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Korea's Emerging Importance in the Practice of International Commercial Arbitration

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Korea's Emerging Importance

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Korea's Emerging Importance in the Practice of International Commercial Arbitration¹

Moderator: Jack J. Coe

Speakers: E.Y. Park, Grant Kim & Kevin Kim

Jack Coe: In the spirit of ADR, I am going to remove my jacket. I encourage you to do the same if you would like to. I know it is not necessarily consistent with the business cultures of some places familiar to our audience, but this is Malibu, after all. You will note, however, that I will keep my tie on, because the first panel is about international arbitration, as opposed to mediation; arbitration, at least in my experience, is a more formal process than mediation.

I have the great honor to introduce a conversation with colleagues that are becoming very good friends of the Straus Institute. In Seoul, we have been received with much hospitality and I am enjoying the opportunity to return the favor, if only in partial measure.

For our panel we decided not to rely on prepared remarks, but rather to have an exchange among the panelists, I serving as moderator. I will address questions to them in alternating order, and their responses will invite still further questions.

1. This is a transcript of the first of four panels from the "Dispute Resolution in the Korean Community" Symposium, co-hosted by Pepperdine's Straus Institute for Dispute Resolution and the Pepperdine Dispute Resolution Law Journal, which was held March 6, 2015 at Pepperdine Law School in Malibu, CA. This panel was moderated by Jack J. Coe, Jr., Professor of Law, Pepperdine University School of Law, with participation from E.Y. Park., a partner at Kim & Chang, Kevin Kim, a partner at Bae, Kim & Lee, LLC, and Grant Kim, Of Counsel to Morrison Foerster.

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First, to introduce the panel: E.Y. Park is a partner of Kim and Chang, a leading global law firm. He is singular at Kim and Chang in the area of international arbitration, litigation. Among his many degrees is a S.J.D. degree from NYU, so he's no stranger to American legal education. And that is also the reason I call him Doctor Park. We are delighted to have him; he is a member of not only the Korean Bar, but also of the New York Bar.

Kevin Kim is the founder of the Disputes Group at Bae, Kim, and Lee. Kevin is, well known in international arbitration circles having had leadership posts and similar activities with a number of important arbitral institutions, including the ICC. Kevin has his LLM from Harvard and is a member of the New York Bar.

Grant Kim is Of Counsel to Morrison Foerster. He was born in the United States and educated at Hasting College of the Law. He has over twenty-five years of professional experience, including several years at Kim and Chang. He knows the Korean and international arbitration scenes well.

Without further ado, let me start with a few questions. Now these are just designed to, as we say, prime the pump—that is, they give us an excuse to talk about anything that comes to mind related to the question.

I'll start with E.Y. One thing that we teach our students is that when one is thinking about selecting the seat of arbitration, that is, the juridical home of the proceedings, one should look for a place that is a party to the New York Convention. These days, most States where one is likely to place an arbitration are Convention parties. Nevertheless, ratification is often symbolic of a commitment to international arbitration. I note that Korea became a party to the New York Convention in 1973. By then, Korea already had an arbitration statute, passed in 1966. My question, EY, is: As an historical matter, is it safe to say that the ratification of the New York Convention in Korea signaled some kind of progressive commitment to international arbitration? Or perhaps, was it just one of the treaties that Korean diplomats are told: if you want to be taken seriously in the international community, you've got to ratify it?

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E.Y. Park: First of all, I want to thank you, Professor Coe and Pepperdine, for hosting this event and inviting me to speak. I'm very honored, and very impressed with Pepperdine as well as the Straus Program, so I'm very glad to be here, and I will cover the questions that you mentioned.

Yes, the New York Convention is one of the most important pieces to make Korea become a successful player in international arbitration, as well as an arbitration center in Asia Pacific regions. But I will say that it was more of a seed, which was sown a long time ago. As you can imagine, the seed alone cannot make a fruit. International arbitration in Korea has actually flourished for the last fifteen years. Before that, it was rarely seen, as there were only a couple arbitration cases in a single decade. But these days, international arbitration is a monthly issue: conferences, as well as case filings. Let me talk about, briefly, as to what has happened the last fifteen years.

Before the 1973 New York Convention, Korea was in a very poor state. In 1960, the GDP per capita for Korea was \$80, which was one-third of the Philippines' at the time. Now, our GDP per capita is \$25,000, and we are one of the big trading nations with big trading companies. Before 1998, the economy was much more staggered and slow, and there were much fewer arbitrations. After 1998, arbitration has flourished, and the economy has flourished. What happened in 1998? There was the Asian financial crisis. As a part of the financial crisis, Korea was bailed out by the IMF. Because of the IMF bailout, many companies, banks, and corporations failed. People were laid off, and assets were sold out. A lot of foreign investors, especially Americans and western investors, came in to buy the assets with a lot of M&As. And those M&A contracts generally had arbitration clauses because they did not want to litigate matters in Korea. Thus, arbitration was put in place as a contract. A couple of years later, arbitrations are leading to actual disputes. Starting from 2000, there was a growing need to resolve disputes with international arbitration mechanisms. Korean companies did not know how to conduct arbitrations, so they knocked on the door of Korean law

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firms, and Korean law firms got involved. That's how they learned and got involved in the international arbitration scene.

After that, during 2000 to 2010, our economy has grown three-fold. The GDP in 1998 was \$400 billion; now in 2013, it's \$1.2 trillion—it's three times more. Likewise, overseas investments have gone up substantially. In 2000, overseas investments by Korean companies were \$5 billion U.S., but in 2013, it became \$30 billion—so it's six times more than just 13 years ago. So because Korean companies went all over the place, like the Middle East, Southeast Asia, Latin America, even the United States and Europe, they actually had more arbitration clauses in their international transaction contracts because they learned that arbitration is better in terms of its efficiency as well as enforcement. Because of that, arbitration has grown. Also, one of the interesting trends is that previously, Korean companies did not have much bargaining power, so they had to agree to arbitration in New York or Switzerland or London because they were not familiar with it. But these days, they are inserting arbitration clauses, which allow for arbitrations closer to Korea, like in Singapore, Hong Kong, or sometimes even in Seoul. That's how arbitration has developed. So in answering your question, yes, the 1973 ratification of the New York Convention is one of the most important foundations. But it has been met with other nourishing events such as the change in economy, the context of the Asian financial crisis, and the new, flourishing momentum of Korean arbitration.

Jack Coe: Thank you for that. Grant, could I just follow up with you, and maybe you could reflect on the “Kim and Chang Years” that you referenced in the book you're writing.

Grant Kim: Yes, I'd like to start by reiterating E.Y.'s thanks to all the good folks at Pepperdine for organizing this symposium. It's really, to me, pretty amazing. Here we are in this beautiful place, and now all my friends from Korea are here. It's like a mini-reunion here and it's wonderful.

In any event, following up on what E.Y. said, he put up a wonderful, macro view of what the real factors are behind international arbitration in Korea. Simply, the economy is so international and there are all these

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clauses, so you're going to have a lot of arbitration. Sure. But what does that mean about the Korean legal community? It actually doesn't tell you anything at all. I mean, you could have a huge growth in international arbitration cases, but they're all being handled by foreign law firms. And what's really unique about Korea is that Korean law firms just totally jumped on this opportunity and really quickly got involved. In Korea, some people say that Korea has this culture, they call it "bali bali." "Bali bali" is like when you're a little kid and your parents say "Hurry, hurry! Bali bali, you have to get everywhere, bali bali." And it's amazing; it's like, they're there, and then zoom, how did that happen? I don't know! (Laughter) But really, I lived in Korea twice. The first time was actually in college, and that's when I actually learned Korean because I didn't know anything. I was teaching English, and it was a different experience. The second time was in 2000. I went to Kim and Chang with the idea that I'd be helping to build their international arbitration practice. At that time, Korea was really not known at all in the international arbitration community. I remember in 2002, E.Y. and I went to an international arbitration conference in Hong Kong, and people asked us where we were from. When we replied that we were from Korea, they were surprised, saying things like, "Wow! Does Korea even have international arbitration? I never heard of Korea. You're the first Korean I've ever met at an international arbitration conference." It was really amazing.

Also, when I went to Kim and Chang in 2000, it seemed there was enough work, but it was actually a bit of a gamble. It wasn't like there were tons of cases; there was a little. Kevin actually, had already founded the Disputes group, and I'd always see the same four people from Bae, Kim, and Lee. I thought they had been there for ten years, even though it had only been a few years. So it was just barely existing. I was there until 2004, and by the time I left, Kim and Chang had a formal group there, about four or five people, who were focused on the area. But then, five years later, they had tripled in size. It was not the same four people, but they now have a whole floor of their building.

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And it was something very adventurous: Korean lawyers and law firms who saw an opportunity and they just jumped on it. And you have to understand: international arbitration is generally considered to be a very closed club. It is almost impossible for outsiders to break in, but the Koreans did it within five to ten years. They were at high levels at all these arbitration organizations. How they did it? They just jumped in feet first and went for it. One other thing I'd just like to mention, I think this is really important, too, is that it was a group effort of a bunch of Korean lawyers at different law firms who are competitors, but, they clearly had wonderful camaraderie, and it was building a community, which of course, is to the benefit of all of Korea and for Korea to be recognized as a star in this area. And I think that was certainly a very important thing.

Jack Coe: Alright. Now, I'm going to ask Kevin to reflect a little bit on his personal precipitous rise in the arbitration world. Kevin, I have a vivid recollection of us meeting in Hong Kong at an ICC conference. My panel assignment was to defend arbitration in California, which is easy to do only to a point, but I won't digress. What I remember most about Kevin is at lunch, he was going around from table to table reminding us of the upcoming ICCA or perhaps it was the IBA Conference?"

Kevin Kim: Not the ICCA, but it was the IBA.

Jack Coe: Yes, so he was already pitching the next conference in which he held an official position. Because everywhere you look, he was on the masthead, so to speak. And so to say he is entrepreneurial is to cheapen it. I think he just gravitates towards leadership, and I think in part, it explains the Korean dynamism, and how quickly they made a name for themselves. Maybe you could just talk a little bit about that.

Kevin Kim: Yes, I cannot start without thanking Pepperdine for inviting me. But I'm sorry to add another Kim in this panel. I noticed that the other panel also had two Kims, and I was already listed. (Laughter)

I started my practice in 1988. At that time, Korean law firms had twenty lawyers, thirty lawyers maximum. We had no idea about arbitration. I had no intention to practice arbitration because I had no idea about

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arbitration. After ten years, as E.Y. pointed out, around 1997 to 1998, we had the so-called financial crisis in Korea. And we had so many transactions within a very short period. Maybe Korea, as Grant pointed out, had “bal bali” symptom, so we sold so many companies within a short period. And hasty contracts led to conflicts and arbitrations. My first arbitration was in 1997, which I personally appeared in front of the tribunal. And I got the idea that maybe we can do this, and we should do this to effectively assist the Korean clients, but nobody believed me. And it took five years. I was allowed to establish a separate practice group for international arbitration. Even at that time, which is when Grant arrived and when he had our first arbitration against each other, people still had doubt about the future of arbitration. That was 2002-2003. But on the other hand, what happened in Korea in 1999, two years after we had the financial crisis, was that Korea adopted the use of the UNCITRAL Model Law. That is the first Model Law adoption in East Asian countries. Korea arguably adopted the use of the Model Law four or five years before Japan. And that provides a huge basis for Korean practice.

Another development happened in Korean arbitrations at that time. We had a clean record of enforcing foreign arbitral awards since we joined the New York Convention in the Code. The Korean Code always enforced foreign arbitral awards without any exception. That has a good reflection, and everybody believed that we had good system to solve disputes through international arbitration. Then in 2006, we actually, as Grant pointed out, organized a group of lawyers among the competitors; we called it the Korean Council for International Arbitration. And we have a joint effort to host arbitration conferences and arbitration events almost every year. That started from 2006. And then we started to get the coalitions in international arbitrations organizations that started from LCIA. I became the member of the LCIA court in 2007, and in 2008, I became a member of the ICC Court. E.Y. also led coalitions of different organizations and other colleagues were also involved in the international arbitration society. That makes Korea visible in the arbitration society. And we are lucky enough to have many

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arbitrations arising out of Korean companies. So nowadays, we are very busy. We are also busy with investment treaty arbitration. And now, everybody says that Korea became the leader in, at least, East Asia in international arbitration. So I'm really happy and pleased to see what happened in the last twenty years.

Jack Coe: I think you are, as we say, vindicated, in your judgment about the importance of starting an arbitration group. And I think whomever laughed at you then, is not laughing now. Let me just reiterate some things that were said: technical standpoint, a very big watershed event—I mentioned that there was a 1966 statute in place, and we know that the ratification, in 1973, of the New York Convention was important. But the adoption of the Model Law is a cardinal event, in the sense that when an outsider looks at the Korean legal system as relates to arbitration, there is a comfort level that is created immediately when it is confirmed that Korea is a Model Law country. That means that they share a statutory structure with dozens of other countries in the world. So that one knows when talking to a Korean lawyer about the grounds upon which an award can be set aside, those grounds will be based on Article 34 of the Model Law. And when one considers the role of courts, the extent to which they may intervene will be limited because they are a Model Law country. Now, each Model Law country does make some slight adjustments when they adopt. Nonetheless, that's a very important event.

Could you talk a little bit just for those of us who are common lawyers, and perhaps not involved in Korea, a little about the legal structure in Korea? I tend to think of Korea as a civil law country, but that may well be an oversimplification. Does that have a bearing on arbitration as practiced there? Perhaps, E.Y., you could start and then others could weight in.

E.Y. Park: Yes, certainly. I should say that Korea is a civil law country, but I would rather say civil law country plus alpha. What does that mean? Well, strict dichotomy between civil law verses common law is that you don't have any stare decisis; you don't have any cross-examination in the court. But our country is different in a strict sense of the civil law

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countries. When I did an arbitration in Switzerland, my Swiss co-counsel suggested that we forgo cross-examination, because they don't have a tradition of cross-examination. I told him that I never had an arbitration where I did not cross-examine. That's when I realized that Switzerland and Germany do not have cross-examination in the court, but we do. In our civil procedure, we have cross-examinations. The reason is because we are influenced by the United States in two ways. After the occupation of Japan ended in 1945, the United States government, debilitated the government, and took a trusteeship under the United Nations for three years. Before Korea started a new republic in 1948, they introduced a number of legislations. One of those was civil procedure in the judiciary, and because of that, thereafter, we had cross-examination in the civil procedure, which is a bit different from the substantive law. Procedurally, Korean lawyers are accustomed to do a cross-examination at the court. That's why I think that a number of Korean lawyers feel comfortable in conducting cross-examinations during international arbitrations. The second influence is that we have a bunch of Korean lawyers studying in the United States. And then the lawmaking, as well as practice, interpretation, and common law concepts, were introduced to Korea. Because of that, Korea has a civil law tradition, but with some common law colors.

In terms of the Arbitration Act, as Jack has mentioned, we enacted the Arbitration Act in 1999, following the 1985 UNCITRAL Model Law. I mentioned earlier, as to the New York Convention. The New York Convention was ratified in '73, but the New York Convention merely states principles. So if you go to other countries in Southeast Asia, they ratified the New York Convention; for example, I had an arbitration in Vietnam, but there was whole bunch of hindrances and obstacles, to get your arbitration through. The reason is because the Convention doesn't provide any specific guidelines; it just merely states principles. But the ratification of the New York Convention was much more effective when the Arbitration Act was also enacted in 1999.

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The whole concept of the UNCITRAL Model Law has three folds: (1) the arbitral economy; (2) fair billings of the parties and fair opportunities to present their case; and (3) the limitation of the court in intervention. These concepts were introduced by way of the Arbitration Act, but at the same time, it lists the criteria of enforcing arbitral awards pursuant to the New York Convention. So the New York Convention became a part of the domestic law by way of the Arbitration Act. In going further, in domestic arbitration, the New York Convention only governs the foreign arbitral awards. And there are many countries where the enforcement or refusal of the enforcement for domestic arbitrations are applied in a different manner from the New York Convention. But Korea actually adopted the criteria in enforcing arbitral awards in domestic arbitration as well, so that the New York Convention becomes not only a domestic law, but also governs even domestic arbitration, in terms of the criteria and the principles. Because of that, it became a really important part of international arbitration. With regards to how you conduct the arbitration, even though you have Korean law which is civil law, the way arbitrations are conducted in Korea is very similar to the way you do arbitration in any of the developed countries, with a number of common law elements, such as discovery, document disclosures, fair opportunities like cross-examinations, and so forth. And these are brought into the picture of international arbitration in Korea.

Jack Coe: That reminds me of the IBA—International Bar Association publishes these soft law texts that are to offer guidance in the field of arbitration. One of them is now its second edition. It's the *IBA Rules of Evidence for International Arbitration*, which covers more than evidence—documentary exchanges and so on. Have those documents been influential, or were the Koreans influential in making those documents? When published, had Korean practice already been established along similar lines? And do soft law texts in general exert much influence among the Korean arbitration bar?

E.Y. Park: Yes, that is a very important element. I mentioned the New York Convention and Arbitration Act, which you would probably constitute

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as a hard law aspect of arbitration. However, there is a big important area of our soft law, because normally this hard law provides general guidelines and principles, but doesn't talk about the details as to how you conduct investigations of the evidence, how you deal with the actual practices, and so forth. These softer laws are used by a number of institutions, such as IBA. IBA issues a guideline on evidence and party conduct, as well as conflict issues. As Kevin mentioned, when we studied arbitration, because there are so few law firms who are familiar with arbitration—we see each other again and again in the international arbitration scene—that whenever an issue comes up as to how you present a document, as discovery or document disclosure, then I would ask my learned colleague Kevin, “Shall we do it in a Redfern schedule? What about applying the IBA guideline over evidence?” Those are the kinds of criteria we would rely upon. And he would agree, then it's agreed among us. Because if you have domestic arbitration under the Korean Commercial Arbitration Board Rules, if the arbitrator, litigators, or arbitration council are not familiar with these international practices—and they tend to apply court practice and civil procedures, then they would limit the document disclosure and so forth—but there are some arbitration lawyers who are familiar with this international practice, [who] generally agree to these practices, and it became kind of a [common] practice among the arbitration bar in Korea. And it became more of an accustomed practice, and well-known, so [now], anyone who comes into the play to arbitration, they need to know about the Redfern schedule, the IBA guidelines of taking evidence, and conflict rules and so forth. That is how it has been settled into the Korean landscape.

Jack Coe: Very good. I'm going to switch it up a little bit here, and I'm actually going to quote Grant but then ask his two colleagues here to comment on what he said. And I'm focusing, in particular, on the development of practice and young arbitration specialists and the legal training. He says in one of his many writings, “Korea was barely visible in the international arbitration community just ten years ago; yet, Korea is now a major player. Korea not only generates numerous large cases, it hosts

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frequent arbitration conferences, has created a new international arbitration center, and is even touted as a possible alternative to Hong Kong and Singapore for arbitration in Asia.” And here is what I underlined in my quote, to continue, “Korean lawyers have quickly acquired arbitration expertise. They are serving as counsel and arbitrators in cases outside of Korea, and have moved into prominent positions in major arbitral organizations.”

Now some of that has already been affirmed by what we've discussed. But I'm curious about several things, and I'll just throw in these threads. You said that the arbitration bar is relatively small still in Korea. On the one hand, I just returned from an arbitration-related matter involving a household name based in Korea and the law firms were English and American (not Korean). At the same time, we have Korean students from Korea who come to our LLM program with great enthusiasm for international arbitration; they see those skills as an important part of the future there. If my unscientific poll is correct, there is a genuine interest within the newest generation of Korean lawyers for becoming adept at international arbitration as a viable practice area, with its a-national attributes and emphasis on blending legal cultures. Yet, there may be something distinctive about their approach. Kevin, as you noted this is something that is no longer a fanciful career prospect, but could you comment a bit more on the Korean approach? Is it distinctive as has sometimes been suggested? And then we'll give Grant a chance to defend himself.

Kevin Kim: As E.Y. mentioned, Korea is a civil law jurisdiction. But it is a very common law friendly civil law jurisdiction. Not only the law itself, but also our constitutional law is quite similar to U.S. constitutional law, and the civil, and particularly criminal, procedural law is also very similar. So we are not surprised to learn about the U.S. legal system when we attend a lot of programs in the United States. But the more important thing is, we have about 500 lawyers in our firm, and among the 500, we have about 170 American lawyers. Those 170 American lawyers include 120 Korean

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lawyers whom are qualified both in Korea and the United States, mostly barred in New York, and some in California. That makes a huge difference when you are practicing arbitration. We are already familiar with American system; we are already familiar with document discovery and the concepts. We never resist adopting such principles. In 2010, when I was on the IBA arbitration committee, I was in the drafting committee for the new IBA evidence rules. I was quite surprised to have debates with Swiss lawyers or French lawyers from their civil law countries on how much we should adopt the common law concept in international arbitration. I was also surprised at myself that I was defending common law concepts in international arbitration because they are so familiar to us. When you go to the international field, our clients also never insist on the Korean factors. I just came from Japan doing arbitration, and the Japanese lawyer on the other side argued some Japanese factors in international arbitration. I was not happy with that. When I am doing arbitration in Korea involving Korean matters, we never insist that because this is related to Korea, we must have some Korean things. For example, Korean K-pop is quite popular around the world. K-pop is not Korean music; it has nothing to do with Korean traditional music. It's just music where we collected ideas from all around the world, and we tried to make something popular in Korea and people around the world liked it. So somebody is talking about Gangnam Style in international arbitration. But we are the only law firm in Gangnam, and our competitors are still in other areas.

Jack Coe: That's true.

Kevin Kim: Our office is located one hundred meters from the Gangnam Station. So when you say Gangnam Style arbitration, it's not just Korean practice. It's that we insist that whatever is acceptable in the international society should be the Korean thing. And that should be international arbitration in Korea and in other places.

And young lawyers are quite ambitious. We have many young students fairly eager to participate in arbitration. I think it's a good thing because in America, I understand that we have about 10,000 American lawyers of

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Korean origin. So maybe Korea is the only jurisdiction that can bring more than 5000 American lawyers outside America if we want. So we have good potential to promote arbitration in Asia and certainly other jurisdictions and working together, particularly with the United States, when required to do so. That is maybe some unique aspects of Korean practice.

Jack Coe: Let's give Grant an opportunity to weigh in now. Your reflections not from too far away?

Grant Kim: Okay, Thank you. There are so many things to say; I can't say them all, of course, but certainly, Koreans do have a reputation as being fast adapters, and arbitration is obviously, definitely in vogue. Picking up on what Kevin is saying, there's been a tremendous globalization of Korea in the last ten, fifteen years, not just in arbitration, of course. And that has been a really big help for Korea, too, because international arbitration is inherently international, of course. So there are overseas Korean lawyers, such as myself, in not only the U.S., but also in Europe, South America, New Zealand, and all over the world. We actually get together once a year, and it's amazing; we have like fifteen different countries there. While there are Korean lawyers who go overseas to study and get LL.Ms, there are also many Koreans now who are going overseas during college or even high school or junior high, who are sometimes trilingual or tri-cultured, and it's amazing. So that's had a big impact, of course.

But I'd like to just pick up on one sort of specific thing on the team. To be effective as an international arbitration counsel, it's really helpful to have a diverse team with people with different perspectives. The one in particular I want to pick up, because it was mentioned earlier, is the common law/civil law issue. You will have some governing law, which might be common law, or it might be civil law. You will have arbitrators, maybe some of them are from common law jurisdictions or civil law jurisdictions. By having those different perspectives, there are definitely differences, but ultimately as counsel, you, of course, want to persuade your arbitrators. And a way that, for example, a lawyer from the U.S. may look at an issue, or a lawyer from England or France or whatever, under the same law, can be different

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based on their own training. I was at Kim and Chang for many years, but most recently, I worked with Kevin's firm on a big arbitration involving Korean law and many contracts. In many of these arbitrations, the law is actually not very important because it's just a contract dispute and there really is no dispute about the law; it's about what the contract means, and what happened, things like that. But sometimes the law is really, really important. And the case I worked on with Kevin, the law was really important. And I had the privilege of being the American member of our team working on the Korean law issues with the experts. So I got this great education out of it. Ultimately, most of our arbitrators were common law, so I was really pushing on the case law; I wanted to argue things based on case law. From my experience, civil law lawyers are much more comfortable just focusing on the abstract principle; even if they cite the case, they'll just tell you what the abstract principle is, and they won't tell you what the facts are. As a common law person, I want to know what the facts are and try to make it relate. But anyway, by working together, we were able, I think, to make a much better product than if we were just working on the American side or just the Korean side. And I think that's really helpful: to have a diverse team working together.

Jack Coe: E.Y., do you want to weigh in?

E.Y. Park: Yes. For the next generation, certainly arbitration is one of the hot topics among law students, as well as young lawyers. There are a lot of activities going on. Arbitration or dispute resolution-focused programs at the law schools, as well as moot court, and a number of Korean law students are attending Vis Moot and similar types of competitions. And they are known to be more of an arbitration-knowledgeable candidate, in case they try to seek job placements. These are good things, but at the same time, I think that we need to broaden the scope.

I did actually head an arbitration in Singapore sitting as an arbitrator. I was a neutral chair between a Chinese company and a Korean company. The governing law was Indonesian law, and I had to render a decision based on the experts. The problem was the experts were starkly

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different in Indonesian law. So I suggested, “Why don’t you prepare and submit any court precedents?” “Mr. Chairman,” the counsel said, “in Indonesia they do not publicize the court precedents, so we don’t have anything to submit.” How can I determine that then? But then they submitted a number of Dutch laws because still, Dutch law has some element of Indonesian law. So I had to review the experts’ opinions and so forth, and I’ve written an award based on Indonesian law. But I realized that Indonesian law, and also Dutch Law, was very similar to Korean law because we have a civil law tradition. There are slight variances and so forth. So I explained this experience at the law school when I taught arbitration and asked the students to put their education in broader context. If they are able to connect their knowledge to the outer-world, rather than only limiting to Korea, I think there are much more opportunities and chances. A small number of the students will try to make an adventure, to go outside to become a clerk to the arbitrator, the well-known arbitrator, or interns in the international arbitration institutions of foreign law firms. Then when they come back with knowledge of these areas, I think they will be much better suited to do international arbitration. But I think that it’s on the way.

Jack Coe: Just to underscore some things E.Y. said—he made a reference to the Vis Moot Court, and for the uninitiated, it’s hard to overstate the impact of what started off twenty-two years ago as an ambitious idea: “Why not hold a moot court based around a mock arbitration?” And today hundreds of teams from all over the world gather in Vienna or Hong Kong (there are now two competition venues) and argue a common arbitration problem based on international standards. It has grown into a rich educational experience, involving regional pre-moot scrimmages and an alumni association. Indeed, one of the things that law firms look for on the resume of someone who wants to be involved in international arbitration is participation in the Vis program.

Kevin, certainly in the classroom I tend to start the course by focusing on the front end of the transaction. We talk about how the dispute arises and

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then how we're going to anticipate them. It starts with an arbitration clause. And so I'm wondering, how much of your work involves pre-disputes planning? What is the interaction between the transaction lawyers in your firms and the disputes group? And what role do client views play, whether reflected in established company policies or otherwise? (I assume the big Korean companies have internal policies about mediation and arbitration, number of arbitrators, preferred institutions they like). After Kevin replies, we will give E.Y. an opportunity to comment further.

Kevin Kim: One thing I did not mention is one of the reasons why we have so many arbitrations coming out of Korea. I have statistics in the ICC Court that says from 2003 to 2013, Korea had 315 cases, while Japan had 221 cases. And China had 314 cases, one less case than Korea. However, given the size of the economy of China and Japan, Korea is maybe a quarter or less of that. That means Korea has a lot of cases. One reason is that we have very good communication with our corporate lawyers. Whenever we have a negotiation or transaction, the corporate lawyers ask me: "What will be the dispute resolution clause?" Normally, the arbitration clause is known to be a 3:00AM clause, which means at the end of the transaction, you negotiate the arbitration or dispute resolution clause, when nobody is interested in it, and everybody wants to go home early. So that's what happens in dispute resolution clauses. But a good thing in Korean practice, particularly in law firm practice in Korea, we normally have good communication with our corporate lawyers. Our corporate lawyers—and some of us arbitration lawyers in Korea, have M&A backgrounds which really helps and gives us a good understanding because it is absolutely important to have the right, proper arbitration clause in a contract. Otherwise, we have no chance to have good dispute resolution.

Then, we also have many events or conference in Korea, to try to have communication with in-house lawyers because in-house lawyers should have the proper idea about arbitration, what will be most proper arbitration clause, and what will be good arbitration institutions. ICC is always well known; ICC is always very powerful in all jurisdictions. However, what happened

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in Korea was recently, we had many arbitrations at the Singapore Arbitration Centre. Singapore has really been a beneficiary of the Korean practice. When I was first involved in arbitration, one of the most frequent questions was: “What would be the most recommendable arbitration clause?” So I say ICC is a good option, and you can think about maybe Singapore. Everybody has followed that trend, and now we have so many ICC/Singapore clauses. And we have many arbitrations in Hong Kong at the Hong Kong Arbitration Centre. And we have many JCAA arbitrations; I was quite surprised. JCAA normally have twelve cases per year and about five of those cases are from Korea, which is quite surprising. That is the Korean society being quite interactive; we always exchange ideas about the trend going on outside Korea, which is very helpful in developing arbitration practice.

E.Y. Park: In addition to what Kevin has mentioned, I have a couple of observations. Arbitration is a contract dispute, so it has a couple of meanings as to what it means. Number one, different from litigation, which will be default, arbitration is a product of party autonomy, so you have choices. If you compare it with the restaurants—it’s not a set menu, it’s more à la carte, so you can compose your meal. But many corporate lawyers and clients do not understand that, so they may just simply think that there will be a set menu. There isn’t. There will be a best choice for your arbitration as a client. Thus, our job is to advise the client to get the best choices in resolving the dispute. Especially, the seat is one of the most important things. If you chose a seat which has some of the tag-along kind of issues, there may be very strict court involvement, or limiting legal mechanisms in terms of evidence, and so forth. If I had arbitration in India, a lot of arbitration counsel in India said that they needed to put in the particulars for the arbitration, such as presentation, and also mentioned the admission of evidence, and so forth. It dragged along the arbitration procedure. Thus, these points have to be discussed with the client in an early phase in drafting new arbitration clauses. As Kevin mentioned, we had established a program inside of a firm to discuss with the corporate lawyers

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in drafting the arbitration agreement. At the same time, we organized a number of seminars for in-house counsel, so they become familiar with the arbitration clauses, and have the right and opportunity to choose their arbitration—the best arbitration agreement for them. At the same time, in our arbitration practice, the members are composed in a manner that 70% have a litigation background but 30% have a contract or corporate background. Especially when arbitration refers to very specific issues such as M&As, there is a dispute about the tag-along issues or crown jewel issues and so forth, and we need to have some input from the M&A people. We even invite the corporate people to get involved in conducting and interpreting the contracts so that we have a seamless interpretation in pursuit of the disputes.

Jack Coe: In the international arbitration community, we have a name for clauses that are not so well conceived or that reflect the 3:00AM drafting that we're talking about. We call them "pathological" because there are flaws in the drafting of essential elements such as by naming a non-existent institution, supplying an ambiguous choice of law, or using language that does not make clear whether the parties actually intended to arbitrate the dispute. That's often a function of the contract drafters not collaborating with the available dispute resolution experts. I want to pitch to Grant here, without giving away any Morrison Foerster secrets, is your sense of it the same, in terms of how one focuses on the front end and the difficulties with pathological clauses and the policy in-house about who gets involved at 3:00AM?

Grant Kim: Short answer, yes.

Jack Coe: That just proves that all international firms feel each other's pain and ultimately do something about it.

Grant Kim: I do get consulted sometimes by my corporate colleagues on arbitration clauses when they're drafting. And I sometimes even give presentations on the subject.

Jack Coe: I have a colleague who worked at a major firm, and he said there was a time when they could proudly claim that they were the only

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major law firm that would not let a contract be signed unless the disputes group had looked at it. Today, that policy is fairly standard. I have more questions to pitch but are there any questions from our colleagues in the audience?

Audience: UNCITRAL serves as the rule. Doesn't that define a law of arbitration clearly under UNCITRAL? Arbitration clauses, are they not included in the context of UNCITRAL? If we have one of those clauses in the contract, does that not bring in . . . so you don't have an issue?

Jack Coe: If I could reframe your question—as I understand it: aren't these standard arbitration clauses essentially foolproof? In other words, if you mention, for example, arbitration under the UNCITRAL rules, is not that not enough to send it to arbitration, and thus keep it out of the courts? Relatedly, how elaborately does one need to set out the clauses? Do we really need to add the seat; do we need to mention the IBA rules of evidence; do we need to maybe, drawing on yesterday, mention the IBA guidelines on party representation or otherwise supplement the basic undertaking to arbitrate? Is one better off merely setting forth the basic elements in the institutional clause, be it ICC or other, or is there a trend toward, what I see in some American contracts, very elaborate dispute clauses? Thank you for that question by the way.

Kevin Kim: My recommendation is normally, we just follow the simple arbitration clause that is recommended by the institution, unless you are very confident about what should be included in the contract. I noticed that in American practice, we have more detailed arbitration clauses, but sometimes, and I would say more often, that caused problems interpreting the arbitration clause. When you have a dispute over the dispute resolution clause—that is somebody really trying to avoid performing the obligation; that's paralyzing. So we will go just five years resolving the dispute resolution clause, even if, we had no choice to dispute on the merit. So, normally, I recommend an institution-recommended clause. If you really want to add, in case of ICC, maybe you want to add something like how you

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appoint the chairperson, maybe that's all. If you add anything more, then, you might have some sort of problems in dispute resolution.

E.Y. Park: Yes, I would add just a couple of points. There's a division: if you prefer an ad hoc arbitration such as UNCITRAL rule, that's okay. However, then you need to have a certain level of specificity. If you just have UNCITRAL arbitration then there are a couple of points that you have to determine. An arbitrator needs to understand where would be the seat, and what language you use, and so forth. And then, appointing authorities: there's a possibility that if you don't have any supervisory authority, that arbitration will be dragged on because if somebody, normally the respondent, their best policy is to drag on, and defer and delay the procedures. But if you choose one of the well-known institutions, like ICC, Singapore Institute, or LCIA, then they have some more of a set menus, if you will. But if you go a little bit further, then there are probably a number of developments in these institutions. For example, ICC recently amended arbitration rules in 2012 which allow emergency arbitrators. There is some limitation; if the contract was drafted before then, then it's not applicable. So if you have an idea that the emergency arbitrator or the emergency measures are important for your case, then you may just opt in to agree to the new rules, same as Singapore rules, and others. So you may have some more detailed choices for your case.

Jack Coe: Thank you. My last question will serve to also give an advertisement for the next panel on investor-state arbitrations. I know that some of you are involved intimately in the current investment disputes, and I know there's only so much you can say, but just talk about the phenomenon in general and maybe how it is different from standard contract arbitration.

Kevin Kim: Investment treaty arbitration—I always say that we have more conferences than actual cases—so that happens in Korea, and we have so many conferences and events talking about investment treaty arbitration, but nothing happened until recently. But in Korea, something happens first, and then we start. Same thing happened in investment treaty arbitration. We had the first investment treaty arbitration recently and I'm personally

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involved in it, so I'm not supposed to talk too much about the case because my opposing counsel is sitting here. But Korea has about ninety BITs and eight FTAs. And we maintain a very clean record, so whenever we have a potential conference, people asked us, "What happened in Korea? We have so many BITs, but how come you have no dispute?" I've often said, we maintain good records because we are always good. Then the American investors broke the ice and filed ICSID arbitration through FTAs and other restrictions. Then we have a great debate about this investment treaty arbitration system, when we had a negotiation about the Korea-U.S. FTA. So we had a large demonstration—167 judges signed a petition to the Chief Justice to reconsider the condition of adopting this ISDS system in the Korea-U.S. FTA, although at that time, Korea already had almost ninety BITs, which included this investment treaty arbitration system. Then everybody talked about the ISDS; even the taxi driver was talking about the ISDS in Korea. Then, what happened was, not using the Korea-U.S. FTA, but using the preexisting BITs, we had the first ICSID arbitration. And then after that, Korean investors, and Korean companies became interested in these ISDS systems, and I was lucky enough to initiate the first investment treaty arbitration against a foreign government. Again, this is confidential; I'm not supposed to specify which company and against what specific country. But that was the first—this is pure ad hoc, not even UNCITRAL, just a pure ad hoc arbitration. And then we recently had one ICSID arbitration against the Chinese government, again, from a Korean investor. And there are some other cases that are supposed to happen in the near future, so that shows that Korean investors maybe wanted to use this investment treaty option.

Jack Coe: So you have claims by Korean investors against foreign countries, and you also now have at least one claim against Korea, so we're seeing both sides of the investment treaty system in action.

Kevin Kim: Yes, and another example is that we were retained by a Korean company, who already got an arbitral award in Vietnam, because they won't enforce it in the Vietnamese court and in the Korean court. And

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there is some issue with the Vietnamese court, so we were retained and gave notice to the Vietnamese government and have instructions to proceed the investment treaty arbitration against the Vietnamese government because their court is hesitant to impose it. Then what happened was the Vietnamese government instructed their company, government or company, to pay the full amount, including interest and attorney's fees. So that is quite useful in investment treaty arbitration, and our clients are obviously very happy with those results. I understand there are some other law firms also involved on similar occasions because I had similar experience in Mongolia when we worked with a client. In that case, even without the formal notice, you send, say, a simple letter to say that our firm is instructed to reconsider this possibility, then you get similar results. That is a quite effective method, like holding equipment to force the rights.

Jack Coe: It remains now for us to just thank our speakers in the time-honored way . . . [applause]. Very interesting conversation. Thank you one and all.

