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# AN ARBITRATION BODY FOR THE INTERNATIONAL SEOUL: KCAB'S NEW RULES

Alexander Wiker\*

## I. INTRODUCTION: ARBITRATION IN THE REPUBLIC OF KOREA

On September 1, 2011, the Korean Commercial Arbitration Board's (KCAB) new domestic<sup>1</sup> and international<sup>2</sup> arbitration rules came into effect.<sup>3</sup> This article outlines key provisions in the revised International Arbitration Rules (International Rules) and changes from the previous to the current regime.

### A. Modern Korean International Arbitration Law

Beginning in the 1960s, South Korea's international arbitration law has undergone considerable development. To date, Korea is a party to most major international arbitration treaties, including the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the Washington Convention)<sup>4</sup> and the New York Convention.<sup>5</sup> Domestically, modern Korean commercial arbitration regulation began in 1966, with the enactment of the Korean Arbitration Act.<sup>6</sup> This Act was extensively revised in 1999 to incorporate the UNCITRAL Model Law, thereby making Korea among the first East Asian nations to enact the Model Law.<sup>7</sup> In 1970, the Ministry of Industry and Commerce (currently Ministry of Commerce, Industry, and Energy) formed the KCAB – the only officially recognized arbitral institution in Korea.<sup>8</sup> The KCAB was established by and administers arbitration in accordance with the Korean Arbitration Act<sup>9</sup> and Korean Supreme Court-approved rules governing arbitral proceedings. The KCAB (formerly the Korean Commercial Arbitration Association, KCAA) first promulgated a combined set of rules for domestic and international

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<sup>1</sup> See generally, KOREAN COMMERCIAL ARBITRATION BOARD (KCAB), DOM. ARB. R. (2011) (S. Kor.).

<sup>2</sup> See generally, KCAB, INT'L ARB. R. (2011) (S. Kor.).

<sup>3</sup> See *id.*

<sup>4</sup> See ICSID, Second Annual Report 1967/1968, at 7, [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/01/17/000011823\\_20060117164452/Rend/d/PDF/34727.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/01/17/000011823_20060117164452/Rend/d/PDF/34727.pdf). Korea signed the Washington Convention (or ICSID Convention) on Apr. 18, 1966, which came into force on Mar. 23, 1967.

<sup>5</sup> See UNCITRAL, *Status: 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html). In 1973, Korea acceded to the New York Convention, which entered into force in Korea the same year.

<sup>6</sup> Arbitration Act, Act No. 6083, Dec. 31, 1999 (S. Kor.) (promulgated by Act No. 1767 on Mar. 16, 1966 and amended on Dec. 31, 1999 to largely adopt the UNCITRAL Model Rules).

<sup>7</sup> See Thomas Moxham, *International Arbitration in Korea*, INFOMAG (2011) (unpublished manuscript) (on file with author).

<sup>8</sup> See *id.*

<sup>9</sup> Arbitration Act (1999), arts. 40-41, add. 3.

arbitration in 1966 (Arbitration Rules).<sup>10</sup> In 2007, the KCAB substantially revised its arbitration rules and enacted separate rules for governing domestic (Domestic Rules) and international arbitration proceedings (International Rules) in order to encourage foreign parties to arbitrate disputes in Korea.<sup>11</sup> Failing to attract international arbitration, the Korean Supreme Court amended both the domestic and international arbitration rules on June 29, 2011, which became effective on and from September 1, 2011.

From 1967 to 2010, the KCAB handled a total of 4,317 arbitration matters.<sup>12</sup> Of the 316 arbitrations registered with the KCAB in 2010, seventy-three (23%) involved non-Korean parties.<sup>13</sup> In spite of the relatively large number of international cases, only two cases have ever been submitted under the previous international arbitration rules.<sup>14</sup>

## **B. Impetus Behind the New Rules**

The primary reason parties seldom utilized the initial International Rules is that the original domestic KCAB Arbitration Rules remained the default rules for all arbitrations under the KCAB, regardless of whether the underlying disputes involved domestic or international parties.<sup>15</sup> Previously, the International Rules applied only if the parties had specifically designated the KCAB's International Rules in the arbitration agreement or another written agreement between the parties.<sup>16</sup> The Domestic Rules were not designed with international parties in mind. As a result, foreign parties agreeing to KCAB arbitrations have been forced to arbitrate under less than hospitable conditions designed to govern domestic disputes. For instance, Korean was the default language, arbitrators were chosen explicitly from the KCAB roster, and time lines were stricter than under the International Rules.<sup>17</sup>

In 2011, along with Korea's entrance into a revolutionary free trade agreement with the European Union, Korea has endeavored to improve international arbitration procedures. In revising the Domestic and International Rules, the key motivation was to create "a clear demarcation between the domestic and international rules so as to promote international arbitration."<sup>18</sup> Additionally, the KCAB has amended the old International Rules with the goals of improving reliability, efficiency, and cost-effectiveness of international arbitration services.<sup>19</sup>

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<sup>10</sup> See Moxham, *supra* note 7.

<sup>11</sup> See Tom Moxham, *An Introduction to International Commercial Arbitration in Korea*, Global Law & Society Forum, Kangwon University (Sept. 29, 2011).

<sup>12</sup> See *id.*

<sup>13</sup> See *id.* The USA, Germany, and Japan have brought the highest number of international arbitration cases in Korea, respectively. Most international cases involve claims of relatively low dollar amounts between USD 10,000 and 500,000. *Id.*

<sup>14</sup> See Clemmie Jepson-Turner, *KCAB Unveils International Rules*, GLOBAL ARB. REV. (Oct. 27, 2011), <http://www.globalarbitrationreview.com/news/article/29914/>.

<sup>15</sup> See Benjamin Hughes & Beomsu Kim, *The Asia-Pacific Arbitration Review 2012: Country Chapters: South Korea*, GLOBAL ARB. REV. (2011), <http://www.globalarbitrationreview.com/reviews/38/sections/135/chapters/1417/south-korea/>.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See Jepson-Turner, *supra* note 14 (quoting Tom Moxham).

<sup>19</sup> See Hughes and Kim, *supra* note 15.

## II. NEW RULES

### A. Reliability

#### 1. Refined Scope

The revised International Arbitration Rules came into effect on September 1, 2011. Accordingly, the International Rules automatically apply to all arbitration agreements made after that date.<sup>20</sup> For arbitration agreements made on or prior to September 1, 2011, unless the parties agree to apply the new International Rules, the former rules will apply even when the request for arbitration is submitted after September 1, 2011.<sup>21</sup> An agreement to apply the revised International Rules after September 1, 2011 will not affect the validity of prior arbitration proceedings.<sup>22</sup>

The revised International Rules apply in two situations: where the parties have agreed in writing to refer their disputes to arbitration under the revised International Rules, and where the parties have agreed in writing to refer their disputes to arbitration before the KCAB and the arbitration is an “International Arbitration.”<sup>23</sup> “International Arbitration” refers to an arbitration where either at least one of the parties at the time of conclusion of the arbitration agreement has its place of business in any State other than Korea, or the place of arbitration is any State other than Korea.<sup>24</sup> In comparison, the 2007 International Rules applied only “where the parties ha[d] agreed in writing to refer their disputes to international arbitration under the KCAB International Arbitration Rules.”<sup>25</sup> Similarly, the revised Domestic Arbitration Rules (Domestic Rules) have been modified to reflect the new conditions for default application of the revised International Rules. Now, the Domestic Rules only apply by default to either arbitrations where parties have expressly agreed to apply the Domestic Rules or “domestic arbitrations.”<sup>26</sup> Reflecting the new clear demarcation between domestic and international rules, the name of the Domestic Rules has been changed from “Arbitration Rules” to “Domestic Arbitration Rules.”

#### 2. Arbitration Committee

The revised International Rules extend the function of the International Arbitration Committee, which is composed of local and international arbitrators and plays a consultative role to the Secretariat.<sup>27</sup> As in the prior International Rules, the KCAB must consult the Committee regarding the challenge, replacement, or removal of arbitrators.<sup>28</sup> New to the revised

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<sup>20</sup> INT’L ARB. R. (2011), art. 3, supp. prov.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* art. 3.

<sup>24</sup> *Id.* art. 2.

<sup>25</sup> KCAB, INT’L ARB. R. (2007), art. 3 (S. Kor.).

<sup>26</sup> *See* DOM. ARB. R. (2011), arts. 2-3. The KCAB defines “domestic arbitrations” as arbitrations between parties having their principal offices or permanent residences in the Republic of Korea.

<sup>27</sup> INT’L ARB. R. (2011), art. 1(3).

<sup>28</sup> *Id.* arts. 1(3), 13, 14.

International Rules, the KCAB may now consult the Committee during the appointment of arbitrators.<sup>29</sup>

## **B. Efficiency: Expedited Procedures**

The revised International Rules now provide for expedited procedures, an option previously available only under the Domestic Rules.<sup>30</sup> The expedited procedures apply automatically where the parties agree or where the claim amount does not exceed 200 million Korean won (approximately USD 175,000).<sup>31</sup> However, if a claim is increased to exceed 200 million won or a counterclaim exceeds 200 million won, then the expedited procedures will not be used, unless the parties agree otherwise.<sup>32</sup>

The expedited procedures establish three timesaving provisions. One, such disputes are settled by a sole arbitrator, appointed by the KCAB Secretariat from its roster.<sup>33</sup> If the dispute is under 200 million won and the arbitration agreement calls for three arbitrators, the Secretariat may “encourage” the parties to agree to refer the case to a sole arbitrator.<sup>34</sup> Two, disputes are to be settled by documents only or, upon party request or panel discretion, through recourse to a single hearing. For disputes under 20 million won, the dispute will proceed by default without a hearing.<sup>35</sup> Where the Arbitral Tribunal deems necessary, it may hold subsequent hearings, or require further submission of documents after the hearing.<sup>36</sup> Three, the award must be rendered, in summary form, within three months from the date of constitution of the tribunal, subject to extension only at the Secretariat’s discretion.<sup>37</sup>

## **C. Cost-Effectiveness**

Administrative fees under the revised International Rules are identical to the Domestic Rules, with a cap at 150 million won (approximately USD 32,000).<sup>38</sup> In contrast, arbitrator fees have been increased from the prior International Rules. Under the previous International Rules, arbitrator fees were relatively low, ranging from USD 250 to USD 500 per hour.<sup>39</sup> Now, fees are determined by the Secretariat based on the amount in dispute and considering the nature of the dispute, time spent by an arbitrator(s), arbitrator experience and other relevant factors.<sup>40</sup> The fees now are approaching that of established international arbitration institutions. For instance,

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<sup>29</sup> *Id.* arts. 1(3), 12.

<sup>30</sup> *See id.* arts. 38-44; DOM. ARB. R. arts. 56-60.

<sup>31</sup> INT’L ARB. R. (2011), art. 38.

<sup>32</sup> *Id.* art. 39.

<sup>33</sup> *Id.* art. 40.

<sup>34</sup> *Id.* art. 42.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* arts. 41-42.

<sup>37</sup> *Id.* art. 43.

<sup>38</sup> *See* DOM. ARB. R., sched. fees; INT’L ARB. R. (2011), app. 1 art. 2.

<sup>39</sup> *See* Sidley Austin LLP, *Promising New International Arbitration Rules in Korea*, INT’L ARB. UPDATE FOCUS ON ASIA (May 2007), available at <http://www.sidley.com/files/News/f8a224dd-c1ce-428f-a0ab-04a50384903b/Presentation/NewsAttachment/73efc124-bdbf-4611-b82b-04dcf22f78e8/IntlArbMay0307v2.pdf>. The 2007 International Rules heralded the first substantial increase in international arbitrator fees. Under the 2000 Rules, arbitrators could only receive from KRW 800,000 to KRW 3.9 million (approx. USD 800 to USD 4,000). *Id.*

<sup>40</sup> INT’L ARB. R. (2011), app. 2 art. 1.

arbitrator fees for disputes between one and five billion won range between USD 6,000 and USD 62,000.<sup>41</sup> Additionally, the revised International Rules do not place a ceiling on arbitrator fees.

## D. Other Important Provisions

### 1. Language

Provisions on determining the language of the award and arbitration have not changed from previous versions of the rules. For arbitrations under the revised International Rules, the tribunal determines the language(s) of the arbitration, unless parties agree otherwise.<sup>42</sup> Comparatively, under the Domestic Rules, Korean remains the default language, unless agreed otherwise by the parties.<sup>43</sup> If one of the parties is non-Korean, both Korean and English languages “may” be used during the proceeding and for the award.<sup>44</sup>

### 2. Clarification of Arbitral Awards

Under the International Rules, the tribunal must render its award within forty-five days from the date final submissions are made or the hearings are closed, whichever comes later.<sup>45</sup> Within thirty days of the rendering of an award, the tribunal may, upon its own initiative or by party request, correct a clerical, computational, typographical, or similar error contained in the award.<sup>46</sup> In contrast, under the Domestic Rules, the tribunal has discretion to correct an award at any time after the award is rendered (although parties have only thirty days to request a correction).<sup>47</sup> Furthermore, under the Domestic Rules, parties may request the tribunal to make an additional award as to claims presented in the arbitration proceedings but omitted from the award.<sup>48</sup>

## III. AN OVERALL IMPROVEMENT

On the one hand, the revised International Rules are certainly a progressive step for South Korean international arbitration law. Most importantly, demarcating the revised International Rules as default for non-Korean parties will certainly ensure increased arbitration under the revised International Rules in the future. Under the revised International Rules, foreign parties

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<sup>41</sup> *See id.* Compare this to Hong Kong, where Hong Kong International Arbitration Centre (HKIAC) arbitrator fees for disputes of similar dollar amounts range from USD 10,750 to USD 100,000. *See* HKIAC ADMINISTERED ARBITRATION RULES, sched. fees (2005), available at <http://www.hkiac.org/index.php/en/aribtration-rules-a-guidelines/hkiac-administered-arbitration-rules/46-hong-kong-international-arbitration-centre-administered-arbitration-rules-2#3.1>.

<sup>42</sup> INT’L ARB. R. (2011), art. 24.

<sup>43</sup> DOM. ARB. R., art. 50.

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

<sup>45</sup> INT’L ARB. R. (2011), art. 33. In contrast, domestic awards must be rendered within thirty days of the closing of hearings. DOM. ARB. R., art. 48.

<sup>46</sup> INT’L ARB. R. (2011), art. 36.

<sup>47</sup> DOM. ARB. R., art. 54(1).

<sup>48</sup> *Id.* art. 54(3).

benefit from a system designed for their specific needs. The amended scope of application and arbitrator fee schedule bring the KCAB's rules closer in line with other established international arbitration administrative agencies.<sup>49</sup> While KCAB overall fees remain relatively low, increased arbitrator fees may attract higher quality arbitrators. Overall, the new expedited procedures are clearly a positive development, fulfilling a procedural necessity.

On the other hand, the revised International Rules have been criticized on several grounds.<sup>50</sup> In particular, the expedited procedures create a number of problems. The expedited procedures apply by default to disputes less than 200 million won.<sup>51</sup> Not only does this preempt party choice of proceedings, but also the expedited procedure can be easily – and definitively – thwarted by a party simply amending a claim or counterclaim to exceed 200 million won. Notwithstanding the ease of avoiding expedited procedures altogether, parties may also be less than willing to agree to a compelled expedited ruling under rules that have only been used in two disputes ever. Furthermore, disputes under 20 million won are to be settled without a hearing by default.<sup>52</sup> Abrogating party choice to have a hearing without express consent could cause problems for the award's enforceability. Also problematic is the KCAB's feeble ability to “encourage” parties to refer the case to a sole arbitrator, as requisite under the expedited procedures if parties have explicitly agreed upon a tripartite tribunal.<sup>53</sup> Where the purpose is to increase judicial efficiency, merely “encouraging” adversarial parties to agree opens the door to considerable delay.

#### IV. CONCLUSION

South Korea has made great strides in becoming a competitive forum for international arbitration. In a recent review of eighty-seven countries comparing regulation of foreign direct investment, the World Bank ranked South Korea highly by both regional and global indexes.<sup>54</sup> Additionally, Korean Supreme Court decisions have been invariably pro-arbitration, a fact that bodes well for enforcing arbitral awards in Korea.<sup>55</sup> Still, Korean legal infrastructure remains lacking in many areas necessary to attract international arbitration.<sup>56</sup> The KCAB's revised International Arbitration Rules aim to improve reliability, efficiency, and cost-effectiveness of international arbitrations in Korea in order to attract increased foreign arbitrations. Overall, the rules are a step in the right direction but remain short of perfection.

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<sup>49</sup> For instance, in Japan the Japan Commercial Arbitration Association (JCAA) sets arbitrator fees between JPY 30,000 and JPY 80,000 per hour (approx. USD 400 to USD 1,000 per hour). See JCAA REGULATIONS FOR ARBITRATORS REMUNERATION, art. 3 (2008).

<sup>50</sup> See Hughes & Kim, *supra* note 15.

<sup>51</sup> See INT'L ARB. R. (2011), art. 38.

<sup>52</sup> *Id.* art. 42.

<sup>53</sup> See *id.* art. 40(2).

<sup>54</sup> World Bank Group, *Investing Across Borders, 2010*, at 122, available at <http://iab.worldbank.org/~media/FDPKM/IAB/Documents/IAB-report.pdf>.

<sup>55</sup> See Moxhan, *supra* note 7.

<sup>56</sup> For instance, under the Attorney-at-Law Act, a foreign attorney who is not qualified to practice law in Korea may not represent parties in arbitration proceedings, and may face criminal sanctions if he or she does so. Also, online arbitration is not available in Korea, although the KCAB is considering it. Moreover, on average, it takes around twenty-five weeks to enforce an arbitration award rendered in Korea, from filing an application to a writ of execution attaching assets (assuming there is no appeal), and 23 weeks for a foreign award. Finally, the KCAB's English website is in serious need of improvement: wrought with missing and dead links, unfinished pages, and unresponsive or nonexistent contacts. See *id.*