Reality and Problem Areas of Korea's Arbitration System

Dr. Hong-kyu Kim*

* Professor, College of Law, Yonsei University
President, The Korean Academy of Arbitration.

I. Establishment and the background of the contemporary arbitration system used in Korea

The establishment in Korea of a permanent arbitration system in the context of contemporary sense begins[1] when the Arbitration Law was promulgated and enforced on March 16, 1966, and with the inauguration on March 22 within the Korean Chamber of Commerce and Industry of the Korean Commercial Arbitration Committee which was organized to exclusively deal with commercial disputes.

In the stages preceding the establishment in Korea of such a permanent arbitration institution, it was the system of the Japanese colonial law that was adopted, with enforcement of arbitration procedures provided for in Chapter 8 of the Japanese Civil Procedures Code. Such a system, however, was abrogated in 1960 when the Korean Civil Procedures Code was promulgated and enforced. The reason behind the Korean Government having not stipulated in the Civil Procedures Code provisions an arbitration system provided for in the Japanese Civil Procedures Code or German Civil Procedures Code while the government whs legislating the Civil Procedures Code, although not to be found in documents, would be discovered under the circumstances prevailing at that time when no arbitration procedures were practiced.[2] And, even if there had been settlement of private disputes in

1) For details on the inauguration of the Korean Commercial Arbitration Committee, reference is made to p.54 of "A 30-year Annal of Arbitration" published by the Korean Commercial Arbitration Board.

2) With respect to the background for enforcement in Korea of arbitration procedures provided for in Chapter 8 of the Japanese Civil Procedures Code and its passage, reference is made to pl of "Current Situation on Arbitration in Korea" by Kim Hong-kyu and published by the Japan Commercial Arbitration Association(1993).

accordance with arbitration, it was in a way similar to that which prevailed in the 19th century Western Europe before the contemporary and permanent arbitration institutions were established; in other words, the object of arbitration was focused primarily on the settlement of disputes that arose between friends, the same clan and partners; even in this case, arbitration was ad hoc in nature and there were no clear distinctions between mediation, conciliation and compromise; not only this but it was more or less the principle to agree on submission of an arbitration request after disputes arose.[3]

Meantime, beginning in the latter half of the 1960s and as foreign trade of Korea became brisk, there arose, as a consequence, a host of disputes from international transactions, resulting in frequent claims filed by buyers on the grounds of quality being poor, non-execution of shipment, non-payment of commissions, shortage in quantity, poor packing and so on. In this vein, there were dire needs for Korea to file claims against foreign business firms of importing and exporting countries on the same grounds mentioned earlier, as imports and exports of commodities were increasing. Given this, the Korean Chamber of Commerce and Industry, and interest organization of businessmen sensitive to pursuit of most reasonable profits put their hands together to establish the Korean Commercial Arbitration Committee as a permanent institution to resolve disputes.

This, I would say, was because they came to perceive a notion that arbitration, or schiedsgerichtsbarkeit, was a most effective and appropriate tool even though there was a variety of other means to settle disputes including litigation, mediation, conciliation and consultation, this, by and large, was necessary not only for international trade among free nations, but also

3) In regards to the history of the commercial arbitration system in Korea, refer to 471 of, vol. 14 of "Current Situation and Prospects for Commercial Arbitration System in Korea" and 'A Study on Civil Precedents" by Mok Young-joon published by Bakyoungsa Co

neccessary for disputes with socialist countries. All-in-all, arbitration was effective and appropriate for settlement of disputes arising from international trade between free and socialist countries. The reason was, on the contrary to parties to disputes in free nations where primarily private enterprises make up the majority, there were numerous instances in which either state or state run entities were parties to disputes in socialist countries, and thus it was extremely difficult to settle trade disputes with the state or state run companies by way of litigation.[4]

In this manner, at last on March 22, 1966, the establishment of the Korean Commercial Arbitration Committee was declared in the grand conference room of the Korean Chamber of Commerce and Industry. This permanent court then expand and reorganized on March 27, 1970 and became the Korean Commercial Arbitration Board, an independent judicial entity, and its name changed on August 29, 1970 to the Korean Commercial Arbitration Board as it is known today.

The Korean Commercial Arbitration Board, both in name and reality, as a quasi judicial institution to receive disputes arising from commercial transactions both within and outside the country, is exercising juxtapositioning, duplicating and selective systems for dispute settlement along with the state court. To put it differently, just like the International Chamber of Commerce(ICC) in Paris, American Arbitration Association(AAA) of the United States, London Court of International Arbitration(LCIA) of the United Kingdom and Japan Commercial Arbitration Association(JCAA), the Korean Commercial Arbitration Board can deal with future trade disputes in international trade in relation the the issues of private law that the parties

4) With regard to literature of Foreign Trade Arbitration Commission managed by the Chamber of Commerce and Industry of the Soviet Union and CIETAC of China as a system of settling trade disputes in socialist countries, reference is made to vol. 10, No. 14 and vol. 13, No. 3 of "Trade Dispute Disposition System of the Soviet Union" and "A Study on Arbitration" by Chung Ki-in.

can dispose of that is the object of an arbitration agreement; and, on the other hand, it can also deal with disputes of present or future nature by private law in connection with the issues of private law. The Korean Commercial Arbitration Board as a permanent arbitration court does have an overall jurisdiction. another thing is that the Commercial Arbitration Board of today serves as a permanent arbitration institution with an overall jurisdiction not only for arbitration cases arising from international trade but also those arising from transactions based on the domestic private law. And, the Board now maintains its head office in Seoul and a branch in Pusan.

As may be noted, the Arbitration Law was promulgated and enforced in 1966. Following this, a permanent arbitration court was established, and with this, arbitration of the 19th century and the preceding age in Korea developed into a contemporary one that encompasses general trends of 20th century arbitration. To amplify, the arbitration clause used in standard form contracts for disputes that may arise in the future has, as a general rule, been established and in accordance with the terms of the arbitration clause and standard contract, rights and obligations of the parties are made clear, further making it possible to designate a specific permanent arbitration institution, along with a method to appoint arbitrators and use arbitration procedures under rules and regulations of the applicable arbitration institution. Thus, in reality, ad hoc arbitration is not practiced in Korea. Rather, it is common that quasi judicial arbitration by a permanent arbitration is practiced in accordance with the so-called arbitration agreement of clause compromissoire[5] that is

5) The standard arbitration clause recommended by the Korean Commercial Arbitration Board is as follows: "All disputes, controversies or differences which may arise between the parties, out of or in relation to or in connection with this contract, or for the breach thereof shall be finally settled by arbitration in Seoul, Korea in accordance with the Commercial Arbitration Rules of the Korean Commercial Arbitration Board and under the Laws of Korea. The award rendered by the arbitrator(s) shall be final and binding upon both parties concerned."

agreed upon in advance for disputes that may arise in the days ahead. Furthermore, the Arbitration Board does not stop at playing the role of a permanent arbitration institution geared to solving disputes for international disputes between Korea and foreign nations. It is now in a postition to play the role of a permanent arbitration institution for settlement of disputes arising from international trade with third countries, not to speak of Asian countries. Prior to the establishment of the Board, business firms of Korea had no choice but to settle their disputes by way of going all the way to "Tokyo Arbitration," "London Arbitration," "ICC Arbitration" or "New York Arbitration" when there were disputes arising from international trade, as there was no permanent arbitration institution taking hold in those days that could deal with settlement of international disputes, but it has now become possible for the Arbitration Board to settle almost any type of disputes through arbitration, provided there is an arbitration agreement between the parties.

Ⅱ. Current status of The Korean Commercial Arbitration Board

1. Organization

With the inauguration on March 22, 1966 in Seoul of the Korean Commercial Arbitration Committee, and the Committee, based on the Arbitration Law, formulated Arbitration Rules of the Korean Commercial Arbitration Board, and, at the same time, maintained, after laying the groundwork, a roster of arbitrators composed of experts and those who were well experienced in their respective field and completed the reorganization of the arbitration court.k[6] Following this, on March 27, 1970, the Korean

Commercial Arbitration Committee attached to the Chamber of Commerce and Industry took over operations and budget,[7] with revision of articles of association to expand and reorganize as a judicial person independent of the Korean Chamber of Commerce and Industry. And then, on August 29, 1980, an extraordinary general meeting was held and, changed its name to the Korean Commercial Arbitration Board in parallel with reorganization. The Korean Commercial Arbitration Board has become a quasi judicial institution that settles disputes arising from commercial transactions, both within and outside the country, and thus becoming a juxtaposing, duplicating and a selective system along with a dispute settlement system of the state court.

The Korean Commercial Arbitration Board is composed of a chairman, president and 3 departments, 1 office(department) and 1 branch. The Chairman is elected at a general meeting consisting of such members of the Arbitration Board as judicial persons or individuals that are engaged in trade and other judicial persons or individuals related to the operation of the Arbitration Board, and normally, the chairman of the Korean International Trade Association is elected as chairman. The Chairman, in this capacity as the chairman of the board of directors, plays an important role in deciding basic direction of policy measures concerning budget, personnel and operations.[8] As to the president, the chairman appoints him, a person well versed in the functions of arbitration, with an approval of the board of directors meeting from among dignitaries who enjoy significant social status and whose credibility is well accepted. The president, with the exception of duties of the

6) The disposition status of claims filed and disposed of from 1967 to 1969 by the Arbitration Board is recorded in detail on p.62 in 'A 30-year Arbitration Annal" (1996); published by the Arbitration Board

7) As to disposition status of claims filed and disposed of by the Korean Commercial Arbitration Association from 1970 to 1979, it is recorded in detail on pp.76-80 of the above Annal

8) Refer to articles 12-17 of articles of association of the Korean Commercial Arbitration Board.

chairman, represents the Korean Commercial Arbitration Board while overseeing the entire business activity of the Board.[9] The Board is further divided into General Affairs Department, Claim Service Department, Arbitration Department, Public Relations Office and Pusan branch, and as for staff members of each department, office or branch, those who are deemed qualified for or experienced in arbitration and those who majored in related fields to arbitration (law, economics and business administration) are employed. The number of personnel based on the table of organization is 44 but there are currently 35 employees. The General Affairs Department is responsible for general administration, planning, training and education and the Claims Service Department tackles matters pertaining to mediation, and research work, while the Arbitration Department is responsible for interna- tional arbitration, domestic arbitration and international cooperation and finally the Public Relations Office plays its due role in public relations fields such as publicity, hosting seminars or symposia and consultation along with publication of arbitration precedents and management of books and literatures.[10] And Pusan Branch is responsible for Consultation, Mediation and Arbitration in the region of Pusan and Kyugnam province.

Specific details of major businesses handled by each department are as follows : One important business in addition to arbitration is conciliation. The Secretariat of the Arbitration Board can attempt, without recourse to arbitration proceedings, to apply conciliation procedures within 15 days in the event of domestic arbitration and 30 days in case of international arbitration from the date of receipt of an arbitration request provided there is a conciliation request. Proceedings of conciliation are followed by methods deemed appropriate by one or several conciliators appointed from the roster of arbitrators. When conciliation is successful, the conciliator(s) appointed in

9) Same as the above.
10) KCAB's organization as of Sept. 1, 1996

accordance with agreement of the parties will be construed as arbitrators and the results of the conciliation are disposed of in a manner consistent with methods of arbitral award by compromise and having the same effect as an arbitral award. Conciliation procedures are terminated if and when conciliation is not reached within 30 days from the date of appointment of conciliator(s), and, in this case, appointment of arbitrators and arbitration procedures will proceed based on Arbitration Rules. Parties, however, can extend the period as mentioned above by mutual agreement. In a nutshell, in the event there is a request from the parties prior to the proceedings of arbitration procedures, conciliators are appointed, with a view to arriving at conciliation.[11]

As for consultation services provided by the Public Relations Office cost free service for the drafting of contract documents, guidance on prevention of disputes or settling methods, laws of a foreign nation, where a firm is a party to the dispute, its system, practices and related data and materials as well as procedures used by the Arbitration Board is available. "Mediation" is available in the Claim Service Department at a low-cost and allows the Arbitration Board to settle disputes amicably from the position of a fair third party in accordance with a request from a party or parties to the dispute in the event that a satisfactory settlement is hard to come by for disputes arising from commercial transactions, both domestic and foreign. The Arbitration Board offers mediation not only for claims filed by foreign companies but also ones filed by domestic firms. Primarily, disputes become the object of mediation if and when there is no arbitration agreement.

In addition to organizations already referred to, there is a Commercial Arbitration Legal Committee established at the Arbitration Board. The Committee comprises of less than 9 members who are scholars with abundant

11) Reference is made to article 18 of Arbitration Rules of the Arbitration Board on settlement by conciliation

knowledge and experience, lawyers and so on, and the Committee primarily provides advisory services, when so requested by the president of the Board or arbitration tribunals, with repect to interpretation of and revisions to the Arbitration Law or Arbitration Rules and foreign arbitration laws.[12]

2. The current status on roster of members and arbitrator(candidates)

The members of the Arbitration Board as of August 31, 1996 are total 60,338 corporations(persons) and out of which ordinary members(trading companies) are 60,166 and special members(Professors, lawyers, and others who are experienced in business and staff members of companies) are 172.[13] For your reference, I might add that the operating budget and funds of the Board come from annual membership fees, arbitration fees, state subsidies, trade promotion funds and other incomes.[14]

12) The Arbitration Board has no specific outside advisory institutions besides the Commercial Arbitration Legal Committee. Nonetheless, the board of directors of the Arbitration Board comprises ex officio directors and elected directors so that diversified views from various fields of expertise may be accommodated in the management of the Arbitration Board. Ex officio directors are the director general of the Trade Office of the Ministry of Trade, Industry and Energy, vice president of Korea Trade-Investment Promotion Agency, standing vice chairman of the Korean International Trade Association, standing vice chairman of the Korean Chamber of Commerce and Industry, standing vice chairman of the Federation of Korean Industries, standing vice chairman of the Korea Federation of Small Business, chairman of Export and Import Sub-Committee of Korean International Trade Association, chairman of the Financial Sub-Committee of Korean International Trade Association, standing vice chairman of the Association of Foreign Trading Agent of Korea and 2 persons with broad knowledge and experiences elected at a general meeting.

13) For details on members, reference is made to p.303 of the above publication by the Arbitration Board.

14) With respect to current status on the financial status and annual operating fund, refer to pp.331-335 and pp.387-389 of the above publication by the Board.

A roster of arbitrators(candidates) is being maintained at the Arbitration Board. It is imperative that the Board above anything else maintain a host of arbitrators(candidates) with integrity and professional expertise in order to conduct arbitration proceedings that are appropriate, fair, expeditious, economical and yet predictable. For this purpose, the Arbitration Board as of 1996 maintains a total of 752 arbitrators(candidates). Out of this, there are 185 from legal circles(primarily lawyers), 160 from the business community (trade, labor, machinery, metal, securities and other fields), 183 professors(each discipline of academic circles), 85 representatives of organizations and 26 certified public accountants and patent attorneys. Of these arbitrator candidates, there are 113 foreign nationals; 31 Americans, 17 Japanese, 9 French, 6 each from Germany and Italy, 5 Russian and so on. All of them reside in Overseas. The roster of arbitrators(candidates) includes their name, date of birth, academic background as well as professional career. Parties to dispute can request further information on would-be arbitrators, along with a roster of arbitrators(candidates).[15]

3. Current status on disposition of claims

The statistical data on arbitration, mediation, conciliation and other settlement methods practiced by the Arbitration Board include related information and data broken down cause, item and region and are reported in detail.[16] Arbitration requests received by the Board in 1995 totaled 79 cases comprising 61 domestic cases and 18 international cases; as to mediation, there was a total of 628 cases of which 137 cases were for domestic while 491 were international cases; on receipt of consultation requests, there were a

15) As to current status on professional fields of arbitrator candidates, refer to p.303 of the above publication by the Board.

16) Refer to pp 293-303 of the above publication by the Board

total of 2,430 cases, out of which domestic cases were 1,097 and internationl cases were 1,333. According to the statistics, arbitration cases totaled 68 in 1993, 72 in 1994 and 79 in 1995, showing an increasing trend. Nevertheless, we can readily see that utilization of the Arbitration Board is extremely marginal for settlement of commercial disputes. There are, of course, a number of reasons, but what is worth to point out here, in particular, is the poor utilization may be attributable to the lack of or erroneous perception of arbitration due to the fact that advertising and publicity campaigns have not been active enough to let business people become aware of the arbitration system. To correct the situation, the Arbitration Board would have to vigorously promote the public perception of arbitration by taking advantage of electronic as well as printed media through which presentations may be made on a continued basis of arbitration system, arbitration status and so forth. Specifically, it ought continually to exert efforts to encourage businessmen to insert an arbitration clause in contracts as part of the terms and conditions that can easily be used for contracts covering both domestic transactions or international trade.

Ⅲ. Current status of Korean Arbitration Law and Arbitration Rules of the Korean Commercial Arbitration Board

1. General

As I mentioned in the foregoing, a contemporary arbitration system of a permanent arbitration court was introduced into Korea with the promulgation and enforcement on March 16, 1963 of the Arbitration Law. In other words, the Arbitration Law was promulgated and enforced on March 16, 1966, and

the Korean Commercial Arbitration Committee attached to the Korean Chamber of Commerce and Industry based on the Arbitration Law, predecessor of the Korean Commercial Arbitration Board of today on March 22 of the same year. And, as a consequence, with the formulation of Arbitration Rules of the Committee on October 13, 1966, arbitration by a permanent arbitration court in name and reality commenced on May 9, 1973, in accordance with the Arbitration Rules. Following this, on May 9, 1973, the Korean Government subscribed to the Convention on the recognition and enforcement of foreign arbitral awards, established in New York, June 10, 1958, and with which it was made possible for the Convention to have its effect in Korea. With this, in particular, it became possible to prepare and be ready for the recognition and enforcement in Korea of foreign arbitral awards and, as a matter of course, the recognition and enforcement in foreign countries of Korean arbitral awards were made possible. And, through the first amendment of the Arbitration Law in 1973 and four revisions conducted in 1973, 1989, 1993 and 1996 of the Arbitration Rules of the Korean Commercial Arbitration Board, efforts have been made to achieve the Korean Arbitration Law and Arbitration Rules of the Arbitration Board from the perspective of organizations and procedures of the arbitration system to be in harmony with the sophisticated development of the international society. Furthermore, with the signing on October 26, 1973 between the Korean Commercial Arbitration Association and Japan Commercial Arbitration Association of an arbitration convention with the purport of "…cooperation on matters pertaining to arbitration, exchange of information and data between the permanent arbitration associations of the two countries… and in the event the intent of the parties to the arbitration is not clear, the locale of arbitration shall be the nation of the respondent. However, when there is an agreement, it shall be the country of the claimant." Since an attempt was made to establish mutual cooperation between a permanent arbitration institution in Korea and its counterpart in Japan and up until September 27, 1995, when a

similar convention as described above was signed between the permanent arbitration institutions of Korea and Sweden, the Korean Commercial Arbitration Board has signed almost the same conventions with 30 foreign arbitrtion institutions including the U.S.A., India and Russia, thus paving the way for a smooth and cooperative relationship for international arbitration.

2. Characteristics of the Korean Arbitration Law and Arbitration Rules of the Korean Commercial Arbitration Board

(1) Application of the same principle to domestic arbitration and international arbitration

In article 22 of the Arbitration Rules, it is provided "domestic arbitration means arbitration in which the parties have their principal offices or permanent residence in the Republic of Korea, and international arbitration means all arbitration other than domestic arbitration as defined above." Accordingly, arbitration is referred to as international arbitration in Korea when both parties or a party has its principal office or permanent residence in countries other than Korea.

Such a provision as article 2 of Commercial Arbitration Rules of the Arbitration Board was provided to coincide with foreign arbitral awards, the object of application of article 1 of the New York Convention of June 10, 1958, with respect to the recognition and enforcement of domestic arbitral awards; "Arbitral awards not recognized as domestic awards are applied in the country where request was made for the recognition and enforcement of arbitral awards in territories other than the country that was requested for the recognition and enforcement of arbitral awards." That is to say Korea is obligated to uphold the convention in light of the fact that it is a nation that

has subscribed to the convention.

Beside this, "Arbitration Committee accepts cases of disputes arising from international trade and economy" as provided in ph. 1, article 2 of the Arbitration Rules of Chinese International Trade and Economic Committee, while article 1492 of the Civil Procedures Code of France refers to international arbitration as "Arbitration with repect to interests arising from international transactions" In this respect, it would be fair to interpret article 2 of the Commercial Arbitration Rules of the Korean Commercial Arbitration Board along the same lines as above.[17] In addition, in ph. 3, article 1 of UNCITRAL Model Law provides "Arbitration when it is applicable to the following, shall be international arbitrations; (a) when the parties to the arbitration agreement, at the time of signing such agreement, have their place of business in different countries or (b) when any one of the following places is in the country where a party has his place of business; (i) place of arbitration defined in the arbitration agreement or decided upon based on the arbitration agreement, (ii) a place where substantial portions of business from commercial perspective is carried out or a place most closely connected to the subject items of the arbitration agreement, or (c) when the parties expressly agreed that more than two countries are related to the subject items of the arbitration agreement." And, this can also be understood in the same context as defined above.

Although such a line has been drawn by the Arbitration Board between domestic and international arbitations, it is nothing but a provision of shouldering arbitration work within the same department of the Board. Accordingly, the same principle is applied based on the interpretations of the provisions of the present Arbitration Law and the Law on conflict of Law.

17) Refer to p.35. 'International Arbitration Law" by Kojima Takeshi and Takaguwa Akira (1988).

with respect to arbitration agreement, method to reach arbitration agreement, arbitration procedures and assistance and cooperation rendered by state court. That is because the Board has followed trends on ligislation and academic theories that regard autonomous characteristics of arbitration as being rather important. However, there are no provisions in the Arbitration Law regarding the recognition and enforcement of foreign arbitral awards. This being the situation, it is augmented by the provisions of the New York Convention as I mentioned earlier. For this, it is being contemplated to specify in detail during the stage of revision of the Arbitration Law currently being performed.[18]

(2) Disputes that become the object of arbitration

It is stipulated in ph. 1, article 2 of the Korean Arbitration Law that not only present disputes but future ones can become the object of arbitration with respect to legal issues of private law that the parties can dispose of ph. 1, article 2 of the New York Convention, article 786 of the Japanese Civil Procedures Code. ph. 1 of article 1025 of the German Civil Procedures Code and articles 2059 and 2060 of the Civil Procedures Code of France provide for almost the same purport as this.

Meanwhile, disputes in relation to legal matters regulated in Patent Law, Trade Mark Law, Laws on regulation of monopoly and fair trade and Bankruptcy Law, etc., can not be the object of arbitration. This is because it is impossible, according to the current laws, to expand to legal matters on public law, with the restriction of utilization of arbitration to legal affairs on private law only. Nevertheless, the weight of technological transactions as well as capital transactions are increasing almost on a daily basis in international transactions, and we can often see international bankruptcies.

18) Refer to "A Study on the Draft Revision of the Arbitration Law (II)" and "Arbitration Journal" No. 277 authored by Kim Hong-Kyu, beginning on p.52.

Therefore, we are faced with the need to review and consolidate, referring to current practices and theories prevailing in advanced countries such as the United States with respect to expansion and consolidation of international arbitration systems [19]

Furthermore, whether or not to make it the object of arbitration the previous arbitration appraisal contract[20] determines whether the existing individual facts in turn becomes a premise in determining the rights of arbitrators or the contents as provided for in ph. 4 of article 1020 of the Civil Procedures Code of Holland. The theory emerges as an object of serious study[21] for the purpose of making it an object of arbitration for accommodation and a contract supplement (as part of the contract) by way of changing the existing contract or augmenting portions lift blank in the provisions of the contracts to cope with changes in situations in long term international contracts. For example, civil engineering and plant construction contracts.

(3) Appointment of arbitrators

According to ph. 1, article 4 of the Korea Arbitration Law, the parties are

19) Refer to "Arbitration of Patent Dispute" by Goldsmith and "The Arbitration Journal," June 1979 issue

20) What is noteworthy with reference to arbitration regarding appraisal contracts is the quality arbitration appraisal of the Merchandise Transaction Association of Hamburg. An arbitration appraiser, in accordance with the procedures covering quality of merchandise and grade appraisal based on request from parties to transactions who has the right to dispose of the merchandise, makes the appraisal, and the appraisal binds both parties. Reference is made to Schwab/Walter, Schiedsgerichtsbarkeit, (Munchen, C H beck, 1990), Kap. p.2. IV, S. 16ff.

21) With respect to the needs to make it an object of arbitration the arbitration, appraisal contract and the accommodation and supplement of the contract, refer to p.150, "Arbitration Appraisal Contract" of dissertations dedicated to Dr Lee Shi-yoon on the occasion of his 61st birthday vol. II, 1995, p.150 on.

entitled to determine, in accordance with the arbitration agreement, the method of appointment and the number of arbitrators.

Whether the case is domestic or international, it is next to impossible to find in Korea an example of ad hoc arbitration. As a consequence, it is a general trend, when an arbitration clause is inserted in the provisions of the contract entered into at the time of commercial transactions, to use an appointing method of arbitrators and arbitration procedures or domestic arbitration based on the Arbitration Rules of the Commercial Arbitration Board, and determine the method of appointing arbitrators and arbitration procedures of the Board or a specific permanent arbitration institution based on its Arbitration Rules in the event of international Arbitration.

When the parties do not appoint arbitrators or fail to reach an agreement on the appointment, the Secretariat of the Board, pursuant to articles 19 thru 27 of the Commercial Arbitration Rules of the Korean Commercial Arbitration Board, appoints arbitrators on behalf of the parties. As to number of arbitrators, the Secretariat appoints either one or three arbitrators unless there is an agreement. The Secretariat, with the selection of several would-be arbitrators from the roster of arbitrators(candidates), sends the list to the parties. The parties assign a number in the desired priority for appointment of a chief arbitrator and arbitrators and send it back to the Secretariat. If the list is not returned within 15 days in the event of domestic arbitration and 30 days for international arbitration, sequence of preference will be regarded as the same for all condidates. Thus, based on this, arbitrators are appointed. Arbitrators who are notified by the Secretariat regarding the appointment advise both parties through the Secretariat when there are causes to raise questions on being fair or maintain an independent position. In this case, when objections are raised in writing by the parties within 15 days for domestic arbitration and 30 days for international arbitration, that arbitrator is

excluded from the appointment.[22] For the Secretariat to appoint arbitrators, a provision is provided in article 23 of the Commercial Arbitration Rules of the Arbitration Board, that the sole arbitrator or chief arbitrator must be selected from among persons of third nations[23] not belonging to any of the nations that either one of the parties belong to, if there is a request from either one of the parties when the nationality or a country where a party resides differs.

(4) Arbitrator competence with respect to the validity of an arbitration agreement of Konpetenz-Kompetenz.

It is provided in article 10 of the Korean Arbitration Law that in case of a dispute regarding the competence of arbitrators, arbitrators can still continue with proceedings of arbitration procedures, with judgment of Konpetenz-Kompetenz and acknowledgement of this point by arbitrators. Article 1037 of the German Civil Procedures Code, article 1466 of the Civil Procedures Code of France and article 797 of the current Japanese Civil Procedures Code stipulate the same purport.

As the trend of arbitrators' autonomy is strongly emphasized in such countries under the continental law system including Germany, Japan, France and Korea, arbitrators have the primary right to judge whether arbitrators can have the rights to render arbitral awards. In other words, arbitrators, even prior to reaching a final conclusion on whether or not arbitrators have the right to render awards, have discretionary rights to proceed with hearings on the issue and thus can render arbitral awards. It has been derived from the

22) A similar provision is stipulated in article 12 AAA Commercial Arbitration (Refer to "A Study on Arbitration I", article 12 of the Commercial Arbitration Rules of the Korean Commercial Arbitration Board).

23) It is a provision of the same purport as article 15 of the Arbitration Rules of AAA(Refer to p 14 of the above publication by the Korean Commercial Arbitration Board).

concept that supervision and control of the state court after the rendering of arbitral awards is derived from an idea that it would be possible to have the state court hand down the final ruling by way of arguing "as to the inappropriateness of arbitration procedures at the stage of lawsuit for cancellation of the arbitral award or at the stage of enforcement."

On the contrary to this, there are by and large predominant trends, under the Anglo-American law system, to regard the supervision or control function of the state court as rather being important, when an argument is presented to the state court by a party that arbitration procedures have taken place based on an invalid arbitraion agreement on arbitration procedures about to take place, the state court, if it judges by a summary litigation that such an agreement holds grounds, can order suspension of arbitration procedures that have already begun or are about to take place and when commencement or continuation of arbitration procedures is deemed illegitimate. The state court, by a summary litigation, can order the other party to proceed with arbitration procedures. These are provided in ph. 2 of article 2 of the U.S. Unified Arbitration Law and article 4 of the U.S. Arbitration Law(chapter 9 of the U.S. Code of Laws, and the purport of such a provision is one of the examples).[24]

In this vein, I would believe that the inherent purpose of an arbitration system that respects autonomy should take hold more solidly. In article 16 of UNCITRAL Model Law, article 21 of UNCITRAL Arbitration Rules and in article 20 of the draft Arbitration Law of Japan, it is spelled out that arbitrators have the primary right to render arbitral awards within the same arbitration procedures as to whether or not arbitrators have the right to

24) Refer to vol. Ⅷ("A Collection of Commercial Arbitration Laws"), the Korean Commercial Arbitration Board(The U.S. Unified Arbitration Law, article 2), p.53 and vol Ⅱ (U.S. Arbitration Law), p 24.

render arbitral awards, and with respect to whether or not an arbitrators' decision is appropriate, a clear stipulation is made in that the state court can handle only by pleas in litigations seeking cancellation of arbitral awards or litigations seeking a declaration of sanctions for enforcement only after arbitral awards are rendered, (articles 34 and 35 of UNCITRAL Model Law and articles 41 and 48 of the draft Arbitration Law of Japan) and I think this substantiates the whole structure.

Likewise, the United States, as may be noted in the Unified Arbitration Law or the U.S. Arbitration Law, does not deem it appropriate not to recognize withdrawal of arbitration requests or ordering the other party or arbitrators the suspension of arbitration procedures by summary litigations or injunctions regarding commencement or continuation of arbitration procedures.

When a party refuses to commence with or continue of arbitration, arguing by way of filing to the court of jurisdiction a litigation for confirmation of nullification of arbitration agreement, it can be said that a litigation could be filed pursing confirmation of the purport that arbitrators have the right to render arbitral awards. That, I believe, is more than a natural incidence from a theoretical point of view, as long as the state court has the final right to judge as to whether or not an arbitration agreement is valid or arbitrators have the right to render arbitral awards. When a party receives a favorable ruling after bringing a lawsuit against the other party, the party can further file a suit with the application of the ruling as a ground for lawsuit seeking revocation of arbitral awards or the ruling allowing enforcement. In addition, arbitrators, in the event that such a "winning" ruling has already been handed down, are not likely to proceed with continuation of arbitration procedures in view of the fact that even if arbitrators go ahead with arbitration procedures and render awards, it is more than obvious that the arbitral awards will be revoked in a litigation seeking cancellation of

arbitral awards. Even before the ruling is finalized, arbitrators are likely to watch the proceedings of the lawsuit by suspending or holding in abeyance the arbitration procedures. Therefore, it should be interpreted that it is possible to file a lawsuit seeking confirmation of nullification of an arbitration agreement or confirmation of the validity of arbitration agreement.

In addition to this, with respect to whether or not arbitrators can render arbitral awards and whether the so called Konpetenz-Kompetenz Agree that gives the finality of awards by arbitrators is possible, there is nothing spelled out in provisions of the Arbitration Law or Arbitration Rules, nor is there anything discussed entirely to this end. The German Arbitration Committee encourages parties who wish to sign arbitration agreements to insert a special provision "Arbitrators (arbitration court) have the right to come to a decision that binds his(its) own jurisdiction (Das Schiedsgericht kann auch uber die Gultigheit dises Schiedsvertrages binded entscheiden)."[25]

Therefore, we ought to have a serious study on whether Korea should provide for this in the draft revision of its Arbitration Law.

(5) Arbitration Procedure

It is provided in article 7 of the Korean Arbitration Law that the parties can establish arbitration procedures in the arbitration agreement and it will be in compliance with what is stipulated by the Korean Arbitration Law in the event there is no such agreement between the parties. It further stipulates in this case, that arbitration will determine them, should there be provisions in the Arbitration Law.

25) P. Schlosser, "German Arbitration Law and Practice," Translated by Shibashi Kunio and edited by Kojima Takeshi, "Law and Practice of Each Nation's Arbitration"(1992, Publishing Department of Chuo University), p.30 on.

As noted above, there is almost no ad hoc arbitration in Korea and there are no lines drawn between domestic and international arbitrations regarding the agreement that requests the Korean Arbitration Board, a permanent arbitration institution, to institute arbitration. And, when the parties agree on an agreement that refers to the Arbitration Board or arbitration, it is regarded that the agreement was reached on the application of the Arbitration Rules of the Board as the applicable arbitration procedures.

With respect to applicable laws, the theory on *lex foci* of arbitration court based on the principle of "arbitration procedures will follow the laws of *lex foci*" which emphasizes the principle of territorial privilege of so called law of procedure of law on conflict of laws and the theory of autonomy of parties that can autonomously designate without following the laws of *lex foci* of arbitration court the principle of autonomy of arbitration procedures are in conflict with each other.

Articles 1 and 2 of UNCITRAL Model Law have adopted a rigid principle of territorial privilege. But, the Korean Arbitration Law does not provide for anything on this. My personal view is that it will be appropriate to adopt a rigorous principle of territorial privilege that UNCITRAL Model Law has adopted. The rationale is to overcome shortcomings that may arise form difficult adjustment of problems if designation of laws of foreign countries as the law of procedure is made in the event that assistance and cooperation of Korean court is needed for arbitration being conducted in Korea, with Korea designated as the locale of arbitration.[26]

26) Refer to p 107, A study on Arbitration law from legislative Perspective by Sawaki Toshiro, Society for Study of Arbitration, 1993

(6) Counsel for arbitration procedures

It is provided in article 7 of the Arbitration Rules of the Arbitration Board "Attorney at law or such a person may be recognized as a counsel. However, such a person may be refused as a counsel when deemed inappropriate as a counsel for arbitration procedures." And, since arbitration is different from litigation, it is not absolutely necessary to abide by the principle of retaining a lawyer as a counsel. It is to make it possible for a staff of a legal corporation or business entity in charge of the issue in question to represent the corporation or the business entity and this coincides with the inherent nature of arbitration nor to have only an attorney-at-law who is a lawyer act as a counsel. Interestingly, attorneys-at-law of foreign nations can't act as a counsel for lawsuits but can act as a counsel for arbitration procedures.

(7) Criterion for arbitral awards

There is no clear-cut provision on criterion for arbitral awards in the Korean Arbitration Law, nor is there anything in the current law on whether or not to apply substantive law or to abide by *ex aequo et bono* if there is no agreement between the parties. Up until recently, criterion for arbitral awards were to be in accordance with the arbitration agreement, provided there was such an agreement reached between the parties, and it was by and large to select according to the discretion of arbitrators, when there was no such an agreement, thus if a questin of whether or not to apply substantive law or should be by *ex aequo et bono*. Nevertheless, it has become sort of a vogue in recent days to apply substantive law.[27]

27) Basic direction of revision to the Arbitration Law ; Sohn Kyong-han and Kim Hwa-jin ; Arbitration(the summer of 1995 issue) , p.26.

But, what can arise as a problem for international arbitrations or arbitration on law on conflict laws, when there is no express agreement between parties on criterion for arbitral awards and to abide by the principle of substantive law. Put it differently, there would be no problem when parties designated substantive law of a specific country as the applicable law as a criterion for arbitra. awards, but a problem does arises when substantive law of a specific country is not specified as a criterion for arbitral awards. Of course, there can be a view that arbitrators in this case, should apply at their own discretion, substantive law of a given nation that is deemed suitable as a criterion for arbitral awards. However, as long as there prevails that substantive law should be applied as a criterion for arbitral awards, it is thought as a matter of course to fix he applicable law as a criterion for laws of a nation decided in accordance with law on conflict laws of *lex foci* in the event of arbitration by law on conflict laws. In the event of litigations by the law on conflict laws, this has the same meaning as the applicable law is naturally fixed based on laws on conflict law of *lex foci*.[28]

Whenever it is agreed on arbitration by "*ex aequo et bono*" or amicable arbitration between the parties, *ex aequo et bono* should be recognized as the criterion for arbitral awards. By fixing *ex aequo et bono* as a criterion for arbitral awards, it makes it possible for arbitrators to render awards commensurate with the actual situation of transaction, utilizing professional expertise and experience in the field and avoiding formality and dispute that may arise in the rigorous application of substantive law.[29]

28) "A Study on Revisions to the Arbitration Law II" by Kim Hong Kyu, Arbitration(the winter of 1995 issue), p.41.

29) "Arbitration Provisions and Provisions of Applicable Law in International Arbitration" by Sawaki Toshiro ; Japanese International Commercial Arbitration Association, 1974 ; p.3 and p.8. This draft revision of the Arbitration Law coincides in general with article 28 of UNCITRAL Model law, article 33 of UNCITRAL Arbitration Rules, article 30 of the draft by Japanese Arbitration Law Research Society(representative Kikui Yudai), article 1074 of the Civil Procedures Code of France and article 822 of

In article 21(criterion for arbitral awards) of the draft revision to the Korean Arbitration Law, it is expressed "when the parties designate the applicable law that becomes a criterion for arbitral awards, it will follow that designation and when there is no express stipulation of the applicable law, arbitrators, in compliance with the principle of law on conflict laws that can be made applicable, determines the applicable law.

In addition, when the parties agree arbitration separately *ex aequo et bono* and amicable arbitration, it will honor the agreement."

(8) Indication of reasons for arbitral awards

It is provided in ph. 3, article 11 of the Korean Arbitration Law that reasons for arbitral awards must be written with he exception of arbitral awards based on conciliation between the parties, and when lumping together what are provided in ph. 1-4, article 13 and article 2 of the same law, it can be the reason for cancellation of arbitral awards when there are reasons for arbitral awards in writing unless there is an agreement between the parties. What is particularly noteworthy is, Korean courts can't refuse the recognition and enforcement of foreign arbitral awards, so long as there are no grounds to refuse he recognition and enforcement of foreign arbitral awards, so long as there are no grounds to refuse the recognition and enforcement as defined in article 5 of the New York Convention, since Korea has subscribed to the convention(June 10, 1958) regarding the recognition and enforcement of arbitral awards of foreign countries. But, as the New York Conventions mentioned earlier does not cite the non-writing of the reasons for arbitral awards as the cause for refusing the recognition and enforcement, it must be recognized and enforced so far as arbitral awards have other requisite factors in the event of international arbitration; different from domestic arbitration.

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the Civil Procedures Code of Italy.

(9) Relief on arbitral awards

It is provided in article 13 of the Korean Arbitration Law that a lawsuit filed with the state court for cancellation of arbitral awards is the only means of denial of arbitral awards. As a consequence, the party who lost in the arbitration can't appeal to the court pleading the arbitral awards, nor can he file a litigation for confirmation of nullification of the arbitral award. In this vein, it is provided in article 15 of the Korean Arbitration Law that only in case reasons attributable to the causes stipulated in ph. 1-5 of article 13 of the same law after the ruling on enforcement is handed down(criminal acts and fraudulent evidence, along with ommission of judgement in relation to important matters that might have influenced arbitral awards), can a lawsuit seeking cancellation of arbitral awards be filed.

What is noteworthy is that any reasons for cancellation specified in articles 13 and 15 of the Arbitration Law can only become the reason for an impediment to the reasons for cancellation of domestic arbitral awards or rulings on the allowing of enforcement; and, with respect to the reasons for the recognition of foreign arbitral awards and denial of enforcement, it must be interpreted that they should be recognized and enforced, so long as there exist no grounds for the recognition and denial of enforcement stipulated in article 5 of the New York Convention(June 10, 1958) to which the Korean government has subscribed. Accordingly, as to the reasons for reexamination applicable to cases where there are no reasons in writing for arbitral awards(the latter part of ph. 1-4, article 13 of the Korean Arbitration Law) and when applicable to ph. 1-4, article 422 of the Korean Civil Procedures Code on arbitral awards(such criminal acts as corruption of arbitrators and fraudulent evidence like fabrication of evidence), they can't be applicable to reasons for refusal of the recognition of foreign arbitral awards and enforcement.

In the draft revision to the Korean Arbitration Law, which is along the same line as article 5 of the New York Convention(June 10, 1958) and phs. 1 and 2, article 34 of UNCITRAL Model Law, it is provided that (i) incompetence of a party or invalid arbitration agreement, (ii) a party has failed to receive a notice on appointment of arbitrators or arbitration procedures or lack of opportunity for defence, (iii) departure from the scope of an arbitration request, (iv) violation in formation of an arbitration tribunal or violation of arbitration procedures, (v) lack of appropriateness of arbitration (possibility of arbitration) and (vi) violation of public policy of Korea,[30] are reasons for obstruction of causes for cancellation and a ruling on enforcement and refusal of the recognition of foreign arbitral awards and enforcement.

Regarding the effect of the original arbitration agreement, it is argued in the event of the ruling on cancellation of arbitral awards or when permission for enforcement is not granted.

A view being upheld is that arbitration agreement becomes extinct with the accomplishment of its purpose and does not resurrect once an arbitral award is rendered.[31]

Another school of thought is that ordinarily and arbitration agreement becomes extinct with the accomplishment of its purpose once an arbitral award is rendered ; nevertheless, if the arbitration agreement is cancelled in a lawsuit at a later date, the arbitration agreement could not have served its purpose. Accordingly, the state court, to a certain extent, ought not to be limited to the

30) The Korean Commercial Arbitration Board, "A Study on the Draft Revision to the Arbitration Law," "Arbitration"(the fall of 1995 issue) . beginning on p.48.

31) Stein-Jonas-Schlosser, Kommentar zur ZPO 19 Aufl., Anm III ; RG 133, 16 ; 114, 170, 180, 174.

cancellation of arbitral awards, but to help make arbitral awards valid by taking measures in lieu of cancellation. Regarding article 30 of the draft revision to the Korean Arbitration Law, with the introduction intact ph. 4 of article 34 of UNCITRAL Model Law which is being upheld by the latter view, it is provided in the draft that the state court, when there is a petition for cancellation of arbitral awards and when it is recognized as being proper, may give arbitrators an opportunity to reopen arbitration procedures or suspend for a certain period of time cancellation of arbitral awards so that arbitrators may take measures deemed necessary to eliminate the causes for cancellation of arbitral awards.

(10) Recognition and enforcement of foreign arbitral awards

There are no specific provisions in the current Arbitration Law on the recognition and enforcement of foreign arbitral awards. However, the Korean government has subscribed to the New York Convention(June 10, 1958), and this being the signature, Korean courts, so long as foreign arbitral awards contain the conditions required for the recognition and enforcement of foreign arbitration awards as per the stipulations in article of the New York Convention and unless there are valid reasons to deny the recognition and enforcement, must recognize and enforce foreign arbitral awards, when such recognition and enforcement is requested. Furthermore, when foreign arbitral awards satisfy the requirements of its constitution and validity of foreign arbitral awards from a theoretical point of view of the Korean law on conflict laws, foreign arbitral awards shounld be recognized and enforced along the same line as domestic arbitral awards.

This is clearly spelled out in article 31 of the draft revision of the Korean Arbitration Law. In other words, foreign arbitral awards, with the exception of the reason for cancellation of arbitral awards as stipulated in article 28 of the draft revision to the Arbitration Law, are binding and

therefore they can be recognized and enforced. It is further provided that a party that seeks to apply an arbitral award or enforcement must submit the original copy of the arbitral award that has been legitimately recognized or a lawfully certified copy along with the original copy of the arbitration agreement or a copy of such arbitration agreement.

IV. Revision to the Korean Arbitration Law and Arbitration Rules

Nowadays, having been increase in international commercial disputes, along with diversifications, accruing from rapid increases in international transaction and international exchanges, and the environment surrounding arbitration has drastically changed, including evaluation of ADR. Because of such changes, revisions to arbitration law as well as a revision to the arbitration rules of permanent arbitration institutions of every country or discussion on the proposed revisions are in rapid progress. Particularly, what draws our attention are the UNCITRAL Arbitration Rules and Model Law adopted in 1976 and 1985, respectively, which have considerably influenced and are still influencing arbitration laws of many countries and arbitration rules of permanent arbitration institutions. In the event the UNCITRAL Arbitration Rules or Model Law influences the arbitration laws of every nation or arbitration rules of permanent arbitration institutions, normally they come in two forms. One of which is to introduce without modifications UNCITRAL Arbitration Rules or Model Law into the arbitration law of a country or arbitration rules of permanent arbitration institutions or to adopt comprehensively with minor modifications.[32]

32) As to nations or regions that have adopted the UNCITRAL Model Law almost comprehensively, we can cite Australia, Bulgaria, Canada, Cyprus, Hong Kong,

The other instance is where the UNCITRAL Arbitration Law and Model Law are adopted in part within the arbitration law of a country or permanent arbitration institutions, with selection of individual articles or provisions.[33]

As I referred to earlier, the Arbitration Law and Arbitration Rules of Korea were formulated back in 1966; as regards the Arbitration Law, it was revised once in 1973 ; however, Arbitration Rules of the Arbitration Board witnessed four revisions, each in 1973, 1989, 1993 and 1996, respectively. In particular, Arbitration Rules of the Board that were amended in 1989, 1993 and 1996 which was after the adoption in 1976 of UNCITRAL Arbitration Rules accommodated as much as possible the Arbitration Rules of UNCITRAL ; thus it was aimed at attaining harmony with procedural regulations universally accepted by permanent arbitration institutions of the world.

During the upcoming revision work on the Korean Arbitration Law and Arbitration Rules of the Korean Commercial Arbitration Board, UNCITRAL Model Law and Arbitration Rules would have to be adequately accmmodated keeping pace with the legal reality of the contemporary world. Regulations that were somewhat vaguely left to the agreements between the parties or discretion of arbitrators that can be seen in the Korean Arbitration Law of today should be more specifically prescribed. With this, legal stability of the parties must be ensured and not only arbitration exprts but even laymen should be allowed to have access to arbitrations ; it is also a must that procedural regulations be stipulated in the Arbitration Law to make further simplify the recognition and enforcement of foreign arbitral awards, contributing to further enhancing the integrity of arbitration system of Korea and credibility in the international community.

Nigeria, Scotland, Peru, Mexico, Bermuda and Tunisia, and others.

33) Nations that have adopted part of the UNCITRAL Model Law include the Netherlands, Switzerland and Spain.