



Arbitration Guide
IBA Arbitration Committee

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I. Background

(i) **How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

Over the past two decades, arbitration has become a common means of resolving international and domestic business disputes in Korea.

As with international arbitration practice in general, the principal advantages of arbitration in Korea are seen as flexibility, amicability, confidentiality, and autonomy. In addition, the relatively lower fees of the Korean Commercial Arbitration Board ('KCAB') can also be counted as an advantage compared to arbitral institutions in other jurisdictions.

To be specific, global finality, particularly in Korea where the legislature and judiciary endorse a pro-arbitration policy, is a real advantage. Korean courts will set aside an award only in limited and defined circumstances pursuant to the Korean Arbitration Act ('KAA'), which is based on the UNCITRAL Model Law of 1985 ('UNCITRAL Model Law'). Korean courts will refuse to recognise and enforce a foreign award in accordance with the likewise limited and defined circumstances prescribed under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), which is incorporated by reference in article 39 of the KAA. The result is a stable legal infrastructure that ensures finality and enforceability.

General disadvantages include unpredictability, difficulty in fact-finding, and difficulty in settling multiparty disputes. The speed and generally low cost of Korean litigation, coupled with the expediency of enforcing a domestic judgment rather than a domestic award, may also be considered a comparative disadvantage of domestic arbitration in Korea.

Overall, the advantages of arbitration continue to be perceived as outweighing its disadvantages. Currently, and as it is reasonably expected to continue in the future, Korean companies will often insist that there be an arbitration clause incorporated into their commercial contracts, especially those of a cross-border nature. The subject-matter of these contracts span a spectrum including consumer brands, industrial manufacturing, construction, technology, media content, shipbuilding and shipping, among many other key domestic and global industries. Hence, coupled with the fact that Korea today stands together with other major global capital and equity markets, the number of parties to cross-border transactions designating Seoul as the place of arbitration is increasing.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

Institutional arbitration remains prevalent in Korea, although ad hoc arbitration is increasing in popularity, due in part to relatively lower costs.

The ICC is the institution most commonly used in international arbitrations that are either seated in Korea or involve Korean parties. According to the 2010 ICC Statistical Report there were 23 cases in 2010 where either the claimant or respondent were from Korea (ie, nine as claimant and 14 as respondent) – the third highest number among Asian countries, following China and India. As previously noted, the number of domestic and international cases referred to the KCAB is steadily and significantly increasing.

(iii) What types of disputes are typically arbitrated?

International commercial arbitrations seated in Korea or those involving Korean parties span the full spectrum of subject matters and claim amounts, ranging from routine commercial disputes to complex, high-valued ones. The KCAB reports that, based on the cases it has administered, the most commonly arbitrated disputes are construction and real estate-related (37 per cent), followed by disputes involving trade (18 per cent), technology and telecommunications (seven per cent), and maritime issues (seven per cent), respectively.

(iv) How long do arbitral proceedings usually last in your country?

The length of arbitral proceedings depends on various factors, including the complexity of a case and the rules under which the arbitration proceedings are conducted. Arbitrations administered by the KCAB under its Domestic Rules are usually completed within a shorter time frame when compared to other major arbitration rules. The KCAB reports that, on average, arbitrations conducted under its Domestic Rules are completed within six to seven months from the filing of the Request for Arbitration.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

The KAA, in article 12, explicitly provides that arbitrators may be appointed without regard to their nationality, unless otherwise agreed by the parties.

The ability to act as counsel in arbitration poses different issues. Acting as counsel in an arbitration is considered to be a legal service, which can only be conducted by ‘attorneys’ or ‘Foreign Legal Consultants’ (‘FLCs’) as defined under the Korean Attorney Act or the Foreign Legal Consultant Act (‘FLCA’),

respectively. A strict application of the FLCA would seem to restrict foreign licensed attorneys from independently advising parties or acting as counsel in arbitrations in Korea. However, international arbitrations which implicate at least one issue of foreign law or customary international law are exceptions under the FLCA. Indeed, foreign licensed attorneys can and do routinely act as counsel in arbitrations in Korea, in cases which implicate the law of the country where they are licensed, although retaining Korean co-counsel would be advisable where issues arising under Korean law are implicated.

II. Arbitration Laws

- (i) **What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

The KAA governs arbitration proceedings seated in Korea and is applicable to both domestic as well as international arbitrations. First enacted in 1966, the KAA was amended in 1999 after Korea adopted the UNCITRAL Model Law.

- (ii) **Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

As prescribed under article 2 of the KAA, articles 9, 10, 37 and 39 of that Act generally apply to any and all arbitrations regardless of whether they are domestic or foreign (ie, seated in or outside of Korea) whereas all other articles apply only to arbitrations seated in Korea.

One key distinction lies in the contours of the public policy grounds to set aside or to refuse recognition and enforcement of an award. In the case of domestic awards, KAA article 36(2)(ii)(b) provides that setting aside is justified if recognising and enforcing that award would be ‘in conflict with the good morals and other forms of social order of the Republic of Korea’. In contrast, recognition or enforcement of foreign awards subject to the New York Convention may be refused if doing so would violate Korea’s public policy with respect to international relations (or *ordre public international*). As confirmed by the Supreme Court of Korea, refusal to recognise and enforce foreign arbitral awards on grounds of public policy will be narrowly construed, taking into consideration the stability of international commerce.

- (iii) **What international treaties relating to arbitration have been adopted (for example, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?**

Korea acceded to the New York Convention on 8 February 1973, and made two declarations and reservations: that the Convention will be applied exclusively to (i) recognise and enforce awards made only in the territory of another state that is also a party to the Convention, and (ii) differences arising out of legal relationships, whether contractual or not, that are considered commercial under Korean law.

Korea became a signatory to the Washington Convention on 18 April 1966 without any reservations. In addition, as discussed further in Section XV(ii) below, Korea is party to approximately 90 bilateral investment treaties ('BITs') and a growing number of bilateral and multilateral free trade agreements ('FTAs'), nearly all of which include the Korean government's standing offer to arbitrate investment disputes.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Parties are free to agree on the substantive law to be applied to the merits of their dispute, and unless otherwise agreed by them, their choice of law or legal system is to be construed as referring to the substantive law rather than conflict-of-laws rules.

If agreement on the substantive law is absent, however, an arbitral tribunal will refer to KAA article 29(2), which provides the conflict-of-laws rule to be applied. That provision authorises a tribunal to apply the law of the state considered to be most closely connected to the 'subject-matter of the dispute'.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

As with the New York Convention and the UNCITRAL Model Law, article 8 of the KAA requires arbitration agreements to be in writing. The KAA deems an arbitration agreement to be in writing if it is contained in: (i) a document signed by the parties; (ii) an exchange of letters, telegrams, telex or other means of telecommunication which provide a record of the agreement; or (iii) an exchange of documents in which the existence of an agreement is alleged by one party but not contested by the other.

Furthermore, a reference in a contract to a document containing an arbitration clause is deemed to constitute an arbitration agreement, provided that the contract is in writing and the reference makes the arbitration clause part of the contract.

Article 8(3)(iii) of the KAA is a noteworthy deviation from the corresponding language in the UNCITRAL Model Law. For the enforcement of foreign arbitral awards subject to the New York Convention, however, the Supreme Court has ruled that the arbitration agreement must be consistent with *both* the KAA as well as the New York Convention. Hence, a party that seeks enforcement of a foreign arbitral award in Korea under the New York Convention should be aware that it will be insufficient to rely on mere exchanges of documents setting forth the parties' respective claim(s) and defence(s) (ie, KAA article 8(3)(iii)) in order to establish the existence of a valid arbitration agreement.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

The Korean judiciary endorses a pro-arbitration policy and will refuse to hear an action regarding a dispute subject to an arbitration agreement unless such agreement is 'nonexistent, null and void, inoperative or incapable of being performed'. Thus, as long as the arbitration agreement evinces in writing the intent to submit the relevant dispute to arbitration, Korean courts have repeatedly enforced arbitration agreements despite various forms of drafting defects, such as the inclusion of ambiguous or equivocal elements.

On the other hand, there are certain types of defects that Korean courts have considered as critically deficient so as to preclude enforceability, and the three principal types are: (i) references to a named individual who is to be appointed as arbitrator but who subsequently proves unwilling or unable to serve; (ii) references to a non-existent arbitral institution; and (iii) 'split' or 'elective' dispute resolution clauses (ie, clauses that refer disputes to 'mediation and arbitration' or to 'litigation and arbitration').

(iii) Are multi-tier clauses (for example, arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

Pre-arbitral procedures such as mediation, expert determination or adjudication by a dispute resolution board are commonly included most often in international construction contracts or commercial contracts involving as a party the Korean government. Although no specific statutory provision or court decision has been

rendered on point, agreements that oblige parties to negotiate before arbitrating do not generally give rise to a binding precondition to arbitration under Korean law, and, thus, no specific consequence arises from a breach of such a clause.

Nevertheless, Korean courts have repeatedly held that a ‘split’ dispute resolution clause, which offers a choice between mediation (or litigation) and arbitration without designating any priority, is unenforceable as an arbitration agreement, provided that there exists no waiver of objections to arbitral jurisdiction or no implied consent to arbitrate.

(iv) What are the requirements for a valid multi-party arbitration agreement?

Korean law does not prescribe any additional requirement concerning the validity of multi-party arbitration agreements.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

The Korean courts’ position on ‘split’ dispute resolution clauses is that split clauses are unenforceable. The Supreme Court observed in dicta that to recognise split clauses as enforceable would bestow upon the initiating party a unilateral right to choose the method for dispute resolution, a result which the Court did not allow. Having said that, it should be stressed that Korean courts may find differently in cases where the parties’ clear intent was in fact to bestow such a unilateral right.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

There is no explicit statutory provision or court decision regarding non-signatories under Korean law. In a recent case, the Supreme Court held that an arbitration clause contained in a bill of lading that explicitly allowed the shipowner to invoke the arbitration clause therein would be binding even between the ship owner and a third-party holder of the bill. In that case, however, the Court applied Japanese law. Thus, it remains to be seen whether similar logic will be applied to cases involving bills or other instruments subject to Korean law.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

The KAA does not explicitly lay out the criteria for judging whether a matter is capable of being submitted to arbitration; however, it does offer some guidance. Article 3(1) of the KAA defines ‘arbitration’ as a procedure to settle ‘any dispute under private law’, not by court judgment but by an arbitral award, in accordance with the parties’ agreement. As the scope of arbitrability under article 3(1) is restricted to disputes ‘under private law’, it is understood that disputes relating to criminal, constitutional or administrative law are incapable of settlement by arbitration.

- (ii) **What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

When the defendant in a civil suit before a Korean court pleads the existence of an arbitration agreement, the court must dismiss the suit, unless it finds that the alleged arbitration agreement is invalid, inoperative or incapable of being performed. The defendant must raise such a defense ‘by not later than the defendant’s first statement on the merits’. Reflecting Korean civil procedure norms, the ‘first statement on the merits’ refers to the party’s oral submission at the first hearing on the merits.

A court’s dismissal of a civil suit under article 9(1) is a dismissal on procedural grounds. Although there remains the possibility that a court might inquire into issues regarding the merits in the process of determining whether a valid arbitration agreement exists, any such inquiry would be without prejudice to the merits of the dispute.

- (iii) **Can arbitrators decide on their own jurisdiction? Is the principle of *competence-competence* applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal’s jurisdiction?**

Consistent with the principle of *competence-competence*, article 17(1) of the KAA entitles the arbitral tribunal to rule on its own jurisdiction and any objections with respect to the existence or validity of the arbitration agreement.

If the tribunal rules on jurisdiction as a preliminary question without issuing an interim order and finds that it has jurisdiction, then a party dissatisfied with such a decision may (i) apply to have the award set aside, in which case the court may decide on arbitral jurisdiction, or (ii) request a foreign court, in which recognition or enforcement of the award is sought, to refuse recognition and enforcement of such award in accordance with either the New York Convention or other applicable legal framework.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

Under article 12 of the KAA, parties are free to agree upon a process for choosing arbitrators. In the absence of party agreement, the KAA provides for default procedures, largely tracking those of the UNCITRAL Model Law.

Even where there is an agreement between the parties on the method of appointment, the parties may apply to the court to make the appointment(s) in the following circumstances: when (i) a party fails to appoint an arbitrator according to the agreed procedure; (ii) the parties or the two appointed arbitrators fail to appoint the third arbitrator according to the agreed procedure; or (iii) the institution or other third party to whom appointment of an arbitrator has been delegated fails to make such appointment (KAA article 12(4)). A court's appointment may not be appealed.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

The KAA prescribes that, upon being asked to serve as an arbitrator, the candidate must promptly disclose to the parties any circumstances likely to give rise to doubts as to their impartiality or independence. This disclosure obligation is understood to be continuous, thus requiring the arbitrator to disclose any such circumstance that may arise during the course of the arbitration.

An arbitrator may be challenged by a party under the KAA at any time if there are circumstances that give rise to doubts as to the arbitrator's impartiality or independence. However, a party that has appointed or participated in the appointment of an arbitrator may challenge that arbitrator only for reasons of which it became aware after such appointment.

Unless the non-challenging party concurs with the challenge, or the challenged arbitrator withdraws voluntarily, the tribunal will decide the challenge. The decision of the court regarding a challenge may not be appealed.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

Anyone may serve as an arbitrator in arbitrations seated in Korea, so long as the person in question has legal capacity and is independent, impartial and able to perform his or her duties as arbitrator. A person does not need to be a Korean national or an attorney to act as arbitrator.

An arbitrator's ethical duties include: (i) exercising due care as an expert in performing his or her duties; (ii) acting fairly, independently and neutrally when making substantial or procedural decisions; (iii) granting both parties equal opportunities to be heard; (iv) adopting appropriate procedures to prevent the parties from expending unnecessary time and money; and (v) keeping the occurrence of disputes between the parties, the arbitral proceedings and any decision or award confidential.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

The Supreme Court has held that when an attorney serves as an arbitrator, the attorney should attempt to minimise *ex parte* contacts with the parties (or their agents) during the course of the arbitration proceedings. The Court has also held that, in principle, an attorney appointed as an arbitrator generally should not represent any of the parties (or their agents) in other matters during the course of the arbitration, regardless of whether such matter has any relevance to the dispute at hand. In particular, if the matter shares the same or similar legal or factual issues with the arbitration, it may provide a basis for a subsequent setting aside of the arbitral award grounded on doubt over the impartiality or independence of the arbitrator.

The 2004 IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') have gained increasing prominence and influence among Korean practitioners, with frequent reference being made to the IBA Guidelines in recent disclosure statements by arbitrators. In limited instances where issues of arbitrator independence or impartiality have been determined by the Korean courts, the standards applied by judges appear to be largely consistent with international best practices, regardless of whether express reference to the IBA Guidelines is made.

VI. Interim Measures

(i) Can arbitrators enter interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

Under article 18 of the KAA, as long as an interim measure relates to the 'subject-matter' of the dispute, arbitral tribunals are entitled to issue interim measures and are further empowered to determine the amount of security to be provided. However, it is generally understood that a tribunal is not entitled to issue

injunctive relief with respect to other assets of a party (eg, provide a means of preserving assets out of which a subsequent award may be satisfied). Interim measures must be issued in the form of an order.

Although interim measures issued by arbitral tribunals are generally understood to lack enforceability by Korean courts, the issuance of such measures often serves as persuasive evidence supporting the granting of an injunction or attachment application filed pursuant to article 10 of the KAA.

As a practical matter, when a party applies to a Korean court for a preliminary injunction or provisional attachment pursuant to article 10 of the KAA (further discussed in Section VI(ii) below), a Korean court usually considers an interim measure issued by a tribunal to be persuasively demonstrative of grounds for granting the requested injunction or attachment.

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court-ordered provisional relief remain in force following constitution of the arbitral tribunal?

As previously mentioned, parties in arbitrations seated in Korea can request a court to grant interim measures of protection before the commencement of or during the arbitral proceedings. Any court-ordered provisional relief obtained before the constitution of an arbitral tribunal maintains its force even after the tribunal is constituted. Furthermore, interim measures or other provisional relief can be ordered after the constitution of the arbitral tribunal as well.

Under Korean law, the two main tests that must be met are: (i) the applicant must have a viable claim that will likely succeed on the merits; and (ii) unless the interim measure is granted, execution of the judgment will be difficult, if not impossible, in light of the likelihood that the losing party will dissipate its assets. Although conclusive evidence is not required, the applicant will need to explain sufficiently the circumstances supporting both the likelihood of success on the merits as well as the necessity of the requested interim measure. In addition, the applicant will have to provide security in an amount determined by the court.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

Under article 28 of the KAA, the tribunal may, *ex officio* or at the request of a party, 'request assistance... of a court in the taking of evidence'. Such requests of evidentiary assistance must be made to a court that has jurisdiction over the area where the taking of evidence is to occur.

Meanwhile, provisional relief can be sought by the parties at their own initiative. No consent from the tribunal is needed in that case.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

A formal document production process is not ordinarily expected by Korean parties in domestic arbitrations, where expectations are often conditioned by the norms and practices of Korean civil procedure. In international arbitrations, however, a foreign party may be involved and request a formal document production process. In such case, tribunals are ordinarily familiar with international disclosure practices and should be able to accommodate the expectations of the parties. Tribunals and parties in international arbitrations alike commonly rely on the IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules of Evidence') and make use of Redfern Schedules.

Where there is no formal document production procedure, parties will produce the documents upon which they rely, together with their written submissions, as the case may be. However, the tribunal may grant specific document production requests made by the parties if it is deemed necessary. In such cases, document production requests tend to occur prior to the commencement of hearings.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

The KAA makes no explicit mention regarding the permissible scope of disclosure or discovery. Tribunals seated in Korea, however, enjoy wide discretion in evidentiary matters, and consistent with Korean civil procedure, will often apply few restrictions upon the evidence that a party may produce and rely upon. Rather than precluding the use of evidence such as hearsay, tribunals tend to admit evidence and then make a discretionary assessment as to the weight that should be attributed.

(iii) Are there special rules for handling electronically stored information?

There are no special rules for handling electronically stored information. Accordingly, parties are not restricted from requesting disclosure of electronic information in its native format, and tribunals seated in Korea have granted such requests, particularly when the documents requested are identified with sufficient specificity. However, in light of the more limited scope of document production

in domestic proceedings, issues related to electronically stored information arise more frequently in the international context.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

The KAA is silent on the matter of confidentiality. As a result, arbitrations governed by the KAA cannot be presumed to be confidential. By the same token, however, the KAA does not bar confidentiality agreements, which are enforceable under Korean law. Accordingly, parties may ensure that their dispute and ensuing arbitrations will be kept confidential by stipulating to a separate clause providing for confidentiality obligations, executing an agreement to the same effect, or designating in their contract institutional arbitration rules containing provisions on confidentiality entering into confidentiality agreements.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

The KAA is also silent on whether an arbitral tribunal possesses authority to protect trade secrets and confidential information. Nonetheless, article 20(2) of the KAA confers upon a tribunal the 'power to determine the admissibility, relevance, and weight of any evidence' without prohibiting them from recognising certain evidence as being trade secrets or confidential information, which tribunals have discretion to exclude from the evidentiary record.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

The KAA does not deal with rules of privilege, which is not surprising since the principle of evidentiary privilege itself is not explicitly recognised under Korean law. Consequently, where a tribunal is faced with issues of confidentiality or privilege, tribunals oftentimes apply the legal or ethical rules which it determines to be appropriate considering the circumstances of the case.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

It is not uncommon for international arbitrations seated in Korea to adopt the IBA Rules of Evidence as guidance. Having said that, the parties are free to agree to exclude the application of the IBA Rules from their proceedings altogether.

Absent an express agreement, it would be within the tribunal's discretion to adhere or depart from the IBA Rules.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Under the KAA, arbitral tribunals seated in Korea are granted wide-ranging discretionary powers to govern the hearing. The tribunal is, however, under a duty to treat the parties equally, provide each side sufficient opportunity to present its case and comply with mandatory provisions of the KAA.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

Arbitrators have wide discretion in deciding the manner by which evidence is to be taken, which includes the manner in which witnesses are examined during the hearings. As a matter of convention, while direct examination is limited and takes form of a brief examination-in-chief, cross-examination is often extensive and may be directed at the witness's previously submitted written statement(s).

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

The KAA does not provide any rules on who can or cannot appear as a witness.

No mandatory rules on oath or affirmation exist under the KAA. Article 319 of the Korean Civil Procedure Act, however, requires witnesses to take an oath prior to giving testimony in court, and although not likely, it remains unsettled by the court whether this provision applies to arbitration.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (for example, a legal representative) and the testimony of unrelated witnesses?

The KAA does not distinguish between the testimony of a party-related witness and that of an unrelated witness. As a practical matter, however, arbitral tribunals may take into account any former or present links between the witness and the parties when determining the weight of witness statements or testimony.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Written statements or reports are the most common form in which experts provide their testimony. If the content of their opinions is highly technical, experts may

include with their reports graphics, diagrams or other supporting authorities or exhibits. Experts may also appear at the hearing and testify to their position if so requested by the parties or if the tribunal requires it *ex officio*.

The KAA distinguishes between party-appointed and tribunal-appointed experts. With respect to the former, the KAA does not prescribe formal requirements regarding their independence or impartiality. Nonetheless, it is common practice for party-appointed experts to include a statement of independence along with their statement or report. On the other hand, the KAA expressly subjects tribunal-appointed experts to independence and impartiality requirements. Accordingly, any party may challenge a tribunal-appointed expert if there is ‘any circumstance likely to give rise to doubts as to such [expert]’s impartiality or independence’.

- (vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

It is rare for arbitral tribunals seated in Korea to appoint experts beside those appointed by the parties. However, unless the parties agree otherwise, tribunals may appoint an expert in lieu of party-appointed experts, or in addition to party-appointed experts when clarification is needed regarding an uncertain issue arising from the party-appointed experts’ respective opinions.

There are no provisions in the KAA, or any known practice that requires (or allows) evidence provided by tribunal-appointed experts to be considered differently than evidence furnished by party-appointed experts. There are no requirements that experts be selected from a particular list.

- (viii) Is witness conferencing (‘hot-tubbing’) used? If so, how is it typically handled?**

Witness conferencing of expert witnesses is commonly used in arbitrations seated in Korea as well as those involving Korean parties. A typical method of conferencing is a hybrid of traditional cross-examination and ‘hot-tubbing’, and typically involves questioning by counsel and tribunal members rather than being limited to direct discussions between opposing witnesses. Counsel may freely alternate between examination of their own and the opposing party’s expert(s) without regard to the traditional order of examination and cross-examination. Meanwhile, hot-tubbing fact witnesses is uncommon.

- (ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

Under Korean law, there are no rules or requirements as to the use of arbitral secretaries. With respect to institutional arbitration, the KCAB Secretariat plays a relatively active role throughout the duration of proceedings commenced and administered under its Rules. Although they are not arbitral secretaries *per se*, KCAB case administrators provide the tribunal as well as the parties with administrative and logistical support throughout the arbitration proceedings.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

The KAA requires arbitral awards to be made in writing and be signed by the arbitrators. In addition, unless the parties agree otherwise or the award is a consent award issued pursuant to article 31, the KAA requires awards to be reasoned. Other formalities include the requirement that the award state its date and the place of arbitration.

Under the KAA, there is no express provision dealing with the specific types of remedies that may be granted by means of an arbitral award. Thus, at least in principle there is no legal restriction on the remedies that the parties may agree upon. As a result, the parties may even agree on remedies that are not available in Korean civil court proceedings, as long as it does not contravene any public policy recognised under Korean law.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Korean law does not recognise punitive damages. Consequently, Korean courts have refused to recognise those portions of foreign arbitral awards granting punitive damages.

(iii) Are interim or partial awards enforceable?

Although the KAA does not expressly provide for interim or partial awards, it is generally understood that arbitral tribunals possess authority to issue them (see also responses to questions in Section VI above). Semantics aside, the enforceability of an award, whether it be labeled as ‘interim’ or ‘partial’, is generally understood to depend on whether the nature of the award constitutes the arbitral tribunal’s final decision on a the issue(s) being decided.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

There are no express rules disallowing the issuance of dissenting opinions, and it is understood that dissenting opinions are allowed. Likewise, there is no restriction on the form and content of dissenting opinions.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Article 31 of the KAA allows parties to request a tribunal to record a mutually agreed settlement in the form of an arbitral award. Such a ‘consent award’ must be made in the form of an official arbitral award but may omit reasoning. The KAA dictates that an award by consent shall have the same effect as an award on the merits.

Other than by means of a final award, under article 33(2) of the KAA, arbitral proceedings may also be terminated by a decision of the arbitral tribunal. A tribunal is obligated to render a termination decision when: (i) the claimant withdraws its claim and the respondent makes no legitimate objection; (ii) the parties agree to terminate the proceedings; or (iii) the arbitral tribunal acknowledges that continuation of the proceedings has become unnecessary or impossible.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Once an arbitral award is rendered, the powers of the tribunal are limited. The arbitral tribunal, upon a request of a party or *ex officio*, may within thirty days from the date of the award (or another timeframe agreed between the parties) correct any errors in computation, any clerical or typographical errors or any similar errors. If the parties agree, a tribunal may also give an interpretation of a specific issue or of part of the award. An additional award regarding claims presented but omitted from the award may also be issued unless the parties agree otherwise.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

The KAA does not endorse a general principle on costs. In the context of domestic arbitration, in which tribunals often follow the norms endorsed by Korean law as prescribed under articles 98 through 101 of the Korean Civil Procedure Act, costs are allocated pro rata based on the percentage that the claimant prevailed in proportion to the amount of the claim(s) filed.

(ii) What are the elements of costs that are typically awarded?

Elements of costs typically awarded include administrative fees of the arbitral institution and the expenses incurred for the proceedings, such as costs for hearing rooms, translation and transcripts. Legal fees and the expenses and fees of the arbitrators, experts and witnesses are also subject to a cost award. Attorneys' fees are likewise subject to cost awards. Notably, under the KCAB Domestic Rules legal fees are not recoverable in an award on costs absent a party agreement, but under the KCAB International Rules 'attorney fees' are expressly included among the costs that the tribunal may award in its discretion.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

The KAA does not touch upon the jurisdiction of a tribunal to decide its own costs and expenses. In KCAB-administrated arbitrations, the KCAB will manage the costs and expenses of the arbitrators and report the final amount to the tribunal in writing.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

The KAA is silent as to an arbitral tribunal's authority to apportion costs, but it is generally understood that such power exists. In KCAB arbitration, the KCAB Domestic Rules empower tribunals to apportion costs but do not provide a specific basis on which to do so. The KCAB International Rules provide that the tribunal, 'taking into account the circumstances of the case, may, at its discretion, apportion each such costs between the parties'.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

There is no specific provision in the KAA pursuant to which an appeal may be made against a decision of the KCAB or the tribunal with respect to costs. Any challenge to a cost award, as is the case for other arbitral awards, is thus limited to the narrow grounds for setting aside or refusing recognition and enforcement of arbitral awards as set out under the KAA.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If

yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

Awards made in Korea may only be challenged by making an application to the competent Korean court to set aside the award based on the narrow grounds provided under article 36(2) of the KAA. Applications to set aside a domestic award are subject to a three-month time limit that begins to run as of the date on which the party making the application received the duly authenticated award or the corrected/interpreted/supplemented award. Korean courts endeavor to conclude the trial at the first or second hearing. The entire procedure from application to judgment ordinarily takes between six and twelve months.

Article 36(2) of the KAA provides that domestic awards may be set aside if: (i) the arbitration agreement is either invalid or there was lack of legal capacity to enter into the arbitration agreement; (ii) the party resisting recognition and enforcement of the award was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; (iii) the award deals with a dispute not subject to the arbitration agreement or with a matter falling outside the scope of the arbitration agreement (if separable, only portions of the award not dealing with subjects of the arbitration agreement may be set aside); or (iv) the composition of the tribunal or the conduct of the proceedings was not in accordance with either the KAA or the agreement of the parties (unless such agreement was not itself in accord with mandatory provisions of the KAA).

With respect to awards made outside of Korea, Korean courts have confirmed that parties to such awards are not entitled to invoke article 36 of the KAA. Furthermore, the grounds for denying recognition and enforcement of foreign awards differ depending on whether or not the New York Convention applies (see also Section XIII(i) below).

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

Korean law is unclear on whether parties may contractually exclude or limit the grounds for setting aside or for refusing the recognition and enforcement of a foreign award. Korean courts may find such an agreement entered into in advance of an award as contrary to public policy and thus unenforceable. However, in a related vein the Supreme Court has recognised the validity of agreements to limit or exclude rights of court appeal arising *after* the rendering of judgment by a court of first instance or court of appeal.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

Article 35 of the KAA prescribes that ‘arbitral awards shall have the same effect on parties as a final and conclusive judgment of the court’. An arbitral award is therefore not subject to appeal, subject only to being set aside or refused recognition or enforcement.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

The KAA is silent with respect to the authority of the courts to remand an award to the tribunal for reconsideration, and there is no court decision on point. It is nonetheless understood that courts do not possess the authority to do so.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

Article 37(2) of the KAA requires an application for recognition or enforcement to be accompanied by (i) a duly authenticated award (or a duly certified copy thereof); (ii) the original arbitration agreement (or a duly certified copy thereof); and (iii) if either the award or arbitration agreement is not written in the Korean language, a duly certified translation of the agreement into the Korean language. In connection with translations, the Supreme Court has held that a diplomatic or consular translation or verification is not necessary. The accuracy of the translation will only be investigated if a party objects.

‘Foreign arbitral awards’ will be enforced unless there exist any of the grounds for refusal of recognition or enforcement under the New York Convention, which are largely identical to those found under article 36(2) of the KAA. An award is considered ‘foreign’ and subject to the New York Convention if it: (i) is rendered in a country outside of Korea that is a signatory to the New York Convention; and (ii) disposes of differences arising out of legal relationships, whether contractual or not, that are considered commercial under Korean law.

(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Once a judgment recognising and enforcing an award has been obtained from a Korean court, the court’s judgment may be enforced against the defendant’s assets by means of a compulsory execution judgment.

Prior to filing an application with the court bailiff or District Court, an ‘execution sentence’ must be obtained from the clerk of the court that rendered the

recognition and enforcement judgment. The execution sentence is then attached to the judgment.

The application for a compulsory execution judgment commences with an application in writing and is followed by a three-step procedure: seizure, liquidation and distribution. In the case of movable property, the application will usually be made to a court bailiff. With respect to real estate, the execution is made to an execution court – the District Court or its branch having jurisdiction over the relevant property.

(iii) Are conservatory measures available pending enforcement of the award?

Court-ordered interim measures or protection prior to enforcement of the award are available under Korean law (see also Section VI).

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Korea is a pro-enforcement jurisdiction. Korean courts infrequently set aside awards rendered in Korea under the KAA and to date, have never refused recognition and enforcement of a foreign award under the New York Convention.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

Pursuant to article 165 of the Korean Civil Procedure Act, a party's right to apply for the recognition and enforcement of an award (whether domestic or foreign) expires after ten years following the date of the award. For domestic awards, pursuant to article 36(3) of the KAA, a losing party's application to set aside an award must be filed within three months from the date that party received a duly authenticated copy of the award or the duly authenticated copy of a correction, interpretation or additional award under article 34 of the KAA.

XIV. Sovereign Immunity

(i) Do State parties enjoy immunities in your jurisdiction? Under what conditions?

State parties enjoy sovereign immunity with regard to their acts in Korea so long as these do not constitute 'private law acts'. The Supreme Court has held that the private law acts of another State in the territory of Korea would be subject to the jurisdiction of Korean courts, barring special circumstances such as where the

exercise of such jurisdiction would constitute undue intervention in the sovereign activities of the subject State.

(ii) Are there any special rules that apply to the enforcement of an award against a State or State entity?

There are no special rules governing the enforcement of an award, domestic or foreign, against a State or State entity. However, in at least one case decided by the Supreme Court, an arbitration award was successfully enforced against the Republic of Korea without the defense of sovereign immunity being asserted by the State or raised as an issue by the Court on its own initiative. The Supreme Court has held, in the context of an employment dispute involving the United States as defendant, that Korean courts may exercise jurisdiction in regard to the private law acts committed by a foreign State in Korea absent special circumstances.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

The Washington Convention was signed by Korea on 18 April 1966, and has been in force since 23 March 1967. Korea has also concluded multilateral FTAs with Association of Southeast Asian Nations (ASEAN), the European Free Trade Association (EFTA) states and more recently with the European Union and the United States, all of which are currently in effect. However, the right of foreign investors to pursue arbitration against the host state is not provided for under all of these instruments. For example, FTAs with the EFTA States and the EU do not grant foreign investors standing to commence arbitration against the host state. Korea's FTAs that do provide standing include those with Chile, India, Singapore, Peru and the United States, the latter which entered into force as of 15 March 2012.

(ii) Has your country entered into Bilateral Investment Treaties with other countries?

As of December 2011, Korea was a party to approximately 92 BITs and FTAs (both bilateral and multilateral) containing investment protection provisions. The first BIT entered into by Korea was with the Federal Republic of Germany. The BIT was signed on 4 February 1964 and entered into force on 15 January 1967.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

Texts available in English:

- ARBITRATION LAW OF KOREA: PRACTICE & PROCEDURE (Juris Publishing, Kap-You (Kevin) Kim & John P. Bang, Eds., 2012);
- Seung-Wha Chang, *Republic of Korea*, in DISPUTE RESOLUTION IN ASIA (Michael Pryles, ed., Kluwer Law International, 3rd ed., 2006) at 237-265;
- Byung-Chol Yoon *et al.*, *Arbitration in Korea*, in INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA (McConaughay, Philip, Gingsburg & Thomas, eds., JurisNet, 2d ed., 2006) at 201-234.

Texts available in Korean:

- Young-Joon Mok, *SANGSA JUNGJEBEOP* [COMMERCIAL ARBITRATION] (Pakyoungsa 2011);
- Kwang-Hyun Suk, *KUKJE SANGSA JUNGJEBEOP YEONGU* [ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION] (Pakyoungsa 2007);
- *JUSEOK JUNGJEBEOP* [COMMENTARIES ON THE ARBITRATION ACT] (Byeong-Hoe Yang *et al.*, eds., KCAB/Korean Association of Arbitration Studies 2005);
- Korean Commercial Arbitration Board, *KUKJE JUNGJE GYUCHIK HAESEOL* [EXPLANATION OF THE INTERNATIONAL ARBITRATION RULES] (KCAB 2010);
- Korean Commercial Arbitration Board, *Sangsa jungje 30 nyeonsa* [30 Years of Commercial Arbitration] (KCAB 1996).

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

The KCAB and the Korean Council for International Arbitration regularly hold seminars and conferences on international arbitration. The KCAB also organises the Arbitration Academy Program aimed at training CEOs as global experts in alternative dispute resolution.

Educational events include the International Arbitration Internship hosted and sponsored annually by BAE, KIM & LEE LLC's International Arbitration & Litigation Practice Group. The internship program is designed for law students and is an intensive, two-week curriculum comprising lectures, seminars and a team-based moot arbitration. Seoul National University and the KCAB co-host an annual moot arbitration competition, and the KCAB organises the Arbitration Program for Young Lawyers, an educational program designed to teach arbitration practice to young practitioners.

In recent years, prominent international arbitration institutions and organisations such as the LCIA, ICC, the International Bar Association ('IBA') and the Global Arbitration Review ('GAR') have held major conferences in Seoul. Among the most recent include the IBA Arbitration Day and the first ever GAR Awards, both of which took place in March 2011.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Arbitration in Korea is a well-established alternative to court proceedings. In 2009, there was a substantial increase of 66 per cent in international case filings at the KCAB, in addition to a dramatic increase of 283.8 per cent in the overall value of domestic and international cases newly filed with the KCAB that year.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

Attitudes in Korea to alternative dispute resolution procedures in the international context have always been positive. Court-annexed mediation, by which a plaintiff may request mediation before a judge or a conciliation committee during the course of litigation, has been part of Korean civil procedure since 1990. In recent times, the use of alternative dispute resolution procedures and their sophistication has grown in Korea with the increase of both inbound and outbound cross-border transactions implicating Korean parties.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

In recognition of the progress and extended use of arbitration to resolve commercial disputes, the KCAB amended its institutional rules for both domestic and international arbitrations. The revised versions of both the KCAB Domestic Rules as well as the KCAB International Rules went into effect on 1 September 2011. It should be noted, however, that the previous rules will apply to arbitration agreements entered into before that date unless the parties agree to the application of the 2011 versions.

