The Dispute Resolution Review

Editor

Richard Clark

Law Business Research

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Chapter 20

KOREA

*Young Seok Lee and Sae Youn Kim**

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Korea is a civil law country. Thus, the legal system in Korea relies heavily on the enacted and promulgated laws and regulations. The judicial function is mainly limited to determining the meaning of the laws at hand. Korean law is influenced by German and French law as interpreted and introduced by scholars and legal practitioners in Japan during the first half of the 20th century. However, in recent years, Korean law has been increasingly inspired by American and English common law. For example, the trust law in Korea adopted the concept of 'trust' that is similar to how such term is used in common law, which is seldom done in civil law countries.

The following is the organisation of the Korean courts: the Supreme Court, five High Courts, the Patent Court, 18 district courts, the Seoul Family Court, the Seoul Administrative Court, 38 district branch courts, four family branch courts and multiple municipal small claims courts. All cases are heard and decided by judges. As a separate specialised court, Korea established the Constitution Court, which deals with constitutional issues and disputes.

The Supreme Court is located in Seoul and is the ultimate court of appeal, with 13 justices. It is the court that renders judgments on all final appeals made in civil, criminal, administrative, patent and family cases. However, it serves as a court of first instance in certain electoral cases.

There are five high courts located in five municipalities of Korea. They deal with appeals from district court judgments. They also determine certain administrative and electoral cases as a court of first instance. All cases are heard by a tribunal of three judges.

The district courts are the courts of first instance having general jurisdiction over civil and criminal cases, including administrative, family and bankruptcy cases. The district branch courts are located in smaller cities of Korea. In Seoul, administrative

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cases are determined by the Seoul Administrative Court and family cases are determined by the Seoul Family Court. District courts have single-judge tribunals and three-judge tribunals. Single-judge tribunals hear cases where the dispute is for 100 million Korean won or less. The judgment made by a single judge tribunal can be appealed to the appellate division of the district court, and then finally appealed to the Supreme Court. The judgment rendered by a three-judge tribunal can be appealed to the competent High Court and then finally appealed to the Supreme Court.

The Patent Court, a specialty court at the High Court level, determines certain patent cases as a court of first instance.

The ADR procedures in Korea are mostly court-driven or administratively handled, and save for arbitration, are very seldom handled privately. The court-driven ADR includes mediation and in-court settlement which are initiated either by a party seeking mediation or settlement, or by a judge in the midst of litigation seeking settlement prior to rendering a judgment. Certain statutes prescribe administrative meditation systems. Most common form of private ADR is a binding arbitration. More information on each of these different types of ADR procedures may be found in Section VI, below.

II THE YEAR IN REVIEW

In Korea, the decisions issued by the Supreme Court, the highest court in Korea apart from the Constitutional Court, which deals with constitutional law issues only, have a high precedential value compared with the decisions issued by the other courts.

i Window dressing and causation: Supreme Court Decision No. 2005da65579 (18 January 2008)

The court held that if employees and executive officers of a company participated in a large-scale 'window-dressing' or if an outside auditor of a company fails to perform or is negligent in performing a significant part of an audit procedure, it is very likely that such would affect the bank's decision to advance a loan to the company. Had the company's financial condition been accurately disclosed in the financial statements, the company would have been rated poorly in the bank's assessment even when factors such as reasonableness of the business plan, availability of resources for repayment, profitability of the company and financial prospects of the company were taken into account. The bank's assessment of these off-balance sheet factors would also have been negatively affected if the financial statements were accurately disclosed to the bank.

The court also determined that the bank's right to claim repayment of the loan from the company is a remedy that is separate from the bank's right to claim damages from the employees and executive officers for their negligence. Even if the bank transferred the right to claim repayment to a third party for an amount less than the face value of the loan, the bank can recover its loss by claiming damages from the employees and executive officers of the company.

ii Window dressing and causation: Supreme Court Decision No. 2007da90647 (26 June 2008)

The court held that there was a causal relation between the outside auditor's failure to discover the window-dressing practice of its client company and the investors' purchase of commercial papers issued by that company. Had the investors been well-informed that the company was engaged in large-scale window-dressing, they would not have purchased that company's commercial papers. Accordingly, the court concluded that the investors' purchase of the commercial paper was attributable to the outside auditor's negligent auditing of the company's financial statements.

iii New company liability for the debts of an old company: Supreme Court Decision No. 2006da24438 (21 August 2008)

The court was asked if a company establishes a new company to evade its obligations, whether the former company's creditor could request performance of obligations by both the former and the new company. The court held that if a company establishes a new company that is substantially identical in form and substance to the former company, the former company cannot argue before the creditor that the two companies are separate legal entities. Accordingly, the court held that the creditor may request either company to perform the former company's obligations. The court, however, held that overall circumstances such as the management and financial condition of the former company at the time of forming the new company, the use of the new company's assets by the former company, the price paid by the new company for any assets transferred from the former company should be considered in determining whether the new company is established by the former company to evade obligations. The court overruled in this case the decision by the appellate court that the new company was established to evade obligations.

iv Piercing the corporate veil: Supreme Court Decision No. 2007da90982 (11 September 2008)

If a company takes the appearance of a corporate entity but is merely an individual engaging in his personal business or is used by an individual as a means to evade certain laws, the court held that the corporate veil must be pierced and the individual behind the company shall be held responsible for the actions of the company. Forming a corporate entity to evade legal responsibilities would grossly violate the good faith principle and equity. The factors that the court considered in determining whether to pierce the corporate veil included the following: (1) whether the properties and business of the company and the individual are commingled; (2) whether a proper corporate decision-making process is taken by the company; (3) the insufficient capital of the company; (4) the size of the company's business and the number of its employees. The court held that the corporate veil may be pierced if the individual has full control over the company and abuses such control for his or her own benefits. Whether the individual's action constitutes an abuse should be determined on a case-by-case basis based on the overall circumstances. The court, however, overruled the appellate court's decision in this case that the individual is liable for the debts of the company.

v Exclusive jurisdiction agreements outside of Korea: Supreme Court Decision No. 2006da68209 (13 March 2008)

An issue arose as to whether the agreement by two Japanese parties for the exclusive jurisdiction of a Japanese court is valid even after the claim was assigned to a Korean party. The court held that the original parties' agreement on exclusive jurisdiction may be construed as an arrangement as to which 'local' court would have exclusive jurisdiction regarding the disputes arising 'within the country', and that such agreement cannot be construed as excluding the jurisdiction of the courts in other countries. Thus, the court upheld that Korean court's jurisdiction in this case. The parties' agreement on exclusive jurisdiction would not be applicable in such case and the appropriate jurisdiction should be determined pursuant to the Korean procedural laws.

vi Leveraged buyouts and criminal charges: Supreme Court Decision No. 2007do5987 (28 February 2008)

LBO (leveraged buyout) occurs when a purchaser finances an acquisition through a loan from a bank and later submits the assets of the target company as collateral to the bank. In such instance, the target company will bear the risks of losing its assets if the purchaser does not repay the loan, unless the purchaser provides a consideration to the target company that will cover the risks imposed on the target company. If the purchaser does not provide corresponding consideration to the target company providing the collateral, then such will inflict loss on the targeting company while unjustly enriching the purchaser. The court held that such arrangement is a breach of a fiduciary duty by the purchaser against the target company and that the purchaser committed a criminal violation.

III COURT PROCEDURE

i Overview of court procedure

The primary source of civil procedure is the Code of Civil Procedure ('the CCP'), which addresses and regulates trial proceedings. The Civil Enforcement Act regulates provisional attachments and provisional injunctions, provisional dispositions, preservation orders and enforcement proceedings. The criminal procedure is regulated by the CCP. Administrative trials are regulated by the Administrative Litigation Act. The court procedure for disputes arising among family members is regulated by the Family Litigation Act. Trademark and patent disputes are regulated by the Patent Act or the Trademark Act, or applicable.

One important fact to featuring the Korean court system is that in most cases the review by appellate courts is done *de novo*, and the appellate courts may accept and consider new evidence not accepted or considered by the court of first instance. The review by the Supreme Court is done only if there is an error of law or if an appeal of rights are specifically provided under the relevant statutes.

ii Procedures and time frames

The most typical way to commence a civil adjudication is by filing a formal lawsuit with the district court of the appropriate forum. As explained above, cases are dealt by either a single judge or a three-judge tribunal depending on the 'importance' of the case, which is usually decided by the amount in dispute.

Generally, it takes about six months to two years on a district court level to render a judgment, depending on the complexity of the case, and four months to one year on the appellate level to render a judgment. Since both the first instance courts and the appellate courts conduct fact-finding activities, the proceedings of these courts include preliminary hearings where issues are identified and discussed, and actual hearings where witness are heard and other types of evidence are examined. Preliminary hearings and actual hearings are held once in three to four weeks.

On the other hand, the Supreme Court only holds hearings in exceptional cases. When an appeal is filed with the Supreme Court, the Supreme Court examines whether the case is appealable to the Supreme Court under the relevant laws. If the Supreme Court determines that the case is not appealable, it can dismiss the case without providing specific reasoning. Such dismissal should be made within four months. Otherwise, the Supreme Court usually uses a three-justice tribunal review, reviews the case and renders its judgment with specific reasoning. It can take from six months to a year or two for the case to be finally determined by the Supreme Court.

There are also more simple ways to commence a court procedure. For claims in the amount of 20 million Korean won or less, the court will, upon receiving the complaint, issue an order for the defendant to pay the amount in dispute. If the defendant disagrees with the order, it can file an answer objecting to it within two weeks from the day the order is delivered to the defendant, and the court will commence an ordinary litigation proceeding.

Also, a plaintiff can initiate a court-driven mediation proceeding, where a judge will be the mediator. If the parties cannot agree on a settlement during the mediation proceeding, they can ask the court to submit the case for a normal litigation proceeding at such time.

Preliminary measures include provisional attachments in cases involving monetary claims, provisional dispositions in cases involving non-monetary claims, and provisional injunctions granting interim relief. Claimants may apply for these preliminary measures at any time during the course of a dispute, both before filing a complaint and while litigation is in process.

The application for a preliminary measure must be accompanied with documents supporting the likelihood of success on the merits as well as the need for the preliminary measure. In cases of preliminary attachments and provisional dispositions (prohibiting disposal of assets in dispute), the court will examine such documents and then order the claimant to post a security deposit in an amount proportional to the claim amount, and then render the decision on an *ex parte* basis. Such procedures usually take about a week from submitting the application to the court rendering decision. In cases of provisional injunctions granting provisional relief before an action on the merits, the court questions both the claimant and the respondent before rendering its decision, and it usually takes about four to six weeks from the application to the decision.

iii Class actions

Class actions are not provided for in the CCP as a type of litigation. The only American-type class action recognised under Korean law is provided in the Securities Transaction Class Action Act of 2005.

A securities class action can only be filed in cases where damages are incurred by (1) fraudulent inclusion or omission of material information in the securities registration statement or tender offer documents, (2) fraudulent inclusion or omission of material information in quarterly reports or business reports, (3) accounting fraud, (4) use of inside information, or (5) manipulation of the value of the security. If representative plaintiffs who file the lawsuit on behalf of the class prevail, the members of the class will be compensated unless they choose to opt out.

The most common method used for litigation involving a large number of plaintiffs is appointing a 'representative party' to become a plaintiff on behalf of all. The appointed parties, who do not need to appear before the court, are also named in the lawsuit and are subject to the effect of the judgment rendered in the case.

The Consumer Protection Act provides for a form of action that can be brought by an organisation to protect consumers' rights. It was adapted from a similar German law and only allows the organisations to seek prohibition of certain acts, and does not allow them to seek compensation of damages.

iv Representation in proceedings

A natural person, unless he or she is a child or otherwise incompetent under the relevant laws, may represent himself or herself without an attorney in any civil case, except in securities class actions.

Under the CCP, legal entities, associations and foundations can be represented by their legal representatives or executives.

In cases handled by single judge tribunals, relatives of natural persons or employees of natural persons or legal entities can represent the natural persons or legal entities after receiving permission by the court.

v Service out of the jurisdiction

Since Korea is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, serving a person with documents outside the jurisdiction should be made pursuant to the Convention if such person is within the signatory state. If a party is not within a state that is a signatory to the Convention, the presiding judge shall entrust the documents with the Korean Ambassador, the Minister or Consul or a competent government authority of that country.

vi Enforcement of foreign judgments

To enforce a foreign judgment in Korea, the plaintiff must seek an enforcement judgment in Korean courts, and the following need to be satisfied:

a the foreign judgment must be final with no further appeal available;

b the foreign court or tribunal that rendered the judgment must have legitimate jurisdiction under the principles of international jurisdiction according to the Korean law or international treaty;

c the defendant must have been properly served with the relevant litigation documents as well as the notice of trial date and had sufficient time to prepare a response for the applicable proceeding (publication notice is not acceptable as a service mechanism), or have voluntarily submitted to the jurisdiction of the court or tribunal although not properly served;

d the foreign judgment must not conflict with Korean public policy or social values; and

e the foreign jurisdiction must provide reciprocity with respect to the enforcement of judgments rendered by the Korean courts or tribunals.

vii Assistance to foreign courts

Under the Act on International Mutual Judicial Assistance in Civil Matters, if a foreign court satisfies certain requirements, it can request a Korean court to serve certain documents and examine certain evidence on its behalf. No such legal cooperation would be provided unless the foreign court complies with the procedures specified in the Act above.

Not only is Korea a signatory to the multilateral Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters as mentioned above, it also concluded bilateral treaties with Australia and China. Korea is not yet a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. However, the Supreme Court has announced its plan to become a signatory in the near future.

viii Access to court files

Under Korean law, interested third-parties are rarely given access to records, and disinterested third-parties cannot access court files. However, in general, any member of the public who has the basic information such as the case number and the names of the parties of a specific case can check the status of the proceeding of such case from the Supreme Court's website.

The Supreme Court regulations provide that parties at dispute or interested third parties may apply to review or obtain copies of civil litigation records. In practice, the court rarely grants access to criminal trial records and the records may only be accessed or copied by certain people such as the complainant or the victim. Other members of the public can only have limited access to such criminal trial records and only if the disclosure of such records is necessary to protect the public interest or other equivalent interest.

In certain limited circumstances, members of the public may, with the court's leave, access court judgments rendered in a civil proceeding after the case has been completed. If a person requests access to the judgments, the courts will disclose them after deleting the names of the parties involved. However, the Criminal Proceedings Act allows a member of the public to access the final record from the prosecutor's office only for limited purposes such as right of relief, scholastic research or public interest.

Furthermore, if such disclosure would interfere with privacy or with a trial proceeding, or if any party involved in the criminal proceeding does not agree, the prosecutors can refuse to disclose the records.

ix Litigation funding

A disinterested third party may fund litigation under the Korean law. However, when the right to a claim is apparently (and not actually) transferred to another party for the main purpose to allow that party to file a lawsuit in its own name, such transfer of the right to a claim is called a litigation trust (a trust for the purpose of litigation), which is not accepted by the court, and thus regarded null and void. The defendant can seek dismissal of the lawsuit so filed, raising the litigation trust as a defence.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Conflicts of interest of attorneys are regulated by the Attorneys' Act. Under the Act, attorneys are conflicted out in the following cases: (1) when the attorneys agree to take on a case, they cannot act for the opposing party in that very case, (2) while the attorneys are handling a case, they cannot act for the opposing party even in a different case unless the client consents to such representation, and (3) if the attorneys have previously handled a case in the capacity as a government officer, a member of a conciliation committee, or an arbitrator, they cannot represent the parties in that case. Types (1) and (3) are not waivable conflicts.

Chinese walls or information barriers are not commonly used in Korean law firms. Chinese walls within a law firm generally do not allow the law firm to take on a case in a conflicts of interest situation. Therefore, if a law firm is to be conflicted out, the law firm cannot take on the case on the ground that a Chinese wall has been established in the law firm. However, when the client consents to a law firm to take on a case notwithstanding the apparent conflicts of interest (refer to the scenario (2) above), the client may demand that the law firm set a Chinese wall within the law firm to alleviate the concern of the conflicts. The type of Chinese walls to be set in such a case would vary depending on the circumstances of each case. To date, however, there are not many cases where the client demands a certain type of Chinese walls upon giving consent to the law firm's taking on the case. Rather, law firms voluntarily propose to set a Chinese wall when requesting the client to give consent to the law firm's taking on a case in an apparent conflicts of interest situation.

ii Money laundering, proceeds of crime and funds related to terrorism

There are statutory laws that regulate money laundering and dealing in the proceeds of crime. There is no statutory law regulating funds related to terrorism. As to money laundering, the main statutory law is the Act on Reporting and Use of Certain Financial Transaction Information. The reporting obligation is imposed mainly on the officers and employees of financial institutions. As to the proceeds of crime, the relevant statutory laws are the Act on the Regulation and Punishment of Concealment of Gains from Crimes and the Act on Special Cases concerning the Confiscation and Restoration of

Properties Acquired by Corrupt Means, which has been enacted to the implement the United Nations Convention against Corruption.

However, the above laws do not specifically address lawyers' responsibilities in relation to money laundering, or protecting against dealing in the proceeds of crime or funds related to terrorism. To date, there has not been much discussion in Korea on lawyers' responsibilities on these issues.

iii Other areas of interest

Korea passed the Foreign Law Advisers Act in March 2009. This Act is to become effective as of September 2009. To date, there has been no legal basis for the lawyers licensed outside Korea ('non-Korean lawyers') to practise law (including advising on foreign laws) in Korea. Although the Act allows non-Korean lawyers to practise in Korea, the Act imposes certain restrictions. First, all non-Korean lawyers who wish to practise law in Korea must obtain approval from the Ministry of Justice. One of the main requirements for obtaining the approval is that the non-Korean lawyers must have been practising law for three years or more in the country where the licence was granted. In addition, since the Act is only the first step towards the full opening of the Korean legal market to non-Korean lawyers, non-Korean lawyers may provide legal advice on the laws of the country in which they are licensed and on the generally accepted international customary law, and to represent clients in international arbitration cases in Korea. Moreover, non-Korean lawyers are not allowed to employ or be in association with Korean licensed lawyers. It is however expected that these restrictions will be lifted step by step as the Korean legal market progresses towards a full liberalisation.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The concept of 'privilege' does not exist in Korea. Instead, there are some statutes, such as the Attorneys act, the CCP, and the Criminal act that provide protections for confidential attorney-client communications, although such protections do not rise the same level as the attorney-client privilege, which is commonly found in common law countries.

These statutes protect the confidentiality of the communications between an attorney and a client by imposing confidentiality obligations on attorneys and allowing them to refuse to testify as witnesses, decline to produce evidence or to refuse seizure.

Thus far there has been no court precedent on this point, but it seems likely that the courts would recognise that the protections mentioned above should also be applied to communications between a company and its Korean-licensed in-house counsel, provided that such communications are made in the course of the performance of an attorney's duties.

It is not clear whether such protections would be recognised for the communications between a foreign lawyer and his client, because at this time, a person who is a licensed attorney in another country but not in Korea cannot practice as an attorney in Korea.

ii Production of documents

The parties may produce the documents that they deem fit to meet their burden of proof. If an admission by the other party is made regarding a fact, the party alleging that fact does not need to produce any documents or evidence to prove that fact. Since discovery as a rule does not exist in Korea, each party is responsible for producing the documents to prove his case.

In civil cases, judges, who are triers of fact, are allowed to freely establish their belief or conviction from the evidence submitted and there are no complicated evidentiary rules like those found under a jury system.

For documents stored overseas and electronically, parties may submit copies if the other party does not dispute that they are true and correct copies of the originals. However, if the other party disputes either the existence of the original or the truthfulness or correctness of the copy, then the party who produced the copy must produce the original under his responsibility.

Since there is no discovery in Korea, neither party has a 'general' obligation to produce documents that are owned by them or by a third party under their control. However, a party can claim that the other party has a certain document that is essential for proving a fact for which he has the burden of proof. In such case, the court may order the other party to produce such document. The party desiring to access the documents must specify the documents and state the reasons for believing that the other party has the documents. When a party desires to obtain a document held by a third party, the party can ask the court to send an inquiry about the document to such third party and to request the third party provide a copy thereof. However, since such inquiry does not have any compelling force against the third party, the third party can refuse to produce the document.

As stated above, since each party only produces what he has and believes are necessary in proving his case, the issue of e-discovery has rarely been the subject of interest or discussion in Korea.

If a party has a right to seek production of certain documents from the other party in limited circumstances as mentioned above and if the other party refuses to produce the documents although it is apparent that he has the documents under control, then the court is allowed to form a negative inference against the party which does not produce the documents with regard to the fact that the document is deemed to prove.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Litigation is still a dominant method of dispute resolution, although arbitration is being frequently used in certain fields, such as government procurement contracts, international transactions and shipping cases. The only alternative to litigation other than arbitration is mediation, including conciliation, but such mediation or conciliation is not a true alternative to litigation in that, as seen below, mediation or conciliation often takes place in the course of litigation with a close involvement or supervision by the court.

ii Arbitration

The Arbitration Act is the law governing and regulating arbitrations in Korea, both domestic and international. This Act applies to institutional and *ad hoc* arbitration.

The sole arbitration institution designated under the Arbitration Act is the Korea Commercial Arbitration Board ('the KCAB'). There are several minor arbitration institutions, but they are seldom used, particularly in commercial disputes with a large claim amount. The KCAB is certainly the most important Korean arbitration institution.

The KCAB has two different rules of arbitration, one for domestic arbitration and the other for international arbitration, which became effective only in 2007. However, since the international rules apply only when the parties agreed specifically to the international rules, there has not been to date a single arbitration case where the international rules applied. The international rules are in line with the arbitration rules of the major arbitration institutions.

International contracts to which one party is a Korean company frequently contain an arbitration clause, choosing international arbitration institutions for dispute resolution. International Chamber of Commerce is by far the most popular international arbitration institution in Korea, followed by the American Arbitration Association, Singapore International Arbitration Centre and Hong Kong International Arbitration Centre.

The KCAB has 300 to 400 arbitration cases per year, both domestic and international. Around one-quarter to one-fifth of the cases are international. It is quite common for contracts, again both domestic and international, to contain arbitration clauses. The other arbitration institutions handle only minor cases, and the number of cases being handled is not large. There are no statistics for *ad hoc* arbitrations, but they are not common and would not exceed several tens of cases per year.

There is no right to appeal against an arbitration award issued in Korea. Only in certain limited circumstances, cancellation of an arbitration award can be sought, and only by filing a lawsuit. The court can cancel the award *ex officio* when the dispute is not 'arbitrable' or when the recognition or enforcement of the award would be against the public policy. In addition, the court will also cancel the award when the party seeking cancellation of the award proves that (1) the party was mentally incapable at the time the arbitration agreement was reached, or (2) the party was not notified of the appointment of the arbitrators or the arbitration proceedings, or was otherwise unable to make arguments on substantive issues, (3) the issues resolved by the award are not subject to, or beyond the coverage of, the arbitration clause, or (4) the composition of the tribunal or the arbitration proceedings was not in accordance with the agreement of the parties, or in absence of such an agreement, the Arbitration Act. In general, the court's intervention on or review of arbitration proceedings is quite limited.

With respect to recognition and enforcement of a foreign arbitral award, it needs to be determined if the award is subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention'). If the New York Convention applies, namely, if the country where the seat of the arbitration lies is a signatory to the New York Convention, then it would be easier to seek recognition and enforcement of the award since only the requirements under the

New York Convention need to be satisfied. Even in this case, however, recognition and enforcement cannot be effected by simple registration or similar method. A court decision for recognition and enforcement of an award must be obtained.

If the New York Convention does not apply, the Civil Procedure Code regulates the recognition and enforcement of foreign court decisions. The additional requirements under the Civil Procedure Code, compared with the requirements under the New York Convention, are that the application for arbitration and other summons have been duly served and there is a reciprocity of enforcement between the relevant countries. The reciprocity requirement is particularly cumbersome since the party seeking recognition and enforcement of an award in Korea needs to investigate the legal regime of the country where the seat of the arbitration was located, to see if that country allows enforcement of an award issued in Korea. As is the case when the New York Convention applies, it is necessary to obtain a court decision for recognition and enforcement of an award.

There is no other way to seek recognition or enforcement of a foreign arbitral award in Korea. If it turns out that recognition and enforcement of an arbitral award is not possible in Korea, the party seeking enforcement can only file a lawsuit for the underlying claim without relying on the award.

Korea is a signatory to the New York Convention, which is applicable to arbitration in Korea as provided in the New York Convention. Korean courts are generally very arbitration-friendly. In a case decided in 2004, the Korean Supreme Court interpreted the requirements under Article 4, Paragraph 1, of the New York Convention in a less strict way in respect of the original document requirement and the translation requirement.

The KCAB is now working to amend the International Rules of Arbitration, aiming for the amendment to become effective as of June 2009. The amendment will make the Rules apply when the parties choose the KCAB as the arbitration institution for an international arbitration, even if the parties do not specifically agree to the international rules. The amendment is expected to widen the application of the international rules since it forgoes the requirement that the parties specifically agree to the international rules.

As to the validity of an arbitration clause, the most controversial decision issued recently (2004) addressed selective arbitration clauses, where the clauses allow selection by the parties between litigation and arbitration. The Korean Supreme Court held that this selective arbitration clause is null and void. Although this decision has been heavily criticised, it is still valid and unchanged. Any change to this decision would require an *en banc* decision.

iii Mediation

Mediations are governed mainly by the Judicial Conciliation of Civil Disputes Act. The words 'mediation' and 'conciliation' are used almost interchangeably.

Mediations are used in Korea mostly in connection with lawsuits. Mediations used in connection with litigation has a special feature, in that if a conciliation order is issued, and not objected to within a certain time frame, the order becomes final and conclusive, and acquires the same effect as a final and conclusive court decision.

The noticeable trend is that courts rely more often than before on mediation. Courts would, during the course of litigation, refer cases to mediation when appropriate. Such mediation is done sometimes by the court itself (an exception not commonly seen outside of Korea) and sometimes by a conciliation committee.

Other than the mediation in connection with litigation, there are also many administrative mediation proceedings provided in the relevant statutory laws. Some of these proceedings are required to be taken before a party files a lawsuit. Whether mandatory or not before filing a lawsuit, the administrative mediation proceedings are not regarded as important dispute resolution methods.

iv Other forms of alternative dispute resolution

Alternative dispute resolution methods other than arbitration and mediation (including conciliation) as explained above are seldom used and almost unheard of.

VII OUTLOOK & CONCLUSIONS

With the recent economic downturn, financial products featuring investment mainly into derivative products suffered huge losses, and many lawsuits have been filed against the financial institutions which sold the financial products on the grounds that the financial institutions did not perform their duty of care in making the investment portfolio and that the financial institutions did not sufficiently explain the risks involved in the products being sold, among others. Particularly when the financial products involve a long term contract period, it is being vigorously debated if a party can terminate the contract on the ground that the economic circumstances have changed from time the contract was entered into, notwithstanding the contractual principle of *pacta sunt servanda*. There have recently been conflicting court decisions on these issues. Although the conflicts in the decisions might be due to the difference in the facts of each of the cases, it is expected that only the decisions by the higher courts, and eventually the Supreme Court, on the applicable legal principles will put the disputes to an end.

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Young Seok is a partner at Yulchon. He practises in the areas of international litigation and arbitration. He has been in practice for over 20 years and has handled diverse cases, including general commercial disputes, construction and engineering disputes, shipbuilding disputes, insurance disputes and maritime disputes, both in court and through arbitration. He is a member of the Korean Bar and also passed the New York Bar exam. He also works frequently as a KCAB arbitrator. He is an executive committee member of the Korean Association of Arbitrators, a director of the Korean Council of International Arbitration, and a member of the international committee of the International Chamber of Commerce in Korea. He regularly speaks at various international arbitration events.

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