

The Development History and Activation Measures of Commercial Arbitration System in Korea

-With Respect to 40 Years of Korean Arbitration Law and Practice-

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I. Introduction

Although the history of arbitration in Korea dates back to the Yi Dynasty(1392-1910), the practice of commercial arbitration as is applied in contemporary international trade is a recent phenomenon. Arbitration first appeared in modern commercial treaties such as the Treaty of Friendship, Commerce and Navigation between the Republic of Korea and the United States in 1957¹⁾.

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1) International Council for Commercial Arbitration, *International Handbook on Commercial Arbitration: The Republic of Korea*, Vol.II, Kluwer Law International, 2005, p.1.

Korea has also acceded to special international conventions on dispute settlement such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 ("Washington Convention").

Prior to the Arbitration Act of 1966, disputes of a private commercial nature were settled in accordance with the Code of Civil Procedures. The Arbitration Act of Korea was promulgated on March 16, 1966 as Act No.1767. The Arbitration Act is an independent body of law, and its provisions will prevail in the event of any conflicts with other codes such as the Civil Code, the Code of Civil Procedures and the Commercial Code of the Republic of Korea. All commercial disputes are decided in accordance with its provisions and the Arbitration Rules of the Korean Commercial Arbitration Board unless parties have agreed otherwise.

Since the promulgation of Arbitration Act of Korea in 1966, consecutive amendments took place in 1973, 1993, 1997, 1999, 2001 and 2002. Each set of amendments has purported to resolve some conflicts, if there be any, with the international arbitration acts and practices. Among the various set of amendments, those of 1999 were designed to accommodate the UNCITRAL Model Law on International Commercial Arbitration of 1985.

The Korean Commercial Arbitration Board(KCAB) is the only authorized institution of its kind in Korea, statutorily empowered to settle any kind of commercial dispute under the Arbitration Act. The KCAB administers the arbitration proceedings in accordance with its Arbitration Rules approved by the Korean Supreme Court.

This year the KCAB has greeted its 40th year since its establishment in 1966. The arbitration applications received at the KCAB in 2005 numbered 213 and the amount involved in those cases was US\$ 129 million. Meanwhile, the number of arbitration cases received during the year established a new record high since the founding of the KCAB.

Some papers with respect to this topic was presented at the ICC/

KCAB/ KOCIA International Commercial Arbitration Conference on 26-27 October 2006. Soonwoo Lee presented on "The Role of Korean Commercial Arbitration Board for Asian International Arbitration." Chan-Sop Shin presented on "Korea's New Arbitration Act and Its Implications for International Commercial Arbitration in Korea." Masaharu Onuki presented on "The Rule of Japan Commercial Arbitration Association for Asian International Arbitration." The above papers proposed basically the cooperation among the arbitral institutions of Korea, Japan and China for the development of the international arbitration in the Asian region.

This paper intends to review the Korea's Accedence to international arbitration conventions, the revision of Arbitration Act of Korea, the trend of arbitration practice in Korea, and the activation measures of commercial arbitration system in Korea.

II. The Revision of Arbitration Act and Rules

1. The Accedence to International Arbitration Convention

The Republic of Korea is a contracting party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. In entering the Convention on May 9, 1973, Korea made certain reservations; (1) by virtue of Article 1(3) of the Convention, the Government of the Republic of Korea declared that it will apply to the recognition and enforcement of arbitral awards made only in the territory of another Contracting State(reciprocity reservation); (2) Korea further declared that Korea will apply the Convention "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Korean law(commercial reservation)." Within the meaning of the above reservations, only those awards rendered under commercial arbitration can be enforced in Korea subject to the requirement

that reciprocity is granted.²⁾

Korea has acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 on March 23, 1967.³⁾

2. The Revision of Arbitration Act

(1) The Revision of Arbitration Act in 1973

The original Arbitration Act of 1966 was modelled on the old German arbitration act as contained in the German Civil Code of 1877. However, the arbitration practice has been influenced more by major international arbitration institutions such as American Arbitration Association(AAA), ICC International Court of Arbitration and London Court of International Arbitration(LCIA). Accordingly, there was a gap between the original arbitration act and practice, and it was temporarily filled by the revision of Arbitration Act in February 19, 1973 as Act No.2537.⁴⁾

The major features of the revised Arbitration Act in 1973 are as follows:

① The revised Arbitration Act added "anyone who has been sentenced to penalties heavier than imprisonment and the period of such probation has not expired" to the disqualification of arbitrator.⁵⁾

② The revised Arbitration Act added "the text" to the form of the arbitral award.⁶⁾

③ The revised Arbitration Act changed "when the parties have not been heard" to "when the parties have not been heard without the cause" as the

2) International Council for Commercial Arbitration, *op.cit.*, p.21.

3) The Korea Commercial Arbitration Board, *Arbitration Practice in Korea*, 2000, p.6.

4) Moonchul Chang, "The New Korean Arbitration Law and Enforcement of Arbitral Awards", *International Arbitration Law Review*, Vol. 3 Issue 6, Sweet & Maxwell, December 2000, p.196.

5) The Arbitration Act of 1973, Article 5 subpara. 4.

6) The Arbitration Act of 1973, Article 11 para. 3.

cases of the lawsuit for setting aside of an arbitral award.⁷⁾

④ In the revised Arbitration Act, the Commercial Arbitration Rules of the Korea Chamber of Commerce and Industry was changed to the Commercial Arbitration Rules of ("The Korean Commercial Arbitration Association, Incorporated") such Association as authorized and so designated by the Minister of Commerce and Industry.⁸⁾

(2) The Revision of Arbitration Act in 1999

To keep up with the continuous changes in the global environment and to remain current with international standards, Korea revised the Arbitration Act in December 31, 1999 as Act No.6083. The revision in 1999 was the first major change of the original Arbitration Act of 1966 following a minor modification in 1973.

The newly revised Arbitration Act positively accommodates the UNCITRAL Model Law of 1985 and other international standards, especially those of advanced countries like Germany and the United Kingdom. The revised Arbitration Act aims to increase the efficiency of arbitration and speed up the arbitration process.⁹⁾

The salient features of the revised Arbitration Act in 1999 are as follows:

① System of the Arbitration Act

The previous Arbitration Act of 1973 was composed of 18 articles and addenda. However, the new arbitration Act of 1999 is composed of 7 chapters, 41 articles and addenda.

② Form of arbitration agreement

The revised Arbitration Act widens the application of content of arbitration agreement. An arbitration agreement by an exchange of letters, telegrams, telexes, telefacsimiles or other means of communication shall be

7) The Arbitration Act of 1973, Article 13 para. 1 subpara. 4.

8) The Arbitration Act of 1973, Article 4 para. 3, Article 7 para.3 and Article 18.

9) The Korean Commercial Arbitration Board, *Arbitration Practice in Korea*, 2000, p.9.

considered effective as an arbitration agreement. An oral agreement is therefore excluded.¹⁰⁾

Under the revised Arbitration Act, an arbitration agreement may be in the form of a separate agreement or in the form of an arbitration clause in a contract. The standard arbitration clause recommended by KCAB reads as follows: "All disputes, controversies or differences which may arise between the parties, out of or in relation to or in connection with this contract, or for the breach thereof, shall be finally settled by arbitration in Seoul, Korea, in accordance with Arbitration Rules of the Korean Commercial Arbitration Board and under the laws of Korea. The award rendered by the arbitrator shall be final and binding upon parties concerned."¹¹⁾

③ Period of filing plea

Under the revised Arbitration Act, a court before which an action is brought in a matter which is the subject of an arbitration agreement shall dismiss the action if the respondent raises a plea that an arbitration agreement exists. The previous Arbitration Act of 1973 did not provide the period of filing plea. However, the revised Arbitration Act provides that the respondent shall raise a plea not later than when submitting his first statement on the substance of the dispute.¹²⁾

④ Grounds for challenge of arbitrator

Under the previous Arbitration Act of 1973, a party may challenge an arbitrator before a court of law on the same grounds applied to judges of the civil court.¹³⁾ However, under the revised Arbitration Act, a party may challenge an arbitrator if his impartiality or independence is doubtful, or if he does not possess qualifications.¹⁴⁾

10) The Arbitration Act of 1999, Article 8.

11) The Korean Commercial Arbitration Board, *Arbitration Practice in Korea*, 2000, p.21.

12) The Arbitration Act of 1999, Article 9 para. 1 and 2.

13) The Arbitration Act of 1973, Article 6.

14) The Arbitration Act of 1999, Article 13.

⑤ Place of arbitration

The previous Arbitration Act of 1973 did not provide the place of arbitration. However, the revised Arbitration Act specifies the method to choose the place of arbitration as follows: If the parties fail to agree on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witness, experts or the parties, or for inspection of goods, other property or documents.¹⁵⁾

⑥ Taking evidence

The revised Arbitration Act empower the arbitration tribunal to secure evidence and oblige the court to send a copy of the reports on witness examination and transcript of the report on admissibility of evidence to the arbitral tribunal without delay.¹⁶⁾

⑦ Period of arbitration award

The previous Arbitration Act of 1973 provides that an arbitral award shall be made within the period prescribed in the arbitration agreement or within three months after the commencement of arbitration.¹⁷⁾ However, the revised Arbitration Act does not specify the period of arbitration award.¹⁸⁾

⑧ Grounds and application for setting aside award

The previous Arbitration Act of 1973, a party may file a lawsuit for setting aside an arbitral award if the arbitral award was omitted respecting a material point which may affect the award.¹⁹⁾ However, the revised Arbitration Act eliminates this controversial ground for setting aside the award.²⁰⁾ The previous Arbitration Act of 1973 provides that a lawsuit for

15) The Arbitration Act of 1999, Article 21.

16) The Arbitration Act of 1999, Article 27 and Article 28 para. 1.

17) The Arbitration Act of 1973, Article 11 para. 5.

18) The Arbitration Act of 1999, Article 32.

19) The Arbitration Act of 1973, Article 13 para. 1 subpara. 5.

cancellation of an arbitral award may be made only within 30 days from the date of knowledge of the grounds for requesting cancellation, or within five years after the judgment of execution became final.²¹⁾ However, the revised Arbitration Act provides that an application for setting aside the award shall be made within three months of the date on which the party making that application has received the duly authenticated award or, if a request has been made under Article 34, the duly authenticated copy of a correction or interpretation or an additional award.²²⁾ The revised arbitration Act shortens the period of filing lawsuit in the spirit of the arbitration system's advantage of swiftness.

⑨ Foreign arbitral award

The previous Arbitration Act of 1973 did not provide the arbitral award in foreign country. However, the revised Arbitration Act specifies the recognition and enforcement of a foreign arbitral award. The revised Arbitration Act differentiates between the foreign arbitral award to which the New York Convention applies and the foreign arbitral award to which it does not. The foreign arbitral award made in the territory of non-contracting states to the New York Convention would be recognized or enforced in Korea, subject not to the New York Convention, but to Article 217 of the Korean Civil Procedure Act, Articles 26(1) and 27 of the Korean Civil Execution Act.²³⁾

<Table 1> Comparison of the Old and New Arbitration Act

Content	Old Arbitration Act	New Arbitration Act
1. System	18 articles, addenda	41 articles, addenda

20) The Arbitration Act of 1999, Article 36 para. 2.

21) The Arbitration Act of 1973, Article 16 para. 5.

22) The Arbitration Act of 1999, Article 36 para. 3.

23) The Arbitration Act of 1999, Article 39.

2. Waiver of right to object	Not mentioned	A party who knows that any mandatory provision of this Act may derogate or that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.(Article 5)
3. Form of arbitration agreement	(2) An arbitration agreement under the preceding paragraph shall be either a written agreement to arbitrate which shall carry the hand and seal of the parties concerned, or an arbitration clause in a contract, or a stipulation to a similar effect contained in correspondences or telegrams exchanged. (Article 2)	(1) An arbitration agreement may be in the form of a separate agreement or in the form of an arbitration clause in a contract. (2) An arbitration agreement shall be in writing. (3) An agreement shall be deemed to be an arbitration agreement in writing of it falls under any of the following sub paragraphs: 1. In a case where it is contained in a document signed by the parties; 2. In a case where it is contained in an exchange of letters, telegrams, telex or other means of telecommunication which provide a record of the agreement; or 3. In a case where it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. (4) The reference in a contract to a document containing an arbitration clause shall be deemed to constitute an arbitration agreement: Provided that this shall apply only if the contract is in writing and the reference is such as to make that clause part of the contract. (Article 8)
4. Plea filing period	The parties to an arbitration agreement shall abide by the arbitral award. A suit may be filed to a court of law, only where the said arbitration agreement is invalid or of forfeited effect or incapable of execution. (Article 3)	(2) The respondent shall raise a plea under paragraph (1) not later than when submitting his first statement on the substance of the dispute. (Article 9)
5. Place of arbitration	Not mentioned	(1) The parties shall be free to agree on the place of arbitration. (2) Failing such agreement referred to in paragraph (1), the place of arbitration shall be determined by

		<p>the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.</p> <p>(3) Notwithstanding the provisions of paragraphs (1) and (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents. (Article 21)</p>
6. Taking evidence	<p>(1) An arbitrator shall give a hearing to the parties prior to making an arbitral award.</p> <p>(2) An arbitrator may examine witnesses and expert witnesses who have presented themselves of their own accord, but may not force them to take an oath. (Article 8)</p> <p>When an arbitrator is incapable of performing an act which he deems to be essential to an arbitral award, the court shall perform such an act at the request of the arbitrator or the parties.</p> <p>In such cases, the provisions of the Civil Procedure Code shall apply mutatis mutandis. (Article 9)</p>	<p>(1) Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by it. In this case, the arbitral tribunal may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection. (Article 27)</p> <p>(1) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of Korea assistance in taking evidence. (Article 28)</p>
7. Form of contents of award	<p>(3) An arbitral award shall be in writing, shall carry the hand and seal of the arbitrators, and shall state the text, the brief grounds for the award and the date of execution. (Article 11)</p>	<p>(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators.</p> <p>(2) The award shall state the reasons upon which it is based</p> <p>(3) The award shall state its date and place of arbitration. In this case, the award shall be deemed to have been made on that date and at that place. (Article 32)</p>
8. Grounds for suit for cancellation of arbitral award	<p>(1) A party may file a lawsuit for cancellation of an arbitral award in one of the following cases:</p>	

	<p>1. When the appointment of the arbitrator or the arbitration procedures are not in accordance with the provisions of this law or with the stipulations of the arbitration agreement.</p> <p>2. When, in the appointment of an arbitrator or in arbitration procedures, a party is incompetent or has not been represented in accordance with the provisions of law.</p> <p>3. When an arbitral award provides for the performance of such an act as is prohibited by law.</p> <p>4. When, in arbitration procedures, the parties have not been heard without due cause or no grounds for the arbitral award have been given.</p> <p>5. When the grounds are present for a lawsuit under Items 4 through 9, Paragraph (1), Article 422, Civil Procedure Code.</p> <p>(2) In case it has been stipulated otherwise between the parties with respect to the matter provided for under Item 4 of the preceding Paragraph, no lawsuit may be made for cancelation of an arbitral award. (Article 13)</p>	<p>An arbitration award may be set aside by the court only if the party making the application furnishes such proofs as stated in Article 36(2)-1 and if the court, on its own initiative, finds such reasons as mentioned in Article 36(2)-2.</p>
<p>9. Applicatio</p>	<p>(1) A lawsuit for cancelation of an</p>	<p>(3) An application for setting aside the award may not be made after three months have elapsed from</p>

n for setting aside award	arbitral award may be made only within 30 days from the date of knowledge of the grounds for requesting cancellation, or within five years after the judgment of execution became final. (Article 16)	the date on which the party making that application has received the duly authenticated copy of the award or the duly authenticated copy of a correction or interpretation or an additional award under Article 34. (Article 36)
10. Arbitral award in foreign country	Not mentioned	(1) Recognition or enforcement of a foreign award which is subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, shall be governed by that Convention. (2) The provisions of Articles 203, 476 (1) and 477 of the Civil Procedure Act shall apply mutatis mutandis to the recognition or enforcement of a foreign award which is not subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (Article 39)

Source, Korean. Commercial Arbitration Board, *Arbitration Practice in Korea*, 2000.

3. The Revision of Arbitration Rules

(1) The Current Arbitration Rules

Since the establishment of the first Arbitration Rules in 1966, consecutive amendments took place in 1973, 1981, 1989, 1993, 1996, 2000 and 2004. Under the current Arbitration Act, the KCAB has to obtain the approval of the Chief Justice of the Korean Supreme Court to establish or amend its Arbitration Rules.²⁴⁾

The original Commercial Arbitration Rules of the Korea Chamber of Commerce and Industry was approved by the Korean Supreme Court on October 13, 1966. The original Rules have been changed to the Commercial Arbitration Rules of the Korean Commercial Arbitration Board. Under the authorization and approval of the Korean Supreme Court, the Commercial Arbitration Rules of the KCAB were put into effect on April 3, 1973.

24) The Current Arbitration Act, Article 41.

The KCAB's Arbitration Rules have been changed to incorporate the sweeping revisions of the Arbitration Act that went into effect on December 31, 1999. The new Rules also reflect practical steps to enhance the fairness and transparency of every aspect of the arbitration process. The revised Arbitration Rules took effect on May 15, 2000 after approval by the Supreme Court on April 27, 2000. The revised Arbitration Rules are composed of 9 chapters, 65 articles, supplementary provisions and annexed table(schedule of fees). There are three key changes to the KCAB's Arbitration Rules as follows:²⁵⁾

First, the title of the Rules itself was changed from Commercial Arbitration Rules to just Arbitration Rules in order to correct a common misperception that the Rules only apply to trade. The changed title reflects the true scope of arbitration, which includes all aspects of industries.

Second, the changes to the Rules are designed to speed the arbitration process by stipulating an intensive hearing system and shortening the period for arbitral awards.

Third, there are provisions in the new Rules to ease the financial burden on small and medium enterprises by dramatically reducing the arbitration fee for cases involving the small amount of claims.

Under Article 4 of the Arbitration Rules, in cases where arbitrators are to be appointed by the Secretariat of KCAB, they shall be chosen from the Roster of Arbitrators in accordance with relevant provisions of these Rules.²⁶⁾ The total of 972 arbitrators are included on KCAB's Roster of Arbitrators as of June 1, 2006. This Roster of Arbitrators includes lawyers, scholars, business persons and other professionals, both Koreans and foreigners.²⁷⁾

Under the Arbitration Rules, the costs of arbitration comprise the fees, the expense and the allowances for arbitrators. The claimant shall first

25) The Korean Commercial Arbitration Board, *Arbitration Practice in Korea*, 2000, p.14.

26) The Arbitration Rules, Article 4.

27) The KCAB' Roster of Arbitrators, 1 June 2006.

deposit in advance to the Secretariat at the time of filing a claim the specified costs of arbitration along with a statement of claim for arbitration. Furthermore, because the costs of arbitration shall be borne by the parties in accordance with the apportionment fixed in the award, the claimant can be refunded all or part of the cost deposited.²⁸⁾

(2) The Draft of KCAB International Arbitration Rules

In line with its drive to enhance the provision of conflict resolution services anywhere in the world, the KCAB plans to enact the International Arbitration Rules, which will be available to disputing parties in addition to the KCAB's Arbitration Rules. Under the new formula, the KCAB will establish an International Arbitration Committee as an advisory organization on arbitration procedures.²⁹⁾

Inspired by the megatrend toward globalization, the KCAB's International Arbitration Rules are expected to become a new avenue for KCAB's goal of becoming a Northeast Asian arbitration hub.

The summarized draft of the KCAB International Arbitration Rules are as follows:

① Scope of application

Where the parties have agreed in writing to arbitrate disputes under the KCAB International Arbitration Rules, these Rules shall be deemed to form part of the arbitration agreement, and the arbitration shall take place in accordance with these Rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing.³⁰⁾

Where the parties have agreed in writing to arbitrate disputes under these Rules, these Rules shall apply.

28) The Arbitration Rules, Article 62 through Article 64.

29) KCAB, *Arbitration News from Korea*, September 2006, p.4.

30) The Draft of KCAB International Arbitration Rules, Article 3 para.1.

② Number of arbitrators

The disputes shall be decided by a sole arbitrator or three arbitrator. in the absence of agreement between the parties as to the number of arbitrators, a sole arbitrator shall be appointed. However, if either party, within thirty(30) days from the receipt of the Request for Arbitration by the other party, notifies the Secretariat of the Request that such number shall be three(3), the number of arbitrators shall be three (3) if the Secretariat, taking into consideration the size, complexity or other factors of the dispute, considers it appropriate and notifies the parties to that effect.³¹⁾

In principal, a sole arbitrator presides arbitral proceeding. However, the Secretariat, at the request of the parties, determines the number of arbitrators taking into account the complexity and relevant circumstances of the disputes.

③ Appointment of arbitrators

Where the dispute is to be referred to a sole arbitrator, the parties shall agree upon and appoint a sole arbitrator within 30 days of the receipt of the Request for Arbitration by the Respondent or the decision of the Secretariat that the number of arbitrators shall be one(1) as provided in article 11 above. If the parties fail to jointly appoint a sole arbitrator within that time frame or within such additional time as may be allowed by the Secretariat, the Secretariat shall appoint the sole arbitrator.

Where the dispute is to be referred to three(3) arbitrators, the Claimant shall appoint an arbitrator in its Request for Arbitration or within such additional time as may be allowed by the Secretariat, and the Respondent shall appoint an arbitrator in its answer or within such additional time as may be allowed by the Secretariat. if either party fails to appoint an arbitrator within that time limit, the Secretariat shall appoint such arbitrator. Upon appointment of the first two arbitrators, the two

31) The Draft of KCAB International Arbitration Rules, Article 11.

arbitrators shall agree upon the third arbitrator, who shall act as chairman of the Tribunal. If within 30 days of the appointment of the second arbitrator, the two arbitrators have not appointed a third arbitrator to act as chairman of the Tribunal, the Secretariat shall appoint such arbitrator.

In case where the Tribunal is to consist of three (3) arbitrators and there are multiple parties, whether as Claimant or as Respondent, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall appoint an arbitrator pursuant to Article 12.2. In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Secretariat may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman.³²⁾

The parties shall, by their agreement, appoint a sole arbitrator within 30 days of the receipt of the Request for Arbitrations. If failed, the Secretariat appoints one. Each party appoints an arbitrator and two arbitrators selected thereby appoint the third arbitrator. If the third arbitrator cannot be appointed within time, the Secretariat appoints one.

④ Challenge of arbitrators

When an arbitrator has been challenged by one party, the other party or parties may agree to the acceptance of the challenge and, if there is agreement, the arbitrator shall withdraw. The challenged arbitrator may also withdraw from office in the absence of such agreement. In neither case does withdrawal imply acceptance of the validity of the grounds for the challenge. If the other party does not agree to the challenge, or the challenged arbitrator does not withdraw, the Secretariat shall make a decision on the challenge.³³⁾

Decisions on the challenge of arbitrators shall be made by the Secretariat after consultation with the International Arbitration Committee.

32) The Draft of KCAB International Arbitration Rules, Article 12 paras. 1 through 3.

33) The Draft of KCAB International Arbitration Rules, Article 13 para. 5.

⑤ Replacement/removal of arbitrators

The Secretariat may remove any arbitrator who fails to perform his or he duties or unduly delays in the performance of his or her duties, or is legally or actually unable to perform his or her duties.³⁴⁾

The Secretariat may replace or remove any arbitrator who fails to or unduly perform his or her duties.

⑥ Pleas as to the jurisdiction of the Tribunal

The Tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.³⁵⁾

The Tribunal shall have the power to rule on the existence or validity of the arbitration agreement and the jurisdiction of the tribunal.

⑦ Notification/document submission

Until the Tribunal is constituted, all documents between parties or between each party and arbitrators shall be made through the Secretariat, thereafter, unless and until the Tribunal directs otherwise, all communications, written or verbal, shall take place directly between parties or between each party and the Tribunal(with simultaneous copies to the Secretariat, if written).³⁶⁾

Prior to the establishment of the tribunal, all pleadings and other written communications submitted by any party shall be sent to the Secretariat. Upon its establishment, the tribunal communicates directly with the parties enhancing the speedy proceedings.

⑧ Separability and autonomy of the arbitration agreement

The Tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is

34) The Draft of KCAB International Arbitration Rules, Article 14 para. 2.

35) The Draft of KCAB International Arbitration Rules, Article 19 para. 1.

36) The Draft of KCAB International Arbitration Rules, Article 4 para. 4.

null and void shall not for that reason alone render invalid the arbitration clauses.³⁷⁾

The nullity of the main contract does not in itself render the arbitration clause therein null or void.

⑨ Language of the arbitration

In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.³⁸⁾

⑩ Applicable law

The parties shall be free to agree upon the substantive law or rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall, apply the substantive laws or rules of law which it determines to be appropriate.³⁹⁾

In the absence of any agreement by the parties, the arbitral tribunal shall determine the governing law to be applied to the merits of the dispute.

⑪ Conservatory and interim measures

Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may at the request of a party order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the Arbitral Tribunal considers appropriate.⁴⁰⁾

It shall be made by the arbitral tribunal and take the form of an order for of an Award as the tribunal considers appropriate.

37) The Draft of KCAB International Arbitration Rules, Article 19 para. 2.

38) The Draft of KCAB International Arbitration Rules, Article 24.

39) The Draft of KCAB International Arbitration Rules, Article 25 para. 1.

40) The Draft of KCAB International Arbitration Rules, Article 28 para. 1.

⑫ Procedural timetable

After having consulted the parties, the Arbitral Tribunal shall establish in a separate document a provisional timetable that it intends to follow for the conduct of the arbitration and shall communicate it to the Secretariat and the parties within 30 days of the constitution of the Arbitral Tribunal.⁴¹⁾

Within 30 days of its constitution, the arbitral tribunal shall make a procedural timetable.

⑬ Time limit for the final award

Unless all parties agree otherwise, the Arbitral Tribunal shall make its award within forty-five(45) days from the date on which final submissions are made or the hearings are closed whichever comes later.⁴²⁾

It shall be made within 45 days from the date on which final submission are made or the hearings are closed whichever comes later.

⑭ Obligation to pay arbitration costs

The arbitration costs include filing fees, the administrative fees, the fees and expenses of the arbitrators and other expenses incurred during the arbitration proceedings in accordance with the "Regulations on Filing Fees and Administrative Fees" and "Regulations on Arbitrators Fees and Expenses." The parties shall be jointly and severally liable for payment of arbitration costs to the Secretariat.⁴³⁾

The parties shall be jointly and severally liable for payment of arbitration costs.

⑮ Advance to cover the costs of the arbitration

The Secretariat shall fix the amount of any advance for costs or supplementary advance for costs. the Secretariat shall request each party to deposit a certain amount as an advance for costs. the advance for costs shall be payable in equal shares by the Claimant and the Respondent

41) The Draft of KCAB International Arbitration Rules, Article 15 para. 1.

42) The Draft of KCAB International Arbitration Rules, Article 33 para. 1.

43) The Draft of KCAB International Arbitration Rules, Article 38 paras. 1 and 2.

unless parties agree otherwise. The payment shall be in cash.⁴⁴⁾

The parties shall deposit equally a sum of money fixed by Secretariat.

III. The Trend of Arbitration Practice

The KCAB is Korea's unique permanent arbitration organization and has offices in Seoul and Pusan. The KCAB administers international and domestic arbitrations as well as mediations.

The total arbitration and mediation applications received at the KCAB in 2005 numbered 709 and the amount involved those cases was US\$ 155 millions, up 8 % and down 17%, respectively, compared with the preceding year's 659 and US\$ 186 million.⁴⁵⁾

In 2005, arbitration applications received at KCAB recorded a historic high at 213 cases, an increase of 22% from 175 cases in 2000. Among these, international arbitration cases increased by 33% to 53 cases from 40 cases in 2000 as shown in Table 2. In 2005, the total amount involved in the arbitration cases decreases to US\$ 129 million, a decline of 63% from US\$ 346 million in 2000. Among these, the amount of the international arbitration cases decreased by 1% to US\$ 24 million from US\$ 25 million in 2000 as shown in Table 3.⁴⁶⁾

In 2005, an analysis of the status of domestic and international arbitration applications by cause shows that the number of cases related to payment settlement were 121 cases, interpretation of contract 35 cases, quality defect 22 cases, late shipment & delivery 22 cases, transportation 7 cases and unknown reason and others 6 cases. By field, the arbitration applications related to general commercial transactions were 69 cases, trade 54 cases, construction 54 cases, real estate 13 cases, maritime affairs 6

44) The Draft of KCAB International Arbitration Rules, Article 39 para. 2.

45) KCAB, *Arbitration News from Korea*, September 2006, p.5.

46) The Korean Commercial Arbitration Board, Arbitration statistics, 2005:
<http://www.kcab.or.kr>

cases, technology 5 cases, intellectual property right 4 cases, finance 3 cases, employment 2 cases and others 3 cases.⁴⁷⁾

Those related to general commercial transactions and real estate posted remarkable year-on year increases of 97% and 333% respectively. the applications associated with trade and construction stood at a level similar to the previous year, while technology and maritime affairs and intellectual property right-related applications decreased.

Among the total of 306 international claim cases, the United States led all countries at 40, followed by India with 28, China with 22 and Japan with 17.

In 2005, claims from Australia recorded the highest growth rate of 333% from three cases in preceding year. Next were Israel at 300% and Hong Kong at 120%. It is noteworthy that claims involving the U.S. and China, which ranked first and second in terms of growth a year earlier, declined 27%(15 cases) and 33%(11 cases), respectively, in 2005.

The claim cases received at the KCAB in 2005 involving less than US\$ 100,000 in amount were 557, accounting for 79% of the total. With five cases large-scale claims involving more than US\$ 5 million declined 100% from 10 in the previous year, and medium-size claims involving an amount more than US\$ 1 million but below US\$ 5 million increased 8% to 27 cases from 25.

Disputes related to commodity sales contracts, sales agent contracts, construction contracts and service contracts numbered 570 cases, accounting for 80% of the total claim. The largest growth was recorded in advertisement contracts and employment contracts, at 700 % each, followed by sales/agent contracts and service contracts.⁴⁸⁾

47) The Korean Commercial Arbitration Board, Arbitration Statistics, 2005:
<http://www.kcab.or.kr>

48) KCAB, *Arbitration News from Korea*, September 2006, p.5.

<Table 2> Number of Arbitration Cases Received(2000-2005)

(Unit : No. of Cases)

	2000	2001	2002	2003	2004	2005
Domestic	135	132	163	173	139	160
International	40	65	47	38	46	53
Total	175	197	210	211	185	213

Source: Korean Commercial Arbitration Board, Arbitration Statistics, 2005.

<Table 3> Amount of Arbitration Cases Received(2000-2005)

(Unit : US\$ thousand)

	2000	2001	2002	2003	2004	2005
Domestic	321,566	203,492	211,782	153,437	89,591	104,955
International	24,641	39,153	47,027	69,330	54,782	24,468
Total	346,207	242,645	258,809	222,767	144,373	129,423

Source: Korean Commercial Arbitration Board, Arbitration Statistics, 2005.

IV. The Activation Measures of Commercial Arbitration System

1. The Globalization of KCAB

East Asia has now grown to be one of the world's three major economic blocs along with North America and the European Union. This expansion in economic scale has naturally increased the number of disputes related to trade. However, the region also has unique characteristics in terms of types of disputes and settlement procedures due to inherent differences in

the various legal systems in asia-traditional continental law prevailing in Korea, China and Japan and British law & American law, adopted in Singapore, Hong Kong and India, etc.⁴⁹⁾

In line with the rapid growth of Korea's trade, the KCAB has to focus on globalization and internationalization. The cooperation among the arbitral institutions of Korea(KCAB), Japan(JCAA) and China(CITEC) is necessary to develop the international arbitration in the Asian region. In order to effectively work together, it seems desirable for this troika of countries to form a forum.⁵⁰⁾

The KCAB should make further efforts to induce foreigners to utilize the services of the KCAB without feeling any inconvenience in the course of its processing international arbitration cases through globalization of its dispute settlement system and enhancement of its employees' foreign language skills. Also the KCAB should faithfully accommodates and observes international rules, including the UNCITRAL Model Law, as well as globalizing all of its system and facilities, strengthening relations and expanding exchanges with international arbitral institutions.⁵¹⁾

2. The Advertisement of Arbitration System

Arbitration is faster and less expensive than litigation in the courts. Above all, it helps to ensure that the parties will not subsequently be entangled in a prolonged and costly series of appeals. Futhermore, arbitration offers the parties the flexibility to set up proceedings that can be conducted as quickly and economically as the circumstances allow.

Among the available dispute resolution alternatives to the court, arbitration is by far the most commonly used internationally. The reasons

49) KCAB, *Arbitrtion News from Korea*, September 2006, p.1.

50) Soonwoo Lee, "The Role of Arbitral Institutions for Asian International Arbitration", ICC/KCAB/KOCIA, *International Commercial Arbitration Conference Proceedings*, 26-27 October 2006, p.4.

51) KCAB, *Arbitration News from Korea*, March 2006, pp.1-2.

for this are clear: (1) final and binding decisions (2) International recognition of arbitral awards (3) Neutrality (4) Specialized competence of arbitrators (5) Speed and economy (6) Confidentiality.⁵²⁾

The arbitration system is not well known to the business circle and the public. So the advertisement of arbitration system is most serious and essential locally and internationally. The advertisement strategies of arbitration system could be divided in the following three steps. The first step is to propagate the existence of arbitration as an alternative dispute resolution. The second step is to popularize the merits of arbitration in comparison with litigation. The third step is to induce a change of venue for international arbitration from somewhere outside of Korea to the arbitral institution of Korea.⁵³⁾

3. The Security of Qualified Arbitrators

The arbitrator plays an integral part in any arbitral proceedings. Also an arbitral institution will be judged by the quality of arbitrators it maintains on its roll. If the KCAB is really serious about becoming a successful international arbitration center, should do its utmost to recruit into its pool of arbitrators distinguished jurists from diverse backgrounds and legal cultures. Specifically, the KCAB should attempt to invite legal scholars or practitioners of law from Japan, China, Hong Kong, Singapore and Australia.⁵⁴⁾

In order to secure well-qualified arbitrators, the KCAB will first have to make an effort to bring its arbitrator remuneration level to the one that is

52) ICC, *International Court of Arbitration*, April 2006, p.4

53) Soonwoo Lee, "The Role of Arbitral Institutions for Asian International Arbitration", ICC/KCAB/KOCIA, *International Commercial Arbitration Conference Proceedings*, 26-27 October 2006, p.4.

54) Chang-Sop Shin, "Korea's New Arbitration Act and Its Implications for International Commercial Arbitrations in Korea" ICC/KCAB/KOCIA, *International Commercial Arbitration Conference Proceedings*, 26-27 October 2006, p.11.

current in major international arbitral institutions around the world.

The arbitral institution should contribute to providing education and training for the arbitrators. Education and training is the critical element for enhancing the qualification of the arbitrator. Therefore, the KCAB and the KAA(Korean Association of Arbitrators) should prepare and provide the regular education and training program for potential and practicing arbitrators.

The education and training program for the arbitrators shall consist of the new arbitrator course and the existing arbitrator course. The new arbitrator course will last one day and consist of such syllabus as Introduction to Arbitration and ADR, Arbitration Law and Rules, and Power, Duty and Ethics of the Arbitrator. The existing arbitrator course will last seven days and consist of such syllabus as Introduction to Arbitration and ADR, Arbitration Law and Rules, Power, Duty and Ethics of the Arbitrators, Introduction to International Arbitration, and Mock Arbitration. The arbitrators who attend and pass the education and training courses shall be appointed as arbitrator for the arbitration cases received at the KCAB.

4. The Enhancement of the Secretariat Service

The arbitral institution should always maintain the well trained bilingual personnel of the Secretariat in supporting arbitral tribunals and serving the needs to the parties. At the request of the arbitral tribunal or the parties, the Secretariat should render the service for effective arbitral proceedings from accepting a request of arbitration through rendering the arbitral award, such as provision of a hearing room and related services including tape recordings, stenographic transcripts and interpretation and so on. Other services include the drafting of any procedural orders issued by the arbitral tribunal and the sending of notifications to the parties.⁵⁵⁾

In order to enhance the arbitration-related services by the Secretariat, the KCAB should transform the secretariat and fill it with the professional who are highly qualified both in terms of expertise in international arbitrations and in language skill. Also, the KCAB should make its efforts to provide the high quality services to the users of commercial arbitration.

55) Masaharu Onuki, "The Role of Arbitral Institutions for Asian International Arbitration-JCAA International Arbitration: Overview", ICC/KCAB/KOCIA, *International Commercial Arbitration Conference Proceedings, 26-27 October 2006*, p.3.

V. Conclusion

Korea's international trade volume has grown rapidly in recent years. In 2005, the trade volume was more than US\$ 500 billion, making Korea the world's 12th largest trading nation.

As international trade increases among the nations of the world, it is an inevitable fact that disputes rise as well. As these transactions grow more complex, it becomes increasingly important to resolve dispute and conflicts as quickly, efficiently and formatively as possible. With the rapid expansion of international trade, the need for arbitration will most likely increase as well.

It is high time that the KCAB should combine its experience with the nation's geopolitical advantages as a hub of Northeast Asia to provide multi-country conflict resolution services. Reflecting KCAB's client-oriented policy in global era, the drafting of the International Arbitration Rules also means that the KCAB will scrap its policy that the Korean language be used in arbitration proceedings unless otherwise agreed by the parties.

Korea has also become a place of arbitration for many disputes supervised by internationally renowned arbitral institutions such as the International Chamber of Commerce (ICC). Thus, arbitration has taken firm root as a major dispute resolution tool for international transactions in Korea.

In spite of the significant developments in Korean arbitration rules and practice, there had been constant criticism that the original Korean Arbitration Act was not sufficient to meet the needs of the rapidly developing domestic and international business community, which expects a prompt and reliable dispute resolution system based on international standards. It was necessary not only to promote international trade but also to promote the use of the Korean arbitration system to resolve

international business disputes involving Korean parties. Accommodating these needs and criticisms, the Korean government amended the Arbitration Act effective as of December 31, 1999. The amended Korean Arbitration Act has adopted the UNCITRAL Model Law in most parts, although it also includes a few provisions from the arbitration laws of other countries, such as Germany and Britain. Following adoption of the amended Arbitration Act, the KCAB amended its Arbitration Rules effective as of May 15, 2000.

The revised Arbitration Act specifies recognition and importance of international arbitration awards. Also the revised Arbitration Act was adopted as Korea's role in the international community has expanded significantly over the past 40 years.

The revised Arbitration Act also increases the efficiency of arbitration, extending the scope of what constitutes an arbitration agreement. Moreover, the revised Arbitration Act aims to speed up the arbitration process.

Also, in order to activate the international arbitration system, the Draft of KCAB international Arbitration Rules shall be effected as soon as possible.

The recent survey by the KCAB showed that the majority of disputing parties are satisfied with the timeliness of the KCAB's arbitration procedures, the fairness of its arbitration decisions and its secretariat. In addition, the survey respondents suggested that the KCAB devise ways to ensure the timeliness and fairness of the entire arbitration system. they also said that better guidance and facilities were needed to enable arbitration parties to utilize the KCAB more conveniently.⁵⁶⁾

Therefore, the KCAB should make efforts for the development of the arbitration system and for the upgrade of customer satisfaction. Moreover, the KCAB should make further efforts to grow into a global arbitration

56) KCAB, *Arbitration News from Korea*, September 2006, p.5.

institution that faithfully accommodates and observes international rules including the UNCITRAL Model Law, as well as globalizing all of the KCAB's system and facilities, strengthening relations with international arbitration institutions.

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ABSTRACT

The Development History and Activation Measures of Commercial Arbitration System in Korea

-With respect to 40 years of Korean Arbitration Law and Practice-

Lee, Kang Bin

The Arbitration Act of Korea was promulgated in 1966. Since the promulgation of Arbitration Act of Korea, consecutive amendments took place in 1973, 1993, 1997, 1999, 2001 and 2002. Among the various set of amendments, those of 1999 were designed to accommodate the UNCITRAL Model Law on international Commercial Arbitration of 1985.

Korea has acceded to special international conventions on dispute settlement such as the New York Convention of 1958 and the Washington Convention of 1965.

The Korean Commercial Arbitration Board(KCAB) administers the arbitration proceedings in accordance with its Arbitration Rules approved by the Korean Supreme Court. Since the establishment of the first Arbitration Rules in 1966. consecutive amendments took place in 1973, 1981, 1989, 1993, 1996, 2000 and 2004. The KCAB plans to enact the International Arbitration Rules, which will be available to disputing parties in addition to the KCAB Arbitration Rules.

In 2005, arbitration applications received at KCAB recorded a historic high at 213 cases, an increase of 22% from 175 cases in 2000. But in 2005, the total amount involved in the arbitration cases decreases to US\$ 129 million, a decline of 63% from US\$ 346 million in 2000.

The KCAB should take the following measures for activating the commercial arbitration system: the globalization of KCAB, the advertisement

of arbitration system, the security of qualified arbitrators, and the enhancement of the secretariat service.

In conclusion, the KCAB should make efforts for the development of the arbitration system and for the upgrade of customer satisfaction. Moreover the KCAB should make further efforts to grow into a global arbitration institution as well as strengthening relations with international arbitration institutions.

Key Words: Commercial arbitration system, Arbitration act, Arbitration rules, Arbitration practice, International arbitration convention, UNCITRAL model law, Draft of International Arbitration Rules