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A Case Study on the International Arbitration : Hanbo Case

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Key Words : International Arbitration, Negotiation, Dispute Settlement, Contract Condition.

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Ⅰ. Introduction

A chain of corporate failures such as Hanbo Steel's and Kia Motors's, in the early months of 1997, led to the downturn of external creditability, the soaring spiral of foreign exchange rate, the pressure from abroad to repay debts and the outflow of foreign exchange reserve. All of them inevitably downgraded Korean Bonds to the level of junk bond in international financial markets. Korea had to face IMF foreign currency crisis.

In its attempt to seek an early economic upturn and are collection of public funds poured in to restructure failed companies, the government has opened all of its doors to investments from abroad, pulling out an all-out endeavor to entice foreign capital. Since then, foreign investments have increased rapidly with the direct or indirect methods due to the opening policy for the financing sectors.

This environment change would bring about the number of international conflicts between the Korean companies and foreign investors in the various fields. Especially, when there is an increasing probability of lawsuits filed by the investment companies or mutual funds based on the overseas country, it is a important matter to know what arbitration is, how to work and apply to the case study in preparing and avoiding the potential dissention. If inevitable, having deep information about the arbitration system will help you cope with one to be coming

The purpose of this paper can provide you with valuable strategy at a time when negotiation will be done unsuccessful, so there is a high probability of filing request for arbitration by explaining the Hanbo Arbitration Case.

The paper is organized as follows. The introductory section has so far described the background and objective of this thesis. The next section reviews an overall arbitration definition, feature and process, based on arbitration rules, regulation and law. The third section discuses the Hanbo Case, in which who are the related parties, applicable law, claimant's claim, proceeding on the Merits and final Award. The last section up the result of the analysis and suggests measures to enhance negotiation performance when engaged in international arbitration.

Ⅱ. Overview on ICC Arbitration

1. Advantages of Arbitration[1]

(1) Final, binding decisions

While several mechanisms can help parties reach an amicable settlement - for example through mediation under the ICC ADR Rules - all of them depend, ultimately, on the goodwill and cooperation of the parties. A final and enforceable decision can generally be obtained only by recourse to the courts or by arbitration. Because arbitral awards are not subject to appeal, they are much more likely to be final than the judgments of courts of first instance.

(2) International recognition of arbitral awards

Arbitral awards enjoy much greater international recognition than judgments of national courts. Over 134 countries have signed the 1958

1) http : //www.iccwbo.org

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the "New York Convention". The Convention facilitates enforcement of awards in all contracting states. There are several other multilateral and bilateral arbitration conventions that may also help enforcement.

(3) Speed, Economy and Confidentiality

Arbitration is faster and less expensive than litigation in the courts. Although a complex international dispute may sometimes take a great deal of time and money to resolve, even by arbitration, the limited scope for challenge against arbitral awards, as compared with court judgments, offers a clear advantage. Above all, it helps to ensure that the parties will not subsequently be entangled in a prolonged and costly series of appeals.

2. Process[2)]

(1) Request for Arbitration and Respondent's Answer

The Request should be supplied in as many copies as there are respondent parties, plus one for each arbitrator and one for the Secretariat. After a review of the documents, the Secretary General normally requests from the Claimant a provisional advance intended to cover the costs of the arbitration until the Terms of Reference have been drawn up.

〈Table - 1〉 The Request's elements

- the name in full, description and address of each of the parties - a description of the nature and circumstances of the dispute - a statement of the relief sought, including amount

2) Summary of the ICC Arbitration Rule ICC

- the relevant agreements and the arbitration agreement - all relevant particulars concerning the constitution of the Arbitral Tribunal

Source : ICC Arbitration Rule article 4.

(2) Setting in motion of the arbitration

The arbitral process is supervised by the International Court of Arbitration (while the dispute itself is decided by the Arbitral Tribunal). The Court meets in plenary sessions once a month, and in committee sessions, generally three times a month. All sessions of the Court are confidential. Neither the parties nor the arbitrators may attend. Following the receipt of the Respondent's Answer to the Request (or the expiration of the time-limit for its receipt), the case is submitted, if necessary, to the Court, which takes such decisions as may be required to set the arbitration in motion.

(3) Terms of Reference

The Terms of Reference offer various technical, psychological and legal benefits. First, They allow the claims and answers submitted by the parties to be ordered and structured. Secondly, The document can also be used to record definitively an agreement between the parties on such important matters as the law applicable to the merits, the language to be used in the arbitration or even certain points pertaining to the merits of the dispute. Finally, The establishment of the Terms of Reference is said to encourage parties to reach a settlement by clarifying the issues

(4) Scrutiny and final Award

After the closing of the proceedings, the Arbitral Tribunal draws up a draft Award that is submitted to the Court's scrutiny. The Court may lay down modifications as to form and, without affecting the Arbitral Tribunal's liberty of decision, may draw its attention to points of substance.

(5) Notification of the Award

Once approved by the Court, the arbitrators sign the Award. It is deemed to be made at the place of the arbitration on the date it indicates. It is then notified to the parties by the Secretariat.

〈Figure-1〉 ICC International Arbitration Process

ICC Arbitration Clause in Parties' contract

↓

Request for ICC International Court of Arbitration

↓

ICC International Court of Arbitration Secretariat

↓

Making up the Arbitral Tribunal

↓

Consideration	Terms of Reference
	Claimant & Respondent claim
	Hearing

↓

Arbitral Award

↓

ICC Secretariat approve Arbitral Award

↓

ICC Secretariat sign and send them to the parties

↓

Enforcement

Source : International Chamber of Commerce, "Rules of Arbitration in force", 1998. p. 15.

Ⅲ. Case study

1. Overview of transaction

(1) Target of sale

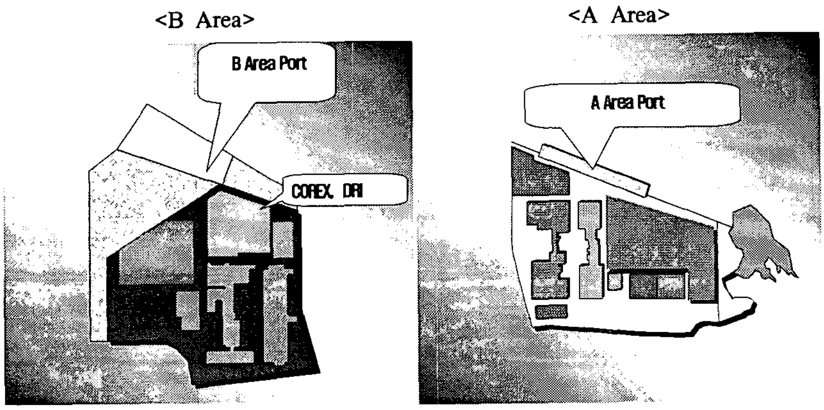
The transaction between Hanbo and AK Capital at issue in this arbitration took place under the auspices of Hanbo's corporate reorganization proceeding[3] in Korea. Hanbo remains under reorganization and continues to operate under the supervision of the Bankruptcy Court. After Hanbo liquidates all of its remaining assets and settles any remaining creditor claims, it will be dissolved. At the time Hanbo filed for reorganization, its principal assets were the steelmaking plants and equipment at its operational facility located in Dangjin, an area on the western coast of Korea that is approximately 135 kilometers south of Seoul (the "Dangjin Facility").

The Dangjin Facility consisted of two principal production areas, known as "Area A" and "Area B,"as well as deep water ports on the Yellow Sea. Area A contained two functioning 9 steel mills : (i) a bar mill, which produced rebar (a steel bar commonly used in reinforced concrete) and which continued to operate even after Hanbo declared bankruptcy; and (ii) a compact strip production ("CSP") mill, which produced "hot rolled coil,"(a higher-grade steel product usually customized for specific uses), but which ceased production shortly after Hanbo declared bankruptcy because it was not profitable at the time. Area B was not yet operational but was designed as a fully- integrated steelmaking facility, with an iron-making

3) Hanbo's petition for commencement of the reorganization proceeding was filed with the Bankruptcy Division of the Seoul Central District Court in Korea (the "Bankruptcy Court") on January 28, 1997, and accepted by the Court on August 27, 1997. On July 27, 1999, the Bankruptcy Court approved a reorganization plan for Hanbo that remained in effect through the transaction with AK Capital.

plant and three separate steelmaking plants for the production of hot and cold rolled steel products. Area B was approximately 70% complete when construction was halted in 1997.

〈Figure - 2〉 landscape of Dangjin Facility



Source : Lehman Brothers, "Hanbo's Informationa Memorandum", 2001. p. 20.

(2) Parties

1) Hanbo's Creditors and Sales Team

The attempted sale of the Hanbo assets to AK Capital was conducted by a large team consisting of creditor representatives, the sales manager and legal advisors. Pursuant to two contracts, which were approved by the Bankruptcy Court, the authority to conduct the sale was delegated to Hanbo's financial institution creditors in 1998 and 2001. As a result, Hanbo's creditors[4], not Hanbo itself, were responsible for conducting the

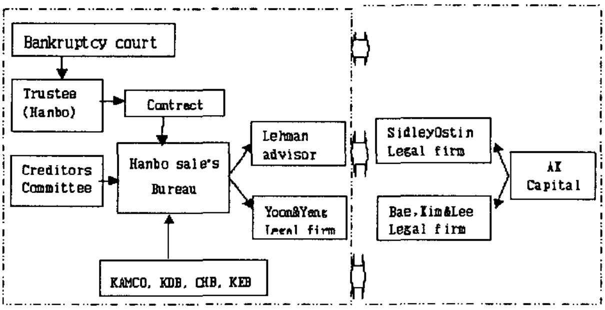
4) These institutional creditors, known as the "Representative Creditor Board,"established the "Representatives Meeting" to oversee the sale and a subcommittee called the "Joint Management Committee" to review Hanbo's requests for creditor approval. The creditors established a "Sales Bureau" to manage the day-to-day aspects of the sale.

sale. As lead creditor, KAMCO's representatives chaired the Representatives Meeting, Joint Management Committee and Sales Bureau, but acted on behalf of all of Hanbo's creditors. Lehman Brothers Korea ("LBK") was engaged as the sales manager for the transaction. Yoon & Yang, a prominent Korean law firm, was engaged as primary legal counsel to the creditors and Hanbo. LBK and Yoon & Yang were the principal parties who interacted with AK Capital's representatives throughout this transaction.

2) AK Capital

AK Capital is a sophisticated investment consortium formed for the sole purpose of acquiring, managing and operating Hanbo's assets. AK Capital and its subsidiaries, NHB, Inc. and DASCO. In total, AK Capital engaged more than 25 different consultants and advisors[5] in connection with the Hanbo transaction.

〈Figure - 3〉 Negotiation structure (Hanbo & AK Capital)



Source : writer's summary of negotiation structure

5) Throughout the Hanbo transaction, AK Capital was assisted by first class technical, financial and legal advisors, including : Two of Korea's most prominent law firms - Bae, Kim & Lee and Kim, Choi & Lim; A prominent international law firm - Sidley Austin Brown & Wood LLP; and At least four leading investment banks - CIBC World Markets, CLSA Emerging Markets, Capital Argus and Newbridge Capital.

3) Korean Bankruptcy Court

The Bankruptcy Court played a central role in the transaction between Hanbo and AK Capital. Once Hanbo's reorganization petition was approved, the Bankruptcy Court assumed final authority over Hanbo's affairs, including the disposition of its assets. Hanbo's chief executive throughout the transaction with AK Capital was its trustee, whose primary responsibilities have included overseeing Hanbo's general operations and its compliance with the reorganization plan.

(3) Negotiation

1) From MOU to SPA

Hanbo was one of Korea's most prominent steel companies. Its bankruptcy was one of the largest in Korean history and came in the midst of an economic crisis that struck Korea in the mid-to-late 1990's. Accordingly, the Hanbo proceeding has attracted close attention from the Korean press and public. In July 2001, Lehman Brother(LB) initiated the bidding process by distributing an Information memorandum and Bidding Instructions to potential purchasers, including AK Capital. The July 2001 Information Memo informed potential bidders that the Hanbo sale was being conducted with the approval of the bankruptcy courts, and that it was their responsibility to be fully acquainted with the laws and regulations of Korea as they pertain to this transaction.

<Table - 2 > sale process

○2001. 07. 27 : Distributed Information Memorandum
○2001. 11. 30 : Bidding of 2 buyers
○2002. 03. 26 : Sign of MOU between AK and Hanbo

○2002. 04. 01	AK deposited EMD (USD 10Million)
○2002. 04. 15	In-depth Due Diligence of AK started
○2002. 06 ~11	Negotiation regarding price adjustment and Terms
○2002. 12. 09	Creditors committee approved the Consideration of USD 377 Million, SPA terms and 10 Million as EMD
○2002. 12. 17	Korean Bankruptcy Court ordered Increase of EMD to 10% of the Purchase Price
○2003. 01. 15	AK responded to court order of increase EMD that AK Capital will deposit additional amount of KRW 10 Billion as EMD with condition of refundable
○2003. 01. 16	court ordered that additional amount of KRW 20 Billion should be deposited
○2003. 01. 18	AK accepted court order that additional amount of KRW 20 Billion should be deposited, subject to that closing not occurring due to AK failure in financing, initial USD 10 Million of EMD will be released to Hanbo and additional KRW 20 Billion of EMD will be refundable to AK Capital
○2003. 02. 12	the SPA execution

Source : writer's summary of sale process

In early December 2001, an Evaluation Team comprised of Hanbo's advisors, including LBK, Yoon & Yang and other advisors, reviewed the two remaining binding bids and determined that AK Capital had submitted the more favorable bid. On December 10, 2001, Hanbo offered to select AK Capital as the winning bidder provided that AK Capital agree to the terms of a memorandum of understanding and provided, further, that the contents of this memorandum of understanding are subsequently approved by the Korean bankruptcy court. By March 2002, Hanbo and AK Capital reached agreement on the terms of a memorandum of understanding (the "MOU") outlining the parameters of the sale.

〈Table-3〉 Summary of MOU

Content	Issue in Negotiation		Finalized
	seller	buyer	
Price adjustment range	5%	15%	9.3%
Criteria	Actual discrepancies	Any materials	Actual discrepancies
EMD	Only if Seller fault and buyer no fault, refund	Only if Seller fault, refund	Only if Seller fault, refund

Source : writer's summary of MOU

2) Negotiation

① The Purchase Price Adjustment Issue

Three months after the MOU was signed, AK Capital demanded a reduction in the purchase price from $401 million to $364 million - the maximum purchase price adjustment allowable (9.3%) under the MOU. Hanbo and its advisors diligently reviewed AK Capital's claims and submitted a response on July 9, 2002 - less than a month after receipt of AK Capital's demand. Hanbo did not agree with AK Capital's claims and submitted a technical report prepared by its steel experts rebutting AK Capital's assertions. AK Capital and Hanbo exchanged additional correspondence on the issue, and met several times to negotiate a resolution.

② Bankruptcy court requires an additional EMD

After eight months of negotiations, AK Capital and Hanbo finally reached agreement on the terms and conditions of the SPA at the end of

November 2002. Bankruptcy Court, however, would not approve the SPA unless the non-refundable EMD that AK Capital was required to pay was raised from $10 million to 10% of the purchase price in order to conform to the Bankruptcy Court's M&A Guidelines.[6] Bankruptcy Court informed that the Bankruptcy Court's research had shown that a 10% EMD had been required in all other transactions that the Court had overseen since the M&A Guidelines were amended in October 2001.[7] Judge also said that the MOU did not preclude the Bankruptcy Court from increasing the EMD[8] at that time.

〈Table-4〉 Summary of SPA

Content	Issue in Negotiation		Finalized
	seller	buyer	
Price adjustment	$312,500	$37,293,000	$24,000,000(6%)
Jurisdiction	seoul	Hong Kong	Hong Kong
Governing Law	Korea	N.Y	Korea

Source : writer's summary of SPA

6) made 2001. 1. 31, amended 2001. 10. 19.

7) On January 15 and 18, 2003, AK Capital's Korean counsel submitted two letters to the Bankruptcy Court presenting AK Capital's objections to the AEMD, both of which attributed the AEMD requirement solely to the Court. Trustee and creditor representatives met several times with Judge to attempt to convince the Bankruptcy Court to reconsider its instructions. Despite efforts, the Bankruptcy Court continued to insist on a non refundable EMD totaling 10% of the purchase price.

8) On January 18, 2003, AK Capital submitted another letter to the Bankruptcy Court. AK Capital agreed to pay an AEMD of 20 billion won, as long as the Bankruptcy Court allowed AK Capital to pay the AEMD in two installments - the first 10 billion Korean won at the SPA signing and the second 10 billion Korean won three months later. The Bankruptcy Court agreed to AK Capital's proposed compromise. AK Capital accepted the AEMD requirement and proceeded with the transaction.

3) Termination of SPA

① AK Capital Misses SPA Deadlines and Requests Its First Extension

AK Capital's own inability to obtain financing came to a head on July 1 when it could not satisfy its contractual obligation under the SPA.[9] AK Capital missed this deadline. It is undisputed that Hanbo could have chosen to terminate the SPA and end the transaction with AK Capital, On July 2, AK Capital presented Hanbo's advisors with its formal request for an extension. AK Capital's July Extension Request acknowledged AK Capital's obligation to provide proof of sufficient financing by July 1, and requested an extension of that deadline to July 28, 2003.[10] Pursuant to Judge's instructions, AK Capital was required to pay default interest at a rate of 9%. Judge Lee also instructed that if AK Capital did not meet the August 18 deadline, the SPA would automatically terminate and AK Capital would have to forfeit the EMD and half of the AEMD. AK Capital, however, was not required to forfeit any money immediately as a condition of this extension.

② AK Capital Misses the New Deadline and Requests a Second Extension

Although it had represented in its July Extension Request that it could deposit the entire purchase price within three weeks, it did not do so after six weeks. Under the terms of the extension, AK Capital was required to deposit the balance of the purchase price by August 18, 2003, but it failed

9) Pursuant to the SPA, AK Capital was required to provide proof by July 1, 2003 that it had secured sufficient funding to close the transaction.

10) AK Capital represented that it could deposit the entire purchase price within three weeks. The Bankruptcy Court approved AK Capital's request for an extension, and even granted AK Capital three more weeks than it had requested, extending the deadline for depositing the balance of the purchase price to August 18, 2003.

to meet the funding deadline for the second time. If AK Capital failed to deposit the balance by that date, the SPA shall automatically terminate without any further action by the Parties.[11] Second extenstion was allowed by the Bankruptcy Court and creditors.

〈Table - 5〉 Extension and Termination of SPA

○2003. 07. 02 : AK required first extension of closing by no later than 2003. 7. 28
• 6 weeks extension will be granted (2003. 8. 18)
• AK should pay penalty charge for delay of closing
• If failed, KRW 10 Billion of EMD should be transferred to hanbo
○2003. 07. 31 : amendment of SPA
○2003. 08. 13 : AK required Second extension of closing by no later than 2003. 10. 17 (2 Months)
○2003. 08. 19 : court approved AK's requirement of Second extension of closing (3 months) by no later than 2003. 11. 18 with below conditions
• KRW 10 Billion of EMD is transferred to hanbo 2003. 8. 19
• AK should pay penalty charge for delay of closing
• If failed, Remaining of EMD should betransferred to hanbo
○2003. 11. 04 : second amendment of SPA
○2003. 11. 18 : AK's requirement of extension of closing
○2003. 11. 18 : meeting at bankruptcy court, judge rejected
○2003. 11. 19 : automatically terminated

Source : writer's summary of extension and termination of SPA

③ The Bankruptcy Court Denies AK Capital' s Request for a Third Extension

Despite having had three additional months to secure its funding, AK Capital failed once again to fulfill its obligation to deposit the purchase

11) As part of Side Agreement No. 2, AK Capital acknowledged that "pursuant to Section 3.2(b) of the SPA, as amended, [AK Capital] was required to deposit the Purchase Price Remainder …by no later than August 18, 2003," but "failed to perform Section 3.2(b) of the SPA, as amended." Pursuant to the Bankruptcy Court's ruling, Side Agreement No. 2 required AK Capital to deposit the balance of the purchase price "[n]o later than November 18, 2003."

price by the contractual deadline. Although Claimants attempt to blame Respondents, the SPA automatically terminated when AK Capital failed to meet its twice-extended deadline and the Bankruptcy Court refused to grant AK Capital yet another extension. AK Capital has no one to blame for the termination but itself.[12] Prior to November 18, AK Capital did not inform Hanbo that it would not be able to meet this deadline. In fact, AK Capital had formally executed Amendment No. 2 to the SPA, which memorialized the terms of the second extension including its November 18 deposit deadline, only two weeks earlier on November 4, 2003, without raising any issues. Bankruptcy Court would not grant AK Capital a third extension. AK Capital made a final appeal for an extension, but Judge refused. AK Capital did not deposit any money into Hanbo's accounts before midnight on November 18, 2003, and, accordingly, the SPA automatically terminated.

2. Argument

(1) Claimant' Claim

1) Tort and Contract Claims for Value of Hanbo's Assets and Lost Profits

Claimants bring concurrent tort and contract Claims for damages in the amount of the replacement value($431 million)[13] of the Hanbo assets that Respondents should have sold to Claimants at the end of 2003, plus

12) Pursuant to the second extension that the Bankruptcy Court had granted in August, AK Capital was required to deposit the balance of the purchase price by November 18, 2003.

13) After SPA termination, Hanbo Assets was sold to the INI/Hysco with the consideration of almost USD 808Million, so AK lost profit is USD431 Million.

recoverable lost profits. Respondents committed a tort by failing to act in good faith in violation of Article 2(1) of the Korean Civil Code ("KCC").[14) Respondents violated their duty to act in good faith by intentionally interfering with Claimants' efforts to perform their obligations under the SPA in a timely manner, and by invoking their contractual termination rights in circumstances when the application of the good faith principle under Korean law required Respondents to grant an appropriate extension of time for Claimants to complete the transaction. Respondents breached their contractual obligations under the SPA by, inter alia, failing to sell the Hanbo assets to Claimants, failing to use best efforts to consummate the transaction and failing to cooperate in good faith with Claimants in connection with the transaction. Claimants do not have to prove what precisely motivated Respondents in committing these acts of bad faith. However, it is undeniable that Respondents'act of bad faith in invoking contractual termination rights under the SPA in November 2003 took place when it had become clear that the market value of the Hanbo assets had increased dramatically beyond the favorable contract price secured by Claimants in 2001. Thus Respondents stood to gain handsomely through a resale of the same assets if they could seize upon any pretext to ensure the failure of Claimants' transaction. Moreover, if Claimants' transaction failed to close, Respondents were fully aware that they would enjoy a windfall through the confiscation of Claimants'earnest money deposits of over $27 million. Respondents' principal defense is that Claimants did not have the funds to buy the assets at the scheduled.

14) Under the Korean Civil Code, in order to recover in tort a party must show that four elements are present. (i) intent or negligence of the tortfeasor in committing the act in question; (ii) legal capacity of the tortfeasor; (iii) unlawfulness of the tortious act; (iv) occurrence of damage to the victim.

2) Claimants bring the following complementary claim

A person who, without legal grounds, derives a benefit from the services of another and causes loss is require to return the benefit. Claimants, at their expense, provided Respondents with technical recommendations, advice and marketing efforts over an extended period, thereby greatly increasing the value of Hanbo's assets to the benefit of Respondents exclusively. At a minimum, by providing recommendations which increased the value of the CSP mill by $120 million and the value of the bar mill by $75 million, Hanbo increased the value of Area A by $195 million. Claimants' marketing efforts also added substantial value to Area B. Claimants' contributions (as well as the rising steel market) are reflected in the additional $431 million paid by the new buyer of the assets in 2004. The limitation of liability provisions do not reach Claimants'unjust enrichment claim either, as they do not bar non-contractual claims, such as this, which are not expressly or impliedly excluded in the contract.

3) Claim for Restitution of Unjust Enrichment

Claim for Restitution of Earnest Money Deposits the $27.7 million that Claimants deposited and Respondents retained are liquidated damages under Korean law. This is not contested. Under Korean law, where a liquidated damages provision is unreasonably high, a court or tribunal may reduce it to an appropriate sum to ensure fairness.[15] This is not contested either. In determining whether to reduce or eliminate liquidated damages, Korean courts look at all the circumstances to evaluate whether the payment of liquidated damages unduly burdens the payer. Given notably

15) Article 389, 765(2) of the Korean Civil Code

Respondents' termination of the deal without warning and without offering Claimants the opportunity to rectify the alleged default, Respondents' windfall from the failed transaction of $431million (the difference between Claimants' favorable price and the higher price paid by the third party), Respondents' benefit through Claimants' technical and managerial expertise before the failure of the transaction, and Claimants'uncontested corresponding loss of $53.7 million, to allow Respondents to retain any of the $27.7 million in liquidated damages is eminently unreasonable and unfair.

(2) Respondents' statement

1) Claimants' claim is contradicted by key documents

They claim that AK Capital sought the first extension to cover a funding shortfall of US$ 30 million. But in its extension request, AK Capital admitted that it was at least US$ 98.5 million short of the amount needed to close. They claims that about one week before November 18, 2003, informed Trustee Na that AK Capital might need a third extension. But on November 12, AK Capital wrote to LBK to designate November 21, 2003, only three days after the deposit date, as the Closing Date. On November 16, AK Capital's counsel, Bae, Kim & Lee, sent an email that contemplated funds being transferred on November 18.

Claimants' story shifts to fit around the facts.[16] For example : The

16) With regard to negotiations with Daeju, Mr. Kwon claims that immediately after July 2, 2003, due to Dae Joo's frequent and increasingly unreasonable changes in positions and demands, [negotiations] dragged out over several weeks and without execution by Dae Joo. But they signed MOU with Daeju on July 2, 2003. AK Capital claims the AEMD scared off foreign investors. But the only documents relating to foreign investors submitted in this case show that such investors, including GE Capital, LNM Holdings, PPM Ventures and Credit Lyonnais, were still

Tribunal should reject Claimants' arguments concerning the November 18 deadline. During their opening statement, Respondents will review the facts concerning the events of November 18. Among other things, AK Capital never submitted a formal extension request to Hanbo, had not deposited a single cent of the balance of the purchase price and had not signed any final contracts with any of its purported institutional investors. In any event, the Bankruptcy Court refused to grant a third extension of the SPA funding deadline. Further, even if Hanbo could have proceeded in the absence of Court approval, nothing in Korean law would have required it to do so. Why did the deal fail? Only AK Capital knows for sure, but the record contains clues showing why AK Capital failed to obtain financing, and it shows that Hanbo was certainly not to blame.

2) Final assert

We strongly urge the Tribunal to reject Claimants' desperate attempt to build their case through a smear campaign against Trustee Na - a campaign unsupported by a single piece of reliable documentary or testimonial evidence. We urge the Tribunal to reject Claimants' unjust enrichment claim[17], the most egregious example of a claim without factual basis belatedly manufactured solely for purposes of litigation.

AK Capital's conduct after the SPA termination and its contemporaneous failure to complain about alleged bad faith and sabotage underscore the fact that Claimants have fabricated their claims purely to

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interested in this transaction long after the Bankruptcy Court required the AEMD. AK Capital was still in discussions with PPM Ventures, one of the potential lead equity investors, evenl at the end of August 2003, seven months after the Court required the AEMD.

17) it was not even mentioned in their Request for Arbitration or the Terms of Reference

profit through this arbitration, despite AK Capital's failures to fulfill its contractual obligations.

3. Arbitration Process

AK and Hanbo entered into the SPA on February 12, 2003, to purchase Hanbo's principal assets. Any jurisdiction that the Arbitral Tribunal may have is based on the SPA article 14.10.[18) The date on which claimants were to deposit the balance of the purchase price was postponed twice, the second time to November 19, 2003[19)After that, the ICC International Court of Arbitration(the ICC Court) confirmed coarbitrator upon joint nomination of Claimants, the secretary general of the ICC international court of arbitration, in accordance with article 9(2) of the rules, confirmed chairman of the arbitral tribunal, upon joint nomination of the coarbirators. The terms of reference were set on November 30, 2004.

The arbitral tribunal issued an order for directions on January 28, 2005. this provided, inter alia, the following; the arbitral tribunal shall seek guidance from, but not be bound by, the (1999) IBA Rules of Evidence. In the written submissions, the parties shall present their allegations and denials with reasonable particularity, offering immediate specific proof for each allegation and denial.

18) All disputes arising out of or in connection with any of the Purchase Documents shall be finally settled exclusively by arbitration administered by the International Chamber of Commerce (the "ICC") under the ICC Rules of Arbitration by three arbitrators appointed in accordance with said Rules..

19) Hanbo's Korean counsel notified claimants that the SPA was automatically terminated.

〈Figure-4〉 Time table of Arbitration

2004. 06. 29	The request/complaint was presented
↓	
2004. 08. 09	Hanbo and its trustee answered
↓	
2004. 08. 20	Claimants' reply
↓	
2005. 06. 10	Claimants' claim
↓	
2005. 10. 07	Respondent's reply
↓	
2005. 12. 5 ~ 8	Hearing was conducted at Hong Kong
↓	
2005. 12. 23	The parties presented their final requests for relief
↓	
2006. 02. 13	The parties submitted their post-hearing briefs

Source : writer's summary of arbitration process

4. Final Award[20]

(1) Full compliance with SPA

Claimants argue that in November 2003 AK Capital complied with its contractual obligations and accordingly Hanbo and its Trustee's termination of the SPA was wrongful. Claimants argue as follows; rather than failing with its financing in November 2003, as Respondents allege,

20) Final Award was decided on July. 3. 2006.

AK Capital succeeded in securing funding by the end of October. And then when faced with last minute investor withdrawals outside its control, AK Capital took rapid and decisive action.

The arbitral tribunal cannot agree with this interpretation of the SPA. The transaction was contemplated to be carried in steps. Some money from the deposit account would first be put into capital accounts so that affiliates of AK Capital could raise their capital, and then would go back into a payment account. At a closing the purchase price would then be released out of the payment account to the seller and the seller would release the shares which were the subject of the SPA to the buyer. The SPA nevertheless expressly foresaw that in preparation of the closing, the balance of the purchase price should be put into a particular deposit account.[21)]

Putting the purchase price in deposit is a typical measure to ensure and make it clear to all concerned that the money will indeed be available at the closing. The arbitrational is also satisfied that the deposit account was organized in such a way in the SPA as to make sure that in the event the transaction would not be carried through because of insufficient money being deposited, the amount deposited would not come at any time under the control of the seller but would be released to those who had made the deposits. The interpretation suggested by claimants in this arbitration is not only contrary to the plain wording of the SPA, it is also contrary to business sense. This underscores the vital importance to the transaction of the whole sum being deposited on November 18, 2003. The evidence available to the arbitral tribunal through the documents provided with the

21) Various other steps under the law of companies would also be taken such as changes in the share register, general meetings of shareholders to accept there signation of certain directors and electing other directors, handing over of company books and the like.

parties'main briefs and the testimony of witnesses, in particular, the live testimony of the witnesses at the main hearing, is plainly insufficient to support the conclusion now suggested by claimants. Claimants' evidence in support of this conclusion could not and was not provided with the post-hearing briefs which had rightly and properly only exhibits on the law. The suggestion by claimants that they fully complied with the requirements of the SPA is therefore rejected.

(2) substantial compliance with SPA

Claimants further argue that, if they did not comply with the requirements of the SPA in every detail, at least they substantially complied, which, claimants contend, is good enough under Korean private law. Claimants invoke article 2 of the Korean civil code.[22] In fact, where the contract provides for an automatic termination, there is no room for the seller to act in one way or another. As the Romans said, time puts everybody on notice as it runs. It is perhaps necessary for the arbitral tribunal to point out the following. The civil law contains a pervasive principle that all rights must be exercised in good faith. This, however, does not mean that all legal obligations are weakened, and no party can require the other to keep its promise. It is not against good faith to exercise a right that one has. There is nothing unreasonable or uncommercial in agreeing to deadlines in business and enforcing them. What in civil law is prohibited is, when one has a right, to exercise that right with the sole purpose of harming or inconveniencing the other party or to exercise it in a way that is unreasonably and uncommercially harsh.

22) It provides as follows : (i) the exercise of rights and the performance of duties shall be in accordance with the principle of trust and good faith. (ii) no abuse of rights shall be permitted.

Claimants argue that, by insisting on the contractual deadline for the deposit to be made in the designated escrow account, hanbo and its trustee acted in abuse of law, that is in an unreasonably and uncommercially harsh way, but the arbitral tribunal cannot agree with this view. So, the argument that claimants substantially complied with the requirements of the SPA is accordingly rejected.

(3) breach of contract by not extending

Claimants argue that even if AK Capital failed to comply with its deposit obligations under the SPA, Hanbo and its trustee breached the SPA by not extending the deadline for deposit of the price. They base their claim on article 7.1(a) of the SPA.[23] Claimants argue that hanbo and its trustee should have extended the deadline by - claimants have not specified how long, but what is mean is apparently several days or one week. When the contract provides that, if a particular condition is not met the transaction automatically terminates, it makes it absolutely plain that there is no obligation to extend the deadline by a month, a week or even a day, and the obligation to provide best efforts and to cooperate does not change this.

5. Implication

Critical factor to make final decision favorable for Hanbo is the governing law that SPA shall be governed by, construed, interpreted, and

23) which reads as follows (!) to use the best efforts to take, or to cause to be taken, diligently and in good faith all actions and to do, or cause to be done, all things necessary, proper or advisable to consummate and make effective the proposed transaction and (!!) to cooperate with claimants in connection with the foregoing and in good faith.

the rights and obligations of the Parties shall be determined in accordance with, the laws of Korea, without giving effect to the principles of the conflicts of laws. With an advantage of governing law, Respondents would defend successfully against claimants' claims.

According with a Korean's law and judicial precedents, Respondents' account of events is consistent, logical and supported by substantial, reliable evidence. On the other hand, claimants' story is illogical, full of inconsistencies, contradicted by contemporaneous documents, and based to a significant degree on speculation and conjecture. So, when it comes to negotiation, although the sale and purchase price and jurisdiction are critical factors to consider, but governing law clause, so called applicable law should be put in first place at the final negotiation stage. Governing law has a major role in affecting arbitration when the parties have failed to compromise on the conflicts about not only the terms and conditions but also the arbitration-related matter. Additionally, as a result of hard preparation to demonstrate many reliable documents and evidence, it were easy for Respondents to take reasonable steps in showing and presenting their facts to the arbitration court.

Ⅳ. Conclusion

Since the IMF crisis, foreign investments have increased rapidly with the direct or indirect methods due to the opening policy for the Financing sectors. This investment environment change would bring about the number of international conflicts between the Korean government agency and foreign investors in the various field.

Especially, when there is an increasing probability of lawsuits filed by the investment companies or mutual funds based on the overseas countries rules and laws, it is a important matter to know what the ICC rule and Arbitration process mean to the Korean companies. It will bring about the points which we have to think twice before making an agreement with investors regarding M&A deal, asset, and stock transactions. Actually, arbitration is a final, binding decision with only one award. There will be no additional appeal so the parties bear in mind that how to work if claimant filed for ICC Arbitration Court to claim the lost profit, or something equivalents, and how to cope with claimant request supported by the various proofs efficiently.

In this case study, what's the critical factor to bring about the winning to Hanbo was the result of keeping the governing law of korea, not U.S. law. So, keep in mind, when it come to negotiate with overseas' investor, that jurisdiction and governing law are very significant factor to consider as well as the sale price.

If you have studied many cases related to the ICC Arbitration, then you could find out the best solution against lawsuit by the counterpart. With sufficient preparation, then you can expect to have a great chance to win in the Arbitration. Further, putting more case studies together, I would like to suggest valuable way to respond to ICC Arbitration in years to come.

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국문요약

국제중재에 관한 사례연구 : 한보철강 사례

최 창 환

1997년 외환위기 이후 국내 부실기업의 해외매각을 빠른 속도로 진행하여 매각과정에서 협상력 부재로 인해 기업가치를 제대로 평가받지 못하였을 뿐만 아니라 계약조건 부분에 있어서도 협상성과는 매우 낮은 것으로 평가되고 있다. 또한, 부실한 계약조건으로 인해 계약이행이 종료되지 못하고 소송이나 중재와 같은 분쟁발생이 급격이 증가하고 있다.

이러한 문제인식 하에 본 논문은 부실기업 매각협상 사례중 국제중재와 관련된 한보철강 매각의 사례를 통해 매각시 국제중재를 통해 분쟁을 해결하는 과정을 상세하게 설명함으로써 향후 매각협상 과정뿐만 아니라 매각이후 분쟁이 실제로 발생한다면 이에 대한 정확한 대처와 중재 대처 전략을 수립할 수 있도록 하기 위함이다. 중재는 소송과 달리 단심제로서 중재기간이 상대적으로 짧다고 볼 수 있으나 단심제의 특성을 감안하여 최대한 유리한 증거와 증인확보 등 보다 더 적극적인 자세로 임해야 할 것이다.

본 사례연구에서 중요한 시사점은 국내 협상자들이 협상시 매각가격에만 중요성을 부여하며 기타 계약조건 특히, 준거법 및 관할권에 대해 소홀히 취급하는 경향이 있다는 점이다. 본 한보 중재에서도 승리의 결정적인 원인은 바로 계약서에 준거법을 한국법이라고 명시하였기 때문에 가능했던 것이다. 이러한 점은 향후 국제협상시 중요하게 다루어져야 할 사항이라고 판단된다.

주제어 : 국제중재, 협상, 분쟁해결, 계약조건