

ADR of Disputes in Intellectual Property and Electronic Commerce in Korea

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I. Introduction

As the intellectual property (IP) issues and electronic commerce (EC) of each country continue to grow both in size and in complexity, there's a definite need for an ADR system that is equipped with the requisite know-how and expertise to effectively deal with the various IP and EC issues involved in the disputes. The ADR system in Korea for IP/EC disputes consists of various statutory committees and organizations that collectively deal with the kind of IP/EC-related disputes they are empowered and trained to handle. The establishment of these ADR organizations in Korea helps to facilitate and promote commercial activities in Korea by providing an alternative venue to resolve their disputes without such delay and expense associated with litigation. In turn, it will help improve the quality of business and technology transactions and set new standards of managing business in Korea.

The following discussion of the different ADR procedures in relation to the IP and EC in Korea provides a general overview of the characteristics of the pertinent organization that deals with each type of IP and EC disputes.

II. ADR of Intellectual Property Disputes

A. Copyright Deliberation and Conciliation Committee

1. Statutory Ground and Organization

Copyright Deliberation and Conciliation Committee (“CDCC”) has been established in 1987 in accordance with Article 81 of the Copyright Act in order to deliberate and help settle disputes concerning copyrights and those rights protected under the Copyright Act, out of court with minimal cost and in a timely fashion.

There are four Conciliation Panels which consist of three experienced members each headed by an attorney and that carry out the affairs of copyright disputes.

2. Jurisdiction and Procedure

The types of disputes that are particularly appropriate for conciliation are those disputes concerning the authors’ moral and property rights, neighboring rights as well as compensation.

The CDCC reaches conciliation on disputes within three (3) months from the date of the application for conciliation. The conciliation is considered to have failed if none has been reached during the said period. The Chairman of the CDCC, upon receipt of the application for conciliation, refers the matter to one of the four Conciliation Panels. The Conciliation Panel then serves upon the concerned parties a summons demanding their attendance on a fixed date to hear the issues involved. The head of the Conciliation Panel may demand supporting evidence, witnesses, documentary evidence, verification, expert opinions, or other relevant information in reaching a resolution. The statements by the concerned parties and interested persons on the date of the conciliation hearing may be made either orally or in writing.

3. Effect of Conciliation Protocol

If the conciliation is, thereby, accomplished, it has the same effect as that achieved by judicial settlement before a judge. If the conciliation is not followed through as agreed, it shall be immediately enforced through a compulsory execution order issued by the competent court at the seat of the CDCC.

4. Other Procedural Matters

When applying for conciliation, the requesting party bears the expense which ranges anywhere from ten thousand (10,000) to one hundred thousand (100,000) Korean won depending on the complexities presented in each claim. Generally, no additional expenses are borne until the conclusion of the conciliation.

The process of conciliation, in essence, is not open to the public, except in such cases deemed necessary by the head of the Conciliation Panel. Therefore, with the exclusion of lawyers, managers, legal representatives or people with the power of attorney, the agent of the concerned party shall be limited to people who have received permission from the head of the Conciliation Panel by verifying his or her qualifications and authority in writing.

As to computer program related disputes, a separate institution called the Computer Program Deliberation & Conciliation Committee (“CPDCC”) has jurisdiction over those disputes (Please refer to chapter III for discussion on the CPDCC).

B. Semiconductor Layout Design Conciliation Committee

1. Statutory Ground and Organization

Semiconductor Layout Design Conciliation Committee

(“SLDCC”) was established under the authority of Article 25 of the Semiconductor Integrated Circuits Lay-Out Design Act (the “Layout Design Act”). The SLDCC is composed of ten (10) to fifteen (15) Korean Industrial Property Office (KIPO)¹-appointed members.

2. Jurisdiction and Procedure

The SLDCC is empowered to review and conciliate disputes concerning layout-design rights and exclusive as well as nonexclusive licenses thereof.

One who seeks to conciliate the dispute may submit to the SLDCC a petition for conciliation with a statement of purpose and reasons therefor. The SLDCC is required to conciliate the dispute within six (6) months from the date of the petition. The provisions of the Civil Conciliation Act apply *mutatis mutandis* to the SLDCC procedures where it is not specifically provided for in the Layout Design Act.

A conciliation panel consists of three members and at least one of them must be qualified as an attorney-at-law or a patent attorney.² Conciliation is accomplished by executing a protocol containing the matters agreed to by the parties concerned.

3. Effect of Conciliation Protocol

Such conciliation protocol has the same effect as a settlement agreement executed in a court action, except for those matters which are not under the parties’ control.³ In contrast, if a party fails to comply with

¹ See Article 25, Paragraph 3 of the Semiconductor Layout Design Act.

² *Ibid.* Article 28.

³ *Ibid.*, Article 29.

a given request to present or submit the related documents more than twice without any justification or the six-month period from the date of the petition for conciliation has lapsed, the conciliation is deemed to have failed.⁴

4. Others

Expenses incurred in a conciliation proceeding are principally borne by the party requesting the conciliation, but generally shared equally if and when the conciliation is accomplished unless otherwise agreed.⁵

C. Domain Name Dispute Resolution Committee

1. Statutory Ground and Organization

Domain Name Dispute Resolution Committee (the “DDRC”) was established under the authority of Article 17 of the Information Network Act (“INA”). The DDRC is composed of twelve (12) members.

2. Jurisdiction and Procedure

The DDRC is empowered to mediate the disputes regarding matters dealing with domain names with the secondary level domain (SLD), “.kr”.

One who wishes to resort to mediation may submit to the DDRC a petition for mediation stating the purpose of the petition supported by relevant documents. The matter may be heard by a mediation panel which may consist of either one or three members. The respondent may

⁴ Ibid., Article 30.

⁵ Ibid., article 31.

communicate his/her statement of defense within fourteen (14) days after he/she receives the claimant's claim.

3. Effect of Mediation Procotol

If a party fails to comply with the panel's decision by not submitting to arbitration as stipulated by the parties in the original agreement and/or fails to file an appeal within two (2) weeks from the day on which the decision was serviced on him, the non-breaching party may enforce the decision by submitting it to the registrar.

4. Others

When applying for mediation, the requesting party bears the expense for mediation from anywhere between eighty-eight million (880,000) to one-hundred-fifty-six million (1,560,000) Korean won.

D. Industrial Property Rights Dispute Mediation Committee

1. Statutory Ground and Organization

Industrial Property Right Dispute Mediation Committee (the "IPDMC") was established under the authority of Article 29 of the Invention Promotion Act ("IPA"). The IPDMC Committee is composed of fifteen (15) to twenty (20) members appointed by the Commissioner of the Korea Industrial Property Office ("KIPO").⁶

2. Jurisdiction and Procedure

The IPDMC is empowered to mediate the disputes involving industrial property rights, but any claims as to the invalidity, cancellation or recognition of rights regarding industrial property may not qualify for

⁶ See Article 29, Paragraphs 1 and 2 of the Invention Promotion Act.

mediation.⁷

One who desires to mediate the dispute may submit to the IPDMC a petition for mediation with a statement stating the purpose of the petition and reasons therefor. The IPDMC is required to mediate the dispute within three (3) months from the date of the petition and there are generally no costs associated with the mediation proceedings. A mediation panel consists of three members. One of them usually must be qualified as an attorney-at-law or a patent attorney.⁸ Mediation is accomplished by executing a protocol that contains the matters agreed to by the parties concerned.

3. Effect of Mediation Protocol etc.

Such mediation protocol has the same effect as an agreement between parties, except for those matters which are not under their authority.⁹ Where a party, whom has been served with a request to present or submit relevant documents to the IPDMC, fails to comply, the particular mediation is deemed to have failed.¹⁰

An application for mediation has the effect of tolling the extinctive prescription. However, if the mediation is considered to have failed, it does not have the effect of interrupting the extinctive prescription unless he/she brings an action within one month from the date that the mediation failed.

E. Arbitration of IP Disputes

⁷ Ibid., Article 29-4.

⁸ Ibid., Article 29-2.

⁹ Ibid., Article 29-6

¹⁰ Ibid., Article 29-5.

1. Korean Commercial Arbitration Board

Most arbitration of IP disputes are submitted to the KCAB. (Please refer to Presentation Paper, “Alternative Dispute Resolution System in Korea” for the discussion on the KCAB). Most IP Disputes arbitration derives from a license agreement of patent, trademark or copyright.

An arbitral award of KCAB has the same effect on the parties as the final and conclusive judgment of the court and thereby enforced through the court. Also, KCAB’s arbitral award is enforceable in foreign countries because Korea joined the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (The New York Convention).

2. Arbitrability of IP Disputes

The scope of arbitration is determined by the jurisdictional limitations of the ordinary court in which the case would have been adjudicated. A legal dispute over the IP rights between private parties can be viewed as both private and public in nature in that while the dispute between two individuals is indeed private, the nature of the IP rights involved are a matter of public concern. For instance, most countries, including Korea, give special treatment to and have special requirements for certain IP rights which can have a great impact on the country’s overall economy. Moreover, where certain IP rights such as patent rights are involved, an examination and registration by the competent governmental authorities in Korea are required for obtaining and nullifying the rights in question. To that extent, such IP rights cannot be said to have only private or commercial qualities that could simply be disposed of by private parties.

In Korea, the application and invalidation process for patents is subject to the jurisdiction of the KIPO and the Patent Court. Thus, such grants can only be effected through trial by the KIPO or a judgment by the Patent Court. Unlike the common law countries, such as the United States, an ordinary court in Korea lacks jurisdiction to adjudicate a patent case if the patent is allegedly null and void due to the lack of non-obviousness of a registered patent in Korea. If, however, a patent is claimed null and void due to the lack of novelty, as opposed to the lack of non-obviousness, the court may hear the matter and declare the nullification of a patent without a separate trial at the KIPO or the Patent Court since the invention was part of public knowledge prior to filing the patent application. A claim regarding the nullification of a patent on grounds that it lacks novelty can be adjudicated in an ordinary civil court as it also could be arbitrated.

It is my opinion, however, that if admitting the patent would constitute an abuse of a right where the patent is clearly void, whether for lack of novelty or improvement, then the claim can either be adjudicated in an ordinary civil court or arbitrated.

III. ADR of Computer Software Transaction Disputes

A. General

The following organizations serve as the ADR for disputes in computer software transactions in Korea; (i) Computer Program Deliberation and Conciliation Committee, (ii) Electronic Commerce Mediation Committee, (iii) Consumer Disputes Conciliation Committee, and (iv) the Korean Commercial Arbitration Board.

B. Computer Program Deliberation and Conciliation Committee

1. Statutory Ground and Organization

The CPDCC serves as the primary ADR for computer software transaction disputes in Korea. Under the authority of the Computer Program Protection Act (“CPPA”), the CPDCC was established in October 1994 within the Ministry of Information and Communication (“MIC”) and has been in service since January 1, 1995. Its ten (10) to fifteen (15) members are appointed by the MIC in consultation with the Minister of Culture and Tourism. The CPDCC is empowered to hear and conciliate, among others, disputes relating to computer programs.¹¹

2. Jurisdiction and Procedure

The CPDCC, however, is also empowered to review¹² matters concerning:

- (i) the interpretation of provisions relative to program copyright;
- (ii) the regulation necessary to conform activities to the propositions of the Copyright Act;
- (iii) the deliberation of fair use limitations and promotion of the utilization of computer programs;
- (iv) the registration of computer programs; and
- (v) other program copyright related matters requested by the MIC.

Those interested in submitting their disputes to conciliation may submit a petition stating its purpose and reasons thereof to the CPDCC. The CPDCC is required to conciliate the dispute within three (3) months from the date of the petition.¹³ Once a petition for

¹¹ CPPA, Article 29, Paragraph 1.

¹² See Enforcement Decree of the CPPA, Article 24.

¹³ Ibid., Article 29-4, Paragraph 1 and 3.

conciliation is submitted to the CPDCC, it is assigned to a Conciliation Panel which is composed by three CPDCC members. The Conciliation Panel may summon the parties concerned, their attorneys and any interested party, or demand production of necessary documents, if any.¹⁴ Opinions from relevant experts, if necessary, may be heard. The Conciliation Panel may, after reviewing the matter, prepare a conciliation proposal and recommend the parties concerned to accept the proposal. Conciliation is accomplished by executing a protocol by which the parties have agreed to follow.

3. Effect of Conciliation Protocol

Such conciliation protocol has the same effect as a settlement agreement executed in a court action except for those matters that are not under the parties' authority.¹⁵ In contrast, if a party to the dispute does not, without any justification, comply with the summons of the Conciliation Panel or if the three-month period from the date of the petition for conciliation has lapsed, the conciliation is considered to have failed. Those expenses incurred during a conciliation proceeding are, in principle, borne by the party requesting the conciliation. However, if the conciliation is accomplished, both parties generally share the expenses equally unless otherwise agreed.¹⁶

C. Electronic Commerce Mediation Committee/ Consumer Disputes Conciliation Committee

¹⁴ Ibid., Article 29-5, Paragraph 1.

¹⁵ Ibid., Article 29-6, paragraph 1 and 2.

¹⁶ Ibid., article 29-7, paragraph 1 and 2.

Electronic Commerce Mediation Committee conciliates EC disputes including those in software transactions dealing with B to B transactions as well as B to C transactions. However, the Consumer Dispute Conciliation Committee (“CDCC”) conciliates the EC disputes including those in software transactions dealing with only B to C transactions. If parties make any transactions online, ECMC is empowered to conciliate the dispute between the software transaction parties even though there is no agreement between parties. (Please refer to Chapter IV below for the detailed discussion on the ECMC.)

IV. Electronic Commerce Disputes and Use of On-line ADR

A. Electronic Commerce Mediation Committee

1. Statutory Ground and Organization

The Electronic Commerce Mediation Committee (“ECMC”) has been established in accordance with Article 32 of the Electronic Transaction Basic Act.¹⁷ The ECMC is composed of fifteen (15) to fifty (50) members appointed by the Minister of Commerce, Industry and Energy.¹⁸

To be eligible for the position of a mediator, one must either (i) presently serve or have served in universities as an associate professor or higher and in public recognized research institutes as a researcher with his/her position corresponding to the former and majored in a field relating to Electronic Commerce; (ii) presently serves as a high level public official or presently work or has worked in public institutions with his/her position corresponding to the former and have experiences in

¹⁷ See article 28 of old law and article 15 of its enforcement ordinance.

¹⁸ Ibid., Article 32, Paragraphs 2 and 3. Presently, ECMC is composed of 47 members

dealing with electronic commerce; (iii) hold legal qualifications as a judge, prosecutor, or attorney-at-law; (iv) have been recommended by nonprofit nongovernmental organizations established pursuant to Article 2 of the Assistance for Nonprofit Nongovernmental Organizations Act; or (v) possess professional knowledge of electronic transactions.

2. Jurisdiction and Procedure

The ECMC is empowered to mediate disputes over electronic commerce.¹⁹ The ECMC is required to mediate the dispute within forty-five (45) days from the date of the petition and no costs are associated with the mediation proceeding. Once a petition for mediation is submitted to the ECMC by the parties, it is assigned to a Mediation Panel consisting of one to three members of the ECMC. The Mediation Panel may summon the parties concerned, their attorneys and any interested party, or demand production of necessary documents. Opinions from relevant experts, if necessary, may be heard. The Mediation Panel may then prepare a mediation proposal and recommend the parties concerned to accept the proposal. Mediation is accomplished by executing a protocol stipulated by the parties concerned.

3. Effect of Mediation Protocol

Such mediation protocol has the same effect as a settlement agreement between parties which is not enforceable.

4. The Cyber Mediation Center

The Cyber Mediation Center, which, under the auspices of the ECMC, establishes all the procedures for online mediation using a

¹⁹ See Article 32, Paragraph 1 of the ECBA

chatting program that allows the parties involved a more convenient and cost effective method to mediate their disputes. Anyone interested in the subject matter of the disputes and mediations can visit Cyber Mediation Center on the Internet and share their opinions in real-time without the difficulty of having to designate a time and location for the mediation.

B. Privacy Dispute Mediation Committee

1. Statutory Ground and Organization

The Privacy Dispute Mediation Committee (“PDMC”) has been established in accordance with article 33 of the Act on Promotion of Information and Communications Network Utilization and Information Protection (the “Information Network Act”). The PDMC is composed of not more than fifteen (15) members whom are appointed by the MIC.²⁰

To be qualified as a mediator, one must (i) presently serve or have served in universities as associate professors or higher and in public recognized research institutes as researchers with their positions corresponding to the former and majored in a field relating to the protection of personal information; (ii) be a high level public official or presently work or have worked in public institutions with their positions corresponding to the former and have experiences in dealing with the affairs of the protection of personal information; (iii) be qualified as a judge, prosecutor, or attorney-at-law; (iv) presently work or have worked for the organization of the users of information and communications services as officers; (v) presently work or have worked for the providers of information and communications services as officers; or (vi) have been recommended by nonprofit nongovernmental organizations established

²⁰ See, Article 33, Paragraph 3 of Information Network Act

pursuant to Article 2 of the Assistance for Nonprofit Nongovernmental Organizations Act.

2. Jurisdiction and Procedure

The PDMC is empowered to mediate disputes over personal information.²¹ The PDMC is required to mediate the dispute within sixty (60) days from the date of the petition. Upon receipt of a petition for mediation by a party in dispute, the Mediation Panel may summon the parties concerned, their attorneys and any interested party, or demand production of necessary documents, if any. Opinions from relevant witnesses, if necessary, may be heard. The Mediation Panel may then prepare a mediation proposal and recommend the parties concerned to accept the proposal. Mediation is accomplished by executing a protocol stipulated by the parties.

3. Effect of Mediation Protocol

Such mediation protocol has the same effect as a settlement agreement between the parties which is not enforceable.

C. The Consumer Dispute Conciliation Committee

The Consumer Dispute Conciliation Committee (“CDCC”), which was established in the Korean Consumers Protection Board under the authority of Article 34 of the Consumer Protection Act (“CPA”), is empowered to conciliate the consumer related EC disputes primarily dealing with B to C transactions such as electric fund transfers, credit

²¹ See Article 33, Paragraph 2 of the Information Network Act

card payments, and cybertrading. The conciliation award rendered has the same effect as a judicial compromise (CPA, Art. 45).

D. The Financial Dispute Conciliation Committee

The Financial Dispute Conciliation Committee, under the auspices of the Financial Supervisory Commission (FSC), also, has been established to review EC-related disputes dealing specifically with finance. Under Article 55 of the Act on the Establishment of Financial Supervisory Organizations, the conciliation award has the same effect as a judicial compromise thus binding on the parties and enforceable.

V. Conclusion

The current ADR for IP disputes in Korea is not as developed as it is for other non-IP related disputes due to the ongoing debate on whether ADR has subject matter jurisdiction over these IP disputes. However, in light of the recent establishment of various IP-related ADR organizations such as the Copyright Dispute Conciliation and Computer Program Dispute Conciliation, resolving IP related disputes through ADR is becoming less foreign in Korea. On the same note, the recent increase in the development of electronic commerce requires increased protection in cyberspace and a method to resolve IP related disputes through ADR.

The issue of whether ADR has jurisdiction over IP related disputes is an ongoing debate. The fact that there is a lack of specialized ADR organizations to deal with e-commerce and/or cyberspace related disputes in Korea creates an obstacle in the development and promotion of ADR systems in Korea.

Consumer protection organizations in many countries, including Korea, serve as the primary ADR for B to C related disputes. However, those specialized in dealing with B to B related disputes are scarce and thus more difficult to promote than those ADRs specialized in dealing with B to C disputes. Moreover, the reluctance with which the disputing parties approach the idea of resolving B to B related disputes through ADR also creates a stumbling block in the future development of ADR specialized in IP in Korea because more and more IP transactions occur online and IP transactions are mostly B to B transactions.

Despite the few obstacles placed in the path of developing ADR for EC related disputes, there is definitely a growing need for an organization that will be equipped to resolve disputes in cyberspace in light of the rapidly growing cyber-industry. There is, therefore, a need to take active interest in organizations such as ICC, the Cyber Court in Singapore, and the Korean ECMC in order to successfully set up an ADR procedure to resolve the disputes in electronic commerce.