

The Main Issues in the International Arbitration Practice in Korea

한국의 국제상사중제에 대한 주요 논점

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I . Introduction

The establishment in Korea of institutional arbitration system in the context of contemporary sense begins when the Arbitration Act was promulgated and enforced on March 16, 1966(Act No. 1787), and with the inauguration on March 22 as the Korean Commercial Arbitration Committee of the Korean Chamber of Commerce and Industry of which was organized to exclusively deal with commercial disputes. In 1970, the Arbitration Committee became a full fledged arbitral institution with separate legal status, known as the Korean Commercial Arbitration Board (and may be referred to as the "KCAB"). KCAB provide various types of ADR services. KCAB is proud of international cooperation with arbitral organizations throughout the world and has signed arbitration agreements with many foreign arbitral bodies, including AAA and CIETAC, JCAA etc. KCAB shall establish and maintain the Secretariat to administer arbitration related matters. Matters concerning the organization, function and operation of the Secretariat shall be separately determined by KCAB.

Korea is contracting party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958("New York Convention"). Korea has also acceded to International Convention on the Settlement of Investment Dispute between States and Nationals of Other States of 1965. An arbitration is international if, the parties to an arbitration have, at the time of the conclusion of that agreement their places of business in different States ; or one of the following places is situated outside the State in which the parties have their places of business : the place of arbitration if determined in, or pursuant to, the arbitration agreement ; any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected.

Both international and domestic arbitration are governed by the Arbitration Act of Korea(Act No.6083).¹⁾ The Arbitration Act ("Act") has the effect of applying the New York Convention. Korea has adoption of the Model Law demonstrate support of the country for a fair and an efficiency arbitration law which was well accepted internationally, having been developed by the UNCITRAL through a process of international consensus.²⁾ The Act is aims to increase the international commercial arbitration and speed up the

1) Jeongil Suh, International Commercial Arbitration Law(May 2003), 65-66.

2) UNCITRAL web site at www.uncitral.org

arbitration proceedings.

Since the establishment of the Arbitration Rules("Rules") in 1966 consecutive amendments took place in several times. The KCAB has to obtain the approval of the Supreme Court to establish or amend its arbitration Rules³⁾. The Rules reflect practical steps to raise the fairness and transparency of every aspect of the arbitration procedure. The latest Rules shall be effective on and from September 1, 2011 as amended by the Supreme Court on June 29, 2011. Any arbitration, the proceedings of which are pending at the time the Rules become effective, shall be governed by the previously existing the Rules.

There are some key changes to the Rules as follows:

The title of the Rules itself was changed from the Commercial Arbitration Rules to the 'Arbitration Rules' in order to correct a common misperception that the Rules only to trade concerned. The changed title reflects the scope of arbitration, which includes the aspects of private transactions except the public. The changed to the Rules are designed to speed the arbitration process by stipulating an intensive hearing system and shortening the period for arbitral awards. Also there are provisions in the Rules to the financial burden on small and medium enterprises by dramatically reducing the arbitration fee for cases involving the small amount of claims.

In line with its drive to enhance the provision the conflict resolution services anywhere in the world, the KCAB enact the Rules of International Arbitration for KCAB("International Rules") is provided with the international standard which was enacted on February 1, 2007 as approved by the Supreme Court. It is now in a position to play the role of international arbitration for settlement of any type of disputes arising from international trade with third countries, not to speak of Asian areas. The latest International Rules shall be effective on and from September 1, 2011.

KCAB shall establish the International Arbitration Committee composed of the members of its own choice, and shall consult with the Committee as appropriate in making decisions with respect to the challenge of arbitrators and replacement, removal of arbitrators of International Rules.⁴⁾ The International Rules stipulate international arbitration procedures to expedite fair commercial arbitration under the arbitration agreement.

3) See Arbitration Act, Article 41.

4) International Rules, Article 1.3.

II . Developments in International Arbitration Law & Rules

1. Scope of Application

In article 2 of the Rules, it is provided “domestic arbitration means arbitration in which the parties have their principal offices or permanent residence in Korea, and international arbitration means all types arbitration other than domestic arbitration as defined above.” Accordingly, arbitration is referred to as international arbitration in Korea when both parties or a party has its principle office or permanent residence in countries other than Korea.⁵⁾

The definitions of terms used in the International Rules shall be as follows :

An arbitration is international if, the parties to an arbitration have, at the time of the conclusion of that agreement their places of business in different States ; or one of the following places is situated outside the State in which the parties have their places of business :

- a. the place of arbitration if determined in, or pursuant to, the arbitration agreement ;
- b. any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected.

Where the parties have agreed in writing to refer their disputes to an international arbitration under the International Rules, the Rules shall be deemed to form part of the arbitration agreement, and the arbitration shall take place in accordance with International Rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing. International Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.⁶⁾

5) Jeongil Suh, 40 Years of the Korean Arbitration Law and Practice : International Arbitration Practice in Korea, ICC/KCAB/KOCIA International Conference Session 7(Oct. 26-27, 2006), p.5.

6) International Rules, Article 3.

2. Competent Court

In matters governed by the Act, no court shall intervene except as provided in the Act.⁷⁾ Matters as prescribed in any articles shall fall under the jurisdiction of the district court or its branch("court") designated by an arbitration agreement or, failing such designation, under the jurisdiction of the competent court of the place of arbitration or, if the place of arbitration has not yet been determined, under the jurisdiction of the competent court of the respondent's habitual residence or place of business or, if none of those can be found, his place of abode or, if it cannot be found, his last known habitual residence or place of business⁸⁾ The court assistance in taking evidence shall fall under the jurisdiction of the competent court of a place where it is performed.

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises a plea that an arbitration agreement exists, dismiss the action, unless it finds that the agreement is null and void, inoperative or incapable of being performed.⁹⁾ The respondent shall raise a plea that an arbitration agreement exists not later than when submitting his first statement on the substance of the dispute. Where an action referred to raise a plea has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.¹⁰⁾

3. Constitution of Arbitral Tribunal

(1) Appointment of Arbitrators

An arbitration agreement may be in the form of a separate agreement or in the form of an arbitration clause in a contract. Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.¹¹⁾

An agreement shall be deemed to be an arbitration agreement in writing :

7) Arbitration Act, Article 6.

8) Arbitration Act, Article 7.1.

9) Arbitration Act, Article 9.1.

10) UNCITRAL Model Law, Article 8 Arbitration Act, Article 9.2.

11) UNCITRAL Model Law, Article 7.

- a. If it is contained in a document signed by the parties;
- b. If it is contained in an exchange of letters, telegrams, telexes or other means of telecommunication which provide a record of the agreement; or
- c. If 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.
- d. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the contract is in writing and the reference is such as to make that clause part of the contract Under the New York Convention, however, an agreement in writing is defined in a much more restricted manner. : An agreement in writing should be at least, “ an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained an exchange of letters or telegrams.”¹²⁾

An arbitral tribunal is organized, in principle, in accordance with the mutual agreement of the disputing parties. If all members of the arbitrator(s) have been appointed pursuant to the Rules, the Secretariat shall without delay notify in writing all members of the arbitrator(s) and both parties of the full name(s), address(es) and occupation(s) of the arbitrator(s). No person shall serve as an arbitrator if he/she has any legal or financial interest in the outcome of the arbitration, provided, however, that the parties can appoint such person as an arbitrator, by mutual agreement in writing, notwithstanding that person's knowledge of such facts.¹³⁾

Arbitrators acting under the Act and International Rules shall be impartial and independent.¹⁴⁾ Prior to accepting appointment, a prospective arbitrator shall disclose in writing to the secretariat any circumstance likely to give rise to justifiable doubts as to his impartiality or independence.¹⁵⁾

When a person is approached in connection with his possible appointment as an arbitrator or has already been appointed as such, he shall without delay disclose all circumstances likely to give rise to justifiable doubts as to his impartiality or independence.¹⁶⁾ An arbitrator may be challenged only if circumstances referred to justifiable doubts exist, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons

12) Youngjoon Mok, Commercial Arbitration (June 2011)66 78.New York Conventio, Article II(2).

13) Arbitration Rules, Article 19.

14) UNCITRAL Rules Article 6(4), AAA International Rule, Articl 6(4), LCIA Rules Article 6.

15) UNCITRAL Model Law, Article 12.1,International Arbitration Rule, Article 10.2.

16) Arbitration Act, Article 13.1.

of which he becomes aware after the appointment has been made.¹⁷⁾ Parties involved in arbitration proceedings are therefore well aware that neutrality of arbitration is closely scrutinized in case of suspicion.¹⁸⁾

The parties are free to agree on the number of arbitrators.¹⁹⁾ Failing such determination, the number of arbitrators shall be three.²⁰⁾

(2) Appointment of Arbitrators

No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.²¹⁾

The parties are free to agree on a procedure of appointing the arbitrator or arbitrators.²²⁾ KCAB International Rules has stipulated the number of arbitrators below :

The disputes shall be decided by a sole arbitrator or three arbitrators. 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 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, the number of arbitrators shall be three 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. ²³⁾

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 as provided in accordance with the number of arbitrators. 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.²⁴⁾

Where the dispute is to be referred to three 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

17) Arbitration Act, Article 13.2.

18) The Baker & McKenzie International Yearbook(2008), Wolters Kluwer, p.159.

19) UNCITRAL Model Law, Article 10.1, Arbitration Act, Article 11.

20) UNCITRAL Model Law, Article 10.2, Arbitration Act, Article 11.2.

21) UNCITRAL Model Law, Article 11.1.

22) Arbitration Act, Article 11.2.

23) International Rules, Article 11.

24) International Rules, Article 12.1.

an arbitrator within that time limit, the secretariat shall appoint such arbitrator.

Upon appointment of the first two arbitrators, the two 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.²⁵⁾

In cases where the tribunal is to consist of three 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 of the International Rules. 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 shall appoint each member of the arbitral tribunal and shall designate one of them to act as chairman.²⁶⁾

In appointing arbitrators, the secretariat shall consider the prospective arbitrator's experience, availability, nationality and residence. When one of the parties requests, the secretariat shall appoint, as the person to act as a sole arbitrator or the chairman of a tribunal a person whose nationality is different from the nationalities of each of the parties.²⁷⁾ If all members of the arbitrator(s) have been appointed pursuant to the International Rules, the secretariat shall without delay notify in writing all members of the arbitrator(s) and both parties of the full name(s), address(es) and occupation(s) of the arbitrator(s).²⁸⁾

III . Practical Problems in International Arbitration

1. Conduct of Arbitration

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. Notwithstanding above paragraph, the arbitral tribunal may, in

25) International Rules, Article 12.2.

26) International Rules, Article 12.3.

27) International Rules, Article 12.4.

28) International Rules, Article 12.5.

general following the submission of the answer, conduct a preparatory conference with the parties for the purpose of organizing and scheduling the subsequent proceedings.²⁹⁾

The arbitral tribunal may, in its discretion, allow or require the parties to present any written statements in addition to the request and the answer(counterclaim), and it shall fix the periods of time for submitting any such statements. The periods of time fixed by the arbitral tribunal for the communication of such written statements should not exceed 45 days. The party who presents the written statements in accordance with the additional periods of time shall provide the other party and the tribunal with such written statements accompanied by copies(or, if they are especially voluminous, lists) of all essential documents on which the party concerned relies and which have not previously been submitted by any party, and (where appropriate) by any relevant samples and exhibits.³⁰⁾ The parties shall be equally treated in the arbitral proceedings and each party shall be given a full opportunity of presenting his case.³¹⁾

Subject to the mandatory provisions of the Act, the parties are free to agree on the arbitral proceedings. Failing such agreement referred to arbitral proceedings, the arbitral tribunal may, subject to the provisions of the Act, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal shall include the power to determine the admissibility, relevance, materiality and weight of any evidence.³²⁾ The tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case. The tribunal may in its discretion bifurcate proceedings and direct the parties to focus their presentation on issues the decision of which could dispose of all or part of the case.³³⁾

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date when a request for that dispute to be referred to arbitration is received by the respondent. In the request for arbitration, the parties, the subject matter of the dispute and the contents of the arbitration agreement shall be contained.

The parties are free to agree on the place of arbitration.³⁴⁾ The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers

29) International Rules, Article 15.

30) International Rules, Article 16.

31) UNCITRAL Model Law, Article 18 Arbitration Act, Article 19.

32) Arbitration Act, Article 20.1.2.

33) International Rules, Article 20.3.

34) Arbitration Act, Article 21.

appropriate.³⁵⁾ The Arbitral Tribunal may deliberate at any location it considers appropriate.³⁶⁾ In the absence of an agreement by the parties, the place of the arbitration shall be Seoul, Korea, unless the Arbitral Tribunal determines in view of all the circumstances of the case that another place is more appropriate under the International Rules. The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine such language or languages, and otherwise the Korean language shall be used.³⁷⁾

The agreement or determination on the language in the arbitral proceedings apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.³⁸⁾ The arbitral tribunal may, if considered necessary, order a party to submit any documentary evidence, accompanied by a translation into the language or languages to be used in the arbitral proceedings.³⁹⁾

Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state his claim and the facts supporting it, and the respondent shall state his defense in respect of these particulars. The parties may submit with their statements of claim or defense all documents they consider to be relevant or may add a reference to other evidence they will submit.⁴⁰⁾ During the arbitral proceedings, any party may amend or supplement its claim, counterclaim or defense and notify thereof to the other party and the secretariat, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties or any other circumstances. A party may not amend or supplement a claim or counterclaim if the amendment or supplement would fall outside the scope of the agreement to arbitrate.⁴¹⁾

Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be only conducted on the basis of documents or other materials. Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.⁴²⁾ The parties shall be given sufficient advance

35) Arbitration Rules, Article 14.2.

36) Arbitration Rules, Article 14.3, Arbitration Act, Article 20.2.

37) Arbitration Act, Article 23.1.

38) Arbitration Act, Article 23.

39) Arbitration Act, Article 23.

40) UNCITRAL Model Law, Article 23(a) Arbitration Act, Article 24.1.

41) UNCITRAL Model Law, Article 23(b) Arbitration Act, Article 24.3.

42) UNCITRAL Model Law, Article 24.1 Arbitration Act, Article 25.1.

notice of any oral hearing and of any meeting of the arbitral tribunal for the purpose of taking evidence.⁴³⁾ All statements, documents or other information supplied to the arbitral tribunal by a party shall be communicated to the other party.⁴⁴⁾

If, within the period of time fixed by the arbitral tribunal, the respondent has failed to file an answer without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.⁴⁵⁾ If any of the parties, although duly summoned, fails to appear without valid excuse, the Arbitral Tribunal shall have the power to proceed with the hearing.⁴⁶⁾ If any of the parties, although duly invited to produce documentary evidence, fails to do so within the established period of time, without valid excuse, the arbitral tribunal may make the Award on the evidence before it.⁴⁷⁾

The arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by it, unless otherwise agreed by the parties.⁴⁸⁾ For this purpose, 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.⁴⁹⁾ If a party so requests or if the arbitral tribunal considers it necessary, the expert shall participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.⁵⁰⁾ A copy of the expert's terms of reference, established by the tribunal, shall be communicated to the parties. The tribunal may require a party to give the expert any relevant information or to provide access to any relevant documents, goods or other property for his inspection.⁵¹⁾ Upon receipt of the expert's report, the tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to comment on the report. A party may examine any document on which the expert has relied in preparing such a report.⁵²⁾

2. Court Assistance in Taking Evidence

43) UNCITRAL Model Law, Article 24.2 Arbitration Act, Article 25.2.

44) UNCITRAL Model Law, Article 24.3, Arbitration Act, Article 25.3.

45) UNCITRAL Model Law, Article 25(a), Arbitration Act, Article 26.

46) UNCITRAL Model Law, Article 25(b), Arbitration Act, Article 26.2.

47) UNCITRAL Model Law, Article 25(c), Arbitration Act, Article 26.3.

48) ICC Rule, Article 2(4), AAA International Rule, Article 22, LCIA Rules, Article 21.

49) UNCITRAL Model Law, Article 26.1, Arbitration Act, Article 27.1.

50) UNCITRAL Model Law, Article 26.2, Arbitration Act, Article 27.2.

51) International Rules, Article 23(1),(2).

52) International Rules, Article 23(3).

The arbitral tribunal may, either on its own initiative or upon the request of a party, request from a competent court assistance in taking evidence.⁵³⁾ When requesting the court assistance, the arbitral tribunal may, in writing, specify the matters to be recorded in the protocol of the court and other particulars necessary for investigation.⁵⁴⁾ The court shall, without delay after taking evidence, send the records on taking evidence such as a certified copy of protocol for examination of witness or inspection of property to the arbitral tribunal.⁵⁵⁾ The arbitral tribunal shall pay necessary expenses for taking evidence to the competent court.⁵⁶⁾

3. Expedited Procedure

(1) 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 200,000,000 Korean won; or
2. where the parties agree to be subject to the Expedited Procedures.

Time Limits to Counterclaims, and Increases to Claim and Counterclaim Amounts

In the event that the amount of a counterclaim exceeds 200,000,000 Korean won, the Respondent shall be allowed to file such a counterclaim only within the time limit. In such cases, the arbitration proceeding shall not be administered pursuant to the Expedited Procedures, unless the parties agree otherwise. 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 200,000,000 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.

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. The hearing, if any, shall be held only once, provided; however, where the Arbitral Tribunal deems necessary, it may hold subsequent

53) UNCITRAL Model Law, Article 27, Arbitration Act, Article 28.1.

54) Arbitration Act, Article 28.2.

55) Arbitration Act, Article 28.3.

56) Arbitration Act, Article 28.4.

hearings, or require further submission of documents after the hearing.

The Award shall be made within three (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. The Arbitral Tribunal shall state the reasons upon which the Award is based in summary form, unless agreed otherwise by the parties

(2) Appointment of Arbitrator

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. 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 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. 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.³ Documentary Proceedings. Unless agreed otherwise between the parties, where neither party's claim exceeds 20,000,000 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. The Arbitral Tribunal shall establish appropriate procedures for the fixing of time periods and methods for written submissions.

4. Grounds for Challenge Procedure

When a person is approached in connection with his possible appointment as an arbitrator or has already been appointed as such, he shall without delay disclose all circumstances likely to give rise to justifiable doubts as to his impartiality or independence.⁵⁷⁾ An arbitrator may be challenged only if circumstances referred to grounds for challenge exist, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.⁵⁸⁾ A challenge of

⁵⁷⁾ UNCITRAL Model Law, Article 12.1 Arbitration Act, Article 13.1.

an arbitrator, whether for an alleged lack of independence, impartiality or otherwise, shall be made by the submission to the secretariat of a written statement specifying the facts and circumstances on which the challenge is based. Such statement shall be copied to all of the parties to the arbitration, and to any arbitrators in the case.⁵⁹⁾ For a challenge to be considered, it must be sent by a party either within fifteen days from receipt by that party of notice of appointment of the arbitrator, or within fifteen days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based.⁶⁰⁾

The arbitrator concerned, the other party or parties and any other members of the arbitral tribunal may comment on the challenge, in writing, within fifteen days of their receipt of the challenge. Such comments shall be communicated to the secretariat, each of the parties and the arbitrators.⁶¹⁾ 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 an 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.⁶²⁾

The parties are free to agree on a procedure for challenging an arbitrator.⁶³⁾

Failing such agreement referred to procedure for challenging an arbitrator, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to grounds for challenge under the Act, send a written statement of the reason for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.⁶⁴⁾ If a challenge under the procedure for challenging an arbitrator is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court to decide on the challenge. While

58) UNCITRAL Model Law, Article 12.2, Arbitration Act, Article 13.2.

59) International Rule, Article 13.2.

60) International Rule, Article 13.3.

61) International Rule, Article 13.4.

62) International Rules, Article 13.5.

63) UNCITRAL Model Law, Article 13.1, Arbitration Act, Article 14.2.

64) UNCITRAL Model Law, Article 13.2, Arbitration Act, Article 14.2.

such a request is pending in court, the arbitral tribunal may continue the arbitral proceedings or make an award.⁶⁵⁾ A decision of the court on a procedure for challenging an arbitrator shall be subject to no appeal.⁶⁶⁾

5. Arbitral Tribunal on its Jurisdiction

It is generally accepted that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.⁶⁷⁾ For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.⁶⁸⁾

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense on the substance of the dispute. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator.⁶⁹⁾ A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.⁷⁰⁾ The arbitral tribunal may rule a plea either as a preliminary question or in an arbitral award on the merits.⁷¹⁾ If the arbitral tribunal rules as a preliminary question that it has jurisdiction pursuant to rules, any party who is dissatisfied with that ruling may request, within thirty days after having received notice thereof, the court to decide on the jurisdiction of the arbitral tribunal.⁷²⁾ While the ruling may request is pending in court, the arbitral tribunal may continue the arbitral proceedings or make an arbitral award.⁷³⁾ A decision of the court shall be subject to no appeal.⁷⁴⁾

Unless otherwise agreed by the parties, the arbitral tribunal may, at a request of a party, decide on such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may determine

65) UNCITRAL Model Law, Article 13.3, Arbitration Act, Article 14.3.

66) Arbitration Act, Article 14.4.

67) ICC Rule, Article 6(2),(4), AAA International Rules, Article 15. Arbitration Act, Article 17(1).

68) UNCITRAL Model Law, Article 16.1, Arbitration Act, Article 17.1.

69) UNCITRAL Model Law, Article 16.2, Arbitration Act, Article 17.2.

70) UNCITRAL Model Law, Article 16.2, Arbitration Act, Article 17.3.

71) UNCITRAL Model Law, Article 16.3, Arbitration Act, Article 17.5.

72) UNCITRAL Model Law, Article 16.3, Arbitration Act, Article 17.6.

73) UNCITRAL Model Law, Article 16.3, Arbitration Act, Article 17.

74) Arbitration Act, Article 17.

an amount of security to be provided by the respondent in lieu of such measure. The arbitral tribunal may require the party requesting the interim measure to provide appropriate security.⁷⁵⁾ Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures.

The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.⁷⁶⁾ Any such application and any measures taken by the judicial authority must be notified without delay to the secretariat. The secretariat shall inform the arbitral tribunal thereof.⁷⁷⁾

IV. Main Issues of International Arbitration Proceedings

1. Applicable Law

The parties cannot make a choice of the law applicable to capacity. The parties generally need not make an express choice in relation either to the law governing the validity of the arbitration agreement or the law governing the procedure of the arbitration itself. The proper law of the arbitration agreement is generally that of the contract of which it is a part, and the law governing the conduct of the arbitration is that of the place of seat of arbitration.⁷⁸⁾ Its leading institutional arbitration rules provide little guidance in selecting the law applicable law expressly directed at the law governing the merits of the parties' disputes.⁷⁹⁾ The arbitral tribunal may, after consultation with the parties conduct hearings and meetings, deliberate at any location it considers appropriate.

The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as

75) Arbitration Act, Article 18.

76) UNCITRAL Rules, Article 26(3), ICC Rules, Article 23(2), AAA International Rule Article 21(3).

77) International Rules, Article 28.

78) The Freshfields Guide to arbitration and ADR(revised edition,1999), Wolters Kluwer, p.12.

79) Jeongil Suh, *ibi.*, p.4

directly referring to the substantive law of the nation and not to its International Private Act.⁸⁰⁾ Failing the designation referred to the substantive law of dispute, the arbitral tribunal shall apply the law of the State with which the subject matter of the dispute is most closely connected.⁸¹⁾

The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.⁸²⁾ The arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.⁸³⁾

Unless otherwise agreed by the parties, in arbitral proceedings with not less than three arbitrators, any decision of the arbitral tribunal shall be made by a majority of all its members. However, questions of procedure may be solely decided by a presiding arbitrator, if so agreed by the parties or if so authorized by all members of the arbitral tribunal.⁸⁴⁾ If, during the arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate such proceedings. The arbitral tribunal may, if requested by the parties, record the settlement in the form of an arbitral award on agreed terms.⁸⁵⁾ An award on agreed terms of the settlement shall be made in accordance with the provisions of form and contents of award and shall state that it is an award.⁸⁶⁾ Its award shall have the same effect as any other award on the merits of the case.⁸⁷⁾

The award shall be made in writing and shall be signed by all arbitrators. However, if, in arbitral proceedings with not less than three arbitrators, there exist circumstances where less than half members of the arbitral tribunal cannot sign, other arbitrator may, instead of them, sign with reason therefore.⁸⁸⁾ The award shall state the reasons upon which it is based, unless the parties have agreed that no reason are to be given or the award is an award on agreed terms in accordance with form and effect of the award.⁸⁹⁾

The award shall state its date and place of arbitration. The award shall be deemed to have been made on that date and at that place.⁹⁰⁾ The duly authenticated award made and

80) UNCITRAL Model Law, Article 28.1, Arbitration Act, Article 29.1

81) UNCITRAL Model Law, Article 28.2, Arbitration Act, Article 29.2

82) UNCITRAL Model Law, Article 28.3, Arbitration Act, Article 29.3.

83) UNCITRAL Model Law, Article 28.4 Arbitration Act, Article 29.4.

84) UNCITRAL Model Law, Article 29, Arbitration Act, Article 30 International Rule, Article 32 ICC Rules, Article 25(1), LCIA Rules, Article 26(3).

85) UNCITRAL Model Law, Article 30.1, Arbitration Act, Article 31.1.

86) UNCITRAL Model Law, Article 30.2, Arbitration Act, Article 31.2.

87) UNCITRAL Model Law, Article 30.2, Arbitration Act, Article 31.3.

88) Arbitration Act, Article 32.1.

89) Arbitration Act, Article 32.2.

signed shall be delivered to each party, and the original award shall be sent to and deposited with the competent court, accompanied by a document verifying such delivery.⁹¹⁾ The arbitral award shall have the same effect on the parties as the final and conclusive judgment of the court.⁹²⁾

2. Application for Setting Aside Award to Court

Recourse against an arbitral award may be made only by an application for setting aside to a court.⁹³⁾

An arbitration award may be set aside by the court only if⁹⁴⁾ :

a. The party making the application furnishes proof that:

- (a) a party to the arbitration agreement was under some incapacity under the law applicable to him; or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the Republic of Korea⁹⁵⁾ ; or
- (b) a party making the application was not given proper notice of the appointment of the arbitrator or arbitrators or of the arbitral proceedings or was otherwise unable to present his case⁹⁶⁾ ; or
- (c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside⁹⁷⁾ ; or
- (d) the composition of the arbitral tribunal or the arbitral procedure were not in accordance with the agreement of the parties, unless such agreement was in conflict with any provision of this Act from which the parties cannot derogate or, failing such agreement, were not in accordance with this Act⁹⁸⁾ ; or

b. The court finds on its own initiative that:

90) Arbitration Act, Article 32.3.

91) Arbitration Act, Article 32.4.

92) Arbitration Act, Article 35.

93) UNCITRAL Model Law, Article 34.1, Arbitration Act, Article 36.1.

94) UNCITRAL Model Law, Article 34.2, Arbitration Act, Article 36.2.

95) UNCITRAL Model Law, Article 36.1(a)(1).

96) UNCITRAL Model Law, Article 34.1(a)(2).

97) UNCITRAL Model Law, Article 34.1(a)(3).

98) UNCITRAL Model Law, Article 34.1(a)(4).

- (a) the subject matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Korea⁹⁹⁾ ; or
- (b) the recognition and enforcement of the award is in conflict with the good morals or other public policy of the Republic of Korea. ¹⁰⁰⁾
- c. 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.¹⁰¹⁾
- d. An application for setting aside the award may not be made after the judgment for recognition or enforcement of the award rendered by a court of Korea becomes final and conclusive.¹⁰²⁾

3. Recognition and Enforcement of Arbitral Award

Enforcement of an arbitral award shall be granted by the judgment of a court.¹⁰³⁾

The party applying for the recognition or enforcement of an award shall submit the following documents. If the award or the arbitration agreement is not made in the Korean language, a duly certified translation thereof into the Korean language shall be accompanied.¹⁰⁴⁾ :

- a. The duly authenticated award or a duly certified copy thereof; and
- b. The original arbitration agreement or a duly certified copy thereof.

99) UNCITRAL Model Law, Article 34.1(b)(1).

100) UNCITRAL Model Law, Article 34.1(b)(2).

101) UNCITRAL Model Law, Articles 34.3, 36.2, Arbitration Act, Article 36.3.

102) Arbitration Act, Article 36.4.

103) UNCITRAL Model Law, Article 35.1, Arbitration Act, Article 37.1.

104) UNCITRAL Model Law, Article 35.2, Arbitration Act, Article 37.2.

V. Considerations for International Arbitration System

The parties shall be free to agree upon the substantive laws 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. In all cases the arbitral tribunal shall take account of the provisions of the contract and the relevant trade usages. The arbitral tribunal shall assume the powers of an amiable compositeur or decide *ex aequo et bono* only if the parties have agreed to give it such powers.

In general, leading institutional arbitration rules provide little guidance in selecting the law applicable to their arbitration agreement. Indeed, provisions of institutional rules dealing with applicable law are expressly directed at the law governing the merits of the disputes. A general overview of the role of international arbitration institutions and arbitrators should consider the aspect of arbitral circumstances. The need for quality is a dominant factor in international arbitration. The expertise and experience are often a precondition of the arbitral tribunal.

With respect to the law to be applied to the substance of a dispute, the Act follows the UNCITRAL Model Law by providing that the arbitral tribunal shall decide the dispute under the substantive law chosen by the parties, and that the parties' choice of law shall be construed as referring to the substantive law and not to conflict of law rules, unless otherwise stated in the parties' agreement. The Act takes a different approach from that of the UNCITRAL Model Law when the parties have not agreed on the applicable substantive law. The UNCITRAL Model Law provides that the arbitral tribunal shall apply the choice of law rules that it considers to be most appropriate to determine the governing substantive law. In contrast, the Act states that the arbitral tribunal shall apply the law of the country with the closest nexus with the subject matter of the dispute. Additionally, the Act states that the arbitral tribunal should decide according to the terms of the contract and take into account the usages of the trade applicable to the transaction.

As to the effect of arbitral award, it is provided in the effect of arbitral award of the Act that its award shall have the same effect on the parties as the final and conclusive judgment of the court. To pursue the recognition and enforcement of foreign arbitral awards in Korea, it is necessary for the party involved to file a lawsuit. Korean courts do not consider any domestic reason or policy as a basis to reject enforcement other than

those stipulated in the New York Convention.

Korean courts have shown in most cases a friendly and progressive attitude toward the enforcement of foreign arbitral awards. As noted above, the Act eliminates some of the grounds for challenge that have been the source of controversy in the past, such as the requirement that the award adjudicate every material point, and that the award not be based on false evidence.

In principle, the Korean Code of Civil Procedure does not apply to arbitrations conducted under the Act. However, when a Korean court is involved in ancillary proceedings related to an arbitration system under the Act, such as enforcement of an arbitral award or taking evidence in response to a request from an arbitral tribunal, then the Korean court will follow the Korean Code of Civil Procedure. Moreover, although the Korean Code of Civil Procedure does not apply to the arbitration proceeding itself, as a matter of practice, many arbitrators with Korean legal training tend to use Korean court procedures in arbitrations conducted in Korea. This is significant because Korean litigation procedure differs from that of common law countries.

The primary sources of law for arbitration in Korea are the Act and treaties ratified by Korea, such as the New York Convention. As the territorial approach of the UNCITRAL Model Law, the Act states that it applies to any arbitration where the place of arbitration is in the territory of Korea. The Act also applies even when the place of arbitration is not Korea with respect to the following provisions: recognition and enforcement of arbitral award; the court's authority to dismiss a lawsuit that is the subject of a valid arbitration agreement; and the court's authority to grant interim.

Korean courts do not consider any domestic reason or policy as a basis to reject enforcement other than those stipulated in the New York Convention. At the time of revising its Arbitration Act in 1999, in particular, Korea made its measure for the recognition and enforcement of foreign arbitral awards all the more clear by specifying them to coincide with the New York Convention.

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국문요약

한국의 국제상사중제에 대한 주요 논점

법학박사 서정일

국제상사중제를 다루는 중재판정부의 중재인은 당사자들 간의 유효한 합의를 통하여 구속력 있는 중재판정을 행사할 권한을 가진다. 중재계약에 다른 정함이 없는 한 중재인의 판정권에 대한 결정은 중재인 자신이 내린다. 중재인은 중재합의에 의하여 그 권한이 부여된 사건에 대해서만 권한을 갖게 되나, 명시적으로 그 권한에 따라야 하는 사건 외에 당해 사건을 해결하기 위하여 처리하지 않으면 안 될 모든 문제, 즉 당해 사건과 절단될 수 없는 형태로 연계되어 있는 문제 또는 그 부차적인 조건의 문제를 해결하여야 하는 책임을 지게 된다.

중재판정부는 그 자율적인 권한범위를 규율하는 권한을 가지며, 그 권한 속에는 중재합의의 존부 또는 효력에 관한 것도 포함된다. 중재인의 판정권에 이의가 있는 당사자는 법원에 중재계약의 부존재·무효 확인을 청구할 수 있고, 중재판정이 이미 내려진 경우에는 중재판정취소의 소를 제기하거나, 집행판결에서 이의를 제기할 수 있다. 우리 중재법의 입장에서 국제중재판정의 판정기준에 대해서는 중재판정부는 당사자들이 지정한 법에 따라 중재판정을 내려야 하며, 특정 국가의 법 또는 법체계가 지정된 경우에 달리 명시되지 아니하는 한 그 국가의 국제사법이 아닌 분쟁의 실체법을 지정한 것으로 보고 있다. 국제중재의 법적 안정성, 예측가능성의 관점에서 실정법을 그 판단의 기준으로 삼는다.

한국의 국제중재의 특성은 국제성, 중립성, 보편성을 보장받는 점이다. 중재인 구성원은 세계 각국의 국적을 가진 전문 중재인들이 참가하고 있다. 중재절차에 있어서도 중재인은 실체법이나 절차법, 또는 법률의 상충에 관계없이 어느 특정법률을 적용하도록 강요받지 않고 각각의 경우에 가장 적합한 법률에 따르며 중재판정부의 진행절차는 국제중재규칙에 의해 규율된다.

주제어 : 중재합의, 국제중재규칙, 중재인 중재판정부, 중재판정집행, 관할법원