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# **The Evolving Korean Statutory Law on Arbitration**

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**PENN STATE LAW**

**THE PENNSYLVANIA STATE UNIVERSITY**

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# Chapter One: Introduction

## 1. Objectives and Goals

The Republic of Korea (Korea)<sup>1</sup> is one of the countries the economy of which has developed rapidly over the past four decades. According to the World Bank, in 2016, Korea had the world's eleventh-largest economy<sup>2</sup> and was in eighth place in the world for trade.<sup>3</sup> Considering its land mass, population, and natural resources, it is amazing how fast and big the Korean economy has developed. In the 1980s, Korea was known as one of the "Asian Dragons" along with Taiwan,<sup>4</sup> Hong Kong,<sup>5</sup> and Singapore.<sup>6</sup> All these countries were believed to have great economic potential and the possibility for development. Among the four countries, Korea showed the greatest economic growth. In fact, Korea has become a model for national economic development. Other emerging countries in Asia are trying to emulate Korea's strategy of economic development.<sup>7</sup>

At the beginning of the industrialization of the Korean economy, Korea pursued an export-oriented

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<sup>1</sup> In this dissertation, "Korea" refers to "the Republic of Korea."

<sup>2</sup> <http://databank.worldbank.org/data/download/GDP.pdf>. (last visited on 8<sup>th</sup> August, 2017). This rank was given by the World Bank based on national gross domestic product (GDP).

<sup>3</sup> According to the statistics provided by the Korea International Trade Association (KITA), in 2016 Korean trade took up 2.8% of the world trade by taking up US \$438,211 million out of US \$15,519,700 million in total. Korea also possessed the world's seventh largest exporter (3.1%) and ninth largest importer (2.6%) in 2016. The KITA presents this statistics based on information provided by the IMF. <http://stat.kita.net/stat/world/major/KoreaStats01.screen>.

<sup>4</sup> Based on GDP, Taiwan is in 22<sup>nd</sup> place. <http://statisticstimes.com/economy/projected-world-gdp-ranking.php> (last visited on 8<sup>th</sup> August, 2017).

<sup>5</sup> Based on GDP, Hong Kong is in 32<sup>nd</sup> place. <http://databank.worldbank.org/data/download/GDP.pdf> (last visited on 8<sup>th</sup> August, 2017).

<sup>6</sup> Based on GDP, Singapore is in 36<sup>th</sup> place. <http://databank.worldbank.org/data/download/GDP.pdf>. (last visited on 8<sup>th</sup> August, 2017).

<sup>7</sup> Some of Southeast Asian countries like the Philippines, Indonesia, Vietnam, and Malaysia try to learn the Korean's strategy of economic development. There are many scholars, government officials, and entrepreneurs who visit Korea for this purpose. Moreover, countries in Central Asia including Mongo have also become interested in studying Korean economic development.

industrialization by combining mass production-mass exports with relatively high productivity-low wages.<sup>8</sup> At that time, Korean trade focused mainly on the export of goods manufactured in Korea through cheap labor. Since the 1990s, however, the Korean strategy for economic development changed because of the rapidity of its economic development; labor-intensive industry declined and more technology-intensive industry began to develop.<sup>9</sup> As a result, Korea is now a player in international business activities. Unlike the past - when Korea was simply manufacturing products through borrowed technology - Korean companies now create the technology they use and, as a result, compete effectively in global commerce.<sup>10</sup> The Korean brand has become a guarantor of high quality. For example, the Hyundai cars have a good reputation abroad and combine relatively high quality with reasonable prices. Electronic goods manufactured by LG or Samsung are recognized as having the highest quality in various Middle Eastern countries.

As Korean companies engaged in more complex international business transaction, they became involved in contracts for sales of goods, licensing, agency, distribution, franchise, construction, and turn-key operations. For example, the Hyundai automobile company began exporting Korean-made cars to countries all over the world; nowadays, they build factories abroad and employ local people to produce cars locally. Thus, Hyundai avails itself of many transactional contracts; agency or distributorship contracts with business partners abroad to sell the cars; service contracts with carriers for the transportation

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<sup>8</sup> Sung-Hoon Jung, *The Korean Development Strategy: Trajectories of the Korean Economic Development, 1961~2010*, 14 Journal of the Economic Geographical Society of Korea 453, 453 (2011).

<sup>9</sup> Since labor costs increase rapidly in Korea, Korean manufacturing companies start producing their products abroad where labor costs are cheap like China, India, Indonesia, Philippines, Vietnam, and etc. Thus, Korean companies become involved with more various and complicated business transactions compared to the past.

<sup>10</sup> In the past, Korean companies exported the goods under the Original Equipment Manufacturing (OEM) method, so they manufactured goods as foreign companies ordered and exported them with foreign companies' brand names. Now, however, Korean companies have foreign companies in southeastern countries to produce goods under the OEM method with Korean companies' own brand names.

of cars; construction contracts with constructors to build local factories; and supply contracts to service manufacturing abroad. In addition, the company enters into employment contracts with local employees and to address consumers. Just like Hyundai, other Korean companies are also conducting international business in more complex ways. They, too, encounter greater transactional disputes with foreign companies, consumers, and employees. Contracts are used to identify and provide for the best ways to solve disputes. Arbitration dominates dispute resolution in international business. To bolster its competitive edge, Korea has begun to devote greater attention to arbitration in ICA.

There is now no doubt that arbitration is more efficient and effective for the adjudication of international commercial disputes as a necessary appendage to the legal system. In Asia, Hong Kong with Singapore as a close second has become the center of ICA. It is the Korean conviction that Korea offers a better society, economy and government and can outdistance either Hong Kong or Singapore. While China seeks to be the Asian leader in ICA, Korea is better positioned geographically to intermeditate between China<sup>11</sup> and Japan<sup>12</sup> - the two Asian economic giants.<sup>13</sup> In ICA, contracting parties generally choose a country with no ties with either party. This practice enhances the neutrality of the arbitration. In comparison to Chinese or Japanese venue, Korea offers greater neutrality. Hong Kong is well-developed as a place for ICA, but that venue might well favor Chinese interest. In addition, Korea's status in Asia has expanded significantly over the last fifteen years, primarily because of the Hallyu.<sup>14</sup> The Hallyu started spreading among the younger generation and now it has spread to the middle-aged

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<sup>11</sup> China's GDP was 11,199,145 (millions of US dollars) in 2016 and it took the second place after USA.

<sup>12</sup> Japan's GDP was 4,939,384 (millions of US dollars) in 2016 taking the third place in the world.

<sup>13</sup> As trade increases, the disputes will increase proportionately. Because there has been a steep increase of trade among the three countries, it has become an important issue to find efficient and fair ways to handle disputes that arise.

<sup>14</sup> The Hallyu is also called 'Korean wave' or 'Korean fever'. It refers to the sudden increase in popularity of South Korean culture around the world in the last fifteen years. This phenomenon was caused largely by the Korean entertainment industry and the popularity of kdrama and kpop.

generation. With a combination of economic development and improved image,<sup>15</sup> organizations like the Korean Commercial Arbitration Board (KCAB), the Korean Bar Association (KBA), the Korea Chamber of Commerce (KCC) have urged that Korea take advantage of its position and use it as a platform to become a center of ICA in Asia. Moreover, lawyers, entrepreneurs, and scholars have advocated that the Korean government should aggressively develop its infrastructure in ICA. In 2013, the Seoul International Dispute Resolution Center (Seoul IDRC) was established through the support of the Seoul Metropolitan Government, the Ministry of Justice, Korea Commercial Arbitration Board (KCAB), and the Korean Bar Association (KBA). The purpose of the Seoul IDRC is to act as a center for Asian ICA proceedings by providing hearing facilities with the cooperation of leading arbitral institutions including the American Arbitration Association (AAA), the Hong Kong International Arbitration Center (HKIAC), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Singapore International Arbitration Center (SIAC).<sup>16</sup>

There needs to be even more progress. Because the legal system and courts are instrumental to the functionality of arbitration, judges need to undertake special training and the current Korean perception

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<sup>15</sup> In 2012, the Korea Foundation for International Culture Exchange conducted a survey regarding the Hallyu in nine countries: China, Taiwan, Japan, Thailand, the U.S.A., Brazil, France, the U.K., and Russia. The respondents were composed of the same number of male and female respondents and were selected from four different groups divided into according to the age; the respondents aged from 15 to 19, from 20 to 29, from 30 to 39 and from 40 to 49. Each group consisted of 25% of total respondents. The question was if the Hallyu had affected them regarding the image of Korea and how they thought of Korea. They were asked to answer the questions by selecting one among ‘positive’, ‘neutral’, and ‘negative’. The result is as follows. (<http://www.kofice.or.kr/index.asp>)

	China	Taiwan	Japan	Thailand
Positive	32%	29%	10%	45%
Neutral	58%	59%	58%	49%
Negative	10%	12%	32%	6%

<sup>16</sup> <http://www.sidrc.org/main/main.php>

of arbitration needs to be revamped. The Korean arbitration law should be reexamined. The national arbitration law measures the depth of the legal acceptance of arbitration. The Korean Arbitration Act (KAA) was enacted as an independent law for the first time in 1966; it was completely amended in 1999 after two partial amendments in 1973 and 1993. In 1999, the KAA was brought into line with UNCITRAL Model Law on International Commercial Arbitration (hereinafter, UNCITRAL Model Law). The UNCITRAL Model Law aims to unify and harmonize worldwide arbitration laws. It was intended to allow jurisdictions in the developing world especially to become instantly seen as favorable to arbitration. Some countries in the developed world (like Germany) also relied on the UNCITRAL Model Law because it reflected global standing and regulation of arbitration. Because of their participation in the development of ICA, countries (like France, the United States, and England) enacted their own statutes on arbitration.<sup>17</sup> Korea amended the KAA in keeping with the UNCITRAL Model Law, allowing it to participate in the global law of arbitration. Korea is now hospitable to arbitration and regulates it in a manner that allows it to be autonomous and effective. The Korean law is fully conversant with the global regulation of arbitration.<sup>18</sup>

In terms of the 1999 amendment to the KAA, Korean scholars and practitioners strongly argued that the KAA had to reflect the changes in the Korean economy and integrate the international regulation of ICA.<sup>19</sup> The need to amend the KAA became more evident when the UNCITRAL Model Law was itself

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<sup>17</sup> There has been lively scholarly discussion about not adopting, in whole or in part, the UNCITRAL Model Law. See Alan S. Reid UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION AND THE ENGLISH ARBITRATION ACT: ARE THE TWO SYSTEMS POLES APART, 21 J. Int'l Arb. 227 (2004); Sanders, Pieter, *Unity and Diversity in the Adoption of the Model Law*, 11 J. Int'l Arb. 1 (1995); Saxby, John, User's Perspective of the UNCITRAL Model Law, 2 J. Int'l Arb. 164 (1986).

<sup>18</sup> The KAA (1999) was nothing more than a pure duplication of the UNCITRAL Model Law.

<sup>19</sup> See Jang-ho Choi, *Academical Understanding and Institutionalization on Commercial Arbitration in Korea*, 30 Journal of Arbitration Studies 281 (1996); Jang-ho Choi, *A Comparative Study on the Revision of the Arbitration Law in Korea and Taiwan*, 14-3 Korea International Commerce Review 109 (1999); Kang Bin Lee, *The Development History and Activation Measures of Commercial Arbitration System in Korea-with respect to 40 years of Korean arbitration law and practice*, 32

amended in 2006. Nonetheless, it took a decade to achieve the evident emendation. The KAA was finally amended in 2016. The 2016 amendment focuses on (i) the removal of inefficiency and the restriction on arbitration law, (ii) adding or drafting new regulations to help arbitral proceedings to operate more smoothly and effectively. By doing so, Korea may have taken its initial step toward becoming an Asian Hub for ICA.

## 2. Methodology and Content

First, the KAA in its first version<sup>20</sup> will be analyzed.<sup>21</sup> That text is obsolete because it embraces old economic and political realities. It is not a 21<sup>st</sup> Century law. It was constituted when Korea gained its independence from Japan. Arbitration was not fully understood in Korea. The initial KAA demonstrates how arbitration began in Korea and provided some indications of how the KAA was developed. Each article is analyzed individually. The analysis addresses these questions; (i) how Korean arbitration was developed, (ii) what were the old KAA's deficiencies, (iii) what was needed to remedy the deficiencies of the KAA, and (iv) why Korea adopted the UNCITRAL Model Law as a whole as its national arbitration law.

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The International Commerce & Law Review 59 (2006); Mun Chul Jang, *A Study on Amendment of Korean Arbitration Act*, 9 Journal of Arbitration Studies, 3 (1999).

<sup>20</sup> After the KAA was enacted for the first time in 1966, there were partial amendments twice in 1973 and 1993. During these partial amendments, there was almost no change in content. However, the KAA was totally amended in 1999 by adopting the UNCITRAL Model Law, so the KAA (1999) is completely different from the previous version of the KAA. Therefore, because there is a big difference between the KAA (1997) and the KAA (1999), the KAA before 1999's complete amendment is called as "old Korean Arbitration Act" (Gu Joongjaebub) and the KAA after 1999's amendment is called as "new Korean Arbitration Act" (Shin Joongjaebub) in Korea in order to distinguish them clearly.

<sup>21</sup> The first version of the KAA is the KAA (1966), but the KAA (1997) will be analyzed because it is the latest version of the KAA (1966) and there was almost no change in content during the partial amendments in 1973 and 1993.

The UNCITRAL Model Law is the second topic of study. Although the Model Law tried to unify and harmonize international arbitration laws, its success on this score is somewhat doubtful. Significant countries failed to adopt it. The reasons for the rejection will be examined through case studies. Also, contemporary issues in the decisional law applying to the UNCITRAL Model Law will be assessed. The considerations on the UNCITRAL Model Law will be provided the background to exam why the KAA (1999) needed to be amended. The KAA (1999) is very close to the UNCITRAL Model Law. The deficiencies of the UNCITRAL Model Law were excluded from the amendment of the KAA.

Third, the newly revised KAA (2016) will be studied. The background and rationale for amendment of each article will be discussed based on the commentary in the legislative history. The Korean government believed that the amendment of KAA is an essential prerequisite to developing a framework for contemporary arbitration and to promote Korea as a venue for ICA in the Asian region. To be a force in the world of arbitration, the national laws and case law must reflect the latest developments. The legal system must allow arbitration to function autonomously and to avoid judicial restriction. Our final step is to determine whether the KAA (2016) can secure the goals.

## Chapter Two: The First Korean Arbitration Act

### 1. General

#### 1.1 The Beginning of Korean Arbitration

For centuries, it was traditional practice in Korea to settle village-level disputes via alternative dispute resolution (*vs.* resorting to the judicial system).<sup>22</sup> Indeed, most of the civil and commercial disputes were brought to elders who (i) were trusted and respected in tribes or villages; (ii) proposed settlements for disputes according to a moral dignity that (a) had developed naturally, over extended time frames and (b) was based on the customs and practices of a tribe or village; and (iii) made decisions that had binding effects on both parties and were based on implied rules—namely, that the parties should accept such decisions without objection and follow them voluntarily.<sup>23</sup> Indeed, up until the Joseon Dynasty (1392-1910),<sup>24</sup> arbitration played a significant role in alternative dispute resolution (ADR)

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<sup>22</sup> The Korean Commercial Arbitration Board, SANGSAJUNGJE 30 NYEONSA [30 Years of Commercial Arbitration], at. 37 (1996).

<sup>23</sup> *Id.*

<sup>24</sup> The Joseon Dynasty is the old name of Korea. After the Joseon Dynasty (1392~1910), Korea went through the colonial period by Japan from 1910 to 1945, and after liberation from Japan, the Republic of Korea became an official name.



systems;<sup>25</sup> in fact, it had as much of a binding effect as the associated judicial system and was further strengthened by Hyang'yak<sup>26</sup> (and the development of local governments) since the Joseon Dynasty.<sup>27</sup>

Hyang'yak is essentially a set of rules based on Confucian thinking and a spirit of mutual help;<sup>28</sup> it was originally developed to lead people to worship Confucianism (*vs.* Buddhism), became a set of regulations during the Joseon Dynasty, and led to the development of local governments. The Yangban<sup>29</sup> (*i.e.*, ruling class) utilized and applied Hyang'yak to govern themselves as well as the lower-class people in their societies.<sup>30</sup> Consequently, it became important to follow Hyang'yak (*i.e.*, as the governing law in society).<sup>31</sup>

During the Joseon Dynasty, most of the societal disputes were settled autonomously via arbitration by Yangban under the rules of Hyang'yak;<sup>32</sup> indeed, if an individual asked the district office of government to settle his or her dispute (and thereby ignored the Yangban's decision), he or she was

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<sup>25</sup> At that time, although the term, 'arbitration' was used, the meaning of arbitration was different from the one in a modern society. It did not require a written agreement and parties did not get a chance to select an arbitrator just like how it works now. It has to be understood that arbitration was just one typical method for settlement of dispute by asking the elderly, who was believed to be wise and thoughtful. Also, there were some occasions where wise elderly man tried to persuade parties in disputes to reach an amicable agreement, which is more like negotiation. Here, arbitration and mediation were distinguished depending on whether there was a binding effect: if the parties had to follow the elderly's decision without objecting to it, it was considered arbitration while mediation was understood as a way to settle their dispute by trying to get an advice from the elderly.

<sup>26</sup> Before the Joseon Dynasty, Confucianism and Buddhism were two dominant thoughts. From the Joseon Dynasty, however, Confucianism became more important and more emphasized. Consequently, rules or regulations were formed based on Confucianism and Hyang'yak was the name for these rules or regulations in the Joseon Dynasty.

<sup>27</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op cit.*, at 37.

<sup>28</sup> The Academy of Korean Studies, Encyclopedia of Korean Culture, <http://encykorea.aks.ac.kr>. (The base of Confucian thinking is that fine customs and public morals for society are strengthened by spreading Confucian proprieties and custom throughout the village).

<sup>29</sup> Yangban is the name for the highest class people in the caste system in the Joseon Dynasty. Pyungmin is the name for the middle class people and Chunmin is the name for the lowest class people.

<sup>30</sup> The Academy of Korean Studies, Encyclopedia of Korean Culture, <http://encykorea.aks.ac.kr>.

<sup>31</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op. cit.*, at 37.

<sup>32</sup> Although the disputes were settled by Yang-Ban's arbitration involving a third person for settlement, it was considered as an autonomous settlement as long as governmental authority was not involved.

punished.<sup>33</sup> Moreover, by the end of the Joseon Dynasty, even the government encouraged the use of arbitration (*i.e.*, by the Yangban) for dispute settlement.<sup>34</sup>

## 1.2. Korean Arbitration during the Colonial Era

Korean commercial arbitration has a longer history than what is presently, widely known. The first record on the Korean commercial arbitration system is found within “Sang-mu-he-y-so gyu-chic (*i.e.*, the Rules for Commercial Matters),<sup>35</sup>” which was enacted on November 10, 1895;<sup>36</sup> Article 3 (4) of “Sang-mu-he-y-so gyu-chic” regulates that “this institute can settle the commercial disputes when there is a requirement of parties concerned.”<sup>37</sup> Korean arbitration was institutionalized for the first time when the Japanese Civil Procedure Act was implemented as a Korean national law in 1912.<sup>38</sup> During the Japanese colonial era, Chapter VIII (*i.e.*, within the Japanese Civil Procedure Act) contained some regulations regarding arbitral procedures, which became Korean arbitration laws.<sup>39</sup> This section of Japanese law fully constituted Korean arbitration laws—even after the Liberation from Japan in 1945.<sup>40</sup> During this period, however, arbitration was not conducted in Korea at all; thus, the arbitration section was eliminated

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<sup>33</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op. cit.*, at 37.

<sup>34</sup> *Id.*

<sup>35</sup> At that time, because there was no English name translated officially for this rule, the Korean name is used here as it sounds and the author makes and inserts an English name in the parenthesis considering the meaning of it. Therefore, this English name is not an official name.

<sup>36</sup> *Id.* at 38.

<sup>37</sup> *Id.* at 38~39.

<sup>38</sup> Seungwoo Cho et al., *ARBITRATION LAW OF KOREA: PRACTICE AND PROCEDURE* 10 (Kap-You Kim et al. eds., 2012). On July 12, 1909, Japan forced Korea to ratify a treaty about handing over jurisdiction to Japan to take a judicial power and colonize Korea. After this treaty, during colonial era, Korea did not have independent judiciary system and national laws.

<sup>39</sup> *Id.* It did not have a separate section for arbitration. Some parts of the Japanese Civil Procedure Act contained regulations regarding arbitration.

<sup>40</sup> Jang-ho Choi, *Academical Understanding and Institutionalization on Commercial Arbitration in Korea*, 30 *Journal of Arbitration Studies* 281, 281 (1996).

completely when Korea enacted the Korean Civil Procedure Act independently in 1960.<sup>41</sup> Consequently, there was a lack of arbitration law and an arbitration system under Korean law from 1960 to 1966.<sup>42</sup>

### 1.3. Korean Arbitration after Colonial Period

On October 7, 1957, Korea ratified a treaty entitled “Treaty of Friendship, Commerce and Navigation between Korea and the U.S.A.”<sup>43</sup> Article 5 of this treaty provided a regulation regarding the settlement of disputes between the two countries, stating that “when there is a dispute between companies or citizens of two countries, they will get the same legal rights.”<sup>44</sup> Furthermore, Article 5 (2)<sup>45</sup> confirmed the enforcement of foreign arbitral awards between Korea and the United States by providing that “both countries shall recognize the validity of arbitration agreement if parties concerned agree to settle their dispute by arbitration, and both countries shall recognize and enforce the arbitral award rendered based on the arbitration agreement.”<sup>46</sup>

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<sup>41</sup>Jang-ho Choi, *A Comparative Study on the Revision of the Arbitration Law in Korea and Taiwan*, 14-3 Korea International Commerce Review 109, 112 (1999).

<sup>42</sup>Jang-ho Choi, *Academical Understanding and Institutionalization on Commercial Arbitration in Korea*, 30 Journal of Arbitration Studies 281, 281 (1996)

<sup>43</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op. cit.* at 39.

<sup>44</sup> *Id.* at 39.

<sup>45</sup> Article V Paragraph 2: Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party.

<sup>46</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op. cit.*, at 39. At that time, because there was no chance to conduct arbitration and arbitration was not widely recognized in Korea, Korea did not consider this arbitration part when they ratified this treaty.

Even after Korea ratified the treaty with regulations aimed at arbitration with the United States, no arbitral award was recognized or enforced under this treaty.<sup>47</sup> Moreover, Korea eliminated the arbitration section from Korean national law in 1960.<sup>48</sup> Thus, notwithstanding the treaty to settle any dispute by arbitration between Korea and United States, Korea did not have any national laws or regulations regarding arbitration until the Korean Arbitration Act was reenacted in 1966.<sup>49</sup>

This reappearance of the law of arbitration in Korea in 1966 resulted from the first “Five-Year Economic Development Project.”<sup>50</sup> In the early 1960s, the Korean government planned to develop the national economy and believed the only way to do so was to revitalize the export industry.<sup>51</sup> The basic plan was to sell more goods and consequently earn more money abroad; thus, more people would be hired to produce more goods. The Korean government commenced the project in 1962 via an export-oriented economic development project.<sup>52</sup> Under this project, the Korean government brought up many merchant-

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<sup>47</sup> *Id.* From this time, the term, arbitration, means what arbitration is in a modern society: one of alternative dispute resolution systems which requires an arbitration agreement and in which a binding award is rendered by arbitrators. It is different from the one that was used in the Joseon Dynasty.

<sup>48</sup> *Id.* At that time, there was no separate and independent arbitration law in the Korean legal system. Some regulations as to arbitration were included in the Korean Civil Procedure Act and these regulations were taken out when the Korean Civil Procedure Act was amended.

<sup>49</sup> Although it is ‘re-enactment’, it is the first enactment as a separate and independent arbitration law.

<sup>50</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op cit.*, at 39.

<sup>51</sup> HANLIMHAKSA, TONGHAP-NONSIL-GAENYUM-SAJEUN, 12 (2007). (In the 1960s, Korean economy was developed strictly under the government’s plan and control. This government-oriented economy development plan focused on only economic growth and export. As a result, Korea accomplished high growth in economy and the national income increased dramatically, which led Korea to one of newly industrialized countries (NICs) in Asia. However, this development caused side effects such as increased gap between rich and poor, as well as between city and countryside, over-reliance on international economy, conglomerate-oriented economic structure, and so on.)

<sup>52</sup> *Id.* (Although the first Korean government (Syngman Rhee government) after liberation from Japan declared ‘Five-Year Economic Development Project’ (this project was called ‘Kyung-jea-gae-bal-oh-gae-nyun-gae-hek’ if it is translated as it sounds in Korean) in 1959 for the purpose to develop economy, this project foundered because of the 4.19 revolution in 1960 and the military coup in 1961. After the second government (Park Chung-hee government) was established, this project was finally put into action. From 1962 to 1971, the first and second economic development plans were executed. During this period, the government focused on the light industry and economic development based on export. From 1972 to 1981, the third and fourth economic development plans were carried out and focused on development of the heavy and chemical industry based on export.)

friendly policies and supported merchants who were doing international business.<sup>53</sup> Consequently, Korea's exports started increasing rapidly—and its amounts were also expanding.<sup>54</sup>

Along with the increase in international commercial transactions involving Korean merchants, international commercial disputes increasingly arose abroad.<sup>55</sup> A typical foreign merchant at that time (*i.e.*, an importer of goods from Korean merchants) requested to settle associated claims with Korean governmental organizations abroad (*e.g.*, consulates).<sup>56</sup> These organizations, however, were not designed to deal with frequently occurring claims, struggled to do so, and requested that the Korean government find a solution for this problem.<sup>57</sup> Although arbitration was one of the ADR systems that foreign merchants preferred over litigation, Korea did not have an arbitration system established at that time.<sup>58</sup>

<sup>53</sup> The typical examples of merchant-friendly policies were to award export bonus, to provide export subsidies, to deduct export tax, and to procure export insurance for merchants. By giving financial benefits to merchants who were doing international business, the government encouraged merchants to focus more on export abroad.

<sup>54</sup> HANLIMHAKSA, *op. cit.*, The following table shows the goals and results of economic development during the 1<sup>st</sup> plan under 'Kyung-jea-gae-bal-oh-gae-nyun-gae-hek'.

		GDP	Agriculture, forestry & fishery	Mining & manufacturing industries	GNP per person	Export of goods	Import of goods
1 <sup>st</sup> Plan (1962~1966)	Goal	7.1*	5.7	15.0	4.2	28.0	8.7
	Result	7.8	5.6	14.3	5.0	38.6	18.7

\*Average annual increasing rate

According to the table above, the goal and the result of increasing rate in export of goods and import of goods are high, indicating 28.0% and 38.6% respectively in export of goods and 8.7% and 18.7% respectively in import of goods. Having considered the status of economy in Korea from 1962 to 1966, 38.6% and 18.7% were great economic growth rate.

<sup>55</sup> At that time, most Korean merchants did not have a good knowledge about international business and they had great difficulties in understanding foreign culture, foreign language and the way of doing business with foreigners.

<sup>56</sup> Jang-ho Choi, *Academical Understanding and Institutionalization on Commercial Arbitration in Korea*, 30 *Journal of Arbitration Studies* 281, 283 (1996). As a foreign merchant who was located in their own country, it was easy for them to go and complain to the Korean governmental organization which was located in their country rather than taking an official step for their complaint either in Korea or in their country. In this sense, the Korean governmental organization had to deal with matters which they were not supposed to do.

<sup>57</sup> *Id.* The Korean arbitration system and Korean arbitration law were established by request of Korean merchants with practical necessity and needs.

<sup>58</sup> Because ad hoc arbitration is not easy to conduct, institutional arbitration is preferred. However, because there was no arbitral institute in Korea at that time, Korean merchants had no choice but to agree to arbitrate their dispute abroad where they could get a full service from an institute when they submitted their dispute to arbitration.

Thus, Korean merchants had no choice but to agree to settle disputes abroad by arbitration even when they were in a better position to negotiate.<sup>59</sup> Korean merchants subsequently vehemently promoted the necessity of an arbitration system that they could use for the settlements of their disputes with foreign merchants.<sup>60</sup>

#### **1.4. How the First Korean Arbitration Act (1966) was Enacted**

Korea joined the Commercial Arbitration Committee in Economic Commission for Asia and the Far East (ECAFE) in 1959;<sup>61</sup> subsequently, the Korea Chamber of Commerce & Industry (KCCI) launched a research initiative to study arbitration systems in foreign countries.<sup>62</sup> In 1963, the KCCI proposed a plan to establish a permanent arbitration body. Consequently, the government, scholars, the committee of merchants, and lawyers would gather regularly to discuss the text of new arbitration law, its possible enactment, and the establishment of a permanent arbitration institute.<sup>63</sup> On March 16, 1966, the Korean Arbitration Act (KAA (1966) was enacted as an independent body of law (*i.e.*, as Act No. 1767)<sup>64</sup>

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<sup>59</sup> *Id.* at 285. Absence of an arbitration system and arbitration law in Korea was one obstacle that made Korean merchant arbitrate abroad. Most of all, however, because Korean merchants did not have knowledge about arbitration, and because they did not think of the effects of arbitration agreement, they easily agreed on what foreign merchants requested.

<sup>60</sup> *Id.* at 285. As Korean merchants understood and realized what arbitration was, they realized that it was a great benefit to do arbitration in their own country.

<sup>61</sup> <http://www.unescap.org/> (viewed on January 20, 2015) ECAFE was established in 1947 to encourage economic cooperation among its member states. The name was changed as United Nations Economic Commission for Asia and the Far East (UNESCAP) or Economic Commission for Asia and the Far East (ESCAP) in 1974. ESCAP's regional focus is managing globalization through programs in environmentally sustainable development, trade and human rights.

<sup>62</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op. cit.*, at 40.

<sup>63</sup> *Id.* at 41.

<sup>64</sup> Prior to 1966, even though the KAA was enacted as an independent body of law, it did not have its own independent name. The regulations regarding arbitration were inserted as a part of Korean Civil Procedure Act.

to regulate international commercial disputes.<sup>65</sup> The International Commercial Arbitration Committee (ICAC) was then quickly founded under the Korean Commercial Arbitration Board (KCAB)<sup>66</sup> and, several months later, on October 13, 1966, the Commercial Arbitration Rules were promulgated by approval of the Supreme Court.<sup>67</sup> The Korean arbitration system was thus finally established as an official ADR system.

Consequently, the Korean government would encourage merchants to use arbitration for the settlement of their international commercial disputes, especially in Korea.<sup>68</sup> The government's strong desire to have such an approach appeared in the KAA (1966) itself. In the supplementary section of the KAA (1966), one provision<sup>69</sup> specified that the Korean government would bear some or all expenses incurred in ICA.<sup>70</sup>

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<sup>65</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op cit.*, at 41. The first arbitration case after the enactment of the KAA was the case where a Japanese company submitted the case for arbitration against a Korean company. It was submitted on May 31, 1966 and an arbitral award was rendered on December 16, 1966 after several hearings were held. The issue of this case was non-conformity of goods (ore) and delayed shipment. The Japanese company claimed US\$9,508.12, but the arbitral award was rendered for US\$1,946.25.

<sup>66</sup> The Korean Commercial Arbitration Board (the KCAB) was established on March 22, 1966.

<sup>67</sup> Kang Bin Lee, *The Development History and Activation Measures of Commercial Arbitration System in Korea-with respect to 40 years of Korean arbitration law and practice*, 32 *The International Commerce & Law Review* 59, 60 (2006).

<sup>68</sup> *Id.*

<sup>69</sup> ADDENDA (2) (Subsidy) When any dispute on commercial affairs has arisen between a Korean and a foreigner, the government may, for the purpose of promoting exportation and encouraging trade, furnish any incorporated association designated by Minister of Trade and Industry with all or part of expenses necessary for ICA so as to resolve the dispute promptly and establish trust in international transactions until such matters are otherwise determined in Act.

<sup>70</sup> The basic idea of this provision was to invite more ICA to Korea by aiding the cost of arbitration. This provision was eliminated when the KAA was amended in 1999.

## 1.5. Impact of the First Korean Arbitration Act (1966) on Korean Arbitration

After the Korean Arbitration Act was enacted in 1966, more commercial arbitrations were conducted in Korea.<sup>71</sup> Table I shows the statistics of the cases submitted for arbitration and the cases settled by arbitration in Korea from 1967 to 1979<sup>72</sup>—and indicates how many cases were submitted in each year. The numbers therein include the cases submitted (but not settled) in the previous year, and the numbers in parentheses indicate how many unsettled cases were transferred from the previous year. For example, in 1973, eight cases were submitted for arbitration to the ICAC in Korea; five were new cases therein and three cases were submitted in 1972 but could not be settled. In 1973, only six cases were settled by arbitration and two cases were transferred to 1974.<sup>73</sup>

**Table I. Statistics regarding arbitration from 1967 to 1979**

Year	Number of cases submitted for arbitration	Number of cases settled by arbitration	Number of cases transferred to the next year
1967~1970	24	10	14
1971	2 + (14)*	16	0

<sup>71</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op. cit.*, at 42.

<sup>72</sup> *Id.* at 58.

<sup>73</sup> This table only shows the number of cases regarding arbitration. It does not clearly show, for example, whether the case that was not settled in 1973 and transferred to 1974 was settled or transferred as unsettled case to 1975. Although there is no indication regarding this matter, it was quite unlikely to transfer the case again which was transferred from the previous year because the KAA (1966) had a provision fixing the time-limit for rendering an arbitral award. The time-limit for arbitral award is three months after the arbitration commences according to Article 11 (5) of the KAA (1966).



1972	4 + (0)	1	3
1973	5 + (3)	6	2
1974	13 + (2)	5	10
1975	11 + (10)	18	3
1976	12 + (3)	8	7
1977	25 + (7)	5	27
1978	11 + (27)	11	27
1979	20 + (27)	30	14

\*The numbers inside parentheses shows how many cases were not settled in the previous year (and were thus transferred to the next year).

The following table (*i.e.*, Table II) shows the number of cases that were submitted for conciliation or mediation as well as arbitration from 1966 to 1979.<sup>74</sup> From 1971 to 1979, the number of cases therein (*i.e.*, submitted for arbitration) generally increased, with a drop twice in 1975 and 1978. Also, during the same period, except in 1975 (which shows a rapid drop), the number of cases submitted for conciliation or mediation increased substantially.<sup>75</sup>

<sup>74</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op. cit.*, at 65.

<sup>75</sup> *Id.* at 62.

**Table II. Statistics regarding conciliation/mediation and arbitration from 1966 to 1979**

Year	Claims submitted for conciliation/mediation*	Claims submitted for arbitration*	Percentage of arbitration to conciliation/mediation
1966~1970	231	24	10 %
1971	117	2	1.7 %
1972	225	4	1.7 %
1973	284	5	1.76 %
1974	595	13	2.1 %
1975	60	11	1.8 %
1976	686	12	1.7 %
1977	769	25	3.2 %
1978	891	11	1.2 %
1979	1,125	20	1.7 %

\*The number of claims submitted for each ADR shows how many cases, in total, were newly submitted in each year. This number does not show how many claims were settled by each ADR.

According to Table II, the percentage of cases submitted for arbitration (*vs.* conciliation or mediation<sup>76</sup>) was 10% from 1966 to 1970. From 1971, however, the percentages sharply dropped to less than 2% (from 1.2 to 1.8%)—except in 1974 (2.1%) and 1977 (3.2%).<sup>77</sup> The reason why mediation was much more popular (*vs.* arbitration) is due to the difference in character between mediation and arbitration; the specific reasons are as follows.

Since the ICAC was founded in 1966, it had been providing a mediation service as well as arbitration.<sup>78</sup> Fifty years ago, however, Korean merchants preferred mediation (*vs.* arbitration) since they were more familiar with it.<sup>79</sup> Conciliation or mediation is conducted by a conciliator or a third-person mediator who gives advice to help parties settle their disputes amicably and reach a settlement, whereas arbitrators unilaterally render a decision that has a binding effect on both parties;<sup>80</sup> this was the main reason why conciliation or mediation was preferred (*vs.* arbitration) in Korea at that time and is related to Korean ethnicity.<sup>81</sup> Koreans believe that the best way to settle their disputes is (i) on their own, (ii) via an

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<sup>76</sup> Margaret L. Moses, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* (2<sup>nd</sup> ed. 2012), at 15. The terms, conciliation and mediation are usually used interchangeably. These are different from negotiation because they invite a third party as an impartial and independent helper for the resolution of their disputes. In most legal systems, conciliation and mediation are not considered as substantially different concepts. The traditional way of these two concepts, mediators being more facilitative and conciliators being more directed, does not work truly anymore.

<sup>77</sup> Being submitted for mediation or arbitration does not mean that these cases were settled by mediation or arbitration. Table II just indicates the number of cases which were submitted for mediation or arbitration. There is no information regarding how many cases were settled by mediation or arbitration. In a case of arbitration, once the case is submitted to arbitration, it is certainly settled because usually arbitrators should make a decision in any way. On the other hand, in a case of mediation, there are more unsettled cases than settled ones because it is parties who reach a decision by themselves. When the case is not settled by mediation, it results in waste of time, because the parties have to find other ways to settle their dispute.

<sup>78</sup> Kang Bin Lee, *op. cit.*, at 61.

<sup>79</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op. cit.*, at 65. In Korea, the term, ‘mediation’ (‘Jojeung’ in Korean), is much more familiar because it is commonly used in a general everyday life. So, although there is no special knowledge regarding alternative dispute resolution systems, most Korean people understand what mediation means: a third person is involved and helps the parties to negotiate and reach an agreement amicably. However, the term, ‘arbitration’ (‘Joongjae’ in Korean), is an unfamiliar word and it is not common to use this word in a general everyday life.

<sup>80</sup> Margaret L. Moses, *op. cit.*, at 14.

<sup>81</sup> Once one party invited a third party for settlement of their dispute either by bringing the case before the court or submitting the case to arbitration, Koreans tended to believe that the opposing party did not have any intention to negotiate again with

amicable negotiation, (iii) without receiving a binding order (*i.e.*, given by a third person), (iv) via the attainment of settlements that can lead to lengthy business relationships.<sup>82</sup> This is why most cases submitted for conciliation or mediation were domestic commercial disputes (*i.e.*, between Korean merchants) whereas arbitration is usually involved when there are international commercial disputes between Korean and foreign merchants.<sup>83</sup> Also, it was not common for Korean merchants to utilize attorneys when negotiating deals with business partners at the time;<sup>84</sup> indeed, they were not generally (i) used to writing precise business contracts under the advice of attorneys, (ii) accustomed to inserting arbitration clauses in their contracts, (iii) sufficiently aware of arbitration, and (iv) accustomed to consulting with attorneys who could give them advice regarding such matters.<sup>85</sup>

Conversely, most international business transactions (*i.e.*, between Korean and foreign merchants) involved written contracts with arbitration clauses.<sup>86</sup> In the 1970s, Korean merchants did not have strong negotiation power and were eager to enter into contracts with foreign merchants. Consequently, they just signed contracts that contained arbitration clauses during negotiations with foreign merchants without

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them about their dispute or to do business again with them. Consequently, Koreans thought that they were aggrieved by the action of inviting a third person for a binding decision.

<sup>82</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op. cit.*, at 66.

<sup>83</sup> *Id.*, at 66

<sup>84</sup> In traditional Korean culture, merchants feel inhospitable if the other party brings a lawyer when they negotiate the deal. Korean merchants tend to think that the business should be just between merchants, so they feel that a lawyer as a third person interferes in their business. Moreover, bringing a lawyer gives an impression that the other party is already prepared for disputes that have not occurred. Although this practice has changed today, many merchants still feel uncomfortable confronting the other party's lawyer when they negotiate and try to make a contract.

<sup>85</sup> Nowadays, there are several model contracts provided by different institutes like the Korea International Trade Association (KITA), the Korea Trade-Investment Promotion Agency (KTIPA), The Korea Chamber of Commerce & Industry (KCCI) in Korea. Most Korean merchants use these model contracts as a draft of their contracts, and in these model contracts, an arbitration clause is almost always contained.

<sup>86</sup> Unlike Korean culture, Western merchants prefer to write down a precise contract under the advice from their lawyers. When Korean and foreign merchants negotiate and enter into a contract, foreign merchants try to insert an arbitration clause which is drafted in their favor under their lawyer's advice.

understanding the meaning of an arbitration clause.<sup>87</sup> This also explains why most cases submitted for arbitration were international, while the cases submitted for conciliation or mediation were domestic.

When domestic commercial disputes arose between Korean merchants and they could not settle the disputes on their own via negotiation, they tended to bring their disputes before courts or go to conciliation or mediation—*vs.* arbitration.<sup>88</sup> Although conciliation or mediation also required consent from two parties (*i.e.*, on a par with arbitration), the attitude of Korean merchants towards conciliation or mediation was totally different (*vs.* their assessments of arbitration);<sup>89</sup> indeed, this is another reason why Korean merchants preferred conciliation or mediation (*vs.* arbitration) for dispute resolution.

In sum, most Korean merchants believed that they could manage conciliation or mediation by themselves.<sup>90</sup> Conversely, arbitration involves an arbitrator who renders a binding decision—and merchants are obligated to follow the decision as it stands.<sup>91</sup> Moreover, arbitration was not widely known and recognized by Korean merchants in the 1970s, so most Korean merchants doubted the credibility and reliability of arbitration.<sup>92</sup>

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<sup>87</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op. cit.*, at 68.

<sup>88</sup> At that time, most Korean merchants believed that they had an option between mediation and litigation. Arbitration was not something that could be considered as a method of dispute settlement.

<sup>89</sup> Korean merchants agreed to do mediation without taking it seriously because they thought they could try other settlement methods if they failed to settle their dispute by mediation. On the other hand, in a case of arbitration, they were more careful with agreeing on arbitration because they knew that they had to accept subsequent consequences as a final settlement. THE KOREAN COMMERCIAL ARBITRATION BOARD, *op. cit.*, at 68

<sup>90</sup> *Id.*

<sup>91</sup> ‘Following the decision without any objection’ means that either party cannot appeal with the same issue. When there is any reason that the arbitral award can be vacated based on grounds under the law, either party can bring an action for its nullification. The grounds, however, are very much limited, so an arbitral award is considered as a final and conclusive decision.

<sup>92</sup> THE KOREAN COMMERCIAL ARBITRATION BOARD, *op. cit.*, at 68. Because an arbitrator is a private person and there is no official minimum qualification to be an arbitrator in Korea, it was generally believed that an arbitrator is not good enough to settle a dispute and make a decision on the dispute. In contrast, to be a judge in Korea, s/he has to not only pass a bar exam, which was incredibly hard to pass, but also get an excellent result during the train period in the Judicial Research

## 2. The Commencement of Arbitration

Following the 1966 enactment of the Korean Arbitration Act (KAA), the Act was amended partially four times (*i.e.*, in 1973, 1993, and 1997).<sup>93</sup> Then, in 1999, the KAA was completely amended through the adoption of the UNCITRAL Model Law.<sup>94</sup> The 1999 version of the KAA was totally different from previous enactments.<sup>95</sup> For example, while there were only 18 articles in the KAA prior to adopting the Model Law, the KAA was amended in 1999 and subsequently had eight chapters with 41 articles.<sup>96</sup> In order to examine the change between the provisions before and after the Act's amendment in 1999, the 1997 version of the KAA will be analyzed, article by article, because it is the latest version of the KAA (*i.e.*, before the 1999 amendment);<sup>97</sup> through this analysis, the questions of why the KAA required a total amendment (and how this amendment was accomplished) will be considered.

First, it is helpful to know that the Japanese law heavily influenced the KAA prior to 1999.<sup>98</sup> The earlier provisions of the KAA were similar to the provisions found in the Japanese Civil Procedure Act

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and Training Institute. Consequently, most merchants used to think that a judge is much better at making a decision regarding their dispute.

<sup>93</sup> Kang Bin Lee, *op cit.*, at 60.

<sup>94</sup> *Id.*

<sup>95</sup> Because there is a big difference between the KAA (1997) and the KAA (1999), in Korea, the 1997 Act is called "old Korean arbitration law" (Gu Joongjaebub) and the 1999 Act is called "new Korean arbitration law" (Shin Joongjaebub). Therefore, when the KAA is mentioned, instead of using the year which the Korean Arbitration Act was amended in, two descriptions are used: "old Korean arbitration law" (Gu Joongjaebub) and "new Korean arbitration law" (Shin Joongjaebub). Generally, the Acts are not termed using the dates of amendment (*e.g.* KAA (1973), KAA (1993), KAA (2010), etc.). In this dissertation, however, the names, the KAA (1997) and the KAA (1999) will be used. Note: the KAA (1997) is the last version of the KAA before total amendment in 1999, and the KAA (1999) is the first version of the KAA after total amendment.

<sup>96</sup> The KAA (1999) has a different format from the KAA (1997). The KAA (1997) states eighteen articles without dividing them into chapters, but the KAA (1999) has eight chapters with a title for each chapter and forty-one articles. The KAA (1999) is more detailed and organized.

<sup>97</sup> During the Act's partial amendments in 1973, 1993, and 1997, there were no significant changes in terms of the structure and content. Amendments were either about changing the name of the organization that governed an arbitration system or changing the words used or written in the provisions to make them easily understood.

<sup>98</sup> Kang Bin Lee, *op. cit.*, at 63.

(Articles 786 to 805).<sup>99</sup> Indeed, just like previous versions, the KAA (1997) had only 18 articles and left most matters to be determined by party discretion.<sup>100</sup>

## 2.1. Aim of the Law

The title of Article 1 is ‘Purpose’ of the KAA.<sup>101</sup>

### *Article 1 (Purpose)<sup>102</sup>*

*The purpose<sup>[103]</sup> of this Act is to promptly resolve disputes under the private law, not by the judgment of court, but through the awards made by arbitrators, in accordance with the agreement between the parties concerned.<sup>[104]</sup>*

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<sup>99</sup> Mun Chul Jang, *A Study on Amendment of Korean Arbitration Act*, 9 *Journal of Arbitration Studies*, 3, 5 (1999). Although the arbitration law was re-enacted as an independent body of law after elimination from the Civil Procedure Act in 1960, its contents were very similar to the previous regulations that were part of the Japanese Civil Procedure Act.

<sup>100</sup> Seungwoo Cho et al., op. cit., at 12. The provisions of the KAA (1997) are not as detailed as the ones in the KAA (1999). For example, regarding the procedure of arbitration, the KAA (1997) just mentions who will decide on the procedure of arbitration. The KAA (1997) states first, “the procedure for arbitration may be determined by an arbitration agreement”, second, “if there is no agreement between parties, the procedure for arbitration shall be governed by the procedure determined by this Act”, and third, “such matters as those not specifically prescribed in this Act shall be determined by the arbitrators”. So, the KAA (1997) simply states who has a right to determine the procedure of arbitration: first, parties concerned, second, the law, and third, arbitrators. In contrast, the KAA (1999) stipulates how the arbitration should be conducted in each procedure and also provides detailed provisions step-by-step.

<sup>101</sup> The English version of the KAA is translated by The Korean Legislation Research Institute and it is named as an official one. However, it expressly declares that when there is conflict in meaning between the Korean and English version, the Korean one prevails over the English one. [http://elaw.klri.re.kr/kor\\_service/main.do](http://elaw.klri.re.kr/kor_service/main.do).

<sup>102</sup> Article 1 of The KAA (1999) states that, “the purpose of this Act is to ensure the appropriate, impartial and prompt settlement of disputes in private laws by arbitration.” So, the KAA (1999) emphasizes not only promptness but also impartiality of arbitration.

<sup>103</sup> The better word would be “aim”. The English version of the KAA (1997) is an official one translated by the Korean Legislation Research Institute, but the author changes words and phrases to make more accurate translation for English speakers. For the parts changed by the author, they will be underlined and new words or phrases will be written in footnotes. The footnote number will be in parenthesis.

<sup>104</sup> Parties concerned can be rewritten as “contracting parties”.

This text clearly states herein that the purpose of the KAA is to “promptly resolve disputes”;<sup>105</sup> indeed, by doing this, the Korean legislative body wanted to emphasize the efficiency and speed of arbitration (*i.e.*, one of the principal characteristics of arbitration).<sup>106</sup> In addition, Article 1 provides information about arbitration (*e.g.*, the definition of arbitration,<sup>107</sup> how arbitration is conducted,<sup>108</sup> and the scope of disputes that can be submitted to arbitration<sup>109</sup>). As for the definition of arbitration, Article 1 (i) makes it evident that arbitration is a dispute resolution process that differs from ordinary litigation,<sup>110</sup> (ii) clarifies that arbitration is a resolution system wherein arbitrators settle a dispute by rendering an arbitral award,<sup>111</sup> and (iii) stipulates that arbitration should be conducted in accordance with an agreement between contracting parties. Thus, it is clear that parties can agree on arbitral procedures in their arbitration agreements.<sup>112</sup> Indeed, it also places limitations on arbitrability by stating that arbitration resolves disputes only under private laws. This means that disputes related to public laws (*e.g.*, anti-trust and property rights) cannot be resolved by arbitration.<sup>113</sup> Also, although Article 1 mentions the scope of the disputes

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<sup>105</sup> As the purpose of this law states, in the KAA (1999), there are several provisions that emphasize the promptness of arbitration. However, there have been some arguments on whether it is reasonable to sacrifice other issues like the fairness of arbitration in order to strengthen the promptness of arbitration.

<sup>106</sup> In contrast to litigation, arbitration law or arbitral rules have regulations or provisions fixing a time-limit for rendering an arbitral award. So, settling a dispute by arbitration is much faster than doing so by litigation.

<sup>107</sup> Article 1 of the KAA (1997) states that “..... resolve disputes....., not by the judgment of court, but through the award made by arbitrators, .....”

<sup>108</sup> Article 1 of the KAA (1997) states that “.....resolve disputes..... in accordance with the agreement of the parties concerned.”

<sup>109</sup> Article 1 of the KAA (1997) states that “..... resolve disputes under the private law.....”

<sup>110</sup> It does not state the difference between arbitration and litigation, but it just makes it clear that arbitration is not a judicatory system by stating “not by the judgment of court.”

<sup>111</sup> It says that the judge is not involved in arbitration. The arbitrators play the role of a judge.

<sup>112</sup> Because arbitration is initiated by a private agreement between parties concerned, they can agree on anything about arbitration as long as it is not against the law, and the party agreement will have priority over the law or regulations of arbitration.

<sup>113</sup> Mun Chul Jang, *op. cit.*, at 15.



that can be settled by arbitration, it does not stipulate the scope of application of the KAA (1997) or whether the KAA (1997) applies to domestic or international arbitrations.<sup>114</sup>

## 2.2. Arbitration Agreement

The title of Article 2 is ‘Arbitration Agreement’:

### *Article 2 (Arbitration Agreement)*

*(1) An arbitration agreement shall take effect under an agreement between the parties concerned to settle through an arbitration the whole or part of any dispute which has arisen or will arise in the future between them with respect to any legal relationship under the private law (hereinafter referred to as an “arbitration agreement”): Provided, That this shall not apply to those legal relations which the parties concerned shall not change.*

*(2) An arbitration agreement under the preceding paragraph shall be a document agreeing to the arbitration which is signed and sealed by the parties concerned, an arbitration clause mentioned in an agreement, or exchanged letters or telegrams in which an arbitration clause is mentioned.*

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<sup>114</sup> Seungwoo Cho et al., op. cit., at 12. Unlike the KAA (1997), the KAA (1999) has a provision stating the scope of application of the law (e.g. to what extent the KAA (1999) applies). Article 2 of the KAA (1999) (The Scope of Application) (1) This Act shall apply to cases where the place of arbitration under Article 21 is in the Republic of Korea: Provided, That Articles 9 and 10 shall apply even in cases where the place of arbitration is not yet determined or is not in the Republic of Korea, and Articles 37 and 39 shall apply even in cases where the place of arbitration is not in the Republic of Korea. (2) This Act shall not affect any other Act by virtue of which certain disputes may not be referred to arbitration or may be referred to arbitration only according to provisions, other than those of this Act, nor those treaties which come into operation in the Republic of Korea.

Article 2 specifies the effectiveness, scope, and forms of the arbitration agreement. (i) Namely, Article 2 (1) stipulates that (a) arbitration agreements become effective when concerned parties agree to settle their disputes and (b) arbitration requires an agreement between concerned parties. (ii) Regarding the scope of an arbitration agreement, the contracting parties can (a) agree to arbitrate either part or all of the dispute<sup>115</sup> and (b) extend the scope of arbitration from the one that has already arisen to the one that will arise in the future.<sup>116</sup> Article 2(1) also repeats the limitation on arbitrability; however, it is more detailed (*vs.* Article 1).<sup>117</sup> For example, the dispute (*i.e.*, the issue requiring a settlement via arbitration) should be about a legal relationship under private law. The contracting parties must clarify the legal relationship that they cannot change; if the legal relationship is something that they cannot change, the arbitration agreement is not valid.<sup>118</sup> This means that there are some disputes that contracting parties cannot agree to arbitrate.<sup>119</sup>

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<sup>115</sup> The parties can agree to settle a part of dispute. It means that the parties can agree to settle the dispute related to a certain issue. For example, an arbitration agreement can be written as, ‘any dispute regarding payment under this contract shall be settled by arbitration.’ In this case, if a dispute arises and the dispute is about payment, then it has to be settled by arbitration.

<sup>116</sup> There are two ways to conclude an arbitration agreement. First, the contracting parties can insert an arbitration clause as one of terms and conditions in their main contract when they conclude the main contract. In this case, the arbitral clause usually states that it covers the dispute that will arise in the future. Second, the parties can also agree to settle their dispute after the dispute has arisen by concluding a separate and independent arbitration agreement from the main contract. In this case, this arbitration contract states that it covers the dispute that has already arisen. In practice, the second case is not common because it is not easy for parties to agree on something that is related to their dispute especially after the dispute has arisen.

<sup>117</sup> Article 1 just states, that “disputes under the private law.”

<sup>118</sup> When the contracting parties agree to arbitrate a dispute that is ‘in arbitrable’ under the law, even if the arbitral award is rendered under an arbitration agreement, it will be vacated because in arbitrability is one ground for nullification of arbitral award.

<sup>119</sup> The English version says, “those legal relations which the parties concerned shall not change.” The meaning of “shall not change” is not clear in the English version. However, if what the Korean version says is taken into consideration, the meaning of “shall not change” can be interpreted as ‘shall not be able to deal with.’ As it was mentioned before, the Korean version prevails when there is difference in meaning. It is assumed that the English version was not precisely translated at that time. Whenever there is a difference in meaning between the Korean and English versions, and when it was caused by inadequate translation, the English version will be re-translated by the author considering the meaning contained in the Korean version.

Thus, the role of Article 2(1) is to make clear that there is a limitation on freedom of contract; indeed, it clearly says that there are some matters that are inarbitrable—notwithstanding contracting parties’ submission to arbitration. (iii) The next section of Article 2 focuses on the form of an arbitration agreement. Article 2(2) states the requirements for an arbitration agreement in terms of the written form (*e.g.*, as a separate arbitration contract<sup>120</sup> or an arbitration clause contained in an underlying contract<sup>121</sup>). An exchange of letters or telegrams can also be considered as the basis of a written agreement, as long as these documents contain an arbitration clause or describe the parties’ intent to submit their disputes to arbitration. However, this in-writing requirement can create practical difficulties because many merchants conclude oral contracts quite often.<sup>122</sup>

When Article 2 is interpreted, a concern arises as to how broadly an arbitration agreement should be interpreted. The first issue involves the validity of an arbitration agreement found in the “general terms” of a contract.<sup>123</sup> The Korean Supreme Court (KSC)<sup>124</sup> has held that an arbitration clause inserted in the “general terms and conditions” section is valid (*i.e.*, as an arbitration agreement) as long as there is evidence showing that the parties consider the “general terms and conditions” to be a part of the contract

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<sup>120</sup> Article 2(2) states that “a document agreeing to the arbitration which is signed and sealed by the parties concerned.”

<sup>121</sup> Article 2(2) states that “an arbitration clause mentioned in an agreement.”

<sup>122</sup> Although there are some legal systems that consider an oral contract invalid, there are many occasions where merchants conclude a contract orally. However, most countries, even the countries that approve oral contracts, require a written arbitration agreement.

<sup>123</sup> Although the KAA (1997) and other national laws approve an arbitral clause inserted in a main contract as a valid arbitration agreement, the issue here is whether the ‘general terms and conditions’ section is part of the contract. If this arbitral clause had been inserted as part of the master contract, there would have been no doubt in approving this arbitral clause valid as a part of the contract.

<sup>124</sup> Unlike the U.S. legal system, which is a common law system, the Korean legal system does not use case names. Supreme Court [S. Ct.], 96Da24385, Feb. 25, 1997 (S. Kor.).

when performing the agreement.<sup>125</sup> A subsequent KSC case<sup>126</sup> confirms this holding; the Court herein found that when there were other documents that contain an arbitration agreement (and thus show a party's intent to resolve disputes through arbitration), they could become part of the contract (*i.e.*, if the contracting parties refer to these documents during the performance of the contract).<sup>127</sup>

Next is the issue of how to properly interpret an arbitration clause containing specific limits or conditions. The KSC tends to construe this occurrence broadly and in favor of arbitration.<sup>128</sup> The Court<sup>129</sup> has held that an arbitration clause may limit the period for the submission of arbitration. Furthermore, the

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<sup>125</sup> The facts of this case are as follows: The seller and the buyer concluded a contract for sale of imported beef. There was no arbitration agreement in their main contract. However, there was an 'Invitation to Bids,' written separately from their main contract and it contained 'Importing Terms and Condition.' Inside the 'Importing Terms and Condition,' there was an arbitral clause. When the dispute arose, the buyer tried to settle the dispute by arbitration, whereas the seller asserted that this arbitral clause was not valid because it was not contained in the main contract. Regarding the role of 'Import Terms and Condition,' the buyer had to carry out his obligation to perform the contract in accordance with the 'Import Terms and Condition,' and the Terms additionally contained the process of bid and how the buyer should perform the bid. Consequently, the buyer had to look at the 'Importing Terms and Conditions' to perform the contract while the seller did not need to look at it at all to perform his/her part of contract. Prior to this case, the Korean Supreme Court made it clear that where both contracting parties sign the contract and where the 'general terms and conditions' are attached as a printed form, contracting parties accept this 'general terms and conditions' as a part of their contract. Supreme Court [S. Ct.], 89DaKa20252, April. 10, 1990 (S. Kor.).

<sup>126</sup> Supreme Court [S. Ct.], 99Da45543, 45550 Oct. 12, 2001 (S. Kor.).

<sup>127</sup> The facts of this case are as follows: The seller (a Brazilian), and the buyer (a Korean), entered into a contract for sale of Brazilian beef. The contract stated that both contracting parties agreed to follow the General Terms and Conditions for N.L.C.F. Bid-Commodity & Freight (General terms), unless otherwise indicated in the contract. Article 14 (B) of the contract stated that the General Provision for Bidding and Contract (General Provision), governed the terms and conditions that the General Terms did not govern. Article 22 of this General Provision stated that all disputes arising under this contract shall be settled by arbitration in accordance with the Korean Arbitration Rules of the Korean Commercial Arbitration Board. The governing law shall be the Korean Arbitration law and arbitration shall be conducted in the Republic of Korea. When the dispute arose the seller brought the case to the Korean court, but the buyer asserted that the dispute had to be settled by arbitration. Notably, the seller admitted that s/he agreed to the condition to follow the General Terms for the contract's terms and conditions and that both parties agreed to this. Supreme Court [S. Ct.], 99Da45543, 45550 Oct. 12, 2001 (S. Kor.).

<sup>128</sup> The arbitration agreement stated that, absent the seller's objection to the buyer's decision, via submission of the claim to arbitration within 30 days, the buyer's decision regarding the matter was final. The buyer claimed, because this clause did not allow the buyer to submit a dispute to arbitration, the agreement was unconscionable. In contrast, the seller claimed that this agreement was not an arbitration agreement, but it provided the buyer with a special right to make a decision regarding the dispute. The Korean Supreme Court held that this was an arbitration agreement that showed intent to arbitrate if the seller submitted for arbitration. This clause simply required the seller to submit a case to arbitration within 30 days if s/he wanted to object to the buyer's decision. Supreme Court [S. Ct.], 88Daka7795, Nov. 13, 1990 (S. Kor.).

<sup>129</sup> Supreme Court [S. Ct.], 88Daka7795, Nov. 13, 1990 (S. Kor.).

Court<sup>130</sup> has provided guidelines for interpreting the scope of an arbitration agreement.<sup>131</sup> Indeed, the court has held that when an arbitration agreement defines the scope of arbitration using specific words like “legal dispute,” these words should be interpreted broadly.<sup>132</sup> The Court has held that the scope of this phrase includes disputes about the (i) interpretation of conditions written in a contract, (ii) formation of a contract, (iii) performance of a contract, (iv) the effects of validity, and (v) termination of the contract.<sup>133</sup> A later Supreme Court case upheld this holding.<sup>134</sup> The Court found that an arbitration agreement affected the formation, performance, and validity of a contract that contained an arbitration agreement.<sup>135</sup> Furthermore, the Court has clarified that an arbitration agreement can affect disputes directly or closely related to the contract.<sup>136</sup>

Lastly, regarding the interpretation of an optional arbitration agreement, the KSC<sup>137</sup> has held that the effectiveness of an optional arbitration agreement depended on the intent of the party against whom

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<sup>130</sup> Supreme Court [S. Ct.], 91Da17146, 91Da17153, April 14, 1992 (S. Kor.).

<sup>131</sup> The facts of this case are as follows: The seller and the buyer concluded a contract for the sale of a factory with other facilities. This contract had an arbitral clause and the clause said that if parties cannot settle any legal dispute regarding the contents of this contract, it should be settled by arbitration. After performance of contract, the buyer was damaged by a hidden defect of the factory. Therefore, the buyer submitted the case to arbitration that the damage, caused by non-performance, was a legal issue that arose from the contract.

<sup>132</sup> The issue of this case concerned what ‘legal disputes’ meant regarding the contents of the contract.

<sup>133</sup> The court reasoned, because damage resulted from the hidden defects and transfer of the object (factory and other facilities), there was no full performance. The legal issue of the contract involved the contents of the contract and because there was non-performance, the dispute had to be settled by arbitration.

<sup>134</sup> Supreme Court [S. Ct.], 99Da13577, 13584, April. 10, 2001 (S. Kor.).

<sup>135</sup> The facts of this case are: Two parties contracted for investment of amusement park development (Investment Contract). In this contract, there was a clause stating that all disputes arising in relation to the contract shall be finally settled by arbitration. Additionally, two contracting parties made another agreement (Agreement), regarding performance of this investment contract and this agreement contained a clause stating that anything not stated in the Agreement shall be governed by the Investment Contract. The Agreement did not have any clause regarding dispute resolution or arbitration. Later, one party did not fulfill the obligation under the Agreement. Consequently, the other party declared the avoidance of the Investment Contract as well as the Agreement. The issue in this case was whether the dispute arising under the Agreement should be settled by arbitration while the Agreement did not say anything about dispute resolution. Supreme Court [S. Ct.], 99Da13577, 13584, April. 10, 2001 (S. Kor.).

<sup>136</sup> Supreme Court [S. Ct.], 99Da13577, 13584, April. 10, 2001 (S. Kor.).

<sup>137</sup> Supreme Court [S. Ct.], 2003Da318, Aug. 22, 2003 (S. Kor.).

the submission to arbitration was made.<sup>138</sup> The Court has held that an option to choose between litigation and arbitration (*i.e.*, in an arbitration agreement) had a valid effect only when there was no strong objection to the commencement of arbitration by the opposing party (when one party has submitted a case to arbitration).<sup>139</sup> Under an optional arbitration agreement, when one party submits a case to arbitration (*vs.* brings a case before a court), the arbitration agreement will be effective if the opposing party makes no objection to the submission.<sup>140</sup> However, if the other party claims that the arbitration agreement is invalid and objects to the commencement of arbitration, the optional arbitration agreement becomes invalid. Indeed, the disputes cannot be settled by arbitration unless the parties so agree.<sup>141</sup>

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<sup>138</sup> The facts of this case are as follows: The provider and the purchaser concluded a contract for sale of goods. Article 28 (1) of the contract stated that, “the provider and the purchaser shall do their best in order to settle any dispute arising out of the contract by negotiation amicably.” In addition, Article 28 (2) of the contract stated that “if the provider and the purchaser cannot reach an agreement within 30 days after the commencement of negotiation, either party may require that the dispute be referred for resolution to the formal mechanisms specified in the Special Condition of Contract.” Here, Article 10 (1) of the ‘Special Condition of Contract’ stated that, “the dispute shall be referred to adjudication/arbitration in accordance with the law of the Purchaser’s country.” When the purchaser breached the contract, the provider submitted the case to arbitration. The purchaser, however, claimed that there was no valid arbitration agreement.

<sup>139</sup> Just as the ‘other’ party did in this case, the court held that when the other party is required to submit an answer in response to the request of arbitration submitted by one party, if the other party strongly asserts invalidity of the arbitration agreement in the answer, then the optional arbitration agreement is invalid. Supreme Court [S. Ct.], 2003Da318, Aug. 22, 2003 (S. Kor.)

<sup>140</sup> It can be interpreted that the ‘other’ party impliedly agrees to settle their dispute by arbitration if the ‘other’ party does not object to the submission of the dispute by one party.

<sup>141</sup> Objecting to commencement of arbitration does not mean that the parties agree to settle their dispute by litigation. Since there is an option between arbitration and litigation, the arbitration, which requires an agreement between parties, cannot be commenced when there is an objection to it. Litigation however, does not need an agreement by parties to be initiated. Thus, either party can bring the dispute to the court regardless of consent.

## 2.3. Prohibiting Lawsuit

Article 3 is about the binding effect of a valid arbitration agreement:

***Article 3 (Prohibition of Lawsuit)<sup>142</sup>***

*Parties concerned in an arbitration agreement shall abide by arbitration awards: Provided, That they may institute a lawsuit, only when the arbitration agreement is invalidated, loses its effect, or becomes impossible to carry it out.*

The effect of a valid arbitration agreement is, as the title says, to prohibit lawsuits.<sup>143</sup> There is no recourse to the court unless the arbitration agreement is invalid, becomes void, or is impossible to perform. Indeed, the KSC<sup>144</sup> has made the “no recourse to the court under a valid arbitration agreement” principle clear;<sup>145</sup> it has held that a court should not rule on a dispute when a valid arbitration agreement is inserted into the contract. A later case strengthened this principle.<sup>146</sup> The issue therein was whether an arbitration agreement became invalid when (i) one party brought a case before a court (notwithstanding a valid

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<sup>142</sup> The better title would be “prohibiting lawsuit”.

<sup>143</sup> It means that there is no way to settle the dispute by litigation as long as a valid arbitration agreement exists.

<sup>144</sup> Supreme Court [S. Ct.], Ja 82Maka77, Aug. 1, 1983 (S. Kor.).

<sup>145</sup> The facts of this case are: An arbitration agreement was inserted in a charter party entered between a ship owner and a charterer. The arbitration agreement said that, “any dispute arising in relation to this charter party shall be settled by arbitration.” The dispute arose because of disagreement on charter freight between the ship owner and the charterer. Although the issue of this dispute more closely related to a consignee who did not pay for carriage, the parties concerned there were the ship owner and the charterer. The court said that this dispute should have been settled by arbitration because there was a valid arbitration agreement between the ship owner and the charterer.

<sup>146</sup> The facts of this case are: The seller and the buyer concluded a contract for sales of goods. Article 26 of the contract stated that, “unless otherwise stipulated in this contract, any dispute arising out of this contract shall be settled by parties’ agreement through a negotiation between parties.” Additionally, “if parties cannot reach an agreement for the settlement of disputes, the dispute shall be settled by arbitration under the Korean Commercial Arbitration Board.” When the buyer did not make a payment, the seller brought a case before the court claiming breach of contract. While the litigation was pending, the buyer did not object. Later, the court rendered a decision against the buyer and the buyer claimed that the decision rendered by the court was not effective and the dispute should be settled again by arbitration because there was a valid arbitration agreement. Supreme Court [S. Ct.], 91Da7774, 91Da7781, Jan. 21, 1992 (S. Kor.).

arbitration agreement), (ii) the other party did not raise any objection to it, and (iii) the court rendered a ruling.<sup>147</sup> The Court held the contracting parties therein had not agreed to invalidate their existing arbitration agreement simply because one of the parties did not take any action against the commencement of litigation—and rendered a ruling thusly on the matter.<sup>148</sup> Indeed, the court found that the dispute between the contracting parties should have been settled by arbitration because there was a valid arbitration agreement.<sup>149</sup>

In addition to the effect of a valid arbitration agreement, Article 3 also recognizes that arbitral awards are binding; it says that when parties agree to arbitrate, they will be bound by a final award. Thus, an award, once rendered, constitutes a final and binding decision. Finality of the arbitral award means *res judicata*; when a losing party seeks another decision and brings a suit before a court for a retrial to oppose the rendered award, the court will dismiss it. This provision prohibits appeals or retrials before a different court.<sup>150</sup> Clearly, the role of this provision is to confirm that arbitration (i) is an independent dispute resolution system<sup>151</sup> and (ii) cannot be conducted alongside litigation.<sup>152</sup> Prohibition to access to second opinions from the court is necessary for a prompt arbitral process.

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<sup>147</sup> Supreme Court [S. Ct.], 91Da7774, 91Da7781, Jan. 21, 1992 (S. Kor.).

<sup>148</sup> The arbitration agreement in this case was not an optional arbitration agreement. The arbitration agreement in this case was a valid one and it did not provide any option between arbitration and litigation.

<sup>149</sup> Supreme Court [S. Ct.], 91Da7774, 91Da7781, Jan. 21, 1992 (S. Kor.).

<sup>150</sup> There are some occasions where either party can bring an arbitral award to the court for nullification. However, the grounds for nullification of arbitral awards are limited.

<sup>151</sup> Because arbitration is a totally independent dispute resolution system from the judicial litigation, the court only gets involved when there is a request from either the arbitrators or the parties or when the law allows the court to do so.

<sup>152</sup> There is a misunderstanding among merchants that arbitration is a preliminary step to litigation and they can bring a case to the court again after arbitration has been done.



### 3. Composition of Arbitral Tribunal

#### 3.1. Designation of Arbitrators

Article 4 provides for the appointment of arbitrators:

##### *Article 4 (Designation of Arbitrators)*

*(1) Parties concerned<sup>[153]</sup> may determine the method of designating arbitrators<sup>[154]</sup> under an arbitration agreement and the number of arbitrators.<sup>[155]</sup>*

*(2) If the designation of the arbitrators is not stipulated in an arbitration agreement, each party concerned<sup>[156]</sup> shall designate one arbitrator.*

*(3) If the designation of arbitrators is not stipulated in an arbitration agreement relating to a legal relation caused by<sup>[157]</sup> a commercial transaction, or if the intention of the parties concerned is not clear, it shall be presumed to be governed by the commercial arbitration rules of incorporated associations designated by the Minister of Trade, Industry and Energy, notwithstanding the provisions of the preceding paragraph.*

*(4) If one of the parties who have<sup>[158]</sup> entered into an arbitration agreement refuses to designate arbitrators, or designated arbitrators fall under any of the following subparagraphs, the other party may demand the designation of arbitrators, or filling or substitution<sup>[159]</sup> of any vacancy:*

- 1. When any arbitrator neglects or refuses to carry out his duties;*
- 2. When any arbitrator is unable to carry out his duties; and*

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<sup>153</sup> The phrase, ‘parties concerned’ can be re-written as “parties to an arbitration agreement.”

<sup>154</sup> The phrase, ‘designating arbitrators’ can be changed as “their appointment.”

<sup>155</sup> The rest parts should be taken out.

<sup>156</sup> The better expression for the words, ‘parties concerned’ would be “contracting parties.”

<sup>157</sup> This phrase would be re-written as “a legal relationship that results from.”

<sup>158</sup> The word, ‘have’ should be taken out.

<sup>159</sup> Because filling and substitution have the same meaning, it can be written “the filling”.

3. When any arbitrator is deceased.<sup>[160]</sup>

*(5) If a person who has received the demand referred to in paragraph (4) above fails to designate, fill, or replace the arbitrator within seven days of the demand, the court shall, upon request of the party making the demand, select, fill, or replace the arbitrator.*

The basic principle of Article 4 is to explain that parties can agree on (i) how arbitrators are to be appointed and (ii) how many arbitrators should be named (Article 4(1)). For the cases wherein there is no agreement on such matters, Article 4 provides two different rules to assist the parties. First, according to Article 4(2), each party appoints an arbitrator and these two appointed arbitrators compose an arbitral tribunal. While the KAA (1997) allows two arbitrators to make a decision on disputes, the resolution of a dispute by an even number of arbitrators is clearly not practical or efficient—especially when each party gets a chance to appoint one arbitrator.<sup>161</sup> The obvious concern is what would happen if the two arbitrators were not able to agree on a decision. (This answer can be found in Article 11 and will be clarified herein.)<sup>162</sup>

Second, when a dispute arises in a commercial transaction, a different rule will be applied under Article 4(3), which states that arbitrators will be appointed in accordance with the commercial arbitration rules of the Korean Commercial Arbitration Board (KCAB). This prevails over Article 4 (2). The reason for making different regulations (*i.e.*, for commercial disputes) is to supplement the shortcomings of

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<sup>160</sup> It can be simply said as “an arbitrator dies.”

<sup>161</sup> Most national arbitration laws or rules do not allow parties to have an even number arbitral tribunal anymore. The KAA (1999) also requires an odd number arbitral tribunal.

<sup>162</sup> Article 11 of the KAA (1997) concerns arbitration awards. Article 11(2) states, “except as otherwise stipulated in the arbitration agreement, if there are a number of arbitrators, and in the event of an equality of opinions on the award, the arbitration agreement concerned shall lose its effect.”

arbitration law that cannot cover everything related to commercial disputes in practice.<sup>163</sup> Therefore, the KAA (1997) tries to incorporate the rules of KCAB whenever it is necessary.<sup>164</sup>

As mentioned previously, the purpose of enacting the new arbitration law in 1960 was to provide a sound arbitration law for the settlement of international commercial disputes;<sup>165</sup> indeed, by making the rules of the KCAB applicable, the KAA (1997) tried to make the law more practical and precise. For example, when two contracting parties cannot agree on a method for arbitrator appointment in ICA, Article 4 (3) provides for the application of the KCAB rules. According to the rules of the KCAB, in a case wherein a dispute is referred to a sole arbitrator, the KCAB will request that both parties agree to the one arbitrator within a certain period of time established by the KCAB.<sup>166</sup> Similarly, in a case wherein a dispute is referred to three arbitrators, the KCAB will request each party to appoint one arbitrator within the established period of time. The two appointed arbitrators then nominate the third arbitrator. If the parties fail to appoint an arbitrator within the time set by the KCAB, the Secretariat will appoint the

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<sup>163</sup> Because arbitration was uncommon and not much developed in other legal areas, in Korea, the KAA (1997) focused more on commercial transactions. It is still true that Korean arbitration law targets commercial arbitration, especially ICA.

<sup>164</sup> Mun Chul Jang, *op. cit.*, at 5.

<sup>165</sup> *Id.*

<sup>166</sup> Article 12 (1) of International Arbitration Rules by the KCAB: Where the dispute is to be referred to a sole arbitrator, the parties shall agree upon and appoint a sole arbitrator within thirty (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.

arbitrators.<sup>167</sup> In sum, by incorporating the rules of the KCAB into the KAA (1997), arbitration can proceed smoothly and promptly, without procedural delay.<sup>168</sup>

Next, Articles 4(4) and 4(5) provide rules on the replacement of an arbitrator. Article 4(4) states that one party can demand that the other party appoint an arbitrator to replace an arbitrator when (i) the other party did not appoint an arbitrator or (ii) the arbitrator, appointed by the other party, is not able to participate in the arbitration. Specifically, Article 4(4) provides the list of occasions wherein the appointed arbitrator cannot conduct the arbitration. Under Article 4 (5), if the other party does not replace the arbitrator within seven days (*i.e.*, of such a demand from the requesting party), the courts are invited to perform this task—even though it is not ideal to have court action in arbitration. Indeed, arbitration works best when courts are not involved.<sup>169</sup> There are some occasions, however, when court involvement is necessary, since it is not possible for parties to agree on every matter.<sup>170</sup> If the parties cannot or do not agree, a third neutral person should decide. In arbitration, this third person is also an arbitrator; however, because Article 4(5) is about replacing arbitrators (which procedurally is before the arbitral tribunal is

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<sup>167</sup> Article 12 (2) of International Arbitration Rules: Where the parties have agreed that the dispute is to be settled by three (3) arbitrators, the Claimant shall appoint an arbitrator in its Request 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. Where the dispute is to be referred to three (3) arbitrators pursuant to the decision of the Secretariat as provided in Article 11 above, each party shall appoint an arbitrator within thirty (30) days from receipt of the notice from the Secretariat 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 arbitrators shall agree upon the third arbitrator, who shall act as chairman of the Arbitral Tribunal. If, within thirty (30) days of the appointment of the second arbitrator, the two arbitrators have not appointed a third arbitrator to act as chairman of the Arbitral Tribunal, the Secretariat shall appoint such arbitrator.

<sup>168</sup> Mun Chul Jang, *op. cit.*, at 11.

<sup>169</sup> *Id.*,

<sup>170</sup> Most national laws or arbitral rules have regulations about the court being involved.

formed), there is no neutral third person who can make a decision on behalf of contracting parties except the courts.<sup>171</sup>

Regarding the selection of arbitrators by a court, the KSC<sup>172</sup> has held that a court could not select an arbitrator when both contracting parties have named one specific arbitrator in their arbitration agreement but the named arbitrator has refused to conduct arbitration.<sup>173</sup> The Court has added that if contracting parties agree on one specific person as an arbitrator for their dispute settlement and specifies this arbitrator in their arbitration agreement, their intent is to receive an arbitral award from this specific arbitrator.<sup>174</sup> Consequently, if the nominated arbitrator refuses to conduct arbitration, it constitutes an impossibility of performance and the arbitration agreement becomes invalid.<sup>175</sup> Thus, the Court found Articles 4 (4) and 4 (5) inapplicable to this case; however, it did provide three typical examples to demonstrate when Article 4 (4) and 4 (5) could apply: (i) when one party requests that the other party select or replace an arbitrator within the fixed period of time but the other party does not do so, (ii) when one party has a right to select or replace an arbitrator according to the arbitration agreement but this party refuses to do so, and (iii) when a selected or replaced arbitrator refuses to function as an arbitrator. Under such circumstances, a court will need to be involved to assist arbitration.<sup>176</sup>

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<sup>171</sup> Basically, the reason why the court is invited to arbitration is to facilitate the arbitration proceeding. By doing so, it can strengthen arbitration's promptness.

<sup>172</sup> Supreme Court [S. Ct.], 96Da280, April 12, 1996 (S. Kor.).

<sup>173</sup> The facts of this case are: Two parties agreed to settle their dispute by arbitration and they specified 'the Mayor of Seoul' as sole arbitrator for their dispute. The Mayor of Seoul, however, refused to conduct this arbitration, so one of parties brought the case to the court requesting the court to appoint an arbitrator as replacement. The issues of this case were twofold. One was whether the arbitration agreement still remained valid after the nominated arbitrator in the agreement refused to conduct arbitration. The other issue was whether the court could select an arbitrator on behalf of contracting parties by exercising Article 4(4) and 4(5) of the KAA (1997).

<sup>174</sup> Supreme Court [S. Ct.], 96Da280, April 12, 1996 (S. Kor.).

<sup>175</sup> Supreme Court [S. Ct.], 96Da280, April 12, 1996 (S. Kor.).

<sup>176</sup> Supreme Court [S. Ct.], 96Da280, April 12, 1996 (S. Kor.).

## 3.2. Disqualification of Arbitrators

Article 5 is about the disqualification of arbitrators:

### *Article 5 (Disqualifications for arbitrators)<sup>[177]</sup>*

*No person who falls under any of the following subparagraphs may be an arbitrator.*

- 1. Person<sup>[178]</sup> who is incompetent or quasi-incompetent;*
- 2. Person who has been declared bankrupt but not reinstated yet<sup>[179]</sup>;*
- 3. Person who has been sentenced to imprisonment without prison labor or heavier punishment, and for whom three years have not passed since the execution of such sentence was completed, or non-execution thereof became definite;*
- 4. Person who was sentenced to imprisonment without prison labor or heavier punishment and is in the period of suspended sentence;*
- 5. Person who is in the period of deferred sentence, if his sentence to imprisonment without prison labor or heavier punishment was deferred; and*
- 6. Person who is subject to a restriction on his civil rights or a punishment of suspension of qualifications.*

This article provides a list of conditions that render persons incapable of being appointed as arbitrators. The title of Article 5 clearly states that anyone who falls under any of the categories should be disqualified; however, the article does not say anything about arbitrators' neutrality or impartiality because these are more related to challenges of arbitrators, which are regulated by Article 6.<sup>180</sup>

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<sup>177</sup> It would be better to change the title as "Disqualification of Arbitrators."

<sup>178</sup> The word, 'person' should be replaced to "someone" in this article.

<sup>179</sup> It should be changed as "and not yet reinstated."

<sup>180</sup> Under the KAA (1997), the difference between 'disqualification of arbitrators' and 'challenge of arbitrator' is that 'disqualification of arbitrator' is related to the time before arbitrators are selected, whereas 'challenge of arbitrator' is related to the time after arbitrators are selected.

### 3.3. Challenge to Arbitrators

As stated before, Article 6 provides the reasons for challenging the appointment of arbitrators:

**Article 6 (Challenge to Arbitrators)**

*Any party may apply [<sup>181</sup>] for a challenge to any arbitrator with the court for such reasons[<sup>182</sup>] as prescribed in Article 37 or 39 (1) of the Civil Procedure Act, only unless otherwise provided in the arbitration agreement or in this Act. Provided, That once he has[<sup>183</sup>] made a statement before the arbitrator, he[<sup>184</sup>] may not challenge an arbitrator for the reasons under Article 39 (1) of the Civil Procedure Act.*

If an arbitrator meets the conditions prescribed in Article 37<sup>185</sup> or 39(1)<sup>186</sup> of the Civil Procedure Act (1995),<sup>187</sup> either party can apply to a court to challenge an arbitrator.<sup>188</sup> The reasons stated under Article 37 of the Civil Procedure Act (1995) clarify when arbitrators might be biased. Although these provisions do not use the words neutrality, independence, or impartiality, they provide a list of specific circumstances wherein it is difficult for arbitrators to be neutral, independent, or impartial. Thus,

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<sup>181</sup> It would be better to insert the phrase, “to a court.”

<sup>182</sup> The better translation is “to an arbitrator for such reasons are.”

<sup>183</sup> If it is written like “Provided that once, he has”, it would be better.

<sup>184</sup> “That person” is better word instead of ‘he’.

<sup>185</sup> Article 37 of the Civil Procedure Act (1995) Cause of Exclusion: The judge shall be excluded from the exercise of his duties in the following cases. (1) If the judge or his spouse or his former spouse is a party to the case or is related to a party to the case as a co-creditor, co-debtor or a person bound to make a reimbursement; (2) If the judge has or had the relationship of a relative, family headship, or family membership with a party; (3) If a judge made a testimony or appraisal on the case; (4) If the judge is or was an attorney for the party in the case; (5) If the judge has participated in the decision of previous case which is subject to appeal; Provide That this shall not preclude him from exercising his duties as an entrusted judge by the entrustment of another court.

<sup>186</sup> Article 39 (1) of the Civil Procedure Act (1995) Right to Challenge by Parties: In a case where there are such circumstances likely to cause difficulties in ensuring fairness of adjudication, on the part of judge, any party may challenge him.

<sup>187</sup> Although it is not ideal to make the Civil Procedure Act, as part of the judicatory system, be incorporated with an arbitration law, the KAA (1997) has some gaps to fill. At that time, the Civil Procedure Acts filled these gaps.

<sup>188</sup> Because the matter is about arbitrators, it is a court that has to make a decision on it.

arbitrators cannot be challenged unless a situation fits in a case listed in Article 37 of the Civil Procedure Act (1995).<sup>189</sup> Furthermore, even though there may be doubt about an arbitrator's neutrality or impartiality, he or she cannot be challenged if the issue does not fit into one of the listed situations.<sup>190</sup> Here, the question is whether the list of specific cases (*i.e.*, provided in the provisions) is broad enough to cover arbitrators' neutrality, independence, or impartiality.

Article 39 (1) of the Civil Procedure Act uses the word "fairness" to clarify the standard of arbitrator neutrality, independence, or impartiality. According to this provision, if any party has difficulty in asserting the fairness of an arbitrator, that party may challenge the arbitrator. Furthermore, because this provision specifically states "fairness of adjudication, on the part of judge," it is clear that "fairness of adjudication" is related to an arbitrator's neutrality, independence, or impartiality (*vs.* other factors that may arise during the arbitration procedure).<sup>191</sup>

In addition, regarding an arbitrator's fairness, under Article 6 of the KAA (1997), the KSC<sup>192</sup> has held that once a lawyer is nominated as an arbitrator, there will be limitations on his or her attorney-related activities.<sup>193</sup> For example, after a lawyer is selected as an arbitrator, he or she is not allowed to consult with any client who is associated with a case wherein the lawyer serves as an arbitrator;<sup>194</sup> thus, even

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<sup>189</sup> Mun Chul Jang, *op. cit.*, at 19.

<sup>190</sup> If this is the case, the party who claims the challenge of arbitrator bears a burden of proof.

<sup>191</sup> In a case where any party has a doubt as to the fairness of adjudication during the procedure of arbitration, s/he should make a claim under other provisions. This provision only governs matters about arbitrators.

<sup>192</sup> Supreme Court [S. Ct.], 2003Da21995, March 12, 2004 (S. Kor.).

<sup>193</sup> The facts of this case are as follows: The LG (a construction company) employed Mr. Park as a lawyer and gave him authority to represent the company and select an arbitrator on behalf of the company. Mr. Park nominated Mr. Kim as an arbitrator appointed by the LG. While the arbitration was being conducted, Mr. Kim was employed by the LG as a lawyer of LG with two other lawyers. Later, Mr. Kim helped two other lawyers prepare documents for arbitration where Mr. Kim was an arbitrator. After an arbitral award was rendered, the counter party of LG filed a case for nullification of arbitral award.

<sup>194</sup> The issue of this case was whether the arbitrator's conduct constituted grounds for setting aside under Article 13 (1) 1, if one arbitrator performed two independent arbitrations for two different cases with closely related legal matters and where



though the cases might be entirely different, the lawyer is strictly prohibited from working with a client who is also a party in a case wherein the lawyer is an arbitrator.<sup>195</sup> This is to secure the arbitrator's neutrality and independence;<sup>196</sup> if the arbitrator takes a case from a client who is also a party to a case wherein the lawyer is an arbitrator, the arbitral award (*i.e.*, rendered by this arbitrator) will be invalidated under Article 13 (1) 1 of the KAA (1997).<sup>197</sup>

The last part of Article 6 is critical; it stipulates that once one party makes a statement before the arbitrator, he or she cannot challenge the arbitrator under Article 39(1) of the Civil Procedure Act, which addresses the fairness of an arbitrator. In other words, the parties are deprived of any chance to question the arbitrator's fairness when the parties have made a statement before the arbitrator during a hearing. Indeed, it is more likely that the parties will doubt an arbitrators' fairness during an arbitral hearing if they are given a limited opportunity to challenge an arbitrator (*i.e.*, on his or her impartiality).

Lastly, if the situation fits into the case listed in the provisions of Article 37 or 39 (1) of the Civil Procedure Act and if any one of parties wants to challenge an arbitrator, he or she has to submit the case to the court.<sup>198</sup> This means that the court is again invited into the procedure of arbitration. The idea is to

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one of the parties in one case was the same party in the other case. Here, the arbitrator will be challenged. If, however, these two arbitrations were conducted one after another, it would not be a problem.

<sup>195</sup> Supreme Court [S. Ct.], 2003Da21995, March 12, 2004 (S. Kor.).

<sup>196</sup> Generally, a lawyer can conduct arbitration as an arbitrator and at the same time s/he also can consult other customers as a lawyer and get attorney's fee for his/her service as long as the cases are totally independent and a party of arbitration is completely independent from a customer of the other case.

<sup>197</sup> Since this case was submitted for nullification of a rendered arbitral award, Article 13 applied. The issue of the case, however, was the arbitrator's fairness. However, if, during the procedure of arbitration, one party claimed that the arbitrator was related to the other party in a different case, and there was therefore difficulty in ensuring fairness of adjudication, Article 6 would have applied.

<sup>198</sup> Unlike the KAA (1997), the KAA (1999) requires a party who wants to challenge an arbitrator to submit a written statement for challenge of arbitrator to the arbitral tribunal first. If a challenge is not successful, the party can request the court to decide on the challenge. Therefore, the KAA (1999) provides two steps for challenge of arbitrator and states that the court's decision is final.

invite courts as a neutral third party because (i) arbitrators cannot be totally neutral third parties when they are challenged and (ii) sometimes arbitrators can be challenged even before the arbitral tribunal is finally formed.<sup>199</sup>

## 4. Conduct of Arbitral Proceedings

### 4.1. The Procedure for Arbitration

Article 7 is about the procedure of arbitration:

***Article 7 (Procedures for Arbitration)<sup>[200]</sup>***

*(1) The procedures for arbitration may be determined by an arbitration agreement.*

*(2) If there is no agreement between the parties concerned<sup>[201]</sup> with regard to the procedures<sup>[202]</sup> for arbitration, it shall be governed by the procedures determined by this Act, and such matters as those not otherwise specifically prescribed in this Act shall be determined by the arbitrators.*

*(3) If there is no agreement between the parties concerned,<sup>[203]</sup> or if the intention of the parties concerned is unclear, with regard to the procedures for commercial arbitration, it shall be presumed to be subject to the commercial arbitration rules of the incorporated association designated by the Minister of Trade, Industry and Energy, notwithstanding the provisions of the preceding paragraph.*

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<sup>199</sup> The law limits the intervention of the courts into arbitration and the purpose of the courts' intervention is to conduct arbitration without barriers that can cause delay.

<sup>200</sup> The better title would be "The procedure for Arbitration."

<sup>201</sup> It is better to say "contracting parties."

<sup>202</sup> A singular form should be used.

<sup>203</sup> It is better to say "contracting parties."

The applicable principle is that the parties can agree on whatever procedure of arbitration they want;<sup>204</sup> however, when there is no agreement regarding the procedure of arbitration between parties, two different rules apply that are similar to Article 4.<sup>205</sup> First, in the absence of agreement on arbitral procedure, the KAA (1997) applies; also, for the matters not specifically prescribed in the KAA (1997), the arbitral tribunal determines the procedure of arbitration. According to Article 7(3), however, if a dispute arises out of commercial transactions, the rules of the KCAB will apply (as with Article 4). Again, these rules fill intrinsic gaps therein and prevail over Article 7(2). Thus, when there is no agreement on the procedure of arbitration between parties under commercial arbitration, the arbitration will be conducted according to the rules of KCAB.<sup>206</sup>

The KSC<sup>207</sup> generally interprets Article 7 broadly; however, this is based on the circumstances of each case. The Court has rejected the nullification of arbitral awards rendered by arbitrators who were selected by an arbitral institution (*i.e.*, the KCAB), regardless of party agreement.<sup>208</sup> Indeed, the court has held that an arbitral award could not be nullified under Article 13 (1) 1 if neither party objected to the

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<sup>204</sup> Because arbitration is a private agreement between parties, they can agree on whatever they want as long as it is not against a law.

<sup>205</sup> There are two rules. These rules apply depending on whether the dispute arises out of commercial transactions or not.

<sup>206</sup> As previously mentioned, the rules of the KCAB are incorporated with the KAA (1997) when a dispute arises out of commercial transactions because there is a desire to encourage merchants to use arbitration for their dispute settlement. The benefits include the efficiency and quickness of arbitration and freedom of contract. Arbitration will not be, however, delayed even if there is no agreement on the procedure of arbitration. The rules of the KCAB will fill the gaps to help the arbitration proceed without delay.

<sup>207</sup> Supreme Court [S. Ct.], 2000Da29264, Nov. 27, 2001 (S. Kor.).

<sup>208</sup> The facts of this case are: The arbitration agreement said that “both contracting parties shall select an arbitrator among a list of arbitrators provided by the KCAB.” After parties received the list of arbitrators, each party selected one arbitrator from the list. The KCAB, however, appointed arbitrators who neither party selected. After the arbitral tribunal was formed, at the first hearing, both parties attended without objecting to the selection of arbitrators or the formation of arbitral tribunal. After the arbitral award was rendered, this case was submitted before the court for nullification of the arbitral award rendered.

formation of an arbitral tribunal until the arbitral award was rendered—even though there was an opportunity (*i.e.*, earlier in the process) for both parties to make an objection to the selection of arbitrators.<sup>209</sup> The court added that since neither party has objected to the selection of an arbitral tribunal during the first hearing in such circumstances, they have impliedly agreed to a new method of selecting arbitrators—and the original agreement thus becomes invalid.<sup>210</sup> In this case, the court considered that party silence constituted acquiescence to a new agreement; both parties accepted the procedure of arbitration even though it conflicted with what was originally expressly agreed upon therein.<sup>211</sup> Therefore, the Court decided that the arbitral award could not be nullified because arbitration was conducted in accordance with the parties' new agreement according to Article 7 (1) and there was no reason for the arbitral award to be nullified under Article 13 (1) 1.<sup>212</sup>

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<sup>209</sup> Supreme Court [S. Ct.], 2000Da29264, Nov. 27, 2001 (S. Kor.).

<sup>210</sup> Arbitration should be conducted in accordance with the parties' agreement, regardless of when the agreement is made. Also, if parties make a new agreement against the previous one, generally the latter one is valid. Therefore, arbitration should be conducted according to the new agreement made by both parties after the commencement of arbitration. Supreme Court [S. Ct.], 2000Da29264, Nov. 27, 2001 (S. Kor.).

<sup>211</sup> Interpretation of silence can vary depending on legal systems.

<sup>212</sup> Supreme Court [S. Ct.], 2000Da29264, Nov. 27, 2001 (S. Kor.).

## 4.2. Examination of Parties and Witnesses

Article 8 is about examination of parties and witnesses:

***Article 8 (Examination of Parties,  
Witnesses and Expert Witnesses)***

*(1) The arbitrator shall examine the parties concerned<sup>213</sup> prior to an arbitration award.*

*(2) The arbitrator may examine any witness or witness expert<sup>214</sup> who attends voluntarily: Provided, That he shall not order such witness or witness expert to take an oath.<sup>215</sup>*

Article 8 includes two different tenses: it (i) uses the imperative “shall” for parties’ examination in Article 8 (1) and (ii) uses the conditional “may” for the examination of witnesses or expert witnesses in Article 8 (2). This means that the examination of parties is compulsory, whereas the examination of witnesses (or expert witnesses) is discretionary. The key issue herein is that parties will have at least one chance to be examined by arbitrators before an arbitral award is rendered. In other words, this provision clarifies that no arbitral award should be rendered unless arbitrators examine the parties. The purpose of this provision is to guarantee the fairness of the procedure. Indeed, it is against Article 8(1) for the arbitrators to examine only one party, regardless of intention. Moreover, the arbitral award (*i.e.*, rendered

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<sup>213</sup> “The contracting parties” is better.

<sup>214</sup> It is better to say “expert witness”.

<sup>215</sup> The meaning of this sentence is not clear. Having interpreted the Korean version, it should be translated to “on the condition that an arbitral tribunal shall not order such witness or expert witness to take an oath”.

pursuant to this approach) can be nullified under Article 13(1) 5, which provides such a basis for nullification.<sup>216</sup>

Regarding the application of the obligation to examine the parties, the KSC<sup>217</sup> has stated that the phrase, “the arbitrator shall examine the parties” under Article 8 (1) should be interpreted as requiring the arbitrators to get statements or evidence from both parties before an arbitral award is rendered.<sup>218</sup> Indeed, this does not mean that an arbitrator must actually examine both parties or make them testify.<sup>219</sup> Moreover, if there are representatives for parties, such as lawyers, who act on behalf of the parties, an examination of these representatives fulfills the obligation of the arbitrators under Article 8 (1).<sup>220</sup> Thus, if the representatives of both parties attend the hearings and submit all statements or evidence on behalf of the parties, an arbitral award (*i.e.*, rendered without examining the parties directly or actually) will not violate Article 8 and should not be nullified under on Article 13 (1) 4.<sup>221</sup>

Conversely, the KAA (1997) does not (i) impose an obligation to examine witnesses or expert witnesses or (ii) give arbitrators any authority to order that a witnesses or expert witnesses attend the

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<sup>216</sup> Article 13 (1) 4 : Any party concerned may bring an action for the nullification of an arbitration award in the cases falling under any of the following subparagraphs: 4. In the arbitration procedures, when either of the parties concerned is not examined without any justifiable reason, or no reason is attached to the arbitration award.

<sup>217</sup> Supreme Court [S. Ct.], 2000Da47200, Nov. 24, 2000 (S. Kor.).

<sup>218</sup> The facts of this case are: Contracting parties entered into a contract (there is neither a record on what kind of contract it was nor other details about the contract) and a dispute arose out of the contract. The dispute was submitted to arbitration because there was an arbitration agreement. During the procedure of arbitration, the parties’ lawyers attended the hearings and submitted all documents required by the arbitrators. Later, an arbitral award was rendered. After the arbitral award was rendered, one of parties brought the arbitral award before the court for its cancellation claiming that the arbitral award had to be cancelled under Article 13 (1) 4. This party asserted that the arbitral tribunal did not examine the parties during the procedure of arbitration and no examination of parties was against Article 8. Consequently, the arbitral award rendered without examination of parties should be cancelled under Article 13 (1) 4.

<sup>219</sup> Supreme Court [S. Ct.], 2000Da47200, Nov. 24, 2000 (S. Kor.).

<sup>220</sup> Supreme Court [S. Ct.], 2000Da47200, Nov. 24, 2000 (S. Kor.).

<sup>221</sup> Supreme Court [S. Ct.], 2000Da47200, Nov. 24, 2000 (S. Kor.).

arbitration.<sup>222</sup> Thus, even though arbitrators may want to examine witnesses or expert witnesses, they cannot order any witness or expert witness to be examined. Indeed, according to Article 8, it is purely the will of witnesses to participate in an arbitration that controls. When the witnesses decide to participate voluntarily, the arbitrators may determine whether the witnesses are going to be examined.<sup>223</sup>

This is a clear difference between arbitration and litigation proceedings; indeed, the parties should be aware of this before they agree to arbitrate. Conversely, in the context of the judicial system, arbitration is an autonomous and private dispute resolution process that is initiated by party agreement. The agreement to arbitrate binds *only* the contracting parties who agree to arbitrate; thus, witnesses (or expert witnesses) should not be forced to participate in arbitration because they have not agreed to arbitrate.

Furthermore, in the context of arbitration, witnesses and expert witnesses should not be required to take an oath.<sup>224</sup> In the judicial system, witnesses are required to take an oath before they are examined or testify;<sup>225</sup> this (*i.e.*, taking an oath) means that witnesses can be charged with and receive a criminal penalty for perjury if they do not tell the truth during the examination or testimony.<sup>226</sup> In arbitration, however, a witness or expert witness does not bear any consequential liability for his or her examination or testimony when he or she agrees to participate in a proceeding.

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<sup>222</sup> Arbitration is an agreement between two contracting parties, not between anybody else and an arbitrators' authority to conduct the arbitration is given by this agreement of contracting parties. Therefore, arbitrator authority is limited to just the parties who agree to arbitrate. Witnesses or expert witnesses are beyond an arbitrators' authority.

<sup>223</sup> There is no obligation on arbitrators to examine witnesses or expert witnesses when witnesses or expert witnesses decide to participate in arbitration. Arbitrators can decide at their discretion.

<sup>224</sup> Article 8 (2) says that, "the arbitrator shall not order such witness or witness expert to take an oath."

<sup>225</sup> Article 319 of the Civil Procedure Act (Obligation to Take Oath) The presiding judge shall have a witness take oath prior to an examination: Provided, That he may administer it subsequent to an examination, when there exists a special reason.

<sup>226</sup> Article 320 of the Civil Procedure Act (Warning of Punishment for Perjury) The presiding judge shall, prior to administering an oath, clarify the purport of oath, and give a warning of the penalty for perjury.

Since witnesses or expert witnesses can be examined only if they agree to participate, there could be occasions wherein arbitrators have difficulty conducting arbitrations. For example, when an arbitrator must determine the veracity of an important piece of evidence or witness testimony, there must be a way to force a witness to testify or be examined—even when he or she does not wish to do so. The courts must indeed intervene in such circumstances to ensure the smooth operation of the arbitration proceedings.<sup>227</sup> Consequently, most arbitration laws allow courts to intervene in arbitration under certain circumstances. Thus, the next article is about judicial assistance in arbitration. Article 9 expressly states that the court can intervene in arbitration proceedings.

### **4.3. Judicial Assistance**

The title of Article 9 is cooperation of courts:

***Article 9 (Cooperation of Court)[<sup>228</sup>]***

*Upon request of an arbitrator or a party concerned, the court shall carry out the duties concerning any action deemed necessary by an arbitrator for an arbitration award which the arbitrator himself cannot take. In this case, the Civil Procedure Act shall be applicable mutatis mutandis.*

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<sup>227</sup> The only purpose of intervention of the court is to aid arbitration.

<sup>228</sup> The title should be “Judicial Assistance.”



There are some arbitration proceedings that require judicial assistance. Article 9 permits courts to intervene in arbitration anytime there is a request by arbitrators or arbitrating parties. Since arbitrators do not have public authority on a par with judges, Article 9 allows arbitrators to borrow some of this authority from the courts.<sup>229</sup> For example, when a dispute arises and the aggrieved party submits the dispute to arbitration, sometimes the breaching party tries to shield assets before the arbitral award is rendered. In order to prevent the breaching party from hiding assets, the aggrieved party has two options under Article 9. First, the aggrieved party can request that the arbitral tribunal order interim measures to freeze the assets of the breaching party; however, because the arbitral tribunal does not have express authority to do so, it must request a court to take interim measures.<sup>230</sup> Second, the aggrieved party can file a case directly before the court for an interim order.<sup>231</sup> The relevant provisions of the Civil Procedure Act apply when either the arbitrator or the parties concerned request the court to order an interim order. For example, when the court needs to order the preservation of evidence during the arbitral proceeding, the court has to do so in accordance with Article 350 of the Civil Procedure Act (1995).<sup>232</sup>

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<sup>229</sup> Arbitration is a private agreement between parties concerned, and arbitrators are also private persons who are appointed by agreement of contracting parties. Therefore, the power of arbitrators cannot go beyond the contracting parties and there are certain limitations on arbitrators' authority for public interest.

<sup>230</sup> The KAA (1997) did not have any provision regarding interim measures, but when the KAA was amended in 1999, one provision about interim measure was enacted. Article 18 of the KAA (1999) allows the arbitral tribunal, upon request of a party, to order any party to take such interim measure of protection if the arbitral tribunal considers necessary in respect of the subject-matter of the dispute.

<sup>231</sup> When this is the case, the party who requests the court to order an interim measure has to use the judiciary system although s/he agreed on arbitration in order to avoid the judiciary system. Unlike the KAA (1997), the KAA (1999) has a provision of interim measure, but there is still heated debate over this matter.

<sup>232</sup> Article 350 of Civil Procedure Act (1995) (ex officio Preservation of Evidence): The court may, if it deems it necessary, render a ruling ex officio for the preservation of evidence during the pendency of a lawsuit. This article was amended as Article 379 of Civil Procedure Act (2011).

#### 4.4. Claim of Illegality of Arbitration Procedures

Article 10 concerns the circumstances wherein a party can claim that arbitration should not be conducted—and whether arbitrators can rule on such claims:

***Article 10 (Claim of Illegality of Arbitration Procedures  
and Powers of Arbitrator to Decide)***

*Even though the parties concerned claim that there exists no legally effective arbitration agreement, that the arbitration agreement has no relation to the disputes referred to arbitration, that the arbitrator has no authority to perform such duties, or that the arbitration procedures<sup>[233]</sup> not permissible for other reasons, the arbitrator may continue with the arbitration procedures and make an arbitration award thereon.<sup>[234]</sup>*

Article 10 outlines four cases wherein a party may object to arbitration: (i) when there is no legally valid arbitration agreement, (ii) when the dispute is beyond the scope of the arbitration agreement, (iii) when arbitrators do not have jurisdiction over the dispute, and (iv) when arbitration is not permitted by law.<sup>235</sup> The emphasis on the power of the arbitrator is the critical issue therein. According to Article 10, when there is a claim against conducting the arbitration, it is the arbitral tribunal that has the power to rule on the claim. Indeed, the provision states that “the arbitrator may continue with the arbitration procedure.” Thus, the arbitral tribunal can make a decision on a claim at its discretion—namely, whether (i) the

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<sup>233</sup> The word, ‘procedures’ should be changed as “proceeding is.”

<sup>234</sup> It would be better if this part is changed to “the arbitration and render an award.”

<sup>235</sup> The KAA (1997) used the phrase, “illegality of arbitration procedures” for the circumstances where the arbitration should not be conducted. These reasons are the grounds for cancellation of arbitral awards under the KAA (1999), which is the next version of the KAA (1997).

arbitration should be halted, (ii) the claim should be disregarded, or (iii) the arbitration should continue—and an arbitral award should be rendered.

After arbitration has commenced, one party could claim that there is no legally valid arbitration agreement and the arbitral tribunal could decide to address this claim. In this situation, the arbitral proceeding would be stopped—and the arbitral tribunal would examine the claim. If the arbitral tribunal determines (*i.e.*, after examining the claim) that the arbitration should not be conducted because of an invalid arbitration agreement, the arbitral tribunal would delay or terminate the arbitration procedure immediately. In this case, the dispute would not be settled by arbitration because there is no valid arbitration agreement. The parties would thus have to find other ways to resolve their dispute.

Conversely, if the arbitral tribunal determined that the arbitration agreement is valid, the arbitral tribunal would reconvene the arbitral proceeding. In the latter case, because of the claim lacks merit, irrespective of whether or not it is intended, the arbitral proceeding is delayed. It is a waste of time for both the arbitral tribunal and the other party. This is why this provision allows the arbitral tribunal to make its own decision on the claim by using the word “may.” Should the arbitral tribunal decide to ignore the claim and continue with the arbitration procedure, it is allowed to do so and can render an arbitral award. If the provision requires an arbitrator to examine a claim (*i.e.*, made by one party) by using the mandatory language “shall,” this provision would be abused by a breaching party who (i) does not want to resolve a dispute by arbitration or (ii) intends to delay the arbitral proceeding on purpose. This is why Article 10 uses permissive (*vs.* mandatory) language and allows arbitrators to rule on the claim; indeed, it avoids purposeful delay. Thus, it is clear that the ultimate purpose of Article 10 is to give arbitrators an

absolute authority to decide on a claim made by a party in order to prevent the party from purposefully delaying an arbitral proceeding.<sup>236</sup>

Regarding arbitrator authority to rule on a claim of illegality of arbitration procedures, the KSC<sup>237</sup> has clarified that a claiming party cannot apply for an injunction to stop an arbitration procedure when he or she believes that the proceeding of arbitration is against the arbitration agreement or applicable law;<sup>238</sup> however, there are two options for the party herein. (1) When one party strongly believes that the proceeding of arbitration does not comply with the arbitration agreement or is illegal, he or she should bring the claim to the arbitral tribunal first. If, however, in spite of the claim, the arbitral tribunal decides to continue arbitration, the claiming party can (i) bring the case before the court and (ii) ask the court to determine whether the arbitration is against the arbitration agreement—or applicable law. The court can thus examine the case and make a decision. This indeed differs from ordering an injunction to stop the arbitration.<sup>239</sup> While the court is examining the claim, arbitrators can continue the arbitration and render an arbitral award if they so choose. (2) The claiming party can bring the case before the court for nullification of the arbitral award based on Article 13 (1) 1 after the arbitral award is finally rendered.<sup>240</sup>

Indeed, whichever option the claiming party chooses, arbitrators can continue the arbitration (*i.e.*, notwithstanding the claim) and thus prevent delay of the arbitral proceeding. Thus, this strengthens the

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<sup>236</sup> As far as Article 10 is concerned, the key point is the power of arbitrator.

<sup>237</sup> Supreme Court [S. Ct.], Ja96Ma149, Jun. 11, 1996 (S. Kor.).

<sup>238</sup> There is no factual record on this case. There was a dispute between two contracting parties and the dispute was submitted to arbitration because there was a valid arbitration agreement. After the arbitration was commenced, one of parties brought the case before the court and claimed that the procedure of arbitration was against the law. Consequently, this claiming party requested the court to order an injunction to stop the arbitration procedure immediately.

<sup>239</sup> If the law allows the court to have authority issue and injunction to stop the arbitration upon the request of party, it would weaken the arbitrators' authority.

<sup>240</sup> Supreme Court [S. Ct.], Ja96Ma149, Jun. 11, 1996 (S. Kor.).

efficiency and speed of arbitration, which is one of the most valuable features of arbitration; however, it is devious that the resolution of merits should be secondary to the efficiency of the process.

The unlawfulness of arbitration procedures may be based on one of four reasons in Article 10; once there is a claim for any of these reasons, it must be addressed. For example, assume that one party makes a claim for the invalidity of an arbitration agreement in the middle of an arbitral proceeding; however, the arbitral tribunal decides to continue the arbitral proceeding without examining the claim—and renders an arbitral award. What if the claim is true? What if there is no legally valid arbitration agreement? Indeed, this means that the arbitral tribunal rendered an arbitral award under an invalid arbitration agreement.

The question becomes whether there is any chance to force an arbitral tribunal to examine the invalidity of an arbitration agreement—or the inarbitrability of a dispute under the KAA (1997). Indeed, there is no provision that addresses these matters in the KAA (1997). The result is that there is no way to nullify an arbitral award rendered pursuant to an invalid arbitration agreement (or when a dispute is simply inarbitrable) because Article 13 (*i.e.*, the nullification of the arbitral award) does not include such grounds. Another issue involves an arbitral tribunal continuing arbitration after a claim by a party about the illegality of the arbitration based on an invalid arbitration agreement or inarbitrability. What if a court finds the agreement to be invalid or inarbitrable? Is there any provision that can stop the arbitration procedure based on the court's decision? Which decision is controlling: the finding of the arbitrators or the courts? Are there any legal grounds under the KAA (1997) for the court to order an arbitrator to stop the arbitration procedure?<sup>241</sup>

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<sup>241</sup> If the purpose of Article 10 is to prevent any of parties from disturbing and delaying the arbitration procedure purposefully, there should be other provisions that can give a clear answer to any questions raised.

Interestingly, two reasons for nullification of an arbitral award under Article 10 reappear in Article 13. The first ground is lack of arbitrator authority<sup>242</sup> and the second is impermissible arbitral procedures.<sup>243</sup> Indeed, if an arbitral tribunal continues with an arbitration proceeding and renders an arbitral award without examining a claim that an arbitrator has no authority to conduct arbitration, the claiming party can bring an action before the court for the nullification of the arbitral award under Article 13. By doing so, the claiming party gets one more chance to have the claim be examined (*i.e.*, after arbitration has ended).

## **5. An Arbitral Award**

### **5.1. Rendering and Effect of an Arbitral Award**

Article 11 is about arbitral award:<sup>244</sup>

#### ***Article 11 (Arbitration Award)***

*(1) If there are a number of arbitrators, any arbitration award shall be made by a concurrent vote of the majority of all arbitrators, except as otherwise provided in the arbitration agreement.*

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<sup>242</sup> When an arbitral award is rendered, even though there is a claim that the arbitrator has no authority to perform such duties, the award can be cancelled under Article 13 (1) 1, “when the designation of arbitrator or arbitration procedures do not conform to this Act or the arbitration agreement.”

<sup>243</sup> An arbitral award rendered, even though there is a claim that the arbitration procedure is not permissible, can be cancelled on the grounds of Article 13 (1) 1.

<sup>244</sup> Although the KAA (1997) uses the term, ‘arbitration award’ for a final decision, in this dissertation, the term, ‘arbitral award’ will be used for unification of terms.

*(2) Except as otherwise stipulated in the arbitration agreement, if there are a number of arbitrators,<sup>[245]</sup> and in the event of an equality of opinions on the award, the arbitration agreement concerned shall lose its effect.*

*(3) The arbitration award shall be prepared in writing, be signed and sealed by the arbitrator or arbitrators, and include the text of the arbitration award, summary of the reasons therefor, and the date of preparation. [Amended by Act No. 2537, Feb. 17,1973.]*

*(4) The arbitrator shall serve a certified copy of the award on the parties concerned and transfer the original copy thereof together with a certificate of service into the custody of the competent court.*

*(5) The arbitration award shall be made within the period stipulated in the arbitration agreement or three months after the arbitration commences.*

Article 11 (1) states that an arbitral award should be made by a vote of the majority of all arbitrators unless an arbitration agreement is otherwise achieved. If the number of arbitrators is an odd number, the decision will be made by a majority vote. If, however, the number of arbitrators is an even number (*e.g.*, two or four), there is a possibility that a decision cannot be reached in the event of a tie and Article 11(2) provides the consequential effect on this matter. According to Article 11(2), if there is a tie between the arbitrators, the arbitration agreement will be invalidated. Thus, if two arbitrators compose an arbitral tribunal and the arbitral tribunal cannot reach the decision by a unanimous vote, the arbitration agreement

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<sup>245</sup> It should be translated as “if there is an even number of arbitrators.”

will be invalidated according to Article 11 (2).<sup>246</sup> Indeed, this issue was raised previously when Article 4 (2)<sup>247</sup> was discussed.<sup>248</sup>

Such a disagreement on a decision (*i.e.*, by even number of arbitrators) results in the invalidation of the arbitration agreement under Article 11 (2). Indeed, there are two ways to interpret “invalidation of arbitration agreement.”<sup>249</sup> First, it can be interpreted that once an arbitration agreement becomes invalid (*i.e.*, because arbitrators cannot reach a decision), the arbitration will be terminated and new arbitration will commence with a different arbitral tribunal; however, the efficiency and quickness of arbitration may subsequently be damaged because the arbitration has to be started all over again. The obligation to arbitrate, in such circumstances, however, would remain intact.<sup>250</sup> Second, invalidation (*i.e.*, losing the effect of the arbitration agreement as stipulated in Article 11(2)) means that there would be no arbitration agreement anymore and the dispute could not be settled by arbitration unless the parties again agree to arbitrate their existing dispute via a submission.<sup>251</sup>

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<sup>246</sup> Each arbitrator who is appointed by each party tends to be on the side of party who appoints him/her as an arbitrator. Because the number of arbitrators is an even number, there is a big possibility for the arbitration agreement to lose its effect.

<sup>247</sup> Article 4 (2): If the designation of the arbitrators is not stipulated in an arbitration agreement, each party concerned shall designate one arbitrator.

<sup>248</sup> The question discussed under Article 4 (2) was what happens if each party selects one arbitrator and the selected two arbitrators cannot agree on the decision.

<sup>249</sup> Article 11 (2) states that in the event of an equality of opinions on the award, the arbitration agreement concerned shall lose its effect. Here, the phrase, “losing its effect” is interpreted as invalidation of arbitral agreement. Because the provision does not state any consequential effect after invalidation of arbitration agreement, it is not clear what the parties can do after arbitrators cannot agree on the final decision.

<sup>250</sup> Although new arbitration starts again because the arbitrators in the former arbitration failed to reach a decision, there is no guarantee that the arbitrators in the new arbitration will reach a decision on arbitral award. Also, the contracting parties cannot bring their dispute to the court because of arbitration agreement, so the dispute cannot be resolved in any way until arbitrators agree on their decision.

<sup>251</sup> In practice, it is almost impossible for contracting parties to make another arbitration agreement for their existing dispute after their first arbitration failed. So, if it is the case, the existing dispute will be settled by any other ways.



Indeed, the second interpretation is more convincing. The issue under the second interpretation, however, is whether it is justifiable to force any such party (*i.e.*, seeking to avoid the judicial system) to depend on the judicial system, due entirely to arbitrator performance. Also, if the arbitration agreement becomes invalid because the arbitrators cannot reach a decision, both parties must generate another arbitration agreement for their present dispute; if they cannot succeed in doing so, they will have to resolve their dispute by other methods (*e.g.*, judicial litigation, in all likelihood).<sup>252</sup> This means that parties who want to settle their disputes via arbitration must nevertheless resort to judicial litigation.<sup>253</sup>

Next, Article 11 (3) is about the form and content of an arbitral award. The KAA (1997) requires an arbitral award to be (i) in writing, (ii) signed, and (iii) sealed (*i.e.*, by arbitrators) to be effective. Also, it specifies what the arbitral award should contain—namely, the (i) text of the award, (ii) summary of the reasons for the award,<sup>254</sup> and (iii) date of issuance.<sup>255</sup> Article 11 (3) uses an imperative word (*i.e.*, “shall”); thus, if the arbitral award does not contain what is specified therein, it will become ineffective.

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<sup>252</sup> Among other dispute resolution systems, litigation is the only system that does not require the consent from the parties. For all alternative dispute resolution systems, there has to be an agreement between parties to settle their dispute by ADR like mediation or arbitration.

<sup>253</sup> Although the parties’ will is to settle their dispute by arbitration because of all advantages of arbitration, they cannot enjoy these advantages because the law makes so. Here, the fundamental problem is not Article 11 (2). The law should have made sure that the arbitral tribunal should not be formed with an even number under Article 4 (2).

<sup>254</sup> Stating the reasons for an arbitral award can cause some troubles in practice. If the reasons are not well-drafted, the losing party will claim that the award is wrong and s/he will try to file a case for nullification of the arbitral award. It is not possible to redo arbitration on the same issue or vacate the arbitral award only because the reasons are not well-drafted or the arbitral award is not right. But, it leaves at least some chances for the losing party not to follow the arbitral award voluntarily or to delay in execution of arbitral award.

<sup>255</sup> The issuing date of arbitral award is important because this date is a starting date for several different occasions. For example, when the arbitral award orders one party to pay interest to another party because payment of interest was claimed in the case, arbitrators often specify the different interest rate before and after the issuing date of arbitral award. Thus, the issuing date of arbitral award should be clearly written.

Furthermore, not providing a summary of the reasons is a ground for nullification of the arbitral award under Article 13 (1) 4.<sup>256</sup>

Several cases have been brought to the KSC for the nullification of arbitral awards, alleging therein that the arbitral award was not clear<sup>257</sup> and the reasons for the arbitral awards were not detailed enough.<sup>258</sup> The list of requirements in Article 11 (3) become clearer via examinations of some of the courts' associated decisions. The KSC<sup>259</sup> has indeed made clear the standard of interpretation required by Article 11 (3).<sup>260</sup> (i) The Court has held that if an arbitral award contains some parts that are not clear or completed, these parts should be interpreted by reasonable supplementary methods.<sup>261</sup> (ii) The arbitral award should not be vacated simply because some parts are vague therein.<sup>262</sup> (iii) The Court has also noted that analogical interpretation should be strictly prohibited when the arbitral award is complete and clear enough.<sup>263</sup> (iv) Furthermore, the KSC<sup>264</sup> has established the scope of reasons for an arbitral award.<sup>265</sup> The

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<sup>256</sup> Article 13 (1) 4 (Action for Cancellation of Arbitration Award): Any party concerned may bring an action for the cancellation of an arbitration award in the cases falling under any of the following subparagraphs:...or no reason is attached to the arbitration award. Whether the reasons for arbitral award are correct does not constitute a ground for cancellation under Article 13 (1) 4. An omission of reasons for arbitral award constitutes a ground for cancellation.

<sup>257</sup> Supreme Court [S. Ct.], 99Da13577, 13584, April 10, 2001 (S. Kor.)

<sup>258</sup> Supreme Court [S. Ct.], 98Da901, July 10, 1998 (S. Kor.)

<sup>259</sup> Supreme Court [S. Ct.], 99Da13577, 13584, April 10, 2001 (S. Kor.)

<sup>260</sup> The facts of this case are: two parties entered into a joint venture agreement. The dispute arose and the issue of dispute was if the joint venture agreement was terminated. After the arbitral award was rendered, one party brought the arbitral award for its cancellation claiming that there was no reason stated in the arbitral award. The Court held that the arbitral award could not be cancelled because the arbitral award stated the reason why one party's claim was right by stating the circumstances that proved termination of contract.

<sup>261</sup> Supreme Court [S. Ct.], 99Da13577, 13584, April 10, 2001 (S. Kor.)

<sup>262</sup> Supreme Court [S. Ct.], 99Da13577, 13584, April 10, 2001 (S. Kor.)

<sup>263</sup> Supreme Court [S. Ct.], 99Da13577, 13584, April 10, 2001 (S. Kor.)

<sup>264</sup> Supreme Court [S. Ct.], 98Da901, July 10, 1998 (S. Kor.)

<sup>265</sup> There is no record for detailed facts of the case. The facts known are: Two parties entered into a contract which involved providing service and sale of goods. During the performance of contract, one party breached the contract and the other party submitted a case for arbitration. After an arbitral award was rendered against one party, this party brought the arbitral award for cancellation claiming the lack of reasons stated. The arbitral award stated the amount of damages that one party should pay and the standard for calculating the amount. With this arbitral award, one party claimed that the standard for calculating the damage amount was based on the circumstances of transaction and commercial customs, not on legal ground.

Court has held that the reasons do not need to necessarily state a clear and detailed determination about the legal relationship of the matters within the disputes.<sup>266</sup> (v) The Court has stated that the arbitral award simply needs to show how the arbitrators have reached a decision—and that it can be rendered on the basis of commercial customs and equity.<sup>267</sup>

Next, Article 11 (4) details what the arbitrators must do with the arbitral award—namely, deliver a certified copy of the award to the parties, transfer the original copy to the competent court, and thereby get an execution judgment from the court. The KAA (1997) imposes an obligation to submit an arbitral award to the competent court on arbitrators.<sup>268</sup> Thus, parties do not need to submit an arbitral award to the court for execution or execution judgment under the KAA (1997).<sup>269</sup>

Lastly, Article 11 (5) concerns the time limit for rendering an arbitral award. Indeed, if an arbitration agreement states when an arbitral award must be rendered, the arbitral tribunal must render the arbitral award within that time frame;<sup>270</sup> an action to the contrary will result in non-compliance (*i.e.*, with the arbitration agreement) and become a basis for nullification of the arbitral award under Article 13 (1).<sup>271</sup> If there is no agreement about the time limit (*i.e.*, for rendering an arbitral award), the arbitral award should be rendered within three months after the commencement of arbitration, according to Article 11 (5).<sup>272</sup>

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<sup>266</sup> Supreme Court [S. Ct.], 98Da901, July 10, 1998 (S. Kor.)

<sup>267</sup> Supreme Court [S. Ct.], 98Da901, July 10, 1998 (S. Kor.)

<sup>268</sup> Regarding this matter the KAA (1999) states that the original of arbitral award should be transferred to the competent court. Although it does not clearly stipulate who has to transfer the arbitral award to the court, it is obvious that it does not impose any obligation to do so on arbitrators.

<sup>269</sup> Because there is no time frame set for transferring the arbitral award, it could be an issue when arbitrators delay in transferring the arbitral award to the court for execution.

<sup>270</sup> Failing to render an arbitral award within the time that both contracting parties agreed constitutes a breach of contract.

<sup>271</sup> Article 13 (1) 1 (Action for Cancellation of Arbitration Award): Any party concerned may bring an action for the cancellation of an arbitration award in the cases falling under any of the following subparagraphs: when.....arbitration procedures do not conform to this Act or the arbitration agreement.

<sup>272</sup> The KAA (1999) does not set the time-limit for an arbitral award. Instead, the International Arbitration Rules of the KCAB sets the time-limit, but it is flexible. The International Arbitration Rules of the KCAB, Article 33 (Time Limit for the Final

This provision also aims to promote the speed of arbitration. As discussed previously, the KAA (1997) emphasizes the efficiency and speed of arbitration in several provisions; however, it is still unclear whether other aspects of the process should be disregarded to achieve these features of arbitration.<sup>273</sup> Nevertheless, the stipulation of three months for rendering an arbitral award, without any consideration of circumstance (*i.e.*, associated with an individual case) is not necessarily efficient—and could be impracticable.

Next, Article 12 emphasizes the effect of the arbitral award:

***Article 12 (Effect of Arbitration Award)***

*The arbitration award shall have, for the parties concerned,<sup>[274]</sup> the same effect as that of a final and conclusive judgment of the court.*

Article 12 confirms that an arbitral award has the same effect as a court judgment. In fact, the characteristics of arbitration enable an arbitral award to have a stronger effect than a court judgment.<sup>275</sup> Once an arbitral tribunal renders an award, the award is final and binding, while judicial litigation allows appeals. Thus, an arbitral award has the same effect as a court’s final judgment, such as one from the Court of Appeal or Supreme Court. This is why Article 12 states “final and conclusive judgment of the

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Award): 1. 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. 2. The Secretariat may extend this time limit pursuant to a reasoned request from the Arbitral Tribunal or on its own initiative if it decides it is necessary to do so.

<sup>273</sup> Three months for rendering an arbitral award after the arbitration commences is practically too short period. Submission of the case, answering to the request, presenting evidence, examining both parties, conducting hearing, and other procedural actions should be done within three months. It would have been more practical and realistic if it sets time limit of three months after the final hearing is closed.

<sup>274</sup> “The contracting parties” would be better.

<sup>275</sup> Once an arbitral award is rendered, it is final. The same issue cannot be dealt with again and this character of arbitration strengthens the efficiency and quickness of arbitration.

court” (vs. merely “judgment of the court”); the implication therein is that neither party can ask the arbitral tribunal to reconsider the case—even when there is a doubt about the decision.<sup>276</sup> The only exception (*i.e.*, to the validity of the arbitral award) is the grounds for nullification within Article 13. For example, when there is unfairness or a flaw in the conduct of the arbitral proceedings<sup>277</sup> (*e.g.*, when the arbitral tribunal does not treat the parties equally or conduct the arbitration in a manner that conforms with the provisions of the arbitration agreement), either party can bring a nullification action before the court,<sup>278</sup> which will determine whether the arbitral award should be nullified on the grounds stated in Article 13.

## 5.2. Compulsory Execution of an Arbitral Award

Article 14 is about the compulsory execution of an arbitral award. Compulsory execution means that a losing party does not voluntarily satisfy what an arbitral award orders; thus, the award is enforced compulsorily by law.<sup>279</sup> This article emphasizes the lawful and binding effect of an arbitral award.<sup>280</sup>

### ***Article 14 (Compulsory Execution by Arbitration Award)<sup>[281]</sup>***

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<sup>276</sup> If either party has a doubt in an arbitral award and tries to vacate it s/he has to bring the case before the court not to the arbitral tribunal. Once the arbitral tribunal renders an arbitral award, it finishes its job as an arbitrator.

<sup>277</sup> It is not possible to reconsider the case again and to change the arbitral award once the arbitral award is rendered. Only making the arbitral award invalid is possible.

<sup>278</sup> The court will reject the case if it is brought for reconsideration and review of the arbitral award. However, the court will take the case if it is brought for nullification of arbitral award.

<sup>279</sup> Most arbitral awards are executed voluntarily.

<sup>280</sup> In a case of an international arbitral award, it can be executed compulsorily by the New York Convention (1958) if the award is rendered in a contracting state to the New York Convention.

<sup>281</sup> “Compulsory Execution of an Arbitration Award” is a better translation.

*(1) Any compulsory execution under<sup>[282]</sup> an arbitration award may be allowed only<sup>[283]</sup> when it is declared lawful by an execution<sup>[284]</sup> judgment of the court.<sup>285</sup>*

*(2) When there is any reason to institute an action for cancellation<sup>[286]</sup> of an arbitration award, the execution<sup>[287]</sup> judgment under the preceding paragraph shall not be rendered.*

*(3) The execution judgment under paragraph (1) shall declare that a provisional execution<sup>[288]</sup> may be allowed with or without a reasonable security placed.*

Article 14 (1) clearly states that when an arbitral award must be enforced compulsorily, an executory judgment from a court is required.<sup>289</sup> Indeed, it is far better when a losing party satisfies an arbitral award voluntarily; however, there must be a compulsory means for providing enforcement when voluntary compliance is not possible. Article 14 guarantees compulsory enforcement; the intent therein is to ensure that arbitration is a binding dispute resolution system.<sup>290</sup> Indeed, the support of the judicial system is

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<sup>282</sup> Using a preposition “Of” gives a right meaning in this sentence.

<sup>283</sup> “May only be allowed” would be a better translation.

<sup>284</sup> Using the word “executory” is better in this context.

<sup>285</sup> Here, the language used in the provision is not clear enough to describe what it intends to mean. The provision uses the phrase, “may be allowed only when.” Literally speaking, it means that the law does not guarantee the compulsory execution of arbitral award even if the arbitral award gets declaration of lawfulness by a court. Because the provision says ‘may be allowed’, it means that there can be some other occasions in which compulsory execution ‘may not be allowed’. To find out what this provision intends, the Korean version has to be considered because if there is a conflict between the English translation and Korean original version, the latter prevails. Having considered the Korean version, this provision should be translated as “Any compulsory execution of an arbitral award rendered shall be done only if the court declares that the arbitral award is legal to be executed.” It means that legality or lawfulness of arbitral award is a prerequisite requirement for the compulsory execution and also compulsory execution judgment of arbitral award should be done as long as the court declares lawfulness of the arbitral award. Although this English version which was translated by the Korean Legislation Research Institute is an official one, it is true that there were some provisions that are not translated with the exactly same meaning as ones in the Korean version.

<sup>286</sup> The word “nullification” is better and a definite article “the” should be also added.

<sup>287</sup> Using the word “executory” is better in this context.

<sup>288</sup> It should be changed to “executory.”

<sup>289</sup> Because an arbitral award is a decision made by a private person who is selected through a private agreement, it has to be confirmed by a court to become binding decision just like a court decision.

<sup>290</sup> For ICA, there are some countries where the court is not hospitable to a foreign arbitral award. In these countries, it is hard to get confirmation for compulsory execution.

sometimes necessary. Furthermore, because Article 14 (1) uses the words, “only when” in the provision, it clearly shows that acquiring confirmation from the court is an essential requirement (*i.e.*, for compulsory enforcement of the arbitral award).<sup>291</sup>

Next, Article 14 (2) specifies one set of circumstances wherein an executory judgment should not be rendered.<sup>292</sup> Indeed, if there is any ground for the nullification of an arbitral award under Article 13, the executory judgment will not be rendered under Article 14 (2).<sup>293</sup> This provision, however, does not clarify the meaning of “when there is any reason to institute an action for nullification of an arbitration award.” For example, it is not clear who determines a reason for nullification. Indeed, it could be interpreted that the judge should determine if there is any reason for the nullification of the arbitral award before he or she renders the executory judgment; however, this would (i) mean the judge would have to review the arbitral award and (ii) cause serious damage to arbitration because this provision invites the courts to undertake a merits review.<sup>294</sup>

Arbitration is based on the principle that the courts should be discouraged from intruding upon the arbitral process. This provision could also be interpreted as “when either party initiates an action for

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<sup>291</sup> When an arbitral award is submitted to the court for confirmation, the court confirms the award without reviewing it.

<sup>292</sup> The KAA (1999) does not have any provision stating when the arbitral award should not be confirmed. It just stipulates that recognition or enforcement of arbitral awards should be made by a court unless any ground referred to in Article 36 (2) exists in a case of domestic arbitral award. Also, the KAA (1999) says in a case of foreign arbitral award, recognition or enforcement of arbitral award should be governed by the New York Convention (1958). Both Article 36 (2) of the KAA (1999) and the New York Convention (1958) state that the arbitral award should not be recognized or enforced when, first, the subject-matter of the dispute is not capable of settlement by arbitration under the law of Republic of Korea, and second, the award is in conflict with the good morals and other forms of social order of the Republic of Korea.

<sup>293</sup> This provision makes the grounds for cancellation of arbitral award to be examined twice. The first time is when the case is submitted for cancellation and the second time is when the court confirms execution.

<sup>294</sup> If this occurs, this provision imposes an obligation to review the arbitral award on the court all the time whenever the award is submitted for confirmation of execution.

nullification.”<sup>295</sup> Once an arbitral award is rendered, either party could bring an action for nullification of an arbitral award. At this stage, the court would be invited to intervene by party request; however, a judge would have to wait until the judgment (*i.e.*, on the nullification of the arbitral award) is rendered.<sup>296</sup> Later, if the action for nullification is dismissed, an executor judgment would be rendered as long as other requirements are fulfilled. Conversely, if the arbitral award is vacated under the grounds stated in Article 13, the request for an enforcement judgment would be also dismissed.<sup>297</sup>

The next article focuses on provisional enforcement.<sup>298</sup> According to Article 14 (3), when the enforcement judgment is rendered, provisional enforcement should also be permitted, irrespective of whether reasonable security is provided. Although the English version uses permissive words like “may be allowed” in Article 14 (3), the Korean version uses an imperative word; indeed, the Korean version implies that a provisional enforcement should be rendered, regardless of whether reasonable security is provided.<sup>299</sup> Thus, the KAA (1997) secures the enforcement of provisional awards.

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<sup>295</sup> Because there is no clear subject for the phrase, “when there is any reason to institute an action for cancellation”, in this provision, its interpretation is not clear.

<sup>296</sup> This means that the judge, who has to confirm an arbitral award, is different from the one who has to determine whether the arbitral award should be vacated or not.

<sup>297</sup> In this case, the court does not bear any obligation to review an arbitral award whenever the award is submitted for confirmation of execution. The court only reserves the decision for confirmation until the decision for nullification is determined.

<sup>298</sup> Having understood what it says, declaration of compulsory execution includes a provisional execution regardless of existence of security.

<sup>299</sup> As mentioned previously, if there is any conflict in meaning between the English and Korean version, the Korean version prevails over the English one.



### 5.3. Nullification of Arbitral Award

Provisions about the nullification of an arbitral award are included in Articles 13, 15, and 16. Also, Article 14(2) is about the enforceability of an arbitral award that is nullified.

#### *Article 13 (Action for Cancellation of Arbitration Award)*

*(1) Any party concerned<sup>300</sup> may bring an action for the cancellation<sup>301</sup> of an arbitration award in the cases falling under any of the following subparagraphs:*

- 1. When the designation of arbitrator or arbitration procedures do not conform to this Act or the arbitration agreement;*
- 2. In the designation of arbitrators or arbitration procedures, when either of the parties concerned<sup>302</sup> does not have<sup>303</sup> legal capacity for action,<sup>304</sup> or either of their representatives has not been designated legally;*
- 3. When the arbitration award included a provision ordering any act prohibited by law;*
- 4. In the arbitration procedures, when either of the parties concerned<sup>305</sup> is not examined without any justifiable reason, or no reason is attached to the arbitration award; and*
- 5. Where there exist causes falling under subparagraphs 4 through 9 of Article 422 of the Civil Procedure Act.*

*(2) When the parties concerned<sup>306</sup> have reached an agreement separately with regard to the cause referred to in subparagraph 4 of the preceding paragraph, no action for cancellation of the arbitration may be instituted.*

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<sup>300</sup> “Any contracting party” is a better word.

<sup>301</sup> “Nullification” is a right word.

<sup>302</sup> “The contracting parties” is a better expression.

<sup>303</sup> The translation is completely wrong. There is no verb in a sentence. It should be written as “does not have.”

<sup>304</sup> These words are not necessary.

<sup>305</sup> “The contracting parties” is a better expression.

<sup>306</sup> “The contracting parties” is better translation.

Article 13 states five grounds for the nullification of an arbitral award; according to Article 13, any party (*i.e.*, seeking to bring an action for nullification) may do so as long as the action is based on one of the reasons stipulated in Article 13. Article 13 (1) 1 details the (i) formation of the arbitral tribunal and (ii) conduct of the arbitral procedure. According to the KAA (1997), arbitration must be conducted according to the agreement or the governing law; thus, if there is an agreement on arbitral procedure between the parties, the arbitration should be conducted according to their agreement.<sup>307</sup> Consequently, if an arbitral tribunal is not formed or conducted pursuant to such an agreement, either party can bring an action for the nullification of the arbitral award (*e.g.*, any selection of arbitrators that differs from such agreements is sufficient reason for the nullification of an arbitral award).

The KSC<sup>308</sup> has confirmed that conducting arbitration against this type of agreement was a basis for the nullification of an award.<sup>309</sup> In this case, an arbitral award was rendered by two arbitrators (in spite of an agreement of the contracting parties to have three arbitrators).<sup>310</sup> Upon the request of one party who wanted to vacate the arbitral award, the Court stated that agreement to attend the hearing without one arbitrator did not mean that the contracting parties had allowed two arbitrators to render an arbitral award

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<sup>307</sup> Arbitration is an agreement between parties, so arbitrators or parties should follow what they agreed as well as the law. If they do not, it constitutes a breach of contract.

<sup>308</sup> Supreme Court [S. Ct.], 91Da17146, 91Da17153, April 14, 1992 (S. Kor.)

<sup>309</sup> The facts of this case are: Both contracting parties agreed to have three arbitrators for an arbitral tribunal. One of arbitrators, however, did not attend the hearing and contracting parties agreed to conduct the hearing without this absent arbitrator. After the hearing, two arbitrators agreed on the settlement of dispute and finally rendered an arbitral award. After the arbitral award was rendered, one of parties brought a case for cancellation of arbitral award claiming that the arbitration was conducted against parties' agreement.

<sup>310</sup> In this case, the agreement of two parties required three arbitrators for the arbitral tribunal. If, however, arbitration was conducted by two arbitrators, it was definitely against the contract and it constituted a breach of contract.

without the absent arbitrator.<sup>311</sup> The Court stressed that (i) such an intent (*i.e.*, conducting a hearing without one arbitrator) should not have been interpreted broadly<sup>312</sup> and (ii) the arbitral award should have been vacated if the arbitral tribunal was not able to prove that contracting parties had agreed on having two arbitrators for rendering the arbitral award.<sup>313</sup>

Conversely, there was a case wherein a decision was made differently (*vs.* the one discussed above). The KSC<sup>314</sup> held that if both parties attended the first hearing without objecting to the formation of an arbitral tribunal (*i.e.*, formed against their agreement), this should have been interpreted as (i) both parties agreeing impliedly on a new method of selecting arbitrators<sup>315</sup> and (ii) that the arbitral award should not have been vacated.<sup>316</sup> The Court adopted herein a broad interpretation of parties' intent.

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<sup>311</sup> When the contracting parties agreed to attend a hearing in which only two arbitrators were present, the parties' intent should have been interpreted as it was. When they agreed, their understanding was that one arbitrator was not able to attend one specific hearing for whatever the reason was, not that the award would have been rendered without that arbitrator. Because the contracting parties agreed to have three arbitrators for their arbitration, they would have expected the arbitral award rendered by three arbitrators, not two.

<sup>312</sup> Supreme Court [S. Ct.], 91Da17146, 91Da17153, April 14, 1992 (S. Kor.)

<sup>313</sup> In this case, because the arbitral tribunal asserted that they rendered the arbitral award under the agreement of contracting parties, the court said that the arbitral tribunal bore the burden of proof.

<sup>314</sup> Supreme Court [S. Ct.], 2000Da29264, Nov. 27, 2001 (S. Kor.)

<sup>315</sup> Parties' action, attending the hearings without any objection, should have been interpreted as that they agreed to accept the new method of selecting arbitrators. By doing so, their original agreement regarding the method of selecting arbitrators became invalid.

<sup>316</sup> The facts of this case are: There was an agreement between parties regarding selection of arbitrators. The contracting parties agreed that they selected arbitrators by themselves. In spite of this agreement, the Korean Commercial Arbitration Board, which was chosen as an arbitral institute, disregarded the choice of both parties and nominated arbitrators on its discretion. After the arbitral tribunal was formed, both parties attended the first hearing without making any objection to the way of forming this arbitral tribunal. When the arbitral award was rendered, one of parties brought a case claiming that this arbitral award had to be cancelled because the selection of arbitrators was against parties' agreement.

Regarding Article 13 (1) 1, there is one more issue to be considered. The KSC<sup>317</sup> held that Article 13 (1) 1 was also related to the impartiality and independence of arbitrators.<sup>318</sup> In this case, one person played two roles in two different cases—namely, as an arbitrator in one case and a lawyer in another case.<sup>319</sup> The Court stated that (i) arbitrators should have tried to avoid any personal contact with any of the parties during arbitration, unless it was necessary to hold an official arbitral procedure (*e.g.*, a hearing or examination); (ii) arbitrators should not have taken any case related to any party in the present arbitration;<sup>320</sup> and (iii) even if an arbitrator took a case as a lawyer (*vs.* an arbitrator) and even if the case had a different legal issue (*vs.* the present arbitration), the arbitral award (*i.e.*, rendered by this arbitrator) should have been vacated because of the lack of impartiality and independence.<sup>321</sup>

Although Article 13 (1) 1 does not mention impartiality or independence of the arbitrators, the Court has held that the arbitrators' impartiality or independence was one of the procedural factors that should have been protected under Article 13 (1) 1.<sup>322</sup> Also, if an arbitrator is selected by a party who lacks legal

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<sup>317</sup> Supreme Court [S. Ct.], 2003Da21995, March 12, 2004 (S. Kor.). The facts of this case are: arbitrators were selected for a dispute. During the arbitral procedure, one of the selected arbitrators took, as a lawyer not as an arbitrator, another case which involved one of parties who were also parties in the present dispute. In other words, one person was involved in arbitration as an arbitrator and also involved in another case as a lawyer of one party who was also one party of the arbitration. As a result, after the arbitral award was rendered, the other party brought a case for nullification of arbitral award claiming that the selection of arbitrator was against the law under Article 13 (1) 1.

<sup>318</sup> In this case, impartiality or independence was raised while the arbitration was being conducted. Generally, arbitrators' impartiality or independence is examined when the arbitrators are selected. That is why the arbitrators' impartiality or independence is discussed mostly under arbitrators' qualification. This case is, however, different. There was no doubt in the arbitrator's impartiality or independence when the arbitral tribunal was initially formed, but one party became suspicious of arbitrator's impartiality when this arbitrator took a case from the other party as a lawyer. In this sense, the Court said that the issue of arbitrator's impartiality could be also raised during the arbitral procedure and after the arbitral award was rendered.

<sup>319</sup> Although two different cases have totally different issues, the arbitrator cannot be considered totally independent from the party who is also his/her client and who is going to pay to the arbitrator.

<sup>320</sup> Once the arbitral tribunal is formed, regarding the matters of arbitrators taking a case, it has to rely on professional ethics of arbitrator because it is not possible practically to check up every single case that the arbitrator takes.

<sup>321</sup> Supreme Court [S. Ct.], 2003Da21995, March 12, 2004 (S. Kor.)

<sup>322</sup> The issue, here, is whether there is any way to challenge arbitrators during the procedure of arbitration if either party has a doubt in impartiality or independence of arbitrators. According to Article 6 of the KAA (1997), there is one chance to challenge arbitrators when the arbitrators are selected. However, once parties make a statement before the arbitrator, they

capacity (*e.g.*, due to diminished mental capacity)<sup>323</sup>, the arbitral award rendered by this arbitrator can be vacated under Article 13 (1) 2.<sup>324</sup> Furthermore, if an arbitral award orders one party to do something that is against the national law or executing the arbitral award is illegal, it should be vacated,<sup>325</sup> for example, if the arbitral award includes punitive damages, this award can be vacated because punitive damages are prohibited under the Korean national law.<sup>326</sup>

Article 13 (1) 4 stipulates two cases wherein an arbitral award may be vacated.<sup>327</sup> The first case is related to Article 8 of the KAA (1997).<sup>328</sup> According to Article 8 (1), an arbitral tribunal should examine both parties before they render an arbitral award.<sup>329</sup> Article 8 (1) uses an imperative word “shall” and states that an arbitral tribunal bears an obligation to examine parties. Thus, not examining parties is a ground for the nullification of an arbitral award under Article 13 (1) 4. Article 13 (1) 4, however, adds one more condition (*i.e.*, “not examined without any justifiable reason”), which means that if there is a justifiable reason for not examining either party, the arbitral award cannot be nullified under Article 13

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will lose their opportunity to challenge the arbitrator. So, the parties should cooperate with arbitrators for conduction of arbitration even when either party is suspicious of impartiality or independence of arbitrators. The party who is not satisfied with arbitrators’ impartiality or independence should wait until the arbitral award is rendered and then file a case for cancellation of arbitral award.

<sup>323</sup> This is about the validity of contract. The contract is invalid if the contract is concluded by parties who do not have the legal capacity under the law. So, if an arbitral award is rendered under the invalid agreement, the arbitral award should also become invalid.

<sup>324</sup> This case has nothing to do with arbitrators. This is about qualification of parties. If either of the parties does not have the legal capacity for action or either representative does not have qualification for their position, the arbitral award rendered can be cancelled.

<sup>325</sup> It is what Article 13 (1) 3 of the KAA specifies. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (1958) also has this ground. Article V. 2 (b) of New York Convention: Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: the recognition or enforcement of the award would be contrary to the public policy of that country.

<sup>326</sup> This ground also appears in Article 36 (Action for Setting Aside Arbitral Award to Court) of KAA (1999). Article 36 (2) 2 (b) states that the award can be cancelled if the award is in conflict with the good morals and other forms of social order of the Republic of Korea.

<sup>327</sup> Two reasons are non-examination of parties and no reasons attached to the arbitral award.

<sup>328</sup> Article 8 is about examination of parties, witnesses and expert witnesses.

<sup>329</sup> Article 8 (1) : The arbitrator shall examine the parties concerned prior to an arbitration award.

(1) 4.<sup>330</sup> The aim of this additional condition is to prevent any party from attempting to vacate an arbitral award on purpose.

Another case for nullification under Article 13 (1) 4 is the omission of reasons in an arbitral award. As discussed previously, a summary of the reasons for an arbitral award is a requirement for an effective arbitral award under Article 11 (3).<sup>331</sup> Consequently, an arbitral award that does not have reason(s) can be vacated under Article 13 (1) 4. However, if the agreement of contracting parties differs from the stipulation in Article 13 (1) 4, the parties cannot nullify the arbitral award based on Article 13 (1) 4<sup>332</sup>— even with the presence of a non-conforming summary of reasons and non-examination of parties.<sup>333</sup> For example, if the parties make an arbitration agreement that contains a provision stating “parties will be examined at discretion of the arbitral tribunal” or “reason(s) for the arbitral award is (are) not necessary to be written,” this agreement prevails over Article 13 (1) 4, according to Article 13 (2).

The last ground for nullification is related to parts of the Civil Procedure Act (1995).<sup>334</sup> Article 422 of the Civil Procedure Act (1995) states the grounds for retrial; however, it also clarifies that if a case falls

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<sup>330</sup> One example of justifiable reason is when arbitrators cannot examine a party because the party does not respond to arbitrators’ request in spite of repeated request. In this case, the law should allow arbitrators to continue the arbitral procedure without examination of that party. Otherwise, the arbitration will be stopped by that party who might be doing so on purpose.

<sup>331</sup> Article 11 (3) : The arbitration award shall be prepared ..... and include the text of the arbitration award, summary of the reasons therefor, and the date of preparation.

<sup>332</sup> Article 13 (2) states if parties agree separately with regard to the cause stated in Article 13 (1) 4, none of parties can initiate an action for cancellation of arbitral award.

<sup>333</sup> Among the grounds for nullification of arbitral award stipulated in Article 13, only two grounds under Article 13 (1) 4 can become ineffective by parties’ agreement. For the rest, there is no way to invalidate them.

<sup>334</sup> Article 13 (1) 5 says when there are causes falling under subparagraphs 4 through 9 of Article 422 of the Civil Procedure Act. So, Article 1, 2 and 3 of the Civil Procedure Act (1995) are excluded. The reason for this is that Article 1, 2 and 3 of the Civil Procedure Act (1995) are the same as the provisions under Article 13 (1) 1 and 2 of the KAA (1997). 422 of the Civil Procedure Act (1995) : (1) A petition for a new trial against a final judgment which has become conclusive may be made in the following cases: Provided, That this shall not apply to a case where a party has asserted the facts in an appeal or has not asserted them even if he had the knowledge thereof: 1. If the adjudicating court was not constituted in accordance with the Act; 2. If a judge who was precluded by the Act from participating in the decision participated therein; 3. If there

under subparagraphs 4 through 9 of Article 422,<sup>335</sup> the arbitral award will be vacated.<sup>336</sup> Specifically, subparagraph 4 is about the disqualification of judges and subparagraphs 5 through 9 focus on procedural fault.<sup>337</sup>

Article 15 provides yet another chance for nullification of the arbitral award,<sup>338</sup> it allows either party to bring an action for nullification of an arbitral award even after the enforcement judgment has been rendered.

***Article 15 (Action for Cancellation<sup>[339]</sup> of Arbitration Awards  
after Execution<sup>[340]</sup> Judgment)***

*Once an execution<sup>[341]</sup> judgment is given, any action for cancellation of an arbitration award may be instituted only if the reason therefor is the cause under Article 13 (1) 5: Provided, That it shall be limited to only when either of the parties*

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was a defect in the powers of the legal representative or an attorney or in the authority of the representative conducting the procedural acts: Provided, That this shall not apply if the ratification mentioned in Article 56 or 88 has been made;

<sup>335</sup> Article 422 of the Civil Procedure Act (1995) : (1) A petition for a new trial against a final judgment which has become conclusive may be made in the following cases: ..... 4. If the judge who participated in the decision committed a crime in connection with the official duty relating to the case. 5. If a party was led to make a confession or was prevented from producing a means of averment or defense which may affect the decision, due to criminally punishable acts of another person. 6. If a document or any other Article used as evidence for the judgment was forged or fraudulently altered. 7. If the false statement of the witness or expert witness, an interpreter or sworn party, or legal representative was adopted as the evidence for the judgment. 8. If a civil or criminal judgment or any other decision or an administrative disposition on which the judgment based has been altered by a different judgment or administrative disposition. 9. If adjudication was omitted regarding a material point which may affect the judgment.

<sup>336</sup> The question is if it is appropriate for the Civil Procedure Act to incorporate into the Arbitration Act. Because arbitration is a totally different dispute resolution system from litigation, independent provisions should be regulated in the Arbitration Act.

<sup>337</sup> According to Article 422 (1) 8 of the Civil Procedure Act, an arbitral award can be cancelled if the arbitral award is rendered based on a certain decision, but the decision is altered by a different judgment. If this occurs, independence of arbitration cannot be guaranteed. It gives an impression that the arbitral award is affected by a judiciary decision, and a judiciary decision has precedence over an arbitral award.

<sup>338</sup> The KAA (1997) provides chances to cancel an arbitral award twice: first, after the arbitral award is rendered, but before the judgment of execution is rendered, and second, after the judgment of execution is rendered.

<sup>339</sup> The word “cancellation” should be changed as “nullification.”

<sup>340</sup> The word “execution” should be changed as “enforcement.”

<sup>341</sup> “Enforcement” is a right word.

*concerned*<sup>342</sup> explains clearly that *he*<sup>343</sup> could not claim the cause for such cancellation during the procedure of the *execution*<sup>344</sup> judgment for no fault of his.

If there is any reason that is specified in subparagraphs 4 through 9 of Article 422 of the Civil Procedure Act, this provision will let either party bring an action for the nullification of an arbitral award that has already been granted an enforcement judgment.<sup>345</sup> As discussed earlier (*i.e.*, under Article 13), the reasons must be related to a judge's disqualification and the procedural flaws in the conduct of the proceeding. For example, if either party identifies a material issue that was omitted during the arbitral procedure and could affect the arbitral award, this party can bring an action for nullification. This action can be brought even after the enforcement judgment is rendered if this party can prove that he or she could not claim the cause for nullification during the enforcement judgment procedure.<sup>346</sup> Although this article was clearly written to be as fair as possible to both parties, it weakens the finality of the arbitral award to some degree<sup>347</sup> since nullification is quite possible after an enforcement judgment is rendered. Thus, to minimize this problem, Article 16 sets a time limit for the action of nullification as follows:

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<sup>342</sup> "Either contracting party" is a better expression.

<sup>343</sup> It does not make sense. The word "it" should be used.

<sup>344</sup> The word "enforcement" is better.

<sup>345</sup> Article 15 mentions Article 13 (1) 5 for grounds of nullification after the execution judgment is rendered, and Article 13 (1) 5 mentions subparagraphs 4 through 9 of Article 422 of the Civil Procedure Act for grounds of nullification.

<sup>346</sup> When it occurs, the party who brings an action for nullification bears the burden of proof.

<sup>347</sup> Giving a chance to bring an action for nullification of arbitral award does not mean that an appeal is allowed in arbitration. The consequence, however, is that the arbitral award is not final yet even after the judgment of execution is rendered.



**Article 16 (Period for Institution of Action)**

*(1) Any action for cancellation<sup>348</sup> of an arbitration award shall be instituted within thirty days after the reason for such cancellation is known or within five years after the execution<sup>349</sup> judgment becomes finalized.*

*(2) The day on which the reason for cancellation<sup>350</sup> under the preceding paragraph is known shall not commence until the execution plan becomes finalized.*

*(3) The period under paragraph (1) shall be a peremptory period.*

Article 16 sets a time limit for nullification action, which is closely related to the time when the enforcement judgment is rendered.<sup>351</sup> If either party realizes that he or she can bring an action for the nullification of an arbitral award based on the provisions under Article 13, he or she has to do so within 30 days after determining the reason. According to Article 16 (2), this time limit takes effect only after the enforcement judgment is rendered.<sup>352</sup> Three hypothetical examples will be discussed below to clarify this provision.

(1) Assume an arbitral award is rendered on March 1, 2014. After the arbitral award is rendered, the losing party realizes, on April 1, 2014, that a basis for nullification exists. One month later, on May 1, 2014, the arbitral award is transferred to the court for the enforcement judgment. A few months later,

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<sup>348</sup> The word “nullification” is better. The word “cancellation” in this article has been all underlined to indicate that it should be changed to “nullification.”

<sup>349</sup> The word “executory” should be used.

<sup>350</sup> The word “executory” is a right one.

<sup>351</sup> The period for nullification action under Article 16 is not limited to the action brought after the execution judgment is rendered. But the period commences from the day when the execution judgment is rendered.

<sup>352</sup> Although Article 16 (1) states that either party should bring an action for nullification of the arbitral award within thirty days after s/he finds out the reason, the thirty-day time limit does not start counting until the award gets confirmation for execution according to Article 16 (2).

on August 1, 2014, the enforcement judgment is rendered. In this case, the action for the nullification of the arbitral award should be initiated by August 30, 2014.<sup>353</sup> In effect, although the losing party identifies a reason for nullification on April 1, 2014, the last day to bring a case for nullification is August 30, 2014, which is almost five months later.

(2) Assume the circumstances remain the same (as in the first example), except that the losing party identifies a reason for nullification on December 1, 2014.<sup>354</sup> In this case, the losing party can initiate an action for nullification even after the enforcement judgment is rendered if he or she submits an action for nullification by December 31, 2014, which is within 30 days after he or she recognizes the reason for nullification.<sup>355</sup>

(3) Again, under the same circumstances (as in the first example), assume that the losing party identifies the existence of a reason for nullification much later—on August 15, 2019. In this case, he or she cannot initiate an action for nullification of the arbitral award because the maximum time frame, wherein either party can bring an action for nullification, concludes on August 1, 2019 (*i.e.*, five years from when the enforcement judgment was rendered).<sup>356</sup>

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<sup>353</sup> Although the losing party realizes that a reason for nullification exists on April 1, 2014, “the day on which the reason for cancellation under the preceding paragraph is known shall not commence until the execution plan becomes finalized” according to Article 16 (2). So, the day will be counted from August 1, 2014 when the execution judgment is finalized, and August 30, 2014 becomes the last day of thirty days.

<sup>354</sup> In this case, a party finds out the reason for cancellation after the execution judgment is finalized.

<sup>355</sup> According to Article 16 (1), the losing party can bring an action for nullification within thirty days after s/he realizes the reason for nullification or within five years after the execution judgment is finalized. In this case, the last date for this is August 1, 2019, but, s/he finds out the reason for nullification on December 1, 2014, so s/he has to bring an action for cancellation until December 30, 2014, which is the thirtieth day from December 1, 2014.

<sup>356</sup> Article 16 (3) states that the period under paragraph (1) is a peremptory period. It means that this maximum period cannot be extended by parties’ agreement.

This article does not specifically state that the action for the nullification of an arbitral award should be submitted only after the enforcement judgment is rendered. Indeed, any party can initiate an action for nullification *after* the arbitral award is rendered—and also before the enforcement judgment is rendered.<sup>357</sup> This article specifically emphasizes that the starting point for counting 30 days is the day whereon the enforcement judgment is rendered.<sup>358</sup>

Among the provisions of the KAA (1997), Articles 13, 14, 15, and 16 are about the nullification of the arbitral award; considering that there are only 18 articles in the KAA (1997), four articles related to nullification may indeed be a disproportionate number.<sup>359</sup> As far as nullification is concerned, Article 13 states five grounds for it and Article 14 (2) states that an enforcement judgment should not be rendered when there is any reason for nullification. Furthermore, Article 15 regulates the action for nullification after an enforcement judgment is finalized,<sup>360</sup> and Article 16 (1) establishes a five-year period for nullification after an enforcement judgment is finalized. The KAA (1997) provides an opportunity to vacate an arbitral award again after the enforcement judgment is rendered to ensure that arbitration is conducted under a fair procedure.<sup>361</sup>

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<sup>357</sup> Either party can bring an action for cancellation of arbitral award at any time from when the arbitral award is rendered to when the execution judgment is rendered. In this case, there is no time-limit for this action under the KAA (1997).

<sup>358</sup> This starting date for counting matters when there is a claim that the action for nullification of arbitral award is brought too late after the reason for nullification is realized. In this case, according to Article 16 (1) and (2), the action for nullification will be accepted as long as the action is brought within thirty days after the execution judgment is finalized.

<sup>359</sup> The KAA (1997) is generous about nullification of arbitral award. Although it emphasizes the efficiency and quickness of arbitration in various ways, it seems to neglect the finality of arbitration by providing several chances to vacate the arbitral award rendered.

<sup>360</sup> Article 15 provides a chance to bring an action for nullification after execution judgment. Strictly speaking, however, Article 15 tries to limit action for nullification by adding a condition for it. It adds two conditions stating that an action for nullification can be brought, first, only when it is based on Article 13 (1) 5 and second, only when the party can prove that s/he did not have a chance to bring an action before the execution judgment is finalized.

<sup>361</sup> The grounds to bring an action for nullification after the execution judgment is finalized under Article 15 are mostly related to the fairness of arbitral procedure.

These provisions help make arbitration fair for both contracting parties; thus, two points should be made clear herein. (1) Although Article 13 stipulates five grounds for nullification, there is no provision regarding the time limit for the nullification action.<sup>362</sup> Only Article 16 (1) regulates the time limit; however, it is only applicable to the action after an enforcement judgment is finalized.<sup>363</sup> Consequently, the KAA (1997) does not provide a clear time limit for nullification action when it is brought before an enforcement judgment is finalized. (2) If an action for nullification is submitted before an enforcement judgment, the enforcement judgment will be pending. For example, assume that the arbitral award is rendered on March 1, 2014, and one party files a case for the nullification of the arbitral award on March 15, 2014. In this case, the court (*i.e.*, rendering the enforcement judgment) must wait until the prior court makes a decision on its case: the action for nullification.<sup>364</sup> Conversely, if the arbitral award is rendered on March 1, 2014 and the enforcement judgment is finalized on August 15, 2014, the party who discourages a reason for nullification after August 15, 2014 has to bring an action within 30 days (*i.e.*, from August 15, 2014).<sup>365</sup> In this case, the action for nullification has to be brought based on the grounds under Article 13 (1) 5.

Thus, the KAA (1997) is generous about the provisions regarding the nullification of an arbitral award. Under the KAA (1997), there are three chances for the arbitral award to be vacated: (i) after it is

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<sup>362</sup> It just stipulates that “any party concerned may bring an action for the cancellation of an arbitral award in the cases falling under any of the following subparagraphs.”

<sup>363</sup> Having applied Article 16 (1) to the case in which one party finds out that the arbitral award can be vacated under Article 13 before the execution judgment, s/he has to bring an action for nullification within thirty days after s/he realized the reason. Having applied Article 16 (2) to this case, however, the thirty days does not commence until the execution judgment is finalized, so it results in the fact that Article 16 regulates a time-limit for action for nullification after the execution judgment is finalized.

<sup>364</sup> Article 14 (2)

<sup>365</sup> Article 16 (1)

rendered but before the enforcement judgment, (ii) during the procedure of enforcement judgment,<sup>366</sup> and (iii) after the enforcement judgment. The ultimate purpose of these provisions is the fairness of arbitration. Since arbitration does not allow appeals and an arbitral award is final, fairness during the arbitral procedure has to be guaranteed; thus, if there is any doubt about this, it should be summarily resolved.<sup>367</sup> The question, however, is whether it is justifiable to give a five-year time period for an action for nullification after the enforcement judgment is rendered.<sup>368</sup>

## 5.4. Competent Court

Article 17 is about the court, which is involved in arbitration:

### *Article 17 (Competent Court)*

*(1) In the event that an arbitrator is designated or challenged, an arbitration agreement is extinguished, the arbitration procedures are not allowable, or an agreement has been made in the arbitration agreement regarding the action for cancellation of arbitration award or the action concerning the execution judgment,<sup>[369]</sup> the district court or a branch court thereof shall have jurisdiction over it; when it is not so, Article 1 through 22 of the Civil Procedure Act shall apply.<sup>370</sup>*

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<sup>366</sup> Article 15 states that any action for cancellation of an arbitral award can be filed “only when either party explains clearly that s/he could not claim the cause for such cancellation during the procedure of the execution judgment for no fault of his/her.” By interpreting this part, there is a chance for any party to make a claim for nullification of arbitral award during the procedure of the execution judgment.

<sup>367</sup> Although the KAA (1997) limits the grounds for nullification after the execution judgment, allowing parties to file an action for nullification after the execution judgment still damages not only the finality and the quickness of arbitration but also reliability of arbitration: it leads the parties to think that they can make the arbitral award invalid because it is rendered by arbitrators, who are private person.

<sup>368</sup> A five-year time is a long period of time considering the characteristics of arbitration.

<sup>369</sup> This terminology should be changed as “enforcement judgment” or “enforcement order.”

<sup>370</sup> Article 1 through 22 of the Civil Procedure Act (1995), No. 05002 is about jurisdiction. The latest version of this act is the Civil Procedure Act (2010), No. 10373.

*(2) When there are number of courts having jurisdiction under the preceding paragraph, the court with which the parties concerned<sup>371</sup> or arbitrators had the initial relation shall have the jurisdiction.*

Article 17 is about the court that is involved in arbitration; the principle herein is that contracting parties can agree on the competent court if they wish. In this case, the competent court will be a district court *or* a branch court. However, if there is no agreement on this matter, Articles 1 through 22 of the Civil Procedure Act apply.<sup>372</sup> Also, if there is more than one competent court, the court wherewith the parties or arbitrators had the initial relation will be the competent court therein, according to Article 17 (2), which follows the application of Article 17 (1).

The main purpose of this article is to (i) summarize when a court needs to be involved under the KAA (1997) and (ii) clarify the court that should be involved (*i.e.*, as a competent court). Article 17 (1) provides a list of circumstances wherein the competent court should be involved: (i) when arbitrators are selected, (ii) when arbitrators are challenged, (iii) when an arbitration agreement becomes invalid, (iv) when an arbitration procedure is not allowable, and (v) when there is an agreement between parties regarding the action (a) for the nullification of an arbitral award or (b) related to the enforcement judgment. Under these circumstances, the competent court will be a district court (or a branch of the district court), according to Article 17. In other circumstances, the competent court will be determined based on Articles 1 through 22 of the Civil Procedure Act.

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<sup>371</sup> “The contracting parties” is better translation.

<sup>372</sup> Article 1 through 22 of the Civil Procedure Act is regulations regarding jurisdiction under civil procedure.

The role of a competent court differs based on differing circumstances; the first circumstance is when the arbitrators are selected. This is related to Article 4 (5). Usually, the parties select arbitrators according to their agreement—or the arbitral institution nominates arbitrators (if the parties have selected an arbitral institution). There is, however, a case wherein the court must be involved in the selection of arbitrators. When one of the parties refuses to select an arbitrator or when its selected arbitrator is not able to conduct arbitration for a reason stated in Article 4 (4), this party will be requested to select an arbitrator, substitute, or a replacement; if the party fails to do so within seven days after the demand is made, the court will do so upon request of the other party, under Article 4 (5).

The second circumstance is when the arbitrators are challenged. This is related to Article 6. According to Article 6, if either party brings an action to the court for the challenge of an arbitrator, the court should decide the matter.

The third circumstance is when an arbitration agreement becomes invalid. This case is related to Article 11 (2), which states that “the arbitration agreement will lose its effect when arbitrators cannot reach an agreement for an arbitral award.” What is not clear herein is what the competent court will do under Article 17 when the arbitration agreement loses its effect under Article 11 (2). Article 17 states that “the district court or a branch court shall have jurisdiction over it.” Thus, having interpreted what it states, the court will take over jurisdiction if arbitrators cannot agree on the decision associated with the dispute. This means that the contracting parties have to settle their dispute by judicial litigation even though this was not their original intent.<sup>373</sup>

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<sup>373</sup> It has been discussed under Article 9. The issue here is if it is reasonable to force parties who have a clear intent to avoid the judicial system to settle their dispute by litigation when they do not want to do so.

The fourth circumstance is when the arbitration procedures are not allowable. This is related to Article 9, which is about judicial assistance. Arbitration (*vs.* judicial litigation) is merely a private agreement between parties; thus, there are some limits on the power of arbitrators. When an arbitrator needs to take an action that is outside the scope of his or her jurisdiction, the court can cooperate and perform what the arbitrator requests.

The last circumstance is when there is an agreement between the parties regarding an action (i) for the nullification of an arbitral award or (ii) related to an enforcement judgment. Under the last case, the role of court is clear. The issue herein is what “in the event that an agreement has been made in the arbitration agreement” means;<sup>374</sup> indeed, the reason for the addition of this phrase is not clear. Generally, the action for the nullification of an arbitral award is submitted to a court and the enforcement judgment is subsequently rendered by a court; an agreement is not necessary between the parties herein (*i.e.*, to bring an action for nullification of an arbitral award to a court or to get the enforcement judgment from a court). Regardless of the existence of an agreement, it is a court (i) whereto an action for nullification is submitted and (ii) that renders the enforcement judgment. Thus, although it is clear what the role of court is under this article, the unnecessary phrase creates confusion.

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<sup>374</sup> It does not need to state “when there is an agreement between parties.” By saying so, it gives an impression that having an agreement between parties is a requirement to bring an action for nullification of arbitral award to the court.



# Chapter Three: The UNCITRAL Model Law

## 1. General

### 1.1. The Objectives of the UNCITRAL Model Law

Significant improvements in communications and advancements in transportation and logistics this century have accelerated the pace of globalization, especially in international trade;<sup>375</sup> however, differing legal systems and laws worldwide have been hindering international trade and generating legal risks and uncertainties for merchants and legal practitioners alike.<sup>376</sup> For this reason, the UNCITRAL (United Nations Commission on International Trade Law) has been drafting and promoting a number of texts via a focus on formulating modern, fair, and harmonized rules in the context of international commercial transactions<sup>377</sup>—and several have already been recognized as a success.<sup>378</sup> Indeed, in the area of arbitration, the UNCITRAL has already attained two notable achievements: a treaty known as the United

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<sup>375</sup> There is no clear and exact definition of globalization, but in this paper, it means the process of international integration. This globalization has shown more progress in international trade than in any other area; it started from a FTA (Free Trade Area) between two countries and gets bigger involving more countries. The TPP (Trans-Pacific Partnership) and the RCEP (Regional Comprehensive Economic Partnership) are big economic blocs. Twelve countries (Singapore, Brunei, New Zealand, Chile, United States, Australia, Peru, Vietnam, Malaysia, Mexico, Canada and Japan) signed on the TPP and sixteen countries (Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, Vietnam, Australia, China, India, Japan, South Korea, New Zealand) are taking part in negotiation. Jan H. Dalhuisen, *DALHUISEN ON INTERNATIONAL COMMERCIAL, FINANCIAL AND TRADE LAW*, Oxford Hart Publishing, 2000, at 2.

<sup>376</sup> Larry Cata Backer, *HARMONIZING LAW IN ERA OF GLOBALIZATION*, Durham Carolina Academic Press, 2007, at 10.

<sup>377</sup> <http://www.uncitral.org/uncitral/en/index.html> (accessed on November 20, 2017).

<sup>378</sup> They are the United Nations Convention on Contracts for the International Sales of Goods (1980), the Convention on the Limitation Period in the International Sales of Goods (1974), the United Nations Convention on Independent Guaranteed and Stand-by Letters of Credit (1995), the United Nations Convention on the Use of Electronic Communications in International Contracts (2005), and so on. More information can be found on [http://www.uncitral.org/uncitral/en/uncitral\\_texts.html](http://www.uncitral.org/uncitral/en/uncitral_texts.html) (accessed on September 17, 2015).

Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (hereinafter, the New York Convention)—and the UNCITRAL Model Law on international commercial arbitration.<sup>379</sup>

The objectives of the Model Law are the harmonization and improvement of national laws (since different laws can cause practical concerns in the context of international business).<sup>380</sup> Indeed, when two different parties make a contract, they have to determine the law that they are going to choose as a governing law. (1) When they execute the contract, they will often have two different laws that (a) they are relying on and (b) are protecting the needs of each of the parties. (2) Thus, when they have a dispute and try to settle it, they will encounter a situation wherein they need two governing laws: a substantive law and a procedural law. (3) In such situations, at least one party will experience foreign laws (or rules that differ from its national laws) if the opposing party's national law becomes a governing law—or a third country's law is selected as a governing law. Furthermore, if they do not determine a governing law before they execute a contract, they could experience an unpredictable and frustrating result since they will not be able to anticipate applicable laws until a dispute arises therein.<sup>381</sup> Moreover, when an agreed-upon governing law does not address an issue that has arisen, a different law may take effect, which could again lead to an unpredictable result.<sup>382</sup> Furthermore, if this applicable law (which is determined outside

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<sup>379</sup> The New York Convention is a treaty while the Model Law is not. With a number of different methods for harmonization of international trade law, there are two most prevalent methods. One is to use formal instruments like multilateral conventions and the other is to use soft law instruments such as model laws. The formal legal harmonization like the New York Convention has an internationally binding effect whereas harmonizing by soft law instruments like the Model Law does not have any binding effect. Sieg Eiselen, *The Adoption of UNCITRAL Instruments to Fast Track Regional Integration of Commercial Law*, Kluwer Law International, 2015, Vol. XII, Issue 46, at 85.

<sup>380</sup> The objectives of the Model Law are clearly specified in its resolution 40/72 of 11 December 1985. Here, the General Assembly recommended “that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”.

<sup>381</sup> Gerold Herrmann, *The UNCITRAL Model Law – its background, salient features and purposes*, 1 Arb. Int'l 6 1985, at. 8.

<sup>382</sup> *Id.* at 8.

of the parties' agreement) does not share the same principle with the agreed-upon governing law, the contracting parties will experience risk and uncertainty.<sup>383</sup>

The UNCITRAL, a legal body of the United Nations (UN) systems in the field of international trade law, has tried to reduce the uncertainty (or unfamiliarity) of law in international business by harmonizing local laws—and drafting a unified law. The Model Law is (i) one outcome of the harmonization of local laws in the area of ICA, (ii) a procedural law for the arbitration proceedings, and (iii) intended to reduce (or eliminate) uncertainty or unfamiliarity of local laws to make the process (or result) of arbitration more acceptable to parties with different legal systems. The Model Law tries to harmonize arbitration laws by providing a standardized text in order to enable individual national laws to share the same principles. Thus, the UNCITRAL has tried to reduce the uncertainty and unfamiliarity of law in international business by harmonizing local laws—and drafting a unified law. In sum, the Model Law is (i) one outcome of the harmonization of local laws in the area of ICA, (ii) a procedural law for arbitration proceedings, and (iii) intended to reduce (or eliminate) uncertainty or unfamiliarity associated with local laws, to make the process (or result) of arbitration more acceptable to parties with different legal systems.<sup>384</sup>

Another objective of the Model Law is to improve national laws. Although countries have their own national arbitration laws, these laws often have problems; some laws are enacted to focus primarily on domestic arbitration and some have provisions that equate the arbitral process with judicial litigation. Furthermore, some laws cannot address all relevant issues that are necessary for arbitration.<sup>385</sup>

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<sup>383</sup> If the applicable law is not in favor of arbitration or if it allows courts' intervention in various ways, the parties' intention of wishing to settle their dispute by arbitration will be damaged and the dispute will be settled in a totally different way.

<sup>384</sup> Part Two; Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 1 UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, 21 2006. at 25.

<sup>385</sup> *Id.*

Consequently, these inadequate national laws cause parties to reconsider the submission of disputes to arbitration (*e.g.*, when they are concerned about confronting frustration, difficulties, and surprises during the arbitration process). The Model Law aims to reduce these problems by (i) providing standardized text with the implied principles of arbitration and (ii) recommending that individual countries adopt it.

The Model Law enables a more flexible approach to the process of harmonization in order to interest more countries or jurisdictions in adopting it; due to this flexibility, countries can take their own circumstances into consideration and make some changes in the provisions accordingly.<sup>386</sup> This flexible approach can indeed bring about positive results by having more countries or jurisdictions adopt the Model Law; however, it can also endanger the harmonization process. For example, when a country adopts the Model Law with some changes, there is a risk that these changes will not incorporate all of the underlying principles of the Model Law.<sup>387</sup>

## **1.2. The Achievement of the UNCITRAL Model Law**

The Model Law was drafted in 1985 and amended once in 2006; it (i) is not a convention but a flexible model framework (as the name indicates),<sup>388</sup> (ii) provides standardized text that allows individual

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<sup>386</sup> Although the Model Law allows adopting countries to change the text of Model Law, States are encouraged to make as few changes as possible when they adopt it for the purpose of achieving a satisfactory degree of harmonization. Part Two; Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 1 UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, 21 2006. at 23.

<sup>387</sup> Sieg Eiselen, *op. cit.*, at 88.

<sup>388</sup> In a case of Convention, once a State ratifies it, the whole Convention becomes one of its national laws. For example, when the seller and the buyer under the international business, agree on 'Korean Law' for their governing law in their agreement for the sales of goods, the CISG becomes an applicable law because Korea is a Contracting State and the CISG is a Korean national law. If the contracting parties want to apply the Korean national commercial law, they have to specify the exact official name for it writing 'the Commercial Act'. Otherwise, because the transaction is an international business, the CISG

countries to adopt and modify it in order to incorporate it into their national laws,<sup>389</sup> (iii) aims to harmonize the laws in an indirect (vs. a direct) way by sharing basic principles,<sup>390</sup> and (iv) tries to implement two basic principles in ICA. The first principle is to guarantee the freedom of the parties in the context of arbitration.<sup>391</sup> Indeed, this means recognizing the freedom of contract, which gives the parties a right to decide how the arbitration should be conducted; for example, the parties can (i) choose a set of standard arbitration rules, (ii) tailor arbitration rules to correspond to their needs, or (iii) make their own rules through negotiations associated with arbitration agreements. Moreover, if there is anything that the parties do not agree on, the discretion of the arbitrators should be guaranteed.<sup>392</sup> By doing so, the parties who want to settle their disputes via arbitration can be kept away from the power of judicial litigation. Thus, the Model Law has been designed, via the provision of standardized text, to (i) operate largely independently from the courts of any country, (ii) reduce any possibility of delay in producing a final award,<sup>393</sup> and (iii) lead individual countries to reflect certain principles in their national laws.<sup>394</sup>

The second principle is to guarantee the fairness of the arbitral process.<sup>395</sup> Although the Model Law has been designed to maximize the parties' freedom of contract, this freedom should not be absolute;<sup>396</sup> instead, it must be somewhat restricted in order to prevent (i) defects in the procedure, (ii) the violation of

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will become a governing law. The judge or arbitral tribunal will interpret 'Korean Law' as any Korean law that is more appropriate for international transactions.

<sup>389</sup> In a case of Model Law, individual state can either adopt the whole model law or draft a new law or change their existing laws based on the Model Law. The Model Law can be understood as a guideline or frame.

<sup>390</sup> Sieg Eiselen, *op. cit.*, at 87.

<sup>391</sup> Gerold Herrmann, *The UNCITRAL Model Law – its background, salient features and purposes*, 1 *Arb. Int'l* 6 1985, at. 8.

<sup>392</sup> *Id.*

<sup>393</sup> Brian Davenport, *The UNCITRAL Model Law on International Commercial Arbitration: the Users' Choice*, 4 *Arb. Int'l* 69 (1988), at 70.

<sup>394</sup> Although national arbitration laws of individual countries do not have the same provisions, sharing the same principle can reduce the parties' frustration.

<sup>395</sup> Gerold Herrmann, *op. cit.*, at. 12.

<sup>396</sup> *Id.*

due process, and (iii) harming fairness and equality in the arbitral procedure. (Sometimes the intervention of judicial courts is necessary to ensure these rights.)<sup>397</sup> Consequently, the parties' freedom, the arbitrators' discretionary powers, and the courts' interventions should be balanced—and the Model Law provides standardized text that reflects a good balance.

The Model Law is considered a successful initiative as 72 States (in a total of 102 jurisdictions) have adopted it;<sup>398</sup> however, each State has its own reason for adopting or rejecting the Model Law.<sup>399</sup> (1) For countries that have not yet developed arbitration laws, the Model Law provides arbitration law with basic principles that are internationally recognized.<sup>400</sup> (Although there is criticism about some provisions within the Model Law, it is utilized in many countries and jurisdictions.) (2) The adoption of the Model Law has even been a practical consideration in countries with their own arbitration laws; under the guidelines of the Model Law, these countries can amend their own arbitration laws (*e.g.*, if the rules of national arbitration law are obsolete, incomplete, or partial). Indeed, local arbitration will be underutilized if it is not completely guaranteed with fair and impartial proceedings.<sup>401</sup> (3) Furthermore, the Model Law is a key consideration within countries wherein there is a strong desire to attract ICA.<sup>402</sup>

Countries typically adopt the Model Law entirely so that they can show that they provide a standardized law for potential users. For example, a case in Korea in 1999 involved the utilization of the Model Law almost entirely because arbitration law therein was not well developed at the time (*e.g.*, it had

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<sup>397</sup> *Id.*

<sup>398</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (accessed on November 20, 2017).

<sup>399</sup> Although four categories are made up, most countries fit into more than two categories. Brian Davenport, *op. cit.*, at 70.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

deficiencies and was unsatisfactory for international use). Thus, the Model Law was initially adopted in order to comply with international arbitration standards. Interestingly, Koreans now frequently promote that Korea is the most appropriate place for ICA (especially within Asia) with the standardized arbitration laws therein—and seek to invite more ICA.<sup>403</sup>

While the Model Law may be regarded as a burden within countries that have longstanding and well-developed arbitration laws (*e.g.*, England, the United States,<sup>404</sup> and France), UNCITRAL has clearly achieved its goal (*i.e.*, harmonization) when the Model Law is considered from the perspective of the number of States and jurisdictions that have adopted it. Nevertheless, England, for example, believes that its own national arbitration law is much more comprehensive (*vs.* the Model Law);<sup>405</sup> the assertions, in such countries, is that they do not need to adopt the Model Law as long as they share the principles within the Model Law.<sup>406</sup> In the United States, there is recognition that the arbitration law therein must be amended; however, because of the difficulty, if not impossibility, of enacting legislation in a highly divided and partisan Congress. As a result, US arbitration law is modernized and updated by court decisions from the US Supreme Court.<sup>407</sup>

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<sup>403</sup> Korea is the UNCITRAL regional center for Asia and Pacific. <http://www.uncitral.org/uncitral/tac/rcap.html> (accessed on September 29, 2015)

<sup>404</sup> Only 8 States of the USA have adopted the Model Law for international commercial arbitration. They are California (1988), Connecticut (1989), Florida (2010), Georgia (2012), Illinois (1998), Louisiana (2006), Oregon (1991) and Texas (1989). [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (accessed on September 18, 2015)

<sup>405</sup> English arbitration law is developed through three hundred year experience. J. Gillis Wetter, *The Mustill Committee Report on the UNCITRAL Model Law*, 6 Arb. Int'l 268 1990, at 270.

<sup>406</sup> John Saxby, *A user's perspective of the UNCITRAL Model Law*, 2 Arb. Int'l 164 1986, at 166.

<sup>407</sup> The UAA was adopted in 1955 and has been widely enacted in 35 jurisdictions. It closely tracks the provisions of the FAA which was adopted in 1925. Since each was enacted, neither the UAA nor the FAA has been amended. As American arbitration statutes have not been revised over the past 90 years, many scholars and practitioners contend that these statutes need to be revised.

### 1.3. 2006 Amendments of the UNCITRAL Model Law

After the Model Law was adopted by the UN General Assembly, in its resolution on 15 December 1985, the UNCITRAL embarked on a revision of the Model Law and established a working group to prepare the revision in 2000; 13 topics were considered therein and a few of them (*i.e.*, conciliation, interim measures of protection, and the written form requirement of the arbitration agreement) were given significant attention.<sup>408</sup> A quick result was reached on conciliation and a new Model Law on International Commercial Conciliation was drafted.<sup>409</sup> The remaining two topics were discussed further, amended, and are included in the 2006 revision; they are Article 7, which focuses on ‘arbitration agreement,’ and Article 17, which focuses on ‘interim measure.’

## 2. The Commencement of Arbitration

### 2.1. Scope of Arbitration

Article 1 specifies the scope of application of the Model Law.

#### *Article 1 (Scope of Application)*

*(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.*

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<sup>408</sup> Pieter Sanders, *UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future*, 21 *Arb. Int'l* 443 (2005), at 443.

<sup>409</sup> It was adopted by UNCITRAL on 24 June 2002. The purpose of this Model Law is that “this Model Law provides uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use” [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html) (accessed on November 20, 2017)



*(2) The provisions of this Law, except article 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in the territory of this State.*

*(3) An arbitration is international if:*

*(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or*

*(b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) 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; or*

*(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.*

*(4) For the purposes of paragraph (3) of this article:*

*(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;*

*(b) if a party does not have a place of business, reference is to be made to his habitual residence.*

*(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.*

Paragraph (1) limits the substantive scope of application and paragraph (2) clarifies the territorial scope. As to the substantive scope, the text therein expressly states that the Model Law applies to ‘international commercial’ arbitration and paragraph (3) clarifies the definition of international herein.<sup>410</sup>

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<sup>410</sup> When the Working Group addressed its application of the Model Law, they discussed, at some length, about how they defined the terms, ‘international’ and ‘commercial’, in the Model Law. After the long discussion, they concluded that it was better not to insert a fix definition of ‘commercial’ in the provision. As an alternative, they inserted the footnote in order to define the meaning of ‘commercial’.

However, although the meaning of international is defined, there is a doubt about the effectiveness of paragraph (3) (c),<sup>411</sup> which states that the arbitration is international if the parties agree that the subject matter of the arbitration agreement relates to more than one country. (In practice, however, how often does this actually occur?)<sup>412</sup>

Also, the word, ‘international,’ in this provision, has been criticized as hindering adoption because countries do not want to have two separate laws for arbitration (*i.e.*, the adopted Model Law, which is designated for international arbitration, and an existing arbitration law for other domestic matters). While flexibility may be appropriate herein, the Model Law—although drafted with ICA in mind—“has basic rules that are suitable to any other type of arbitration”; also, because the Model Law allows flexibility in adoption, countries may consider modifying it to cover domestic disputes as well when they adopt it.<sup>413</sup>

Indeed, it is advisable to modify the Model Law to address both domestic and international arbitration—particularly since the international arbitration bar has advocated that there should be a distinction between international and domestic arbitration—namely, to provide better service to parties or arbitrators who are involved in international business.<sup>414</sup> This assertion is based on the rationale that less protection, more expediency, more flexibility, and faster procedures are preferred in international arbitration.<sup>415</sup> Also, the appointment of countries as places of arbitration generally generates little

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<sup>411</sup> Pieter Sanders, *op. cit.*, at 445.

<sup>412</sup> Who can ever anticipate whether the subject-matter of their future dispute will be related to more than one country?

<sup>413</sup> Part Two; Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 1 UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, 21 2006. at 25.

<sup>414</sup> Pierre-Yves Tschanz, *International Arbitration in the United States: the Need for a New Act*, 3 *Arb. Int'l* 309 1987, at 309.

<sup>415</sup> *Id.*

associated interest in strictly regulating the international arbitration therein.<sup>416</sup> Thus, two different laws may sometimes be a better option: one for international arbitration and one for domestic arbitration.<sup>417</sup>

The word, ‘commercial’ in paragraph (1) is not strictly defined in the provision; however, the footnote states that a wide interpretation should be given—and provides examples of commercial transaction activities that the Commission had in mind.<sup>418</sup> According to the Working Group, the avoidance of confusion is the reason for the absence of the definition of ‘commercial’ within the provision, as it could lead to problems with domestic legislation wherein the term ‘commercial’ is utilized in a myriad of contexts.<sup>419</sup> When the Commissioners drafted the Model Law, they did anticipate the broad interpretation of ‘commercial’ to include any commercial relationships regardless of whether the parties are commercial parties or merchants.<sup>420</sup> For example, one case involved a home that was sold and purchased via a real estate listing agreement with a provision to arbitrate any claim about the physical condition of the property; the court, *inter alia*, regarded this transaction as a commercial one because it was conducted in a businesslike manner—even though this sale was unrelated to the regular business activity of either party.<sup>421</sup>

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<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> There is little problem or difficulty in interpretation and application of term, ‘commercial’, in practice. Pieter Sanders, *Unity and Diversity in the Adoption of the Model Law*, 11 *Arb. Int’l* 1 1995, at 11.

<sup>419</sup> Stavros L. Brekoulakis & Laurence Shore, *UNCITRAL Model Law*, Chapter 1, Article 1 [Scope of application] in Loukas A. Mistelis(ed), *CONCISE INTERNATIONAL ARBITRATION*, Kluwer Law International, 2010, at 585.

<sup>420</sup> *Id.*

<sup>421</sup> The facts of this case are as follows; the defendant moved to Ontario and sold their home in Minnesota to the applicant. The transaction was undertaken through a real estate listing agreement which included a provision to arbitrate any claim about the physical condition of the property. A claim arose and an arbitral award was subsequently made granting the applicant \$9,049.50 for the cost of replacing the septic system servicing the property. The defendant refused to pay and the applicant brought an application to enforce the award in Ontario. The only issue was whether the arbitration agreement and the award were "commercial" within the meaning of the Model Law. The Court concluded that the arbitration agreement between the parties and the resulting award were commercial within the meaning of the Model Law. While the sale of the home was unconnected to the regular business activity of either party, it was done in a business-like way, with the assistance of professional realtors. So, the application for enforcement was granted. CLOUT Case No. 390, Ontario

Although the Model Law defines the substantive scope of application under paragraph (1), this law will not be applicable if a certain dispute (i) is inarbitrable according to any other law of the Model Law country (*i.e.*, the State adopting the Model Law)<sup>422</sup> or (ii) must be submitted to arbitration according to any other law.<sup>423</sup> Paragraph (5) helps limit this issue by stipulating the need for arbitrability provisions from each State (since the absence of a list of non-arbitrable issues leaves matters of arbitrability to the individual States and thus minimizes uniformity and predictability).<sup>424</sup> Some scholars have responded to this criticism by asserting that the topic of arbitrability is better left to individual, national arbitration laws due to doubts, in the arbitration community, about (i) ultimately attaining the global unification of arbitration and (ii) the usefulness of creating a list of non-arbitrable issues.<sup>425</sup> Indeed, the assignment of non-arbitrable issues to individual national laws indicates that international arbitration practitioners are expected to be familiar with the intricate aspects of arbitration law (governing each arbitral venue); however, this is not realistic or possible.<sup>426</sup>

As to the territorial scope regulated under paragraph (2), this Model Law is applicable only if the place of arbitration is in a territory of the Model Law country.<sup>427</sup> In most legal systems, the place of

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Court, Canada, 1 February 1996. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V01/847/23/PDF/V0184723.pdf?OpenElement> (accessed on October 3, 2015).

<sup>422</sup> The Model Law country means the country which has a national arbitration law inspired by the Model Law or the country which enacts a new law based on the Model Law or the country which uses a considerable number of Model Law provisions in their national law. Although there is an assertion that these three categories of countries should be recognized differently, distinction will not be made in this paper. See Pieter Sanders, *Unity and Diversity in the Adoption of the Model Law*, 11 *Arb. Int'l* 1 1995, at 1.

<sup>423</sup> This is the case in which parties determine other laws as their governing law.

<sup>424</sup> Stavros L. Brekoulakis & Laurence Shore, *op. cit.*, at 588.

<sup>425</sup> Pieter Sanders, *UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future*, 21 *Arb. Int'l* 443 2005, at 475-6.

<sup>426</sup> Fernando Mantilla & John Adam, *UNCITRAL Model Law: Missed Opportunities for Enhanced Uniformity*, 31 *UNSW Law Journal* 309, 2008, at 314.

<sup>427</sup> A German company and a U.S.A. company concluded a contract for design, manufacture, deliver and operation of transfer system. The contract contained an arbitration clause. After the conclusion of contract, the U.S.A. company assigned the contract to a Canadian company. During the performance of contract, the Canadian company had disputes with a German company and brought the case to the court in Canada for damages. In response to the action, a German company moved to

arbitration becomes a criterion for determining the applicability of national law; thus, when the Model Law country is appointed as a place of arbitration, the national law (in the place of arbitration) becomes a governing law—and its provisions are applicable to the arbitration.<sup>428</sup> Nevertheless, the law of the place of arbitration does not always become the governing law. Indeed, national law allows the parties to choose the procedural law of the other country; however, this rarely occurs in practice because the involvement of two different jurisdictions (for arbitration) does not generate much benefit to the parties.<sup>429</sup>

The territorial criterion has further practical significance because the court, at the place of arbitration, provides supervision and assistance therein.<sup>430</sup> Nevertheless, the Model Law has some exceptions for territorial application that are mostly related to the court's assistance—namely, in the context of (i) arbitration agreements (Article 8), (ii) court actions (Article 9), (iii) the 2006 amendments regarding interim measures (Articles 17 H, 17 I, 17 J), and (iv) the context of the recognition and enforcement of arbitral awards (Articles 35 and 36). However, they are also applicable to arbitration that takes place outside of a Model Law country. Generally, State courts abide by this territorial principle.

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have the action stayed. The Canadian court dismissed the motion and refused to wait for a tribunal to render its decision on jurisdiction on the basis that neither article 5 nor article 16 were applicable to a case in which the place of arbitration was outside Canada. See CLOUT Case No.13, Ontario District Court, Canada 27 October 1988. (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V93/855/96/IMG/V9385596.pdf?OpenElement>); CLOUT Case No. 383, Ontario District Court, Canada, 27 October 1989 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V01/847/23/PDF/V0184723.pdf?OpenElement>) (accessed on September 21, 2015).

<sup>428</sup> Part Two; Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 1 UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, 21 2006. at 26.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

## 2.2 Court Intervention

In more recent times, court intervention in ICA has been strictly restricted, clearly defined, and divided into two major components: the supervision of the arbitral process and judicial assistance therein (*i.e.*, to the arbitral process).<sup>431</sup> The typical roles of the courts are to (i) keep arbitration separate from the courts, (ii) refer the parties to arbitration, (iii) enjoin or compel the arbitration, (iv) review arbitral awards, and (v) recognize and enforce arbitral awards.<sup>432</sup> Article 5 of the Model Law also limits court intervention as a principle; national courts should intervene only in exceptional circumstances and these are exhaustively provided in the Model Law. Indeed the limitation of court intervention as a principle (*i.e.*, the concept that national courts should intervene only in exceptional circumstances that are delineated in the Model Law) is to prevent any unpredictable or disruptive interference from the court during the arbitral process. This prevention is indeed essential to the parties—particularly foreign parties who choose arbitration.<sup>433</sup>

### ***Article 5 (Extent of Court Intervention)***

*In matters governed by this Law, no court shall intervene except where so provided in this Law.*

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<sup>431</sup> W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 *Tex. Int. L. J.* 1, 1995, at 48.

<sup>432</sup> Matthew B. Cobb, *Domestic Courts' Obligation to Refer Parties to Arbitration*, 17 *Arb. Int'l* 313 2001, at 313.

<sup>433</sup> Part Two; Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 1 *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006*, 21 2006. at 27.

Although the text in Article 5 limits court intervention, it also indicates a possible area of court control; for this reason, this provision has been criticized for not taking a position on the appropriate role of the courts in the context of assisting or supervising arbitration.<sup>434</sup> While there is no doubt that court intervention is sometimes necessary within the context of arbitration, arbitration is first and foremost a private system. Furthermore, while Article 6 specifies areas wherein the court can interfere for the purpose of assistance and supervision, these areas are seemingly broader than necessary. Specifically, Article 6 expresses that (i) the court can interfere in areas that are not governed by the Model Law<sup>435</sup> and (ii) the scope of exclusion of the court intervention, regulated under Article 5, is narrower (*vs.* the substantive scope of application of the Model Law regulated under Article 1).<sup>436</sup>

The courts generally abide by Articles 5 and 6 (*e.g.*, by not interfering with matters that are not associated with court intervention in the Model Law). In *International Civil Aviation Organization (ICAO) v. Tripal Systems Pty. Ltd.*, the International Civil Aviation Organization (ICAO) requested immunity to contest the jurisdiction of the arbitral tribunal. However, the Superior Court refused to intervene on the basis of Article 5 of the Model Law and noted that the court would not intervene and review the decision of the arbitral tribunal once it had declared its competence.<sup>437</sup>

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<sup>434</sup> Gerold Herrmann, *op. cit.*, at 15.

<sup>435</sup> These areas are the issues which the Working Group decided not to regulate in the Model Law: the arbitrability of the subject-matter of the dispute, the capacity of parties to conclude the arbitration agreement, the impact of state immunity, consolidation of substantially related arbitration proceedings, the competence of the arbitral tribunal to adapt contracts, the contractual relations between arbitrators and parties or arbitration bodies, the professional liability of arbitrators, fixation of fees or request for deposit, and the time-limit for enforcement, for example. See Gerold Herrmann, *The UNCITRAL Model Law – its background, salient features and purposes*, 1 *Arb. Int'l* 6 1985, at 15.

<sup>436</sup> Stavros L. Brekoulakis & Laurence Shore, *UNCITRAL Model Law*, Chapter 1, Article 5 [Extent of court intervention] in Loukas A. Mistelis(ed), *op. cit.*, at 594.

<sup>437</sup> The International Civil Aviation Organization (ICAO) concluded a contract with Tripal for the conception, construction and installation of an airport in Vietnam. The contract included an arbitration clause as well as a clause that preserved any immunity that might accrue to the ICAO. When Tripal tried to commence the arbitration to resolve a dispute between the parties, the ICAO raised its immunity contesting the arbitral tribunal's competence. In order to rule on the objection, the

## 2.3. Arbitration Agreement

The text in Articles 7, 8, and 9 helps to regulate arbitration agreements. Article 7 was amended via a 2006 amendment and provides two options; the original 1985 version closely followed Article II of the New York Convention (which permits only written arbitration agreements). However, critics have noted that drafting written arbitration agreements could become impractical and impossible in international business contexts.<sup>438</sup> Indeed, most practitioners assert that, in the absence of any doubt about the willingness of parties to arbitrate, the validity of arbitration agreements should be recognized—regardless of whether there is an existing written arbitration agreement or not.<sup>439</sup> As a result, Article 7 was revised (in the 2006 amendments) in order to meet practical needs within international business contexts.

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arbitral tribunal decided to hear all evidence, but the ICAO asked the Superior Court of Quebec to declare that it enjoyed an absolute immunity from the judicial process of any kind. Tripal responded with its own motion for dismissal on the grounds that only the arbitral tribunal was competent at that stage of the proceedings. The Superior Court decided that the arbitral tribunal alone was competent to decide the immunity issue and granted the motion for dismissal of the declaratory motion. Also, the Superior Court refused to intervene on the basis of article 5 of the Model Law after examining the conditions regulating the judiciary intervention in the arbitral process (articles 16 and 34 of the Model Law) and concluded that these were not met. The court, however, noted that once the arbitral tribunal had declared itself competent, the court would be competent to review the decision in accordance with article 16(3) of the Model Law upon a party's request. CLOUT Case No.182, Superior Court of Quebec, 9 September 1994, Canada (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V97/274/84/PDF/V9727484.pdf?OpenElement>) (accessed on September 21, 2015)

<sup>438</sup> There are many jurisdictions which recognize an oral contract valid and it is common for merchants to conclude a contract without an actual written contract.

<sup>439</sup> Part Two; Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 1 UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, 21 2006. at 28.



### 2.3.1. Definition and Form of Arbitration Agreement

Article 7 has included two options since the 2006 amendment. Option I of Article 7 is more comprehensive; it (i) is based on the 1985 version, (ii) includes more rules, and (iii) specifies the meaning of “arbitration agreement” and the formal requirements therein. Option II of Article 7<sup>440</sup> is simple; while it defines the meaning of the arbitration agreement, it does not regulate how the arbitration agreement should be made and there are no formal requirements for arbitration agreements.

#### *Article 7 [Option I] (Definition of arbitration agreement)*

*(1) “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. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*

*(2) The arbitration agreement shall be in writing.*

*(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.*

*(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.*

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<sup>440</sup> Article 7 (option II) of the Model Law : “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.

*(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.*

*(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.*

The definition of an arbitration agreement follows Article II(1) of the New York Convention. An arbitration agreement can be concluded for any dispute—irrespective of whether it is a contractual or non-contractual (and present or future) dispute. An interpretation of paragraph (1) indicates that an agreement between two parties is more important than what is written in the arbitration agreement. This means that the true intention of both parties matters. (1) For example, when one party unilaterally adds an arbitration clause into an existing agreement after both parties have signed it, this arbitration agreement is not valid even though it is in a written form because there is no consent to arbitrate between two parties.<sup>441</sup> (2) In a certain case, there was an agreement that contained both an arbitration clause and a clause providing a right to sue. The court qualified this as a valid arbitration agreement and thus the arbitral tribunal had the initial right to decide its jurisdiction.<sup>442</sup> (3) In another case, an arbitration agreement contained drafting

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<sup>441</sup> The plaintiff is a member of the registered association for the breeding of German Shepherd dogs, and the Association is the defendant in the proceeding. After the plaintiff joined the association, it introduced an arbitration clause into its rules through a majority vote by its members without Plaintiff's assent. When the Association imposed a penalty on the Plaintiff, the Plaintiff filed a claim in the Regional Court and the Court declined jurisdiction because of the arbitration clause contained in the rules. On appeal, however, the Federal Supreme Court reversed and remanded the case to the Higher Regional Court. The Court held that while an arbitration clause could generally be introduced into the rules of an association, this did not necessarily mean that a member of the Association would automatically be subject to the clause if it was later added without its assent. CLOUT Case No. 406, Bundesgerichtshof, Germany. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V01/879/59/PDF/V0187959.pdf?OpenElement> (accessed on September 29, 2015).

<sup>442</sup> Mine Star was a licensee and sub-licensed to Samsung. The sub-licensed agreement contained an arbitration clause and a clause which provides Mind Star with the right to sue if Samsung failed to perform its obligations. Mind Star brought a case to the court claiming the fundamental breach of agreement by Samsung and the damaged entitled to it. The court concluded that the right to sue did not disqualify the duty to arbitrate. The court held that this clause was consistent with the requirement

errors associated with the scope of the subject matter in the arbitration; the court rejected the claim, asserting the invalidity of the arbitration clause based on the errors. Nevertheless, the court held that the drafting errors did not actually reflect the intention of the parties.<sup>443</sup>

There has been concern within some countries that Article 7 does not deal with States or governmental agencies that enter into arbitration agreements (and thus have any rule regarding the issue of State immunity therein);<sup>444</sup> indeed, in most cases, the agreement to arbitrate constitutes waiver of immunity.<sup>445</sup> Also, Article 7 provides more detailed and practical rules about the form of arbitration agreements. For example, while it requires written arbitration agreements, it will recognize such agreements with the content therein recorded in any form<sup>446</sup> (e.g., oral agreements or agreements concluded by conduct).<sup>447</sup> Thus, if any party can prove that they have agreed on arbitration via the

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that the arbitrators determined its own jurisdiction and the scope of its authority. Therefore, the arbitral clause was operative and the parties should be referred to arbitration. CLOUT Case No.32, Ontario Court, Canada, 30 April 1992. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V93/899/70/IMG/V9389970.pdf?OpenElement> (accessed on September 29, 2015).

<sup>443</sup> The plaintiff and defendant concluded a joint venture agreement containing an arbitration clause. When a dispute arose, the plaintiff brought a case requiring the court to rectify a provision of arbitration clause and to declare the invalidity of arbitration clause based on a drafting mistake. The defendant, however, sought a stay of proceedings and submission of the whole dispute to arbitration. The arbitration clause contained the expression of “arising under” or “in relation to the construction of the agreement” and the plaintiff claimed that this expression was not broad enough to cover the rectification of the agreement by the arbitral tribunal. The court, however, this expression was sufficient enough to cover this matter and the arbitration clause in doubt should be interpreted in a matter which would be conducive to arbitration. Consequently, the court granted a stay of the proceedings and referred the matter to arbitration. CLOUT Case No. 69, Ontario Court, Canada, 24 January, 1994. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V94/257/97/IMG/V9425797.pdf?OpenElement> (accessed on September 25, 2015)

<sup>444</sup> Some countries like Bulgaria, Peru, Egypt, Tunisia, Canada, Hong Kong and Bermuda have rules regarding State immunity in relation to arbitration. Pieter Sanders, *Unity and Diversity in the Adoption of the Model Law*, 11 *Arb. Int'l* 1 1995, at 11~12.

<sup>445</sup> See Hazel Fox, *State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution Against State Property?* 12 *Arb. Int'l* 89 1996; Carlo de Stefano, *Arbitration Agreements as Waivers to Sovereign Immunity*, 30 *Arb. Int'l* 59 2014; George Rosenberg, *State as a Party to Arbitration*, 20 *Arb. Int'l* 387 2004.

<sup>446</sup> Stavros L. Brekoulakis & Laurence Shore, *UNCITRAL Model Law*, Chapter II, Article 7 [Definition and form of arbitration agreement] in Loukas A. Mistelis(ed), *op. cit.*, at 596.

<sup>447</sup> Article 7(3) of the Model Law.

fulfillment of the associated requirements, the agreement should be recognized as written.<sup>448</sup> This change results from two factors. One is the development of telecommunication. When the Model Law was drafted for the first time in 1985, electronic communications were not commonplace. Nowadays, however, the most common method of communication in international business is electronic communication via email. Thus, this form of electronic communication has to be considered. The other factor is common practice since merchants often conclude contracts orally or by conduct.

Consequently, some national courts have tried to adopt a less strict approach to the interpretation of Article 7. In one case, a charter party did not have the signatures for both contracting parties; however, the court upheld the arbitration agreement therein (*i.e.*, as valid and in compliance with the requirement of Article 7) because the charter party was concluded regardless of the non-existence of the signature.<sup>449</sup> The actions of both parties and pre-voyage communications proved the existence of a contract.<sup>450</sup> In another case, the contract was concluded via the conduct of a seller who sent a sample of goods and promised the delivery; the arbitration clause, included in the associated contract, was binding even though the seller never returned a signed document.<sup>451</sup>

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<sup>448</sup> If the law requires an arbitration agreement in writing interpreting in a narrow way, consent to arbitrate will be proved very easily and also it will be unlikely to be challenged.

<sup>449</sup> CLOUT Case No. 40, High Court of Hong Kong, 30 July, 1992. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V93/899/70/IMG/V9389970.pdf?OpenElement> (accessed on September 29, 2015).

<sup>450</sup> The plaintiff chartered the vessel to the defendant and sought payment of damages for breach of the charter-party by the defendant. The plaintiff appointed an arbitrator according to an arbitration clause contained in the charter-party, but the defendant failed to appoint a second arbitrator. As a result, the plaintiff brought the case to the court applying for the court to appoint a second arbitrator in accordance with article 11(4) of the Model Law. Although the charter-party was not signed by both parties, the court found through the pre-voyage communications that there was a charter-party between the plaintiff and the defendant because there was no doubt from the facts that the defendant had chartered the vessel to the plaintiff and the plaintiff had paid certain amount of money in accordance with the charter-party. Therefore, the court concluded that the arbitration clause had been complied with the requirement of article 7 of the Model Law and the defendant was given seven days to appoint a second arbitrator, otherwise the court was to appoint him/her. CLOUT Case No. 40, High Court of Hong Kong, 30 July, 1992.

<sup>451</sup> The purchaser sent a written offer to the seller to buy oregano. The seller never returned a signed copy of the offer, but s/he

### 2.3.2. Arbitration Agreement and the Courts

Article 8 focuses on the recognition of an arbitration agreement by a court and deals with some important issues regarding the relationship between the arbitration agreement and the resort to the court.<sup>452</sup>

***Article 8 (Arbitration agreement and substantive claim before court)***

*(1) A court before which an action is brought in a manner which is the subject of an arbitration agreement shall, if a party so request not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

*(2) Where an action referred to in paragraph (1) of this article 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.*

According to paragraph (1), a court is obliged to refer the parties to arbitration if the claim on the same subject matter is brought—unless it finds that the agreement is null and void, inoperative, or incapable of being performed. This means that the courts, in the presence of valid arbitration agreements, should reject cases that are brought by parties who claim invalidities therein (*i.e.*, of arbitration agreements)

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responded to the offer by submitting a sample and promising delivery. The seller, however, did not deliver oregano and the purchaser sought to arbitrate the alleged breach of contract. During the arbitration, the seller did not participate in the arbitration and the award was rendered against the seller. When the purchaser tried to enforce the award, the seller objected on two grounds that there was no contract bound the parties and the arbitration agreement was not in writing. The court allowed the application for enforcement holding that the seller was bound and the contract was concluded validly because of his/her conduct—sending samples and promising delivery. Therefore, for the dispute, the parties should arbitrate because having interpreted article 7 of the Model Law, it did not expressly require a signature, so the arbitration agreement was also valid and binding. CLOUT Case No. 365, Saskatchewan Court of Queen’s Bench, Canada, 1 October, 1996. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/602/96/PDF/V0060296.pdf?OpenElement> (accessed on September 29, 2015).

<sup>452</sup> Gerold Herrmann, *op. cit.*, at 16.

and seek judicial litigation. Furthermore, when a court rejects a case and refers the parties to arbitration, there are some issues to be addressed. First, when a party brings a case to the court claiming the invalidity of an arbitration agreement, the validity of the arbitration agreement should be determined before the court refers the parties to arbitration. The question herein is who determines the validity of an arbitration agreement. The court? Or should the court wait until the arbitration tribunal makes a decision on the validity of the arbitration agreement?<sup>453</sup>

Second, when the court determines the validity of an arbitration agreement, what if the court's decision is against the arbitral tribunal's decision? For example, which decision should be given priority if the court determines the invalidity of an arbitration agreement while the arbitral tribunal finds that the arbitration agreement is valid? Conversely, where should the parties bring their case when the court determines the validity of an arbitration agreement and refers the parties to arbitration while the arbitral tribunal determines that the arbitration agreement is not valid and rejects the case?

Third, if a court makes a positive ruling on the validity of an arbitration agreement, what is the next step? The provision says that "the court shall refer the parties to arbitration." Does this mean that the court will compel the parties to undertake an arbitration? Or does this mean that the court simply rejects the case? Or is it possible for a party to appeal to a court above?

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<sup>453</sup> According to the phrase in Article 8(1), it states that "unless it finds that the agreement is null and void, inoperative or incapable of being performed", and the demonstrative pronoun, "it", indicates the court. So, it appears that the court is the one who determines the invalidity of arbitration agreement.

### 2.3.2.1. Who Decides First?

Article 8 tries to delimit national court intervention in arbitration by clarifying that a court should refer the parties to arbitration unless an arbitration agreement is null and void, inoperative, or incapable of being performed. However, it does not mention who decides the validity of an arbitration agreement first when (i) one party brings a case to the national court claiming invalidity of the arbitration agreement and (ii) the other party pleads the arbitration agreement, requesting that the court to compel them to do arbitration. This issue was raised when the Model Law was drafted; it was suggested that the Model Law should expressly specify the priority herein (*i.e.*, to refer this issue to arbitrators) because by doing so, it became consistent with Article 16.<sup>454</sup>

Nevertheless, the Model Law does not indicate who has priority over the claim of whether an arbitration agreement is valid or not—and this is what many national courts have attempted to sort out.<sup>455</sup> Two approaches have been discussed in response to this issue; the *prima facie* test and the full review test.<sup>456</sup> First, according to the *prima facie* test (a longstanding rule endorsed by the French courts), unless there is a proof of the manifest nullity or inapplicability of the arbitration clause, the parties shall be referred to arbitration. Thus, if the claim over the invalidity of an arbitration agreement is brought before the national court after the arbitration is in motion, the constituted arbitral tribunal will decide on this claim by applying the *prima facie* approach.<sup>457</sup> Thus, once the arbitral tribunal is constituted, it has a

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<sup>454</sup> Pieter Sanders, *UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future*, 21 *Arb. Int'l* 443 2005, at 443.

<sup>455</sup> Stavros L. Brekoulakis & Laurence Shore, *UNCITRAL Model Law, Chapter II, Article 8 [Arbitration agreement and substantive claim before court]* in Loukas A. Mistelis(ed), *op. cit.*, at 602.

<sup>456</sup> Giacomo Marchisio, *Jurisdictional Matters in International Arbitration: Why Arbitrators Stand on an Equal Footing with State Courts*, 31 *J. Int'l Arb.* 455 2014, at 457.

<sup>457</sup> *Id.*

priority to decide the validity of an arbitration agreement.<sup>458</sup> The courts are consequently prevented from deciding on the existence, validity, or scope of the arbitration agreement before the arbitral tribunal makes a decision on this matter unless the agreement is manifestly null or inapplicable.<sup>459</sup> Indeed, this approach applies even before the arbitral tribunal is constituted. When a case is brought to the court and one party pleads an arbitration agreement, the court makes a prima facie determination on whether there is any potential basis for validity and refers the parties to arbitration if it finds the arbitration agreement valid. After that, an arbitral tribunal is constituted according to the alleged agreement and makes a final decision on the issue.

The second approach is the full review test.<sup>460</sup> Under this approach, the court does a more detailed review of the substantive validity of arbitration agreement in question and if the court finds that an arbitration agreement is valid, it refers the parties to arbitration.<sup>461</sup> On the other hand, if the court finds the invalidity of arbitration agreement, the court has jurisdiction and makes a decision over the dispute without giving arbitrators any chance to decide over the dispute.<sup>462</sup>

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<sup>458</sup> William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks between Court and Arbitrators*, 8 Am. Rev. Intl. Arb. 133, (1997), at 138.

<sup>459</sup> Giacomo Marchisio, op. cit., at 458.

<sup>460</sup> This one has been preferred in England under the traditional position although recent decisions give the impression that the prima facie test is more applicable. See. *Fiona Trust & Holding Corp v. Privalov*, [2008] 1 Loyd's Rep 254 HL.

<sup>461</sup> CLOUT Case No 178, British Columbia Supreme Court, Canada, 31 January, 1996, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V97/274/84/PDF/V9727484.pdf?OpenElement>, CLOUT Case No 43, High Court of Hong Kong, 8 September, 1992, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V93/899/70/IMG/V9389970.pdf?OpenElement>, CLOUT Case No 44 High Court of Hong Kong, 17 February 1993, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V93/899/70/IMG/V9389970.pdf?OpenElement>, CLOUT Case No 78 High Court of Hong Kong, 18 August 1994, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V94/270/11/IMG/V9427011.pdf?OpenElement>, CLOUT Case No 87 High Court of Hong Kong, 17 November 1994, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V95/529/10/IMG/V9552910.pdf?OpenElement> (accessed on September 30, 2015).

<sup>462</sup> In Sweden, parallel proceedings are allowed in a jurisdictional matter. Upon the request of one party, the arbitral tribunal assesses over the validity of arbitration agreement, but its assessment does not prevent a state court from examining the validity of arbitration agreement at the same time. In this situation, the court's judgment is a final settlement over the issue relating to the validity of agreement and this decision binds the arbitrators as well. Giacomo Marchisio, op. cit., at 458-9.



However, with the full review test, two problems arise. First, assume a case wherein the arbitral tribunal makes a negative decision over a jurisdictional matter (*i.e.*, finds an arbitration agreement invalid when the parties are referred to arbitration after the court's full review, which finds the validity of arbitration agreement). In this case, what should the parties do next? They cannot bring the case before the court because the court (i) found the arbitration agreement valid after the full review and (ii) referred the parties to arbitration according to Article 8 (1). Also, the parties cannot ask the arbitral tribunal to settle their dispute because the arbitral tribunal has declared the invalidity of the arbitration agreement.

Second, assume another case wherein the arbitral tribunal finds the arbitration agreement valid and proceeds with the arbitration. However, at the same time, the court makes a final decision over the substantive dispute; after the court's full review, the arbitration agreement is determined to be invalid. The full review test brings out unnecessary intervention by the court, which provides a means of escape to a party who does not want to do arbitration. Also, it could lead to a wrong interpretation that the court has a right to (i) make a final decision regarding the jurisdictional matter and (ii) ignore the parties' intention of giving the jurisdiction over their dispute to arbitrators—by concluding an arbitration agreement.<sup>463</sup> What is more, the full review test could encourage ill-founded applications by a party who simply wants to delay arbitration proceedings.<sup>464</sup>

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<sup>463</sup> In this case, it results in that the court encourages the parties to breach a contract, which is an arbitration agreement.

<sup>464</sup> Giacomo Marchisio, *op. cit.*, at 461.

### 2.3.2.2. Global Scope of Article 8

As stated in Article 1 (2) of the Model Law, Article 8 is not limited to arbitration agreements that provide for arbitrations in States with courts that examine arbitration agreements. Indeed, the national courts should refer the parties to arbitration under a valid arbitration agreement even if the place of arbitration is a different State. For example, when the place of arbitration is State A and one party brings the case to a court in State B (which is a Model Law country), the court in State B should reject the case and refer the parties to arbitration—even if the place of arbitration is not State B.<sup>465</sup> By doing so, the Model Law can pursue uniformity (*i.e.*, a legal framework for enforceability based on a valid arbitration agreement).<sup>466</sup>

### 2.3.2.3. Conditions of Application of Article 8

The interpretation and application of Article 8 involves two conditions. First, either party must invoke an arbitration agreement within the time limits therein.<sup>467</sup> There is no *ex officio* reference provided to the national courts.<sup>468</sup> This means that the court will not determine the validity of an arbitration agreement in the absence of a request by one of parties to do so.<sup>469</sup> Also, the rules of Article 8 should not

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<sup>465</sup> If one party wants to bring the case to the court denying the validity or the existence of arbitration agreement, s/he has two options. First, the party can bring the case to the court in State A, which is the place of arbitration. Second, s/he can ask the court in State B, which is usually his/her country because of the practical convenience.

<sup>466</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter II, Article 8 [Arbitration agreement and substantive claim before court] in Loukas A. Mistelis(ed), *op. cit.*, at 602.

<sup>467</sup> According to article 8 (1), the time limit is ‘not later than when submitting his first statement on the substance of the dispute’.

<sup>468</sup> Isaak I. Dore, *THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE*, Graham & Trotman, 1993, at 106.

<sup>469</sup> CLOUT Case No.508, Ontario Superior Court of Justice, Canada, 8 October, 2002. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/600/35/PDF/V0460035.pdf?OpenElement> (accessed on September 30, 2015).

be understood that Article 8 authorizes the parties to bring a case to the court for an order to compel arbitration;<sup>470</sup> it should be interpreted that the court must dismiss the case—or stay an action if the dispute is within the scope of the valid arbitration agreement. The court’s role does not go further and direct the parties to arbitrate;<sup>471</sup> if the court does so (*i.e.*, go further and order the parties to do an arbitration), it is inconsistent with Article 5.<sup>472</sup>

In *United Laboratories, Inc. v Abraham* case, the parties had contractual disputes that led to lawsuits in Illinois and Ontario.<sup>473</sup> The defendant resisted the enforcement of the default Illinois judgment, claiming that they were bound by the arbitration agreement.<sup>474</sup> The court, however, held that Article 8 of the Model Law (which was applicable in Ontario) did not impose on courts the obligation (or the power) to refer the parties to arbitration when there was no request by any party to do so.<sup>475</sup> Also, because the defendant had failed to appear before the Illinois courts to contest its jurisdiction, the defendant could no longer invoke the arbitration agreement.<sup>476</sup> Thus, in this case, the defendant should have either commenced the arbitration or brought the case before the court to request that it refer the parties to arbitration. In order to commence the arbitration, a party simply needs to submit the claim according to

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<sup>470</sup> Like the Model Law, other modern statutes do not have provisions for such purpose, authorizing courts to order the parties to compel arbitration unless the court finds that the arbitration agreement is null, void, inoperative or incapable of being performed. Markham Ball, *The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration*, 22 Arb. Int’l 73 2006, at 76.

<sup>471</sup> Markham Ball, *op. cit.*, at 76.

<sup>472</sup> According to article 5, the court should not intervene except where so provided in the Model Law.

<sup>473</sup> COULT Case No. 508, Ontario Superior Court of Justice, Canada, 8 October 2002. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/600/35/PDF/V0460035.pdf?OpenElement> (accessed on September 30, 2015).

<sup>474</sup> COULT Case No. 508.

<sup>475</sup> COULT Case No. 508.

<sup>476</sup> COULT Case No. 508.

the manner provided in the rules (*i.e.*, the agreements of both parties in their arbitration agreement).<sup>477</sup> The court's involvement is not necessary for the commencement of arbitration.<sup>478</sup>

Second, the arbitration agreement must not be null, void, inoperative, or incapable of being performed. Although the meaning of this phrase, 'null, void, inoperative, or incapable of being performed' is not defined in the Model Law, it clearly limits the power of the court before which an action is brought for the decision on the validity of the arbitration agreement.<sup>479</sup> Thus, under Article 8, the courts cannot deal with any related arbitration dispute (*i.e.*, associated with the interpretation of this clause and the merits of the case).<sup>480</sup> The meaning of this phrase should be interpreted, case by case, depending on precedents; in *Jean Charbonneau vs. Les Industries A. C. Davie. Inc. et. al.*, the court held that the arbitration clause was inoperative on the ground that the Minister of Agriculture could not act as an impartial arbitrator, as a party to the contract.<sup>481</sup> In *Lucky-Goldstar International (H.K.) Limited v Ng Moo Kee Engineering Limited*, the court held that the reference to an unspecified third country, a non-existent organization, and

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<sup>477</sup> Unlike the Model Law, the FAA section 4 authorizes the court to compel arbitration. At that time when this statute was enacted in 1925, the court's assistance to direct parties to proceed to arbitration was necessary because arbitration rules were not much developed. Now, however, under the modern, well-developed arbitration rules, parties do not need such judicial assistance on this matter. Markham Ball, *The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration*, 22 *Arb. Int'l* 73 2006, at 76.

<sup>478</sup> The purpose of Article 8 is to make sure that the parties cannot settle their dispute by judicial litigation if there is a valid arbitration agreement.

<sup>479</sup> Jean-Paul Beraudo, *Case Law on Articles 5, 8, and 16 of the UNCITRAL Model Arbitration Law*, 23 *J. Int'l Arb.* 101 2006, at 104.

<sup>480</sup> This wording is from the New York Convention (1958) and many states have tried to construe the words. As no definition is provided neither in the Model Law nor the New York Convention, its meaning can vary depending on cases. One thing clear is that, however, it should be understood to be a restrictive rule in relation with the jurisdiction of courts. Jean-Paul Beraudo, *op. cit.*, at 104.

<sup>481</sup> The plaintiff sued for damages which were caused by the delay in the delivery of a fish boat against the defendants who were to construct and the Minister of Agriculture who was to finance. The defendants sought a stay of proceedings according to article 8 of the Model Law on the ground that the construction contract had an arbitration clause. The court, however, held that an arbitration clause providing that one of the parties to the arbitration agreement would also act as an arbitrator in case a dispute would arise was held to be inoperative finding that under the arbitration agreement the Minister of Agriculture was to arbitrate any dispute arising between the parties. CLOUT Case No. 66, Superior Court of Quebec, Canada, 14 March 1989. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V94/257/97/IMG/V9425797.pdf?OpenElement> (accessed on September 30, 2015).

non-existent rules did not render the arbitration agreement inoperative or incapable of being performed because arbitration could not be held in any country other than the countries wherein the parties had their places of business (under the law of the place of arbitration).<sup>482</sup>

### 3. Composition of Arbitral Tribunal

#### 3.1. Jurisdiction of Arbitral Tribunal

Chapter IV focuses on the jurisdiction of the arbitral tribunal and has only one provision. Article 16 is about competence of the arbitral tribunal;<sup>483</sup> indeed, the substance therein has important practical effects on the evolution of arbitration.<sup>484</sup> A great number of arbitration laws, including the Model Law, recognize the principle that an arbitral tribunal can decide on its own jurisdiction—and also deal with challenges to its jurisdiction. Despite this general recognition, the effects of the arbitral tribunal’s decision on jurisdiction (*e.g.*, its form and the means of recourse against decisions by the arbitral tribunal) should be more clearly defined.<sup>485</sup>

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<sup>482</sup> The plaintiff, a Hong Kong company and subsidiary of a Korean company, sold sets of elevators to the defendant, a Hong Kong company. The contract had an arbitration clause which stated like “arbitration in a 3<sup>rd</sup> country, under the rules of the 3<sup>rd</sup> country and in accordance with the rules of procedure of the International Commercial Arbitration Association”. The plaintiff sued for damages in the Hong Kong courts and the defendant sought a stay of the proceedings under article 8 of the Model Law. The plaintiff argued that the arbitration agreement should be considered null because it referred by mistake to an unspecified third country or inoperative because it referred to a non-existent organization and to non-existent rules. CLOUT Case No. 57, High Court of Hong Kong, 5 May 1993. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V94/257/97/IMG/V9425797.pdf?OpenElement> (accessed on September 30, 2015).

<sup>483</sup> The system of article 16 has been called ‘an innovative and sensible compromise’, Howard M. Holtzmann & Joseph E. Neuhaus, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY*, Kluwer Law and Taxation Publishers, 1989, at 486.

<sup>484</sup> Jean-Paul Beraudo, *op. cit.*, at 108.

<sup>485</sup> Dr. Stefan Kroll, *Recourse against Negative Decisions on Jurisdiction*, 20 *Arb. Int’l* 55 2004, at 55.

**Article 16 (Competence of arbitral tribunal to rule on its jurisdiction)**

*(1) The arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement. 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. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

*(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. 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. 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. The tribunal may, in either case, admit a later plea if it considers the delay justified.*

*(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merit. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; when such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.*

### **3.1.1. The Doctrines of Competence-competence**

Paragraph (1) adopts two important principles: one is the competence-competence principle and the other is the separability principle. These two crucial arbitration doctrines significantly affect a large number of national legislatures.<sup>486</sup> The competence-competence means that the arbitral tribunal may (i)

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<sup>486</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter IV, Article 16 in Loukas A. Mistelis(ed), op. cit, at 613.

independently make a decision over the question of whether it has jurisdiction and (ii) deal with any objection regarding the existence or validity of the arbitration agreement, without having to resort to a court.<sup>487</sup>

The arbitral tribunal is generally asked to determine its jurisdiction (i) when either party opposes its jurisdiction (before the arbitral tribunal) for the first time or (ii) when a court decides to stay proceedings on the merits—namely, to make the party (who is alleging the absence of arbitral jurisdiction) take corresponding procedural steps before the arbitral tribunal.<sup>488</sup> In both situations, the arbitral tribunal makes a decision on its jurisdiction; however, there is a substantial difference between the procedural approaches of these two situations.<sup>489</sup> In the first situation, when one party raises an objection to the arbitral jurisdiction (either at the beginning of arbitration or during the arbitral proceedings), the arbitral tribunal makes a decision on this claim (which can be about the validity of the arbitration agreement or its scope of application to the subject matter in dispute).<sup>490</sup> Conversely, in the second situation, when one party seeks to settle their dispute via the court, the court (i) determines the existence and validity of an arbitration agreement pursuant to Article 8 and (ii) makes an order to stay court proceedings by referring the parties to arbitration.<sup>491</sup> In this case, there will be no further debate regarding the jurisdictional matter because the judgment on jurisdiction has *res judicata* authority. Thus, if one party challenges the arbitral

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<sup>487</sup> Part Two; Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 1 UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, 21 2006, at 30.

<sup>488</sup> Jean-Paul Beraudo, *op. cit.*, at 108.

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> As it is discussed in article 8 part, the court determines the existence and validity of arbitration agreement under *prima facie* approach. So, the court refers the parties to arbitration ‘unless it finds that the agreement is null and void, inoperative or incapable of being performed’.

jurisdiction before the court again, it will be not about the validity of the arbitration agreement but the scope of application to the subject matter.<sup>492</sup>

### 3.1.2. The Separability Principle

The separability principle means that an arbitration clause shall be treated as an independent agreement, which is not affected by any other terms in the contract. The effect of separability principle is that an arbitral clause will not become invalid even if an arbitral tribunal finds that the associated contract is null and void.<sup>493</sup> Thus, assume a case wherein one party has commenced arbitral proceedings and there is a concurrent dispute over whether the main contract, with the arbitration clause, has been validly concluded. In this case, when there is a finding that the main contract is not validly concluded, it will not affect the validity of an arbitration agreement (which has been inserted in the main contract as a clause).<sup>494</sup> Thus, under the separability principle, when the parties conclude a contract with an arbitral clause, they enter two separate agreements (*vs.* one agreement).<sup>495</sup>

The purpose of recognizing the separability principle is to prevent a party with a bad faith from obstructing the arbitral proceedings by alleging the invalidity of the agreement.<sup>496</sup> Thus, this doctrine enables (i) an arbitration agreement to remain in effect (even after the voiding of the invalid contract that

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<sup>492</sup> Jean-Paul Beraudo, *op. cit.*, at 108.

<sup>493</sup> Part Two; Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 1 UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, 21 2006. at 30.

<sup>494</sup> The judgment in *Premium Nafta Products* gave further guidance on the question of separability holding that the arbitration agreement survived an allegation that the entire contract was induced by bribery because even if the allegation was true, it would not affect the parties consent to arbitrate. *Premium Nafta Products* [2007] UKHL 40, para. 19.

<sup>495</sup> Stephen M. Schwebel, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS*, Grotius Publications, 1987, at 5.

<sup>496</sup> Carl Svernlöv, *What Isn't, Ain't : The Current Status of the Doctrine of Separability*, 8 J. Int'l Arb. 37 1991, at 38.



contains the arbitration agreement) and (ii) an arbitral tribunal to make a decision over the dispute—even if it is about the validity of the main contract (in the context of approving the intention of parties to arbitrate without any obstruction by any party). In *Harper v. Kvaerner Fjellstrand Shipping A.S.*, the court held that an arbitral tribunal might determine whether an arbitration clause covered the particular dispute therein (*i.e.*, referred to arbitration) and thus determine whether the arbitration clause was valid—even though the underlying contract was void.<sup>497</sup>

### 3.1.3. The Relationship between the Competence-competence and the Separability Principles

The principle of competence-competence allows an arbitral tribunal to have a chance to decide (subject to review by a court) whether it has jurisdiction—even when it decides that it does not have jurisdiction ultimately.<sup>498</sup> The separability principle overlaps with the principle of competence-competence; however, it goes further. The separability principle works under one pre-condition—namely, one assumption is needed that there is a valid arbitration agreement. Thus, the separability principle means that if an arbitral tribunal finds (or assumes) that it has jurisdiction and works to determine whether a contract with the arbitration agreement is void, its jurisdiction (to make that finding on the merits) will

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<sup>497</sup> The facts of the case are as follows; the plaintiff and the defendant entered into joint venture negotiations to establish a ferry service and a letter of intent was signed by parties. The contract contained an arbitration clause and the plaintiff claimed the defendant's breach of contract. After plaintiff's various efforts to settle a dispute with the defendant who refused to continue to deal with the plaintiff, the plaintiff brought the case to the court. The issue was whether there was an enforceable arbitration agreement or whether the contract including an arbitration clause was terminated. The court found that section 16 of the International Commercial Arbitration Act (MAL, article 16) accepted the principle of severability and that the contract being terminated at an end had no effect on the continued validity of the arbitration clause. CLOUT Case No. 349, British Columbia Supreme Court, Canada, September 13, 1991, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/569/59/PDF/V0056959.pdf?OpenElement> (accessed on October 2, 2015).

<sup>498</sup> Mark S. Mcneill & Ben Juratowitch, *Agora: Thought on Fiona Trust: The Doctrine of Separability and Consent to Arbitrate*, 24 Arb. Int'l 475 2008, at 477.

not be influenced or lost<sup>499</sup> (*i.e.*, the principle of competence-competence is not influenced by whether the arbitral tribunal finds that there was no valid agreement to arbitrate).<sup>500</sup> If the arbitral tribunal finds that there is no valid arbitration agreement, it simply needs to decline the jurisdiction in such a case. Conversely, the separability principle cannot work if there was no valid agreement to arbitrate (regardless of being separable from the main contract). Due to the presence of a valid arbitration agreement between the parties, the arbitral tribunal can make a decision over any dispute arising out of the contract wherein an arbitration agreement has been inserted—regardless of the failure of the rest of the contract.<sup>501</sup>

#### **3.1.4. Deadline for Objection against the Tribunal's jurisdiction**

Paragraph (2) sets the time limits for an objection against the jurisdiction of an arbitral tribunal. When the claimant submits a dispute to arbitration, the respondent has to object no later than the submission of the statement of defense (if he or she wishes to do so). Although the provision does not expressly specify that this rule applies to the case of the counterclaim, it is generally accepted that paragraph (2) applies to the counterclaim as well. Thus, the claimant should also bring a jurisdictional objection no later than the time that he or she submits his or her reply to the counterclaim (if he or she wishes to do so) and this should be made clear.<sup>502</sup> When the objecting party wants to object to the

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<sup>499</sup> W. Laurence Craig, William W. Park & Jan Paulsson, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION*, 3<sup>rd</sup> ed. Oceana Publications, 2000, at 48~49.

<sup>500</sup> Julian D.M. Lew, Loukas A. Mistelis, Stefan M. Kroll, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION*, Kluwer Law International, 2003, at. 334.

<sup>501</sup> Mark S. Mcneill & Ben Juratowitch, *op. cit.*, at 477.

<sup>502</sup> Commentary, art. 16 para.5.

jurisdiction of the arbitral tribunal, he or she needs to make clear (in his or her statement of defense) that he or she objects to the arbitral jurisdiction—*vs.* just stating the facts upon which an objection is based.<sup>503</sup>

The purpose of setting the time limits for objection is quick and smooth arbitral proceedings.<sup>504</sup> Paragraph (2) states that a party should be precluded from bringing an objection if he or she fails to make an objection to arbitral jurisdiction within the established time limit. The exception herein is when the arbitral tribunal permits a later plea if it considers the delay justified. One example for the justified delay is the objection that is related to public policy including any arbitrability objection.<sup>505</sup> This objection, regarding the public policy or arbitrability, may be brought to the court later—at the stage of setting aside under Article 34 (2) (b) or the recognition and enforcement of the arbitral award under Article 36 (1) (b).<sup>506</sup>

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<sup>503</sup> The facts of the case are as follows. The plaintiff filed an application to set aside an arbitral award made against him/her. S/he claimed that no arbitration agreement existed between the plaintiff and the defendant, so the arbitral tribunal had no jurisdiction to examine the dispute in question. The court held that the plaintiff, who was a respondent in the arbitral proceedings, made no reference to the lack of jurisdiction of the arbitral tribunal either in its statement of defense or in the subsequent correspondence with the arbitral tribunal, and had not raised any plea regarding the jurisdiction of the arbitral tribunal during the hearing of the case. CLOUT Case No. 148, Russian Federation, Moscow City Court, 10 February, 1995. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V96/853/30/IMG/V9685330.pdf?OpenElement> (accessed on October 2, 2015)

<sup>504</sup> If there is no time limits set, the arbitral proceedings could be halted when the other party makes a jurisdictional objection with an intention just to delay the arbitral proceedings.

<sup>505</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter IV, Article 16 in Loukas A. Mistelis(ed), *op. cit.*, at 614.

<sup>506</sup> According to article 34(2)(b) and 36(1)(b) of the Model Law, the arbitral award may be set aside or refused to be recognized and enforced if the court finds that (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the place of arbitration or the place of enforcement; or (ii) the award is in conflict with the public policy of the place of arbitration or the place of enforcement.

### 3.1.5. Form of the Tribunal's Decision on Jurisdiction

When either party brings an objection to arbitral jurisdiction, the arbitral tribunal makes a decision—either as a preliminary question or in an arbitral award (based on the merits), according to Article 16(3). Although the arbitral tribunal has the competence to rule on its own jurisdiction, it is subject to the court control.<sup>507</sup> The first case wherein a court intervenes is when the arbitral tribunal rules on its own jurisdiction (via a preliminary question confirming that it has jurisdiction); the objecting party can ask the court, in the place of arbitration, to decide the matter under paragraph (3). In this case, the court would intervene as soon as a party's request is made; however, there are three procedural safeguards to reduce the risk and effect of dilatory tactics. (1) The request should be made within 30 days (after the party receives the notice of the ruling made by the arbitral tribunal). (2) The court decision, about the jurisdiction, is not appealable.<sup>508</sup> (3) The arbitral tribunal can continue the arbitral proceedings and make a final award while the matter is pending before the court.<sup>509</sup>

A court may also intervene when an arbitral tribunal continues with proceedings in spite of an objection to the arbitral jurisdiction—and makes an award (which contains its decision on jurisdiction and the merits therein). A court may intervene herein and review the question of jurisdiction—either in the setting aside proceedings (under Article 34) or enforcement proceedings (under Article 36).<sup>510</sup> Paragraph (3) regulates the procedure wherein an arbitral tribunal rules on its jurisdiction therein. Thus, if the arbitral tribunal decides not to rule on a plea that it has no jurisdiction, this omission cannot be subject to the

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<sup>507</sup> Part Two; Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 1 UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, 21 2006. at 30.

<sup>508</sup> *Id.*

<sup>509</sup> *Id.*

<sup>510</sup> *Id.*

review under paragraph (3).<sup>511</sup> Furthermore, the arbitral tribunal may continue the arbitral proceedings without ruling on a plea; however, the objecting party must, *inter alia*, wait to challenge the final award—either in the setting aside proceedings (under Article 34) or in the enforcement proceedings (under Article 36).

Paragraph (3) presupposes that the arbitral tribunal will rule in favor of its positive jurisdiction (against a party’s objection to the arbitral jurisdiction); however, it does not have any rule regarding decisions that deny arbitral jurisdiction. Indeed, various suggestions and drafts have been made for a special procedure to review negative decisions on jurisdictions because only positive decisions can be reviewed in the setting-aside proceedings and enforcement proceedings against the final award.<sup>512</sup> However, the suggested regulation for the negative decisions on jurisdiction was ultimately rejected and paragraph (3) only provides an appeal procedure for decisions under the jurisdiction of the arbitral tribunal (which determines the final award).<sup>513</sup> Indeed, the majority of Working Group rejected the suggested provisions for the review of decisions that deny jurisdiction—namely, they expressed their opinion, *i.e.*,

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<sup>511</sup> The facts of the case are as follows. One party objected the arbitral jurisdiction based on the lack of validity of arbitration agreement. Upon the objection, the arbitral tribunal delivered an order without reasons declaring that the “application of Applicant was rejected.” Four month later, the arbitral tribunal delivered a further order which correct the first order and stated that it “rejected the application of Applicant to decide the issue of jurisdiction by way of an intermediate decision according to para. 3 ZPO (German Code of Civil Procedure)” and that “The arbitral tribunal will decide on its jurisdiction in the final award.” Accordingly, the objecting party brought the case to set aside this order. The Court dismissed the motion and held that a decision on the jurisdiction would only be made in the final award, and might only be reviewed by a court in a motion for setting aside or a motion for recognition and enforcement of the award. CLOUT Case No. 441, Oberlandesgericht Köln, Germany, 20 July 2000, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V03/846/34/PDF/V0384634.pdf?OpenElement> (accessed on October 3, 2015).

<sup>512</sup> Howard M. Holtzmann & Joseph E. Neuhaus, *op. cit.*, at 495.

<sup>513</sup> Regarding the issue that Article 16(3) does not provide the regulation for the arbitral tribunal’s negative ruling on its jurisdiction Professor Sanders asserted that the Model Law should ‘extend the possibility for a quick decision of the court on the ruling of the arbitral tribunal that it has jurisdiction, to the ruling of the arbitral tribunal that it has no jurisdiction. So, his suggestion was to provide a procedural regulation that allows the parties to submit the negative ruling to the court. Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter IV, Article 16 in Loukas A. Mistelis(ed), *op. cit.*, at 614.

that (i) the decision made by the arbitral tribunal should be final and binding (for the associated arbitration) and (ii) the decision denying arbitral jurisdiction did not mean that the substantive claim should be decided by judicial litigation.<sup>514</sup> The underlying rationale for their view (*i.e.*, the determination to hold the tribunal's decision as binding) was that there was no point in forcing the arbitral tribunal to continue their arbitration when they believed that they had no jurisdiction.<sup>515</sup>

#### **4. Conduct of Arbitral Proceedings**

Chapter V is composed of 10 articles: (i) equal treatment of parties (Article 18), (ii) determination of rules of procedure (Article 19), (iii) place of arbitration (Article 20), (iv) commencement of arbitral proceedings (Article 21), (v) language of arbitration (Article 22), (vi) statements of claim and defense (Article 23), (vii) hearings and written proceedings (Article 24), (viii) default of a party (Article 25), (ix) expert appointed by arbitral tribunal (Article 26), (x) and court assistance in taking evidence (Article 27). Certain procedural factors must be agreed upon by the parties to ensure the smooth conduct of arbitration; in most cases, the parties agree on the rules of arbitral institutions (*vs.* setting up their own procedural rules). Arbitral institutions have their own well-established and viable procedural rules and the arbitration is usually conducted without problems if these rules are appointed by the parties.<sup>516</sup>

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<sup>514</sup> Dr. Stefan Kroll, *op. cit.*, at 61.

<sup>515</sup> Commission Report of 21 August 1985, para. 163.

<sup>516</sup> John B. Tieder, JR., *Factors to Consider in the Choice of Procedural and Substantive Law in International Arbitration*, 20 *J. Int'l Arb.* 393 2003, at 393.

## 4.1. Equal Treatment of Parties

### *Article 18 (Equal treatment of parties)*

*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.*

Arbitration is a private resolution system and party autonomy is thus emphasized therein; Article 18, however, regulates party autonomy and due process in the context of international procedural public policy.<sup>517</sup> Indeed, parties and arbitrators, in such contexts, are given wide discretion regarding the procedural rules applicable to arbitration unless due process is violated.<sup>518</sup> If due process is violated, the award will be set aside—or refused for recognition or enforcement. This provision is (i) a mandatory one that is construed by the courts (even though it does not expressly say so)<sup>519</sup> and (ii) labeled as the ‘most important provision[s] of the Model Law.’<sup>520</sup>

Although Article 18 expressly specifies the principle of ‘equality of the parties’ and the ‘giving each party a full opportunity of presenting the case,’ these are abstract guidelines for due process.<sup>521</sup> An interpretation of the phrase ‘equality of the parties’ should not be understood on a simple quantitative

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<sup>517</sup> The term, ‘due process’ in this paper includes a number of notions with varying names under different national laws like natural justice, procedural fairness, the right or the opportunity to be heard. Renata Brazil-David, *Harmonization and Delocalization of International Commercial Arbitration*, 28 J. Int’l Arb. 445 2011, at 453.

<sup>518</sup> Stavros L. Brekoulakis & Laurence Shore, *UNCITRAL Model Law, Chapter V, Article 18* in Loukas A. Mistelis(ed), op. cit., at 624.

<sup>519</sup> Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, 24 J. Int’l Arb. 327 2007, at 329.

<sup>520</sup> Commentary, art. 19, para.1.

<sup>521</sup> Stavros L. Brekoulakis & Laurence Shore, *UNCITRAL Model Law, Chapter V, Article 18* in Loukas A. Mistelis(ed), op. cit., at 624.

basis (*e.g.*, this does not mean that both parties should be given exactly the same amount of time in every process). Furthermore, the phrase, ‘full opportunity of a party to present his case’ should not be abused by a party for dilatory tactics.<sup>522</sup> In practice, ‘equality’ is often wrongly brought for a ground of setting aside. In CLOUT Case No. 146, one party brought a claim during the arbitral proceedings and the arbitral tribunal dismissed the claim. After the claims’ dismissal, the other party partially acknowledged the dismissal of the claim; however, the first party (who brought the original claim) argued that the arbitral award should be set aside because the other party was not equally treated.<sup>523</sup> The court, however, held that the other party’s partial acknowledgement did not amount to a violation of due process.<sup>524</sup> Also, the rejection of the party’s request (regarding the arbitral proceedings) did not amount to a violation of due process under Article 18.<sup>525</sup> In another case, one party challenged the award on the basis that the arbitral tribunal violated the due process because it did not compel a witness to testify during the arbitral

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<sup>522</sup> Commentary, art. 19, para.1.

<sup>523</sup> The facts of the case are as follows. The plaintiff brought a claim during the arbitral proceedings. The arbitral tribunal dismissed the claim and the defendant partially acknowledged the dismissal of claim. After the arbitral tribunal rendered an award, the plaintiff filed an application for setting aside of arbitral award on the ground that the parties had not been treated with equality-violating article 18- so, the award was in conflict with public policy. The plaintiff asserted that the fact that the arbitral tribunal dismissed the claim and the defendant partially acknowledged the claim dismissed constituted unequal treatment of parties. So, the plaintiff argued that the arbitral award rendered under this situation was in conflict with public policy and it should be set aside. Upon the plaintiff’s application, the court held that such acknowledgement did not constitute grounds for setting aside the award because the arbitrators were not bound by acknowledgement of the claim. Also, the court noted that a procedural infringement in the arbitral proceedings had no relevance to the notion of public policy. COULT Case No. 146, Russian Federation, Moscow City Court, 10 November 1994. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V96/853/30/IMG/V9685330.pdf?OpenElement>. (accessed on October 4 2015).

<sup>524</sup> COULT Case No. 146, Russian Federation, Moscow City Court, 10 November 1994.

<sup>525</sup> COULT Case No. 146, Russian Federation, Moscow City Court, 10 November 1994.



procedure.<sup>526</sup> The court rejected the challenge because the arbitral tribunal had no power to compel the witnesses to testify.<sup>527</sup>

## 4.2. Determination of Rules

### *Article 19 (Determination of the rules of procedure)*

*(1) Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*

*(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

Article 19 gives the parties considerable freedom to set out the procedural rules for their own arbitrations;<sup>528</sup> indeed, its fundamental purpose is to allow the parties to select (or tailor) the procedural

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<sup>526</sup> The facts of the case are as follows. The plaintiffs filed a case for setting aside of arbitral award based on Article 34(2)(a)(ii) and Article 34(2)(b)(ii) of the Model Law, which are about unequal treatment of parties during arbitral proceedings and violation of public policy respectively. The plaintiffs asserted that the arbitral tribunal did not compel witnesses to testify despite their request, so that the arbitral award should be set aside. The court, however, held that the arbitral tribunal had no power to compel witnesses to testify and the parties should have had resorted to national courts to compel testimony. It also added that it was simply failure of the plaintiffs to seek judicial assistance. CLOUT Case No. 391, Superior Court of Justice, Canada, 22 September 1999, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V01/847/23/PDF/V0184723.pdf?OpenElement>, (accessed on October 6, 2015).

<sup>527</sup> CLOUT Case No. 391, Superior Court of Justice, Canada, 22 September 1999.

<sup>528</sup> The procedural law is generally understood in its broad sense to encompass the followings, the procedure to be followed by the arbitral tribunal, the law regulating the constitution of arbitral tribunal, the jurisdiction of arbitral tribunal, arbitrability, conditions applicable to the rendering of the award, the intervention of courts of law, and the conditions for the recognition and enforcement of the award. Fabien Gelin, *Peeking Through the Form of Uniform Law: International Arbitration Practice and Legal Harmonization*, 27 J. Int'l Arb. 317 2010, at 322.

rules in accordance with their specific wishes and needs (for efficient conduct in ICA).<sup>529</sup> As mentioned before, the parties usually agree on the preexisting rules (*e.g.*, the rules of arbitral institution, such as ICC, LCIA, and AAA). Furthermore, the parties can agree to apply the provisions of another national law to their arbitral proceedings, even though there is an argument that applying a national law (*i.e.*, legislation for domestic arbitration) to international arbitration is not appropriate. Indeed, many countries have separate provisions for domestic and international arbitration; however, when a jurisdiction has adopted the Model Law with a minimum alteration, it does not have many problems with applying it to the international arbitration.<sup>530</sup> Thus, it is acceptable to agree to utilize a national law for arbitration; however, this may lead to a complicated situation. For example, when parties agree to apply the national law of another country (*i.e.*, outside the place of arbitration), there could be a conflict between these two laws.<sup>531</sup>

### 4.3. Due Process

Article 18 provides the fundamental principle that each party must be given a fair and reasonable opportunity to present their case and to answer the case of the opposing party. However, if one party does

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<sup>529</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter V, Article 19 in Loukas A. Mistelis(ed), *op. cit.*, at 625.

<sup>530</sup> John B. Tieder, JR., *Factors to Consider in the Choice of Procedural and Substantive Law in International Arbitration*, 20 *J. Int'l Arb.* 393 2003, at 398.

<sup>531</sup> Although most jurisdictions assume that arbitration will be conducted in accordance with the procedural law of the place of arbitration, they do not prohibit the application of national law of the place other than the place of arbitration through the parties' agreement. When parties agree to apply the national law of the place other than the place of arbitration, there could be a conflict between these two laws. In this case, there is no clear answer for this conflict. So, in practice, it is advisable for the parties not to nominate the national law of the place other than the place of arbitration. See. Laura M. Murray, *Domestic Court Implementation of Coordinative Treaties: Formulating Rules for Determining the Seat of Arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Award*, 41 *Va. J. INT'L L.* 859, 2001, at 868; Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter V, Article 19 in Loukas A. Mistelis(ed), *op. cit.*, at 625.

not participate in arbitration, how should the requirement of due process be ensured during the arbitral proceedings?<sup>532</sup> This question is crucial because the arbitral award may be set aside or refused for recognition or enforcement if the due process is not ensured. Another initial question is whether the arbitral proceedings should be continued in the event of the default of either party.<sup>533</sup>

***Article 26 (Default of a party)***

*Unless otherwise agreed by the parties, if, without showing sufficient cause,*

*(a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;*

*(b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;*

*(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.*

According to paragraph (a), the arbitral tribunal can terminate the arbitral proceedings if the claimant fails to submit its statement without a sufficient reason. While the arbitral tribunal may seek to determine whether there is a sufficient reason for not submitting the statement before terminating the proceedings, it is not within the duties of the arbitral tribunal to investigate why the claimant is not submitting its statement.<sup>534</sup> Indeed, if the arbitral tribunal were to thoroughly investigation the claimant's

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<sup>532</sup> Judith Butchers & Philip Kimbrough, *The Arbitral Tribunal's Role in Default Proceedings*, 22 Arb. Int'l 233 2006, at 234.

<sup>533</sup> *Id.*

<sup>534</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter V, Article 25 in Loukas A. Mistelis(ed), op. cit., at 632.

default, it would risk violating the principle of impartiality or equal treatment of the parties.<sup>535</sup> The arbitral tribunal only needs to make a minimum effort to find out why a claimant has failed to submit its statement.<sup>536</sup>

Although paragraph (a) deals with the default of the claimant, it is rare, in practice, for the claimant not to submit a full statement of a claim when he or she is requesting the commencement of arbitration.<sup>537</sup> In this sense, paragraph (a) seems a redundant provision; however, it is necessary for cases wherein a claimant initially only submits a brief request and plans to submit a full statement of the claim later on, in accordance with Article 23.<sup>538</sup> If the claimant does not submit the full statement after submitting the brief request for the commencement of arbitration, the claimant will be in default and the proceedings will be terminated under paragraph (a).

Paragraph (b)<sup>539</sup> is about the default of the respondent. If the respondent defaults without a sufficient reason, the arbitral tribunal will continue the arbitral proceedings and render an arbitral award based on the available evidence. However, there is no default judgment in arbitration.<sup>540</sup> Indeed, in such circumstances, the claimant has a greater burden when attempting to substantiate a claim; if the claimant cannot prove his or her claim, the arbitral tribunal is likely to render an award against the claimant.<sup>541</sup> If

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<sup>535</sup> *Id.*

<sup>536</sup> *Id.*

<sup>537</sup> *Id.*

<sup>538</sup> So, in this case, the arbitral tribunal needs to clarify whether the initial document submitted by the claimant is a request for arbitration or a statement of claim.

<sup>539</sup> Article 25 of the Model Law (Default of a party): Unless otherwise agreed by the parties, if without showing sufficient cause, (b) the respondent fails to communicate his statement of defense in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations.

<sup>540</sup> Judith Butchers & Philip Kimbrough, *op. cit.*, at 237.

<sup>541</sup> In *Liberian Eastern Timber Corp. (Letco) v. Government of the Republic of Liberia*, (1987) 26 ILM 647 at 656. The arbitral tribunal stated that "the failure of the Government of Liberia to take part in the present arbitral proceedings does not entitle the claimant to an award in its favor as a matter of right. The onus is still upon the claimant to establish the claim which it has put forward"

the arbitral tribunal has limited information from most likely the claimant (*i.e.*, facts presented by only one party), the arbitral tribunal must nevertheless fulfill its duty and render a decision on the dispute.<sup>542</sup> Thus, an arbitral tribunal examines the merits of each dispute independently as its right to invoke *ex officio* to determine the arbitrability and public policy implications of a dispute.<sup>543</sup>

As previously discussed, the arbitral proceeding often continues, albeit at the discretion of the arbitral tribunal, when one of the parties defaults without sufficient reason;<sup>544</sup> indeed, the agreement between the parties to arbitrate should not be defeated by a recalcitrant respondent.<sup>545</sup> The arbitral tribunal is appointed by the parties pursuant to a consensual arbitration agreement between the parties; thus, it has a duty to conduct arbitration via (i) inviting the parties to present their cases and (ii) making a decision over the claim.<sup>546</sup> Consequently, if either party refuses to participate in the arbitration after having been duly notified, (i) the defaulting party will be deemed to have deliberately forfeited the opportunity<sup>547</sup> and (ii) default in arbitration will not be held to bar the enforcement of an arbitral award.<sup>548</sup> Thus, even if one party does not participate in the arbitration, he or she is still bound by the arbitral award.<sup>549</sup> The key to due process, in this context, is notification. (1) The arbitral tribunal should make certain that the respondent is routinely updated on the progress of the arbitral proceedings. (2) The principle of due

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<sup>542</sup> Judith Butchers & Philip Kimbrough, *op. cit.*, at 238.

<sup>543</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter V, Article 25 in Loukas A. Mistelis(ed), *op. cit.*, at 632.

<sup>544</sup> Judith Butchers & Philip Kimbrough, *op. cit.*, at 234.

<sup>545</sup> On the contrary to the case of non-participation of respondent, if the claimant fails to participate after constitution of the arbitral tribunal, the arbitration should not be continued. It is expressly stated in Article 25(a).

<sup>546</sup> *Id.*, at 236.

<sup>547</sup> Albert Jan van den Berg, *THE NEW YORK CONVENTION OF 1958: TOWARDS A UNIFORM INTERPRETATION*, Kluwer, 1981, at 306.

<sup>548</sup> Gary B. Born, *INTERNATIONAL COMMERCIAL ARBITRATION*, 2<sup>nd</sup> ed., Transnational Publishers: Kluwer Law International, 2001, at 847.

<sup>549</sup> Although this provision empower the arbitral tribunal to continue the arbitral proceedings and make an award, a number of national laws, particularly the Latin-American region, may hesitate to recognize foreign *ex parte* awards. Gerold Herrmann, *op. cit.*, at 8.

process imposes a duty on the arbitral tribunal to (a) inform the respondent of the arguments and evidence of the claimant and (b) allow the respondent to express his or her opinion.<sup>550</sup> (3) The claims and statements therein must be submitted in writing; furthermore the evidence, submitted by the participating party, should be also in writing.<sup>551</sup> (4) Although the parties initially agree on a specific manner of communication (*i.e.*, of receiving notifications), the arbitral tribunal should attempt to ensure that all routine channels are utilized therein, so that (i) there cannot be any objection regarding proper notice and (ii) the defaulting party has sufficient time to respond.<sup>552</sup>

## **5. An Arbitral Award**

After the arbitral proceedings, the arbitral tribunal has to make an award and terminate the proceedings. Chapter VI provides the rules and regulations that are applicable to the (i) substance of a dispute (Article 28), (ii) decision making by panel of arbitrators (Article 29), (iii) settlement (Article 30), (iv) form and contents of an award (Article 31), (v) termination of proceedings (Article 32), and (vi) correction and interpretation of an award (Article 33).

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<sup>550</sup> Albert Jan van den Berg, *op. cit.*, at 307.

<sup>551</sup> Alan Redfern & Martin Hunter, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION*, 4<sup>th</sup> ed. Sweet and Maxwell, 2004, at 324-5, para. 6-121.

<sup>552</sup> Michael J. Mustill and Stewart C. Boyd, *COMMERCIAL ARBITRATION*, 2<sup>nd</sup> ed. Butterworths, 1989, at 537.

## 5.1. Rules Applicable to the Substance of Dispute

### *Article 28 (Rules applicable to substance of dispute)*

*(1) 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 directly referring to the substantive law of that State and not to its conflict of laws rules.*

*(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.*

*(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.*

*(4) In all cases, 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.*

The text in Article 28 focuses on the substance of a dispute and the applicable rules therein. The parties have the freedom to agree on the procedural rules under Article 19, can determine the substantive rules under Article 28,<sup>553</sup> and these choices are not limited to particular national laws; furthermore, Article 28 could be extended to non-national substantive rules because the provision uses the phrase, ‘such rules of law’ (vs. merely ‘law’).<sup>554</sup> Moreover, the substantive rules therein include rules from various sources

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<sup>553</sup> In arbitration, several laws are involved: the law which is applicable to the arbitral proceedings, the law which determines the validity of arbitration agreement, the law which governs arbitrability of the subject-matter, and the law which applies to substance of dispute. Markham Ball, *The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration*, 22 Arb. Int’l 73 2006 at.77

<sup>554</sup> Commentary, art. 28, para. 4.

(*e.g.*, *lex mercatoria*, general principles of law, customary trade rules, the UNIDROIT principles, UCP, and Incoterms).<sup>555</sup>

The term “party autonomy” suggests that the parties can agree on a law (*i.e.*, a set of rules) that is not connected to the dispute or the parties at all.<sup>556</sup> Also, once the parties choose the law (or a set of rules) as their governing law, the arbitral tribunal should render a decision on the dispute in accordance with the agreed-upon law or rules, without reviewing whether the choice of law is correct or not.<sup>557</sup> If the arbitral tribunal does not apply this agreed-upon law or rules, the award will be brought to the court for setting aside on the basis that the arbitral procedure was not in accordance with the agreement of the parties under Article 34 (2) (a) (iv). When a case is brought to the court for this reason, the court reviews only whether the arbitral tribunal has applied the agreed-upon law or rules (*vs.* examining whether the parties’ choice of governing law was correct). Moreover, the court does not examine whether the agreed-upon law or rules were applied correctly.

One case involved a party requesting that the court set aside the arbitral award rendered against it, claiming that the arbitral tribunal did not apply the governing law (*i.e.*, the Italian Patent law) correctly because it did not have the required knowledge about the law; the court held that the court did not have the power to review the merits of an arbitral award and rejected the case thusly. If a court examines

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<sup>555</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VI, Article 28 in Loukas A. Mistelis(ed), *op. cit.*, at 636.

<sup>556</sup> So, parties do not need to consider their own national laws, the law of the place where the contract is concluded, or the law of the place where the contract is performed mostly.

<sup>557</sup> Regardless of which law or set of rules are chosen by the parties, the choice of the parties is binding upon the arbitral tribunal.



whether the governing law has been correctly applied, this means that the court is reviewing the merits of the case; however, this is, in principle, not allowed in most jurisdictions.<sup>558</sup>

As to “party autonomy” in the choice of governing law, some key questions arise. Do the parties enjoy the unfettered freedom to agree on the law (or rules) applicable to their contract? Is their choice limited by the application of mandatory laws, *e.g.*, (i) substantive mandatory rules of the seat of the arbitration, (ii) the mandatory rules of the State that are most closely connected to the dispute, or (iii) the mandatory rules of the State wherein the reviewing court, examining the parties’ choice of applicable law, is located.<sup>559</sup> Indeed, this question is an ongoing discussion in ICA.

When there is no agreement between the parties regarding the rules applicable to the substance of the dispute, the arbitral tribunal can determine this under paragraph (2).<sup>560</sup> While the law (*i.e.*, the rules chosen by the parties) directly refers to the substantive law of a certain State, the law nominated by the

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<sup>558</sup> The facts of the case are as follows. The defendant and the applicant are manufacturers and distributors of car door locks. The parties entered into a license agreement for manufacture and distribution of car door locks. The defendant was the producer of the A-lock and s/he held a patent under Italian law. The applicant was the producer of the B-lock. A dispute arose between the parties as to the question on whether the B-lock was covered by the defendant’s patent for the A-lock and whether any royalties were due. The parties agreed to submit the dispute to ICC arbitration and the arbitral tribunal ruled in favor of the defendant who was the patent holder. After the award was rendered, the applicant applied to the Court for the setting aside of this award. It argued that the arbitral tribunal did not possess the required knowledge of Italian patent law, so the applicant had offered to call for a neutral expert opinion. In spite of the applicant’s request, however, the tribunal had neither ordered one nor given any reasons for its decision. Therefore, the applicant requested the court to set aside the award based on several grounds. Among these several grounds, the court held that courts did not have the power to review an arbitral award on the merits under German law, so it could not review whether the tribunal had applied Italian patent law correctly. CLOUT Case No. 375, Bayerisches Oberstes Landesgericht, Germany, 15 December 1999. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/602/96/PDF/V0060296.pdf?OpenElement> (accessed on October 8, 2015).

<sup>559</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VI, Article 28 in Loukas A. Mistelis(ed), *op. cit.*, at 634-5.

<sup>560</sup> If the parties to a dispute do not agree on the substantive law which governs their dispute in their arbitration agreement, this issue is left to the arbitral tribunal. The arbitral tribunal applies the conflicts of law rules which is deemed applicable by considering the issues such as the following: where the contract was entered into, where the performance occurred, what the intent of the parties was, where the majority or most significant contracts were, what the contract stipulates regarding the governing law, and so on. John B. Tieder, JR., *Factors to Consider in the Choice of Procedural and Substantive Law in International Arbitration*, 20 J. Int’l Arb. 393 2003, at 393.

arbitral tribunal is determined by the conflict of laws considered applicable therein.<sup>561</sup> Thus, the arbitral tribunal may not apply non-national rules of law because the application of conflict of laws (or rules) will lead to the application of the specific States' national law. While there is discrepancy between the parties' freedom to agree on the application of rules of law and the arbitral tribunal's obligation to follow the conflict of laws, the drafters of the Model Law do not explain the reason for this discrepancy and indeed leave this matter to the national legislation.<sup>562</sup> Also, the Commentary mentions that the parties can agree that the arbitral tribunal may determine the applicable substantive law by identifying the applicable law directly (*vs.* via the conflicts of laws).<sup>563</sup> However, when the parties cannot foresee a need to provide for substantive applicable law (and would thus not nominate a specific law via their agreement), it is unrealistic to assume that they would insert an express term that expands the arbitral tribunal's power to identify the applicable law.<sup>564</sup>

According to paragraph (3), the arbitral tribunal can apply non-legal rules to settle a dispute and make a decision *ex aequo et bono* or as *amicable compositeur* (if there is such an agreement between the parties). However, the Model Law again does not clarify the meaning of *ex aequo et bono* or *amicable compositeur*.<sup>565</sup> Nevertheless, it is clear that when the parties agree to give the arbitral tribunal the power to decide *ex aequo et bono* or as *amicable compositeur*, the arbitral tribunal has been instructed to decide based on the general considerations of fairness and equity (*vs.* on applications of specific legal rules).<sup>566</sup>

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<sup>561</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VI, Article 28 in Loukas A. Mistelis(ed), *op. cit.*, at 635.

<sup>562</sup> *Id.*, at 635~7.

<sup>563</sup> Commentary, art. 28, para.6.

<sup>564</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VI, Article 28 in Loukas A. Mistelis(ed), *op. cit.*, at 637.

<sup>565</sup> *Id.*

<sup>566</sup> *Id.*, at 638.

Lastly, paragraph (4) states the self-evident rules—namely, that the contractual and express terms of the agreement prevail over any default national provision; however, any mandatory national provision prevails over these terms.<sup>567</sup> Thus, it uses the phrase ‘decide in accordance with’ for the contractual and express terms of the agreement—and operative language (*e.g.*, ‘take into account’) for the trade usages applicable to the transaction.<sup>568</sup> In cases wherein the parties agree that the arbitral tribunal can decide *ex aequo et bono* or as *amicable compositeur*, the arbitral tribunal will have to decide based on the equity or fairness—unless its decision is contrary to the contractual and express terms that the parties have agreed on.<sup>569</sup>

## 5.2. Form and Contents of an Arbitral Award

The text in Article 31 focuses on the form and contents of the arbitral award. The arbitral award needs to fulfill certain requirements—in terms of form and contents—to be a valid and enforceable.

### ***Article 31 (Form and contents of award)***

*(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.*

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<sup>567</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VI, Article 28 in Loukas A. Mistelis(ed), *op. cit.*, at 638.

<sup>568</sup> *Id.*

<sup>569</sup> *Id.*

*(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.*

*(3) The award shall state its date and the place of arbitration as determined in accordance with the article 20(1). The award shall be deemed to have been made at that place.*

*(4) After the award is made, a copy signed by the arbitrators in accordance with the paragraph (1) of this article shall be delivered to each party.*

The Model Law requires the award to contain the (i) date, (ii) place of arbitration, (iii) signatures of the arbitrators, and (iv) to be in writing. While the latter two requirements provide certainty, only the majority of the arbitrators need to sign an award if the arbitration is conducted with more than one arbitrator—as long as the reason for omission of the signature is stated therein (*i.e.*, in the award).<sup>570</sup> Article 29<sup>571</sup> may indeed be interpreted as stating that a decision can be made by a majority of all members; however, in Article 31, it is understood that if arbitration is processed with more than one arbitrator, the arbitral award is made by majority of arbitrators; thus, the award only needs the signature of the majority of arbitrators (who have agreed on the decision).

Indeed, the Commentary says that the omission of signature (under paragraph (1) of Article 31) should only be acceptable when there is a serious reason, *e.g.*, when an arbitrator dies or becomes physically unable to sign the award.<sup>572</sup> Thus, it should not be condoned when an arbitrator refuses to sign

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<sup>570</sup> Although, in the 2006 amendments, the Model Law provides for options for the written requirement of arbitration agreement to adopting States, the arbitral award still requires a strict written requirement.

<sup>571</sup> Article 29 of the Model Law (Decision making by panel of arbitrators): In arbitral proceedings with more than one arbitrator, any decision of arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

<sup>572</sup> Commentary, art. 31 para. 2.

an award because he or she does not agree with the majority of arbitrators.<sup>573</sup> The purpose of paragraph (1) is to prevent any recalcitrant arbitrator from having the power to block the issuance of an award (*e.g.*, via a unfounded refusal to sign it).<sup>574</sup> For instance, in CLOUT Case No. 12, the court refused to set aside the arbitral award even though one of arbitrators did not sign it. There was no reason for the omission of the signature.<sup>575</sup> The court held that it was sufficient for the president of the tribunal to formally provide the reason for the arbitrator's lack of signature in the court at the annulment proceedings.<sup>576</sup>

Paragraph (2) stipulates that the reasoning for the award should be contained within the text therein; however, this should not be considered a public policy requirement.<sup>577</sup> Indeed, paragraph (2) also stipulates that the reasoning of an award can be waived within the parties' agreement; however, it helps to confirm that the arbitrators have identified and examined all relevant facts and legal issues raised by the parties therein before making a decision.<sup>578</sup> Thus, the purpose of requiring the reasoning in the award is to confirm the arbitral tribunal has decided on the issue after a thorough examination. The reasoning

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<sup>573</sup> Commentary, art. 31 para. 2.

<sup>574</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VI, Article 31 in Loukas A. Mistelis(ed), *op. cit.*, at 640.

<sup>575</sup> The facts of the case are as follows. The claimants and the defendants signed the charter-party which contained an arbitration clause, so the dispute arisen between them was settled by arbitration. After the award was rendered, the claimant requested the court to set aside the arbitral award in which only two out of three arbitrators had submitted their opinion. The application to set aside the award was dismissed even though only two arbitrators rendered the award. The court held that under Article 31 of the Model Law, the signatures of the majority of all members of the arbitral tribunal suffice because the reason for the omitted signature was formally given by the president of the arbitral tribunal. CLOUT Case No. 12, Federal Court of Canada, 7 April 1988. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V93/855/96/IMG/V9385596.pdf?OpenElement>

<sup>576</sup> CLOUT Case No. 12, Federal Court of Canada, 7 April 1988.

<sup>577</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VI, Article 31 in Loukas A. Mistelis(ed), *CONCISE INTERNATIONAL ARBITRATION*, Kluwer Law International, 2010, at 640-641.

<sup>578</sup> Commentary, art. 31 para.3; Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VI, Article 31 in Loukas A. Mistelis(ed), *op. cit.*, at 641.

does not need to be expressed in strict legal terms because the qualifications of arbitrators are not limited to the legal field.

The remaining formal requirement therein (*i.e.*, of an award) is to specify the date and place of arbitration, as stipulated in paragraph (3). The award date is crucial because it initiates a finite time frame wherein the award may be challenged—and the award interest starts calculating from that date.<sup>579</sup> The place of arbitration is also important because it has significant legal consequences; for example, it would be the location where the challenging party would submit its case for setting aside the award—and the law therein (*i.e.*, of the place of arbitration) would be the governing law for setting aside the award.<sup>580</sup>

### **5.3. Nullification of an Arbitral Award**

The challenging party (*i.e.*, the party with an arbitral award rendered against it) has two ways to make the arbitral award invalid: (i) asking the court to set aside the arbitral award (after it is rendered) and (ii) refusing recognition (or enforcement) of the arbitral award. Article 34, in Chapter VII, specifies the grounds for setting aside an arbitral award (and how to apply for it) and Article 36 regulates the grounds for refusing recognition (or enforcement) of an arbitral award under Chapter VIII.

#### ***Article 34 of the Model Law (Application for setting aside as exclusive recourse against arbitral award)***

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<sup>579</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VI, Article 31 in Loukas A. Mistelis(ed), *op. cit.*, at 641.

<sup>580</sup> Here, the meaning of place of arbitration is the one that is determined in accordance with art. 20(1). It does not include the place where the actual hearings took place or the place where the arbitrators were when they signed the award.

*(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.*

*(2) An arbitral award may be set aside by the court specified in article 6 only if:*

*(a) the party making the application furnishes proof that:*

*(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; 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 this State; or*

*(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*

*(iii) 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, provided that, 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 aside; or*

*(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or*

*(b) the court finds that:*

*(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or*

*(ii) the award is in conflict with the public policy of this State.*

*(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.*

*(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.*

This area (*i.e.*, the setting aside of arbitral awards) has impeded the harmonization of national arbitration legislation.<sup>581</sup> Although there has been a great improvement in harmonization by the Model Law (which provides uniform grounds for recourse against an arbitral award), this area is still undermined because of national actions or remedies against the award. There are some jurisdictions wherein appeals against decisions of the courts therein (*i.e.*, for setting aside awards) are allowed. In CLOUT Case No. 323, an award was submitted to the High Court for setting aside, was subsequently dismissed, and was submitted again to the Supreme Court for setting aside.<sup>582</sup>

Indeed, setting aside an award is the sole recourse herein and Article 34 provides the grounds for setting aside.<sup>583</sup> These grounds are the same as those in Article V of the New York Convention (which provides the grounds for non-enforcement of an arbitral award). The only difference between these two articles is that the application for setting aside (in Article 34) may only be made to a court in the State wherein the award was rendered, while the application for recognition or enforcement may be made to the

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<sup>581</sup> Explanatory Note at para. 44.

<sup>582</sup> For example, in Zimbabwe, a decision that a national court makes on set aside is open to appeal. An employer and an employee had an arbitration to settle their dispute and the arbitral tribunal made a decision against the employer. Consequently, the employer filed a case for setting aside of award and at the same time the employee brought a case for enforcement of award. Upon their claims, the High Court dismissed both claims and the employer appealed to the Supreme Court. After the Supreme Court reviewed the award and found that it had a fundamental error, the Supreme Court set aside the award. CLOUT Case No. 323 Zimbabwe Supreme Court, 21 October and 21 December 1999, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/541/89/PDF/V0054189.pdf?OpenElement> (accessed on October 9, 2015)

<sup>583</sup> A sole recourse means that after the arbitral tribunal makes a decision over the dispute, the parties cannot ask the arbitral tribunal to review the decision and decide it again. Moreover, the parties cannot bring the case to the court for appeal.



court in any State.<sup>584</sup> The list of the grounds for setting aside is exhaustive; however, it should be narrowly construed based on the fact that the scope of judicial intervention into ICA is restricted.<sup>585</sup> Furthermore, none of these grounds permits a review of the merits of the dispute and the parties cannot contract out of this provision because Article 34 is a mandatory one.<sup>586</sup>

In order to set aside an award, there are at least three requirements to fulfill under Article 34. (1) According to paragraph (3), the application for setting aside should be made within three months from the date whereupon the party received the award. Thus, the Model Law sets a time limit of three months for the application of setting aside to support the efficiency of arbitration. However, if the ground for setting aside is, for example, a violation of public policy law and is discovered after three months, should the award be enforced? The Model Law does not mention about this matter and thus leaves it to individual State law.<sup>587</sup>

The second requirement is that the decision should be an award. Although the Model Law does not define “award,” it requires that a decision must qualify as an arbitral award when determined as such by

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<sup>584</sup> Explanatory Note at para. 48.

<sup>585</sup> A Canadian company, who was a supplier entered into a contract with a Japanese company for the sales of coal. They had an arbitral clause saying that any contractual dispute would be submitted to binding arbitration. When dispute concerning the interpretation of a contract term arose, the arbitration was conducted. After the arbitral award was rendered, the Canadian company brought the case for setting aside of award based on the ground that the arbitral tribunal had exceeded their jurisdiction by dealing with a matter beyond the scope of the submission to arbitration. The court of appeal upheld the lower court’s affirmation of the award noting that the word-wide trend toward restricting the scope of judicial intervention into commercial arbitration and the award could be justified under the terms of the contract so the court was prevented from intervening under Article 34(2)(a)(iii) of the Model Law. CLOUT Case No. 16, British Columbia Court of Appeal, 24 October 1990. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V93/855/96/IMG/V9385596.pdf?OpenElement> (accessed on October 9 2015).

<sup>586</sup> Reviewing the merits of the dispute is examination of the national court regarding, for example, whether the arbitral tribunal assessed the evidence correctly, whether the law was applied correctly, or whether the correct law was applied and so on.

<sup>587</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VII, Article 34 in Loukas A. Mistelis(ed), op. cit., at 648.

a tribunal.<sup>588</sup> The practical difficulty herein is that the definition (or understanding) of arbitral award varies in different jurisdictions.<sup>589</sup> For example, some courts qualify a decision as an award if it provides for determination on the merits of the case,<sup>590</sup> while other courts emphasize the formal characteristics of arbitral decisions.<sup>591</sup>

The last requirement for setting aside is that when party challenges the arbitral award, he or she must furnish proof that one of the grounds in Article 34 exists. Thus, the Model Law imposes the burden of proof on the challenging party; however, this applies only to grounds (i) to (iv) listed in Article 34 (2)

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<sup>588</sup> Initially, the Working Group had decided to include a definition of arbitral award in the Model Law, but it failed to do so in the end because of lack of time.

<sup>589</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VII, Article 34 in Loukas A. Mistelis(ed), op. cit., at 644.

<sup>590</sup> The claimant appealed to the appellate board after the award was rendered, but the appellate board rejected the appeal because the claim was not submitted in accordance with the procedure agreed by the parties. Consequently, the claimant brought the case to the Higher Regional Court in Hamburg to make this dismissal to be annulled under Section 1059(2)(1d) of German Code of Civil Procedure claiming that the procedural rules the parties agreed was not valid and should not have been applied. The court held that the dismissal of the appeal constituted an award in the sense of Section 1059(1) of German Code of Civil Procedure. The court added that, even though the decision made by the arbitral tribunal was not drafted as an award, it was declared as an award by the tribunal and also it made a decision on the merits of the case. Therefore, it should be considered as an award. CLOUT Case No 455, Hanseatisches Oberlandesgericht Hamburg, Germany, 4 September 1998. [http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V03/856/49/PDF/\\_/V0385649.pdf?OpenElement](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V03/856/49/PDF/_/V0385649.pdf?OpenElement) (accessed on October 10, 2015).

<sup>591</sup> During the arbitration proceedings, the claimant requested the arbitral tribunal to declare that it did not have jurisdiction in the matter because of the lack of a valid arbitration agreement. The arbitral tribunal delivered a decision without giving any reason for it and later declared that it “rejected the application of Applicant to decide the issue of jurisdiction by way of an intermediate decision according to Section 1040 (3) of German Code of Civil Procedure and that “The arbitral tribunal will decide on its jurisdiction in the final award”. Consequently, the claimant brought this case to the court to have this order set aside. The court held that the first decisions made by the arbitral tribunal could not constitute an award because the decision without any reason for it did not fulfill the formal requirements for an award. Moreover, regarding the second decision, the court held that the tribunal’s decision was not an interim decision according to Section 1040(3) of German Code of Civil Procedure because the arbitral tribunal had not intended to make a decision regarding its jurisdiction, but merely rejected the procedural application made by the claimant. The court made it clear that a decision on the jurisdiction would only be made in the final award and might only be reviewed by a court either in a motion for setting aside or a motion for recognition and enforcement of the award. CLOUT Case No. 441, Oberlandesgericht Koln, Germany, 20 July 2000. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V03/846/34/PDF/V0384634.pdf?OpenElement> (accessed on October 10, 2015).

(a). Conversely, the grounds listed in Article 34 (2) (b) are provided as an ex officio ground of setting aside.

The grounds for setting aside are divided into two groups in paragraph (2): (i) paragraph (2) (a) includes the grounds that the challenging party must prove and (ii) paragraph (2) (b) includes the grounds that the court determines to be ex officio. The first group has four grounds for setting aside: (i) incapacity or invalidity of an arbitration agreement, (ii) the violation of due process, (iii) the exceeding of jurisdiction by an arbitral tribunal, and (iv) irregularity in the constitution of an arbitral tribunal. Paragraph (2) (a) (i) of the Model Law expressly indicates that the law, agreed upon by the parties, determines the invalidity of an arbitration agreement (*vs.* clarifying which law is applicable to determine the incapacity or invalidity of an arbitration agreement).<sup>592</sup> If there is no such agreed-upon law in certain instances, the invalidity of the arbitration agreement is determined by the law of the place of arbitration.<sup>593</sup>

The second ground, paragraph (2) (a) (ii) (*i.e.*, the violation of due process) covers both procedural and substantive fairness and overlaps with the public policy ground.<sup>594</sup> Due process indeed requires strict compliance because arbitration is a private system and thus beyond judicial power. While this is closely related to fairness in the arbitral procedure, *equality* herein should involve the consideration of every unique circumstance (*e.g.*, the parties should not necessarily be given the same, exact amount of time for the presentations of their claims).

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<sup>592</sup> The restriction of application for setting aside is that the challenging party can apply the case only to the court in the place of arbitration, so the court which the application for setting aside is submitted to has to be aware of the law of some places other than the one in the place of arbitration.

<sup>593</sup> As to incapacity, although the New York Convention expressly refers to ‘the law applicable to the parties’ it does not point to a specific connecting factor like nationality or domicile.

<sup>594</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VII, Article 34 in Loukas A. Mistelis(ed), *op. cit.*, at 646.

The third ground, paragraph (2) (a) (iii), is the exceeding of a jurisdiction by a tribunal; however, this is not frequently invoked—and it is even less frequently accepted by national courts (in the context of setting aside an award).<sup>595</sup> Indeed, the jurisdictional matter is usually determined at the beginning of arbitration (during the determination of whether or not there is a valid arbitration agreement); however, either party can still claim an objection to the jurisdiction when the arbitral proceeding commences or during the proceedings. In such circumstances, the arbitral tribunal first determines that it has jurisdiction, then continues with the arbitration—and the tribunal’s jurisdiction is subsequently examined by the court (after the award has been rendered). An examination of whether a tribunal has exceeded its jurisdiction would include the claim therein (*i.e.*, of whether or not it has decided over a matter that is beyond the scope of the arbitration agreement).

The last ground, paragraph (2) (a) (iv) is an irregularity in the constitution of an arbitral tribunal (or deviation from a procedure agreed upon by the parties). The constitution of an arbitral tribunal and other general proceedings must follow the procedure that is agreed upon by the parties (or any referred rules in the arbitration agreement). As an arbitration agreement is a private contract between the parties, the arbitration should be conducted in accordance with the agreements of the parties therein. If the arbitral tribunal conducts the arbitration against the agreements of the parties therein, this would constitute a breach of contract—and the award should be set aside.<sup>596</sup>

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<sup>595</sup> *Id.*, at 647.

<sup>596</sup> The facts of the first case are as follows. The claimant, a potato farmer, had initiated arbitral proceedings before the arbitral tribunal of the potato industry against the defendant, a potato trader. The claimant appointed a farmer as his arbitrator, but the defendant successfully challenged this arbitrator as well as the substitute nominated by claimant. Arbitrator C, a trader, was finally appointed for the claimant and claimant’s challenge to arbitrator C was dismissed by the Highest Arbitral Tribunal composed of three traders. After an award was rendered in favor of the defendant, the claimant applied to the courts for setting aside of this award based on procedural irregularities in the appointment process. The court granted the application and set aside the award on the basis of Section 1059 (2) (1 b, d) of the German Code of Civil Procedure

The other group specifies the grounds that do not require the challenging party to furnish the proof. This means that the court may *ex officio* examine the award. The grounds are inarbitrability under paragraph (2) (b) (i) and the violation of public policy under paragraph (2) (b) (ii). First, as for arbitrability, the Model Law does not provide for the scope of arbitrability and leaves this matter to national legislators because the scope of arbitrability varies depending on the national laws.<sup>597</sup> Second, the public policy ground is most unpredictable because this ground relies on the interpretation of basic notions of morality and justice (*e.g.*, in relation to corruption, bribery, and fraud); thus, it could be broadly interpreted (depending on each nation's legislation and the interpretations therein).<sup>598</sup>

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[equivalent to Article 34 (2) (a) (iv) of the Model Law]. It held that the procedure employed by the Highest Arbitral Tribunal with regard to the appointment and challenge of arbitrator C violated Section 1032 of the German Code of Civil Procedure. According to the applicable arbitration rules it was not mandatory that the party-appointed arbitrator come from the list of arbitrators. The list was only to be used as a recommendation. CLOUT Case No. 436 Bayerisches Oberstes Landesgericht, Germany, 24 February 1999. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V03/846/34/PDF/V0384634.pdf?OpenElement> (accessed on October 12, 2015).

The facts of the second case are as follows. Both parties are shareholders of a Turkish company incorporated in Istanbul. Their shareholders' agreement contains an arbitration clause. On May 26, 1994, the applicant brought a dispute before the Istanbul Chamber of Commerce, which rendered an award on August 15, 1994. Before that date, on July 21, 1994, the respondent had already applied to an Istanbul court of first instance for a declaration on the inadmissibility of arbitration. The application was dismissed on November 18, 1996 by the Court of second instance. The respondent also made an application for the setting aside of the award before a Turkish court on the grounds that the arbitral tribunal had decided the case without waiting for the court to rule on the admissibility of arbitration. This application was successful and the award was set aside by the Court of Second Instance on February 6, 1995. The applicant then filed the dispute for arbitration a second time at the Istanbul Chamber of Commerce. The newly composed tribunal ruled in favor of applicant on May 26, 1998, without ordering an oral hearing. A motion for the setting aside of this second award was dismissed by the Court of Second Instance on February 2, 1999. The respondent tried to resist the recognition and a declaration of enforceability of the award in the German Court relying on various grounds. In respect of Section 1061(1) of the German Code of Civil Procedure, the equivalent of Article 36 (1) (a) (ii) of the Model Law, the Court stated that the tribunal's denial of a motion to take evidence could not constitute a violation of the right to present one's case. The Court further held that the Turkish court had rendered a non-appealable decision on the arbitrability of the dispute at hand. Under Section 328(1) of the German Code of Civil Procedure, the German court was bound to recognize this decision without further review, unless one of the exceptions under Section 328(1) was met, which was not the case here. The Court also held that the fact that no oral hearing had been ordered by the arbitral tribunal did not in itself constitute a violation of Article 36 (1) (a) (iv) of the Model Law. CLOUT Case No. 371 OLG, Breme, Germany, 30 September 1999. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/602/96/PDF/V0060296.pdf?OpenElement> (accessed on October 12, 2015).

<sup>597</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VII, Article 34 in Loukas A. Mistelis(ed), *op. cit.*, at 646.

<sup>598</sup> The facts of the first case are as follows. The plaintiffs filed a case for setting aside of arbitral award based on Article 34 (2) (a) (ii) and Article 34 (2) (b) (ii) of the Model Law, which are about unequal treatment of parties during arbitral

Although the text in Article 34 focuses on recourse against awards, it is also worded to reduce the likelihood that an arbitral award will be set aside. According to paragraph (4), when the arbitral award is brought to the court for setting aside, the court may remit it back to the arbitral tribunal for a period of time to eliminate the reasons of setting aside—if there is an appropriate request therein by a party. When a party brings a case to the court for setting aside of the award, the court tries to give the arbitral tribunal an opportunity to remove the ground (*vs.* setting aside the award at once). In this case, the grounds are mostly related to the formality, which could be easily fixed and thus would not affect the contents of the award.<sup>599</sup> Nevertheless, when interpreting this paragraph, it should not be understood or interpreted that the court can order the arbitral tribunal to review the award. As seen in the CLOUT Case No. 12, this

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proceedings and violation of public policy respectively. The plaintiffs asserted that the arbitral tribunal did not compel witnesses to testify despite their request, so that the arbitral award should be set aside. The court, however, held that the power of the arbitral tribunal did not go beyond the contracting parties and it was not violation of public policy. The court also added that the plaintiffs should have sought the judicial assistance. CLOUT Case No. 391, Superior Court of Justice, Canada, 22 September 1999, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V01/847/23/PDF/V0184723.pdf?OpenElement>,

The facts of the second case are as follows. The employer suspended one of its senior employees pending disciplinary hearings into alleged misconduct. Suspension was initially with full pay and subsequently without pay effective 5 February 1997. The employment dispute was submitted to arbitration and the arbitral tribunal awarded the employee his salary and benefits together with interest from 24 December 1996. The employer, however, sought to have the award set aside on the basis that the arbitral tribunal had made a reviewable factual error in calculating the back-pay, and, under Zimbabwe's Arbitration Act 1996, (Article 34 of the Model Law), the award rendered based on that error was contrary to public policy. The court considered that an award which was contrary to public policy would be one that would undermine the integrity of the system of international arbitration and that violation of public policy would include cases of fraud, corruption, bribery and serious procedural irregularities. The court held that, as in this case it was not suggested that any moral turpitude attached to the arbitrator's conduct, the award could not be said to be in conflict with public policy (Article 34 of the Model law). It found that the error was clearly one of computation for which the Model Law makes adequate provision; a party may request the tribunal to correct such errors and, if necessary, the time limits for making such a request may be extended (Article 33 of the Model Law) CLOUT Case No. 267, Harara High Court of Zimbabwe, 29 March and 9 December 1998, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V99/892/77/PDF/V9989277.pdf?OpenElement> (accessed on October 12, 2015); CLOUT Case No. 323, Zimbabwe Supreme Court, 21 October and 21 December 1999. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/541/89/PDF/V0054189.pdf?OpenElement> (accessed on October 12, 2015).

<sup>599</sup> For example, the omission of signature or the date of award can be added.

provision does not provide the court with an authority to refer the matter back to the arbitral tribunal and request the arbitral tribunal to consider the issue that was not originally considered therein.<sup>600</sup>

The text in Article 34 focuses on the setting aside of arbitral awards. This provision, however, does not mention the subsequent step after the arbitral award is set aside. Once the award is set aside, what happens to the arbitration agreement? Is the arbitration agreement still operative? Or is it ineffective? Indeed, the national arbitration law in some States does have an answer to this question; for example, the German Code of Civil Procedure provides that the arbitration agreement becomes operative again after the award has been set aside.<sup>601</sup>

The grounds for refusing recognition or enforcement of arbitral awards are regulated in the last article of the Model Law. The structure and contents therein are quite similar to those in Article 34, which focuses on the grounds for setting aside of the arbitral award.<sup>602</sup> Although Article 36 is based on the New York Convention (1958), the scope of application under the Model Law is broader (*vs.* under the New York Convention)—namely, Article 36 of the Model Law applies to an arbitral award irrespective of the

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<sup>600</sup> The facts of the case are as follows. The claimants and the defendants signed the charter-party which contained an arbitration clause. One defendant was personally involved in the charter-party because he signed it in his personal capacity while another defendant signed it acting as the president of his company. Upon the request by the claimants that the court should refer the matter, which was related with the defendant who signed in personal capacity, back to the arbitral tribunal and request it to consider the question that was not originally considered by the claimants. The court held that the powers of the court were limited to examining the award on the basis of the restrictive provisions of article 34 of the Model Law, so the court could not refer the matter back to the arbitral tribunal again. CLOUT Case No. 12, Federal Court of Canada, 7 April 1988, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V93/855/96/IMG/V9385596.pdf?OpenElement> (accessed on October 12, 2015).

<sup>601</sup> Section 1059 (5) of the German Code of Civil Procedure (Application for setting aside) : Setting aside the arbitral award shall, in the absence of any indication to the contrary, result in the arbitration agreement becoming operative again with respect to the subject-matter of dispute.

<sup>602</sup> Both article 34 and 36 are based on the 1958 New York Convention.

State wherein it was made (whereas the New York Convention applies to an award made in the territory of a State other than the State wherein the recognition and enforcement of the award have been sought).<sup>603</sup>

***Article 36 (Grounds for refusing recognition or enforcement)***

*(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:*

*(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:*

*(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; 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 country where the award was made; or*

*(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*

*(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*

*(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*

*(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or*

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<sup>603</sup> Article I.1 of the New York Convention regulates the scope of application of the Convention.



*(b) if the court finds that:*

*(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or*

*(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.*

*(2) if an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.*

Article 36 provides for seven grounds; however, while they are listed exhaustively, they should be interpreted narrowly. Just like Article 34, the grounds for non-recognition and non-enforcement are divided into two groups. (1) Paragraph (1) (a) has the grounds that must be invoked by the party who resists the award; indeed, the burden of proof stays with the party who resists the recognition or enforcement of an award (no matter which ground the claim is based on).<sup>604</sup> (2) Paragraph (1) (b) states the grounds that the national court may invoke ex officio; when the resisting party brings a case to the court for the non-recognition (or non-enforcement) of an arbitral award, it is a principle that a review of the merits of the award is not allowed (regardless of which ground is exercised in any case).

Paragraph (1) (a) specifies five grounds; indeed, while four of them are the same (as those listed in Article 34 (2) (a), there is one additional ground. The first ground addresses the incapacity of parties or invalidity of an arbitration agreement under paragraph (1) (a) (i). The prevailing view, on this ground, is

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<sup>604</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VIII, Article 36 in Loukas A. Mistelis(ed), op. cit., at 652.

that a party has the burden to prove the conclusion of an arbitration agreement when it is relying on the award; however, once this is done, the burden shifts to the party who resists the recognition (or enforcement) of an award—namely, to prove the invalidity of the arbitration agreement.<sup>605</sup> This view, however, needs to be updated; following the 2006 amendments, paragraph (2) no longer requires that when a party is seeking recognition or enforcement, it must provide an arbitration agreement.<sup>606</sup> Also, because paragraph (1) (a) (i) does not refer to Article 7, there is no legal ground that the burden of proof should be shifted to one party (*vs.* the other). As a result, it should be understood that the resisting party has to bear the burden of proving that an arbitration agreement is not concluded—as well as that the agreement is not valid.<sup>607</sup>

The second ground for non-enforcement is the violation of due process under paragraph (1) (a) (ii). Whether or not the due process has been violated has to be determined by reference to Article 18 wherein due process means an equal treatment of both parties and a full opportunity to present the case. However, the violation of the due process ground is usually invoked via incorrect interpretations; for example, the fact that the arbitral tribunal refused to take the evidence (in spite of the party's request) does not constitute

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<sup>605</sup> *Id.*

<sup>606</sup> Before the 2006 amendments, having interpreted Articles 35(recognition and enforcement) and 36(grounds for refusing recognition or enforcement), the party who tries to seek recognition or enforcement of arbitral awards has to provide for the original arbitration agreement to apply for its recognition or enforcement under Article 35(2). So, the seeking party has a burden to prove that the arbitration agreement was concluded. At the same time, if the other party wants to apply for non-recognition or non-enforcement of awards, this party has to prove that the arbitration agreement is not concluded or not valid. In this sense, the burden of proof is said to be shift from the party seeking recognition or enforcement to the party who is resisting the recognition or enforcement.

<sup>607</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VIII, Article 36 in Loukas A. Mistelis(ed), *op. cit.*, at 652.

a violation of due process. Also, the enforceability of an award is not affected by the fact that a party did not actually make use of an opportunity to present a case.<sup>608</sup>

The third ground is the exceeding of jurisdiction by a tribunal under paragraph (1) (a) (iii). The arbitral tribunal's mandate is given by the arbitration agreement concluded between the parties. Thus, when an associated decision therein (by the arbitral tribunal) is beyond the arbitration agreement, it may be unenforceable. For example, if the parties conclude an arbitration agreement that excludes matters related to the termination of contract, the arbitral tribunal does not have jurisdiction over a dispute therein (*i.e.*, related to the termination of the contract).<sup>609</sup>

Fourth, under paragraph (1) (a) (iv), an irregularity in the constitution of the arbitral tribunal (or deviation from the procedure agreed upon by the parties) is a ground for refusing recognition or enforcement of arbitral awards. As mentioned in Article 34, arbitration is an agreement between two

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<sup>608</sup> The facts of the case are as follows. The plaintiff obtained an arbitral award from the China International Economic and Trade Arbitration Commission (CIETAC) ordering the defendant to pay the purchase price of Peruvian fish meat. The defendant failed to pay and the plaintiff applied the enforcement of award to the court. The court granted leave for enforcement and the defendant requested the court to set aside the leave on the ground of due process violation. The defendant argued that the arbitral tribunal made its opinion regarding the amount of the claim "through independent investigation". The court found that the defendant had an opportunity to present its own evidence regarding the amount of the claim, but failed to do so. The court held that even if there was ground for setting aside of award, it was at the discretion of the court to do so since the Model Law provided that enforcement may be refused. Therefore, the court dismissed the application for setting aside. CLOUT Case No. 88, High Court of Hong Kong, 16 December 1994. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V95/529/10/IMG/V9552910.pdf?OpenElement> (accessed on October 13 2015).

<sup>609</sup> The facts of the case are as follows. The appellant terminated a franchise agreement with the respondent because the respondent failed to file business reports and to pay fees. This matter was submitted to arbitration in the U.S. pursuant to an arbitration clause. The arbitration clause contained a provision that excluded from arbitration matters arising from "...termination by AAMCO which is based in whole or in part upon the fraudulent acts of Franchisees or Franchisee's failure to deal with any customer or Franchisees' failure to report his gross receipts to AAMCO...". The arbitral tribunal found in favor of the appellant and the appellant sought to have the award recognized and declared enforceable by the courts in Canada. The court of first instance refused to be recognized the arbitral award, and on appeal, the issue was whether the award dealt with a matter which was not contemplated by or which was not falling within the terms of the submission to arbitration. The appellate court found that the failure of the respondent to file business reports was explicitly mentioned in the arbitration clause as a non-arbitrable matter and dismissed the appeal upholding the decision of the court of first instance. CLOUT Case No. 67, Saskatchewan Court of Appeal, Canada, 17 September 1991. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V94/257/97/IMG/V9425797.pdf?OpenElement> (accessed on October 14, 2015).

parties; thus, it has to be conducted in accordance with what the parties have agreed upon—or the rules that the parties have appointed. If one party, however, determines that the arbitral tribunal has been constituted in a manner that is incompliant with the parties’ agreement, he or she must object to the irregular constitution of the tribunal during the arbitral proceedings (*i.e.*, without waiting until the enforcement proceedings commence).<sup>610</sup>

The last ground in paragraph (1) (a) is that recognition or enforcement may be refused when an award (i) is not binding, (ii) has been set aside, or (iii) has been suspended by the court in the State wherein the award was made. In this provision, the meaning of the term ‘not binding,’ ‘being set aside,’ or ‘being suspended’ is that the award has already been cancelled in the place of arbitration. Although some courts hold that a court has discretion to recognize or enforce an award (even if one of the grounds listed under Article 36 exists), the prevailing view is that the national courts are obliged to refuse to recognize or enforce an award that has been set aside in the State of origin.<sup>611</sup>

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<sup>610</sup> The facts of the case are as follows. The plaintiff sought from the court leave to enforce an arbitral award which was rendered by the Shenzhen Subcommission of the CIETAC (THE China International Economic and Trade Arbitration Commission). The defendant opposed the enforcement of the award on the grounds that the composition of arbitral tribunal was not in accordance with the agreement of the parties. The parties agreed on arbitration by CIETAC, Beijing, but the arbitration was conducted by CIETAC, Shenzhen. The court held that CIETAC, Shenzhen did not have jurisdiction to decide this dispute because a Chinese court would not allow a Shenzhen arbitrator, who could not arbitrate in Beijing, to decide a case that was referred to CIETAC, Beijing. The court, however, found that the defendant waived its right to raise the jurisdictional objection because s/he participated in the Shenzhen arbitration without clearly reserving its right to later object to the award on the ground that the arbitral tribunal lacked jurisdiction. Therefore, the court declared the award enforceable because it satisfied that the defendant basically obtained what it had agreed to. CLOUT Case No. 76, High Court of Hong Kong, 13 July 1994. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V94/270/11/IMG/V9427011.pdf?OpenElement> (accessed on October 14, 2015).

<sup>611</sup> The facts of the case are as follows. The applicant, a Russian company, entered into a contract with the respondent for the repair of a ship. The contract contained an arbitration clause and it provided for arbitration before the “Arbitration Commission of the City of Moscow”. When the respondent did not pay, the applicant filed a request for arbitration before the Arbitral Commission for Shipping Matters in Moscow. The Commission declared itself to be competent arguing that even though it had not been explicitly named in the arbitration agreement, there was no other arbitral commission for shipping law in Moscow. The Commission rendered an award in favor of the applicant, but it was later set aside by the competent court in Moscow holding that the arbitration agreement was not sufficiently certain about the arbitral institution. This decision was affirmed by the Highest Russian Court in Civil Matters, but the Vice-President of the Highest Court of

The second group for setting aside has two grounds and the court examines these grounds *ex officio*—just like the second group under Article 34 of the Model Law. One is inarbitrability in paragraph (1) (b) (i) and the other is the violation of public policy in paragraph (1) (b) (ii). If the subject matter of the dispute is inarbitrable under the State law of recognizing or enforcing and if this State is a Model Law country, the award may be refused in relation to recognition or enforcement.<sup>612</sup> Also, if the recognition and enforcement of the arbitral award violate public policy within the recognizing or enforcing State (and this State is a Model Law country), recognition and enforcement may be refused therein.

There are some key matters herein in the context of public policy. First, the court may refuse to recognize or enforce the award on a public policy ground only if the recognition and enforcement of awards violate the essential morality of the recognizing or enforcing State.<sup>613</sup> Second, the public policy objection can be related to procedural and substantive issues.<sup>614</sup> Indeed, the public policy objection, in relation to the procedural issue, is mostly the violation of due process. For example, when one party does not get a proper notice of commencement of arbitration and the award is rendered against him or her by default, this award may not be recognized or enforced if the method of communication therein (*i.e.*, of

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the Russian Federation challenged this decision, demanding a reappraisal of the case. While that motion was still pending, the applicant moved for a declaration of recognition and enforceability of the award in Germany. The German Court denied a declaration of recognition and enforceability under German law in conjunction with Article V (1) (e) of the New York Convention. CLOUT Case No. 372, Oberlandesgericht Rostock, Germany, 1 Sch 3/99, 28 October 1999. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/602/96/PDF/V0060296.pdf?OpenElement> (accessed on October 14, 2015).

<sup>612</sup> The scope of the arbitrability provisions of each model law country varies.

<sup>613</sup> The facts of the case are as follows. The arbitral award included interest at the rate of 1.5% per month with no annual interest rate. Section 4 of Canada's Interest Act imposes limits on interest rates which are not expressed annually. The respondent argued that enforcing the award would be contrary to public policy of Canada, so it should be refused under article 36(1)(b)(ii) of the Model Law. The court held that in order to refuse enforcement of the award, the award must be contrary to the essential morality of the enforcing State. CLOUT Case No. 37, Ontario Court, Canada, 12 March 1993. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V93/899/70/IMG/V9389970.pdf?OpenElement> (accessed on October 14 2015). Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VIII, Article 36 in Loukas A. Mistelis(ed), *op. cit.*, at 654.

<sup>614</sup> *Id.*

giving notice) is against the law of the recognizing or enforcing State.<sup>615</sup> Conversely, the violation of substantive public policy is more related to the misapplication of the law. For example, when the arbitral tribunal misapplies the interest rate associated with the award, the award may not be recognized or enforced on the ground of public policy violation.<sup>616</sup> Nevertheless, it is possible for the court to examine

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<sup>615</sup> The facts of the case are as follows. The decision, arising out of an action to have a foreign award declared enforceable, concerns the question of whether the buyer (Respondent) was duly informed about the arbitration, or whether his due process rights were violated. The dispute arose out of a sales contract between a Russian seller (Claimant) and a German buyer (Respondent) and the contract contained an arbitral clause for arbitration before the Court of Arbitration of the Chamber of Commerce of the Russian Federation. Because the buyer withheld part of the purchase price and invoked a set-off with a claim for damages, the seller initiated an arbitration proceeding. The buyer did not attend the oral hearing and a decision in favor of the seller was rendered by default. The seller sought enforcement of the award in Germany under the bilateral Agreement on Trade and Maritime Shipping between Germany and Russia of 1958. According to this Agreement, recognition and enforcement of an arbitral award may only be refused if the award is either not considered final in the country where it was rendered or violates public policy in the country where enforcement is sought. The buyer requested that enforcement had to be denied because he was not duly summoned to the arbitration proceeding. The Court decided that the award which was final and enforceable in Russia, but it should not be recognized in Germany because the arbitral proceeding violated the principle of due process. The right to be heard is fundamental to public policy and encompasses the right to be informed to a hearing in due time. Because the seller did not contest the buyer's allegation that he never received a notice of arbitration, and on the basis of the evidence, the Court concluded that the buyer's right to be heard was violated. Under German law, the legal fiction of receipt is not sufficient for valid notice. Moreover, the Court stated that a duly dispatched notice should have resulted in a successful delivery as the buyer did not change its place of business. As a result, the court held that fictitiously service violated German public policy irrespective of the fact that it was considered legal in accordance with the law of Russia. CLOUT Case No. 402, Highest Regional Court of Bavaria, Germany, 16 March 2000. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V01/879/59/PDF/V0187959.pdf?OpenElement> (accessed on October 14, 2015).

<sup>616</sup> The facts of the case are as follows. A dispute between two parties had been referred to arbitration in 1990. The arbitrator issued his award in the matter in 1991. It was for an amount of some \$700.000, plus interest which was to be calculated with effect from 1989. The successful party applied to the High Court under Article 35 of the Model Law for the recognition and enforcement of the award. The application was opposed under Article 36 of the Model Law on the basis that the award was contrary to public policy because it contravened the *in duplum* (the double) rule, which applies in terms of the Common Law of Zimbabwe and under which interest ceases to run when it equals the capital sum owing. The High Court held that if the award were to be taken literally, i. e. by calculating interest with effect from 1989 to the date of the award, the sum payable in terms of the award would amount to over \$17 million. This result would be in conflict with the *in duplum* rule and would be contrary to public policy. However, the High Court found that the arbitrator's award was capable of being interpreted as being impliedly subject to the *in duplum* rule; and it could be recognized and enforced accordingly. The High Court further ruled that interest beyond the double of the capital sum did not run during the arbitration proceedings. In the result, the award was recognized and enforced by the High Court with interest calculated on the capital sum until it reached the double. Interest would also run, on the double, from the date of the award to the date of payment provided that once again, it did not breach the *in duplum* rule. CLOUT Case No. 342, Harare High Court, Zimbabwe 1 March and 5 April 2000. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/550/47/PDF/V0055047.pdf?OpenElement> (accessed on October 14 2015).

the substance of the dispute (*i.e.*, the violation of substantive public policy), even when the court is not allowed to review the merit of the case.<sup>617</sup>

## 5.4. Recognition and Enforcement of Arbitral Awards

The provisions about the recognition and enforcement of arbitral awards are regulated in the last chapter (*i.e.*, Chapter VIII).

### ***Article 35 (Recognition and enforcement)***

*(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.*

*(2) The party relying on an award or applying for its enforcement shall supply the original award or a duly certified copy thereof. If the award or arrangement is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.*

The principle herein is that this provision exists to facilitate the automatic recognition of arbitral awards, which means that the prior confirmation (namely, on the place of arbitration or any other procedure) is not needed for an award to be recognized.<sup>618</sup> Furthermore, when a national judgment

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<sup>617</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VIII, Article 36 in Loukas A. Mistelis(ed), *op. cit.*, at 655.

<sup>618</sup> The facts of the case are as follows. The Plaintiff sought to enforce in Ontario a final award which was issued in New York. The application was made after the right to appeal the award in New York had expired. The defendant, however, argued that the award should not be enforced in Ontario because the plaintiff did not take any step to have the award confirmed and to make the award binding under the New York law. Upon the defendant's argument, the court held that it was not

confirms the award, this should not be considered a representation of any earlier judgment therein (*i.e.*, confirming the award).<sup>619</sup> Furthermore, via the principle of automatic recognition of arbitral awards, once the arbitral award is recognized, it has all the legal consequences of a domestic court judgment.<sup>620</sup> As a result, the State of recognition determines the boundaries of the *res judicata* effect (*vs.* the place of arbitration).<sup>621</sup>

Paragraph (2) was amended during the 2006 amendments to reflect the amendment in Article 7 on the form of the arbitration agreement—namely, a copy of the arbitration agreement is no longer required (to be presented) for the recognition of arbitral awards.<sup>622</sup> This omission of the presentation of a copy of the arbitration agreement is recognized as extremely useful and practical by many arbitration practitioners; however, many parties do not keep original contracts containing the original arbitration agreements—especially if the contracts were concluded a number of years earlier.<sup>623</sup> Moreover, an arbitration agreement is considered valid (*i.e.*, as fulfilling a written requirement under Article 7) if its content is recorded in any form—regardless of whether it has been concluded orally, by conduct, or by any other

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necessary for the foreign arbitral award to be confirmed in order to be enforceable in Ontario. CLOUT Case No. 117, Ontario Court of Justice, 19 December 1994. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V95/604/92/IMG/V9560492.pdf?OpenElement> (accessed on October 12 2016).

<sup>619</sup> The facts of the case are as follows. The parties, Schreter and Gaswmac, agreed to arbitrate under the law of the state of Georgia, U.S.A. and the place of arbitration was determined to be Atlanta. An arbitral award was rendered in favor of Schreter and confirmed by the Georgia court. Gaswmac challenged the enforcement of the award in Ontario on a number of procedural grounds and one of them was that the award had merged in the Georgia court judgment so that it should be enforced in Ontario only as a foreign judgment, not an arbitral award. Upon the challenge of Gaswmac, the court held that there was no indication in article 35 of the Model Law that awards should be considered to merge in judgments which confirm them. CLOUT Case No. 30, Ontario Court, Canada, 13 February 1992. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V93/899/70/IMG/V9389970.pdf?OpenElement> (accessed on October 12 2-15).

<sup>620</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VIII, Article 35 in Loukas A. Mistelis(ed), *op. cit.*, at 650.

<sup>621</sup> *Id.*

<sup>622</sup> Explanatory Note at para. 53.

<sup>623</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter VIII, Article 35 in Loukas A. Mistelis(ed), *op. cit.*, at 650.



means. Thus, if the parties have concluded a contract by conduct (*i.e.*, without an actual written contract) and cannot present a copy of the arbitration agreement, they would find it difficult to enforce an arbitral award. For these practical reasons (*i.e.*, to support the effectiveness of arbitration), paragraph (2) is amended with Article 7.

## **Chapter Four. The New Korean Arbitration Act (2016)<sup>624</sup>**

### **1. The Background of Amendment**

As noted in the Chapter Two, the Korean government adopted the UNCITRAL Model Law in its entirety in 1999; indeed, it utilized it in lieu of establishing a new Korean national arbitration law until October 2016 and believed that adopting the UNCITRAL Model Law could best enable a unified legal system in ICA. Thus, although judicial litigation remains a dispute resolution system (DRS) that people still frequently utilize, arbitration has become more popular (*e.g.*, due to neutrality,<sup>625</sup> international

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<sup>624</sup> As discussed in Chapter II, the Korean Arbitration Act (the KAA) has been partially amended three times since it was enacted in 1966. After that, the KAA was wholly amended by adopting the UNCITRAL Model Law in 1999, and has been partially amended four times. The last version of the KAA is the KAA (2013), but because there was no change made comparing to the KAA (1999) in terms of contents, the previous version of the KAA is called as the KAA (1999). So, the new revised one, which is the KAA (2016), will be compared with the KAA (1999) in Chapter IV.

<sup>625</sup> As arbitration is an agreement between contracting parties, they can determine the place of arbitration which is a neutral place to them.

effect,<sup>626</sup> promptness,<sup>627</sup> and confidentiality<sup>628</sup>) in business contexts and is thus more frequently used to settle commercial disputes. As a result, the Korean government has recognized the importance of arbitration in business—and the necessity of amending the Korean Arbitration Act<sup>629</sup> (hereinafter, ‘the KAA’).

The Korean Ministry of Justice established a Committee (*i.e.*, a group of lawyers and scholars who are specialized in arbitration) to (i) draft a revision of the KAA (after approximately 20 meetings from March 2013 to October 2014)<sup>630</sup> and (ii) submit the draft to the National Assembly via the Ministry of Justice for approval in 2015. When the Committee initially started discussing the amendment of the KAA (1999) in 2013, the Committee members had some disagreements about the amendment process; the suggestions included amending and adapting portions of the UNCITRAL Model Law 2006 as well as establishing a new law—on a par with England, Sweden, and France.<sup>631</sup> After considering two different

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<sup>626</sup> Among the states which ratify the New York Convention (the United Nations Convention on the recognition and enforcement of foreign arbitral awards 1958), an arbitral award which is rendered in a contracting state has an international effect in other contracting states.

<sup>627</sup> Article 33 of International Arbitration Rules by the KCAB states that “1. 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. 2. The Secretariat may extend this time limit pursuant to a reasoned request from the Arbitral Tribunal or on its own initiative if it decides it is necessary to do so.”

<sup>628</sup> Article 52 of International Arbitration Rules by the KCAB specifies that “1. Arbitration proceedings, and records thereof, shall be closed to the public. 2. The members of the Arbitral Tribunal and the Secretariat, the parties and their representatives and assistants shall not disclose facts related to arbitration cases or facts learned through arbitration cases except where disclosure is consented to by the parties, required by law or required in court proceedings.”

<sup>629</sup> The Korean Ministry of Justice officially states the purpose of amendment. The purpose of amendment of the KAA is to make Korea to be a favorable place for arbitration by making the Korean Arbitration Act more advanced and corresponding to the international standard. In order to achieve this purpose, it broadens the scope of arbitrability, relaxes the writing requirement of arbitration agreement and makes the recognition or enforcement of arbitral award easy. Cf. [http://www.lawnb.com/lawinfo/link\\_view.asp?cid=1C6236B786284A83931D89A98A0DDAB4](http://www.lawnb.com/lawinfo/link_view.asp?cid=1C6236B786284A83931D89A98A0DDAB4)

<sup>630</sup> The Commentary of legislative history

<sup>631</sup> The members who made the second suggestion believed that when we adopted the UNCITRAL Model Law in 1999, the whole Model Law was adopted as a Korean arbitration law because Korea did not have much experience and arbitration was very unfamiliar system in Korea. Now, however, they claimed that Korea is able to draft its own law which can fit better in the Korean legal system.

suggestions, the majority of the Committee agreed that it was not an appropriate time to draft a brand-new arbitration law;<sup>632</sup> for example, (i) it would have been difficult to advertise the law internationally at that time<sup>633</sup> and (ii) unless the Model Law contained serious defects therein (*i.e.*, incompatibilities with the national legal system), there would be no reason for changing the entire law. Consequently, the Committee decided to partially amend the KAA via (i) the addition of provisions not otherwise included therein (*i.e.*, within the Model Law) or (ii) an agreement to change the present provisions if necessary.<sup>634</sup> Upon the approval by the National Assembly on November 30, 2016, the KAA (2016) became effective. (Singapore and Hong Kong have their own provisions even though they adopted the Model Law.)<sup>635</sup>

In this chapter, the revised KAA (2016) will be analyzed, based on the commentary in the legislative history<sup>636</sup> to (i) explore the background of the amendment, (ii) analyze the revised provisions (and rationale for amending them), and (iii) clarify the issues, discussed by the Committee—and residual concerns therein (*e.g.*, issues that may be addressed via future amendment).<sup>637</sup>

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<sup>632</sup> England and France are much developed countries in terms of arbitration and they claim that, because the basic principles in their laws are the same as those in the UNCITRAL Model Law, it is not necessary to abandon their laws in order to adopt the Model Law. Ho Won Lee, *Feature: Legal and Practical Issues of International Construction Contracts; Recent Discussions on the Revision of Korean Arbitration Act - For the Promotion of the International Arbitration*, 22(2) *Journal of International Commercial Law Studies* 1, 3 (2013).

<sup>633</sup> Korea aims to be a hub of international arbitration in Asia and amending the KAA is one of the measures taken to achieve this aim. In this sense, drafting our own arbitration law would not help to make Korea to be a center of arbitration.

<sup>634</sup> *Id.*

<sup>635</sup> *Id.*

<sup>636</sup> This commentary was provided to the author by one member of the Committee for the study purpose only. The original document is written in Korean and the KAA (2016) is also written in Korean. There are no official English version for both, the commentary and the KAA (2016)s, yet. Therefore, the author translated all contents of the documents into English considering the meaning of words written in Korean by consulting the member of the Committee if it was necessary in order to convey the meaning as accurately as possible.

<sup>637</sup> In fact, several issues were left out for the next amendment.

## 2. The Commencement of Arbitration

### 2.1. Definition of Arbitration<sup>638</sup>

The meaning of arbitration is defined in Article 3, which clarifies the definition of terms used in the Act—namely, arbitration, arbitration agreement, and arbitral tribunal. There is no change in Articles 3.2 and 3.3 therein (*i.e.*, from the KAA (1999)); however, the text in Article 3.1 (which focuses on the definition of arbitration) has been revised in the KAA (2016).

Article 3.1 defines arbitration as a procedure to settle a dispute via the decisions of an arbitrator and specifies the substantive scope of arbitration in detail. Article 3.1 of the KAA (1999) states that disputes in private laws can be settled by arbitration; indeed, this is on a par with the wording in Article 1. The Committee, however, agreed that the scope of arbitrability should be extended. When the Korean arbitration statute was amended via the adoption of the UNCITRAL Model Law in 1999, there was no thorough discussion about the scope of arbitrability.<sup>639</sup> While the UNCITRAL Model Law states both territorial and substantive scopes of application in Article 1, the KAA states the territorial scope of application in Article 2 (1) under the title of ‘the scope of application’<sup>640</sup>; the substantial scope of

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<sup>638</sup> Chapter I of the KAA (2016) has seven provisions: purpose (Article 1), scope of application (Article 2), definitions (Article 3), written notices (Article 4), forfeiture of right to object (Article 5), court intervention (Article 6) and competent court (Article 7).

<sup>639</sup> When Korea adopted the UNCITRAL Model Law as a national arbitration law in 1999, there were not enough human resources or experience to discuss the provisions of Model Law and adjust them into our own law. So, Korea basically adopted the whole provisions of the Model Law and changed the order of the provisions so as to prevent them from conflicting with other Korean national laws.

<sup>640</sup> Article 2 of the KAA (1999) (Scope of Application) (1) This Act shall apply to cases where the place of arbitration under Article 21 is in the Republic of Korea: Provided, That Articles 9 and 10 shall apply even in cases where the place of arbitration is not yet determined or is not in the Republic of Korea, and Articles 37 and 39 shall apply even in cases where the place of arbitration is not in the Republic of Korea. (2) This Act shall not affect any other Act by virtue of which certain disputes may not be referred to arbitration or may be referred to arbitration only according to provisions, other than those of this Act, nor those treaties which come into operation in the Republic of Korea.

arbitration was determined in Article 3.1 under the title of ‘definition.’

Both Articles 1 and 3.1 specified the substantive scope of application in the KAA (1999) and there was no difference in the two articles; however, in the KAA (2016), the substantive scope in Articles 1 and 3.1 is different because only Article 3.1 has been amended. Thus, although the Committee has suggested that both articles should be changed (because they both demonstrate the substantive scope), the final statutes show that only Article 3.1 has been changed.<sup>641</sup> Consequently, as far as the arbitrability is concerned, Article 3.1 may be assumed to prevail over Article 1 because Article 1 is about the purpose of law whereas the text in Article 3.1 focuses on the definition of arbitration.<sup>642</sup> Nevertheless, there is a lack of clarity herein associated with the interpretation and application of two different scopes of arbitrability.

### **2.1.1. What Has Been Amended**

Article 3.1 of the KAA (1999) and the KAA (2016) are as follows. The revised parts are underlined.

#### ***Article 3.1 of the KAA (1999)***

*1. The term “arbitration” means a procedure to settle any dispute in private laws, not by the judgment of a court, but by the decision of an arbitrator, as agreed by the parties.*

#### ***Article 3.1 of the KAA (2016)<sup>643</sup>***

*1. “Arbitration” means a procedure to settle any dispute involving an economic interest, not by the judgment of a court, but by the decision of an arbitrator, as agreed by the parties. Also, any dispute which does not involve economic interest,*

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<sup>641</sup> No record can be found why the Committee’s suggestion was not accepted.

<sup>642</sup> In the KAA (2016), there is no clear ground that Article 3.1 prevails Article 1.

<sup>643</sup> While the KAA (1999) has an official English version, the KAA (2016) does not have one yet. So, the author would like to make it sure that the English version of the KAA (2016) is translated by the author.

but can be resolved by an agreement of the parties may be settled by arbitration.<sup>644</sup>

Ever since the Model Law was adopted, there was continuous discussion over whether the scope of arbitrability in Article 3.1 of the KAA (1999) was broad enough to address all disputes that were arbitrable in practice—not only in domestic arbitration but also in ICA.

According to Article 3.1 of the KAA (1999), disputes in private laws were arbitrable;<sup>645</sup> however, there has been a debate regarding the meaning of disputes in private laws and the interpretation of the scope of arbitrability. Some say that there is no need to interpret it (*i.e.*, it just needs to be applied as it says in the provision); thus, if a dispute is within the private law boundary in Korea, it is arbitrable<sup>646</sup> (*i.e.*, it not necessary to distinguish what is arbitrable *vs.* not arbitrable). Others claim, however, that the substantive scope of arbitration should not be limited to disputes in private laws. Indeed, even when a dispute is not within the private law boundary, the law should allow it to be settled by arbitration as long as it is disposable between the parties (*i.e.*, does not harm the public interest).<sup>647</sup> The rationale for this assertion is that disputes in public laws can be arbitrated if they do not necessarily need to be settled by

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<sup>644</sup> This provision was not translated literally. It was translated based on section 1030 (1) of the German Code of Civil Procedure, which was referred to by the Committee.

<sup>645</sup> When the scope of arbitrability is concerned, Articles 1, 2 (2), and 3.1 should be considered together. Under the different names of title, they specify the scope of arbitrability in different ways. Article 2 (2) states, “This Act shall not affect any other Act in cases where the arbitral proceedings are not approved [where the dispute is not referred to arbitration] or where a dispute is referred to arbitration only according to provisions other than those of this Act, nor those treaties which come into operation in the Republic of Korea.” So, Article 2 (2) provides three cases in which a dispute cannot be arbitrated; first, in which the arbitral proceedings are not approved, second, in which a dispute is referred to arbitration according to provisions other than those of this Act, and last, in which there is a treaty in effect in Korea. Having interpreted these three cases mentioned above, the first one is the case in which other Korean laws prohibit the matter from being arbitrated even though it is under a private law to protect the public interest; the second one is the case in which other arbitration law is applicable; the last one is in which there is a treaty which excludes the application of the KAA. See, Sun Ju Jeong, Main Issues on Revision of Korean Arbitration Act, 69 Journal of Korean Law Study 211, 221(2013).

<sup>646</sup> Young Jun Mok, COMMERCIAL ARBITRATION LAW, Bak Young Sa, at 77.

<sup>647</sup> If it does not harm the public interest, the law should respect the parties’ agreement to avoid the judicial litigation. Also, it is an international trend that the substantive scope of arbitrability gets broad.

the judicial litigation for the public interest.<sup>648</sup>

After a heated discussion, the Committee decided to change the phrase that indicates the scope of arbitrability under Article 3.1.<sup>649</sup> They referred to Section 1030 (1) of the German Code of Civil Procedure<sup>650</sup> and required that the statute include disputes that involve economic interests as well as the ones that are disposable between the parties without involving economic interest.<sup>651</sup> The rationales for the amendment of Article 3.1 are (i) to eliminate the confusion about the interpretation of the phrase ‘disputes in private laws’ and (ii) to extend the scope of arbitrability to areas that were not arbitrable in the past but are now.<sup>652</sup> Indeed, by broadening the substantive scope of arbitrability in the KAA (2016), when disputes therein raise arguments about arbitrability (*e.g.*, unfair trade and anti-trust laws and intellectual property rights and patent laws), they can be settled by arbitration in Korea.<sup>653</sup>

### 2.1.2. Issues Left for the Next Revision

Although the KAA (2016) ultimately broadens the scope of arbitrability, there are still several issues raised. First, the meanings of some words in Article 3.1 are not clear; indeed, if the second part of Article 3.1 is literally translated, it means “any dispute which does not involve property right, but can be resolved

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<sup>648</sup> Sun Ju Jeong, *Main Issues on Revision of Korean Arbitration Act*, 69 *Journal of Korea Law Study* 211, 221 (2013).

<sup>649</sup> As mentioned before, the Committee also changed the phrase in Article 1, which states the purpose of the law, but the final draft does not reflect the will of the Committee.

<sup>650</sup> Section 1030 of the German Code of Civil Procedure (Arbitrability) (1) Any claim involving an economic interest can be subject to an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute.

<sup>651</sup> If Article 3.1 of the KAA (2016) is translated literally, it can be translated like, ” Arbitration” means a procedure to settle any dispute regarding property rights as well as non-property rights that can be resolved by reconciliation between parties, not by the judgment of a court, but by arbitration as agreed by the parties”.

<sup>652</sup> Kang, Su-Mi, *The Arbitrability of the Subject-matter of a Dispute on the Antitrust Law*, 20(1) *Journal of Arbitration Studies* 41, 41 (2010).

<sup>653</sup> The anti-trust law and patent law are not private laws according to the Korean law system.

by reconciliation may be settled by arbitration.” Here, the meanings of ‘reconciliation’ and ‘property right’ are not clear. Indeed, even though the Committee uses these words, they cannot reach an agreement regarding the meanings of these words;<sup>654</sup> for example, it can be interpreted based on Section 1030 of the German Code of Civil Procedure (which is referenced in this provision) as the legislative history states. As a result, because there is no official English version of the KAA (2016) yet, the author translates the second part of Article 3.1 to “any dispute which does not involve economic interest, but can be resolved by an agreement of the parties may be settled by arbitration’ by taking Section 1030 of the German Code of Civil Procedure. Thus, when a dispute can be resolved by an agreement of the parties (even if it is within public laws), it is arbitrable as long as it is a contractual matter; resolving, by an agreement of the parties, may mean that the parties can settle their disputes without the government authority being involved. Following this interpretation, the substantive scope of application includes matters addressed by both private and public laws—but disposable by the parties. Nonetheless, how this phrase should be interpreted and understood is still debatable.<sup>655</sup>

Second, it may be interpreted herein (*i.e.*, in the KAA (2016)) that matters in patent and anti-trust laws are arbitrable; however, it is still not clear whether the KAA (2016) allows all matters in these laws to be arbitrated or not.<sup>656</sup> Thus, some members in the Committee have suggested providing more guidelines herein (*i.e.*, on the matters in patent and anti-trust law that are arbitrable), while others have suggested leaving Article 3.1 as it is in the KAA (1999) and just adding some exceptional provisions (or

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<sup>654</sup> The Commentary of the legislative history. p.2.

<sup>655</sup> It will get clearer through the case study after the KAA (2016) is applied in Korea.

<sup>656</sup> The committee adopts Section 1030 of the German Code of Civil Procedure, but in Germany there is not one clear answer to the issue of whether the dispute regarding the validity of patent is arbitrable or not. In Korea, the scope of arbitration has been extended to the patent law area, but the matter as to the validity of patent is not arbitrable yet.



special rules or regulations) therein via the provision of a list of arbitrable matters.<sup>657</sup> Also, if the KAA (2016) states that “any dispute which does not involve economic interest, but can be resolved by an agreement of the parties may be settled by arbitration,” the scope of arbitrability is not certain enough. Thus, there is still a possibility that the statute will be interpreted differently case by case, and there will be inconsistent decisions over the scope of arbitrability in patent law and anti-trust laws.<sup>658</sup>

Third, if the KAA (2016) is interpreted as it is stated therein, it may be interpreted that family matters (*e.g.*, divorces and adoptions) are arbitrable; however, this is not true. Thus, some members have suggested specifying clearly that the family matters are not arbitrable in the KAA (2016) to avoid an incorrect interpretation; however, the KAA (2016) is silent on this matter.

Lastly, the KAA (2016) states that any dispute involving economic interest is arbitrable and an arbitrable dispute is not limited to private laws. Consequently, although investment matters belong to the public law, they can be governed by the KAA (2016) because investment arbitration involves economic interests. Thus, some members of the Committee have suggested that the provisions therein (*i.e.*, regarding investment arbitration) should have been drafted and inserted in the KAA (2016) because they believed that there would be some limitation and inappropriateness in applying the KAA (2016) to investment arbitration; however, this suggestion was not taken.

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<sup>657</sup> Yun, Sun-Hee, Lee, Heon-Hui, *A study on the Possibility of Patent Arbitration*, 22(1) *Journal of Arbitration Studies* 111, 111 (2012).

<sup>658</sup> The Commentary of the legislative history. p.2.

## 2.2. Arbitration Agreement

Ever since the UNCITRAL Model Law was amended in 2006, the necessity of amending the KAA has been discussed. Indeed, as the KAA (1999) was based on the UNCITRAL Model Law, it seemed necessary to revise the KAA (1999) by following the international standard; in fact, the 2006 amendment of the UNCITRAL Model Law was one of the reasons for the amendment of the KAA (1999).

As previously discussed (in Chapter III), the focus of Article 7 in the UNCITRAL Model Law—the form of the arbitration agreement—is a provision that was most significantly amended in the 2006 amendment. Although the UNCITRAL Model Law does not specify a preference herein (*i.e.*, between Options I and II),<sup>659</sup> the KAA includes Option I within Article 8 because it corresponds with the existing provision and case law in Korea.<sup>660</sup>

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<sup>659</sup> Part Two; Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 1 UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, 2008, para. 19

<sup>660</sup> Consequently, the Committee decided to revise Article 8 based on the existing KAA (1999) by omitting some parts and adding some detailed conditions. The Committee agreed to omit Article 8 (1), which states that that an arbitration agreement could exist as a separate agreement or as an arbitral clause in a main contract. Although the purpose of this provision is to indicate that an arbitration agreement could be made either before or after the dispute arises, it can be interpreted to limit the forms of arbitration agreement, either as a separate agreement or an arbitral clause in a main contract. The Committee's suggestion was not accepted, however.

### 2.2.1. What Has Been Amended

Article 8 of the KAA (1999) and the KAA (2016) are as follows. The revised parts are underlined.

*Article 8 of the KAA (1999) (Forms of Arbitration Agreement)<sup>661</sup>*

- (1) Arbitration agreement may be in the form of separate agreement or in the form of an arbitration clause in a contract.*
- (2) Arbitration agreement shall be in writing.*
- (3) Agreement failing under any of the following subparagraphs shall be deemed a written arbitration agreement:*
- 1. Where a document signed by the parties contains arbitration agreement;*
  - 2. Where a document exchanged by means of letters, telex, telegrams, fax or other means of communication contains arbitration agreement;*
  - 3. Where one party alleges that statements of the documents exchanged between the parties contain arbitration agreement, and the other party does not deny it.*
- (4) Where a contract cites a document containing an arbitration clause, arbitration agreement shall be deemed to have made: Provided, That this shall be limited to cases where the contract is prepared in writing, and includes an arbitration clause in the contract.*<sup>662</sup>

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<sup>661</sup> This provision corresponds to Article 7 of the UNCITRAL Model Law.

<sup>662</sup> The official English version of the KAA (1999) states that “this shall be limited to cases where the contract is prepared in writing, and includes an arbitration clause in the contract.” This translation is, however, not accurate. This sentence means that the contract includes an arbitration clause in the contract, and it does not make sense at all. It is not what this provision tries to mean. This provision is talking about the case in which the contract refers to a separate document which contains an arbitration agreement, not a contract which contains an arbitration agreement. On the contrary, the Korean version of the KAA (1999) delivers the right meaning of what it intends to do.

### **Article 8 of the KAA (2016)**

- (1) Arbitration agreement may be in the form of separate agreement or in the form of an arbitration clause in a contract.*
- (2) Arbitration agreement shall be in writing.*
- (3) Agreement failing under any of the following subparagraphs shall be deemed a written arbitration agreement:*
- 1. Where the content is recorded in any form irrespective of whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.*
  - 2. Where a document exchanged by means of telex, telegrams, fax, electronic mail or other electronic means of communication contains arbitration agreement; this shall be limited to cases where the information contained therein is accessible so as to be useable for subsequent reference.*
  - 3. Where one party alleges that an arbitration agreement is contained in an exchange of statements of claim and defense, and the other party does not deny it.*
  - (4) Where a contract cites a document containing an arbitration clause, arbitration agreement shall be deemed to have made; this shall be limited to cases where the reference is such as to make that clause part of the contract.*<sup>663</sup>

There is no change in Article 8 (1) and (2). Thus, an arbitration agreement can be made either as an arbitration clause in a contract or as a separate agreement; however, it must be in writing. The revised portion in the KAA (2016) is Article 8 (3), which provides cases wherein the arbitration agreement is considered in writing.<sup>664</sup> In the KAA (2016), the writing requirement is much more relaxed and the scope

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<sup>663</sup> The translation of this part is taken from Article 7 (6) of the UNCITRAL Model Law.

<sup>664</sup> The KAA (2016) adopts the option I of the UNCITRAL Model Law (2006).

of writing has been broadened.<sup>665</sup>

Article 8 (3) of the KAA (1999) and KAA (2016) provide three examples that can be deemed an arbitration agreement in writing; however, there are small differences. First, Article 8 (3) 1 focuses on a document that contains an arbitration agreement. The KAA (1999) requires the signatures of both contracting parties in written arbitration agreements; however, the KAA (2016) accepts any content that is recorded in any form within “written” arbitration agreements.<sup>666</sup> Indeed, this reflects the business practice wherein a contract can be concluded orally, by conduct, or by any other means. Thus, this provision ensures that a written arbitration agreement does not mean that the arbitration agreement must exist in a written form; indeed, an arbitration agreement can be recorded in any form and still be valid.<sup>667</sup> Thus, the methods of recording do not matter; such agreements could be made orally, by conduct, or by any other means.<sup>668</sup> This provision thus confirms that arbitration begins with the autonomy of parties, beginning with the agreement—and this intention should be respected no matter how it is recorded,<sup>669</sup> it should simply be clear how the contracting parties have agreed to arbitrate.<sup>670</sup>

Second, the text in Article 8 (3) 2 is focused on the validity of an arbitration agreement that is

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<sup>665</sup> Some members of the Committee suggested adopting option II of the UNCITRAL Model Law, but the committee concluded that adopting option II is too advanced.

<sup>666</sup> It means that as long as the agreement for arbitration is recognizable and its contents, which are necessary to do arbitration, are recorded, an arbitration agreement is in writing.

<sup>667</sup> Supreme Court [S. Ct.], 89Daka 20252, April 10, 1990 (S. Kor.) The court held that according to Article 2 of the New York Convention, a writing requirement of arbitration agreement is fulfilled by a written agreement which indicates the parties’ agreement to submit their dispute to arbitration, although it does not specify the place of arbitration, an arbitral institution, or the governing law.

<sup>668</sup> As regards the record of arbitration agreement, the provision does not specify who should record, when it should be recorded or how detailed contents it should have. It just makes clear that as long as it has a record of agreement to arbitrate for their dispute, it fulfills a writing requirement.

<sup>669</sup> Supreme Court [S. Ct.], 89Daka 20252, April 10, 1990 (S. Kor.)

<sup>670</sup> So, the following cases are considered to fulfill the writing requirement, for example; a contract which both parties signed, or a document which was prepared by one party and exchanged between the parties, or in the cases in which one party offers orally and the other party accepts it in writing, or the parties confirm in writing later after they agree to arbitrate orally. Kwang Hyun Suk, *Proposals for the Revision of the Korean Arbitration Act – with a Focus on International Commercial Arbitration*, Seoul Law Journal, 53 Seoul Law Journal 533, 542 (2012).

inserted in a document made by electronic means of communication (*e.g.*, telegraph, fax, and email); this provision states that if the consent to arbitration is recognizable, the arbitration agreement therein (*i.e.*, contained in a document exchanged by electronic means of communication) is in writing. Thus, as long as the information about arbitration is accessible, any document can be considered as an arbitration agreement in writing when it contains this information—irrespective of the method used for communication by the parties. As to the methods of communications, the KAA (2016) takes out ‘letters’ from the list but adds the electronic means into it. This change does not have any particular meaning; it simply reflects a change in a modern society wherein email or other electronic methods are becoming more common methods of communication.

Lastly, the text in Article 8 (3) 3 is focused on the statements of claim and defense. The KAA (1999) does not specify the document wherein a party should claim the existence of an arbitration agreement; it simply states that if one party claims the existence of an arbitration agreement in a document that both parties have exchanged, the arbitration agreement is in writing. As to this, the Committee has agreed that the document wherein a party must claim the existence of an arbitration agreement (and by when the other party should object to it) should be clear.<sup>671</sup> Thus, under the KAA (2016), an arbitration agreement is considered to be in writing if one party claims the existence of arbitration agreement in a statement of claim and the other party does not object to it in a statement of defense.

The last difference, in Article 8, between the KAA (1999) and KAA (2016) is the reference in a contract. While both consider an arbitration agreement to exist if a main contract refers to a document that contains an arbitration clause (and that document is part of a contract), Article 8 of the KAA (1999)

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<sup>671</sup> Commentary in the legislative history, p. 4

states that “the contract should be prepared in writing”; however, this condition is not mentioned in the KAA (2016).<sup>672</sup> However, since the writing requirement is newly regulated in Article 8 (3), this should not be detrimental; it should simply be emphasized via Article 8 (4) of the KAA (2016) that there is a valid arbitration agreement in writing if the document therein (*i.e.*, referring to the contract) is part of a contract and contains an arbitration agreement.

One concern herein (*i.e.*, based on the relaxed writing requirement) is that Article 8 (3) could conflict with the New York Convention, which requires a stricter definition—namely, Article II of the New York Convention requires an arbitration agreement to be (i) included as an arbitral clause within a contract or a separate arbitration agreement (that is signed by the parties) or (ii) an agreement contained in an exchange of letters or telegrams. As the provision of Convention is stricter (in terms of a writing requirement), there could be cases wherein a writing requirement is fulfilled under the KAA or the UNCITRAL Model Law but not under the New York Convention;<sup>673</sup> nevertheless, once an arbitral award is rendered, there is no difficulty in its recognition or enforcement under Article VII of the New York Convention.<sup>674</sup> Article VII. 1 of the Convention states that the Convention does not deprive the parties of a right to rely on any applicable law therein.<sup>675</sup> For example, according to Article VII. 1 of the Convention,

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<sup>672</sup> As to the writing requirements, Articles 8 (2) (a), (b) and (c) are applicable. So, it is better to omit the phrase, ‘where the contract is prepared in writing,’ because it could bring about the confusion.

<sup>673</sup> In Supreme Court [S. Ct.], Sungo 2004Da20180, December 10 2004 (S. Kr), the Korean Supreme Court held that when the claimant submitted the case to the Vietnam International Arbitration Center and the defendant did not object to the submission of arbitration, even though there was an implied arbitration agreement, it could not be interpreted as that there was a valid arbitration agreement under Article 2 of the New York Convention. In this case, the Korean Supreme Court approved that an implied arbitration agreement was valid, but denied that an implied arbitration agreement fulfilled a writing requirement under the New York Convention.

<sup>674</sup> Sun Ju Jeong, *op. cit.*, at. 218.

<sup>675</sup> Article VII. 1 of the New York Convention: The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

when the arbitral award is rendered based on an arbitration agreement that does not satisfy the writing requirement under the New York Convention, it can be recognized or enforced in Korea as long as the arbitration agreement validly exists under the KAA.

### **2.2.2. Issues Left for the Next Revision**

There was no special issue raised concerning this provision. The Committee simply agreed that it is necessary to make the writing requirement relaxed due to current trends in ICA. However, while there are some jurisdictions or states that completely eliminate the writing requirement in arbitration agreements, the majority of the Committee agreed that this is far too advanced.<sup>676</sup> They noted that because most arbitration laws still require an arbitration agreement in writing (and with consideration of the importance and meaning of the existence of valid arbitration agreements), it is not advisable to permit oral arbitration agreements via the KAA.<sup>677</sup>

## **3. Composition of Arbitral Tribunal**

Chapter III of the KAA (2016) has provisions that focus on the arbitral tribunal. Namely, it has eight articles: number of arbitrators (Article 11), appointment of arbitrators (Article 12), grounds for

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<sup>676</sup> The French Code of Civil Procedure abolished the form requirement of arbitration agreement in international arbitration. Article 1507 of Chapter I – International Arbitration Agreement: An arbitration agreement shall not be subject to any requirement as to its form.

<sup>677</sup> As having a valid arbitration agreement means that the parties are prevented from using a judicial litigation system, it is crucial to know the intention of both parties. In this sense, approving an oral arbitration agreement is not appropriate. Sun Ju Jeong, *op. cit.* at. 216.



challenge (Article 13), procedures for challenge (Article 14), termination of mandate of arbitrator due to a failure of impossibility to act therein (Article 15), appointment of substitute arbitrator (Article 16), ruling of arbitral tribunal on its jurisdiction (Article 17), and interim measure (Article 18).

### **3.1. Appointment of Arbitrators**

Article 12 is about the appointment of arbitrators;<sup>678</sup> the principle therein is party autonomy—namely, the parties can agree on the procedure for appointing arbitrators. Indeed, there is not much change in this provision. In the KAA (2016), however, there is one more appointing institution utilized as a third appointing party—namely, when the contracting parties require a third party to appoint an arbitrator.

#### **3.1.1. What Has Been Amended**

The following is Article 12 of the KAA (2016) and the revised parts are underlined.

*Article 12 of the KAA (2016)*

*(1) No person shall be precluded by reason of his/her nationality from acting as an arbitrator, unless otherwise agreed by the parties.*

*(2) The parties shall be free to agree on a procedure of appointing arbitrators.*

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<sup>678</sup> This provision corresponds to Article 11 of the UNCITRAL Model Law.

*(3) Failing such agreement under paragraph (2), arbitrators shall be appointed according to the following classification:*

*1. In arbitration with a sole arbitrator, if the parties are unable to agree on an arbitrator within thirty days after a party has received a request for initiating the procedure for his/her appointment from the other party; he/she shall be appointed, upon request of either party, by the court, or by the arbitral institution appointed by the court.*

*2. In arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall agree on the third arbitrator. In such cases, if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators appointed fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of either party, by the court or by the arbitral institution appointed by the court.*

As to Article 12 (3) of the KAA (1999), there were concerns herein about whether it was efficient for the court to appoint an arbitrator. Indeed, every court is expected to appoint the most appropriate person for a dispute after considering his or her career, experience as an arbitrator, nationality, and other relevant factors. In reality, however, it is not easy for a court to find and appoint an ideally suited arbitrator unless there is a specialized court for arbitration—or the court has an exclusive department for arbitration.<sup>679</sup> Furthermore, when a foreign law is designated as a substantive governing law for a dispute, the court has to find a foreign arbitrator who knows the law; however, this can be quite challenging.<sup>680</sup>

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<sup>679</sup> Sun Ju Jeong, op. cit., at. 222.

<sup>680</sup> *Id.*

Conversely, an arbitral institution is in a better position to efficiently appoint an appropriate arbitrator because it is a specialized body organized only for arbitration.<sup>681</sup> All members of the Committee agreed on this and thus the KAA (2016) requires the arbitral institution to appoint an arbitrator when it is necessary—or upon the request of contracting parties.

This change was made for practical reasons. (1) The arbitral institution is better at appointing the most appropriate arbitrators in certain areas of disputes because it is a specialized institution. Indeed, the KCAB has a wide pool of potential arbitrators in various areas and updates its list therein every year. (2) The arbitral institution can more quickly appoint an arbitrator. Thus, one considerable advantage of arbitration is that arbitration proceedings are generally faster (*vs.* judicial litigation) since the sole focus of an arbitral institution is arbitration, whereas the court deals with all other matters. (3) Especially in ICA, if the court appoints the arbitrator, it is not easy to deliver the notice regarding the appointment of an arbitrator. Indeed, provisions of timely notices are very important in arbitration because if a party does not get a proper notice during proceedings, the rendered arbitral award may be subsequently set aside (because of the defect in the arbitration proceedings). Indeed, when arbitral institutions serve as appointing authorities, communications between the parties and institutions will be more efficient. Thus, the Committee decided to add the arbitral institution as an appointing party referring to (i) Article 11 of

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<sup>681</sup> Also, if the arbitral institution appoints an arbitrator, it could prevent the arbitral proceedings from being delayed because an institution has its own arbitral rules regulated and the appointing process is subject to that rule which usually sets the time-limit for appointment.

the UNCITRAL Model Law,<sup>682</sup> (ii) Article 13 of the Singapore Arbitration Act,<sup>683</sup> and (iii) Article 24 of the Hong Kong Arbitration Ordinance.<sup>684</sup>

### 3.1.2. Issues Left for the Next Revision

All members of the Committee agreed that there has to be an appointing authority when one party fails to appoint an arbitrator or the contracting parties cannot agree on an arbitrator. However, during the drafting process, there were three different suggestions on adding an arbitral institution as an appointing authority. The first suggestion was not to amend the provision because Article 12 (3) was just fine as it was; the rationale herein was that it is appropriate for the court to have sole authority to appoint an arbitrator. Indeed, they claimed that there could be an issue of unfairness if one specific arbitral institution is given the authority to appoint an arbitrator, especially for a domestic arbitration. Since there is no difference in the KAA between domestic and international arbitration, this regulation also applies to domestic arbitration; however, in domestic arbitration, issues of unfairness can be raised when a private institution gets the power to appoint an arbitrator and gives this arbitrator the power to make a final decision.<sup>685</sup>

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<sup>682</sup> Article 11 of the UNCITRAL Model Law is almost same as Article 12 of the KAA. The Model Law states that the court or other specified authority in Article 6 can appoint an arbitrator. Article 6 is about the court and the arbitral institution that should perform the functions referred to in the law.

<sup>683</sup> Article 13 (3) (b) of the Singapore Arbitration Act: (3) Where the parties fail to agree on a procedure for appointing the arbitrator or arbitrators - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, the arbitrator shall be appointed, upon the request of a party, by the appointing authority.

<sup>684</sup> Article 24 of the Hong Kong Arbitration Ordinance is exactly same as Article 11 of the UNCITRAL Model Law.

<sup>685</sup> As the Republic of Korea is a small country, the fairness of arbitrators could be more vulnerable. Arbitration industry is really competitive and an arbitral institution is a private one, so some members of the Committee concerned about whether an arbitral institution can play a proper role as a fair appointing authority.

The second suggestion was to amend the provision by giving appointing authority to the arbitral institution only when there is a request by either of the contracting parties. The suggested provision was that ‘... he/she shall be appointed by the court, or, upon request of either of parties, by the arbitral institution.’<sup>686</sup> As to the second suggestion, the provision says “... he/she shall be appointed, upon request of either of parties, by the court OR the arbitral institution”; thus, it is not clear which body herein (*i.e.*, whether the court or arbitral institution) has a prior authority to appoint an arbitrator when requested by a party. Moreover, if one party requests the court to appoint an arbitrator and, at the same time, the other party asks the arbitral institution to appoint an arbitrator, the provision cannot give an answer to the question herein (*i.e.*, which one has the appointing authority). Another ambiguous point is the definition of arbitral institution in this provision; although there is only one arbitral institution in Korea—the Korean Commercial Arbitration Board (KCAB)—this does not necessarily mean that the arbitral institute, in this provision, is the KCAB.

The third suggestion was to get rid of the ambiguous points that were raised in the second suggestion by amending the provision via such wording as ‘by the court or by the arbitral institution appointed by the court’; indeed, the adjustment of such a phrase clarifies that the court has a prior authority to appoint an arbitrator. Furthermore, if the court must ask an arbitral institution to appoint an arbitrator, the court will nominate the arbitral institution—no matter which institution the court wants to nominate. Thus, a party must submit a request to a court when seeking the appointment of an arbitrator, according to this provision;

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<sup>686</sup> Commentary in the legislative history, p. 7.

the court herein appoints the arbitrator by itself or the arbitral institution (for the appointment of an arbitrator).<sup>687</sup>

## 3.2. Jurisdiction of Arbitral Tribunal

Article 17 is about the competence of an arbitral tribunal to rule on its jurisdiction.<sup>688</sup> While the KAA (1999) adopts Article 16 of the UNCITRAL Model Law, the structure of the provision is different.

### 3.2.1. What Has Been Amended

The KAA (2016) keeps the existing provision of the KAA (1999) as it is; however, some sections herein (*e.g.*, regarding the negative ruling on the arbitral tribunal's jurisdiction) are added in paragraph (6) and a new paragraph (9) is drafted.<sup>689</sup> The followings are paragraphs (6) and (9) of the KAA (2016) and the changes are underlined.

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<sup>687</sup> In Korea, there is only one arbitral institution, which is the Korean Commercial Arbitration Board (KCAB). So, it is clear that the arbitral institution which is appointed by the court in Korea under the KAA will be mostly the KCAB. Some members of the Committee suggested specifying the name of the KCAB, but the Committee decided not to specify it. The reason for this is that specifying the name of certain national arbitration institute in the national statute does not look appropriate. So, the Committee decided, instead of specifying the name of KCAB, to make a guideline for the court saying that the court should nominate the KCBA for the appointment of arbitrators when it is necessary. By doing so, the case in which the court nominates a foreign arbitral institution for international commercial arbitration will be removed.

<sup>688</sup> This provision corresponds to article 16 of the UNCITRAL Model Law.

<sup>689</sup> Article 17 of the KAA (2016) (As most provisions are same as ones in the KAA (1999), revised parts are underlined) (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. In such cases, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other clauses of the contract. (2) A plea concerning the arbitral tribunal's jurisdiction shall be raised by not later than the submission of the statement of defense. In such cases, a party shall not be precluded from raising such plea by the fact that he/she has appointed, or participated in the appointment of, an arbitrator. (3) A plea that the arbitral

### **Article 17 of the KAA (Ruling of Arbitral Tribunal on its Jurisdiction)**

*(6) If the arbitral tribunal rules as preliminary question that it has jurisdiction or it does not have jurisdiction under paragraph (5), 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.*

*(9) If the court decides that the arbitral tribunal has jurisdiction under paragraph (6), the arbitral tribunal should continue the arbitral proceedings. In a case where the arbitrator cannot continue the arbitral proceedings or he/she does not want to continue it, the mandate of arbitrator terminates and a new arbitrator should be appointed under Article 16.*

As raised in Chapter III (wherein Article 16 of the UNCITRAL Model Law is discussed), what is the next step for the parties when the arbitral tribunal makes a negative ruling on its jurisdiction? Indeed, the KAA (1999) does not contain any answer to this question and is thus similar to the UNCITRAL Model Law in this regard. In a situation like this, there could indeed be nowhere for the parties to go to settle their disputes if the arbitral tribunal rejects the case due to a lack of jurisdiction; the parties would have to

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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. (4) The arbitral tribunal may, in either case of paragraphs (2) and (3), admit a later plea if it considers the delay justified. (5) The arbitral tribunal may rule a plea under paragraph (2) or (3) either as a preliminary question or in an arbitral award on the merits. (6) If the arbitral tribunal rules as preliminary question that it has jurisdiction or it does not have jurisdiction under paragraph (5), 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. (7) While a request under paragraph (6) is pending, the arbitral tribunal may continue the arbitral proceedings or make an arbitral award. (8) No appeal shall be filed against the review of the authority which is concluded by a court following request therefor under paragraph (6). (9) If the court decides that the arbitral tribunal has jurisdiction under paragraph (6), the arbitral tribunal should continue the arbitral proceedings. In a case where the arbitrator cannot continue the arbitral proceedings or he/she does not want to continue it, the mandate of arbitrator terminates and a new arbitrator should be appointed under Article 16.

bring the case to the court. If the court, however, rejects the case again because it finds that the arbitral tribunal has jurisdiction, where can the parties go?<sup>690</sup> The Committee has agreed that there must be a way that the parties can appeal against a negative ruling on the arbitral tribunal's jurisdiction; otherwise, the agreement to arbitrate between the parties is disregarded and their options herein are severely limited.<sup>691</sup>

The Committee amended Article 17 by adding “or it does not have jurisdiction” in paragraph (6). Thus, the contracting parties can now appeal the arbitral tribunal's decision herein (*i.e.*, to the court) regardless of whether the decision of the arbitral tribunal on its jurisdiction is positive or negative. Consequently, the parties can request that the court examine a decision when the arbitral tribunal decides that it does not have jurisdiction. Conversely, the arbitral tribunal should continue the arbitral proceedings if the court finds the jurisdiction of the arbitral tribunal positive, according to Article 17 (9), which is a newly drafted paragraph.<sup>692</sup> On this topic, the Committee referred to (i) Section 30 of the Arbitration Act 1996,<sup>693</sup> (ii) Article 1465 of the French Code of Civil Procedure,<sup>694</sup> and (iii) Article 10 of the Singapore Arbitration Act.<sup>695</sup>

Article 17 (6) provides the parties with a right to get a second opinion regarding the jurisdictional matter and Article 17 (9) guarantees the parties a right to arbitrate when the court finds the arbitral

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<sup>690</sup> The same issue is discussed in Chapter III in which Article 16 of the UNCITRAL Model Law is analyzed.

<sup>691</sup> Commentary in the legislative history, p.9

<sup>692</sup> In this context, the role of court should be remained as an assistance of arbitration proceedings.

<sup>693</sup> Section 30 of the Arbitration Act 1996 (Competence of tribunal to rule on its own jurisdiction) (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

<sup>694</sup> Article 1465 of the French Code of Civil Procedure: The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction.

<sup>695</sup> Article 21 (4) of the Singapore Arbitration Act: (4) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense.



tribunal's jurisdiction positive. These provisions, however, give an impression that the decision of the court (*vs.* arbitral tribunal) prevails because they imply that the arbitral tribunal has to arbitrate if the court orders it to do so. Thus, Article 17 (9) of the KAA (2016) adds one condition—namely, it states that if an arbitrator cannot or will not continue the arbitral proceedings, he or she can cease the arbitration.<sup>696</sup> If the arbitrator decides to cease the arbitration, the mandate of this arbitrator terminates and a new arbitrator will be appointed (according to Article 16).<sup>697</sup> This provision does not intend to compel the original arbitrator to carry on the arbitral proceedings by the court's order. Indeed, the only purposes of paragraph (9) are (i) to give the parties an opportunity to get a second opinion from the court regarding the arbitral tribunal's decision on its jurisdiction (irrespective of whether its decision is positive or negative) and (ii) to remove the possibility that the parties will be compelled to settle their dispute via judicial litigation because of the arbitrator's judgment.

### **3.2.2. Issues Left for the Next Revision**

There were also two responses to the concern that the parties do not have an opportunity to get a second opinion from the court when the arbitral tribunal finds its jurisdiction negative. The first suggestion was to make the arbitral tribunal's decision herein (*i.e.*, on its jurisdiction) a provisional (*vs.* final) one.<sup>698</sup> Thus, if the arbitral tribunal finds its jurisdiction negative, it just stops the arbitral

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<sup>696</sup> The court can order the arbitrator to do arbitration if it finds a positive jurisdiction of the arbitrator, but the arbitrator also has a right to decide whether s/he continue the arbitration or not. Article 17(9) of the KAA (2016) is not drafted to enforce the arbitrator who does not want to do arbitration to continue the arbitral proceedings.

<sup>697</sup> Article 16 of the KAA (1999) (Appointment of Substitute Arbitrator) When, in consequence of the termination of the mandate of an arbitrator, a substitute arbitrator is appointed, he/she shall be so done in conformity with the procedure that is followed for the appointment of the arbitrator being replaced. There is no change in article 16 in the KAA (2016).

<sup>698</sup> Commentary in the legislative history, p. 10.

proceedings and declares the termination of arbitration. In this case, the parties can start new arbitration again with a newly formed arbitral tribunal. However, the suggestion herein (*i.e.*, making the arbitral tribunal's decision a provisional one) was rejected because it is against the principle that the arbitral tribunal's decision is final.<sup>699</sup>

The other suggestion was to adopt Section 1032 (2) of the German Code of Civil Procedure.<sup>700</sup> Section 1032 (2) states that the parties may request the court to decide whether or not the arbitral tribunal has jurisdiction before the arbitral tribunal is formed.<sup>701</sup> However, this suggestion was not accepted, because it can raise other issues; for example, if the court finds that the arbitral tribunal has jurisdiction, does the arbitral tribunal have to commence the arbitration without having the opportunity to make its own decision on its jurisdiction? Or, what is the next step if the arbitral tribunal refuses to do arbitration because of the lack of jurisdiction—even after the court finds that the arbitral tribunal has jurisdiction? Indeed, there is no reason to ask the court to make a decision on the jurisdiction of an arbitral tribunal before the arbitral tribunal is actually formed.

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<sup>699</sup> Commentary in the legislative history, p. 10.

<sup>700</sup> Commentary in the legislative history, p. 10.

<sup>701</sup> Section 1032 (2) of the German Code of Civil Procedure: (2) Prior to the composition of the arbitral tribunal, an application may be made to the court to declare whether or not arbitration is admissible.

## 4. Conduct of Arbitral Proceedings

### 4.1. Interim Measure

Article 18 of the KAA is about the interim measure. Indeed, this provision has changed the most in the KAA (2016)—just like Article 17 in the UNCITRAL Model Law.<sup>702</sup> The UNCITRAL Model Law makes the interim measure (which is issued by the arbitral tribunal) recognizable and enforceable and many jurisdictions and states have amended their own national arbitration statutes to confirm the recognition and enforcement of the interim measure herein (*i.e.*, granted by the arbitral tribunal).<sup>703</sup> Also, when states are advanced in arbitration, they generally make the interim measure recognizable and enforceable; thus, the Korean Ministry of Justice realizes that the KAA has to be revised in the same way to follow up the current trend.<sup>704</sup>

As a result, the Committee has decided to adopt the UNCITRAL Model Law with some modifications, except that the provisions herein address preliminary orders. Indeed, the KAA (2016) rearranges the paragraphs of the UNCITRAL Model Law by combining or dividing them.<sup>705</sup> However, before this discussion goes further, Article 18 of the KAA (1999) will be discussed first.

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<sup>702</sup> Two big changes in the amendments of UNCITRAL Model Law in 2006 are article 7, which is about the arbitration agreement, and article 17, which is about the interim measure.

<sup>703</sup> They are Australia, Belgium, Hong Kong, Ireland, New Zealand, Peru, Slovenia, Florida in US, and etc. These countries and jurisdictions amended their arbitration law based on the UNCITRAL Model Law amended in 2006. Cf. [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)

<sup>704</sup> Also, the Committee believed that, if the interim measure granted by the arbitral tribunal is recognizable and enforceable, the proceedings of arbitration will be faster and efficient and it will strengthen the advantage of arbitration more.

<sup>705</sup> The following table compares the structure of article 18 of the KAA (2016) and article 17 of the UNCITRAL Model Law.

Title	Article 18 of the KAA (revised statute)	UNCITRAL Model Law
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### Article 18 of the KAA (1999)

*(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. In such cases, the arbitral tribunal may determine the amount of security to be provided by the respondent in lieu of such interim measure.*

*(2) The arbitral tribunal may order the party requesting the interim measure to provide appropriate security.*

<different titles are used for this provision>	Article 18 (interim measure)	Article 17(power of arbitral tribunal to order interim measure)
Conditions for granting interim Measure	Article 18. 2	Article 17 A
Modification, suspension, termination of interim measure	Article 18. 3	Article 17 D*
Provision of security	Article 18. 4	Article 17 E
Disclosure	Article 18. 5	Article 17 F
Costs and damages	Article 18. 6	Article 17 G
Recognition and enforcement of interim measure	Article 18. 7	Article 17 H
Grounds for refusing recognition or enforcement	Article 18. 8	Article 17 I

\* Article 17 B and article 17 C are provisions about preliminary orders. These provisions are not adopted by the KAA, however. So, they do not appear in the table.

Article 18 of the KAA (1999) is the same as Article 17 of the UNCITRAL Model Law (1986).<sup>706</sup> Under this provision, the arbitral tribunal has a default power to order an interim measure of protection when the tribunal considers it necessary.<sup>707</sup> However, Article 18 of the KAA (1999) does not clarify whether the interim measure should be (i) treated as the preservative measure under the Civil Execution Act or (ii) considered as a separate and different concept because there is no definition of interim measure provided in the law.<sup>708</sup> Also, even though the interim measure is understood as a different concept from the preservative measure, there is no detailed regulation about its scope or contents therein.<sup>709</sup> Furthermore, according to Article 37 of the KAA (1999), which focuses on the recognition or enforcement of the arbitral awards, the interim measure is not included in the scope of recognition or enforcement of the awards; thus, the law does not guarantee its recognition and enforcement.<sup>710</sup> This means that the interim measure is effective only based on the assumption that the parties will comply with it voluntarily. In other words, if the opposing party therein (*i.e.*, to whom the interim measure is directed) refuses to comply with it, it becomes meaningless.

Thus, the arbitral tribunal (or a party therein) must ask the court to grant an enforceable interim measure under Article 10 of the KAA (1999).<sup>711</sup> In this sense, Article 18 of the KAA (1999) treats the interim measure as a component of arbitration proceedings (*vs.* a binding order).<sup>712</sup> The only way to

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<sup>706</sup> Article 17 of the UNCITRAL Model Law, which is about interim measure, is not discussed in the Chapter III, so it will be dealt with in this part.

<sup>707</sup> Stavros L. Brekoulakis & Laurence Shore, UNCITRAL Model Law, Chapter 1V, A , Article 17 [Power of arbitral to order interim measure] in Loukas A. Mistelis(ed), *op. cit.*, at. 616.

<sup>708</sup> Moses also points out the ambiguity in concept of interim measure. Margaret L. Moses, *op. cit.*, at. 56.

<sup>709</sup> Sun Ju Jeong, *op. cit.*, at. 226.

<sup>710</sup> *Id.*

<sup>711</sup> Article 10 of the KAA (1999) (Arbitration Agreement and Interim Measures by court) A party to arbitration agreement may request, before the commencement of or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

<sup>712</sup> Commentary in the legislative history, p. 15

enforce the interim measure is to request that the court take a preservative measure therein (*i.e.*, against the party who is refusing to comply with the interim measure issued by the arbitral tribunal), in accordance with the Civil Execution Act.

Second, Article 18 (1) of the KAA (1999) limits the scope of the interim measure to the subject-matter of the dispute. Indeed, this means that the arbitral tribunal has no power to issue an order that goes beyond the subject-matter of the dispute submitted therein. The interpretation regarding the scope of the interim measure can be found in the CLOUT Cases. In CLOUT Case No. 565, the court made clear that Article 17 of the UNCITRAL Model Law (1985)<sup>713</sup> limited the interim measures that were directly related to the protection of the subject-matter of the dispute—and did not confer any power on the arbitral tribunal therein (*i.e.*, to enforce its order).<sup>714</sup> In another case, however, the court held that when the court grants the interim measure upon a request by the arbitral tribunal (or a party under Article 9<sup>715</sup> of the UNCITRAL Model Law (1985)), the interim measure should be interpreted as having wider application (*vs.* merely

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<sup>713</sup> This one is the previous one before 2006 amendment, and it corresponds to Article 18 of the KAA (1999).

<sup>714</sup> The facts of the case are as follows. The claimant who was a professional track and field athlete, had been suspended by the International Association of Athletics Federations (IAAF) for negligent use of stimulant drugs. Because of the suspension, the German Tract and Field Federation (DLV), who was the respondent, rejected his application to participate in a German championship tournament. Regarding this decision, a DLV arbitral tribunal was formed and issued a temporary injunction which ordered the respondent to authorize the claimant to take part in the tournament. After that, the claimant brought the injunction to the Higher Regional Court of Hamburg for its enforcement through expedited proceedings under Sections 1063 (3) and 1041 (2) of the German Code of Civil Procedure. So, the claimant participated in the tournament and declared the dispute settled afterwards. The respondent opposed this declaration and brought the case requesting the Court to reject the claimant's application to declare the tribunal's temporary injunction enforceable. Upon the respondent's request, the Court defined the prerequisites under which a State Court can declare interim measure of protection rendered by an arbitral tribunal under Section 1041 (1) of the German Code of Civil Procedure. The reasons for the Court's decisions are, first, the Court said that the measure must be classified as interim measures. In this particular case, the arbitral tribunal defined the measures as interim measures and the Court found itself not entitled to evaluate the substance of the tribunal's decision, and the Court added that it was common practice of German Courts. Second, as the interim measure of protection had to be rendered by an arbitral tribunal, and in this particular case, the respondent's procedural terms, which both parties agreed, stated that the tribunal's decision would be final and binding, even though the arbitral tribunal was a body of the Federation itself. So, recourse to the State Court system was explicitly ruled out. CLOUT Case No. 565, Germany: Oberlandesgericht Frankfurt, 5 April 2001

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V05/878/28/PDF/V0587828.pdf?OpenElement>

<sup>715</sup> This one is the previous one before 2006 amendment, and it corresponds to Article 10 of the KAA (1999).

being an order to preserve ‘the subject-matter of the dispute’ stated therein).<sup>716</sup> As can be seen from the two cases, the scope of the interim measure under Article 17 of the Model Law (1985) and Article 18 of the KAA (1999) is often varied.

#### **4.1.1. What Has Been Amended**

As Article 18 of the KAA (2016) is a long provision, the whole provision is in the footnote. Only some parts of Article 18 will be discussed here.

#### **Article 18 of the KAA (2016) (Interim Measure)**

*(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures that the arbitral tribunal considers necessary.*

*(2) An interim measure is any temporary measure, at any time prior to the issuance of the award by which the dispute is finally decided, by which the arbitral tribunal orders a party to,*

*1. Maintain or restore the status quo pending determination of the dispute;*

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<sup>716</sup> The defendant, a Hong Kong company, tried to set aside a Mareva injunction that was rendered by the court to the plaintiff, also a Hong Kong company. The issue was whether the court had jurisdiction to grant such an interim measure of protection, based on the fact that a charter-party agreement between the plaintiff and defendant contained an arbitration clause and it stated that “any dispute will be settled before Hong Kong Arbitrators and under British Maritime law...” The court, referring the decision on *Fung Sang Trading v. Kai Sun Sea Products and Foods Co. Ltd.*, found that the UNCITRAL Model Law covered this dispute because a substantial part of the obligations provided in the charter-party was to be performed outside Hong Kong. The court held that the interim measure of protection referred to in Article 9 of the UNCITRAL Model Law was wide enough to cover a Mareva injunction. Consequently, the court concluded that it had jurisdiction to grant a Mareva injunction in support of domestic arbitration carried out in Hong Kong, both under Article 9 of the UNCITRAL Model Law and Section 14 (6) of the Arbitration Ordinance. CLOUT Case No. 39. Hong Kong: High Court of Hong Kong. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V93/899/70/IMG/V9389970.pdf?OpenElement>

2. *Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;*
3. *Provide a means of preserving assets out of which a subsequent award may be satisfied; or*
4. *Preserve evidence that may be relevant and material to the resolution of the dispute.*

As previously noted, the KAA (1999) limits the scope of the interim measure herein (*i.e.*, ordered by the arbitral tribunal) to ‘the subject-matter of the dispute’ and this phrase has been deleted from the KAA (2016). Indeed, the KAA (2016) does not state the scope of interim measure at all; it just contains generic definitions like ‘any temporary measure.’<sup>717</sup> However, paragraph (2) gives specific examples of what kinds of orders may become interim measures. By doing so, paragraph (2) reduces the possibility of another dispute over whether the order therein (*i.e.*, issued by the arbitral tribunal) is an interim measure or not.<sup>718</sup> Indeed, these listed examples are essential because the provision does not give a definite meaning of interim measure; however, there are associated concerns herein. For example, if the arbitral tribunal’s authority in this respect (*i.e.*, to issue an interim measure) is expanded more and more, the statute will need to add more and more measures within future lists.<sup>719</sup> Thus, unless the law states that the examples of interim measures are only examples therein (*i.e.*, for the interim measure) and do not limit the scope or form of interim measure, this provision will require repeated revisions.<sup>720</sup> Thus, some

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<sup>717</sup> Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, in UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, United Nations publication, Sales No. E.08.V4, Part Two, at para.27.

<sup>718</sup> Sun Ju Jeong, *op. cit.*, at. 231.

<sup>719</sup> *Id.*

<sup>720</sup> *Id.*



members of the Committee have suggested specifying a clear definition of ‘interim measure’ without providing examples of interim measures—thereby leaving its interpretation to the court or arbitral tribunal.<sup>721</sup>

The only difference in the Article herein (*i.e.*, between the UNCITRAL Model Law and the KAA (2016)) is that the KAA (2016) does not mention the form of the interim measure while the Model Law states that “an interim measure is any temporary measure, whether in the form of an award or in another form...” The KAA (2016) merely regulates the time that the interim measure may be issued by stating “before the issuance of the award.” Indeed, the Committee submitted a draft that states the forms of interim measures therein and on a par with the Model Law; however, the Ministry of Justice eliminated this with no further explanation.<sup>722</sup>

Since an interim measure has not been finalized (and is not even necessarily about the subject-matter of a dispute), granting an interim measure in the form of an award may indeed be problematic.<sup>723</sup> Also, if the interim measure is issued in the form of an award, it requires (i) the scope of the award to include the interim measure and (ii) the interim measure to be recognizable and enforceable under Article 37 of the KAA—namely, on the recognition and enforcement of an arbitral award. Also, the award should be defined differently in this case. Due to these concerns, an interim measure is often granted in the form of an order (*vs.* an award).<sup>724</sup>

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<sup>721</sup> *Id.*

<sup>722</sup> As there is no official document available that explains why the Korean legislature changes the committee’s draft, the reason for this is unknown.

<sup>723</sup> Michael McIlwrath & John Savage, *INTERNATIONAL ARBITRATION AND MEDIATION-A PRACTICAL GUIDE*, Kluwer Law International, 2010. para. 5-156.

<sup>724</sup> Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on INTERNATIONAL ARBITRATION*, 6<sup>th</sup> ed. Para. 7.21, Oxford University Press, 2015 and Sun Ju Jeong, *op. cit.*, at. 238.

The second provision discussed herein is Article 18.7; its text focuses on the recognition and enforcement of an interim measure. The underline shows the difference in the UNCITRAL Model Law.

**Article 18.7 (Recognition and Enforcement of Interim Measures)**

*(1) The party who is seeking recognition of an interim measure granted by the arbitral tribunal may apply for the court's decision on its recognition and the party who wants compulsory execution based on the interim measure may apply for the court's decision on its enforcement.*

*(2) The party who is seeking recognition or enforcement of an interim measure and the other party shall inform the court of any termination, suspension or modification of that interim measure.*

*(3) The court where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.*

*(4) With regard to the enforcement of interim measure, the provisions related to the preservative measure under the Civil Execution Act shall apply.*

As previously noted, an interim measure differs from an arbitral award. Thus, the KAA (2016) includes an independent provision (*i.e.*, Article 18. 7) for its recognition and enforcement since the interim measure can be granted as an order—and recognized or enforced without being changed into the arbitral award.<sup>725</sup>

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<sup>725</sup> Suk, Kwang Hyun, *Courts' Roles in the Arbitral Procedures*, 37 Bar Association at. 84 (2007).

Article 18.7 (1) of the KAA (2016) specifies that when a party is seeking recognition or enforcement of interim measures, it should apply for the court's decision on it. Article 18.7 (2) specifies who should inform the court of this when there is any modification, suspension, or termination of an interim measure; it imposes this obligation on both parties while the UNCTRAL Model Law imposes this obligation only on (i) the party who is seeking (or has obtained) the recognition and (ii) enforcement of the interim measure.<sup>726</sup> Also, Article 18.7 (4) regulates the law enforcing the interim measure; indeed, the interim measure, ordered by the arbitral tribunal, is enforced through the same procedure as those for the preservative measure under the Civil Execution Act.

As the interim measure is recognized or enforced under separate and different regulations (*vs.* those for awards), there must also be separate regulations for refusing its recognition or enforcement. Article 18.8<sup>727</sup> states the grounds for refusing recognition or enforcement of interim measures; indeed, most

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<sup>726</sup> If the interim measure is modified in a favorable way towards the other party or suspended or terminated, it could be the other party who wants more to inform the court of these modification or suspension or termination of the interim measure.

<sup>727</sup> Article 18.8 (Grounds for refusing recognition or enforcement) (1) Recognition or enforcement of an interim measure may be refused only: 1. At the request of the party against whom it is invoked if the court is satisfied that: (a) If the party against whom it is invoked proves that: 1) Such refusal is warranted on the grounds set forth in Article 36(2)1(a) or (d); or 2) The party against whom it is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or 3) The interim measure deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the interim measure which contains decisions on matters submitted to arbitration may be recognized and enforced. (b) The decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal or the court has not been complied with; or (c) The interim measure has been terminated or suspended by the arbitral tribunal. 2. If the court, *ex officio*, finds that: (a) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulates the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or (b) Any of the grounds set forth in Article 36(2)2(a) or (b), apply to the recognition and enforcement of the interim measure. (2) The court where recognition or enforcement is sought under Article 18.7 shall not, in making that determination, undertake a review of the substance of the interim measure. (3) Any determination made by the court on any ground in paragraph (1) of this Article shall be effective only for the purposes of the application to recognize and enforce the interim measure.

grounds are the same as those under Article 36 of the KAA (*i.e.*, for actions for setting aside arbitral awards via the courts), except for the addition of Article 18.8 (1) 2 (a).<sup>728</sup>

### **Article 18.8 (1) 2 (a) of the KAA (2016)**

*(1) Recognition or enforcement of an interim measure may be refused only: [...some parts of 1 are omitted....] 2. If the court, ex officio, finds that: (a) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulates the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance;*

Article 18.8 (1) 2 (a) states that the court may refuse recognition or enforcement of an interim measure if the interim measure is incompatible with the powers conferred upon the court. This provision is indeed reasonable because an interim measure is quite different from an award in terms of content; for example, an interim measure is mostly a series of orders—such as to maintain or restore the status quo, take action to prevent an arbitral process, provide a means of preserving assets, and preserve evidence.

Thus, a key arbitration development has been the enabling of interim measures that are issued by arbitral tribunals—namely, to be recognizable and enforceable under independent and separate regulations. However, this will be meaningless if the court cannot deal with this quickly. Thus, a separate court might deal with arbitration only—in order to address such issues efficiently and quickly.<sup>729</sup> For example, in

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<sup>728</sup> While the UNCITRAL Model Law says that an interim measure issued by an arbitral tribunal should be recognized as binding, Article 18.8 paragraph (1) implies a binding effect of interim measure by providing a list of grounds which its recognition and enforcement may be refused based on.

<sup>729</sup> Sun Ju Jeong, *op. cit.*, at. 239.

Germany, issues associated with setting aside an arbitral award (or recognition and enforcement therein) should be submitted only to the High Court.<sup>730</sup> In sum, a separate court for arbitration is beneficial because a specialized court can address arbitration matters quickly and efficiently (whenever this is required).

#### 4.1.2. Issues Left for the Next Revision

The adoption of regulations herein (*i.e.*, associated with the interim measure) is indeed important within the context of arbitration; thus, many issues have been raised and discussed. These include the preliminary order that is regulated under Article 17 B and C of the UNCITRAL Model Law. The Committee has discussed whether or not the KAA (2016) should have adopted the provisions herein (*i.e.*, about the preliminary order) from the UNCITRAL Model Law; however, most members of the Committee agreed not to adopt them. The preliminary order is an unfamiliar system in Korea because it does not exist in other areas of Korean national law.<sup>731</sup> Also, as the UNCITRAL Model Law does not approve the enforcement of the preliminary order under Article 17 C (5),<sup>732</sup> the Committee believed that there would be no actual effect therein.<sup>733</sup>

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<sup>730</sup> Section 1062 of the German Code of Civil Procedure (1) The Higher Regional Court (“Oberlandesgericht”) designated in the arbitration agreement or, failing such agreement, the Higher Regional Court in whose district the place of arbitration is situated, is competent for decisions on applications relating to...

<sup>731</sup> The preliminary order is from the common law system. So, in the civil law system like Korea legal system, it does not exist and it is an unfamiliar concept. Also, because the preservative measure in the civil law system implies to include preliminary order and it is enforceable, adopting the preliminary orders does not have practical benefit in Korea. Cf. Sun Ju Jeong, *op. cit.*, at. 231~236.

<sup>732</sup> Article 17 C (5) of the UNCITRAL Model Law (Specific regime for preliminary orders) (5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

<sup>733</sup> Born said that the preliminary order which was drafted assuming the parties’ voluntary execution is ‘ill-considered’ one. Cf. Gary B. Born, *op. cit.*, at. 2018.

Second, the Committee had an argument over Article 18.8 (1) 2 (a).<sup>734</sup> This provision says that the court may reformulate the interim measure herein (*i.e.*, enforce it) as long as the substance of the interim measure has not been changed. Some members of the Committee have had doubts about whether it is appropriate for the court to have a right to reformulate an interim measure ordered by an arbitral tribunal;<sup>735</sup> most members have asserted that if the interim measure is not acceptable under Korean law, it should be refused for recognition or enforcement by the court. As previously noted, the contents of interim measures are quite different from those of arbitral awards. Thus, as a compromise, the KAA (2016) allows a court to reformulate an interim measure for recognition or enforcement whenever necessary—without changing or harming its substance.

The third issue was the geographical scope of interim measures that are enforceable in Korea. The Committee has discussed the enforceability of interim measures ordered in foreign countries. Some members of the Committee have contended that when interim measures are ordered in foreign countries, they should be enforceable as stated within the UNCTRAL Model Law—namely, in Article 17 H (1).<sup>736</sup> The line of reasoning herein is that because the court has a right to reformulate an interim measure that is not compatible with Korean law, there would never be a case wherein the court could not enforce an interim measure ordered in a foreign country.

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<sup>734</sup> Article 18.8 (1) 2 (a) (Grounds for refusing recognition or enforcement) Recognition or enforcement of an interim measure may be refused only if the court finds that the interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance.

<sup>735</sup> Commentary in the legislative history, p. 16.

<sup>736</sup> Article 17 H (1) of the UNCITRAL Model Law (Recognition and Enforcement) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

Nevertheless, other Committee members have disagreed. They believe that (i) enforcing an interim measure, ordered in a foreign country, is too advanced and (ii) the act of permitting the enforcement of interim measures, ordered in Korea, is sufficiently attractive (*i.e.*, helps bring ICA to Korea).<sup>737</sup> After much debate, the Committee decided to draft a provision stating that ‘an interim measure issued by an arbitral tribunal in Korea shall be recognized or enforced’; however, the KAA (2016) does not say anything about the nationality of the interim measures.<sup>738</sup> Indeed, whether or not an interim measure herein (*i.e.*, issued in a foreign country) is enforceable in Korea under the KAA is dependent on how the court will interpret it after the KAA (2016) becomes effective in Korea.

Fourth, regarding the grounds to refuse recognition or enforcement of the interim measure, Article 18.8 (1) 1 (c) states that “recognition or enforcement of an interim measure may be refused when it has been terminated or suspended by the arbitral tribunal.”

***Article 18.8 (1) 1 (c)***

*(1) Recognition or enforcement of an interim measure may be refused only: 1. At the request of the party against whom it is invoked if the court is satisfied that: [..... (a) and (b) are omitted....] (c) The interim measure has been terminated or suspended by the arbitral tribunal.*

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<sup>737</sup> Commentary in the legislative history, p.17.

<sup>738</sup> Article 18.8 (1) of the KAA (2016) (Recognition and Enforcement of Interim measures) (1) The party who is seeking recognition or enforcement of an interim measure may apply for the court’s decision on its recognition or enforcement.

The original draft made by the Committee was “... when it has been terminated or suspended by the arbitral tribunal or the court”; however, in the provision drafted, which court the provision indicates is not clear. Thus, the Committee agreed to change the draft (*e.g.*, via “the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted”) in order to make this more specific. Nevertheless, omitted in the KAA (2016) is (i) the court of the State wherein the arbitration takes place, (ii) the case associated with the termination of the interim measure, and (iii) the law associated with the granting of the interim measure. The KAA (2016) simply stipulates that “...when the interim measure has been terminated or suspended by the arbitral tribunal.”

Fifth, as emergency arbitrators are closely related to the interim measure, some members have wanted to explore this topic further. The first suggestion was to draft provisions about the emergency arbitrator;<sup>739</sup> however, the majority agreed that the emergency arbitrator is a matter that should be incorporated into arbitration rules of arbitral institutions (*vs.* arbitration law).<sup>740</sup> Another suggestion was that the revised statute should state that emergency arbitrators are considered to be arbitrators; thus, interim measures, issued by emergency arbitrators, are also recognizable or enforceable—referring to Article 2 (1) of the Singapore Arbitration Act.<sup>741</sup> In the end, the Committee agreed to leave such matters herein (*i.e.*, regarding emergency arbitrators) to arbitral institutions.

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<sup>739</sup> For supporting opinion for this, see Jeong, Kou Hwa, *A Study on Emergency Arbitrator Proceeding – With a Focus on Emergency Arbitrator Procedures Adopted by Major Arbitral Institutions*, 5 *Bub Hak Pyung Ron* 68, 115 (2015).

<sup>740</sup> Commentary in the legislative history, p.17

<sup>741</sup> Article 2 (1) of the Singapore Arbitration Act (Interpretation) (2) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators or an arbitral institution, and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organization.



Sixth, as there are a few changes between the UNCITRAL Model Law and the KAA (2016), some members of the Committee have suggested translating the provisions of the UNCITRAL Model Law directly, so they could be adopted as they are (*i.e.*, without changing their structures).<sup>742</sup> The Committee, however, rejected this suggestion because the majority believed that the provisions should be rearranged or modified by splitting and combining the paragraphs or sentences to fit them into the style or structure of Korean national law—even though Korea has adopted the UNCITRAL Model Law.<sup>743</sup> As a result, the paragraphs of the UNCITRAL Model Law have been reorganized and rewritten, according to the typical style of Korean national law.<sup>744</sup>

## 4.2. Place of Arbitration

The text in Article 21 focuses on the place of arbitration.<sup>745</sup> Indeed, there is not a significant change in this provision. Paragraphs (1) and (2) remain the same (as in the KAA (1999));<sup>746</sup> however, the structure of paragraph (3) has been changed to deliver the meaning more clearly.

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<sup>742</sup> Commentary in the legislative history, p.17

<sup>743</sup> Commentary in the legislative history, p.17

<sup>744</sup> Again, it has to be remembered that the English version of the revised parts of KAA is translated and written by an author because there is no official English version for the revised parts. The author tries to use as many provisions of the UNCITRAL Model Law as possible without changes unless the contents are different.

<sup>745</sup> This provision corresponds to article 20 of the UNCITRAL Model Law.

<sup>746</sup> Article 21 of the KAA (2016) (Place of Arbitration) (1) The parties shall be free to agree on the place of arbitration. (2) Failing such agreement under paragraph (1), the place of arbitration shall be determined by the arbitral tribunal having regard to all circumstances of the case, including the convenience of the parties. One thing that I would like to point out is Article 21 (1) of the KAA. It says that “the parties shall be free....”, but the word, ‘shall’ is not appropriate in this context. The Korean version of this provision says that “the parties are free....”, so it must have been changed to ‘shall’ while it was translated into English. Although it does not have much difference in meaning, the word, ‘shall’ had better be removed.

#### 4.2.1. What Has Been Amended

The followings are Article 21 (3) of the KAA (1999) and the KAA (2016). The difference between these two is underlined.

##### **Article 21 (3) of the KAA (1999)**

*Notwithstanding 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 of the parties, or for inspection of goods, place or documents.*

##### **Article 21 (3) of the KAA (2016)**

*Notwithstanding paragraphs (1) and (2), the arbitral tribunal may, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts of the parties, or for inspection of goods, place or documents. If the parties agreed otherwise, the arbitral tribunal shall not do so.*

The principle in this provision is that the parties can agree on the place of arbitration; however, if there is no agreement on the place of arbitration between the parties, the arbitral tribunal can make this determination (after having considered all of the circumstances associated with the dispute). Thus, Article 21 (3) exists for cases wherein arbitral tribunals want to gather at venues that differ from where the parties have agreed to meet for hearings and examinations. Indeed, while there was no intention initially to change the meaning of this provision, the Committee agreed that ‘unless otherwise agreed by the parties’ could cause misinterpretation—namely, that the arbitral tribunal can supposedly meet at any location for

a hearing or examination if there is no specific, agreed-upon venue therein (*i.e.*, by the parties). However, this is not the actual meaning in this provision; Article 21 (3) of the KAA instead states that the arbitral tribunal can meet at any location to hear witnesses and experts (associated with the parties) or for the inspection of goods, places, or documents—unless the parties specifically prohibit the arbitral tribunal from meeting at another location.

Consequently, in order to eliminate misinterpretation and ambiguity in this provision, the Committee decided to change the structure therein. Thus, paragraph (3) now states that the arbitral tribunal can meet at any location for a hearing and examination if they find it appropriate; however, if the parties agree *not* to allow an arbitral tribunal to do so, it should not do so. For a clearer meaning, the second part of paragraph (3) has been amended and states that “if the parties agreed otherwise, the arbitral tribunal shall not do so”; this implies that the parties can take away the arbitral tribunal’s right to determine a different place for a hearing and examination.

#### **4.2.2. Issues Left for the Next Revision**

Some members of the Committee suggested combining Articles 21 (1) and (2) just like Article 20 of the UNCITRAL Model Law; however, the Committee decided not to do so because there is no rationale to change them. Other than this, there was no other issue raised regarding Article 21.

### 4.3. Hearings<sup>747</sup>

The text in Article 25 focuses on the hearings.<sup>748</sup> There is no significant change in this provision. Paragraphs (1) and (2) remain; however, some words in paragraphs (3) and (4) are changed to make the meaning clearer.

#### 4.3.1. What Has Been Amended

The followings are the provisions of the KAA (1999) and KAA (2016) and the differences between these two are underlined.

#### Article 25 of the KAA (1999)

*(3) All statements, documents or other information supplied to the arbitral tribunal by a party shall be communicated to the other party.*

*(4) Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.*

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<sup>747</sup> This provision corresponds to Article 24 of the UNCITRAL Model Law. The structure of the provision is different, but the contents are the same.

<sup>748</sup> Article 25 of the KAA (2016) (Hearings) (1) Unless otherwise agreed 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: Provided, That 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. (2) The arbitral tribunal shall provide the parties sufficient notice of any oral hearing and of any meeting for the purpose of inspection of other evidence. (3) All statements, documents or other information supplied to the arbitral tribunal by a party shall be provided to the other party immediately. (4) Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be provided to the parties.

### **Article 25 of the KAA (2016)**

*(3) All statements, documents or other information supplied to the arbitral tribunal by a party shall be provided to the other party immediately.*

*(4) Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be provided to the parties*

The KAA (1999) requires that when an arbitral tribunal receives information (*e.g.*, statements and documents) from one party, the information must be submitted to the other party as well. Also, any type of expert report or evidentiary document therein (*i.e.*, relied upon by the arbitral tribunal) should be communicated to both parties, according to Article 25 of the KAA (1999). However, the meaning of ‘communication’ is not clear in this context. Furthermore, since the Committee was concerned that ‘communication’ could be interpreted and understood as ‘informing’ or ‘giving a notice,’ they agreed to use a different word that can deliver the right meaning (as intended in this provision).

When Article 25 (3) of the KAA (1999) states that the documents submitted by one party should be communicated to the other party, it does not mean that one party should inform the other party of the fact that the documents have been submitted to the arbitral tribunal. The intended meaning within this provision is that the other party should physically have all of the documents that the original party submitted to the arbitral tribunal. If the other party is not provided with these documents, the arbitral award may be set aside based on procedural defect (*i.e.*, unfair treatment during the arbitral proceedings). Consequently, the Committee decided to use ‘provide’ (*vs.* ‘communicate’). By doing so, the provision

can deliver the right meaning—namely, by making clear that both parties should be provided with all necessary documents that are related to the proceedings of the arbitration.

Another change, in this provision, is that the Committee added the word ‘immediately’ in paragraph (3). ‘Immediately’ means that ‘as soon as’ one party submits the documents to the arbitral tribunal, the other party should be provided with them. Article 25 does not expressly specify *who* has an obligation to provide the documents to the parties; however, the Committee says that the provision should be interpreted that the arbitral tribunal has an obligation to provide the parties with the documents. Thus, if one party submits a document, the arbitral tribunal or an arbitral institution (if it is an institutional arbitration) should ensure that the other party has the document as well.

#### **4.3.2. Issues Left for the Next Revision**

There was no other issue discussed in relation to this provision.

## 4.4. Court Assistance<sup>749</sup>

The text in this provision is focused on court assistance when the arbitral tribunal accepts evidence and examines witnesses. Although an arbitration is a private DRS, there are some stages wherein the court—as a governmental authority—must be involved.<sup>750</sup>

### 4.4.1. What Has Been Amended

In Article 28 of the KAA (2016), some words have been changed and two paragraphs are added. The followings are Article 28 of the KAA (1999) and the KAA (2016). The differences between these two are underlined.

#### Article 28 of the KAA (1999)

- (1) The arbitral tribunal may, ex officio or in receipt of the application of the parties, entrust the court with the taking of evidence.*
- (2) Where paragraph (1) applies, the arbitral tribunal may, in writing, specify the matters to be entered in the report on evidence by the court and others subject to the taking of evidence.*
- (3) The court from which the arbitral tribunal requests the assistance shall, after taking evidence, send the records with respect to the taking of evidence, such as a certified copy of the report on witness examination and transcripts of the report on admissibility of the evidence to the arbitral tribunal without delay.*

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<sup>749</sup> This provision corresponds to Article 27 of the UNCITRAL Model Law.

<sup>750</sup> Arbitration is based on the agreement between the parties. Arbitrators are appointed by the agreement of the parties and their power is given by the parties. So, the power of the arbitral tribunal is limited only to the parties. As the arbitral tribunal does not have any authority over others, the assistance of the court is essential.

*(4) The arbitral tribunal shall pay necessary expenses incurred in taking evidence to the court from which it requests the assistance.*

#### **Article 28 of the KAA (2016)**

*(1) The arbitral tribunal may, ex officio or in receipt of the application of the parties, entrust the court with the taking of evidence or request the court to assist in taking evidence.*

*(2) Where the arbitral tribunal entrusts the court with the taking evidence, the arbitral tribunal may, in writing, specify the matters to be entered in the report on evidence by the court and others subject to the taking of evidence.*

*(3) Where paragraph (2) applies, when the court takes evidence, the arbitral tribunal or the parties can participate in taking of evidence after getting permission from the presiding judge.<sup>751</sup>*

*(4) Where paragraph (2) applies, the court shall, after taking evidence, send the records with respect to the taking of evidence, such as a certified copy of the report on witness examination and transcripts of the report on admissibility of the evidence to the arbitral tribunal without delay.*

*(5) Where the arbitral tribunal requests the court to assist in taking evidence, the court may take a measure which is considered appropriate such as ordering the witness to attend the hearing or ordering the person who possesses the document to submit it to the arbitral tribunal.<sup>752</sup>*

*(6) The arbitral tribunal shall pay necessary expenses incurred in taking evidence to the court.*

Article 28 is amended to enable the arbitral tribunal to have more controlling power in the acceptance of evidence. First, Article 28 of the KAA (1999) specifies that the arbitral tribunal may entrust

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<sup>751</sup> Paragraph (3) is newly drafted in the KAA (2016).

<sup>752</sup> Paragraph (5) is newly drafted in the KAA (2016).



the court with accepting evidence. The word, ‘entrust’ is interpreted herein as the court doing what the arbitral tribunal requests. Thus, the court accepts evidence herein on behalf of the arbitral tribunal. That is why the following paragraph (2) states that the arbitral tribunal can, in writing, specify the evidentiary matters that the court should include in the report on evidence. Thus, the court does what the arbitral tribunal asks in writing. However, under Article 28 of the KAA (1999), there is no way that the arbitral tribunal can take the evidence directly by itself.

Indeed, the acceptance of evidence indirectly through the court is not problematic or difficult when the evidence can be provided via written documents (*e.g.*, in association with queries about certain facts or requests for deliveries of documents).<sup>753</sup> However, when a case requires the examination of one or more witnesses, it is not efficient for the court to undertake this on behalf of the arbitral tribunal. Thus, the Committee decided to add that ‘the arbitral tribunal may request the court to assist in taking evidence’ to Article 28 (1) and paragraph (5) is thus newly drafted. However, paragraph (5) only applies when the arbitral tribunal asks the court for assistance therein (*i.e.*, in accepting evidence). Alternatively, when the arbitral tribunal requests the court to assist in examining a witness or other evidence under paragraph (1), the court can order the witness to attend the hearing or submit documents therein (*i.e.*, when it is necessary under paragraph (5)). These paragraphs require the arbitral tribunal to examine witness(es) and documents directly. This direct examination assists the arbitral tribunal with (i) determining what they need to know

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<sup>753</sup> Commentary in the legislative history, p. 24.

and (ii) making correct decisions in relation to the dispute. This provision refers to Section 44 of the Arbitration Act 1996<sup>754</sup> and Article 30 of the Singapore Arbitration Act.<sup>755</sup>

Second, another newly drafted provision, paragraph (3) of Article 28, provides the arbitral tribunal and the parties with an opportunity to participate in accepting evidence under the permission of the presiding judge when the court takes evidence via a request from the arbitral tribunal. Here, it is not clear what ‘participation’ in paragraph (3) means. For example, does it mean that the arbitral tribunal and parties can examine the evidence under the permission of the presiding judge? As this text is newly drafted, the meaning of participation becomes clearer when paragraph (3) is applied; otherwise, it must be interpreted by the court after the KAA (2016) becomes effective.

Third, paragraph (5) also contains newly drafted text (as previously noted); it applies only when the arbitral tribunal requests the court to assist with accepting evidence. As can be seen in the provision, this paragraph makes clear that requesting such assistance is different from entrusting the court herein. Paragraphs (2) through (5) are divided into two categories; paragraph (5) states what the court may do when there is a request for assistance by the arbitral tribunal, while paragraphs (2), (3), and (4) are applicable only when the arbitral tribunal entrusts the court with taking evidence.<sup>756</sup>

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<sup>754</sup> Section 44 of Arbitration Act 1996 (Court powers exercisable in support of arbitral proceedings): (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings. (2) Those matters are (a) the taking of the evidence of witness... [The rest is omitted]

<sup>755</sup> Article 30 of the Singapore Arbitration Act (Witnesses may be summoned by subpoena): (2) The Court may order that a subpoena to testify or a subpoena to produce documents shall be issued to compel the attendance before an arbitral tribunal of a witness wherever he may be within Singapore. [The rest is omitted]

<sup>756</sup> Commentary in the legislative history, p. 24.

Fourth, paragraph (6) of the KAA (2016), which corresponds to paragraph (4) of the KAA (1999), changes the phrase ‘the court from which it requests the assistance’ into ‘the court.’ Paragraph (4) of the KAA (1999) in the Korean version states ‘the court which the arbitral tribunal entrusts’; however, the English version of this paragraph is wrongly translated as “the court from which it requests the assistance.”<sup>757</sup> The KAA (2016) states ‘the court’ in order to include all courts that are involved in taking evidence—either under entrustment or assistance. The Committee made clear that ‘the court’ includes any court that is involved either directly or indirectly with accepting evidence.<sup>758</sup>

#### **4.4.2. Issues Left for the Next Revision**

Three issues were raised during the revision of Article 28. The focus of the first issue was on who can entrust the court with accepting evidence. Some members of the Committee claimed that the parties should be given a right to entrust the court with accepting evidence if (i) there is consent by the arbitral tribunal or (ii) the parties agree to do so without consent of the arbitral tribunal.<sup>759</sup> However, this suggestion was rejected based on the notion that the arbitral tribunal should make the decision therein (*i.e.*, whether this action is necessary or not).<sup>760</sup> Also, the parties can request, at any time, that the arbitral tribunal entrust the court with accepting evidence.<sup>761</sup>

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<sup>757</sup> As discussed before, entrusting and requesting for assistance are different.

<sup>758</sup> Commentary in the legislative history, p. 24.

<sup>759</sup> Commentary in the legislative history, p. 25.

<sup>760</sup> Commentary in the legislative history, p. 25.

<sup>761</sup> Commentary in the legislative history, p. 25.

The second focused on the examination of a witness by the arbitral tribunal. The KAA (2016) allows the arbitral tribunal to examine a witness under the assistance of the court; however, there is no way to prevent a witness therein (*i.e.*, a third party) from committing perjury. In this sense, some members of the Committee have contended that only a court should have a right to examine a witness—leaving the provision as it is in the KAA (1999).<sup>762</sup>

The last issue focuses on the procedure of accepting evidence, which is regulated in paragraph 28 (3) of the KAA (2016). Some members of the Committee have claimed that in order to avoid ambiguity in interpreting the word ‘participation,’ paragraph (3) should provide examples therein—such as looking through documents, verifying or investigating submitted objects, or questioning a witness or expert under the permission of a presiding judge.<sup>763</sup> However, this suggestion was also ultimately rejected based on the determination that it should be a presiding judge who decides what ‘participation’ means and allows the arbitral tribunal (or parties) to undertake such actions.<sup>764</sup> Thus, it is not appropriate to define the meaning of ‘participation’ and make a list of what the arbitral tribunal or parties can do when they participate in accepting legal evidence therein. Therefore, the Committee determined that interpretations of the word ‘participation’ should be made by presiding judges who are entitled to undertake such decision-making after considering the circumstances within each case.

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<sup>762</sup> Commentary in the legislative history, p. 25.

<sup>763</sup> Commentary in the legislative history, p. 25.

<sup>764</sup> Commentary in the legislative history, p. 25.

## 5. Termination of arbitration and Newly Drafted Provision

Chapter V consists of eight articles, including two newly drafted ones: (i) rules applicable to the substance of disputes (Article 29), (ii) decision-making by an arbitral tribunal (Article 30), (iii) settlement (Article 31), (iv) form and details of arbitral awards (Article 32), (v) termination of proceeding (Article 33), (vi) correction or interpretation of award or additional award (Article 34), (vii) allocation of the costs of arbitration (Article 34. 2), and (viii) delayed interest (Article 34. 3). Among these provisions, Article 34.2 and 34.3 are newly drafted in the KAA (2016).

### 5.1. Allocation of the Cost of Arbitration

This provision is a newly drafted one. Although the KAA (1999) does not specify the cost of arbitration, the bearers of such costs are typically noted in the arbitral awards rendered in Korea. During the revision process, however, the necessity of such a provision (*i.e.*, regulating the cost of arbitration) was raised. The Committee determined that the parties can agree on the allocation of arbitration costs; however, in a case with no agreement between the parties, the law should specify that the arbitral tribunal can determine this matter.<sup>765</sup> Some members of the Committee claimed that the law should provide more detailed regulations—such as the basis of determination, with examples of the grounds on which the arbitral tribunal may make such determinations.<sup>766</sup>

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<sup>765</sup> Commentary in the legislative history, p. 28.

<sup>766</sup> Commentary in the legislative history, p. 28.

### 5.1.1. What Has Been Amended

#### *Article 34.2 (Allocation of costs of arbitration)*

*Unless otherwise agreed by the parties, the arbitral tribunal may determine the allocation of the costs of or incidental to any proceedings of arbitration with consideration of all relevant circumstances.*

This new provision makes clear that the parties can agree on the allocation of arbitration costs and if they do not, the arbitral tribunal can determine such fees; however, a specific itemization therein (*i.e.*, of such costs) is not clear although Article 34.2 says ‘the costs of or incidental to any proceedings of arbitration with consideration of all relevant circumstances.’ This provision refers to Section 1057 of the German Code of Civil Procedure,<sup>767</sup> Article 49 of the Japanese Arbitration Law,<sup>768</sup> Section 61 of the

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<sup>767</sup> Section 1057 (1) of the German Code of Civil Procedure (Decision on costs) (1) Unless the parties agree otherwise, the arbitral tribunal shall allocate, by means of an arbitral award, the costs of the arbitration as between the parties, including those incurred by the parties necessary for the proper pursuit of their claim or defense. It shall do so at its discretion and take into consideration the circumstances of the case, in particular the outcome of the proceedings. (2) To the extent that the costs of the arbitral proceedings have been fixed, the arbitral tribunal shall also decide the amount to be borne by each party. If the costs have not been fixed or if they can only be fixed once the arbitral proceedings have been terminated, the decision shall be taken by means of a separate award.

<sup>768</sup> Article 49 of the Japanese Arbitration Law (Appointment of the Costs of the Arbitral Proceedings) (1) The costs disbursed by the parties with respect to the arbitral proceedings shall be apportioned between the parties in accordance with the agreement of the parties. (2) Failing an agreement as described in the preceding paragraph, each party shall bear the costs it has disbursed with respect to the arbitral proceedings. (3) In accordance with the agreement of the parties, if any, the arbitral tribunal may, in an arbitral award or in an independent ruling, determine the apportionment between the parties of the costs disbursed by the parties with respect to the arbitral proceedings and the amount that one party should reimburse to the other party based thereon. (4) If the matters described in the preceding paragraph have been determined in an independent ruling, such ruling shall have the same effect as an arbitral award. (5) The provisions of article 39 shall apply to the ruling described in the preceding paragraph.

Arbitration Act 1996,<sup>769</sup> and Section 74 of the Hong Kong Arbitration Ordinance.<sup>770</sup> The Arbitration Act (1996), with seven articles under the heading of ‘costs of the arbitration,’ has detailed regulations (*e.g.*, to explain the costs of arbitration,<sup>771</sup> the revocable costs of arbitration,<sup>772</sup> and how these costs should be determined). However, in spite of the suggestion for detailed regulations like ones in the Arbitration Act 1996, the Committee has decided to draft the provision based on Article 1057 (1) of the German Code of

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<sup>769</sup> Section 61 of the Arbitration Act 1996 (Award of costs) (1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties. (2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

<sup>770</sup> Section 74 of the Hong Kong Arbitration Ordinance (Arbitral tribunal may award costs of arbitral proceedings) (1) An arbitral tribunal may include in an award directions with respect to the costs of arbitral proceedings (including the fees and expenses of the tribunal). (2) The arbitral tribunal may, having regard to all relevant circumstances (including the fact, if appropriate, that a written offer of settlement of the dispute concerned has been made), direct in the award under subsection (1) to whom and by whom and in what manner the costs are to be paid (3) The arbitral tribunal may also, in its discretion, order costs (including the fees and expenses of the tribunal) to be paid by a party in respect of a request made by any of the parties for an order or direction (including an interim measure). (4) The arbitral tribunal may direct that the costs ordered under subsection (3) are to be paid forthwith or at the time that the tribunal may otherwise specify. (5) Subject to section 75, the arbitral tribunal must (a) assess the amount of costs to be awarded or ordered to be paid under this section (other than the fees and expenses of the tribunal); and (b) award or order those costs (including the fees and expenses of the tribunal). (6) Subject to subsection (7), the arbitral tribunal is not obliged to follow the scales and practices adopted by the court on taxation when assessing the amount of costs (other than the fees and expenses of the tribunal) under subsection (5). (7) The arbitral tribunal (a) must only allow costs that are reasonable having regard to all the circumstances; and (b) unless otherwise agreed by the parties, may allow costs incurred in the preparation of the arbitral proceedings prior to the commencement of the arbitration. (8) A provision of an arbitration agreement to the effect that the parties, or any of the parties, must pay their own costs in respect of arbitral proceedings arising under the agreement is void. (9) A provision referred to in subsection (8) is not void if it is part of an agreement to submit to arbitration a dispute that had arisen before the agreement was made.

<sup>771</sup> Section 59 of the Arbitration Act 1996 (Costs of the arbitration) (1) References in this Part to the costs of the arbitration are to (a) the arbitrators’ fee and expenses, (b) the fees and expenses of any arbitral institution concerned, and (c) the legal or other costs of the parties. (2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration.

<sup>772</sup> Section 63 of the Arbitration Act 1996 (The revocable costs of the arbitration) (1) The parties are free to agree what costs of the arbitration are recoverable. (3) The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit. (5) Unless the tribunal or the court determines otherwise (a) the recoverable costs of the arbitration shall be determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and (b) any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favor of the paying party.

Civil Procedure.<sup>773</sup> Indeed, as both the Korean and German legal systems are civil law systems, the Committee tended to focus on German law more (vs. common-law legal systems).<sup>774</sup>

### 5.1.2. Issues Left for the Next Revision

All members of the Committee agreed on the necessity of having a new provision to focus on the allocation of arbitration costs; thus, the KAA (2016) includes a default rule (via the adoption of Article 1057 (1) of the German Code of Civil Procedure). During the process of drafting the provision, several issues were raised. The first issue was whether it is necessary to specify details, such as a clarification of arbitration costs and what is included therein.<sup>775</sup> For example, some members have claimed that the law should at least clarify that arbitration costs include attorneys' fees.<sup>776</sup> Indeed, after a significant discussion, the Committee agreed that having detailed provisions would be convenient in some ways; however, since this is a new provision, they would need some time to see how it would work after the KAA (2016) becomes effective.<sup>777</sup>

Second, some Committee members have suggested that the allocation of arbitration costs should follow one of two different methods—and the arbitral tribunal should make the decision therein. Namely, that when a party loses a case, it should pay the whole cost of arbitration or each party should bear its own

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<sup>773</sup> Commentary in the legislative history, p. 28.

<sup>774</sup> Also, it is true that most members of the Committee studied in Germany, rather than in U.K or U.S., so it naturally affects the way of revision.

<sup>775</sup> Commentary in the legislative history, p. 28.

<sup>776</sup> With regard to the attorney's fee, even though the Committee considered it necessary to specifically include the attorney's fee in the cost of arbitration, they also agreed that specifying this matter in the statute needs more consideration because it could be varied in different jurisdictions.

<sup>777</sup> Commentary in the legislative history, p. 29.



costs.<sup>778</sup> However, the majority of the Committee agreed that the provision of such directives is too simplistic and thus may constrain the decision-making autonomy of arbitral tribunals (seeking to consider all relevant circumstances).<sup>779</sup>

Third, in the case of ad hoc arbitration, the total cost of arbitration is not determinable. Thus, two options were presented: (i) adopting Article 1057 (2) of the German Code of Civil Procedure, which states that the arbitral tribunal should determine the amount of costs therein, *i.e.*, the sums each party has to bear (vs. making an allocation) or (ii) creating a separate provision that allows the parties to request the courts to determine the total amounts of arbitration costs.<sup>780</sup>

The last issue was whether it is necessary to use compulsory language for this provision via the utilization of “shall” (vs. “may”). This suggestion was made because some members of the Committee were concerned about cases wherein there is no agreement between the parties about the cost of arbitration—and the arbitral tribunal does not determine the allocation of the costs of arbitration. In such cases, the parties may request that the court determines who pays what. Furthermore, in order to avoid a further dispute like this, they have asserted that it is necessary to impose this obligation on the arbitral tribunal (by using compulsory language).<sup>781</sup>

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<sup>778</sup> Commentary in the legislative history, p. 29.

<sup>779</sup> Commentary in the legislative history, p. 29.

<sup>780</sup> Commentary in the legislative history, p. 29.

<sup>781</sup> Commentary in the legislative history, p. 29.

## **5.2. Delayed Interest**

The KAA (1999) does not have a provision about delayed interest. Thus, the Committee agreed to draft a new provision that stipulates when an arbitral tribunal can order the payment of delayed interest therein (*i.e.*, when there is no agreement between the parties).

### **5.2.1. What Has Been Amended**

#### **Article 34.3 of the KAA (2016) (Delayed Interest)**

*Unless otherwise agreed by the parties, the arbitral tribunal may award, at the time when the award is rendered, the delayed interest which is considered appropriate having considered all circumstances related to the dispute.*

Article 34.3 allows the parties to agree on the matter of delayed interest—and gives the arbitral tribunal authority to award the delayed interest. When the provision was drafted, the Committee agreed to take out ‘at the time when the award is rendered’ because it could be interpreted as imposing a limitation on the time (or period) that the arbitral tribunal can order the payment of delayed interest. However, in spite of the Committee’s suggestion, the KAA (2016) still includes this phrase. This article refers to (i)

Section 49 of the Arbitration Act 1996,<sup>782</sup> (ii) Article 35 of the Singapore Arbitration Act,<sup>783</sup> and (iii) Sections 79 and 80 of the Hong Kong Arbitration Ordinance.<sup>784</sup>

### 5.2.2. Issues Left for the Next Revision

Although the new provision provides an arbitral tribunal with the power to award delayed interest, some members of the Committee have questioned whether awarding delayed interest is a procedural

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<sup>782</sup> Section 49 of Arbitration Act 1996 (Interest) (1) The parties are free to agree on the powers of the tribunal as regards the award of interest. (2) Unless otherwise agreed by the parties, the following provisions apply. (3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case (a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award; (b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment. (4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rates as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs). (5) References in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal. (6) The above provisions do not affect any other power of the tribunal to award interest.

<sup>783</sup> Article 35 of the Singapore Arbitration Act (Interest) (1) Subject to subsection (3), unless otherwise agreed by the parties, the arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest from such date, at such rate and with such rest as the arbitral tribunal considers appropriate, for any period ending not later than the date of payment on the whole or any part of (a) any sum which is awarded by the arbitral tribunal in the arbitral proceedings; (b) any sum which is in issue in the arbitral proceedings but is paid before the date of the award; or (c) costs awarded or ordered by the arbitral tribunal in the arbitral proceedings. (2) Nothing in subsection (1) shall affect any other power of the arbitral tribunal to award interest. (3) Where an award directs a sum to be paid, that sum shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

<sup>784</sup> Section 79 of the Hong Kong Arbitration Ordinance (Arbitral tribunal may award interest) (1) Unless otherwise agreed by the parties, an arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest from the dates, at the rates, and with the rests that the tribunal considers appropriate, subject to section 80, for any period ending not later than the date of payment (a) on money awarded by the tribunal in the arbitral proceedings; (b) on money claimed in, and outstanding at the commencement of, the arbitral proceedings but paid before the award is made; or (c) on costs awarded or ordered by the tribunal in the arbitral proceedings. (2) Subsection (1) does not affect any other power of an arbitral tribunal to award interest. (3) A reference in subsection (1) (a) to money awarded by the tribunal includes an amount consequence of a declaratory award by the tribunal.

Section 80 of the Hong Kong Arbitration Ordinance (Interest on money or costs awarded or ordered in arbitral proceedings) (1) Interest is payable on money awarded by an arbitral tribunal from the date of the award at the judgment rate, except when the award on otherwise provides. (2) Interest is payable on costs awarded or ordered by an arbitral tribunal from (a) the date of the award or order on costs; or (b) the date on which costs ordered are directed to be paid forthwith, at the judgment rate, except when the award or order otherwise provides. (3) In this section, “judgment rate” means the rate of interest determined by the Chief Justice under section 49 (1) (b) (Interest on Judgments) of the High Court Ordinance.

matter or a substantial matter and the interest before and after the date of an award should be the same or different.<sup>785</sup> Thus, this article needs more discussion (in relation to how the interest rate should be different).<sup>786</sup> As to all the questions and issues raised herein, the Committee decided to discuss them later because of time constraints.<sup>787</sup>

## **6. An Arbitral Award**

Chapters VI and VII focus on the arbitral award. Chapter VI has two articles: (i) Article 35 (which focuses on the effect of arbitral awards) and (ii) Article 36, which is focused on recourse against the award. Chapter VII (*i.e.*, the last chapter) is focused on the recognition and enforcement of the arbitral award.

### **6.1. Effect of Arbitral Award**

Article 35 states that an arbitral award is final and has the same effect as the judicial decision.

#### **6.1.1. What Has Been Amended**

Article 35 of the KAA (2016) builds on the text within the KAA (1999) via the inclusion of an additional condition (as seen in the text below).

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<sup>785</sup> Commentary in the legislative history, p. 30~31.

<sup>786</sup> Commentary in the legislative history, p. 31.

<sup>787</sup> Commentary in the legislative history, p. 31.

### **Article 35 of the KAA (1999)**

*Arbitral awards shall have the same effect on the parties as the final and conclusive judgment of the court.*

### **Article 35 of the KAA (2016)**

*Arbitral awards shall have the same effect on the parties as the final and conclusive judgment of the court unless its recognition or enforcement is refused under article 38.*

Article 35 of the KAA (1999) clarifies the effects of arbitral awards; however, the Committee's question was whether the arbitral award is still binding and has the same effect as the final and conclusive judgment of the court—even if it is refused for recognition or enforcement.<sup>788</sup> In order to answer this question, four articles herein (*i.e.*, related to arbitral awards) have to be interpreted together. (1) Article 35 of the KAA (1999), which focuses on the effects of the arbitral award, states that an arbitral award is the same as the final judgment of the court. (2) Article 37 (which is about the recognition and enforcement of arbitral awards) states that arbitral awards are recognized or enforced through a court's judgment. (3) Recognition and enforcement therein (*i.e.*, clarified in Article 37) are subject to Article 38 (if they are domestic arbitral awards) or Article 39 (if they are foreign arbitral awards). Thus, unless there is a ground for refusal of recognition or enforcement in the arbitral award, it will be recognized or enforced. (Conversely, if there is a ground for refusal, it will not be recognized or enforced.) However, Article 35 of the KAA (1999) was of concern to the Committee because it can be understood that even when an

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<sup>788</sup> Commentary in the legislative history, p.34

arbitral award is refused for recognition or enforcement, it still has a binding effect (on a par with a court's final judgment).<sup>789</sup> Setting aside is the only way to make the arbitral award ineffective; thus, if the award is not set aside, it has a binding effect (regardless of whether or not it is refused for recognition or enforcement).<sup>790</sup> However, some members of the Committee have claimed that if the award is refused for recognition or enforcement because of a certain ground, it should be set aside automatically (because the grounds for setting aside are the same as those for refusal of recognition or enforcement).<sup>791</sup> Thus, if the award is refused for recognition or enforcement, it no longer has a binding effect.

Nevertheless, there is a the potential interpretation herein (*i.e.*, of Article 35 of the KAA (1999)) that the award still has the same effect on the parties as the final and conclusive judgment of the court—even if it is refused for recognition or enforcement based on the ground specified in Article 38.<sup>792</sup> As a result, in order to eliminate the misunderstanding or misinterpretation of Article 35 of the KAA (1999), the Committee added one condition thereon.<sup>793</sup> Article 35 of the KAA (2016) states that arbitral awards have the same effect on the parties as the final and conclusive judgment of the court (unless they are refused for recognition or enforcement under Article 38);<sup>794</sup> this indeed clarifies that the arbitral award is not final and conclusive (like the court's judgment) if its recognition or enforcement is refused—regardless of whether it has been set aside or not.

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<sup>789</sup> Commentary in the legislative history, p.34.

<sup>790</sup> Commentary in the legislative history, p.34

<sup>791</sup> Commentary in the legislative history, p.34

<sup>792</sup> Commentary in the legislative history, p.34

<sup>793</sup> Commentary in the legislative history, p.34

<sup>794</sup> Article 38 of the KAA is about recognition and enforcement of domestic arbitral awards.

### 6.1.2. Issues Left for the Next Revision

The first issue herein was the relationship between the effect and vacation of an arbitral award. Some members of the Committee have asserted that even when there is a ground whereon an arbitral award may be set aside, the arbitral award should have a binding effect unless it is set aside.<sup>795</sup> Thus, setting aside the arbitral award is the only way to make an arbitral award ineffective and non-binding. Conversely, other members have claimed that as long as a ground exists for setting aside, the arbitral award should not have a binding effect (even though it has not been set aside); thus, they have suggested inserting this into the provision.<sup>796</sup> However, how does one know whether a ground for setting aside even exists? Indeed, if the law states that an arbitral award is not binding when there is a ground for setting aside, every arbitral award should be reviewed by a court before it is given a binding effect. However, this conflicts with the role of arbitration and a key goal herein (*i.e.*, less involvement of the courts in arbitration).

Article 35 of the KAA (2016) has an additional condition that applies to domestic arbitral awards only; some Committee members have expressed concern that this results in the law making the effect of domestic arbitral awards weaker.<sup>797</sup> Also, they have claimed that there should not be two different standards herein (*i.e.*, in the binding effects of domestic and foreign arbitral awards). However, the KAA does not actually include two different standards (in spite of this claim). For the foreign arbitral awards, the KAA simply states that the New York Convention applies to foreign arbitral awards that are rendered in Contracting States (because Korea ratified the New York Convention). The purpose of the Convention

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<sup>795</sup> Commentary in the legislative history, p.35

<sup>796</sup> Commentary in the legislative history, p.35

<sup>797</sup> Commentary in the legislative history, p.35

is to ensure that foreign arbitral awards have a binding effect, irrespective of borders. Thus, the Convention states that a Contracting State should recognize foreign arbitral awards as binding and enforce them; however, it also provides for the basis for refusing recognition and enforcement. Thus, the statute simply states that the Convention is applicable to foreign arbitral awards within Contracting States.

Third, some members of the Committee have suggested that the grounds for setting aside an arbitral award should have appeared in Article 35, which focuses on the effect of the arbitral award.<sup>798</sup> The rationale for this suggestion was that it is more logical to specify that ‘the arbitral award should have the same effect as the final and conclusive judgment of the court unless it is set aside under the following grounds’ and the following grounds should be listed.<sup>799</sup> In this case, Article 35 would have two regulations therein (*i.e.*, about the effect of arbitral awards and grounds for setting aside). If this suggestion had been accepted in the KAA (2016), it would have required the court to review every arbitral award in order to get a final and conclusive effect; heretofore, an arbitral award would not have been final and conclusive.

## 6.2. Setting Aside of Arbitral Award

Article 36 focuses on the basis whereon an arbitral award may be set aside. This provision was wholly adopted from Article 34 of the UNCITRAL Model Law in 1999.<sup>800</sup>

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<sup>798</sup> Commentary in the legislative history, p.35

<sup>799</sup> Commentary in the legislative history, p.35

<sup>800</sup> Article 36 of the KAA (2016) (Action for Setting Aside Arbitral Awards to Court): (1) Recourse against an arbitral award may be raised only by an action for setting aside such arbitral award to a court. (2) An arbitration award may be set aside by the court only if: 1. The party making an application for setting aside furnishes proof that: (a) A party to arbitration agreement was under some incapacity under the law applicable to him/her; 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 Korea; (b) A party



### 6.2.1. What Has Been Amended

In comparison to Article 36 of the KAA (1999), a small change has been made in Article 36 (2) 1 (b), which is underlined below.

#### **Article 36 (2) 1 (b) of the KAA (2016)**

##### **(Action for Setting Aside Arbitral Awards to Court)**

*(2) An arbitration award may be set aside by the court only if:*

*1. The party making an application for setting aside furnishes proof that:*

*(b) A party making the application was not given proper notice of the appointment of an arbitrator or of arbitral proceedings or was otherwise unable to present his/her case;*

There is no change in the contents of this article; however, the Committee has suggested that Article 36 (2) 1 (b) of the KAA (1999)<sup>801</sup> has a word that could make the meaning of the provision differ

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making the application was not given proper notice of the appointment of an arbitrator or of arbitral proceedings or was otherwise unable to present his/her case; (c) The award has dealt 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: Provided, That if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside. (d) The composition of the arbitral tribunal or arbitral proceedings were not in accordance with agreement of the parties, unless such agreement was in conflict with any mandatory provision of this Act from which the parties cannot derogate, or failing such agreement, were not in accordance with this Act; 2. The court finds on its own initiative that: (a) The subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Korea; (b) The award is in conflict with the good morals and other forms of social order of the Republic of Korea. (3) An action for setting aside an arbitral award shall be raised within three months from the date on which the party making such 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. (4) After a final and conclusive judgment for recognition or execution of the relevant award by a court of the Republic of Korea is rendered, no action for setting aside the award may be raised.

<sup>801</sup> The Korean version of Article 36 (2) 1 (b) of the KAA (1999) (Recourse Against Award) : (2) An arbitral award may be set aside by the court specified in article 6 only if: 1. The party making an application for setting aside an arbitral award

from the text in the UNCITRAL Model Law. When the UNCITRAL Model Law was translated into Korean in 1999, the wording in the Model Law was ‘unable to present his case’; however, the Korean version of the KAA (1999) specifies ‘unable to present the issue of his/her case’ and the English version of the KAA (1999) says ‘unable to present his/her case.’ Thus, the English version of the KAA (1999) contains the same wording as the Model Law; however, the Korean version narrows the scope of issues that the parties may raise. According to Article 36 (2) 1 (b), the award may be set aside only when a party cannot present the issue of his or her case therein because of an improper notice; however, this is not what was intended. Thus, the Committee agreed to omit the word ‘issue’ in the KAA (2016).

### **6.2.2. Issues Left for the Next Revision**

First, in order to attract more ICA to Korea, some members of the Committee suggested that the KAA (2016) should clearly specify that the parties, by their agreement, are not allowed to exclude certain grounds that are specified in the law—and are not allowed to agree to prohibit the application for setting aside.<sup>802</sup> However, this suggestion was rejected because the majority of the Committee agreed that keeping (vs. changing) the UNCITRAL Model Law would be preferable.

Second, there was a suggestion that the KAA (2016) should specify the next step after the arbitral award is set aside. When an arbitral award is set aside, there could be two likely outcomes: (i) the

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furnishes proof that: (b) A party making the application was not given proper notice of the appointment of an arbitrator or of arbitral proceedings or was otherwise unable to present the issue of his/her case.

<sup>802</sup> Ho Won Lee, *General International Laws: Expansion and Limitation of the Grounds for Setting Aside International Arbitral Awards – With Regards to the Judicial Review on the Merits*, 21(2) *Journal of International Commercial Law Studies* 181, 181 (2012) & Kwang Hyun Suk, *Proposals for the Revision of the Korean Arbitration Act – with a Focus on International Commercial Arbitration*, *Seoul Law Journal*, 53 *Seoul Law Journal* 533, 572 (2012).

arbitration agreement is extinct, there is no valid arbitration agreement, and the parties can go to court to settle their disputes or (ii) the arbitration agreement is revived and the parties can undertake arbitration again.<sup>803</sup> Some members of the Committee suggested specifying the associated choice therein (*i.e.*, after the arbitral award is set aside) in Article 36 of the KAA (2016); however, the majority of the Committee agreed that this is not a matter that the law needs to specify—and thus this must be interpreted case by case.<sup>804</sup>

### **6.3. Recognition or Enforcement of Arbitral Awards**

Chapter VII (which is about the recognition and enforcement of arbitral awards) has three articles. Indeed, the KAA has separate provisions for the recognition or enforcement of domestic and foreign arbitral awards.

#### **6.3.1. Recognition or Enforcement of Arbitral Award**

Article 37 of the KAA (1999) states that “recognition or enforcement of arbitral awards shall be made by recognition or judgment by a court.” When this provision was enacted, the need for the court’s judgment on the recognition or enforcement of the arbitral award was raised. In practice, the need for the court’s judgment therein (*i.e.*, on the recognition and enforcement of awards) could hinder the efficiency

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<sup>803</sup> Kap You Kim, JOONGJAE SILMOO GANG UI, Bak Young Sa, (2012), at 380.

<sup>804</sup> For more discussion about this issue, see Young Jun Mok, COMMERCIAL ARBITRATION LAW (Bak Young Sa, 2011), at 264 & Kap You Kim, *op. cit.*, at 291.

and speed of arbitration.<sup>805</sup> Many scholars and practitioners have contended that the arbitral award should be recognized or enforced by the court's decision, which is more like a confirmation (vs. a court's judgment).<sup>806</sup> As a result, Article 37 has been completely amended.

### **6.3.1.1. What Has Been Amended**

Before Article 37 of the KAA (2016) is discussed, a clarification of the need to thoroughly amend Article 37 is required. The following is Article 37 of the KAA (1999).

#### **Article 37 of the KAA (1999)**

*(1) Recognition or enforcement of arbitral awards shall be made by recognition or judgment by a court.*

*(2) The party applying for the recognition or enforcement of an arbitral award shall submit the following documents: Provided, That if the award or arbitration agreement is made in a foreign language, a duly certified Korean translation shall be accompanied:*

*(a) The duly authenticated original award or a duly certified copy thereof;*

*(b) The original arbitration agreement or a duly certified copy thereof.*

Article 37 of the KAA (1999) states that the arbitral award should be recognized or enforced via the court's judgment; this requires the parties to submit both an authenticated original award and a certified

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<sup>805</sup> Commentary in the legislative history, p.40.

<sup>806</sup> Sun Ju Jeong, op. cit., at. 243.

copy of the arbitral award and arbitration agreement to the court. The arguable point in this provision is that paragraph (1) could be wrongly interpreted—namely, that the court should make a judgment on the subject-matter of a dispute before it decides whether the award is recognizable or not. Furthermore, it could lead to the misconception that both an arbitral tribunal and a court have jurisdiction—or a court needs to review the arbitral award rendered by the tribunal.<sup>807</sup>

Although the provision says that recognition is made by the court’s judgment, this does not mean that the court must actually review all arbitral awards to make a judgment over a dispute. Article 35 confirms this; it specifically says that an arbitral award has the same effect as the judgment of the court, which means that the award does not need to be judged by the court again. In fact, this article makes arbitral awards recognizable or enforceable via the courts bestowing governmental authority herein—since arbitral awards are rendered via arbitration, which is a private DRS. Consequently, the Committee agreed to make this a procedural process.<sup>808</sup> They referred to Section 1063 of the German Code of Civil Procedure<sup>809</sup> and Article 45 (1) of the Japanese Arbitration Law.<sup>810</sup> Article 37 of the KAA (2016) is as follows.

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<sup>807</sup> Commentary in the legislative history, p.40.

<sup>808</sup> Commentary in the legislative history, p.40.

<sup>809</sup> Section 1063 of the German Code of Civil Procedure (General Provisions) (1) The court shall decide by means of an order. The party opposing the application shall be given an opportunity to comment before a decision is made. (2) The court shall order an oral hearing to be held, if the setting aside of the award has been requested or if, in an application for recognition or declaration of enforceability of the award, grounds for setting aside in terms of section 1059 are to be considered. (3) The presiding judge of the civil court senate (“Zivilsenat”) may issue, without prior hearing of the party opposing the application, an order to the effect that, until a decision on the request has been made, the application may pursue enforcement of the award or enforce the provisional or conservatory measure of protection of the arbitral tribunal pursuant to section 1041. In the case of an award, enforcement of the award may not go beyond measure of protection. The party opposing the application may prevent enforcement by providing an amount corresponding to the amount that may be enforced by the applicant as security. (4) As long as no oral hearing is ordered, applications and declaration may be put on record at the court registry.

<sup>810</sup> Article 45 of the Japanese Arbitration Law (Recognition of Arbitral Award) (1) An arbitral award (irrespective of whether or not the place of arbitration is in the territory of Japan; this shall apply throughout this chapter) shall have the same effect

## **Article 37 of the KAA (2016)**

### **(Recognition and Enforcement of Arbitral awards)**

*(1) An arbitral award is recognized unless there is a ground for non-recognition under Articles 38 or 39. However, if a party requests, the court may make a decision on the recognition of arbitral award.*

*(2) The enforcement of arbitral award shall be made, upon the party's request, only after the court allows it through the enforcement decision.*

*(3) The party applying for recognition or enforcement to the court shall supply the original award or a copy thereof. If the award is made in a foreign language, the party shall supply a duly certified Korean translation of the award.*

*(4) When there is a request under the second part of paragraph (1) or paragraph (2), the court shall determine the date for defense or hearing that both parties can participate in and communicate the determined date to both parties.*

*(5) The court shall provide the reasons for the decision on recognition requested under the second part of paragraph (1) or enforcement requested under paragraph (2). However, if the hearing is not held, the court may provide a summary of the reason.*

*(6) A party can appeal immediately against a decision made under the second part of paragraphs (1) or paragraph (2).*

*(7) The appeal made under paragraph (6) shall not stop the enforcement of arbitral award. However, the appellate court may order the party who appealed to provide the security, or order the court to stop the enforcement of arbitral award without the security provided, or order the court to stop the enforcement of arbitral award in part or in whole, or order the court to continue the enforcement of arbitral award only after the security is provided by the party who appealed.*

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as a final and conclusive judgment. Provided, an enforcement based on the arbitral award shall be subject to an enforcement decision pursuant to the provisions of the following article. And this article states the grounds for non-recognition.

*(8) The application for recourse against the decision made by the court under paragraph (7) shall not be allowed.*

First, Article 37 of the KAA (2016) states that an arbitral award is recognizable if there is no ground for non-recognition under Articles 38 (*i.e.*, grounds for non-recognition or non-enforcement of domestic arbitral awards) or 39 (*i.e.*, grounds for non-recognition or enforcement of foreign arbitral awards). Thus, this no longer requires the court's judgment; the court will decide whether it is recognizable or enforceable only when there is a request by a party for recognition or enforcement of an arbitral award. All members of the Committee agreed that this amendment would make Korea a more favorable and friendly place for arbitration and attract more ICA into Korea since the process of recognition and enforcement of the arbitral award will become more time-efficient—and efficient overall.<sup>811</sup>

Article 37 adds one more condition to the court's decisions associated with recognition and enforcement of arbitral awards—namely, when there is a request for recognition under the second part of paragraph (1) or enforcement of the arbitral award under paragraph (2), the court should determine the date of the defense or hearing that both parties can participate in. (However, it is not clear whether or not a defense or hearing should be held anytime when there is a request for recognition or enforcement of an award.) Furthermore, the court is required to provide a summary of the reasons for its decision; although the Committee did not give a rationale for this, they mentioned that they referred to Section 1063 of the German Code of Civil Procedure for this article.<sup>812</sup>

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<sup>811</sup> Commentary in the legislative history, p.43.

<sup>812</sup> Commentary in the legislative history, p.41

The drafting of Article 37 of the KAA (2016) differed from some of the Committee’s recommendations and raised some questions. First, according to Section 1063 (1) of the German Code of Civil Procedure, when a party opposes the application for recognition (or enforcement) of an arbitral award, the court should give that party an opportunity to comment before it makes a decision. Thus, under German law, the opposing party is entitled to comment (*vs.* a hearing); indeed, a hearing is a different procedure from making a comment (*e.g.*, it is more complicated).<sup>813</sup>

Second, the German law requires a court to have a hearing only when one party requests the court to set aside the arbitral award—or the court finds that the grounds for non-recognition or non-enforcement under Section 1059 must be considered. Conversely, the KAA requires a hearing to be held whenever a party requests the court to make a decision over recognition or enforcement of the award. Indeed, a hearing with both parties may be acceptable under German law because the setting aside of an arbitral award is an important matter and must be done with a great care. However, the process of making an award recognizable should indeed be different—namely, more straightforward (*vs.* the process of setting it aside). Consequently, if the Committee intended to adopt the German law, the statute should be drafted more precisely in order to avoid misinterpretation or misunderstanding.<sup>814</sup>

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<sup>813</sup> Giving a chance to make a comment to an opposing party is different from having a hearing with both parties.

<sup>814</sup> If ‘a party’ is changed to ‘the opposing party’ in paragraph (1) of the revised Article 37 of the KAA, the statute makes more sense. Arbitral awards are recognized unless there is a ground under Articles 38 or 39, but if the opposing party requests, the court may make a decision on recognition. So, if there is no reason for non-recognition or non-enforcement subject to Articles 38 or 39, the award is recognized without a special procedure. But, the party against whom the arbitral award is rendered can request the court to decide whether the award is recognizable or not under Article 37(1), and in this case, the court should ask both parties to participate in the hearing under Article 37 (4) before it makes a decision.



Third, Article 37 (5) requires the court to provide the reasons for its decision under the second part of paragraph 1 or paragraph 2,<sup>815</sup> which burdens the court and makes the procedure of recognition or enforcement more complicated. Indeed, it would have been more reasonable and practical if the KAA had required the court to provide its reasoning only when the court denies recognition or enforcement (*e.g.*, on a par with Section 1488 of the French Code of Civil Procedure<sup>816</sup>); conversely, when the court finds the arbitral award recognizable or enforceable, it should just confirm the recognition—or order the enforcement.

Fourth, another key consideration herein is how ‘the reasons for decision’ differ from ‘the summary of the reason’ under paragraph (5) of Article 37. This requires the court to provide the reasons for the decision on recognition after having a hearing with both participating parties; however, if the hearing is not held, the court may provide a summary of the reasons. Does this mean that the court may give a brief reason for its decision without having the hearing because it did not have a chance to hear from both parties?

### **6.3.1.2. Issues Left for the Next Revision**

Although Article 37 has been thoroughly amended, there were not many arguments for or against it; only one issue—an appeal against the arbitral award in arbitration—raised significant debate. Under the KAA, the only way to object to the decision of the arbitral tribunal is via application for the setting

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<sup>815</sup> Actually, in the Korean version of the KAA (2016) states that “the court shall write the reasons for its decision....”. So, the court should provide the reasons in writing.

<sup>816</sup> Article 1488 of the French Code of Civil Procedure: An order denying enforcement shall state the reasons upon which it is based.

aside of arbitral awards, and this is true in most states and jurisdictions. Thus, finality is a key advantage of arbitration; however, there has been continuous discussion about appealing arbitral awards—not only in Korea but also internationally.<sup>817</sup> Indeed, there are some jurisdictions that allow an appeal against an arbitral award; for example, the Arbitration Act 1996 allows an appeal on point of law if (i) all parties to the proceedings agree or (ii) the court allows it;<sup>818</sup> also, there are some international arbitral institutions that have appeal systems.<sup>819</sup> Thus, some members of the Committee have suggested adding regulations about an appeal system to the KAA (2016) by referring to Article 44 of the Japanese Arbitration Law.<sup>820</sup>

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<sup>817</sup> In the 7<sup>th</sup> of Geneva Global Arbitration Forum which was held in 1998, the appeal system in arbitration was discussed. See. <http://www.ggaf.ch/7.php> for more information.

<sup>818</sup> Section 69 of the Arbitration Act 1996 (Appeal on point of law) (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section. (2) An appeal shall not be brought under this section except (a) with the agreement of all the other parties to the proceedings, or (b) with the leave of the court. The right to appeal is also subject to the restrictions in section 70 (2) and (3). (3) Leave to appeal shall be given only if the court is satisfied (a) that the determination of the question will be substantially affect the rights of one or more of the parties, (b) that the question is one which the tribunal was asked to determine, (c) that, on the basis of the findings of fact in the award (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all circumstances for the court to determine the question. [The rest is omitted]

<sup>819</sup> These institutions are, for example, WTO, ICSID, CPR (International Institute for Conflict Prevention and Resolution), and CEA (European Court of Arbitration).

<sup>820</sup> Article 44 of the Japanese Arbitration Law (1) A party may apply to a court to set aside the arbitral award when any of the following grounds are present: (i) the arbitration agreement is not valid due to limits to a party's capacity; (ii) the arbitration agreement is not valid for a reason other than limits to a party's capacity under the law to which the parties have agreed to subject it (or failing any indication thereon, under the law of Japan); (iii) the party making the application was not given notice as required by the provisions of the laws of Japan (or where the parties have otherwise reached an agreement on matters concerning the provisions of the law that do not relate to the public policy, such agreement) in the proceedings to appoint arbitrators or in the arbitral proceedings; (iv) the party making the application was unable to present its case in the arbitral proceedings; (v) the arbitral award contains decisions on matters beyond the scope of the arbitral proceedings; (vi) the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the provisions of the law of Japan (or where the parties have otherwise reached an agreement on matters concerning the provisions of the law that do not relate to the public policy, such agreement); (vii) the claims in the arbitral proceedings relate to a dispute that cannot constitute the subject of an arbitration agreement under the laws of Japan; or (viii) the content of the arbitral award is in conflict with the public policy or good morals of Japan. (2) The application described in the preceding paragraph may not be made after three months have elapsed from the date on which the party making the application had received the notice by the sending of a copy of the arbitral award (including the document constituting the ruling of the arbitral tribunal described in the provisions of article 41 through 43), or after an enforcement decision under article 46 has become final and conclusive. (3) Even when the case for application described in paragraph (1) falls within its jurisdiction, a court may, upon request or by its own authority, if it finds it appropriate, transfer all or part of said case to another competent court.

Although the majority of the Committee agreed that it may be necessary to allow appeals, they believed that finality is one distinguishable characteristic of arbitration—and allowing appeals in arbitration is too advanced at the moment. Thus, they decided not to draft regulations about appeals and added paragraph (6) in Article 37, which simply notes the possibility of appealing a court’s decision on the recognition and enforcement of arbitral awards (and thus indicates that the parties can ask the court to reconsider its decision).

Additionally, some members of the Committee have claimed that (i) a party’s right to have a neutral trial should be protected and (ii) the recognition or enforcement of an arbitral award should be made after a proper trial. They said that there is always a doubt about whether the arbitrators (who are private persons) are making correct decisions or not. Thus, the court should ensure that (i) each arbitrator’s decision is correct (through the merit of review) and (ii) the role of the court therein (*i.e.*, in arbitration) is as an authority body that supervises the arbitration. Based on their rationale, they suggested that Article 37 should be revised to guarantee the party’s basic right to have a trial. However, this suggestion was refused because it challenges the role of arbitration (which is based on an agreement between parties to avoid judicial litigation).

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(4) An immediate appeal may be filed against a decision made under the provisions of article 5, paragraph (3) or the preceding paragraph regarding the case for application described in paragraph (1). (5) A court may not make a decision with respect to the application described in paragraph (1), unless and until an oral hearing or oral proceedings at which the parties can attend was held. (6) Where an application is made under paragraph (1), an arbitral award may be set aside by the court in the event that it finds any of the grounds described in each of the items under the same paragraph to be present (with respect to the grounds described in items (i) through (vi) of the same paragraph, this shall be limited to where the party making the application has proved the existence of such grounds). (7) Where the ground described in paragraph (1), item (v) is present, and where the part relating to matters prescribed in the same item can be separated from the arbitral award, only that part of the arbitral award may be set aside by the court. (8) An immediate appeal may be filed against the decision regarding the application in paragraph (1).

## 6.3.2. Recognition or Enforcement of Domestic Arbitral Award

### 6.3.2.1. What Has Been Amended

The text in Article 38 is focused on the recognition and enforcement of domestic arbitral awards.

The followings are Article 38 of the KAA (1999) and the KAA (2016).

#### **Article 38 of the KAA (1999)**

*Arbitral awards made in the Republic of Korea shall be recognized or enforced, unless any ground referred to in Article 36 (2) exists.*

#### **Article 38 of the KAA (2016)**

*Arbitral award made in the Republic of Korea shall be recognized or enforced, unless any following ground exists.*

*1. A party furnishes proof that:*

*(a) The grounds referred to in Article 36 (2) 1 exist.<sup>821</sup>*

*(b) The following fact exists:*

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<sup>821</sup> Article 36 (2) 1. of the KAA (2016): (2) An arbitration award may be set aside by the court only if: 1. The party making an application for setting aside furnishes proof that: (a) A party to arbitration agreement was under some incapacity under the law applicable to him/her; 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 Korea; (b) A party making the application was not given proper notice of the appointment of an arbitrator or of arbitral proceedings or was otherwise unable to present his/her case; (c) The award has dealt 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: Provided, That if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside. (d) The composition of the arbitral tribunal or arbitral proceedings were not in accordance with agreement of the parties, unless such agreement was in conflict with any mandatory provision of this Act from which the parties cannot derogate, or failing such agreement, were not in accordance with this Act;

- 1) *The arbitral award is not binding yet on the parties, or*
  - 2) *The arbitral award is set aside by the court*
2. *The grounds referred to in Article 36 (2) 2 exist.*<sup>822</sup>

The grounds for non-recognition or non-enforcement of domestic arbitral awards, under Article 38 of the KAA (1999), are the same as the ones under Article 36 of the UNCITRAL Model Law. Indeed, these grounds are the same as the ones for non-recognition or non-enforcement of foreign arbitral awards under Article 39 of the KAA (1999). The KAA (2016), however, adds two more grounds therein (*i.e.*, that constitute a basis for refusing a domestic arbitral award for recognition or enforcement). First, when the arbitral award is not yet binding therein (*i.e.*, on the parties), the court may refuse the recognition or enforcement of awards; for example, if another court refuses to recognize the award or if a setting aside of the award is under process, the court may refuse to recognize or enforce it on the ground of Article 38. 1 (a) 1). The second additional ground is that if the arbitral award is set aside by the court, the court may refuse to recognize or enforce it, based on the ground of Article 38. 1 (a) 2).

### **6.3.2.2. Issues Left for the Next Revision**

Some members of the Committee claimed that there should not be separate regulations regarding recognition or enforcement of domestic and foreign arbitral awards. They asserted that the same grounds

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<sup>822</sup> Article 36 (2) 2: 2. The court finds on its own initiative that: (a) The subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Korea; (b) The award is in conflict with the good morals and other forms of social order of the Republic of Korea.

should be applied for both foreign and domestic arbitral awards; however, this suggestion was rejected without any further discussion.

### **6.3.3. Recognition or Enforcement of Foreign Arbitral Award**

#### **6.3.3.1. What Has Been Amended**

There is no change in this provision; the text in paragraph (1) focuses on the arbitral awards that are rendered or issued in countries ratifying the New York Convention<sup>823</sup> (*i.e.*, Contracting States) and the text in paragraph (2) focuses on arbitral awards that are rendered or issued in other countries (*i.e.*, non-Contracting States). As Korea is a Contracting State, Korea recognizes and enforces foreign arbitral awards herein (*i.e.*, subject to the New York Convention). However, arbitral awards rendered in non-Contracting States are recognized or enforced subject to Article 217 of the Civil Procedure Act<sup>824</sup> and

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<sup>823</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

<sup>824</sup> Article 217 of the Civil Procedure Act (Recognition of Foreign Country Judgment) : (1) A final and conclusive judgment rendered by a foreign court or a judgment acknowledged to have the same force (hereinafter referred to as “final judgment, etc.”) shall be recognized, if all of the following requirements are met; (a) That the international jurisdiction of such foreign court is recognized under the principle of international jurisdiction pursuant to the statutes or treaties of the Republic of Korea. (b) That a defeated defendant is served, by a lawful method, a written complaint or document corresponding thereto, and notification of date or written order allowing him/her sufficient time to defend (excluding cases of service by public notice or similar), or that he/she responds to the lawsuit even without having been served such documents. (c) That the approval of such final judgment, etc. does not undermine sound morals or other social order of the Republic of Korea in light of the contents of such final judgment, etc. and judicial procedures. (d) That mutual guarantee exists, or the requirements for recognition of final judgment, etc. in the Republic of Korea and the foreign country to which the foreign country court belongs are not far off balance and have no actual difference between each other in important points. (2) A court shall ex officio investigate where the requirements under paragraph are satisfied.

Article 26 (1)<sup>825</sup> and Article 27<sup>826</sup> of the Civil Execution Act. The following is Article 39 of the KAA (2016), which is same as Article 39 of the KAA (1999).

### **Article 39 of the KAA (2016)**

#### **(Arbitral Awards in Foreign Country)**

*(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) Article 217 of the Civil Procedure Act and Article 26(1) and 27 of the Civil Execution Act shall apply mutatis mutandis to the recognition or execution of a foreign arbitral award which is not subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.*

#### **6.3.3.2. Issues Left for the Next Revision**

Some members of the Committee have suggested eliminating paragraph (2) of Article 39 (which is focused on the recognition or enforcement of foreign arbitral awards rendered in non-Contracting States) based on the notion that (i) it would not be difficult to recognize or enforce the non-Contracting States’

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<sup>825</sup> Article 26 (1) of the Civil Execution Act (Compulsory Execution by Foreign Trial) (1) Compulsory execution based upon the final and conclusive judgment of a foreign court or a trial the effect of which is recognized as the same therewith (hereinafter referred to as "final and conclusive judgment, etc.") may be conducted only if a court of the Republic of Korea has permitted such compulsory execution by means of a judgment of execution.

<sup>826</sup> Article 27 of the Civil Execution Act (Judgment of Execution) (1) A judgment of execution shall be made without making any examination as to whether the judgment is right or wrong. (2) A lawsuit seeking a judgment of execution shall be dismissed without prejudice if it falls under any of the following; (a) When it has not been proved that the final and conclusive judgment, etc. of a foreign court has become final and conclusive; (b) When the final and conclusive judgment, etc. of a foreign court fails to fulfill the conditions under Article 217 of the Civil Procedure Act.

foreign arbitral awards subject to the New York Convention and (ii) it would be meaningless to have separate regulations for foreign arbitral awards because almost all countries are currently Contracting States. Nevertheless, the conclusion herein was to have separate regulations for foreign arbitral awards because there are still countries that have not ratified the New York Convention; thus, the law should regulate it differently.

## **Chapter Five: Conclusion**

With establishment of Seoul IDRC (International Dispute Resolution Center), Korean has a reasonable chance of becoming an ADR center for Asia. This aspiration is bolstered by Korea's increasing visibility in global commerce. Having 'the UNCITRAL regional center for Asia and the Pacific' located in Korea is a further step in this direction. These indicia are not a failsafe guarantee. It is an absolute requisite that Korean legal system educate students and lawyers (but, especially judges) about arbitration and its significance for global commerce. All manner of instruction for these groups should be developed so that Korea can begin to mold its reputation in ICA such as Hong Kong or Singapore. Korea has to engage fully in these efforts.

In Korea, arbitration is still at a formation stage. It is not widely recognized and does not have much standing or presence in the Korean judicial system. It has been just over fifty years since the first Korean arbitration law was drafted. There is no long-standing history of arbitration in Korea. Even the first KAA had numerous flaws and lacked a clear understanding of its regulatory mission.



Thirty-three years later, Korea adopted the UNCITRAL Model Law as its national arbitration law. The objective was to have a law that incorporated international standard and rules on ICA. By doing so, Korea began a march to make itself arbitration-friendly. Much still needs to be done. The standing of arbitration remains embryonic. Misunderstandings and confusion persist. The average perception is that arbitration is nothing more than a modified form of mediation and a first step to be taken prior to judicial litigation. That same perception sees arbitration as a non-binding process; arbitration is a precursor either to settlement or judicial litigation. Binding determination is exclusively the product of the legal process. The main reason for this misunderstanding is that arbitration is conducted by private arbitrators and seems to be dissociated from the judicial system. Judicial litigation, on the other hand, involves judges who have governmental authority to decide cases in a final and binding judgment that can be coercively enforced.

The recent Korean interest in arbitration is something of a break-through in traditional Korean views. In fact, any attention of the KAA remained inactive until 2013. At that time, the Korean government established the Seoul IDRC, representing it as a center of ADR in Asia. In keeping with this new approach, the government amend the KAA to make Korea an arbitration-friendly jurisdiction. The substantive reconstruction of the KAA was completed in 2016. More and more policy-makers, lawyers, and legal practitioners now realize that ICA has become a true global industry and a real business. It, therefore, behooves Korea to embrace ICA and build its status in the field.

The 2016 amendment of KAA focused on four objectives; (1) broader application and greater availability of arbitration, (2) faster and more efficient arbitral procedures, (3) greater powers for arbitral tribunal, and (4) a simpler and faster process for the recognition or enforcement of arbitral awards. First, when the KAA (2016) defines ‘arbitration’, it provides a broader scope of substantive application. While

the KAA (1999) limited the scope of arbitrable disputes to “disputes under private law,” the KAA (2016) allows parties to settle not only “any dispute which involves an economic interest,” but also disputes that can be “resolved by an agreement of the parties,” even though they do not involve an economic interest. The underlying objective of this amendment is to make disputes relating to unfair trade practices under anti-trust law or patent disputes arbitrable. Because such disputes were beyond the range of private contractual authority under the Korean legal system, they were not arbitrable under the KAA (1999). Under the new KAA (2016), they are now arbitrable. The ultimate purpose of broadening the scope of arbitrability is to encourage parties to have recourse to arbitration as a dispute resolution mechanism in as much areas as possible.

More wide-ranging arbitration mirrors contemporary business practices; it loosens formalistic legal restrictions. In the ICA setting, most legal systems recognize the validity of non-written contract if the parties agreed. Therefore, Article 8 of the KAA (2016) recognizes an arbitration agreement valid as long as it can be established that contracting parties agreed to arbitrate. By doing so, the KAA (2016) tries to prevent parties from resorting to a judicial litigation to decide on arbitrability. Under an arbitration law with a stricter written requirement for arbitration agreements, parties would have to bring their case to a court if their contract for arbitration proved deficient.

Second, the KAA (2016) creates the possibility of a faster and more efficient arbitral procedure. When an arbitral proceeding is delayed because an arbitrator cannot be appointed, Article 12 of the KAA (2016) allows a court either to appoint arbitrators by itself or designate an arbitral institution to appoint arbitrators. In contrast, Article 12 of the KAA (1999) only allowed courts to remedy appointment problems; the revised statute adds another option of nominating an arbitral institution to select the

arbitrators. By doing so, an arbitral proceedings need not suffer delay. Moreover, an arbitral institution is generally far better at selecting arbitrators than a court.

Another set of delaying circumstances relates to the determination of jurisdiction of the threshold of the proceeding. If an arbitral tribunal arguably decides its jurisdiction differently than a court, the matter must be determined by a court. If a court holds that the arbitral tribunal has jurisdiction and the arbitral tribunal rules that it did not, contracting parties may have nowhere to go for the settlement of their dispute. A court would reject the case because of the arbitral tribunal's right to rule and the arbitral tribunal would decline to hear the case because it concluded it had no right to assert its authority over the matter. Neither the UNCITRAL Model Law nor the KAA (1999) provided a solution to this dilemma. The KAA (2016) does provide a solution to this conflict of jurisdiction; when there is a clash of jurisdiction determinations between a court and arbitral tribunal, the law provides for the constitution of a new arbitral tribunal which will commence or continue arbitral proceedings. The court's decision on jurisdiction prevails only to give effect to the parties' intent to arbitrate. A pro-arbitration remedy is provided statutorily. The law thereby respects the first arbitral tribunal's decision (lack of jurisdiction), but it also enables the arbitration to continue without further delay. The KAA (2016) strengthens the speed and efficiency of arbitration.

Third, the KAA (2016) provides greater and more thorough rules for the granting of interim measure by arbitrators. Although the KAA (1999) contained provisions on interim measures, they were neither detailed nor clear and were, therefore, difficult to apply. The older statute simply stated that an arbitral tribunal could order interim measures if it found them necessary. It was, in effect, a non-rule rule. It did not provide useful practical guidance. The KAA (2016), however, has an entire sub-chapter on interim

measures; it specifies (i) the types of interim measures an arbitral tribunal may grant, (ii) the requirements that need to be fulfilled by a requesting party, (iii) the process of granting such relief, (iv) the form in which the interim measure is granted, (v) its recognition and enforcement, and (vi) the grounds for denying enforcement. With more detailed and specific regulations, interim measures become a reality. The law makes it easier for an arbitral tribunal to grant interim measures and, as a result, it increase their utility. This arbitration-friendly change will make the use of arbitration more compelling.

The 2016 KAA's most extensive revision relates to the recognition and enforcement of arbitral awards. Its core purpose is to eliminate obstacles to recognition and enforcement of arbitral awards. Article 37 of the KAA (2016) specifies in detail the procedure for the recognition or enforcement of an arbitral award through a number of practical processes, e.g., (i) having a hearing with parties before making a decision on recognition or enforcement, (ii) providing reasons for the decision on recognition or enforcement, (iii) giving parties a chance to appeal for the court's decision on recognition or enforcement, et al. The primary reason for providing for such specific procedures is to give a guidance to judges on the procedure of recognition and enforcement in order to have a smooth process that functions without a delay. Also, because so many judges are unfamiliar with arbitration, the process of recognition and enforcement was riddled with flaws and negative outcomes. The statutory remedy was to create an additional chamber to deal with arbitration. Although it is too early to determine whether the new statutory provisions will work, the fact that the KAA is to make courts friendlier to arbitration is a good starting point for the development of arbitration in Korea.

Korea focused on ICA much later than either Hong Kong or Singapore. Korea must develop its arbitration infrastructure to compete effectively with Hong Kong and Singapore and to become an Asian

center for ICA. Not only should the government support the arbitration industry, but the lawyers and business parties' understanding of arbitration should be corrected and deepened. In Korea, it is difficult for lawyers to recognize arbitration as a business because the KCAB sets arbitrators' fee on the basis of the amount in dispute. Fees are quite modest as a result.<sup>827</sup> The reason for having fixed arbitrators' fee is to ease burden on parties (companies) that want to use arbitration to resolve future disputes. It makes arbitral adjudication more attractive to business interest. There continue to be obstacles to the acceptance of arbitration in Korea. The lack of substantial fees for arbitrators converts arbitration to a pro bono activity that has few adherents and users. Such local views makes it difficult to sell Korea as a hospitable jurisdiction to arbitration. Like the Japanese, Koreans see arbitrators as less qualified as judges. They have no public law purpose. They can ignore or misinterpret the law or procedural fairness. The judicial route is long-standing and has accomplished its social task. There are strict requirement for fairness. Arbitration is a lesser adjudicatory process.

The Korean government should lead the effort to establish an arbitration industry in Korea. Hong Kong and Singapore are constantly investing in arbitration and declare, plausibly and persuasively, that they are the centers of ICA in Asia and now for the entire world. They have a strong and secure position.<sup>828</sup>

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<sup>827</sup> According to the arbitration rules of KCAB, some examples of arbitrator's fee are as follows.

The amount of dispute/case	Arbitrator's fee
USD910,000 (KRW100,000,000)	USD9,104 (KRW9,960,000)
USD9,140,000 (KRW1,000,000,000)	USD21,115(KRW23,100,000)
USD91,400,000 (KRW10,000,000,000)	USD43,317(KRW47,400,000)

<sup>828</sup> According to the survey conducted by Queen Mary University of London and White & Case's 2015 International Arbitration Survey, the HKIAC (Hong Kong International Arbitration Center) is ranked in the third position and the SIAC (Singapore International Arbitration Center) in the fourth for the most preferred and used arbitral institution worldwide. Also, the HKIAC is selected as the most improved arbitration institution and the SIAC, ICC and LCIA follow in order. The respondents pointed out the seat's established formal legal infrastructure for their selection of seat such as the neutrality and impartiality of the legal system, the national arbitration law, and its track record for enforcing agreements to arbitrate

Singapore, especially, is aggressively chasing Hong Kong with substantial government support.<sup>829</sup> In 2012, the Singapore government decided that legal fees related to arbitrations conducted in Singapore would be exempt from tax by 50%. Singapore also relaxed its regulation of foreign law firms making it easy for foreign and local law firms to cooperate and work together without much in the way of restrictions. The SIAC is a well-known and well-regarded arbitration organization. Further, in 2015, the government established the Singapore International Commercial Court (SICC); it is intended to be a leading forum for legal services in ICA.<sup>830</sup> The SICC is a department of the Singapore High Court.<sup>831</sup> It consists not only of Singapore national judges but also foreign judges who are approved internationally. Its jurisdiction is established when the parties agree to or the Supreme Court Justice of High Court transfers the case. The SICC takes cases governed by Singapore national law and other national laws. Foreign laws are allowed to appear before the court if they register with the SICC. Unlike other arbitration processes, an appeal to the Court of Appeal is allowed.<sup>832</sup> Singapore's ultimate aim is to be a leading ICA forum.

There is no doubt that Korea ranks far behind Hong Kong and Singapore as an arbitral destination. Nonetheless, it should devote large amounts of money and time to being an effective and meaningful competitor. Korea's global economic standing merits such a campaign. There is also a cultural reason

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and arbitral award. Cf. <http://www.arbitration.qmul.ac.uk/research/2016%20Improvements%20and%20Innovations%20in%20International%20Arbitration/176756.html>

<sup>829</sup> In 2013, 259 cases were submitted to the SIAC increasing by 10% comparing it in 2012. On the contrary, the number of cases submitted to the HKIAC were 260 and it was decreased by 10% comparing it in the previous year. Although more cases were submitted to the HKIAC, the amounts for disputes handled in the SIAC were greater than those in the HKIAC. (In 2013, its amounts were 48billions and 35billions (Singapore Dollars) respectively.) cf. <http://www.siac.org.sg/> and <http://www.hkiac.org/>

<sup>830</sup> The SICC is modelled on the 'International Financial Centre Court' in Dubai, the London Commercial Court and the Supreme Court's Commercial Division in New York.

<sup>831</sup> The Singapore Supreme Court is composed of High Court and Appellate Court.

<sup>832</sup> <https://www.sicc.gov.sg/>

that speaks to intellectual integrity for engaging in such a reconstruction. Korean values and practices should be part of the returns to global commerce. The Korean legal system's regulation of arbitration needs to reflect the circumstances of the 21<sup>st</sup> century. Korean law should stand as a beacon of adaptability and globalism. It should end useless conflicts of sovereignty and jurisdiction and concentrate on the law's ability to civilize human relations and to allow society to achieve greater prosperity. Because it adopted the UNCITRAL Model Law, Korea should stand as a truly international venue for arbitration.

## **[The List of Abbreviations]**

- International Commercial Arbitration (ICA)
- the Korean Commercial Arbitration Board (KCAB)
- the Korean Bar Association (KBA)
- the Korea Chamber of Commerce (KCC)
- the Seoul International Dispute Resolution Center (Seoul IDRC)
- the American Arbitration Association (AAA)
- the Hong Kong International Arbitration Center (HKIAC)
- the International Chamber of Commerce (ICC)
- the London Court of International Arbitration (LCIA)
- the Singapore International Arbitration Center (SIAC)



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