

A Place of Arbitration: Laws and Regulations of Korea

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I. Introduction

Both time and place are incessantly dealt with in any legal instrument of the countries of the world whether developed or less developed in the legal systems thereof. And, the notion of place as well as time has indeed changed to such an astonishing magnitude that any reference towards distance, if made, is more often than not, quite frustrating. Indeed, physical distance has been shortened in this horizontalized arena of economic life. Furthermore, economic interdependency has also made the perceiving of “place” entirely different from that of yesterday, particularly amid busy international transactions.

Nonetheless there arises a question. Should a place of arbitration where an international commercial dispute is to be settled be so near situated on the part of the international traders? Or, is it still far-away? Comparativists have continually rendered efforts in harmonizing various laws on the place of tribunals by virtue of which any commercial disputes among natural and juristic persons of the world could therefore be efficiently solved.

The purpose of this paper is, therefore, to present the Korean laws and regulations on the place of commercial arbitration with consideration of the trend towards the so-called “internationalizing planning” of legal regime on commercial arbitration.

II. The Laws on the International Jurisdiction

A. Alien’s access to Korean Courts and other Tribunals

As may be the case in many civilized countries of the world, the Consti-

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tution of the Republic of Korea guarantees the legal status of aliens in accordance with customary international law and those treaties to which Korea is a contracting party. Paragraph 1, Article 5 of the Constitution specifically prescribes that "...duly contracted and promulgated treaties by virtue of this Constitution and generally recognized rules of international law shall have the same legal effect as those of national laws." Hence the alien's proper standing before Korean courts and other tribunals is generally granted.

B. Private International Law on Place

The growth of rules for choice of applicable law or forum is the necessary result derived more conspicuously from the prevalence of international commercial transactions. However, the problem of international jurisdiction over commercial disputes only comes to the forefront when and if the parties in dispute have not previously agreed upon an applicable law to which they are bound or a place of arbitration in which their disputes shall subsequently be settled. Commercial arbitration in Korea differs in its legal character from a civil suit in a court of law. The Korean Arbitration Act (March 16, 1966: revised February 19, 1973 as Law No. 2537, hereafter referred to as the Arbitration Act or KAA), which is special law, prohibits by Article 3 any direct recourse to a court of law to be filed by either party to an effective arbitration agreement. However, a suit may be filed "only where the said arbitration agreement is invalid, forfeited or incapable of performance." Furthermore, Article 1 of the Arbitration Act states from the onset that "...this law purports to facilitate the settlement of any dispute in private law without recourse to judicial procedures but the awards of an arbitrator through agreement between the parties concerned." It follows, therefore, that when and if the parties to an agreement in private law have agreed that any dispute shall be settled by arbitration, they must abide by the result of arbitration. An inference can therefore be drawn to the extent that, within the meaning of this Act, any party or parties without having agreed to an arbitration agreement is unable to bring the other party to an arbitration in Korea.

The Arbitration Act further qualifies commercial arbitration from arbitration in private law in general. Commercial arbitration is regulated by the Korean Commercial Arbitration Rules (hereafter referred to as CAR). Paragraph 3 of Article 4 of the Arbitration Act regulates that; in case an agreement to arbitrate concerning legal problems arising out of commercial transaction contains no stipulation regarding the appointment of arbitrator, or in case the intention of the parties concerned is not known, such matters shall be presumed to be disposed of in accordance with the Commercial Arbitration Rules of the Korean Commercial Arbitration Association.

It must be noted here again that the problem of international jurisdiction comes to play if and only if an arbitration agreement does not specify any applicable law of a place of arbitration. The Korean Private International Law (January 15, 1962 as Law No. 966) itself presupposes the intention of the parties as a legal postulate when choice of proper law matter is regulated by Article 9:

“...in regard to the formation and effect of a juristic act, the applicable law shall be determined by the intention of the parties. However, if the intention of the parties is not obvious, the law of the place of the act shall govern.”

A problem, however, is presumed to arise when and if the disputing parties have agreed to an arbitration *without* specifying the place of arbitration, and one of the parties (a Korean party) has nonetheless requested an arbitration at the place of his domicile(Korea). The question depends on who is to be the respondent or where to request an arbitration from the beginning. In other words, can a Korean party as a requesting party for arbitration, bring his foreign counterpart residing abroad to the arbitration tribunal, if constituted, in Korea? Are there any legal instruments which enable such Korean party to do so?

Paragraphs 4 and 5 of Article 4 of the Arbitration Act stipulate that “...in case one of the parties to (such) arbitration agreement refuses to nominate an Arbitrator,...the other party may demand the nomination of an Arbitrator...”,

and also "...In case of failure to nominate an arbitrator as to fill a vacancy or to replace him within seven days after a demand is made... the court (of law) shall at the request of the other party which has made such demand either appoint an Arbitrator or fill a vacancy...." In a commercial arbitration, if no agreement as to procedures has been reached between the parties, the same rules apply (para. 3, Art. 7, KAA). In such circumstance, as a final resort, the Secretariat of the Korean Commercial Arbitration Association appoints Arbitrator(s). An arbitration may proceed in the absence of either party who, after due notice, fails to be present or fails to obtain an adjournment (para. 1, Art. 37, CAR). Even in such case, the party absent can produce documents or other evidence, and they are considered to have been orally stated or submitted to the Tribunal and considered to have been necessary for making an award, as if the party absent were present(para. 2, Art. 37, CAR).

Come what may from a case like this, the parties concerned may not be able to foretell who will be the demanding party or respondent when a contract of international transaction was signed. The question still remains to be answered. Can an award of this nature be enforced in the country of the respondent? Is there any bilateral treaty wherein the place of arbitration or arbitral clause is provided? Are both countries of disputing parties the very contracting parties to the so-called New York Convention? Are there any agreements between the arbitration institution of one country and that of the others? Has it been so seldom in recent years that an arbitration agreement has been concluded without the applicable law and the place of arbitration being specified?

III. Treaties on the Place of Arbitration

A. Bi-lateral treaty: ROK-USA

The modern commercial treaty usually provides a clause in which the *modus vivendi* on judicial remedies are prescribed. The treaty of such a nature serves as the basic governing law on mutual transactions between the nationals and companies of both contracting parties. The Treaty of Friendship, Commerce and

Navigation of November 7, 1957 between the Republic of Korea and the United States of America can well be exemplified with respect to the place of arbitration.

Paragraph 1, Article V of the Treaty provides easy access by the nationals and companies of both countries to the court of justice and the administrative tribunals and agencies in all degree of jurisdiction without any requirement of registration or domestication. It follows therefore that any American traders (natural or juristic persons) can file a request for arbitration in Korea. He can also do it while he resides in the United States by sending necessary documents or evidences to the Arbitration Tribunal for proceedings, irrespective of a fact that he has not previously agreed with his counterpart on the place of arbitration.

Paragraph 2, Article V, which is the arbitral clause in the Treaty, must be, the present writer believes, one of the provisions of great significance. The underlying logics of this clause is collateral to the legal semantics, so to speak, of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was done nearly a year later in 1958 than the signing of the said ROK-USA Commercial Treaty. The clause states:

“Contracts entered into between the nationals and companies of either Party and nationals of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the ground that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to any such contract and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the Arbitrators is not of such Party.”

That the place designated for arbitration proceedings is outside one's own territory does not constitute any sufficient ground for making a contract unenforceable. At the same time, an arbitral award is valid and enforceable regardless

of the fact that such an award is rendered in the territory of the other contracting Party. Luckily, in this modern commercial treaty of bi-national nature, the place of arbitration connotes the sense of dual nature. The designation of a place of arbitration is presumptive in that an agreement as to the place of arbitration is deemed to have *mutatis-mutandis* agreed upon between the anticipated disputants.

B. Multi-lateral Treaties on the Place of Arbitration

Those treaties on commercial arbitration in which a larger number of countries, whether European, Socialist, Asian-African, or Latin-American countries, has joined, provide without fail, with certain provisions, on the place of arbitration. But, by greater majority the designation of a place of arbitration left entirely to the discretion, that is, the intention of the parties in dispute, excepting a few treaties concluded among the socialist countries. The characteristic feature of these treaties among a limited number of socialist countries is that the place of arbitration is primarily fixed as the place of the respondent. Such a rigid rule of the so-called "defendant domicile" undoubtedly arouses keen attention on the part of those traders of outside the Socialist world. It is from this fact therefore, that a propensity has acutely appeared towards the use of a third country and its applicable laws, when transactions of any kind are carried out with the socialist countries.

Multi-lateral treaties on commercial arbitration so far existing vary to such a considerable extent, that it may be well worth looking briefly into Article 14 of the UNCITRAL Arbitration Rules (Draft), which will be coming into existence in the near future as a Convention.

On deciding the place of arbitration the "party autonomy" is *a priori* recognized. If no agreement can be reached, the arbitrators within the meaning of the Rules decide the place. If the parties have agreed upon the place, the locale then will be decided by the arbitrators. On the other hand, paragraphs 3 and 4 bear significance. The arbitrators are authorized to perform at any place such functions as hearing witnesses, holding interim meetings, conducting inspection

of goods, other property, or documents. In these cases the parties can come to the place. To a certain degree the “mobility of arbitrator” has been made possible. On the other hand in the process of arbitration, arbitrators as well as disputants are virtually roving around the world.

Now, from these treaty provisions on the place of arbitration, and from an examination of the Korean laws and regulations in the preceding sections, it is made quite clear that the place of arbitration must be the problem that requires a more realistic and concrete approach, if the place is to be virtually and effectively chosen between the disputants. In the following section we shall make a brief survey on the Agreements which the Korean Commercial Arbitration Association has so far concluded with those similar arbitration institutions of a few notable countries.

IV. Agreements between the Korean Commercial Arbitration Association and the Other Associations

A. US-Korean Commercial Arbitration Agreement

(Agreement between the American Arbitration Association and the Korean Commercial Arbitration Association to Facilitate the Use of Commercial Arbitration in Trade between the United States of America and the Republic of Korea) December 1, 1974.

The Agreement recommends the firms of both countries to insert a model arbitral clause in their contracts. And that clause regulates in part that all disputes, controversies or difference between the parties shall be settled by arbitration pursuant to this Agreement. The terms of the Agreement is composed in the main of four items. Item 1 prescribes the applicable rules of arbitration procedures. Item 2, which is the main body thereof, states clearly how to decide the place of arbitration, when and if the place is not designated. The party demanding arbitration first of all gives notice to the Arbitration Association of the country in which such party resides. Then that Association notifies the parties that “they have a period of 14 days to submit their arguments and

reasons for preference regarding the place to a Joint Arbitration Committee....” The Committee consists of three members, two appointed by the respective Associations, and the third, to act as Chairman and to be chosen by the other two, of a third nationality. The Committee’s seat will be either Seoul or New York, both of which are legitimate. The most important of all the provisions is the passage, “...The determination of the place of arbitration by the Joint Arbitration Committee shall be final and binding upon both parties to the controversy.”

An initiative granted to the requesting party bears significance to a certain degree. However, a fact is that within 14 days both the requesting party and the respondent may be able to reach an agreement as to a place of arbitration. The intention of the parties concerned is preserved, even on the final stage of Joint Committee. Any smack of “double arbitration” or “party arbitration” is sufficiently cleared out by the phraseology of “final” and “binding.”

B. Korean-Japanese Arbitration Agreement

(Agreement between The Korean Commercial Arbitration Association and The Japanese Commercial Arbitration Association) October 26, 1973

Together with a prescription on the applicable rules, a place of arbitration is regulated by three different tests so to speak which differs to some degree from those of the US-Korean Agreement. Within 28 days from the date on which a demand for arbitration by either one of the parties to either one of the Associations, a place of arbitration is expected to be agreed upon, if not, the place will automatically be the country of the Respondents. But, there is provided a proviso that both Associations may agree on the application of either party to either of the Associations, to the effect that the place of arbitration be the country of the Claimants. In that case such agreement is binding. However, failing such agreement between the Associations, the place is in the Respondents’ country.

C. The Korean-Chinese Arbitration Agreement

(Agreement between The Korean Commercial Arbitration Association and The Commercial Arbitration Association of The Republic of China) May 10, 1978.

This Agreement is in its substance and form identical in coincidence with the Korean-Japanese Agreement of 1973.

D. The Netherlands-Korean Arbitration Agreement

(Agreement between the Netherlands Arbitration Institute and The Korean Commercial Arbitration Association to Facilitate the Use of Commercial Arbitration in Trade between the Netherlands and Korea) May 29, 1978.

This Agreement is in its form and substantial body of rules almost identical with that of US-Korean Agreement of 1974.

E. The Thai-Korean Arbitration Agreement

(Agreement between the Board of Trade of Thailand and the Korean Commercial Arbitration Association) December 10, 1978.

The Agreement recommends by the Article 1 an arbitral clause within which a place of arbitration is to be regulated. The respondent residence (domicile) rule is adopted. Furthermore, within the meaning of the Article the respondents' nationality is to be considered one of the decisive factors in determining a place of arbitration.

F. The Indo-Korean Commercial Arbitration Agreement

(Agreement between the Korean Commercial Arbitration Association and The Indian Council of Arbitration to facilitate the use of Commercial Arbitration in Trade between the Republic of Korea and the Republic of India) February 28, 1979.

This agreement, the most recent one, in its form and substantial body of rules, is identical with that of the Korean-Japanese Agreement.

G. Agreement between The International Chamber of Commerce, The Court of Arbitration of the International Chamber of Commerce, The Korean

National Committee of the International Chamber of Commerce, and the Korean Commercial Arbitration Association.

This is an agreement entered into with an international organization on a place of arbitration, among other matters. Article 6 states that "...Whenever the ICC Court of Arbitration chooses Seoul (the Republic of Korea) as the place of arbitration according to Article 12 of its rules, the hearings will, unless otherwise agreed, take place at the premises of the K.C.A.A. (Korean Commercial Arbitration Association)...." Then K.C.A.A. only provides the I.C.C.-arbitrators with administrative supports.

The applicable procedural rules are of course by the I.C.C. Rules and a place in terms of physical space is chosen in Seoul. This ruling is a consequential attribute of Article 4 which states that "...The I.C.C. will set up an I.C.C. Arbitration Court in the Republic of Korea...."

V. Concluding Remarks

A place of arbitration in the case of Korea, has been examined from the prescriptions of the related laws and regulations of Korea, and from those Agreements which the Korean Commercial Arbitration Association has concluded with various foreign institutions of similar nature. By doing so a few remarks have been drawn in the followings:

1. The alien's access to Korean Arbitration Tribunals is legally granted.
2. The Korean Private International Law, which regulates international jurisdiction, guarantees the intention of the parties. Therefore, the intention of the parties to arbitration, when they agree in designating a place of arbitration, is also guaranteed.
3. Since the Korean Arbitration Act qualifies an arbitration in private law, by prohibiting a direct suit to the court of law, from a civil suit, and since the Act distinguishes further an arbitration in private law in general from a commercial arbitration, the so-called "defendant domicile" rule does not and can not apply to the place of commercial arbitration.

4. Those bi-lateral treaties to which Korea is a contracting party as exemplified by the Korea-US Commercial Treaty have guaranteed the intention of the parties and mutuality on deciding the place of arbitration.

5. A point of departure lies rather in the existing multilateral treaties wherein both places of claimant and respondent as the places of commercial arbitration are provided to varying degree. It is from this fact that the commercial arbitration associations of individual countries tend to seek for a bilateral agreement in which a place of arbitration is regulated in detail.

6. Those Agreements which the Korean Commercial Arbitration Association has concluded with other Associations indicate the “place of claimant” and the “place of respondent”. But neither of the cases has prevented both parties in dispute from agreeing on the place of arbitration.