

Alternative Dispute Resolution System in Korea

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1. Introduction

A. Historical Developments of ADR in Korea

Alternative Dispute Resolution (“ADR”) has become a popular form of dispute resolution in Korea as international business transaction and domestic transactions in specialized fields increase. It is, thus, inevitable that there be a correlative increase in the number and types of disputes that will arise as well. As costs of litigation rise and time delays continue to burden litigants, ADR, which is designed to be a less formal and less complex means of resolving disputes quickly and cheaper than court proceedings, is regarded as an important tool in settling disputes. Furthermore, due to the rapid and continuous change characterized by specialization, globalization, internationalization and digitalization, it becomes increasingly important to resolve disputes as expeditiously and efficiently as possible.

The practice of commercial arbitration as applied in contemporary international trade is a recent phenomenon. The Arbitration Act of Korea, which was promulgated in 1966, is an independent body of law which is separate from the code of Civil Procedure. Further to enactment of the Arbitration Act, Korea joined the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Award in 1973. The Korean Commercial Arbitration Association (“KCAA”) was established in 1973 which changed its name to the Korean Commercial Arbitration Board (“KCAB”) in 1980. The KCAB established the Arbitration Rules

(“Rules”) under the authorization and approval of the Korean Supreme Court. Korea drastically amended the Arbitration Act in 1999 in order to adopt the UNCITRAL Model Law.

As with mediation, procedures such as court-annexed conciliation and statutory conciliation have long been used in Korea. Both procedures judicially or administratively require the parties in dispute to submit to conciliation before adjudicating the matter before a court. Korea has established various Conciliation or Mediation Committees such as the Copyright Deliberation and Conciliation Committee and the Electronic Commerce Mediation Committee. These judicially and administratively promoted conciliation procedures are characteristic of Korea’s ADR system.

B. Definition of ADR

As in other countries, Alternative Dispute Resolution in Korea refers to any means of settling disputes outside of the courtroom. ADR typically includes arbitration, mediation, conciliation and consultation, etc. The two most common forms of ADR in Korea are arbitration and mediation. In Arbitration, an arbitration agreement between the parties must exist. In Korea, Arbitration has long been used in international trade disputes, but is now gaining popularity in other domestic business disputes such as construction and technology disputes. Mediation, on the other hand, is a process in which the mediator assists the disputants in reaching a negotiated settlement of their differences even if no prior agreement to settle the disputes by mediation exists.

1. Differences between mediation and arbitration

Arbitration is generally defined as a legal proceeding to settle a

dispute by the decision of an arbitrator(s) who is appointed by the disputing parties. Disputants are, thus, bound by the outcome of the arbitral award. Once an arbitral award is rendered, it carries the effect of a judicial settlement which is readily enforceable in Korea.

In comparison, for a mediation, an agreement between the parties to resolve their disputes through mediation is not required. In mediation, the mediator's role is primarily to encourage open communications by helping the disputants identify the specific areas of dispute and agreement and ultimately reaching a negotiated settlement. Therefore, the settlement agreement between the parties made at mediation is not readily enforceable and thus requires a regular judgment from the court after examination on the merits to enforce the agreement.

In Korea, there is what is called 'statutory conciliation' whereby the conciliation procedures are institutionalized by the governmental agencies. The difference between general mediation and statutory conciliation is in the enforcement procedure where a settlement agreement made at the statutory conciliation has the same effect as a judicial compromise making it readily enforceable unlike its counterpart made at a mediation which has no such effect.

2. Comparison of litigation and arbitration

In Korea, like in many other countries, the fundamental difference between arbitration and litigation procedures is in the enforcement mechanisms. The KCAB has, since its establishment, handled most of the arbitration proceedings in Korea. The arbitration procedures are, thus, institutionalized in Korea whereby the arbitral awards rendered by the KCAB are analogous to judgment of the court that are fully enforceable.

Arbitration, however, is advantageous in that it provides the same effective results as going to court, but without the same formalities associated with the court proceedings such as the delay and costs incurred in the adjudication process. Moreover, unlike in trial where the judge oversees and controls the litigation process, the parties in arbitration are autonomous from such judicial formalities where the parties may select their own place of arbitration, adjudicators and even tailor the arbitration proceedings to their own specific needs.

However, whereas a judgment rendered by a court is self-executing, the arbitral award must be separately ordered by a judge with an execution judgment to be enforced.

II. Types of ADR in Korea

A. Court-annexed Conciliation

Both the abovementioned statutory conciliation as well as the court-annexed conciliation have been prevalently used in Korea. Court-annexed conciliation is a procedure to be commence by a petition of a party or referral by a judge who has a litigation case. Historically, court-annexed conciliation was imposed on disputes arising out of domestic affairs and house lease matters only. With the enactment of a more general statute in 1990, namely the Civil Conciliation Act (“CCA”), however, all types of civil disputes are now encompassed under the court-annexed conciliation.

B. Arbitration

Arbitration is one of the commonly used ADR in Korea. The KCAB is the most popular arbitration institution in Korea.

C. Mediation

Mediation is requested by the parties even without an agreement to settle disputes in ADR between parties. In Korea, it is essentially a cost-free administrative process which encourages both parties to settle the disputes supported by government of agencies.

D. Statutory Conciliation

Statutory conciliation generally are those where the actual statutes institutionalize the mediation procedure. Procedurally, if conciliation is successfully reached among the parties, the settlement agreement has the effect of a judicial compromise.

III. **ADR Organizations**

A. Court-Annexed Conciliation

The main types of disputes that are required to exhaust conciliation procedures are civil and family cases. According to the Judicial Annual Report 2001, disputes heard by conciliation committees annexed to courts were approximately 16,801 applications of which 6,717 reached conciliation. The rest were either denied or failed to reach conciliation. And those disputes heard by a court that resulted in conciliation were a total of 50,797 applications of which 26,297 reached conciliation. The costs generally associated with statutory conciliation are formulated based on the figures provided under Article 2 and 14 of the Civil Procedure Stamp Tax Act.

B. Korean Commercial Arbitration Board

There are currently a total of 1,019 arbitrators on the KCAB's Panel of Arbitrators. The current pool of arbitrators now serving on the KCAB's panel is composed of Korean and foreign lawyers, scholars, businesspersons and other qualified professionals with the largest concentration of arbitrators from the legal field (19.6%), the academia (25%) and the business community (26.4%).

C. Electronic Commerce Mediation Committee

The Electronic Commerce Mediation Committee ("ECMC"), was established in accordance with the Framework Act on Electronic Transaction Basic Act to mediate all disputes in electronic commerce.

One of the key features of the ECMC is that the mediation process can be conducted either at a particular location or electronically via computer such as chatting in real time hence, 'cyber-hearing'. The application for and the decision to the mediation process may be, respectively, filed and rendered both electronically. Only the evidence need to be physically submitted. The decision rendered through mediation carries the effect of a party settlement since it is rendered through extra-judicial means.

There are a total of 49 mediators currently serving on the ECMC's Panel of Mediators. This panel consists of lawyers, patent attorneys or specialists, professors and those in the consumer protection field.

D. Other Statutory Conciliation Committees

1. Consumer Dispute Settlement Committee

The Consumer Dispute Settlement Committee ("CDSC") was established in the Korean Consumers Protection Board ("KCPB") under

the authority of Article 34 of the Consumer Protection Act (“CPA”). The CDSC is empowered to mediate the consumer related disputes. The conciliation award rendered has the same effect as a judicial compromise (CPA, Art. 45). The CDSC is composed of approximately thirty (30) members whom are appointed by the Minister of Finance and Economy upon the proposition of the president of the KCPB.

2. ADR Organizations for Intellectual Property Disputes

The Copyright Deliberation and Conciliation Committee (“CDCC”) has been established in accordance with Article 81 of the Copyright Act in order to deliberate and conciliate disputes concerning rights, such as copyrights and those rights protected under the Copyright Act. The types of disputes that are particularly appropriate for conciliation under this category are those disputes concerning the authors’ moral and property rights, neighboring rights as well as compensation. Also software disputes, the Computer Programs Deliberation and Conciliation Committee (“CPDMC”) is empowered to hear and conciliate, among others, disputes relating to computer programs in Korea under the authority of the Computer Program Protection Act (“CPPA”).

3. Financial Dispute Conciliation Committee

The Financial Dispute Conciliation Committee, under the auspices of the Financial Supervisory Commission (“FSC”) has been established under Article 55 of the Act on the Establishment of Financial Supervisory Organizations to review those disputes in financial

transactions including those under the Banking Act, the Insurance Business Act and the Securities Exchange Act.

IV. Resolution Process

A. Court-annexed Conciliation

Under court-annexed conciliations, the judge may undertake the conciliation procedure by himself or refer to a conciliation committee composing of three members, including the judge and two other non-judges. The settlement award derived from such conciliation process has the same effect as a judicial compromise which can be readily enforceable.

Under paragraph 1 of Article 21 of the CCA, in cases where it is deemed particularly necessary for conciliation, the conciliation judge may, upon application of one party, order the other party or other persons interested in the case not to change the status quo, or to dispose the goods, and may prohibit other acts which make it impossible or considerably difficult to accomplish the purpose of the conciliation, before the conciliation procedures begin.

If conciliation fails the judge may render the a conciliation settlement award. The party who does not accept the award, must file an objection within two (2) weeks from the date award was served on the parties. If the parties file an objection, the matter will be litigated in court and a judgment will follow trial whereas if they do not file an objection, the settlement award will be finalized.

B. Korean Commercial Arbitration Board

1. Arbitration Procedure

If and when a dispute does, in fact, arise a written statement of claim for arbitration must be submitted to KCAB. Both parties in dispute appoint the arbitrator and hearings are held. Upon the completion of the arbitration, the arbitrator then renders an arbitral award which has the effect of a final judgment of a court that is fully enforceable. Recourse against an arbitral award is allowed only by an application for setting aside the award to a court within three (3) months of the date on which the party making that application has received the duly authenticated award.

2. Arbitration to Mediation

The parties may, under Arbitration Rule 18 of the KCAB, submit their claim to mediation first. The arbitrator must complete mediation procedures within thirty (30) days from the date the arbitrators were appointed. However, the parties may extend the above period by mutual agreement.

3. Mediation to Arbitration

If the mediation fails, then arbitration procedure commence. The arbitrators who mediate the dispute remain as arbitrators.

C. Electronic Commerce Mediation Committee

1. Mediation Process

The ECMC contacts the disputing parties and suggests a mutual agreement which both parties can agree on. When the disputing parties fail to reach an agreement or when there is a request from one of them, the committee sets up a mediation panel comprised of one (1) to three (3) members, develops an appropriate resolution, and recommends it to the

involved parties. A mediation settlement must be reached within forty-five (45) days from the date the application for mediation was submitted. The settlement agreement has the same effect as a party settlement which is not enforceable without a judgment from the court.

2. Arbitration to Mediation

There is no such case at present.

3. Mediation to Arbitration

If the parties agree prior to or during mediation to arbitrate their dispute, the parties may have the mediators serve as the arbitrators for the same dispute involved.

V. Relationship with the Court

A. Mediation-first System

Similar to the discussion on the court-annexed ADR, certain statutes in Korea implement a mediation-first system whereby requiring the claimants to submit their dispute or claim to mediation before resorting to the court system. One such example is the Domestic Affairs Litigation Act which allows either the judge, under his discretion, to place the matter in conciliation or the parties to apply for conciliation. If such application is denied, it may proceed to litigation.

B. Referral to Arbitration

If a party to an arbitration agreement files a litigation, the court does not stay the case but dismiss it. Therefore no referral to arbitration by the court is allowed.

C. Referral to Mediation

Article 6 under the CCA provides that a court of a suit may, if deemed necessary, place a case pending therein in conciliation by a ruling. A judge at the appellate court may also refer a case to conciliation.

VI. Assistance of Court for ADR

A. Extinctive Prescription

There is no specific provision governing the issue of tolling the extinctive prescription by filing an application for arbitration. Preliminary means, however, such as preliminary injunctions or preliminary attachments tolls extinctive prescriptions under the Korean Civil Code.

As for civil conciliation, Article 35 of the CCA provides that the submission of an application for conciliation has the effect of tolling extinctive prescriptions.

B. Enforcement of ADR Decisions

The enforcement of settlement awards depends on the type of ADR involved. For example, an arbitral award are readily enforceable as the final and conclusive judgment of the court and thereby enforced through the court by obtaining an executory judgment after trial from the competent court; court-annexed, conciliation, under the CCA, has the same effect as a settlement in court; and ECMC mediations has the effect of a settlement agreement under the Civil Code once a mediation proposal is accepted by the disputants and is not readily enforceable absent a regular judgment issued by the court after trial.

C. Examination of Evidence

Article 28 of the Arbitration Act provides in part that the arbitral tribunal may, either on its own initiative or upon a party's request, request from a competent court assistance in taking evidence. In so doing, it may, also, specify the matters to be recorded in the protocol of the court and other particulars necessary for investigation.

As for a court-annexed conciliation, if a judge hears the parties' claim, or any person interested in the conciliation for that matter, and deems it necessary to investigate the facts and evidences, he may do so by any suitable means.¹

VII. Selection & Training of Arbitrators and Mediators

A. Qualifications

According to the standards of the KCAB, any person, including foreigners, is eligible to serve as an arbitrator unless specifically disqualified by law. The KCAB designates the members of the panel of arbitrators in accordance with the provisions of the agreements and from candidates recommended by its Secretariat in selecting those who are capable of rendering 'virtuous judgments.'

The Minister of Commerce, Industry and Energy appoints the mediators of the ECMC. Under the ECMC's standards, one must have professional knowledge of electronic transactions or be a member of a management group for consumer business or social organizations. One must also have certain qualifications as a professional such as an attorney

1. Art.22 of the CCA

or CPA.

B. Selection and Training

Most ADR organizations select highly qualified individuals including lawyers, scholars, and other professionals who have had some experience in arbitration, mediation, or other related fields. Also, ADR organizations provide educational programs and workshops to improve the quality of arbitrators and mediators on an as-needed basis.

VIII. Conclusion

As stated above, the two types of ADR that are most prevalently used in Korea are arbitration and mediation in the form of court-annexed or statutory conciliation.

In Korea, the conciliation system can be classified as either a judicial conciliation, such as those court-annexed conciliation procedures under the CCA or non-judicial conciliation such as statutory conciliation administered by governmental agencies.

With the establishment of the KCAB, most arbitration proceedings, are conducted by the KCAB according to the Arbitration Rules as well as the Arbitration Act. Moreover, KCAB deals with a disproportionately large number of international commercial disputes in comparison with noncommercial disputes, with construction industry disputes being the only exception. This is due to the fact that inserting a dispute resolution clause such as an arbitration clause in a particular commercial agreement is still foreign to transacting parties in Korea.

Furthermore, as for mediation and/or statutory conciliation in Korea, it is uncertain which of the two will be more favored and

promoted by the Korean governmental agencies in the future. In the meantime, there is a practical need, however, to have a general statute that can be made applicable to all kinds of mediation and conciliation procedures rather than having different statutes governing each type of procedure in order to improve mediation/conciliation procedures in Korea.