COMMENTS ON THE USE OF AAA/ICDR ARBITRATION RULES IN KOREA

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I. THE USE OF ARBITRATION IN KOREA

In the last 50 years, the Republic of Korea[1] has emerged as the fourth largest economy in Asia after China, Japan and India, and with a nominal gross domestic product of around 1.3 trillion USD, as the eleventh largest economy in the world.[2] In terms of exports, it is the fifth largest overall exporter in the world, after China, the United States, Japan and Germany.[3] These statistics are especially remarkable considering that Korea has a smaller population base compared to other countries in the top five. The data also demonstrates the dependence of the Korean economy on cross-border business transactions. It is no surprise that the number of cross-border transactions with Korean parties is increasing.

Disputes are a fact of life and business transactions in any setting are no exception. Cross-border commercial transactions and interactions underpinning international trade and commerce are particularly susceptible to disputes due to their additional complexities involving differences in languages, cultures, laws and currencies, distances and borders. It is therefore maybe inevitable that the rise in cross-border transactions and the rapid growth of the Korean economy corresponds to a steady growth in the numbers of international arbitrations involving Korean parties.

Although international arbitration, in its modern form, administered by dedicated arbitration institutions, has emerged in particular in Europe and the United States, Asian based arbitration institutions, such as the Singapore International Arbitration Centre (SIAC) or the Hong Kong International Arbitration Centre (HKIAC), are becoming

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[1] The Republic of Korea, or South Korea, will be referred to hereinafter as "Korea."

[2] International Monetary Fund (2016).

[3] The World Factbook, U.S. Central Intelligence Agency (2015).

more and more prominent. Asian parties have embraced the practice of international arbitration, demonstrated by a steady growth in the number of cases in the region, including cases involving Korean parties.

Korean companies have earned (and are perhaps burdened with) the reputation of preferring to resolve disputes pursuant to more conciliatory approaches in order to preserve long-term business relationships at the cost of short-term business gains. However, the actual number of cases suggests that Korean parties are, or are becoming, more receptive to resolving international disputes through arbitration. The statistics of the International Chamber of Commerce (ICC) (which tracks case data by nationality of claimants/ respondents) demonstrate that the number of ICC arbitrations involving Korean parties has steadily increased over the past twenty years. The number of cases per year involving Korean parties has approximately doubled from twenty years ago.

The ICC statistics show that Korean parties have become the second biggest "user" of ICC arbitrations in Asia, with 151 ICC arbitration cases from 2008-2014 involving a Korean party as either a claimant or respondent. These are more cases than those involving either Japanese (101) or Chinese parties (146), both countries with larger populations and economies.

Korea's arbitration institution, the Korean Commercial Arbitration Board ("KCAB"), has likewise seen a steady growth in case numbers with a significant portion of the KCAB caseload involving international parties.

	Domestic Cases	International Cases
2015	339	74
2014	295	87
2013	261	77
2012	275	85
2011	243	77
2010	264	55

[KCAB Case Filings from 2010-2015][4]

[4] KCAB 2013 Annual Report.

The increase in the number of international arbitration cases coincided with the recovery of the Korean economy after the 1997 Asian financial crisis. One of the key events during this time was the enactment of a new Korean Arbitration Act in 1999, which was modelled on the UNCITRAL model law. Accordingly, Korean courts demonstrate acceptance of international arbitrations and have consistently enforced international arbitration awards pursuant to the limits of the New York Convention.

In line with this development, some Korean companies have steadily increased the size and capability of their international legal departments due to greater focus on legal risks involving cross-border transactions. In the current climate, with more focus of Korean companies on legal risks in cross-border transactions and an increased focus on overseas investments, it is a well-settled Korean market practice for international transactions to negotiate a dispute resolution clause providing for international arbitration.

II. THE USE OF THE AAA/ICDR ARBITRATION RULES IN KOREA

The American Arbitration Association (AAA) is one of the largest and most active arbitration institutions in the world. It was formed in 1926, pursuant to the merger of Arbitration Society of America and the Arbitration Foundation. With over 8,000 arbitrations filed under its rules in 2015, it has among the largest caseloads of arbitration institutions.

In 1996, the AAA established its international arm, the International Centre for Dispute Resolution (ICDR), to administer arbitration proceedings involving international parties. Within 15 years of its existence, the ICDR's caseload has increased nearly ten-fold, with over 1000 case filings in 2014.

The ICDR arbitration rules are continuously used in Asian countries. For example, ICDR statistics place the ICDR among the most frequently used international arbitration rules in terms of case numbers in Japan and Australia. In the past five years, approximately 20 percent of all ICDR cases have been with at least one Asian party.

While the growth in international trade and business in Korea corresponds to an increase of international arbitrations, there has been no noteworthy increase in the number of ICDR arbitrations involving Korean parties. Whereas a good number of ICDR arbitration proceedings

are filed with at least one party with Korean nationality, the number of ICDR arbitration cases involving Korean parties has remained steady and did not increase in recent years. Between 2011 and 2015 the number of AAA/ICDR arbitration cases per year involving a Korean party ranged between 10-17 per year, for a total of 73 cases. For example, the number of AAA/ICDR cases involving Korean parties is smaller than the comparable number of ICC arbitrations in a similar 5-year period.

Considering the overall volume of international arbitrations involving Korean parties, the lower number of ICDR arbitrations compared to other Asian countries, notably Japan and China, suggests that Korean parties have not embraced ICDR arbitration as the preferred dispute resolution mechanism. This is in contrast to other countries such as Japan and Australia were ICDR rules are more frequently used. For Japan and Australia, for example, the statistics show that the number of ICDR arbitrations filed between 2011 and 2015 involving a Japanese or Australian party was higher than the number of similar ICC arbitrations filed in the same period.

Rather uniquely among Asian jurisdictions, the largest contingent, by some distance, of foreign licensed attorneys working in Korea are U.S. licensed attorneys and many Korean licensed practitioners have spent some time in U.S. law schools and gained exposure to the U.S. legal system. Despite Korea being a country with a legal system based on civil law principles, parts of the Korean legal system are influenced by U.S. law. Many of the larger corporations in Korea, especially corporations engaged in international trade and business, employ more U.S. licensed attorneys in their legal departments than Korean licensed attorneys. Furthermore, the U.S. is generally seen as the most influential country in terms of the Korean economy, politics and diplomacy, in addition to being the leading trading partner of Korea. It is therefore maybe surprising that despite this apparent familiarity by Korean parties with the U.S. legal system, the use of AAA/ICDR is not more frequent.

III. FEATURES OF THE ICDR RULES

While some international arbitrations are conducted under the AAA commercial arbitration rules, the ICDR international arbitration rules (the "ICDR Rules") are designed to be used in arbitrations involving parties from different nationalities. These rules share many similarities with rules from other leading institutions, such as the ICC, SIAC and LCIA. However, there are certain aspects that are unique to

the ICDR Rules, and the following section will discuss the features of the ICDR Rules and their relevance to Korean parties.

A. Discovery

Discovery, or document production, is one of the defining features of U.S. style litigation. U.S. style discovery procedures have a reputation, arguably rightfully earned, of being extremely costly and onerous for the parties. The scope of discovery procedures in U.S style litigation is wider than in most other legal systems, including other common law jurisdictions. As indicated above, Korean parties and practitioners are well aware of the pitfalls and costs involved in U.S. court procedures. Although the ICDR Rules are specifically promulgated for international arbitrations, Korean parties and practitioners may feel a general sense of connection between the ICDR and the AAA rules and U.S. style procedure and that choosing "U.S. based" arbitration rules could influence the scope of discovery.

At the heart of the concern is that Korean litigation, as litigation in most civil law jurisdictions, does not provide for large scale document production, and Korean parties therefore approach document creation and retention differently to U.S. parties. Korean parties may therefore be concerned that they are disadvantaged in proceedings that involve U.S. style document production.

Certain features of Korean law may contribute to such concerns. The Personal Information Protection Act ("PIPA"), enacted in 2011, for example, includes strict restrictions on collection and retention of personal information in Korea, with requirements for periodic permanent deletion of data containing personal information.

However, a close examination of the ICDR Rules and its provisions on the taking of evidence demonstrate that concerns regarding an undue burden due to U.S. style discovery procedures are not justified. The ICDR Rules do not specifically provide for discovery. In fact, the word "discovery" does not appear in the ICDR Rules, suggesting a considered distance to U.S style litigation proceedings. In this regard, Article 21 of the ICDR Rules provides guidance on the approach taken. Article 21, in section 1, provides that, "*the arbitral tribunal shall manage the exchange of information between the parties with a view to maintaining efficiency and economy*."

Article 21 was newly revised in the 2014 version of the ICDR Rules. Luis Martinez, the Vice President of the ICDR, in an interview

posted on ICDR's website, stated that the rules were drafted "*in response to perception that arbitration was becoming overly Americanized, particularly in relation to discovery. Our guideline dealt with the issue in ways similar to the IBA rules of evidence, although the IBA rules are only guidelines and we have asked arbitrators to treat our guidelines as if they were mandatory*."

Article 21 of the current ICDR Rules specifically addresses the perceived concern on document production. Section 6 of Article 21 states, "*Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules*."

The provision of Section 6, as well as the statements by Mr. Martinez, demonstrate an awareness of the concerns of international parties relating to document production. As noted by Mr. Martinez, the ICDR has taken a strong position against "American-style" discovery even compared to other international arbitration rules.

While the procedure is largely in the hands of the arbitrators and the parties, and some document production is often provided for in the timetable of international arbitrations, the choice of the ICDR Rules does not suggest a different approach to document production compared to other international institutions. The experiences of the authors in two recent ICDR/AAA arbitrations involving Korean Parties and U.S. tribunals mirror this. One arbitration did not provide for any document production at all. In the other arbitration, the tribunal chose to adopt the IBA rules in full and only allowed limited document disclosure.

B. Emergency Arbitration and Expedited Procedure

In recent years, leading arbitration institutions started to incorporate provisions relating to emergency arbitrations in their rules, and parties are increasingly using this feature. The ICDR has been at the forefront of this development and was one of the first organizations to incorporate emergency arbitration procedures in its rules in 2006, allowing parties to obtain emergency interim relief before the constitution of the arbitral tribunal.

Pursuant to Article 6 of the ICDR Rules, a party may apply for emergency relief by submitting a written notice "*concurrent with or following the submission of Notice for Arbitration*" to the ICDR and

the other partie(s). The notice may be submitted via email. The ICDR Rules provide for a swift timeline for the resolution of request for an emergency relief, requiring that: (a) the ICDR appoints a single arbitrator within one business day of such application; (b) any challenges to an appointment are made within one business days of such appointment; and (c) the arbitrator must establish a schedule for consideration within two business days of the appointment.

Emergency arbitrators under ICDR Rules have broad authority to order or award interim or conservatory measures, including injunctive relief and measures for the protection or conservation of property. Despite the compressed timetable, the schedule for consideration established by the emergency arbitrator should provide a reasonable opportunity to all parties to be heard. The schedule may provide for proceedings by telephone, video, written submissions, or other suitable means and does not necessarily require an "in-person hearing."

While emergency arbitration proceedings are not appropriate for every case, it is a feature that rightfully has its place in the ICDR Rules. However, parties should think carefully whether this feature is required for their contractual framework and potential dispute, especially as the timetable in emergency arbitration procedures to respond to applications for relief is very condensed.

C. Privilege

Another notable feature of the ICDR Rules is the emphasis placed on privilege. Legal professional privilege is a long-standing principle in most common law jurisdictions. While this generalization is not always correct, countries with a civil law tradition tend to treat questions of privilege differently than their common law counterparts. However, even between some common law jurisdictions, the specific ways legal privilege is applied and granted differs. The question which privilege applies in a dispute involving parties from different countries and potentially lawyers from yet other jurisdictions may be a very relevant question and a difficult one to solve absent any clear guidance. The ICDR Rules are one of the few rules that specifically address this issue. In short, where parties, counsel and documents could be subject to different applicable laws on privilege, Article 22 of the ICDR Rules provides that the tribunal should apply the same rule to all parties and that the Tribunal should give preference to the "highest level of protection."

Korean parties may find this rule particularly attractive, given that the laws on legal professional privilege in the Korean legal system do not provide the same protection compared to, for example, U.S. or English law. While there are certain specific statutes of Korean law providing for attorney-client privilege in limited circumstances, such as the Korean Criminal Procedure Act and the Attorney-at-Law Act, there is no wide ranging attorney-client privilege comparable to that granted in the courts of the United States or England and Wales.

In international disputes, Korean parties will likely be placed in circumstances in which the applicable rules providing for attorney-client privilege may be weaker than those of the counterparty, especially if the counterparty is from a common law jurisdiction. In these circumstances, Article 22 of the ICDR Rules would afford additional protection and clarity.

D. Strike and Rank Method

Unlike the ICC or the SIAC, the ICDR Rules use a system of "Strike and Rank" for the selection of the arbitrators unless the parties have agreed on another method.

Article 12.6 of the ICDR Rules describes the "Strike and Rank" method as follows: (i) the ICDR shall send to the parties an identical list of arbitrators; (ii) parties are encouraged to agree upon an appointment from the list of names; (iii) if the Parties cannot agree, the Parties shall "strike" the names objected to; (iv) the parties then "rank" the remaining names on the list in number; (v) finally, the ICDR shall appoint the arbitrator among the approved names, with consideration of the "rank" by the parties.

The following is an illustration by the ICDR on how the rule is applied in practice:

The ICDR can draw from a large pool of international arbitrators ensuring that the list of candidates is not limited to arbitrators based or licensed in the U.S. The AAA/ICDR has significant experience in appointing international tribunals and parties can trust that appropriate candidates are included. The method of providing the Parties with an identical list of candidates to strike and rank provides for a fair and efficient method to appoint the tribunal. While the method may not be appropriate for all cases, the Parties are free to agree upon an alternative method of appointment.

E. Waiver of the Right to Challenge Arbitrators

While most international arbitration rules require the Parties to disclose relevant facts regarding the impartiality of arbitrators, the ICDR Rules arguably take this requirement a step further and place a particular emphasis on the parties to identify and communicate any concerns about an arbitrator's potential impartiality. Article 13.5 of the ICDR Rules, provides that: "*Failure of a party to disclose any circumstances that may give rise to justifiable doubts as to an arbitrator's impartiality or independence within a reasonable period after the party becomes aware of such information constitutes a waiver of the right to challenge an arbitrator based on those*

circumstances." The rules provide a welcome clarification on the obligation of the parties in this regard.

F. Rules of Efficiency of Proceedings

Delay and the duration of arbitration proceedings from the date of the notice of arbitration to the final award are one of the more frequent concerns expressed by clients. The ICDR tries to address this concern by incorporating provisions aimed at ensuring that the proceedings are completed without undue delay.

For example, Article 21 of the ICDR Rules provides that:

> *the arbitral tribunal shall manage the exchange of information between the parties with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time avoiding surprise, assuring equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.*

Regarding conduct of proceedings, Article 22(1)of the ICDR Rules provides that:

> *The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute. The tribunal may, promptly after being constituted, conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures, including the setting of deadlines for any submissions by the parties. In establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings.*

Furthermore, Article 30 of the ICDR Rules states that "*Unless otherwise agreed by the parties, specified by law, or determined by the Administrator, the final award shall be made no later than 60 days from the date of the closing of the hearing.*" While arbitral institutions generally are increasingly putting an emphasis on rules providing for a swift and attractive timeline for the determination of the award, the choice to include a 60 day timeframe from the closing of the hearing to the rendering of a final award demonstrates that the ICDR as an institution takes the concerns of delay seriously and does

its best to provide for rules that encourage tribunals to render the final award without delay.

ICDR Rules further provide for expedited procedures for international arbitrational cases in which the aggregate amount of claims and counterclaims is below USD 250,000, providing for shortened timelines for submissions and the rendering of the award. For cases where the amount in dispute is below USD 100,000, the rules provide in addition that such disputes shall, in principle, be determined with only written submissions and without an oral hearing. Provisions aimed to increase efficiency for cases under the expedited rules include the requirement to submit available evidence early in the Notice of Arbitration and the Answer.[5] The expedited rules further state that, in principle, a sole arbitrator is to be appointed.[6]

The ICDR Rules provide that the parties may "opt-in" to the expedited procedure without regards to the claim amounts, giving parties an option to accelerate the resolution of the dispute.

G. Punitive Damages

One of the concerns about U.S. litigation that is sometimes mentioned by Korean parties is the uncertainty introduced by the possibility to award punitive damages. While this is usually a question of the applicable law, the ICDR provides certainty by including a provision stating that punitive damages are not available in ICDR arbitration unless the applicable law provides otherwise. In Article 31.5 of the ICDR Rules, it is provided that the Parties waive, "*punitive, exemplary, or similar damages unless any applicable law(s) requires that compensatory damages be increased in a specified manner*." This provision is a welcome clarification for Korean parties, who are generally not exposed to punitive damages in their home jurisdiction.

[5] Article E-2 of International Expedited Procedures of ICDR Rules Parties are to present detailed submissions on the facts, claims, counterclaims, setoffs and defenses, together with all of the evidence then available on which such party intends to rely, in the Notice of Arbitration and the Answer.

[6] Article E-6 of International Expedited Procedures of ICDR Rules.

IV. CONCLUSION

The use of the ICDR Rules by Korean Parties has been steady over the last years and there is no reason why they should not be used more frequently. The ICDR specific method of appointing tribunals works well in practice and parties are free to provide for an alternative method. While the institution has its roots in the U.S., it is a truly international arbitration institution. The ICDR Rules address concerns that non-U.S. parties may have in terms of discovery and punitive damages and at the same time provide clarity on the applicable legal privilege, opting for an approach that favours a wide application.