with active practices at the KCAB.

Another important development was the introduction of the Expedited Procedure in the International Rules. Like many institutions in the region and around the world, the KCAB introduced its Expedited Procedure in response to complaints from counsel and parties that arbitration was becoming too expensive and time consuming, especially in respect of smaller claims and matters requiring urgent resolution. The introduction of the Expedited Procedure is also a welcome development, and the first case brought under these new provisions is currently underway. However, while the inclusion of the Expedited Procedure is a positive step forward, the authors respectfully suggest that several important improvements can and should be made in order to increase their use and avoid problems in their application. This article will examine the Expedited

Procedure, point out problematic provisions and suggest modest proposals for reform.

The Expedited Procedure of the KCAB International Rules

The Expedited Procedure is set forth in Chapter 6 (Expedited Procedure) of the KCAB International Rules, which is a stand-alone chapter consisting of seven articles (Articles 38–44). As an initial matter, it is instructive to contrast this approach with other leading arbitral institutions in the region. Both the Singapore International Arbitration Centre (“SIAC”) and the Hong Kong International Arbitration Centre (“HKIAC”) have incorporated expedited procedures into their rule in a single article (Article 5 and Article 38, respectively). This difference is not merely cosmetic; the rules of both the SIAC and the HKIAC manage to accomplish more in their relatively simple and straightforward single-provision approach than KCAB achieves in the seven provisions of its Expedited Procedure, while avoiding many of its problems.

● Application of the Expedited Procedure

The circumstances under which the Expedited Procedure will apply are set forth in Articles 38 and 39 of the International Rules, as follows:

Article 38. Scope of Application

In either of the following cases, Arbitration proceeding shall be conducted in accordance with the expedited procedures provided in this Chapter of these Rules (“Expedited Procedures”):

1. Where the claim amount does not exceed 200 million Korean won; or

2. Where the parties agree to be subject to the Expedited Procedures.

Article 39. Time Limits to Counterclaims, and Increases to Claim and Counter-claim Amounts

1. In the event that the amount of a counterclaim exceeds 200 million Korean won, the Respondent shall be allowed to file such a counterclaim only within the time limit set out in Article 9(4). In such cases, the arbitration proceeding shall not be administered pursuant to the Expedited Procedures, unless the parties agree otherwise.
2. The Expedited Procedures shall not apply when, due to a party's application for increase, the amount of the claim or counterclaim comes to exceed 200 million Korean won, unless the parties agree that the Expedited Procedures shall continue to govern the arbitration proceedings notwithstanding such an increase, and the Arbitral Tribunal, if already constituted, approves.

Article 38(2) provides that the parties may agree to be subject to the Expedited Procedure. A similar provision is found in Article 5(1)(b) of the SIAC Rules. This is useful to include, as it allows the parties to agree in advance to the application of the Expedited Procedure regardless of the amount in dispute.

However, there are several significant problems in these provisions regarding the scope of application of the Expedited Procedure. First, the threshold amount provided in Article 38(1) for the default application of the Expedited Procedure is too low. At the exchange rate current as of this writing, KRW 200 million is about US \$180,000. Under Article 5(1)(a) of the SIAC Rules, by contrast, a party may apply for the arbitration to be conducted under the Expedited Procedure if the amount in dispute does not exceed Singapore \$5 million, or about US \$4,067,000. The HKIAC Rules are closer to the KCAB International Rules, providing at Article 38.1 that the Expedited Procedure shall apply as the default procedure where amount in dispute does not exceed US \$250,000.

More importantly, the threshold amount in Article 38(1) of the International Rules applies only to the amount of the

claim, and not the amount in dispute (which would include the claim, counterclaim and/or any set-off defense). Both the HKIAC Rules and the SIAC Rules use the total amount in dispute as the threshold amount. Again, the difference is more than cosmetic; the approach taken by the KCAB leads directly to the problems which can be easily seen in Article 39 of the International Rules.

Article 39(1) provides that the Expedited Procedure shall not apply where the counterclaim exceeds KRW 200 million, or about US \$180,000. This provides an easy, obvious and relatively inexpensive way for a respondent to avoid the Expedited Procedure. A respondent wishing to cause delay could simply file a counterclaim exceeding this small amount, resulting in minimal additional administrative fees. After the arbitration has commenced under the normal International Rules, the respondent could elect to withdraw its claims. Moreover, the International Rules are silent as to what happens if respondent refuses to pay these administrative fees. In short, Article 38 and 39 provide many opportunities for mischief and a great deal of uncertainty for the parties.

Finally, it is important to also note what is missing from these provisions. Article 38 has no provision for the application of the Expedited Procedure on a showing of exceptional urgency by a party. This is a major shortcoming in the view of the authors. Urgency does not depend on the amount in controversy. Again, the contrast with the SIAC Rules is instructive. Article 5(1)(c) of the SIAC Rules provides that a party may apply for the proceedings to be conducted in accordance with the Expedited Procedure in cases of exceptional urgency. If the Chairman of the SIAC determines, after considering the views of the parties, that the applicant has shown an exceptionally urgent need, then the arbitration will proceed under the Expedited Procedure.

Perhaps one reason for this oversight is that the KCAB has elected to apply its Expedited Procedure by default based upon the amount of the claim. The HKIAC Rules have taken a similar approach (although based on the total amount in controversy) and suffer the same defect. The SIAC Rules, on the other hand, apply the Expedited Procedure only where a party applies in writing, prior to the full constitution of the Tribunal, for the arbitration to

be conducted under the Expedited Procedure. The parties' agreement to proceed under the Expedited Procedure is merely one ground for such an application.

SIAC's approach seems to the authors to be the more reasonable approach; a party may always apply for the Expedited Procedure where the parties have agreed, the amount in controversy does not exceed a certain limit, or in cases of exceptional urgency. The approach taken by the KCAB, on the other hand, leads to a default provision which may apply despite the parties' wishes, which may be avoided easily by a respondent wishing to cause delay, and which does not take into account cases which require urgent resolution regardless of the amount in controversy.

● Appointment of the Arbitrator

The appointment of the arbitrator under the Expedited Procedure is set forth in Article 40, as follows:

Article 40. Appointment of Arbitrator

1. The Secretariat shall appoint a sole arbitrator from among the Roster of International Arbitrators without recourse to Article 12 provided herein unless agreed otherwise by the parties.
2. If the arbitration agreement provides for three arbitrators, the Secretariat may encourage the parties to agree to refer the case to a sole arbitrator.

The KCAB has made great strides in improving the quality and depth of its Roster of International Arbitrators ("Roster"). Article 40(1) provides an expeditious way for the KCAB secretariat to appoint a sole arbitrator from the Roster quickly and without reference to the normal procedures for more time-consuming manner of appointing a sole arbitrator under Article 12 of the International Rules.

However, problems arise under Article 40 as well. Under Article 40(1), the KCAB Secretariat may not proceed to appoint a sole arbitrator if the parties have agreed otherwise. Thus, where the parties have agreed to three arbitrators, the Secretariat has no authority to proceed with the expedited appointment contemplated under Article 40(1). Indeed, Article 40(2) provides that where the parties have agreed to three arbitrators, the Secretariat may only "encourage the

parties to agree" to refer the case to a sole arbitrator.

Again, a respondent wishing to cause delay will not be receptive to such "encouragement" from the Secretariat. Assuming that three arbitrators must be appointed, Article 12 of the International Rules must apply. This means that each party would be entitled to appoint one arbitrator, and the two appointed arbitrators would have 30 days to appoint the chair. This presents many opportunities for delay, and it is safe to say that any so-called "expedited arbitration" proceeding under a three member tribunal will not be much more expedited or less expensive than an arbitration proceeding under the normal International Rules.

A comparison with the SIAC Rules is once again instructive. Article 5(2)(b) provides that where the SIAC Chairman has determined that the arbitration shall proceed in accordance with the Expedited Procedure, the case shall be referred to a sole arbitrator unless the Chairman determines otherwise. While this may leave the door open for the Chairman to refer the case to three arbitrators if absolutely necessary (perhaps in an exceptionally urgent but exceptionally complex case), it removes the possibility for mischief and delay. Regardless of whether the parties had originally agreed to three arbitrators, if the arbitration is to proceed under the Expedited Procedure, it will be referred to a sole arbitrator unless the SIAC Chairman (and not the parties) determines otherwise. It is not open to a reluctant respondent to force the arbitration to be heard by three arbitrators by simply refusing to agree to a sole arbitrator. And no concern need arise regarding party autonomy, as the parties had agreed to arbitrate under the SIAC Rules, including Article 5.

● Hearing and Procedure

Articles 41 and 42 of the International Rules address the procedures for the arbitral hearing under the Expedited Procedure, if any:

Article 41. Hearing Procedures

1. The Arbitral Tribunal shall fix the time, date and place of the hearing, and shall give notice to the parties and the Secretariat of the same orally, by hand, by telephone, in writing, or by any other appropriate method.

2. The hearing, if any, shall be held only once, provided; however, where the Arbitral Tribunal deems necessary, it may hold subsequent hearings, or require further submission of documents after the hearing.

Article 42. Documentary Proceedings

1. Unless agreed otherwise between the parties, where neither party's claim exceeds 20 million Korean won, the dispute shall be resolved on the basis of documentary evidence only, provided, however, that the Arbitral Tribunal may hold a hearing at the request of a party or on its own initiative.
2. The Arbitral Tribunal shall establish appropriate procedures for the fixing of time periods and methods for written submissions.

These provisions are intended to provide for expeditious proceedings. However, they contain much that is unnecessary, redundant and internally inconsistent. Article 41 seems to have been drafted on the assumption that a hearing will take place, while Article 42 establishes a default position that no hearing will take place where neither party's claim exceeds KRW 20 million, or about US \$18,000, unless the parties agree otherwise, a hearing is requested by a party, or the Tribunal decides to hold a hearing on its own initiative. The provisions seem to have been drafted backwards, as it would make more sense to first determine whether a hearing will take place (Article 42) before describing the procedures for the hearing, if any (Article 41). We will therefore address these provisions in reverse order.

As noted, Article 42(1) establishes as a default position that the dispute shall be resolved on the basis of documents alone (i.e., without a hearing), unless either party's claim exceeds KRW 20 million, or about US \$18,000. While Article 42(1) does allow for a hearing to be held if requested by a party or at the initiative of the Tribunal, one must question the wisdom of establishing as a default position that no hearing will be held for small disputes. It would seem more prudent to provide that a hearing will be held, regardless of the amount in controversy, unless the parties agree that the dispute may be decided on the basis of

documents only. This guarantees that all the parties have had a chance to make their arguments and examine any witnesses at a hearing before the Tribunal, unless they have explicitly and knowingly agreed to waive this opportunity. Indeed, this is exactly the approach taken in Article 5(2)(c) of the SIAC Rules, which provides that a hearing shall be held unless the parties agree otherwise, regardless of the amount in controversy.

It seems likely that the intent of the default position in Article 42(1) of the International Rules was to provide for the expeditious resolution of disputes by avoiding the trouble of a hearing where it is not deemed necessary. However, a hearing may be held at the request of a party, and a Tribunal would be rightfully reluctant to deny such a request. In addition, it would be very easy and inexpensive for a party to simply raise its claim amount to exceed this minimal threshold. Thus, as a practical matter this provision does not seem likely to result in fewer hearings than a provision such as Article 5(2)(c) of the SIAC Rules. Rather, Article 42(1) is more likely to lead to problems in enforcing an award if one party sought a hearing but did not get one.

Article 42(2), which provides that the Tribunal shall establish appropriate procedures for the fixing of time periods and methods for written submissions, is simply unnecessary. It is unclear what purpose this provision serves; perhaps it was felt necessary in the event no hearing was to be held.

Likewise, Article 41 is not necessary. It goes without saying, but is nevertheless said in Article 41(1), that the Tribunal will fix the time, date and place of the hearing, and give notice of these particulars to the parties and the Secretariat. What this provision leaves out is that the Tribunal should consult with the parties on this matter, if only in order to confirm their availability at least. Perhaps this provision was included in order to permit the Tribunal to fix the time, date and place of the hearing without consulting the parties? However, this would be dangerous indeed, and no Tribunal is likely to take such measures. This provision seems to serve no purpose whatsoever, and could, if taken literally, actually create problems in enforcement.

Regarding Article 41(2), it simply provides that if there is a hearing, it should only be held once, unless the Tribunal decides it is necessary to hold subsequent hearings. Again, this is unnecessary and meaningless, and adds nothing but confusion and excess verbiage to the Expedited Procedure provisions.

● The Award

The provisions regarding the timing and contents of the Award under the Expedited Procedure are set forth in Article 43:

Article 43. The Award

1. The Award shall be made within 3 months from the date of constitution of the Arbitral Tribunal, provided however that the Secretariat, at the request of the Arbitral Tribunal or on its own initiative, may decide to allow extension of the time limit, if it deems necessary.
2. The Arbitral Tribunal shall state the reasons upon which the Award is based in summary form, unless agreed otherwise by the parties.

Like most expedited procedural rules, the KCAB Expedited Procedure provides a time limit for the rendering of the Award which runs from the date of the constitution of the Tribunal, but also provides that the deadline may be extended by the Secretariat if necessary. In addition, like other expedited rules, Article 43(2) of the International Rules provides that the Award shall be in summary form, unless otherwise agreed by the parties.

The primary problem with these provisions is simply that three months is not sufficient to render an Award under normal circumstances even under the Expedited Procedure. In the case which is currently underway, it has been necessary to extend the deadline twice, and an Award is expected to be rendered in about six months. Notably, both the HKIAC and the SIAC Expedited Procedure provisions provide that the Award shall be rendered within six months, unless the Secretariat or Chairman, respectively, determines that a longer period is necessary. Three months is simply not a realistic time period in most cases to receive submissions from both parties, hold a hearing on the merits,

and render the Award.

● Application Mutatis Mutandis

The final provision of the Expedited Procedure is Article 44, which simply states that the other provisions of the International Rules shall apply mutatis mutandis to matters which are not prescribed in Chapter 6. This provision is also not necessary. It is clear that the Expedited Procedure forms a part of the International Rules, and provides for certain exceptions to them. Where the exceptions do not apply, the other International Rules, which the parties have chosen after all, naturally do apply. Neither SIAC nor the HKIAC Rules contain this unnecessary provision.

Proposals for Reform

As will be evident from the preceding discussion of the KCAB's Expedited Procedure, the authors believe that while its introduction into the International Rules is a step in the right direction, the Expedited Procedure as currently drafted is in need of serious revision. It should also be evident that we believe the SIAC Expedited Procedure provides an excellent starting point for such revisions.

● Article 5 of the SIAC Rules

While we do not advocate the wholesale importation of provisions from other arbitral rules into the KCAB's International Rules, we include the Expedited Procedure (Article 5) of the SIAC Rules in its entirety for the consideration of the reader. Obviously certain changes would be in order, as discussed further below, but we are of the strong view that reference to the SIAC Rules and other arbitral rules may be of substantial assistance to the KCAB when considering revisions to its own rules, including the Expedited Procedure.

SIAC Rules, Article 5: Expedited Procedure

- 5.1** Prior to the full constitution of the Tribunal, a party may apply to the Centre in writing for the arbitral proceedings to be conducted in accordance with the Expedited Procedure under this Rule where any of the following criteria is satisfied:

- a. the amount in dispute does not exceed the equivalent amount of S\$5,000,000, representing the aggregate of the claim, counterclaim and any setoff defence;
- b. the parties so agree; or
- c. in cases of exceptional urgency.

5.2 When a party has applied to the Centre under Rule 5.1, and when the Chairman determines, after considering the view of the parties, that the arbitral proceedings shall be conducted in accordance with the Expedited Procedure, the following procedure shall apply:

- a. the Registrar may shorten any time limits under these Rules;
- b. the case shall be referred to a sole arbitrator, unless the Chairman determines otherwise;
- c. unless the parties agree that the dispute shall be decided on the basis of documentary evidence only, the Tribunal shall hold a hearing for the examination of all witnesses and expert witnesses as well as for any argument;
- d. the award shall be made within six months from the date when the Tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time; and
- e. the Tribunal shall state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given.

● Implications for the KCAB's Expedited Procedure

Considering the many problems we have discussed in relation to the KCAB's Expedited Procedure, there can be little doubt that it must be, and will be, revised. We believe the SIAC Expedited Procedure can be instructive in this process in several regards:

1. Simplicity

As noted at the outset, the Expedited Procedure of the SIAC Rules is contained in one relatively simple and elegant provision. It nonetheless accomplishes much more than the seven provisions of the KCAB's Expedited Procedure, while avoiding its problems. Many of the provisions of the KCAB's Expedited Procedure are completely unnecessary and should be deleted (Articles

41, 42(2) and 44, for example). Others are overly long and convoluted. The KCAB should endeavor to redraft the Expedited Procedure such that it is simple, brief and internally consistent.

2. Scope of Application

As discussed, several problems arise in the scope of application of the KCAB's Expedited Procedure as currently drafted. We suggest that the Expedited Procedure be applied only by application of a party, rather than as a default position based on the amount of the claim. In addition, Article 38(1) should reference the amount in controversy (including claims, counterclaims and/or set-offs) instead of the amount of the claim, and Article 39 should be eliminated. Finally, the grounds should include exceptional urgency in addition to the currently enumerated grounds of the amount in controversy and the agreement of the parties. Finally, the threshold amount in controversy should be increased to perhaps US \$500,000 (and should be expressed in US dollars, like the HKIAC does, as foreign parties arbitrating under the International Rules will be less familiar with Korean won).

3. Appointment of Arbitrator

The KCAB Secretariat should be given the power and discretion to appoint a sole arbitrator, regardless of the prior agreement of the parties. As seen above, requiring the agreement of the parties effectively means that a party may avoid the application of the Expedited Procedure by refusing to refer the case to a sole arbitrator.

4. Hearing and Procedure

The default position under the Expedited Procedure should be that a hearing will be held, regardless of the amount in controversy, unless the parties agree that the dispute may be resolved on the basis of documentary evidence alone. The KCAB's current default position that no hearing will be held where the amount in controversy is less than about US \$18,000 could create problems if this default is successfully imposed on any party seeking a hearing.

5. The Award

The time for rendering the Award should be lengthened to six months. Three months is simply not a realistic time period in which to render an Award in an international arbitration.

Conclusion

The KCAB has made continuous improvements in its rules and administrative procedures over the past several years, and there is no reason to believe that the coming years will be any different. Korea has enthusiastically embraced international arbitration as the preferred method of dispute resolution, as evidenced by the thriving international arbitration practices which have developed at leading Korean law firms in recent years and the upcoming opening of a high tech center for international dispute resolution in Seoul. The KCAB has played a leading role in these developments, and we hope it will continue to do so.

We also hope our comments on the Expedited Procedure will be taken in the spirit in which they are offered. It is hoped that constructive criticism of certain aspects of the International Rules by local and international arbitration practitioners and users will lead to even further improvements. We are confident that the KCAB will continue to grow and evolve into one of the most important regional arbitration centers in Asia, and that its International Rules will continue to evolve both by absorbing useful influences from other arbitral institutions and by making its own innovative contributions to the development of international arbitration rules in the Asian region.

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