

**DISTINGUISHED LECTURE ON INTERNATIONAL ARBITRATION**  
**DEVELOPMENT OF ARBITRATION IN KOREA - LESSONS FOR EMERGING**  
**ARBITRAL REGIMES**

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A very good day to everyone attending the event. Many thanks to Prof. Ukey and Prof. Balyan for the kind invitation. It is my distinct honour and privilege to speak at the event on a very interesting topic about the development of arbitration in Korea and lessons for emerging arbitral regimes. I understand that I have around one full hour to speak on the topic. It is a big responsibility to ensure that the audience is kept entertained! While I deliver my speech, I will use the PowerPoint presentation only as a visual aid. I will project a few images that I hope will give you some visual insight into Korea. I will aim to finish my speech earlier so that we have some time for any Q&A that the audience may have.

So, I will begin with an anecdote about this picture on your screen that is from a time when arbitration was almost non-existent in Korea. This is a picture of my siblings and me on a fair ride. I am the tiniest one. The English translation of the phrase on the plane is “New York Bound”. I was seven years old; it was 1969. In those days, living in the west was always aspirational. Be it in development, industrialization, or technology, the west was the gold standard. For several years, even up to a few decades back, the idea of international arbitration did not catch up in Korea.

There are various reasons that could be attributed to a late entry of international arbitration into Korea.<sup>1</sup> First, until a few decades back, international business transactions were not common. Not many international agreements were entered into and as a result, not many international arbitration agreements were signed in the first place. Second, there was a perception that Common law dominated international arbitration, and as Korea is a civil law country, there was a hesitancy to embrace international arbitration. Third, the concept of international arbitration was considered “foreign” where the west dominated the international arbitration landscape.

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<sup>1</sup> Yun Jae Baek et al.; *South Korea, International Arbitration 2021*; CHAMBERS & PARTNERS (Aug. 17, 2021), <https://practiceguides.chambers.com/practice-guides/international-arbitration-2021/south-korea/trends-and-developments>.

Fourth, and this is true even to date, that domestic courts are efficient to handle domestic disputes.

If I had to pick one word to describe Korea's rise in international arbitration and its current state – that word would be “vivid”. Both Korean parties and counsel have become very active in the international arbitration landscape & the kinds of arbitration matters arising out of Korea have been mostly high-value and specialized.<sup>2</sup> Such cases are so large that many a time they are more sophisticated than the kinds of matters that are dealt with by older and more established arbitral jurisdictions.<sup>3</sup>

The natural question that arises is what led to the phenomenal growth of international arbitration in Korea?<sup>4</sup> Incidentally, the growth came at the heels of the Asian Financial Crisis towards the end of the 1990s. The graph on the screen shows how badly the financial crisis affected Korea in the late 1990s. What is also visible in the graph is the subsequent Korean recovery. As the Korean economy came at the verge of collapse in the 1990s, the International Monetary Fund undertook its largest bailout ever.<sup>5</sup> One of the terms of the bailout required most corporations to dispose of non-core assets.<sup>6</sup> This resulted in rapid and large-scale Foreign Direct Investments [“FDI”] in Korea. International arbitration clauses were inserted in most such FDIs.<sup>7</sup> These clauses led to initial several high-value and complex disputes resulting in final awards.<sup>8</sup> As a result of this process, arbitration as a means to resolve disputes started becoming a common practice. After the economic crisis, the Korean economy grew rapidly. This led to the formation and strengthening of some of the largest global businesses. They came to be termed as the “chaebols” as they were mostly family-held large businesses. Several of these Chaebols gained expertise in niche industries such as construction, automotive, and technology.<sup>9</sup> Once the Chaebols started investing across the globe, the industry-specific

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<sup>2</sup> *A View from Seoul: How Is Arbitration Viewed In Korea and How Is It Changing?*, HERBERT SMITH FREEHILLS (Jul. 27, 2018), <https://www.herbertsmithfreehills.com/latest-thinking/a-view-from-seoul-how-is-arbitration-viewed-in-korea-and-how-is-it-changing>.

<sup>3</sup> Rinat Gareev, *The Rise of South Korea as an “Arbitration Eager” Jurisdiction: Rethinking the Current Role and a Promising Future*, APRAG, <http://www.aprag.org/wp-content/uploads/2021/05/8-The-Rise-of-South-Korea-as-an-Arbitration-Eager-Jurisdiction.pdf>

<sup>4</sup> Yun Jae Baek et al., *supra* note 1.

<sup>5</sup> David T. Coe & Se-Jik Kim, *Korean Crisis and Recovery*, IMF (Sept. 12, 2002), <https://www.imf.org/external/pubs/nft/seminar/2002/korean/>.

<sup>6</sup> *Id.*

<sup>7</sup> David MacArthur, *What’s “Next” for Arbitration in Korea*, KLUWER ARB. BLOG (Apr. 19, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/04/19/whats-next-for-arbitration-in-korea/?print=print>.

<sup>8</sup> *Id.*

<sup>9</sup> David Murillo & Yun-Dal Sung, *Understanding Korean Capitalism: Chaebols and their Corporate Governance*, ESADE GEO CENTER FOR GLOBAL ECONOMY AND GEOPOLITICS (Sept. 2013), [https://itemsweb.esade.edu/research/esadegeo/201309Chaebols\\_Murillo\\_Sung\\_EN.pdf](https://itemsweb.esade.edu/research/esadegeo/201309Chaebols_Murillo_Sung_EN.pdf).

disputes also saw an increase. This led to the Korean arbitration practitioners gaining industry-specific expertise. Once the Korean businesses saw the advantages of international arbitral awards, there was no looking back. Korean parties soon became active users of institutional rules such as the International Chamber of Commerce [“**ICC**”], London Court of International Arbitration [“**LCIA**”], and Singapore International Arbitration Centre [“**SIAC**”].<sup>10</sup>

In today’s date, even though Korea is much smaller in size compared to China or Japan, its case-load in various arbitral institutions is heavy. By way of an example, according to available statistics – between 1998 and 2008, ICC witnessed 442 Japanese parties and 499 parties from mainland China. In the same period, 665 Korean parties participated in ICC arbitrations. Between 1966 and 2014, Korea’s own arbitral institution, the Korean Commercial Arbitration Board [“**KCAB**”] administered a total of 10,171 arbitration cases including 8,837 domestic and 1,334 international cases.<sup>11</sup>

Earlier, most Korean arbitrations were handled by western firms. As the demand for arbitration grew, there was a need felt to cater to regional clients including Koreans and Japanese. Several Korean lawyers, especially those who were trained in the west, returned to Korea to build robust international arbitration practices. The inherent advantage they had was that of understanding the Korean culture and intricacies better. The Korean lawyers continued building their capabilities, especially through counselling with experienced international firms, mostly from the west. With time, the Koreans, who by the way are very hard-working, excelled at the tricks of the trade. They became familiar with the international best practices and started adopting those practices in their style of handling international arbitrations. They also started getting involved in more advocacy as they became comfortable with international practices. The Korean clients also became more comfortable with Korean lawyers because of cultural and linguistic complexities. Gradually, some of the Korean firms were doing their own advocacy. Additionally, they were also managing cases through their complete life cycles.

As of today, there are practitioners who are not only representing Korean parties in international arbitration, but also global parties in international arbitrations that have little or no link with Korea. Since the opening of the legal market for foreign firms, foreign firms have also started setting up their arbitration practices in Korea. In the last 20 years, the market has come a long

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<sup>10</sup> *Supra* note 2.

<sup>11</sup> Dami Cha, *International arbitration in South Korea: overview of KCAB International's Statistic for 2019*, CMS Law-Now (Jun. 1, 2020), [https://www.cms-lawnow.com/ealerts/2020/06/international-arbitration-in-south-korea-overview-of-kcab-internationals-statistic-for-2019?cc\\_lang=en](https://www.cms-lawnow.com/ealerts/2020/06/international-arbitration-in-south-korea-overview-of-kcab-internationals-statistic-for-2019?cc_lang=en).

way, from its infancy to its adolescence. While I think it has matured fully, it still has a large scope to grow further into a very advanced market.

Now, I will briefly delve into how in the past two decades the arbitration practice grew from strength to strength. One of the key factors has been “knowledge sharing”. The more established Korean practitioners took it upon themselves to promote the international best practices in the local legal community.<sup>12</sup> The first generation of arbitration practitioners in Korea, to which I belong, had the first movers’ advantage. And we knew that to keep the arbitration story of Korea strong, there was a need to prepare the new generations of lawyers so that they are at par with their counterparts across the globe.

The Korean firms also started hiring international practitioners to bring in a diverse set of practitioners. The inputs from foreign lawyers have aided in making the Korean international arbitration landscape sophisticated and advanced. As of today, there are several international attorneys from across the globe who are working in various Korean firms and practicing international arbitration. They are adding value to the Korean arbitration landscape with different skills some of which include language, legal background, and advocacy. At the same time, they are also getting exposed to the “K-way” of practicing international arbitration. As a culmination of these factors, we can see Korean firms feature in most global rankings of international arbitration practices.

The success of the Korean story of international arbitration could not have been possible without active government support.<sup>13</sup> When the Korean government saw that the efforts of the legal community were yielding results, it further aided by providing crucial support. That support has been instrumental in enhancing Korea’s reputation as a trustworthy and attractive seat for arbitration.

Korea was a pioneer among the East Asian countries to adopt the Model Law in 1999. Not only that, but it has also kept updating its arbitration law as and when required.<sup>14</sup> In recent times, it was updated to incorporate some of the 2006 revisions to the Model Law. Additionally, the Korean judiciary has been regularly training the judges.<sup>15</sup> This has helped the international arbitration landscape as the courts are supportive of the arbitral processes. They aid

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<sup>12</sup> Rinat Gareev, *supra* note 3.

<sup>13</sup> Rinat Gareev, *supra* note 3, at 2.

<sup>14</sup> Rinat Gareev, *supra* note 3, at 6.

<sup>15</sup> Rinat Gareev, *supra* note 3, at 16.

international arbitration proceedings and are not obstructive to the arbitration process. So far Korean courts have a clean record, i.e., there is no single international arbitration award that has been vacated or refused enforcement. Recently, there were two instances where the lower court refused enforcement but upon appeal, the Supreme Court asked the parties to respect the award even though there were a few issues with the award.<sup>16</sup> Further, the government and other international organizations such as the SIAC have assisted in setting up high-tech and convenient hearing centres. Other ancillary services have also taken shape in Korea including translation and transcription services.

What has also been instrumental in helping international arbitration in Korea is Korea's stature as a global city. Seoul is connected well with almost every capital city across the world. Korea has a reputation as a neutral country that makes it an attractive destination to position itself as an arbitration seat and venue. Especially as regards the Asia-Pacific region, it has gained the tremendous spotlight as a preferred destination for conducting arbitrations. By way of an example, recently you must have seen the growth of virtual hearings due to the pandemic. The situation in Korea has been unique. Even though we have world-leading internet speed and technologies, most Korean offices have been working regularly from the office space. As a result, several international counsels have been coming to Korea for matters where they prepare together with the Korean co-counsel and conduct the hearing before the tribunals who may be sitting abroad.

Over the years, the KCAB has come up to become the official arbitral institution of Korea.<sup>17</sup> It enjoys the support of not only the government but also that of the local and international firms and institutions. As a result of this, it has steadily developed into an internationally recognized institution. It has ensured that its rules are regularly updated and are in sync with other institutions.

KCAB also established KCAB International in 2018 as a separate body, especially to cater to international arbitrations.<sup>18</sup> To keep up with the rapidly changing arbitration practices, KCAB

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<sup>16</sup> *South Korean Courts Twice Refuse to Enforce International Arbitral Awards*, HERBERT SMITH FREEHILLS (Sept. 23, 2013), <https://hsfnnotes.com/arbitration/2013/09/23/south-korean-courts-twice-refuse-to-enforce-international-arbitral-awards/>.

<sup>17</sup> Woohyung (Mark) Choe, *KCAB: The Rise of a New Arbitration Hub in East Asia*, THE AMERICAN REVIEW FOR INTERNATIONAL ARBITRATION (Oct. 5, 2020), <http://blogs2.law.columbia.edu/aria/kcab-the-rise-of-a-new-arbitration-hub-in-east-asia/>.

<sup>18</sup> Sue Hyun Lim, *Innovation in progress – developments in Korea after the launch of KCAB INTERNATIONAL*, GLOBAL ARBITRATION REVIEW (Jun. 11, 2020), <https://globalarbitrationreview.com/review/the-asia-pacific->

International has appointed eminent practitioners to guide and advise on initiatives that KCAB International should be undertaking. Additionally, KCAB International has also formed an International Arbitration Committee that I am chairing currently. This Committee is consulted on issues relating to the appointment, challenge, replacement, and removal of arbitrators.

With the success of KCAB and KCAB International, the next progression has been towards KCAB Next. Like other initiatives globally to promote international arbitration among the new entrants to arbitration in different regions of the world, KCAB Next's aim is to induct Korean practitioners into the international arbitration world. KCAB does that by upskilling the legal practitioners and providing various kinds of training to those interested in the arbitration field. It provides a platform for the new entrants to meet other like-minded practitioners and get a sense of community. It also acts as a link between the established practitioners and new entrants which has proved to be quite useful for the new generation of Korean lawyers, especially in recent years.

Let me share something interesting. In the past, there have been a few agreements between North Korea and South Korea such as the Agreement on the Procedure of Commercial Dispute Resolution between Parties in South and North Korea (2000) and the Agreement on Organization and Operation of Inter-Korean Commercial Arbitration Board (2003).<sup>19</sup> These set out arbitration as a commercial dispute resolution method. Further, they also promote institutional arbitration through Inter-Korean Commercial Arbitration Board to be constituted (not completely constituted yet). As for the procedural rules, UNCITRAL Arbitration Rules can be the main reference for procedural rules to be agreed upon between South and North Korea. In this regard, the chairman of the KCAB said that since North Korea has joined the United Nations Convention on Contracts for the International Sale of Goods [“CISG”], it is worth paying attention to the ‘arbitration system’, a neutral dispute resolving mechanism because it is difficult for North and South Korean parties to accept any judgment from South Korean or North Korean courts.

As for the substantive law, CISG could prove instrumental in resolving the disputes relating to the sale and purchase of goods. The Kaesong Industrial Complex (Kaesong Industrial Zone) has had a difficult beginning but hopefully now that North Korea has signed the CISG,

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arbitration-review/2021/article/innovation-in-progress-developments-in-korea-after-the-launch-of-kcab-international.

<sup>19</sup> Kwang-Rok Kim, *Settling Business Disputes with North Koreans in the Advent of the External Economic Arbitration Law*, 16 TRANSNAT'L LAW 401 (2002).

something good may finally come out of it in terms of resolving disputes using the CISG. In 2013, Kaesong Industrial Complex Inter-Korean Joint Committee signed an annex to implement the Agreement on Organization and Operation of Inter-Korean Commercial Arbitration Board for Commercial Arbitration Board of Kaesong Industrial Complex to resolve disputes arising in the complex.<sup>20</sup> However, it ran into several difficulties time and again.

The Inter-Korean Commercial Arbitration Board of Kaesong Industrial Complex was established as a separate legal entity with the purpose of resolving any commercial disputes arising out of economic transactions in relation with Kaesong Industrial Complex through arbitration.<sup>21</sup> It is likely that for all the sale and purchase of goods, CISG is used when the Industrial Zone finally becomes fully operational.

Korea seems to have caught the world's attention for many reasons in the recent past. K-pop, K-drama, K-technology, and K-cosmetic have already played an instrumental role in getting Korea to become a global hot topic. In the same way, "K-arbitration" which has a comparable ring to its popular siblings is fast catching up. The soft power of Korea has, in many ways, helped its arbitration and legal industry as well. Basically, every "K" these days is not necessarily Korean in its traditional sense. It is an amalgamation of the best practices the world over. A recent and relatable example is that of the K-drama called Squid Games. It is inspired by a game that many Koreans, including myself, played as kids. However, the drama itself is very international. Along the same lines, K-arbitration is bringing together global best practices. Similarly, another example is the concept of "Gangnam Arbitration" that I introduced. It relates to concepts related to hearing to encourage tribunal to engage with cases at an early stage. Other ideas are those related to witness conferencing and more effective ways of document production. All these ideas are not necessarily coming from Korea, but we adopted these from several jurisdictions and summarized them to try and establish that they are used in the international arbitration society.

In conclusion, if one must take away from Korea's example on how it emerged as a key international arbitration player, the following will be lessons worth examining.

- It is important that there is a cohesive effort by all the stakeholders to promote

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<sup>20</sup> Jeehye You, *Legislative Reform of the Kaesong Industrial Complex in North Korea*, 29 UCLA PACIFIC BASIN LAW JOURNAL 36 (2011).

<sup>21</sup> *Id.*

international arbitration in any emerging regime.

- This includes the arbitration counsel, parties, arbitrators, judiciary, government, and arbitral institutions.
- Any emerging regional regime will have to tackle the work at each of these levels simultaneously.
- Imagine the eco-system like a chariot where each of the wheels has to function independently and together at the same time.
- Any effort to strengthen one limb while the other limb suffers will only lead to a stagnation of any arbitral regime.

Well, that was a brief overview of the growth of the Korean arbitration industry and the lessons from it that can be implemented in emerging arbitral jurisdictions. I am happy to answer questions if there are any. I am grateful again for inviting me to speak at this platform on this topic.

Thank you very much!