International arbitration in South Korea: current status and recent developments

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Introduction

As Korea's economic success story "miracle on the Han River" spread, it has simultaneously developed into a global innovation leader in the tech industry. Both feats, in less than half a century.[1] Its alternative dispute resolution (ADR) techniques were, and continue to be, effective in facilitating cross-jurisdictional trade and commercial growth. This article will discuss critical aspects of the processes and recent trends in arbitration in South Korea to identify its core features and potential development path.

The legislative framework governing arbitration in Korea functions under the Korean Arbitration Act (KAA). The KAA was amended in 2016 to incorporate the 2006 UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (UNCITRAL Model Law). This ensures Korea has a reliable and predictable environment in which to conduct arbitration. The enactment of the Arbitration Industry Promotion Act in 2016 further conferred the Korean Government to fund and support arbitral institutions, facilities and practitioners in Korea. These developments point to a positive commitment to setting up an attractive dispute resolution centre both domestically and internationally.

Arbitration institutions

The Korean Commercial Arbitration Board (KCAB) is the sole domestic institution in Korea. Sitting under the auspices of the Ministry of Justice (K-MOJ), the KCAB is the most popular choice for arbitration practitioners in the region. Its operational model is similar to those in the UK, Singapore and Hong Kong, with an annual arbitration case load of close to 400 from 2015 to 2020.[2] As to international arbitration cases, the KCAB has launched an independent division — KCAB International, in development since April 2018.[3] As a result of the introduction of KCAB International, there has been strong growth in the cross-jurisdictional arbitration industry in Korea, such that in May 2021 the institution had approximately 583 arbitrators from 40 different countries holding the post of International Panel of Arbitrators.[4]

On 8 February 1973, South Korea signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention), which was entered into force 3 months later. Korea has also entered into "multiple free trade or investment agreements which contain arbitration provisions and is a party to 88 ratified bilateral investment treaties as of August 2020".[5] On top of this, and in its 2019–23 master plan, South Korean Government presented a vision for South Korea to become one of the world's top five arbitration countries.[6] The state is devoted to becoming an international seat of arbitration to meet the growing demand for cross-border dispute resolution.

While the KCAB is the only arbitral institution in the Asia-Pacific region that is governed by a civil law system, it thereby has a key advantage in attracting parties with a civil law preference.[7] At present, the institution is concentrated on domestic litigation with international arbitration cases making up only 18.05% of the total cases held in 2021.[8] This is compared to more than 70% cases in Hong Kong and Singapore coming from offshore. It is clear that South Korea remains behind some of its other Asian arbitration competitors in the international arbitration field.

Critical aspects of the arbitration procedure

Arbitration practitioners

A person representing a party in arbitration is required to be an attorney certified to practice in South Korea under the Attorney-at-Law Act 2014[9] (ALA), the Foreign Legal Consultant Act 2016[10] (FLCA) and KAA. For obvious reasons, this does not play a positive role in attracting overseas arbitration practitioners or parties in seeking to resolve their dispute resolution in South Korea.[11] Further, the ALA stipulates that any foreign attorneys or professionals are unable to practice international arbitration in South Korea with compensation.[12] It is only the FLCA which allows foreign legal counsels to provide representation in international arbitration cases.[13] Accordingly, it is illegal if a foreign counsel provides services related to the legal matter of a Korean statute in international arbitration.

When comparing the Korean system to Singapore's Legal Profession Act 1966, amended in 2009 (which does not require a foreign lawyer's license to represent a party in arbitration proceedings),[14] South Korea's system seems rigid. Unfortunately, the government has not yet demonstrated any willingness to propose or engage in reform, regardless of the repeated advice of legal scholars and professionals.[15]

Third-party funding

As third-party litigation funding in Korea is not specifically restricted by legislation, the line is blurred as to its function in the arbitration process. However, Art 6 of the Korean Trust Act 1961 prohibits the entrustment of lawsuits, so any third-party funding deemed to come within the meaning of "an entrustment of a lawsuit" will be deemed null and void.[16] Despite the increasing interest in third-party funding in Korea, especially after the similar financial liberalisation efforts in Singapore and Hong Kong, Korean courts appear to take a conservative approach to this issue if no next legislation change.

Enactment and interim relief in arbitral proceedings

South Korean courts are well known for their efficiency, ranking second place for "enforcing contracts" in the World Bank's 2020 Doing Business Report. The KCAB demonstrates an enthusiasm for enforcing a foreign arbitration award made under the NY Convention. Two significant changes have occurred under the amended provisions of the KAA with respect to arbitrations outside Korea. The first: it assists the tribunal by ordering witnesses to appear before the tribunal or requiring document holders to submit requested documents to the tribunal. This allows the court to more effectively help the tribunal obtain evidence (Art 28). Secondly, the recognition and enforcement of arbitral awards under the amended KAA are now committed by order (Art 7).

Interim relief in arbitral proceedings has also become a matter of great interest in arbitration in this region recently. Despite incorporating the UNCITRAL Model Law, KAA has maintained some unique features, including (amongst others):

- only interim measures issued in arbitrations seated in South Korea can be enforced by South Korean courts and
- ex parte preliminary orders (which do not exist in South Korea) are not provided for in the revised KAA

Recent developments

Rapid growth in investment treaty arbitrations

Since 2018, investment treaty arbitrations in South Korea have experienced rapid growth. The first investment arbitration case was initiated in 2019 by a South Korean government-owned corporation, filed by South Korea Western Power Company against the Indian Government. The arbitration found grounding pursuant to the India–Korea BIT 1996 and India–Korea Comprehensive Economic Partnership Agreement 2009 and was based on the Indian Government's failure to supply the promised gas under the relevant agreement. Up to now, South Korea has entered approximately 100 or more International Investment Agreements, with most of these treaties reported to include investor-state dispute settlement clauses. It is clear that the South Korean Government seeks to engage in investment arbitration as an inevitable part of its dispute resolution and investment tapestry.[17]

To this end, the only adverse award presently against Korea is the *Mohammad Reza Dayyani v Korea* case (PCA Case No 2015-38), which for obvious reasons has received widespread public attention.[18] Compliance with the previous awards was difficult due to international sanctions against Iran rather than the Korean Government's reluctance to comply with the award. Although this case is still pending, the Korean Government was reportedly granted a license from the US Government to transfer the amount of the arbitration award. The result of this case would undoubtedly (whether positive or not) become the landmark of investment treaty arbitration of South Korea.

Arbitration jurisprudence

Several notable cases dealing with arbitration jurisprudence have engaged the South Korean courts' interest in the application of the KAA when it also involves domestic legislation and mandatory regulations.

In a case handed down on 29 April 2021,[19] the Seoul Bankruptcy Court held that the Korean Debtor Rehabilitation and Bankruptcy Act (KDRBA) did not have a preferential effect over the KAA. Relying on the KDRBA, a creditor maintained it had a right to file an application for investigation and confirmation of its claim under a contract which included an arbitration agreement. Confirming the decision of the Seoul Central District Court, the Supreme Court of Korea affirmed that an arbitration agreement would not be invalid in violation of the mandatory provisions of the South Korean Fair Transactions in Franchise Business Act 2022[20] and the South Korean Act on the Regulation of Terms and Conditions 2018[21] because they were neither "internationally mandatory" nor "extraterritorially applicable".[22]

Conclusion

The KCAB is anticipated to further promote Korea as a hub of international dispute resolution in North-East Asia and beyond. In line with the legislative provisions, the government is also eager to convey to the international arbitration community a message of openness, to meet the growing demand for cross-border commercial dispute resolution and better facilitate transboundary transactions.[23] This can be reflected by the state's compliance with the arbitration award and the courts' choice of arbitration jurisprudence. However, in order to catch up with its Asian arbitration counterparts, some legislative and policy gaps will need to be addressed.

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Footnotes

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2. J Choi "How to Develop an International Arbitration Industry in South Korea" (2020) 21(2) *Asian-Pacific Law & Policy Journal* 1 at 13.
3. M Han amd U Khalil "International Arbitration Law and Rules in South Korea" *CMS Law, Tax, Future* 11 May 2021 https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/south-korea.
4. Korean Commercial Arbitration Board *KCAB Annual Report 2021* Report (2021) p 17.
5. The Legal 500, South Korea: International Arbitration, Korean Commercial Arbitration Board, www.legal500.com/guides/chapter/south-korea-international-arbitration/.
6. Above n 2, at 16.
7. Above n 2, at 36.
8. Above n 4, p 11.
9. Attorney-at-Law Act 2014 (South Korea), s 4.
10. Foreign Legal Consultant Act 2016 (South Korea).
11. Above n 2, at 31.
12. Above n 9, art 109.
13. Above n 10, art 24–2.
14. Legal Profession Act 1966 (Singapore), s 35.
15. Above n 2, at 33.
16. J Min Jeon, Y Yoon and A Eernisse "Commercial Arbitration: South Korea" *Global Arbitration Review* 4 May 2022 https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/south-korea.
17. Above.
18. YJ Baek, JS Ahn, H Park and W Jung "International Arbitration 2022: South Korea" *Chambers and Partners* 16 August 2022 https://practiceguides.chambers.com/practice-guides/international-arbitration-2022/south-korea/trends-and-developments.
19. Seoul Bankruptcy Court, Decision No 2017HaHwak259 dated 29 April 2021.
20. Fair Transactions in Franchise Business Act 2022 (South Korea).
21. South Korean Act on the Regulation of Terms and Conditions Act 2018.
22. Seoul Central District Court, Decision No 2020Da225442 dated 5 November 2020; also see above n 18.
23. T Andriotis and others "Cooperating on Disputes Moving towards a Stronger Cooperative Foundation for the Settlement of Disputes in Asia" (2021) 12 *Korean Arbitration Review* 39 at 41.