12th
Edition

2018-2019

The
Baker McKenzie
International
Arbitration Yearbook

South Korea

South Korea

Robert Wachter,[1] Michele Sonen[2] and Hyunyang Koo[3]

A. Legislation and rules

A.1 Legislation

South Korea has adopted a pro-arbitration legal framework that governs both domestic and international proceedings. International arbitration continues to be governed by the Korean Arbitration Act, which is based on the UNCITRAL Model Law. In 2016, the Korean legislature enacted long-awaited amendments to the Korean Arbitration Act and adopted many of the 2006 Amendments to the UNCITRAL Model Law. The revised Act has been well-received in the arbitration community, and the legislature has not enacted any additional amendments since then.

The Arbitration Industry Promotion Act is another important legislation for international arbitration in Korea. Through the Arbitration Industry Promotion Act, the Korean legislature has mandated governmental support for efforts to make Korea an attractive arbitral seat, to cultivate experts and arbitration professionals, and to further develop the arbitration industry in Korea. There have been no legislative amendments since the law came into force in 2017.

A.2 Institutions, rules and infrastructure

The international arbitration industry is continuing to expand in Korea. In recent years, various stakeholders have undertaken initiatives to ensure that Korea is arbitration-friendly. The recent

[1] Robert Wachter is a partner and co-head of the International Dispute Resolution Practice Group at Lee & Ko, in Seoul, Korea.
[2] Michele Sonen is an associate in Lee & Ko's International Dispute Resolution Practice Group.
[3] Hyunyang Koo is an associate in Lee & Ko's International Dispute Resolution Practice Group.

revision to the Korean Arbitration Act and the enactment of the Arbitration Industry Promotion Act are two examples of legislative initiatives.

At the institutional level, Korea's only arbitral institution, the Korean Commercial Arbitration Board ("KCAB"), underwent significant developments in 2018 in an effort to better serve the unique needs of international arbitration users. Most notably, in April 2018, the KCAB launched "KCAB International," an independent division to administer international arbitrations. Its launch was intended to meet growing demand in Korea and worldwide for efficient resolution of cross-border disputes, and to promote Seoul as a seat of international arbitration. KCAB International is chaired by Professor Hi-Taek Shin, a former law professor from the prestigious Seoul National University School of Law and a well-known arbitrator in Korea. The new division will be run by its newly appointed Secretary-General, Ms. Sue Hyun Lim, an experienced arbitration practitioner in Korea and former partner at the Bae, Kim & Lee law firm. Arbitrations administered by KCAB International will be governed by the KCAB's International Arbitration Rules.

In November 2018, during the annual Seoul ADR Festival, KCAB International launched one of its first initiatives, "KCAB: Next," a professional development group aimed at the rising generation of arbitrators and practitioners. KCAB Next intends to provide a platform and support network for current practitioners and arbitrators, as well as attorneys and students aspiring to break into the field. Members will have access to training events and opportunities to increase their visibility in the arbitration community. KCAB Next is co-chaired by Robert Wachter from the Lee & Ko law firm (and a co-author of this chapter), and David MacArthur, from the Bae, Kim & Lee law firm.

In addition to broadening its services, the KCAB expanded its hearing room facilities and consolidated with the Seoul International Dispute Resolution Center ("SIDRC"). The SIDRC was established in 2013 as

a venue to provide facilities and services for international dispute resolution in Korea. In 2018, the SIDRC re-located to the offices of the KCAB, and both institutions now share hearing room facilities. The venue covers a total space of 1,911 square meters and includes five hearing rooms of various sizes. The newly re-located SIDRC continues to house the Korea offices of the ICC, HKIAC, and SIAC.

B. Cases

A significant number of disputes in Korea involve international transactions between Korean companies and foreign companies. In 2018, many of these disputes involved contract parties challenging the existence and scope arbitration agreements in the Korean courts. The Korean courts maintained their arbitration-friendly approach and rendered decisions that are consistent with international practice. Discussed below are two notable decisions that attracted the attention of international arbitration practitioners in Korea.

B.1 Insolvency is not a basis for a counterparty to terminate an arbitration agreement

In April 2018, the Seoul High Court issued a decision rejecting a party's attempt to terminate an arbitration agreement against a counterparty that had become insolvent based on an impossibility of performance legal theory.[4] The party seeking to terminate the arbitration agreement argued that it was impossible for the insolvent party to perform its obligation to arbitrate because it was unlikely to pay its share of the arbitration fees.

The litigation arose out of a payment dispute between a Turkish company and a Korean shipping company. The Korean shipping company had become insolvent, which forced the Turkish company to demand payment from the company's administrator. Although the underlying contract between the Turkish company and the Korean shipping company included an arbitration clause, the Turkish

[4] Seoul High Court Decision No. 2018Na24 dated 27 April 2018.

company attempted to assert its payment claim in the Korean courts because it had reason to believe that the administrator would not pay its fees. The Korean shipping company had recently been involved in another dispute in which the administrator had objected to Korean court proceedings based on the arbitration agreement, but then later failed to pay the arbitration fees once the dispute was referred to arbitration. In that case, as a result of the non-payment, the arbitration proceedings had been suspended. The Turkish company hoped to avoid a similar result. It, therefore, argued to the Seoul High Court that its arbitration agreement with the Korean shipping company had become impossible to perform given that the Korean shipping company would fail to pay the arbitration costs.

The Seoul High Court rejected this argument on several grounds. First, as a matter of Korean contract law, insolvency generally is not a ground for concluding that a contract has become impossible to perform. Second, Korean courts excuse performance of arbitration agreements based on impossibility only in exceptional cases. For example, the Korean courts have held that an arbitration agreement was no longer capable of being performed when the arbitrator refused to perform its work,[5] or when parties had designated an arbitral institution in their arbitration agreement that no longer administered arbitrations.[6] Third, the court noted the absence of any international consensus on whether a party's insolvency causes performance of an arbitration agreement to become impossible. Finally, the Seoul High Court pointed out that, under the arbitration rules designated by the parties – the KCAB International Arbitration Rules – one party's failure to pay its share of the arbitration fees does not necessarily suspend the proceedings. The other party may pay the full costs of the arbitration and request that the tribunal issue an award requiring the non-paying party to reimburse the other party. In addition, the arbitration can proceed even if the other party refuses to participate in the proceedings. The court, therefore, held that even if the insolvent

[5] Korean Supreme Court Decision No. 96Da280 dated 12 April 1996.
[6] Seoul High Court Decision No. 80Na535 dated 26 June 1980.

administrator fails to pay for the arbitration fees or refuses to participate with the arbitration proceedings, the dispute could still be resolved through arbitration. As a result, performance of the arbitration agreement was not impossible.

This case establishes that Korean courts generally will not treat insolvency as a valid ground to terminate an arbitration agreement. However, the Seoul High Court also left open the possibility that it might carve out an exception when the amount of a non-paying party's share of the arbitration costs is so high that it would be overly burdensome for its counterparty assume those costs. This possible exception caught the interest of local practitioners, as it could permit forum shopping despite the existence of an arbitration agreement. It remains to be seen what factors Korean courts will consider in determining whether arbitration costs are sufficiently high to justify affording parties the extreme remedy of terminating an arbitration agreement.

B.2 Korean courts' broad interpretation of arbitration agreements

The second noteworthy decision presented the issue of how broadly Korean courts interpret arbitration agreements.[7] The case arose out a Korean company's attempt to litigate its tort claim against an American company despite the existence of an arbitration agreement between the two parties. The Seoul High Court rejected the Korean company's position that the tort claim fell outside the parties' arbitration agreement, and broadly interpreted the arbitration agreement as applying to any dispute that was closely connected to performance of the underlying contract.

The two companies were parties to a distributorship agreement through which the American company had agreed to supply freezers and cooling towers to the Korean company, and the Korean company had agreed to sell the products in the Korean market as the American

[7] Seoul High Court Decision No. 2017Na2028588 dated 16 January 2018.

company's distributor. The distributorship agreement contained an arbitration agreement referring "any disputes which cannot be resolved amicably by the parties" to arbitration.

During the term of the distribution agreement, one of the executive directors of the Korean company established a new company that would conduct the same business as the Korean company and then resigned from the Korean company. Soon after, the American company terminated its distributorship agreement with the Korean company and entered into a new agreement appointing the former executive director's new company as its sole distributor in Korea.

The Korean company brought actions in the Korean courts against both its former director and the American company. The Korean company asserted that its former director had violated the Korean Criminal Act by committing an occupational breach of duty, and had violated the Korean Prevention of Unfair Competition Act by engaging in an unlawful competitive transaction, an infringement of trade secrets and unlawful competition. Against the American company, the Korean company asserted a tort claim for participating in the executive director's tortious and criminal acts and sought monetary damages.

The American company objected to the court action and sought to compel arbitration based on the arbitration agreement. In response, the Korean company argued that, because its claim was a tort claim, not a contractual claim, the claim fell outside the scope of the arbitration agreement. It argued that the parties had agreed to arbitrate only contractual claims.

The Seoul High Court disagreed. It relied on a Korean Supreme Court decision in which the court had held that under article 3.2 of the Korean Arbitration Act,[8] if an agreement between the parties to

[8] Article 3.2 of the Korean Arbitration Act states:

> The term "arbitration agreement" means agreement between the parties to settle, by arbitration, all or some disputes which have already occurred or might occur in the future with regard to defined legal relationships, whether contractual or not

resolve future disputes through arbitration exists, that agreement extends to any dispute that arises out of the underlying contract, unless there is an explicit limitation in the agreement limiting the scope of disputes subject to arbitration.[9] The arbitration agreement between the American company and the Korean company did not expressly exclude tort claims. The Seoul High Court was also guided by another Korean Supreme Court decision providing that an arbitration agreement applies not only to contractual claims arising out of the underlying contract but to any dispute that is directly or closely related to the validity, effect and performance of the underlying contract.[10]

The Seoul High Court also considered international practice. It first observed that the definition of "arbitration agreement" in article 3.2 of the Korean Arbitration Act is based on the UNICTRAL Model law and is consistent with the New York Convention. The court, therefore, reasoned that article 3.2 – in particular, the meaning and scope of an arbitration agreement – should be interpreted in accordance with international standards. The court then looked to English and US court practice. Under English law, arbitration agreements are broadly interpreted based on the presumption of "one-stop adjudication," or the presumption that rational business people intended to resolve all disputes arising out of their legal relationship in one forum. US courts likewise interpret arbitration agreements broadly by applying a presumption in "favor of arbitration" where an arbitration agreement is ambiguous, unless there is clear evidence proving that arbitration agreement does not exist.

Turning back to the arbitration agreement at issue, the court concluded that it was possible to formulate the Korean company's claim as a contractual claim based on the fact that the two parties had formed a fiduciary relationship when the American company appointed the Korean company as its Korean distributor, and that the American company breached its fiduciary obligations to the Korean company by participating in the executive director's tortious acts. Based on above,

[9] Korean Supreme Court Decision No. 2005Da3433 dated 31 July 2007.
[10] Korean Supreme Court Decision No. 2004Da67264 dated 13 May 2005.

the court decided that the dispute was closely related to the American company's performance under the contract and therefore fell within the scope of the arbitration agreement.

This case followed a long line of arbitration-friendly decisions in Korea that broadly interpreted arbitration agreements. By citing the UNCITRAL Model law, the New York Convention, and English and US case law, the Seoul High Court also confirmed that Korean courts are willing to adopt international best practices when interpreting arbitration agreements.