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Korea's New Arbitration Act and Its Implications for International Commercial Arbitrations in Korea*

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Key Words : International Commercial Arbitration, Korea's Arbitration Act, New York Convention, UNCITRAL Model Law, KCAB

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I. Introduction

In recent years, the trade among Korea, China and Japan has been exponentially expanding. In 2004, for example, the overall trade volume of these countries, as combined, amounted to 3,003 billion dollars, constituting more than 13.5% of the whole world trade.[1)]

As anyone involved in international trade will have guessed, this steep increase of trade among China, Japan and Korea is necessarily entailing proportionate frequency of the disputes involving these countries, and it has become an important issue to find effective ways to handle these disputes efficiently as well as fairly. It is widely acknowledged that arbitration is the preferred method of dispute resolution for international commercial disputes. In this respect, arbitration is taking on more and more significance as a quicker and more efficient method of dispute resolution in this region's international trade.

Generally, international commercial arbitrations will take place in countries which have no connection with either of the parties on the premise that the process will be free from bias in such a way. It is frequently said that Korea, being situated between China and Japan, will be preferred as the place of arbitration for disputes arising from the trade at least between those two countries. Taking advantage of this unique opportunity, it is frequently urged, Korea should make whatever preparations would be necessary to emerge as the place for international commercial arbitrations in this vibrant region comprising China, Japan and Korea.

In this regard, it is worth noting that Korea's Arbitration Act (KAA),[2)]

1) http : //www.wto.org/english/res_e/statis_e/its2005_e/section1_e/i09.xls.

first enacted forty years ago, has undergone a complete revision in 1999. The KAA, as amended, has adopted the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law)[3] almost verbatim. While it is true that the newly revised KAA, in an attempt to catch up to the latest developments in arbitration law, has incorporated principal aspects of the UNCITRAL Model Law, it should not be hastily presumed to be nothing more than a mere replica of the UNCITRAL Model Law.

In this presentation, I will first briefly survey some aspects of the KAA which are different from the UNCITRAL Model Law or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Then, I will suggest possible measures needed to be taken to make Korea an attractive place for international commercial arbitrations.

Ⅱ. Key Aspects of the KAA Differing Either From the UNCITRAL Model Law Or the New York Convention

1. Scope of Application

There are two types of arbitration, domestic and international. Although

2) Arbitration Act, Act No. 6083, as amended on Dec. 31, 1999.

3) UNCITRAL Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on 21 June 1985, U.N. Doc./A/40/17, annex I.

there are similarities in domestic and international arbitrations,[4] they are in fact quite different animals. This is because there are factors which affect international arbitration but not domestic arbitration. For example, different laws will be relevant to the arbitral process. Relatedly, international arbitration will rely upon conventions to allow for enforcement of an arbitral award.

Unlike the UNCITRAL Model Law[5] which regulates only international arbitrations,[6] the KAA, as the only legislation relating to arbitrations in Korea, governs both domestic and international arbitrations,[7] as long as the proceedings occur in Korea. The KAA, however, distinguishes between domestic and foreign arbitral awards[8] and defines a "domestic arbitral award" as the one which was made in Korea.[9] From this definition, it may be inferred that a foreign arbitral award will be any arbitral award other than domestic arbitral award, that is, the one not made in Korea.

This distinction has become necessary because different laws apply to

4) G. B. Born, *International Commercial Arbitration : Commentary and Materials* 2 (2nd ed., Kluwer Law Int'l, 2001).

5) The UNCITRAL Model Law provides in Article 1(1) that "This Law applies to international commercial arbitration, subject to any agreement in force between this State and anyother State or States."

6) UNCITRAL Model Law Article 1(2) defines an international arbitration as follows : an arbitration is international if (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States, (b) one of the following places is situated outside the State in which the parties have their places of business : (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement or (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected, or (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

7) KAA, Art. 2.

8) KAA, Arts. 38 and 39.

9) The KAA provides in Article 38 that "An arbitral award made in the Republic of Korea shall be recognized or enforced, unless any ground referred to in Article 26(2) can be found."

foreign arbitral awards and domestic ones under the KAA regime. Under the KAA Article 39(1), the New York Convention governs recognition or enforcement of any foreign arbitral awards,[10] whereas domestic arbitral awards, as defined in the KAA, will be given effect under the KAA Article 38. This distinction, however, will not be as significant as it seems because the application of different laws does not necessarily entail different treatment of foreign and domestic arbitral awards. What anyone involved in an arbitral proceeding will be ultimately interested in, for example, will be whether the arbitral award he or she has won will be enforced, and under what circumstances it may not be. In this matter of enforcement, the KAA guarantees in Article 38 that a domestic arbitration award will be recognized and enforced unless there is any ground articulated in the KAA Article 36(2), and those grounds for setting aside an arbitral award listed in the KAA Article 36(2)[11] are substantially the

10) The New York Convention provides in Article I(1) that "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

In such unusual cases as where a foreign arbitral award does not come under the umbrella of the New York Convention, the KAA provides in Article 39(2) that the relevant provisions of Korea's Civil Procedure Act and Civil Enforcement Act shall apply. Therefore, reprocity, among other requirements, will have to exist before an arbitral award be given effect. KCPA, Art. 217.

11) The KAA provides in Article 36(2) that "An arbitration award may be set aside by the court only if :

1. The party making the application furnishes proof that :

(a) A party to the arbitration agreement was under incapacity under the law applicable to him; or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the Republic of Korea; or

(b) A party making the application was not given proper notice of the appointment of the arbitrator or arbitrators or of the arbitral proceedings or was otherwise unable to present his case; or

(c) The award has dealt with a dispute not contemplated by or not falling within

same as the ones enumerated in the New York Convention Article V.[12]

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the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration : however, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(d) The composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the agreement of the parties, unless such agreement was in conflict with any mandatory provision of this Act from which the parties cannot derogate, or failing such agreement, were not in accordance with this Act; or

2. The court find on its own initiative that :

(a) The subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Korea; or

(b) The recognitionor enforcement of award is in conflict with the good morals and other public policy of the Republic of Korea."

12) The New York Convention provides in Article V that "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that :

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that :

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

2. Arbitrability

Arbitrability deals with the question of what types of issues can and cannot be submitted to arbitration. Domestic laws often impose restrictions or limitations on what matters can be referred to and resolved by arbitration. In certain countries, for example, states or state entities may not be allowed to enter into arbitration agreements at all or may need a special authorization to do so. More important than the restrictions relating to the parties are limitations based on the subject matter in issue. Certain disputes are viewed to involve such vital public policy issues that they should properly be dealt with only by the judicial authority. A typical example is criminal issues which generally come within the domain of the national courts.[13]

Although certain legislation provides for arbitrability, the KAA does not have any express provisions concerning the arbitrability.[14] The KAA, however, provides in Article 1 that its purpose is to ensure the proper, impartial and rapid settlement of disputes in *private laws* through arbitration. According to this provision, therefore, it will be only disputes in "private law" that may be referred to arbitration.[15]

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13) A. Tweeddale & K. Tweeddale, *Arbitration of Commercial Disputes : International and English Law and Practice* 109 (Oxford Univ. Press, 2005).

14) It is true that the UNCITRAL Model Law does not have any provision defining arbitrability, either. As a matter of fact, the issue of arbitrability was raised and considered when the UNCITRAL Model Law was first being drafted. Yet the drafters could not reach any consensus as to proper definition of arbitrability. In the end they decided to ignore the issue whthin the UNCITRAL Model Law. Howerver, the issue has not gone away and UNCITRAL's recent paper on "Possible future work in the area of international commercial arbitration"still talks about the need to reach some worldwide consensus on this issue. U.N. Doc./A/CN.9/460 paras 32-34.

15) With respect to arbitrability, New York Convention Article II(1) obliges each of the Contracting States to the Convention to "recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which

The lawyers from the civil law tradition are well familiar with the dichotonomy between the "public" and "private" law. Since the antitrust law or intellectual property law, for example, is typically considered to belong in the category of the public law, disputes involving antitrust or intellectual property issues will not be arbitrable under the KAA. If this construction stands,[16] an arbitral award may not be enforced because the issues dealt with therein do not come within the confines of the private law and therefore are not arbitrable under the KAA,[17] a result hardly in accord with the recent trend that arbitration is fastly replacing litigation as a dispute resolution method in an increasingly broad area of international trade.

3. Receipt of Written Communications

The KAA provides in Articles 4 (1) and (2) that unless otherwise agreed by the parties, any written notice should be delivered to the addressee personally or if there is no way the personal delivery can be made, a written notice will be deemed to have been delivered to the addressee when it is properly delivered at the place of his domicile, business or

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have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

16) Though a few Korean arbitration law experts have addressed this thorny issue and suggested that under the KAA not only disputes in private law but also those in the areas of public law such as antitrust law or intellectual property law will be arbitrable, it is questionable that reading the relevant provision in that way will be warranted under the KAA, as it is. I am not yet aware of any case that directly coped with this issue in Korea.

17) The KAA provides in Article 36 (2) 2 (a) that "An arbitration award may be set aside by the court if the party making the application furnishes a proof that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Korea."

mailing address. Although these provisions closely follow the UNCITRAL Model Law's relevant provisions,[18] they are defining "written communications" too narrowly. Since under the strict interpretation of these provisions, the facsimile or online communication will not be deemed to be a valid "written notice," expedient communications between parties involved in the arbitration proceeding will certainly be hampered and to that extent the arbitration proceeding will become less effective. These days the facsimile or online communication is rapidly becoming a preferred method of communication between parties residing in different countries, and there is no reason whatever to deny effect to communications made by these methods as long as there are ways to verify them. In this regard, it might be useful to note that the International Chamber of Commerce Rules of Arbitration (ICC Rules) allows notifications or communications from the secretariat and the arbitral tribunal by facsimile transmission, telex, telegram or *any other means of telecommunication that provides a record of the sending.*[19]

4. Form of Arbitration Agreement

The KAA provides in Article 8(2) that an arbitration agreement must be made in writing, just as the New York Convention[20] and the UNCITRAL

18) UNCITRAL Model Law, Article 3.

19) The International Chamber of Commerce Rules of Arbitration provides in Article 3(2) that "all notifications or communications from the Secretariat and the Arbitral Tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provides a record of the sending thereof."

20) New York Convention, Art. II(1).

Model Law[21] do. The KAA further provides that an arbitration agreement in writing is deemed to exist "in a case where the inclusion of an arbitration agreement in the documents exchanged between the parties is alleged by one party and not denied by the other party."[22] Under the New York Convention, however, an agreement in writing is defined in a much more restricted manner. According to the New York Convention, an agreement in writing should be at least "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."[23] This disparity in the definition of written agreement between the KAA and the New York Convention renders the unfortunate situation conceivable where an arbitral award granted under the KAA may not be enforced in other countries on the ground that it has been awarded in the arbitration proceeding which was not properly supported by any "arbitration agreement in writing," as defined under the New York Convention.

It should be noted in this regard, however, that with respect to the requirement of written agreement, at least, the approach taken by the KAA is more preferable than that of the New York Convention because the former is in more conformity with the current business practices. The rationale underlying the writing requirement has two aspects. First, the writing requirement is intended to ensure that the parties have actually agreed on arbitration. Second, writing provides a tangible record of the agreement which helps prove the existence and the content of an

21) UNCITRAL Model Law, Art. 7(2).

22) KAA, Art.8(3)3. Under this clause the extent to which an agreement in writing may be found is even broader than under the UNCITRAL Model Law, which provides in Article 7(2) that an agreement is in writing if it is contained ···in *an exchange of statements of claim and defence* in which the existence of an agreement is alleged by one party and not denied by another."

23) New York Convention, Art. II(2).

arbitration agreement in subsequent proceedings. The form requirement, however, does not always reflect business practice. It is not infrequent in today's international trade environment that the parties orally agree on a multi-million dollar contract. There is no justification to subject arbitration agreements to the stricter form requirement than other contractual provisions. Arbitration is no longer considered a dangerous waiver of substantial rights. The form requirement does not necessarily promote legal certainty; rather it is often the source of additional disputes.[24] Because of these concerns, the writing requirement in most jurisdictions and even under the New York Convention has tended to be liberally interpreted. It seems more proper, therefore, that the difference in the written requirement between the KAA and the New York Convention be resolved by giving liberal interpretation to the New York Convention's form requirement, and not the other way around.

5. Judicial Enforcement of Interim Measures

Arbitral tribunals in general lack the court's powers to enforce their orders over the parties or their property.[25] Furthermore, penalties for noncompliance are only possible if the parties have either agreed on them or they are specifically allowed by the applicable law. In all other cases the court's intervention is necessary to enforce such measures.

Domestic legislation relating to enforcement is normally interpreted to apply only to final arbitral awards. Due to its provisional character, any interim measure has been thought to be unenforceable under the domestic

24) J. D. M. Lew, L. A. Mistelis & S. M. Kroell, *Comparative International Commercial Arbitration* 132 (Kluwer Law Int'l, 2003).

25) Tweeddale & Tweeddale, *supra* note 13, at 305

procedural rules. In order to cope with this problem, some recent legislations relating to arbitration contain special provisions regulating the enforcement of provisional measures ordered by arbitral tribunals.[26]

The KAA authorizes the arbitral tribunal to take such interim measure of protection as it may consider necessary in respect of the subject-matter of the dispute,[27] faithfully following the UNCITRAL Model Law.[28] Yet the KAA does not contain any specific provision concerning how an interim measure given by the arbitral tribunal should be enforced.[29] Since the KAA provides in Article 37(1) that only an "award" shall be recognized or enforced by the court's judgment and does not explicitly require the court to enforce such interim measures as ordered by the arbitral tribunal, the courts in Korea are not bound, and will be therefore less than willing, to enforce these interim measures. The prospect of the court's reluctance or even refusal is becoming more probable in view of the fact that the KAA explicitly prohibits the court from intervening in matters governed thereby, unless it provides otherwise.[30]

It is true that the KAA allowes a party to an arbitration agreement to file with a court an interim measure of protection,[31] after the fashion of the UNCITRAL Model Law Article 9.[32] The provision, however, only

26) English Arbitration Act, s. 44; A. Redfern, M. Hunter, N. Blackaby & C. Partasides, *Law and Practice of International Commercial Arbitration* 338 (4th ed., Sweet & Maxwell, 2004)

27) KAA, Article 18(1).

28) UNCITRAL Model Law, Article 17.

29) UNCITRAL Model Law Article 17 does not deal with enforcement of such measures, either. UNCITRAL Secretariat's Explanatory Note, however, observes that "any State adopting the Model Law would be free to provide court assistance in this regard." *Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration*, comment 26. Obviously, the KAA did not follow UNCITRAL Secretariat's recommendation.

30) KAA, Article 6

31) KAA, Article 10.

recognizes the party's right to seek an interim measure of protection from a court, and it is far from certain that the court will construe this provision as requiring or authorizing it to grant "enforcement judgment" to enforce interim measures given by the arbitral tribunal.

6. Rules Applicable to Dispute

Parties may choose a system of substantive law to regulate their contractual relationship. It is widely accepted that they may also choose more amorphous bodies of law, such as general principles of law, transnational law or international commercial law, *i.e. lex mercatoria.*[33]

The KAA requires the arbitral tribunal to decide the dispute in accordance with the "law" chosen by the parties and at the same time authorizes the arbitral tribunal to apply "the law of the nation" having the closest connection with the subject-matter of the dispute, where the parties have not agreed upon the applicable law.[34] What is significant in these provisions is that only the "law," and not "rules of law," may be applied inasmuch as we read them in their original Korean text. Strictly interpreted, these provisions will forbid the parties to agree upon the *lex mercatoria*[35] or the UNIDROIT Principles of International Commercial

32) The UNCITRAL Model Law provides in Article 9 that "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

33) Lew, Mistelis & Kroell, *supra* note 24, at 417

34) The KAA provides in Article 29(1) that "The aribitral tribunal shall decide the dispute in accordance with the law chosen by the parties" and in Article 29(2) that "failing the designation referred to in paragraph (1), the arbitral tribunal shall apply the law of the nation which it considers having the closest connection with the subject-matter of the dispute."

35) *Lex mercatoria*is generally understood to be a universal system of customary law

Contracts as the governing law or the arbitral tribunal to apply them in the absence of any agreed-upon governing law. If they are to be given strict construction, as envisaged in the above, it will squarely go against the generally observed practice in international commercial arbitration. Because of this undesirable consequence, those few Korean scholars who have addressed this issue are generally of the opinion that they should be liberally interpreted to mean "rules of law." It is not yet clear, however, how the Korean court would interpret these provisions.

7. Appointment of Arbitrators

In most international commercial arbitrations, there will be three arbitrators appointed to determine the dispute. The general practice is that one arbitrator will be appointed by the claimant and another arbitrator by the respondent. A chairman will then be appointed by the two party-appointed arbitrators, by an arbitral institution or by the parties themselves.[36]

The KAA requires three arbitrators to be appointed, where the parties haven't agreed upon the number of arbitrators.[37] The Arbitration Rules of Korean Commercial Arbitration Board (KCAB Rules), on the other hand, provides that the number of the arbitrators shall be determined as one or three by the KCAB Secretariat in the absence of any agreement thereupon.[38] In case the KCAB appoints a sole arbitrator, as it often

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and not a law established by the sovereignty or any prince.

36) Tweeddale & Tweeddale, *supra* note 13, at 140

37) KAA, Article 11(2).

38) KCAB Rules, as amended on December 13, 2004, provides in Article 23 that "The number of the arbitrators shall be determined as one or three by the Secretariat,"in the absence of the agreement thereupon.

does,[39] doubts are being raised whether the appointment of a sole arbitrator complies with the specific command of the KAA that the number of arbitrators should be three. If it should be found in violation of the KAA, then it may lead to the arbitral award being set aside on the ground that the composition of the arbitral tribunal was not in accordance with the KAA requirement.[40]

Though it is possible to argue that by submitting their disputes to the KCAB, the parties have agreed upon the number of arbitrators, as determined by the KCAB Secretariat, it would have been free from this unnecessary confusion if the KAA had been more flexible about the number of arbitrators by providing the number of arbitrators could be one or three, as the KCAB Rules presently does.

Ⅲ. Suggestions About Ways To Improve the Institutional Framework For Korea To Become A Center For International Commercial Arbitrations

Despite some problems, as discussed in the above, the KAA fairly well incorporates the latest developments in international commercial arbitration and thereby has created a regulatory framework that will guarantee the legal status and effectiveness of international arbitration in Korea, and it

39) ICC Rules of Arbitration provides in Article 8(2) that "where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators."

40) KAA, Art. 36(2)1(d).

should be praised as an important step in the right direction to make Korea an attractive place for international commercial arbitrations. Having the right law in place, however, is merely a necessary condition, and hardly a sufficient one to achieve the goal. As much important, if not more, is the presence of institutional framework that will make international arbitration a quicker and cheaper dispute resolution method.

In this respect, the KCAB, as the sole institution which oversees arbitrations, domestic or international, in Korea, will be standing in the center of the efforts at establishing the necessary institutional framework. I am glad at this juncture to report that the KCAB has begun on the challenging task of building the environment that will induce international arbitrations to Korea. Welcoming its efforts, I would like to make a couple of suggestions about the particular direction these efforts would have to take.

1. Securing Competent and Devoted Arbitrators

It is commonly said that "an arbitration is no better than the arbitrators" or that "the arbitrator is the *sine qua non* of the arbitral process."[41] As these sayings succinctly imply, the arbitrators play an integral part in any arbitration proceedings and an arbitration institution will be judged by the quality of arbitrators it maintains on its roll. That is why the KCAB, if it is really serious about becoming a successful international arbitration center, should do its utmost to recruit into its pool of arbitrators distinguished jurists from diverse backgrounds and legal cultures as varied as those of the participants in the arbitral process. Specifically, the KCAB should attempt to invite legal scholars or practitioners of law from China

41) Lew, Mistelis & Kroell, *supra* note 24, at 223

and Japan, and also from such countries as Hong Kong, Singapore or Australia.

One of the reasons why the KCAB is having difficulties in securing well-qualified arbitrators is its inadequate level of arbitrator remuneration. The arbitrator's fees in the KCAB are reported to be less than 20 percent of those maintained by the ICC Court of Arbitration. Undoubtedly, this will not help the KCAB in its efforts to find highly competent arbitrators who are willing to invest his time and expertise on the international commercial arbitration proceedings, which frequently involve complicated legal and factual issues and take an extended period of time. In order to attract experienced arbitrators, therefore, the KCAB will first have to make a serious effort to bring its arbitrator remuneration level to the one that is current in major international arbitration institutions over the world.

Relatedly, the KCAB's fee and expense system needs revamping in such a way as to make possible the more efficient handling of cases. The new system, in fixing arbitrator remuneration among other things, should place more emphasis on the manner in which the arbitration is being handled, and, especially, the arbitrators' efficiency. To be more specific, the arbitrators'fees should not be fixed solely based upon the amount in dispute, as they now are; rather, such factors should be taken into consideration as the diligence of the arbitrators, the time expended, the speediness of the proceedings and the complexity of the dispute.

2. Enhancing the Expertise of the KCAB Secretariat

An arbitration institution will be able to provide the highest level of arbitration-related services, only when it has the secretariat or staff which is up to that task. That is because it is usually the secretariat of an

arbitration institution which is in charge of the arbitration proceedings being conducted under its auspices. In particular, the secretariat is responsible for appointing arbitrators, confirming arbitrators nominated by the parties, deciding upon challenges of arbitrators, reviewing drafts of arbitral awards and fixing the arbitrators' fees. During the arbitration proceedings, the secretariat regularly supervises the progress of all pending cases, and takes any needed measures to ensure that the case advances as quickly as possible and that the proceedings are being conducted in conformity with its arbitration rules. Considering these broad range of works that the secretariat has to perform, it is no exaggeration to say that an arbitration institution is only as good as its secretariat or staff working therein.

The importance of a secretariat, as discussed above, strongly urges the KCAB to initiate the efforts at overhauling its own. It does not mean that the KCAB merely increases the number of its secretariat's staff. Rather, it should transform the secretariat and fill it with the professionals who are highly qualified both in terms of expertise in international arbitrations and of language skills. Since disputes in international trade will generally concern complicated legal issues most likely involving more than one legal system, the KCAB should make every attempt to recruit lawyers who have been educated in law schools abroad as well as in Korea and at the same time are familiar with legal issues frequently arising in disputes in international trade.

Ⅳ. Conclusion

The dawning new era of ever expanding trade among China, Japan and

Korea provides Korea a unique opportunity to become a center for international arbitration, and it cannot afford to let it slip away. In order to make the opportunity a reality, Korea will need to set up the institutional, as well as legal, framework that could attract international arbitrations.

I believe that Korea has taken an important step by adopting a new arbitration act, and I do hope that it will continue its efforts until it will have converted the goal of becoming a center for international arbitration into an accomplished reality.

References

http : //www.wto.org/english/res_e/statis_e/its2005_e/section1_e/i09.xls.

UNCITRAL Secretariat, *Explanatory Note on the Model Law on International Commercial Arbitration.*

UNCITRAL Secretariat Report, U.N. Doc./A/CN.9/460 paras 32-34.

Born, G. B., *International Commercial Arbitration : Commentary and Materials* (2nd ed., Kluwer Law Int'l, 2001).

Lew, J. D. M., Mistelis, L. A. & Kroell, S. M., *Comparative International Commercial Arbitration*(Kluwer Law Int'l, 2003).

Redfern, A., M. Hunter, Blackaby, N. & Partasides, C., *Law and Practice of International Commercial Arbitration* (4th ed., Sweet & Maxwell, 2004).

Tweeddale, A. & Tweeddale, K., Arbitration of Commercial Disputes : International and English Law and Practice (Oxford Univ. Press, 2005).

국문요약

한국에서 개정 중재법이 한국에서 국제상사중재에 미치는 영향에 관한 연구

신 창 섭

이 논문은 지난 10월 26일 및 27일 양일간에 걸쳐 서울의 Grand InterContinental Hotel에서 개최된 국제중재학술대회 ICC/KCAB/KOCIA Conference에서 발표된 것으로 외국 변호사들의 이해를 돕기 위해 우리나라 중재법의 주요 내용을 설명하되, 특히 뉴욕협약과 국제상사중재에 관한 유엔모범법과 차이가 있는 부분을 주로 설명하였다. 이 논문은 우리나라 중재법이 규율하는 분야 중에서 그 적용범위, 중재적격, 통지의 서면성, 중재합의의 형식, 중간구제조치의 집행, 중재의 준거법 및 중재인의 선정 등에 관하여 설명하였다.

또한 이 논문은 우리나라가 일본, 중국 및 우리나라를 포함하는 동북아무역과 관련한 분쟁에서 중재의 중심지가 되어야 할 것을 역설하고, 이를 위해서 우리나라 유일의 중재기관인 대한상사중재원이 중재인 및 사무국 분야에서 개선이 필요함을 주장하였다.

주제어 : 국제상사중재, 중재법, 뉴욕협약, UNCITRAL 모범중재법, 대한상사중재원