

The Rise of South Korea as an “Arbitration Eager” Jurisdiction: Rethinking the Current Role and a Promising Future

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Abstract

This paper introduces the concept of an “arbitration eager” jurisdiction and sets out principal criteria that could be used to describe the term. The author analyses and discusses the recent development of international commercial arbitration industry in South Korea as a prime example of a jurisdiction that matches the description of the concept.

Introduction

The spectacular growth of many economies, ambitious industrial reformation and vast technological progress in the Asian Pacific region was termed as an “asian miracle”.¹ The extraordinary record of economic growth has led to the fact that Asia is today the world’s fastest growing economic region,² and is still undergoing rapid growth and industrialization.

In less than a half a century, the Republic of Korea (further in the article - Korea) has evolved from a war-torn region to a top-notch, high-tech economy, which is today renowned worldwide as a global innovation leader in tech industry. Korean economic success story has been referred to as the “miracle on the Han river”³. Technological innovation has played a pivotal role in Korea’s long-term economic growth success, and such advanced developments can now be further exploited in other areas, such as in dispute resolution.

Such rapid economic growth would not be possible without global cooperation, exchange of knowledge, utilization of technology, foreign investments inflow and exploration of new export markets. As many of the Asian countries began to dominate large portions of the global economy, they had not been an exception to the internationalization. Export became not only an engine of further economic growth, but greatly contributed to the wider opening of borders and prompted the countries to explore new ways of international collaboration. To take a well-known example, China’s ambitious Belt and Road Initiative (一帶一路) was launched with an aim to foster trade cooperation by building a massive network of trade, investments,

¹ Nelson Richard and Pack Howard., “The Asian Miracle and Modern Growth Theory” [1999] The Economic Journal, 109 (457). P. 516.

² International Monetary Fund., “World Economic Outlook: Growth Slowdown, Precarious Recovery”, 2019. P. 15, 47.

³ Karadas Songül and Cetin Rajmi., “The Miracle on the Han River: South Korean Economic Development” [2018] Istanbul Journal of Economics-Istanbul Iktisat Dergisi, 68(1). P. 93-95.

transportation and energy infrastructure projects, that connects Asia, Europe, the Middle East and Africa.⁴ In 2020, 15 Asian countries, including Korea, signed the Regional Comprehensive Economic Partnership (RCEP) agreement, the world's largest free trade agreement.⁵ The arrangement signals the countries' shared commitment to open and connect supply chains, multilateral trade integration and openness towards foreign investments.

Globalization has also contributed directly to the rapid and broad growth of international arbitration.⁶ A proliferation of cross-border trade inevitably leads to the increased number of disputes and the need for a neutral, efficient mode of dispute resolution. In the cross-border trade's context, dispute settlement is an essential pillar of ensuring security, integrity and reliability.⁷ For various reasons, including, inter alia, speed, confidentiality, ease of enforcement,⁸ international arbitration became the medium for good: foreign investors and corporations prefer to resort to international arbitration, and Asian parties are not exception.⁹

As a result of the financial crisis that jolted the Korean peninsula in the late 90s, many Korean corporations were involved in a high number of complex cross-border disputes that, as a result, led to the sophistication of international arbitration industry in the country. Today, however, a new chapter for the international arbitration in Korea began to unfold: it gains a firm foothold of acceptance and credibility worldwide as a safe, efficient and user-friendly seat of arbitration.

To hasten the growth of transboundary cooperation and business, the Korean government supports wider implementation and utilization of various ADR techniques, including international arbitration, to resolve cross-border disputes. Government support is manifested through the state's legislative activities and is evidenced by the judicial response. Economic growth in Korea led to the demand in dispute resolution services that can deal with some of the most tangled cross-border disputes. This article explores the recent developments in the Korean arbitration *fora* by providing an introductory overview of the Korean *lex arbitri* and the Korean Commercial Arbitration Board (KCAB)'s International Arbitration Rules and certain other noteworthy capacity building projects.

I. Unveiling the Concept of “Arbitration Eager” Jurisdictions

The selection of an appropriate seat of arbitration is arguably one of the most crucial considerations for the parties to an arbitral agreement.¹⁰ By choosing the seat, parties determine the mandatory law of the procedure which the arbitration adopts, and pursuant to

⁴ Mitrovic Dragana., “*The Belt and Road: China's Ambitious Initiative*” [2016] China International Studies, 59. P. 76.

⁵ Cimino-Isaacs Cathleen and Sutherland Michael., “*Regional Comprehensive Economic Partnership: Status and Recent Developments*” (Congressional Research Service, 2020) Available at: <https://crsreports.congress.gov/product/pdf/IN/IN11200>.

⁶ Leahy Edward and Bianchi Carlos., “*The Changing Face of International Arbitration*” [2000] Journal of International Arbitration, 17(4). P. 19.

⁷ Snyder Earl., “*Foreign Investment Protection: The Arbitration Aspect*” [1964] South Carolina Law Review, 16(3). P. 388-398.

⁸ Born Gary., “*International arbitration: Law and practice (Second edition.)*” (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2016). P. 7.

⁹ Taylor Veronica and Pryles Michael., “*The Cultures of Dispute Resolution in Asia*” (Dispute Resolution in Asia (3rd ed), Kluwer Law International, Rijn, The Netherlands, 2006). P. 16.

¹⁰ Ordway Eric., “*The Importance of the Seat of Arbitration*” [2003] Advocate (State Bar of Texas), 25. P. 16.

which national courts will exercise its supervisory jurisdiction over the arbitration.¹¹ The seat will also determine the degree to which an arbitral award may be challenged, as it is common that the local courts in the designated seat hear appeals in relation to arbitral awards.¹² Further, the extent to which judicial review is available to parties will also depend on the principles of the law of the seat.

As such, the law of the seat impacts international arbitration on a number of fronts. The judiciary retains a level of control over arbitration to ensure that the private system of justice meets at least minimum standards of fairness – so that ADR is not a system that is fraudulent, corrupt, or lacking in essential due process.¹³ On many occasions, the parties and tribunals seek assistance from state courts in the seat of arbitration: regarding the composition of the arbitral tribunal, applications to stay concurrent proceedings, interlocutory injunctions, taking of evidence and enforcement of the arbitral award, to name a few. Whilst these procedural assistance does not *per se* determine the merits of the dispute, it nonetheless has a significant impact on the arbitration proceedings and affects parties' experience.

In 2015, the Chartered Institute of Arbitrators (CI Arb) developed the London Centenary Principles,¹⁴ which sought to encapsulate the key elements of a “safe seat” for international arbitrations. The principles identify key characteristics that an arbitral seat should have in order to ensure that an international arbitration can be conducted effectively and efficiently.

The Queen Mary University of London (QMUL) International Arbitration Survey also considered the factors that influenced respondents when choosing a seat of arbitration. The results of the survey indicated that reputation and recognition were primary factors driving the choice of seat. In addition, preferences for certain seats were mainly based on an assessment of the seat's formal legal infrastructure, the neutrality and impartiality of the legal system, the national arbitration law and its track record for enforcing arbitration agreements and awards.¹⁵

Yet another project was undertaken by the Delos Dispute Resolution (Delos). Considering the best practices, the most recent developments and “accepted wisdom” in international arbitration,¹⁶ the so-called Delos Principles on fair and efficient international arbitration were introduced. According to the Delos, a “safe seat” of arbitration is the one where the legal framework and practice of the courts support recourse to arbitration as a fair, just and cost-effective binding dispute resolution mechanism. Conversely, a place of arbitration that does not qualify as a “safe seat” by the Delos standards is the one that materially increases the

¹¹ *Ostrove M., et al., “Choice of venue in international arbitration”* (Oxford University Press, 2014).

¹² *Birgonul Talat, Dikmen Irem and Bektas Sinasi. “Comparison of an Emerging Seat of Arbitration and Leading Arbitration Seats and Recommendations for Reform”* [2018] *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 10(1). P. 2.

¹³ *Moses, Margaret., “The Principles and Practice of International Commercial Arbitration”* (Cambridge: Cambridge University Press, 2008). P. 84.

¹⁴ CI Arb London Centenary Principles 2015. Available at: <https://www.ciarb.org/media/1263/london-centenary-principles.pdf>.

¹⁵ “2018 International Arbitration Survey: The Evolution of International Arbitration” (Queen Mary University of London in partnership with White & Case). Available at: [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF).

¹⁶ *Virjee Hafez., “Activating Arbitration: Four Principles to Achieve Fair and Efficient International Arbitration”* [Delos Dispute Resolution, 2017]. Available at: <http://delosdr.org/wp-content/uploads/2018/01/Hafez-R-Virjee-Activating-Arbitration-Delos-2017.pdf>.

cost of arbitrating disputes in that place, whether such cost is borne by the parties directly (e.g. jurisdictions that require awards to be signed at the place of arbitration and/or deposited with competent authorities).

Despite the safe seat term, arbitration community frequently tags certain jurisdictions as “arbitration friendly” to describe certain appealing features. Taking into account the most recent developments in the international arbitration landscape, emergence of new arbitral forums bent on securing a piece of the market, and the pro-active role of local governments in promoting ADR, the time has come to unveil the concept of an “arbitration eager jurisdiction”.

Arbitration is by no means a modern innovation, there are a number of well-established arbitration hubs like Paris and London. As more countries are increasingly enmeshed in the cross-border transactions, new seats are concomitantly emerging as new locations for international arbitration. In the Asian region, by way of example, arbitration has been developing “at full gallop”.¹⁷ Several countries adopted modernized arbitration laws, invested substantially in capacity building programs to raise awareness of ADR among practitioners and judiciary, cultivated the sense of trust in international arbitration among businesses, supported financially and administratively launch of the state-of-the-art hearing facilities.

A pro-arbitration legislation is a distinct trend in many countries. Nevertheless, domestic laws on arbitration vary greatly from one country to another. The key distinguishing factor of an “arbitration eager” jurisdiction is its innovative, pro-active approach to arbitration. These jurisdictions joined the arbitration race more recently, but they compete intelligently. They must have already undergone legislative reforms, demonstrated a good track record of judicial support of international arbitrations, evolved into neutral and transparent seats. Arbitration eager jurisdictions actively seek to modernize the arbitration process by introducing new concepts, supporting diversity and implementing pioneering measures to boost arbitration.

In Asia, several countries have already demonstrated arbitration eager attitude. When the issue of choice is in question, the new entrants understand that they need to play wisely to compete with veteran competitors. In Singapore, for example, the government introduced tax exemption for non-resident arbitrators till the year of 2022.¹⁸ In Hong Kong, the Arbitration Ordinance (Cap. 609) was amended to allow third party funding in international arbitration. Being neighbors with such powerful competitors, Korea faces heavy competition. In Korea, the government introduced the Arbitration Industry Promotion Act,¹⁹ which laid down cardinal principles for promoting the arbitration industry in the country.

Korea was barely visible on the international arbitration map just fifteen years ago,²⁰ however, today it has firmly marked itself as a major player. The government was the

¹⁷ D’Agostino Justin., “Arbitration in Asia at Full Gallop” [2014] Kluwer Arbitration Blog. Available at: <http://arbitrationblog.kluwerarbitration.com/2014/02/10/arbitration-in-asia-at-full-gallop>.

¹⁸ Inland Revenue Authority of Singapore, Government Agency Website. Available at: <https://www.iras.gov.sg/irashome/Individuals/Foreigners/Your-Situation/Non-resident-professional/Non-Resident-Arbitrators>.

¹⁹ Arbitration Industry Promotion Act (Act No. 14471, 27 December 2016). Available at: https://elaw.klri.re.kr/eng_service/lawView.do?hseq=42311&lang=ENG.

²⁰ Yoon Byung-Chol and Richardson Joel., “The Legal System for International Arbitration in Korea” [2014] Korean Arbitration Review 4. P.18.

staunchest supporter of rebranding and revitalization of the international arbitration industry in Korea.

Subsequent paragraphs will consider a combination of factors that make Korea a vibrant and successful player in the highly competitive world of international arbitration.

II. General Overview of the Korean Arbitration Laws

The recent years witnessed unprecedented transformations and rapid changes in the arbitration landscape of Korea. By bringing creativity and innovation in the business sector, the Korean government has been successful in developing and commercializing innovative new products and services and also very virtuosic in utilizing its innovative capacities in implementing and advancing dispute resolution services. To this date, KCAB, the only authorized national arbitral institution in Korea, has gained a strong foothold among the international arbitration community in Asia and continues its transformation into a leading arbitral institution.

Korea has a relatively long arbitration tradition. ADR as means of resolving disputes has deep roots in the Korean legal tradition dating back to the Yi Dynasty (1392 – 1910).²¹ It has been a common practice for traders to call upon a respected colleague to express a view on disputes between them.²² Also, Korea has traditionally encouraged the use of arbitration to resolve disputes between domestic parties, particularly for construction disputes. With international trade growing at a brisk pace, arbitration has come to the fore and became a preferable method of dispute resolution among Korean companies involved in cross-border business. Today, Korean companies are among the most fervent users of international arbitration.²³

The establishment of a permanent arbitration system in Korea begins with promulgation and enforcement of the Korean Arbitration Act in 1966.²⁴ The Act²⁵ was first enacted as a stand-alone statute governing both domestic and international arbitrations.²⁶ In the same year, a separate commercial arbitration committee had been established as a section of the Korean Chamber of Commerce and Industry,²⁷ which in 1970 transformed into a separate legal entity, the KCAB.

Keeping pace with contemporary developments in international arbitration and acting towards achieving the objective of meeting demands of the business community, Korean legislators introduced comprehensive amendments to the arbitration legislation. In 1999, the

²¹ Liew Song Kun., “Commercial Arbitration in Korea with Special Reference to the UNCITRAL Rules” [1977] Korean Journal of Comparative Law 5. P. 69.

²² Collier John and Lowe Vaughan., “The Settlement of Disputes in International Law: Institutions and Procedures” (Oxford University Press, 1999). P. 45.

²³ MacArthur David., “What’s «Next» For Arbitration in Korea” [2019] Kluwer Arbitration Blog. Available at: <http://arbitrationblog.kluwerarbitration.com/2019/04/19/whats-next-for-arbitration-in-korea/>.

²⁴ Kim Hong-Kyu., “Reality and Problem Areas of Korea’s Arbitration System” [1996] Journal of Arbitration Studies 6. P. 23.

²⁵ Above fn 19.

²⁶ Shin Hi-Taek., “Republic of Korea: Model Law in Asia: the case for Korea” in “The UNCITRAL Model Law and Asian Arbitration Laws” (Cambridge University Press, 2018). P. 116.

²⁷ Yoon Byung-Chol, Kim Grant and Lee Chul-Won., “Arbitration in Korea” [2013] International Commercial Arbitration in Asia 263.

National Assembly approved extensive amendments to the Korean Arbitration Act which incorporated the UNCITRAL Model Law on International Commercial Arbitration 1985 to a great extent.²⁸ As Korean legislators highlighted, the purpose of these amendments was to promote international trade and international commercial arbitration by adopting international standards, minimizing domestic court interference, and facilitating enforcement of arbitral awards.²⁹

Adhering to the UNCITRAL Model Law as early as in 1999, Korea became the first nation in North-East Asia that fully harmonized its *lex arbitri* with the generally accepted international standards. In 2016, Korea further enacted several important amendments to its Arbitration Act to reflect the new features of the 2006 UNCITRAL Model Law.

In 1973, Korea acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and ratified ICSID Convention in 1967. It also has a well-developed judicial system that is fully conversant with arbitration and have demonstrated its pro-arbitration stance.

The Korean government today continues to endorse the promotion of ADR. Notably, with an objective to invigorate arbitration, the Korean government introduced the Arbitration Industry Promotion Act (Promotion Act),³⁰ which laid down cardinal principles for promoting the arbitration industry in Korea. The Promotion Act not only reiterates the government's common support of ADR, but it also demonstrates its pro-activeness in creating incentives and encouraging the growth and development of arbitration in the region. The Korean government also actively invests in the infrastructure: it supported the launch of the Seoul International Dispute Resolution Center (Seoul IDRC) in 2013,³¹ which was later consolidated with KCAB in 2018, the same year the KCAB INTERNATIONAL was established as an independent international division of the KCAB,³² to meet the growing demand for cross-border dispute resolution services. For international cases, KCAB introduced separate International Rules in 2011 which made it more attractive to foreign users.³³ Today, the KCAB INTERNATIONAL actively contributes to capacity building in Asia and beyond.

The growing popularity of arbitration in Korea was accompanied by corresponding developments of its *lex arbitri*. In 2016, Korea revised its domestic laws on arbitration to reflect the best practices and it now fully integrates leading international standards. Korean legislators adopted the 2006 UNCITRAL Model Law, praised for its simplicity, flexibility and pragmatism.³⁴ The principal legislation was amended to reflect the most recent changes to the UNCITRAL Model Law, including provisions regarding the definition of arbitration,

²⁸ Above fn 26. P. 117.

²⁹ Ibid P. 117.

³⁰ Online resource: “*Arbitration Industry Promotion Act*”. Available at: https://elaw.klri.re.kr/eng_service/lawView.do?hseq=42311&lang=ENG.

³¹ Kim Joongi., “*International Arbitration in East Asia: From Emulation to Innovation*” [2014] Arbitration Brief 4(1). P. 1, 8.

³² Online resource: “*The Official Launch of KCAB INTERNATIONAL*”. Available at: http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do.

³³ Rhie John and Byun Shinhong., “*Development in International Arbitration and Mediation at the KCAB*” [2012] Korean Arbitration Review 1. P. 29.

³⁴ Dunna Timothy., “*Keeping with the times, revisiting the UNCITRAL model law on international commercial arbitration*” [2020] Journal of International Dispute Settlement 11(3).

expanding the scope and application of interim measures, taking evidence in arbitration, and, perhaps most importantly, simplifying the requirements for recognition and enforcement of awards. The changes strengthen the effectiveness of the arbitration process and further help to make it more user-friendly.

In the last several years, Korea has sent a clear message to the arbitration community that its legislature and judiciary endorse a pro-arbitration policy. Korean courts will set aside an award only in limited and defined circumstances pursuant to the Korean Arbitration Act, which is based on the UNCITRAL Model Law.

Together with modern pro-arbitration legislation, arbitration-friendly judiciary, and in-depth expertise in ADR, Korea is today an appealing place for international arbitration. Indeed, Korea earned a reputation of an arbitration eager jurisdiction as it energetically competes with traditional forums and strives for more innovative, cost-efficient and user-friendly experiences. Specific legal changes that made Korea considerably more attractive as a forum for international arbitration are discussed below.

a) The Devil is in the Detail: noteworthy provisions of the Korean *lex arbitri*

An up-to-date legislation is necessary to attract a greater number of arbitration cases.³⁵ Although pro-arbitration legislation is a distinct trend in many countries, domestic laws on arbitration, nevertheless, vary greatly from one jurisdiction to another, and certain specific details are what mark the *lex arbitri* out of the mass.

Under the amended Article 3(1) of the Korean Arbitration Act, the definition of arbitration has been expanded. The scope of arbitrable disputes has been widened by encompassing disputes based on both property rights and non-property rights. The amendment eliminated confusion between private and public law matters, as was the case in the previous version of the provision.³⁶ In Korea, there is no exhaustive list of non-arbitrable matters, however, Article 1 of the Korean Arbitration Act refers to the “disputes in private law”.³⁷

In this regard, the issue of arbitrability of IP-related disputes garners special attention. The issue is particularly relevant given the fact that Korea is one of the leading holders of IP rights and is home to many leading tech companies. The 2019 KCAB Annual Report reveals that Information Technology ranked 2nd in the list of all arbitration cases, grouped by industry. Out of all cases filed before KCAB, 16% was the Information Technology related disputes, whilst IP-related cases amounted to 3.4%, accordingly. Traditionally, the general view in Korea has been that issues such as the validity of IP rights were non-arbitrable,³⁸ whilst the recent change in the wording of the arbitration act has made IP-related disputes arbitrable, *in*

³⁵ Werbicki Raymond., “Arbitral Interim Measures: Fact or Fiction?” in “AAA Handbook on International Arbitration & ADR” (JurisNet, 2010).

³⁶ Shin Chang-Sop., “Korea’s New Arbitration Act and Its Implications for International Commercial Arbitrations in Korea” [2006] Journal of Arbitration Studies 16(3). P. 9.

³⁷ Article 1: «The purpose of this Act is to ensure the appropriate, fair and prompt settlement of disputes in private law by arbitration»; Under Article 3: Arbitration «means a procedure to settle a dispute over property rights or disputes based on non-property rights that the parties can resolve through a reconciliation, not by a judgment of a court, but by an award of an arbitrator».

³⁸ Rhie John and Noh Harold., “Resolving IP Disputes through International Arbitration” [2016] Korean Arbitration Review 7. P. 15.

principium. As such, it is now the prevailing view in Korea that the validity of registered IP rights is an arbitrable issue as long as it has the binding effect between the parties.³⁹

Drawing attention to the provisions on arbitration agreements, Article 8(3) of the Korean Arbitration Act provides that an arbitration agreement in writing is deemed to exist when “*the inclusion of an arbitration agreement in the documents exchanged between the parties is asserted by one party and not denied by the other party*”. The definition is wider than that under the New York Convention, which is seen by practitioners as a better fit with the current business practices.⁴⁰ In today’s ever-busy “빨리빨리” (“Ppali-Ppali” that means “hurry-hurry” in the Korean language) environment,⁴¹ multi-million-dollar contracts might be entered orally on the plane or in a zoom conference, therefore, the more liberal approach is generally seen as the more appropriate. This approach demonstrates Korea’s credentials as a sound choice of location for resolving business disputes in today’s business climate.

Under Korean case law, an arbitration agreement only needs to contain parties’ clear intention for arbitration and does not require other provisions such as an arbitral institution, governing law or the place of arbitration.⁴² Seoul High Court upheld a skeletal arbitration agreement drafted in abbreviations,⁴³ and an arbitration agreement that technically referred to a non-existing arbitration institution was found to be valid by the Seoul District Court.⁴⁴

The question that also gathers prominence in international arbitration is the validity of an arbitration clause incorporated by reference. The phenomenon is not unheard of in Korea, as the recent case law became more homogeneous. Generally, the courts uphold arbitration agreements not only where an arbitral clause is stipulated in a contract but also where a contract refers to another document that contains an arbitral clause and the parties deem it part of the contract.⁴⁵ A more recent case involved the incorporation of an arbitration agreement through a standard voyage charter party.⁴⁶ With regard to the group of companies doctrine (from what doctrine and case law the author has been able to access), suggests that Korean courts only recognize “piercing the corporate veil”, and in very limited circumstances, such as when a corporate entity is used by a company or individual in bad faith to circumvent the law or avoid liability in a grossly unfair or unjust manner.⁴⁷

Another noteworthy decision presents the issue of termination of an arbitration agreement. In 2018, the Seoul High Court rejected a party’s attempt to terminate an arbitration

³⁹ Baek Yun Jae and Ahn Jeonghye Sophie., “Challenging and Enforcing Arbitration Awards: South Korea” [2020] Global Arbitration Review. Available at: <https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/south-korea>.

⁴⁰ Shin Chang-Sop., “Korea’s New Arbitration Act and Its Implications for International Commercial Arbitrations in Korea” [2006] Journal of Arbitration Studies 16(3). P. 12.

⁴¹ Mechitov Alexander, Moshkovich Helen and Springer Levi., “Economic Success Story South Korean Way” [2019] Journal of International Finance and Economics 19(3).

⁴² Hanjin Heavy Industries & Construction Co. v Hanshin Steel Construction Co., 2005 Da 74344, 31 May 2007 (The Supreme Court of Korea).

⁴³ Shagang Shipping Co., Ltd. v IDS Co., Ltd., 2005 Na 102982, 10 November 2006 (Seoul High Court).

⁴⁴ Guangzhou Shipping v Eagle Shipping, 91 Gahap 45511, 1 May 1992 (Seoul District Court).

⁴⁵ Keumjung Co. v Gyeong-Deok Seo (II), 99 Da 13577, 10 April 2001 (The Supreme Court of Korea).

⁴⁶ P Trading v D Corp, 2008 Gahap 7003, 24 September 2008 (Busan District Court).

⁴⁷ Above fn 30. P. 122.

agreement against a counterparty that had become insolvent based on the impossibility of performance theory.⁴⁸

Furthermore, according to the Korean Supreme Court's position, an arbitration agreement applies not only to contractual claims arising out of the underlying contract but also to any dispute that is directly or closely related to the validity, effect and performance of the underlying contract.⁴⁹

Lastly, while the Korean Arbitration Act is based on the UNCITRAL Model Law, it nevertheless differs from it in several respects. The Korean Arbitration Act also applies to arbitrations between Korean domestic parties. As such, a foreign company, whose Korean subsidiary enters into a contract with another Korean company, need not take any special measures to ensure that there is at least one "foreign" party to the contract, because the procedures for enforcing domestic arbitral awards are similar to those for enforcing a foreign award under the New York Convention.⁵⁰

b) Provisions Regarding Interim Measures

There are other several noteworthy features of the domestic legislation on arbitration, which make Korea an appealing seat of arbitration. For instance, the power to grant interim measures in international arbitration was historically solely reserved for domestic courts. The question whether the party that's being attached or enjoined under such measures will comply with the tribunal's order was of the utmost concern. The domestic courts' approach towards interim measures rendered by arbitral tribunals varies greatly across jurisdictions. In Switzerland, for instance, the Swiss Federal Tribunal has characterized it as "dangerous" to treat interim measures as an award,⁵¹ whilst in several other jurisdictions interim measures by tribunals are not enforceable as being not final.

Recognizing that protection of parties' rights at the early stage is essential, the Korean Arbitration Act explicitly acknowledged that arbitral tribunals may order interim measures for the first time in 2010.⁵² Under the amended Article 18(1) of the Korean Arbitration Act, an arbitral tribunal can, at the request of a party, order any interim measures that it considers necessary, and those interim measures are now enforceable *per se*. With an aim to provide a clearer guidance, the amended provision illustrates various types of interim measures that can be rendered by the arbitral tribunal when so requested. This change sends a positive signal that the Korean arbitration industry assures efficiency and neutrality.⁵³

The amended Arbitration Act adopts all of the interim measures available under the Chapter IV A. of the 2006 Model Law, with a minor exception for *ex parte* preliminary orders. Article 18-3 of the Korean Arbitration Act states that arbitral tribunals may modify, suspend

⁴⁸ A v B., 2018 Na 24, 27 April 2018 (Seoul High Court).

⁴⁹ Decision No. 2004 Da 67264, 13 May 2005 (The Supreme Court of Korea).

⁵⁰ Kim Grant., "Korea's Bali Bali Growth in International Arbitration" [2015] Pepperdine Dispute Resolution Law Journal 15(3). P. 619.

⁵¹ X. v Y. BV. Judgment of April 13, 2010, DFT 136 III 200.

⁵² Lee Junsang and Um Young Shin., "The New Arbitration Act of Korea: Focus on the New Interim Measure Regime and Courts' Assistance in Evidence Taking" [2016] Korean Arbitration Review 7. P.16.

⁵³ Suk Kwanghyun., "Proposals for the Revision of the Korean Arbitration Act with a Focus on International Commercial Arbitration" [2012] Seoul Law Journal 53(5) P. 538.

or terminate interim measures. However, it adds a requirement that the tribunal must examine the parties before they do so. Another minor departure from the verbatim wording of the 2006 Model Law is that Article 18-8 of the Arbitration Act allows refusal of recognition or enforcement of an interim measure only if the measure has been terminated or suspended by the tribunal, thus, excluding refusal by the courts at the seat of arbitration or under the laws of which that interim measure was granted. The amended provision provides significant convenience to the parties and clarifies that an interim measure issued by an arbitral tribunal shall be recognized as binding and can be enforced upon application to the competent court.

As such, under the current Korean arbitration regime, arbitral tribunals are explicitly vested with a wide range of discretion to render interim measures in various types and forms. The relevant provisions of the Arbitration Act ensure the ease and further maximized convenience to the parties by providing that an interim measure issued by an arbitral tribunal shall be recognized as binding and can be enforced upon application to the competent court.⁵⁴

In the same vein, Article 32 of the KCAB International Arbitration Rules also explicitly sets forth that the arbitral tribunal, at the request of a party, may order conservatory and interim measures it deems appropriate. The parties may also, by mutual consent, agree on the types and forms of interim measures the tribunal can issue. It is, however, important to note that interim measures may not be directed to third parties and are ineffective to them *in principium*.

This provides a powerful protection of right to property and secures the effectiveness of the final judgment.⁵⁵ Without such mechanisms, the adverse party may remove or alter crucial evidence or deplete the assets base.

c) Who Can Be an Arbitrator and What Could be Awarded?

The amended Korean Arbitration Act deals with yet another issue that has been also the object of intense discussions among the arbitration practitioners. In certain jurisdictions, a question sometimes arises in international commercial arbitrations as to the qualifications of the arbitrators or counsels. As per the Article 12(1) of the Korean Arbitration Act, an arbitrator can be appointed regardless of his or her nationality, unless the parties agree otherwise. Notably, the Korean Arbitration Act does not require an arbitrator or a counsel to be licensed to practice law in Korea or in any other jurisdiction. One exception is, however, active Korean judges, who are prohibited from engaging in any profit-making activities. In the Incheon Airport case, the Seoul High Court confirmed that if a person not licensed as an attorney acted as a counsel in an arbitration it would not affect the award.⁵⁶

Considering the fact that parties often select arbitrators for their unique expertise in a specific field, which enables them, by training and experience, to determine a specific dispute better than a domestic court would do, the amended provision provides further flexibility and fosters a better users' experience.

⁵⁴ Korean Arbitration Act, Article 18-7 (Recognition and Enforcement of Interim Measures), Section 1.

⁵⁵ *Marchac Gregoire*, "Interim Measures in International Commercial Arbitration under the ICC, AAA, LCA and UNCITRAL Rules" [1999] Am. Rev. Int'l Arb. 10. P. 136.

⁵⁶ *Incheon International Airport Corporation v Halla Engineering and Construction*, 2002 Na 6878, 2 July 2002 (Seoul High Court).

Yet another noteworthy amendment of the Korean *lex arbitri* concerns the types of remedies that are available to the parties to arbitration. The parties can freely agree on the remedies to be sought from the arbitral tribunal, and might even seek remedies that are not available in the domestic courts.⁵⁷ In general, domestic courts in Korea do not intervene in an arbitral tribunal's ordering of remedies, damages or profits.⁵⁸ It must, however, be noted that punitive damages included in a foreign arbitral award may not be enforced as it be found to violate Korean public policy.⁵⁹

By way of conclusion, the amended Korean Arbitration Act brings Korea closer to meeting international standards in relation to the arbitration procedures. With the objective of modernizing the Korean legal framework on arbitration, the revised Arbitration Act enshrines important legal instruments and principles, further strengthens party autonomy and ensures limited curial interventions, that in turn enhances the attractiveness of Korea as a place of arbitration. Some amendments might seem trivial, but these are small yet concrete steps in order to complete the long journey. The amended Korean Arbitration Act establishes a sound legal framework for the fair and efficient settlement of commercial disputes by means of arbitration, and it is hoped to serve as a powerful tool to lead the future direction of the international arbitration in Korea, bringing more opportunities for international arbitration to flourish.

III. The Role and Input of Judiciary in Upholding the Korea's Status as an Arbitration Eager Jurisdiction

The domestic courts in Korea have also made a crucial contribution by delivering decisive judgments in aid of international arbitration, further upholding the status of Korea as an arbitration eager jurisdiction.

Arbitration, despite being praised for its autonomous nature, arbitration, in certain instances depends on assistance from state courts and public authorities as it lacks certain procedural powers traditionally vested in state courts. Evidence taking is one of the most explicit examples when the state court's assistance in arbitration proceedings might be required. State courts can also complement the arbitral tribunal's competence in protecting interim rights.⁶⁰

The Korean court system has earned an international reputation as one of the most efficient and cost-effective judiciaries in the world,⁶¹ and consistently maintains the pro-arbitration stance.⁶² When asked to appoint a chair-arbitrator in an international *ad hoc*

⁵⁷ Baek Yun Jae, Lee Hyung Keun, Ahn Jeonghye Sophie and Park Hyunah., "Arbitration procedures and practice in South Korea: overview" [2020] Thomson Reuters, Practical Law. Available at: [https://uk.practicallaw.thomsonreuters.com/8-381-2907?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/8-381-2907?transitionType=Default&contextData=(sc.Default)&firstPage=true).

⁵⁸ Kim Joongi., "International Arbitration in Korea" (Oxford University Press, 2017). P. 304.

⁵⁹ Mok Young-Joon., "Sangsa Jungjebeop [Commercial Arbitration]" (Pakyoungsa, 2011) P. 326.

⁶⁰ Lee Junsang and Um Young Shin., "The New Arbitration Act of Korea: Focus on the New Interim Measure Regime and Courts' Assistance in Evidence Taking" [2016] Korean Arbitration Review 7. P. 20.

⁶¹ World Bank. 2017. Doing Business 2017: Equal Opportunity for All. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-0948-4.

⁶² Shin Hi-Taek., "Changing Scene in International Arbitration and Notable Developments in Korea" [2018] Korean Arbitration Review 9. P. 6.

arbitration case with a seat in Seoul, the Seoul Central District Court appointed a foreign arbitrator of neutral nationality after requesting a list of recommendations from the KCAB.⁶³

It is well settled that domestic courts in Korea will refuse to hear an action regarding a dispute falling under an arbitration agreement unless such agreement is found to be «nonexistent, null and void, inoperative or incapable of being performed», as per provisions of the New York Convention.⁶⁴ In principle, as highlighted by the Seoul High Court, domestic courts in Korea cannot supplement nor alter final arbitral awards.⁶⁵ Despite some past controversies at the local courts level, the Korean Supreme Court noted in particular that courts should not second-guess arbitrators in international cases.⁶⁶

Domestic courts elucidate the minimum requirements with which the parties must comply in order to uphold the parties' decision to opt to arbitration. Insofar as the arbitration agreement acknowledges the parties' intent to submit the relevant dispute to arbitration, Korean courts have continuously enforced arbitration agreements despite various forms of drafting defects, such as the inclusion of ambiguous or equivocal elements. For instance, the Seoul High Court upheld a skeletal arbitration agreement drafted in abbreviations.⁶⁷

In Korea, domestic courts take a pro-active stance to ensure the smooth running of the arbitral proceedings. Under the amended provisions of the Korean Arbitration Act, domestic courts can help to resolve many pressing challenges relating the procedural issues, for instance, in taking evidence. It has been reported that interim measures may be obtained from Korean courts easier than in other jurisdictions.⁶⁸ No cases when Korean courts intervened to frustrate arbitral proceedings have been reported.⁶⁹

Switching the gears to the issue of enforceability of arbitral awards, which is touted as arbitration's "most valuable characteristic".⁷⁰ One of the key amendments to the Korean Arbitration Act was introduction of a simplified process for recognition and enforcement of foreign arbitral awards, which now is carried out by issuing an order (rather than a judgment, which requires an oral hearing), stimulating more expeditious and streamlined enforcement process. Importantly, the Korean Arbitration Act provides that awards can only be set aside by a judgment, thus, drawing crucial distinction to reflect the general view that a court cannot easily set aside an award and it must carefully review the reasons before doing so.

In the same vein, under the Korean Arbitration Act, arbitral awards cannot be appealed before the courts. The Korean Arbitration Act defines an arbitration as "*a procedure to resolve a dispute by an award of arbitrators under an agreement between parties, not by judgment of*

⁶³ Decision No. 2016Bihap30170, 19 July 2017 (Seoul Central District Court).

⁶⁴ Above fn 58. P. 337.

⁶⁵ Decision No. 2013Na13506, 17 January 2014 (Seoul High Court).

⁶⁶ *Chang Seung Wha.*, "Article V of the New York Convention and Korea" [2008] *Journal of International Arbitration* 25(6). P. 865.

⁶⁷ *Shagang Shipping Co., Ltd. v IDS Co., Ltd.*, 2005 Na 102982, 10 November 2006 (Seoul High Court).

⁶⁸ *Hopkins Bryan.*, "A Comparison of Recent Changes in the Arbitral Laws and Regulations of Hong Kong, Singapore and Korea" [2013] *Korean Legislation Research Institute Repository* 3(1). P. 302.

⁶⁹ Above fn 66. P. 306.

⁷⁰ "2018 International Arbitration Survey: The Evolution of International Arbitration" (Queen Mary University of London in partnership with White & Case). Available at: [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF).

a court”, which is to exclude the national court’s jurisdiction over a dispute (Article 3(1), Korean Arbitration Act). There is a lower court decision invalidating an arbitration agreement that provided for a right to appeal an arbitral award to a court of competent jurisdiction.⁷¹

Through the years, domestic courts in Korea have taken an arbitration-friendly stance regarding enforcement of the foreign arbitral awards. In general, domestic courts in Korea refuse enforcement of final arbitral awards only in rare cases where one or more of the grounds under the Arbitration Act (Article 38) or the New York Convention (Article V) exist.⁷² The Korean Supreme Court, by far, has never refused enforcement on the public policy grounds,⁷³ and has held that the public policy exception must be construed narrowly.⁷⁴ In 2019, an appellate court ordered the enforcement of an ICC award in favor of a foreign investment company fund against a subsidiary of Korea Deposit Insurance Corporation.⁷⁵

IV. Korea’s Premier Arbitration Institution: a promising start and steps forward

As an arbitration eager jurisdiction, Korea went an extra mile to promote arbitration industry. In 2018, KCAB INTERNATIONAL, a separate division of KCAB was formed to meet the growing demand for efficient resolution of cross-border disputes and to promote Seoul as a seat of international arbitration.

The KCAB is the only statutory recognized arbitral institution in Korea. With a wealth of experience in providing ADR services in Korea, KCAB has firmly established itself as a leading regional ADR provider in Northeast Asia. It has handled over 7,000 arbitration cases and 15,000 mediation cases, including court-annexed mediations. In 2019, a total of 443 arbitration cases were filed with KCAB, including 70 international cases.⁷⁶ That represents a substantial increase from the 393 cases filed in 2018, and the 385 cases filed in 2017. Compared to the previous year, 2019 saw a growth of 12,7%. The number of new arbitration cases filed with the KCAB continues to increase steadily.

In 2019, the total sum in dispute of the administered cases amounted to over USD 875 million. Notably, there was a remarkable increase of 200% in the number of high value cases. The highest ever dispute amount for a single arbitration case in the institution’s history is USD 1.39 billion.⁷⁷ Administrative fees at KCAB, according to the GAR Guideline,⁷⁸ are lower than in other leading arbitral institutions.

⁷¹ Decision No. 2002 Na 68982, 24 October 2002 (Seoul High Court).

⁷² *Yoon Byenchol and Menard Richard.*, “*Role of Korean Courts in International Arbitration*” [2012] Korean Arbitration Review 1. P. 15.

⁷³ *Shin Hi-Taek.*, “*Changing Scene in International Arbitration and Notable Developments in Korea*” [2018] Korean Arbitration Review 9. P. 6.

⁷⁴ Decision No. 2006 Da 20290, 28 May 2009 (The Supreme Court of Korea).

⁷⁵ *Lim Sue Hyun.*, “*Innovation in Progress – developments in Korea after the launch of KCAB International*” [2021] The Asia Pacific Arbitration Review. P. 19.

⁷⁶ KCAB Annual Report 2019. Available at: http://www.kcabinternational.or.kr/user/Board/comm_notice.do?BD_NO=174&CURRENT_MENU_CODE=MENU0017&TOP_MENU_CODE=MENU0014.

⁷⁷ Above fn 38. P. 11.

⁷⁸ Guide to Regional Arbitration (Global Arbitration Review, 2020) vol. 6. Available at: <https://globalarbitrationreview.com/survey/the-guide-regional-arbitration/2020>.

With regard to the parties, United States ranked the first in the number of users of KCAB. It is noteworthy that Vietnam overtook China and became the second largest user of KCAB services in 2019.

The KCAB reports that, based on the cases it has administered, the most commonly arbitrated disputes are construction and real estate-related, followed by disputes involving trade, technology and telecommunications, and maritime issues, accordingly.

In 2013, Seoul IDRC opened its doors in Gangbuk and later moved in 2018 to Gangnam, the heart of the business district of Seoul. Equipped with the state-of-the-art technology, the hearing facility offers an elevated level of services. The project was carried out by the Korean Bar Association and the KCAB, with support and funding from the Seoul Metropolitan Government and the Korean Ministry of Justice.⁷⁹ This is further indication of Korean government's determination to establish the country as a primary arbitral hub in the world.

The KCAB International Arbitration Rules were adopted in 2011 and subsequently updated in 2016. The truly unique feature of the KCAB International Arbitration Rules is their coherence, clarity, and the particular attention to detail. In cross-border commerce, arbitration is seen as providing a way for companies from different parts of the world to level the procedural playing field.⁸⁰ With this in mind, KCAB paid great attention to adopting procedural provisions with more precise and explicit rules.

As a reaction to the increased number of international arbitration proceedings involving multiple parties, the 2016 KCAB International Arbitration Rules outline a detailed provision for conducting multi-party arbitrations. In contrast to court proceedings, generally the consent of all parties is required before additional parties or related disputes can be joined to existing arbitration proceedings.⁸¹ In multi-contract and multi-party transactions' context, joinder issue has proven itself to be a highly controversial and complicated issue.⁸²

Article 21 of the KCAB International Arbitration Rules sets out a detailed procedure in which third parties can be joined in pending arbitration proceedings. The requirements for joinder are: when the joining party is a party to the same arbitration agreement with the parties, its written consent is required for joinder; the provision also permits joinder of one who is not a party to the arbitration agreement provided that the joining party and all the parties have consented to joinder in writing. Article 21(3) grants discretion to the tribunal by providing that it may refuse joinder if it is not appropriate in the circumstances of the case, for instance, when it will cause a delay of the proceedings. Joinder may be permitted only after the constitution of the arbitral tribunal.

⁷⁹ *Cha Dami and Song Zachary*, "International arbitration in South Korea: overview of KCAB International's Statistic for 2019" [2020] Lexology. Available at: <https://www.lexology.com/library/detail.aspx?g=c8b15846-4d65-47ac-82c8-6581d922161c>.

⁸⁰ *Park William*, "Arbitration's Protean Nature: The Value of Rules and The Risks of Discretion" [2003] *Arbitration International* 19(3). P. 2.

⁸¹ *Strong SI*, "Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?" [1998] *Vand. J. Transnat'l L.* 31. P. 922.

⁸² *Redfern Alan and Hunter Martin*, "Law and Practice of International Commercial Arbitration" (Sweet & Maxwell, 1991). P. 184.

One of the conventional benefits of international arbitration is its speed.⁸³ There is, however, a growing concern that arbitration saves neither money nor time, and it is becoming quite similar to litigation.⁸⁴ To streamline the arbitration process, the 2016 KCAB International Arbitration Rules enshrine the default expedited procedure for certain disputes. The main features of the procedure are that disputes are resolved by a sole arbitrator, with only one hearing, within shorter time limits for rendering an award in a summary form.

The KCAB's diverse panel of renowned arbitrators, highly experienced in various fields, provides additional assurance to the parties that their dispute will be resolved in an efficient and most-proper manner.

a. Navigating Challenges: KCAB's creative leadership and response to the contemporary needs of users

KCAB adapts promptly and responds proactively to the contemporary challenges, facilitating a move to a more user-friendly arbitration. As the technology advanced significantly over the last decade, videoconferencing has become a viable alternative to traditional in-person witness examinations. Accordingly, the KCAB developed the Seoul Protocol on Video Conferencing in International Arbitration (Seoul Protocol).⁸⁵

Korea's cutting-edge I.T. infrastructure is another major attribute. The country is ranked as number one for the world's fastest internet connectivity and access. In Korea, the mobile internet speed is 3.4 times faster than the world average of 35.96 Mbps.⁸⁶ With this level of I.T. infrastructure, the KCAB is in unique position to utilize various technological solutions to improve its users' general experiences. Seoul IDRC offers an innovative, sophisticated virtual hearing service, that facilitates a fast, stable and seamless connection for conducting hearings remotely.⁸⁷

Due to the continued worldwide spread of COVID-19, many hearings are conducted virtually. KCAB remained fully operational and offered its users the possibility to conduct hearings virtually or semi-virtually. With the use of high-definition video quality cameras, it is possible to ensure that facial expressions and body gestures are clearly visible. As opposed to an in-person hearing, video conferencing provides a closer-up view of witnesses and allows for video replays (if recording permitted) for analyzing body language. Through the installation of rotating cameras, parties and tribunals may monitor the witnesses to remove any outside influence.

⁸³ "2018 International Arbitration Survey: The Evolution of International Arbitration" (Queen Mary University of London in partnership with White & Case). Available at: [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF).

⁸⁴ *Overcash Allen*, "Fast Tracking Construction Arbitrations" [2011] *Colorado Lawyer* 40(8). P. 69.

⁸⁵ *Hong Jiyoung and Hwang Jong Ho*, "Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing" [2020] *Kluwer Arbitration Blog*. Available at: <http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/>.

⁸⁶ Online resource: Korea has world's fastest mobile internet for 2nd straight month. Available at: <https://www.korea.net/NewsFocus/Sci-Tech/view?articleId=191128>.

⁸⁷ Online resource: "About Seoul IDRC V-Hearings". Available at: <http://www.sidrc.org/idrc/en/page/hearing.do>.

Article 24(2) of the 2016 KCAB International Arbitration Rules expressly permit hearings and meetings to be conducted at any physical location that the tribunal deems appropriate. Commentary to the 2016 KCAB International Arbitration Rules explain that this provision exists to enhance the efficiency and convenience of arbitrations, and videoconferencing would naturally be allowed by this reasoning.⁸⁸

Korea and local lawyers are pioneers in the movement towards virtual hearings. The Seoul Protocol was drafted to enable users to identify potential issues with videoconferencing and to address them effectively by making necessary preparations in advance. The Seoul Protocol offers a standard set of rules that counsels and arbitrators may use for guidance on how to address some of the logistical challenges presented by remote hearings. While not directly applicable to all circumstances involving video hearings, and principally targeted at international arbitration practitioners, the Seoul Protocol offers helpful default standards that may be more widely applicable to streamline video-conference proceedings.⁸⁹

These technologically advanced solutions coupled with logistical best practices, address a majority of concerns on the credibility of virtual hearings. Korea is in the forefront in ensuring efficiency, cost-effectiveness of international arbitration.

In the same vein, considering Korea's leads in high-speed internet and advanced information and communication technology infrastructure, there is a great potential for development of ODR processes. As a global hub of I.T., the Korean government has been investing heavily into innovative technologies such as artificial intelligence which could also greatly benefit arbitration industry in the very near future.

b. The Best of Both Worlds – hybrid forms of arbitration

In the realm of ADR, mediation and arbitration remain the most popular methods for resolving disputes. As is often said, hybrid forms of arbitration and mediation (Med-Arb, Arb-Med, Arb-Med-Arb) meld the two processes and provide the parties with the best of both worlds by guaranteeing more efficient resolution of their dispute through one process or another.⁹⁰ With the introduction of the Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention), the attractiveness of hybrid forms of international arbitration has increased. However, hybrid forms of arbitration and mediation in the wrong hands presents a minefield of problems.⁹¹ KCAB has a broad experience in dealing with domestic court-annexed mediations and has already administered more than 15,000 mediations.⁹² Also, KCAB has been running a special training program for mediators since 2012.

KCAB INTERNATIONAL is planning to enhance its rules to allow more flexibility in the use of mediation. As reported, KCAB is in the process of making mediation rules

⁸⁸ *Kim Inho*, Korean Council for International Arbitration., “2016 KCAB International Arbitration Rules Commentary” (KCAB INTERNATIONAL, 2018).

⁸⁹ Above fn 82.

⁹⁰ *Weisman Martin and Stark Sheldon*., “*Is Med/Arb the Process for You*” [2016] Michigan Bar Journal 94(6). P. 26.

⁹¹ *Lang Georgiale*., “*Family Law MED/ARB: The Best of Both Worlds*” [2013] Advocate (Vancouver Bar Association) 71(6). P. 841.

⁹² Above fn 76.

specifically tailored to international disputes.⁹³ The initiative is expected to boost the use of ADR in the region, considering the Asian culture of disliking litigation and appreciating value of relationships.

c. Capacity Building Initiatives: promoting diversity in arbitration

The phrase “pale, male, and stale” is frequently used to describe the lack of diversity in arbitration.⁹⁴ KCAB INTERNATIONAL led the creation of KCAB Next which aims to promote arbitration among younger and diverse community of professionals and students. The idea behind the initiative is to encourage and support professional development of its members through various educational and social events. The primary aim is to facilitate the sharing of know-how and build skills through collaboration among practitioners, academia, and students. The unique feature of the KCAB Next is that it does not set any age limits and welcomes any interested persons to participate in the project. KCAB Next was established to foster diversity, professional development and to inspire next generation of lawyers to become ADR experts.

The KCAB INTERNATIONAL’s case management team also deserves to be mentioned separately. Being led by the Chairman, Professor Hi-Taek Shin, and the Secretary-General, Ms. Sue Hyun Lim, both highly esteemed figures in the Korean arbitration community and beyond, the international team of case managers, admitted to practice in Korea, New York, Washington D.C., and New Zealand, brings a myriad of benefits to the users. Thanks to each member’s cultural background, language abilities and extensive experience in international arbitration, KCAB International delivers the best user experience.

V. The Future is Now: Korea’s distinct geo-political and socio-economic position as a key determinant of development

Recent changes to the Korean *lex arbitri*, KCAB International Arbitration Rules and KCAB’s pro-active stance ushers in a new era for Seoul as a new hub for international arbitration. Korea’s unique geo-political location merits particular attention: it is strategically located in close proximity to China, Japan and Russia. Setting aside all the differences, one of the most visible set of characteristics of these countries’ is their legal systems, that are based on the principles adopted from the civil law tradition. One can certainly argue that Seoul can attract users from China, Japan and other East Asian countries who seek civil-law-centric model of arbitration that replicates the proceedings followed by their domestic courts. Whilst Asia is home to a number of world-class arbitral institutions that have recently made great progress, they are, for the most part, located in common law jurisdictions. Korea’s civil law background does not make it a lesser attractive seat for users from common law jurisdictions. To date, KCAB has managed a lot of arbitration cases filed by various countries and continents, with the largest percentage being 49.3% in Asia, followed by 16.4% in North America and 15.1% in Europe. In 2019, the United States ranked the first in the number of users of KCAB INTERNATIONAL. Arbitrators appointed by KCAB INTERNATIONAL, as per 2019 Report,

⁹³ Shin Hi-Taek., Keynote Speech titled “*Proposal for facilitating use of international mediation*” delivered at V Asia Pacific Mediation Conference (11 December 2020), Conference Paper. P. 6.

⁹⁴ K.V.S.K Nathan., “Mealey’s International Report” [2000] Mealey’s International Arbitration Report 15. P. 24.

constituted arbitrators from Germany, Australia, the United Kingdom, whilst arbitrators from the United States of America were the top choice.

Despite already strong interest by users from common law jurisdictions, stable and predictable Korean *lex arbitri* and judicial support of arbitration are increasing the country's prospect of becoming a prominent seat in Asia, providing also an alternative civil law jurisdiction seat to parties and counsels who may be more familiar with civil law procedures.⁹⁵

To illustrate the potential for growth in that direction, Russian companies, by way of example, faced with the western sanctions, had been forced to seek alternative forums for conducting arbitrations. In practical terms, much controversy arose on whether western arbitrators' services amounted to "technical assistance" prohibited by the sanctions laws, the asset-freezing, limitations on international bank transfers created further practical obstacles to conducting arbitration proceedings in traditionally favored European countries.⁹⁶ As a result, businesses had to turn towards Asian ADR providers.⁹⁷ HKIAC, for instance, was among the first to be granted permission to operate as a permanent arbitration institution in Russia.⁹⁸

In terms of actual numbers, the bilateral trade between Korea and Russia has shown an upward trend with the goal to reach \$30 billion by 2020.⁹⁹ The recent period saw a significant increase in the flow of Korean investment into Post-Soviet countries with major Korean companies (such as Samsung and Hyundai) trying to increase their market share in the region. President Moon Jae-in announced New Northern Policy (NNP), to improve ties with northern neighbors, whilst Russia was named a "key partner".¹⁰⁰

Russia, for its part, started to pay more focused attention to the country's Far Eastern territories. Russia's plans for the development of its Pacific regions require closer cooperation with the neighboring states and generally correlate with Korea's desire to expand ties with Eurasian countries. With enhanced trade connections, steep increased number of commercial activities, there will inevitably be a heightened demand for independent dispute resolution providers.¹⁰¹ As such, Korea has a great potential for promoting itself as a new, promising arbitral seat for users from the civil law centered countries.

a. Opportunities in Niche Sectors: Entertainment, Information Technology and beyond

⁹⁵ Chung Liz (Kyo-Hwa), "International Arbitration in South Korea: A new Push Forward" [2018] Proceedings of the ASIL Annual Meeting 112 P. 98-100.

⁹⁶ Gareev Rinat., "Russian Response to Western Sanctions: Exclusive Jurisdiction of State Commercial Courts" [2020] CIS Arbitration Forum. Available at <http://www.cisarbitration.com/2020/06/25/russian-response-to-western-sanctions-exclusive-jurisdiction-of-state-commercial-courts/>.

⁹⁷ Cheng Teresa and Joe Liu., "Russia Turns East: The Use of Hong Kong Arbitration for Russian Disputes" [2017] Kutafin University Law Review 4(2). P. 458.

⁹⁸ Online resource: "HKIAC permitted to administer disputes in Russia". Available at: <https://www.hkiac.org/news/hkiac-permitted-administer-disputes-russia>.

⁹⁹ Suk-ye Jung., "South Korea and Russia to Work on Service and Investment FTA" [2019] Business Korea. Available at: <http://www.businesskorea.co.kr/news/articleView.html?idxno=36377>.

¹⁰⁰ Online resource: "2020 New Year's Address by President Moon Jae-in". The Republic of Korea. Available at: <https://english1.president.go.kr/BriefingSpeeches/Speeches/741>.

¹⁰¹ Lew Julian and et al., "Comparative International Arbitration" (Kluwer Law International, 2003). P.1.

Arbitration industry in Korea has a great potential for growth in certain niche sectors. Entertainment, Information Technology (I.T.) and cryptocurrency are some of the fields that could bring more international arbitration business in Korea.

The construction sector is a major industry in Korea, with a contribution of about 67.4 trillion won to GDP in 2018.¹⁰² Despite the negative effects of COVID-19, the construction industry is nevertheless expected to recover among the first. In Korea, arbitration of construction disputes is not novel. The KCAB Annual Report for 2019 reveals that 25% of all filed cases were related to construction industry, although majorly of which are domestic arbitrations. As such KCAB accumulated extensive experience over the years and can provide a full range of dispute resolution services to the construction industry for fast and efficient resolution of international projects.

As a well-recognized leader in information and communication technology, Korea is uniquely positioned to offer arbitration services for the companies within these sectors. In the 2020 Bloomberg Index Innovation Index, Korea secured the second place as a nation with high concentration of patent activity, high-tech density, innovative and technologically advanced manufacturing.¹⁰³ Korea is home to global leading electronics and I.T. companies, such as Samsung and LG, that might prefer to resolve their IP related cases in arbitration. Korean government is also heavily investing in artificial intelligence and released the 2020 Digital New Deal, which emphasizes its efforts to turn Korea into an AI powerhouse.¹⁰⁴

Also, another possible avenue for expanding arbitration industry is entertainment and media sectors. Today, the world witness phenomenal growth of K-Pop, Korean movies and online games, to name a few. The Korean government considers the entertainment industry as a major driver for the future national economy.¹⁰⁵

Although Korea has already made extensive progress in promoting arbitration in these sectors among local companies, it is now gaining a momentum by establishing itself as a hub for international arbitration. The aforementioned sectors are only a few industries that might fuel the use of international arbitration in Korea. Blockchain-related technologies, cryptocurrency and certain other emerging technologies could bring more arbitration business in Korea.

Concluding remarks

¹⁰² Statista. “Gross domestic product (GDP) from the construction sector in South Korea from 2009 to 2018”. Available at: <https://www.statista.com/statistics/756955/south-korea-gdp-from-the-construction-sector/>.

¹⁰³ Jamrisko Michelle and Lu Wei., “Germany Breaks Korea’s Six-Year Streak as Most Innovative Nation” [2020] Bloomberg. Available at: <https://www.bloomberg.com/news/articles/2020-01-18/germany-breaks-korea-s-six-year-streak-as-most-innovative-nation>.

¹⁰⁴ Stangarone Troy., “South Korea’s Digital New Deal” [2020] The Diplomat. Available at: <https://thediplomat.com/2020/06/south-koreas-digital-new-deal/>.

¹⁰⁵ U.S. Department of Commerce. “South Korea – Country Commercial Guide, 2020”. Available at: <https://www.trade.gov/knowledge-product/korea-entertainment-and-media>.

In roughly half a century, Korea emerged from a country lacking reliable electricity to becoming the center of the global economy. Rapid expansion of cross-border commercial relationships has fueled the use of international arbitration as a preferred method of dispute resolution.

The globalization has created exciting opportunities for the development of commercial arbitration in the Asia-Pacific region, and Korea took colossal steps towards supporting development of international arbitration. In the midst of intensifying competition in the market for international arbitration services, Korea demonstrated innovative and pro-active approach. Korea not only evolves into neutral and transparent seat, but also its judiciary consistently maintains the pro-arbitration stance. The government is the staunchest supporter of rebranding and revitalization of international arbitration industry in Korea.

KCAB INTERNATIONAL has also taken extraordinary strides towards making a reputable name for itself in the international arbitration scene. It has lifted the Korean arbitration industry to international prominence and continues to gain a stronger foothold as a viable and credible ADR provider.

As an arbitration eager jurisdiction, it is expected that Korea will continue to implement innovative features to advance cross-border dispute resolution services. With more innovative and flexible solutions, Korea will stand head and shoulders above other illustrious arbitral hubs.