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Surveying the Landscape of Conflict Management

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Surveying the Landscape of Conflict Management[1]

Moderator: Tom Stipanowich
Speakers: J. Kwang Ho Lim, E.Y. Park, Beomsu Kim & Joongi Kim

Tom Stipanowich: It is my pleasure to invite our panelists Beomsu Kim, E.Y. Park, Judge Kwang Ho Lim, and Joongi Kim to offer further reflections on changes in the way commercial conflict is being managed. To begin with, I'd like to draw your attention to the summary of our recent study of conflict management among Fortune 1,000 corporations, *Living with ADR*.[2] Among other things, that study draws attention to the growing use of mediation among major companies with respect to all kinds of business disputes. At the same time, perhaps surprisingly, the study—which may be affected greatly by U.S. domestic practice—shows that although commercial arbitration is widely employed, many corporate counsels have concerns about arbitration, and the number of companies anticipating future use of arbitration for different kinds of disputes appears to have dropped in recent years. In particular, there are growing concerns regarding cost and inefficiency in arbitration. At least in the United States, it appears that the

1. This is a transcript of the fourth 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 Professor Thomas Stipanowich, the Academic Director of the Straus Institute for Dispute Resolution at Pepperdine School of Law, with participation from Judge Kwang Ho Lim from the Judicial Research and Training Institute in Seoul, Korea, E.Y. Park, a partner at Kim & Chang, Beomsu Kim, a partner at Shin & Kim, and Professor Joongi Kim from Yonsei Law School in Seoul, Korea.

2. Thomas Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1 (2014).

primary cause of increasing cost and delay in arbitration is the interposition of litigation-style discovery in arbitration. Motion practice—American-style—is another reason, and finally, too lengthy hearings and the inability to manage that process. Finally, companies seem to be more and more focused on mechanisms for early case assessment, processes for early third party evaluation, and early resolution of disputes. Such systems are most pronounced in the area of workplace disputes, but are beginning to appear in commercial contexts. I would like to ask our panelists, beginning with E.Y. Park, if Korean companies are experiencing similar trends.

E.Y. Park: Thank you, Tom. One of the benefits of conducting the international dispute resolution is to have a chance to look, yourself, in a more objective manner; if you are outside, then you can think about your country, your life, your practices, a bit more objectively. That is what I am doing today, thinking about Korean practice and so forth, listening to all the different perspectives. That is one benefit, in addition to the unexpected benefit that I had a great view of the ocean. It is actually a windfall, not something that you naturally expect. I agree with you, as to your prediction, as to what will be the future of dispute resolution mechanisms and so forth, but I would make a couple of observations [based on] my specialties—that is international dispute resolution.

You know, every country and society has its own traditions, which affect their domestic arbitration, mediation, and dispute resolution. Thus, the methods are comparatively different to each other. You cannot impose your views to the other polities, but international dispute resolution is a bit different.

Let me start with arbitration. I believe that international arbitration will grow, at least for Korean companies, or anyone who has business with Korean parties. I do agree with you, about the concerns raised—the costs, [and lack of] appeal, or things like that; but also, international arbitration is not the best choice for your client. The best choice would be your own home court, but the other side will not agree with you. And even [if] you are able to persuade the other party, because of your power, to litigate in your

home court, what about the enforcement? Would the foreign court immediately enforce it? Because of certain unpredicted systems in the international arena, the international arbitration is chosen in the international dispute resolution mechanism. It has finality; it has a good enforcement system because of the New York Convention, and because of that, I think that international arbitration would grow statistically. When I talked to in-house counsel in Korea, according to their response to me, 90% of the international transactions have arbitration clauses. So I think that it is definite, at least for the Korean business community, international arbitration will grow.

Mediation is very good, as Judge Lee has mentioned. [The] Korean judiciary has put in enormous efforts to further facilitate the peace, and we also had great people doing pro bono work, receiving a small amount of money, but generating a lot of resolutions. That actually made enormous [improvements], but the problem with the mediation is that it has been led by the judiciary; it is a bit different from voluntary mediation, which is quite common in the United States. [Thus,] Korean parties and Korean companies are not accustomed to voluntary mediation. They are relatively accustomed to international arbitration because they have experience [therein]. But in terms of mediation, they believe that judges . . . or [the] mediators would do [all the work, and] I would just simply sit and nod my head [without further participation]. But international mediation is different; you need to organize your ideas. You cannot only put the figure of money that you are seeking; you need to persuade the others of [your] reasoning and so forth, which Korean parties and Korean in-house counsel did not have much experience in [before]. So because of that, in terms of mediation, I think we need to think a bit more about how to bring mediation to the next level.

And I would introduce what Singapore does. You know, because mediation was so popular in Asian regions, there were enormous efforts in China that, when arbitration or litigation was filed, a Chinese decision maker imposed mediation without the consent, or somehow, and then it failed and went back to the arbitration or mediation—the court. The problem was that

when Western parties were not pleased with [the award], they would challenge the award in foreign courts. And then—the confidentiality issue was discussed earlier—confidentiality was not completely set, in terms of such procedures, so then [the award] is set aside or canceled. So if the mediation is set in an international arena, you need to have a system in place. Because of that, Singapore recently launched a mediation mechanism where you could use arbitration, but at the same time you do mediation, [and] confidentiality is strongly kept. And then when you go back to the arbitration, it is separate. So they are selling such a judicial system—a new dispute resolution system. So if Korea wants to become more of a center of mediation in terms of international business, you need to think about how you can match up this need in the business community.

Finally, as to the early case management assessment that you mentioned, big Korean corporations gradually take these steps to prevent conflicts or disputes at an early phase, because, as I mentioned, after the aftermath of the Asian financial crisis, they went over to make investments, buying out things as done previously; [they] made a lot of subsidiaries overseas—Germany, U.K., and Middle East, and India—and they encountered a lot of problems, such as HR issues, dispute issues, tax issues, and so forth. So then in-house counsel started to [perform] early case dispute assessment mechanisms inside, where they [perform] a lot of research and set up manuals. And then they grow to build such a system inside. And that will be a very interesting aspect in the future.

Tom Stipanowich: Thank you so much. Beomsu, do you wish to offer a few comments?

Beomsu Kim: I have two observations to your presentation. I am of the impression that mediation is still a long shot in Korea. There are still virtually no commercial arbitration services in the Korean market yet. Only the court-supported mediation processes are being placed in Korea. But, I personally view that even if it is a long shot, commercial [mediation] services will be introduced quite shortly, because, as you mentioned, the companies in Korea and the Korean community are quite sensitive to the

costs, time, and efficiencies. At the same time, they are quite risk-averse in terms of their attitudes. They have been thinking [about] the implications of disputes and revocation of such results, so, more and more, they are geared to think about how to get out of this dispute as early as possible. And in this sense, as you mentioned, early case management and early neutral evaluation have been introduced in Korea, even though it has been in a few exceptional instances, but those have been introduced and I have been involved in those practices. And more and more companies are [growing] quite interested in early risk assessments and how to get out of this mess.

One more thing is that [even today], financial contracts and the financial system are not yet friendly with the ADR systems in Korea. But, more and more, regulators and participants in the finance world are [becoming] interested in adopting ADR. [This means that] the regulators are quite keen to know, and keen to understand and learn how ADR works in relation to finance contracts. So it will be interesting to see how this will develop in the finance arena.

Tom Stipanowich: The two of you offer similar perspectives. Are there others?

Joongi Kim: Tom, one question I had was the survey—does it focus on domestic or international disputes, or just, everything?

Tom Stipanowich: That is a good question. The way that the survey was framed, it could be interpreted to apply to domestic disputes or international disputes. But as E.Y. indicated, it is probably most reflective of developments in the American dispute resolution landscape. However, I see some of the same concerns spilling over into the international arena.

Joongi Kim: Just two quick things I will add. I thought a very interesting point was that U.S. general counsel wants to have more control. And I was thinking that, from the Korean perspective, general counsel would want to have less control; they would rather have the [outside] counsel take over. It [becomes] *their* job, and if things go well, then *we* hired the right counsel, and if it did not go right, it is *their* fault, not mine.

Tom Stipanowich: The U.S. scene is actually very much the same, as reflected in a recent piece I wrote on the state and future of commercial arbitration.[3] Here, too, there is a tendency often just to turn things over. Indeed one quote I often use is one by a very enlightened corporate counsel who said, "We have only ourselves to blame because we do turn things over to litigators, and they have turned arbitration into litigation."

Joongi Kim: And one other thing that I thought—the other reason that Koreans actually tend to be sometimes hesitant, from my experience—it is kind of the flip side of discovery—is that a lot of Korean companies do not manage their documents that well; they do not retain as much evidence as they should, so they do not have enough to offer. So it is actually disadvantageous to their position, and that is why it is kind of the opposite of discovery.

Tom Stipanowich: That is a very interesting counterpoint. If you do not mind, I am going to move on. One of the wonderful slides that Judge Lee presented respecting the Korean court system indicated that you have a wide array of professional backgrounds among mediators. However, if you look at dispute resolution professionals, professional arbitrators, as well as mediators, they are overwhelmingly lawyers. We have here a breakout of all of the backgrounds of all of the leading arbitrators, at least the ones in the college of commercial arbitrators. All but one of the respondents, 133 out of 134 people, had legal backgrounds, and most of them had practiced as litigators.[4]

Let me also note the data demonstrating experience in this group with streamlined or fast track procedures.[5] You most often see this, of course, in small-value cases—we will say anything under half a million dollars. Another thing we are seeing is these arbitrators are, at least describing

3. *See* Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 COLUM. AM. REV. INT'L ARB. 297, 308-20 (2014), *available at* http://ssrn.com/abstract=2519084.

4. *See id*. at 366-67.

5. *Id*. at 346-47.

themselves as, extremely proactive; they feel it is essential that they manage the case and manage it with a fairly strong arm. This group of U.S. arbitrators is also very focused on working with counsel to limit or streamline discovery.[6] Many actively monitor discovery and remain attuned to issues coming up through the pipeline.

Dispositive motions are a major and growing factor in the arbitration as described by these arbitrators. And traditionally, I can say among arbitrators that I know, there is a tendency to say, "Let's postpone dealing with motion until a hearing on the merits." And often there are very good reasons for that; often they have no business taking the time and effort to try to address a specific issue. However, there are categories of issues where preliminary motions can be addressed relatively straightforwardly, without getting into all of the heavy factual treatment, and what we are seeing is that arbitrators are attempting to make more of an effort to parse dispositive motions, to say, "Which are the ones that I may be able to address early and up front? What can streamline the process, as opposed to something that is simply wasting time and delaying the eventual resolution?"[7]

Another set of findings indicates that U.S. arbitrators are experiencing higher rates of settlement during the course of arbitration. Many arbitrators, moreover, see a relationship between their own activities and settlement—that is, ways in which arbitrators may "set the stage" for settlement. [8]

I would like to invite all of you to talk about any tools or roles that you see arbitrators developing. Have you seen an evolution of the way arbitrators think about what they do? Does any of this resonate with you, or again do you feel that it is very much either a phenomenon of the American system or something else?

E.Y. Park: Well. You know, arbitration is a hybrid. Historically, it is considered another type of negotiation, an extended contract negotiation, but

6. *Id*. at 351-54.
7. *See id*. at 354-56.
8. *Id*. at 381-83.

it has some judicial processes inside. It always goes back and forth. Some people think that it is about party autonomy and party control. Why do we have so many litigation tactics? But some people criticize that it is not applying the laws and it does not further justice, and you need to follow strict evidentiary rules and so forth. Overall, I think that it is a really, I guess, a virtue of arbitrators who would accommodate these tools. On one hand it is part autonomy, on the other, you need to further and implement justice. So, I think the best approach of the arbitrator would be to try to accommodate or persuade the parties as much as possible using the power, not as a strict sanction power, but as a power of persuasion, so that the party will consent and then nevertheless you will try to reach the right direction.

When I sat in arbitration in Singapore I had two counselors appearing before me as litigators, not as arbitration lawyers, but then they had a big fight over all of the little procedural issues. I had to make a proposal for what I wanted to do, but I did not impose it; but I just tried to, you know, give a couple options, and tell them to think about it and come back to me. And then they discussed it and then they proposed it as if [it was their idea even though it came from me]. And they actually did it under the roof of the party autonomy, and then I accepted it. The process of it was [thus] smooth. Although I had to make a decision on the substantive issues in terms of procedures, it actually worked very well in terms of the party autonomy and efficient management. These are the kind of the ways that arbitrators [can] accommodate by using [power] as a means.

Beomsu Kim: Based on my very limited experiences, it is kind of interesting to see that the proceedings really depend on who the arbitrator is, and what kind of background and experience they have. It really depends on their natures, their flavors, or their experiences. [Thus], it really differs from having one arbitrator to two arbitrators in terms of dealing with the proceedings and how much he will put his hands on the proceedings. One tendency I found—probably my personal kind of view—is that the higher the claimant is, the less direction or involvement by the arbitrators. They just let the parties do [what they want] until the hearing procedures, unless it

is something really critical, because they are concerned about some future enforcement difficulties, or whatever the challenge is afterwards. So they just let parties do and see what happens during the hearing processes. This is based purely on my experiences.

Joongi Kim: Just to make a very anecdotal comment, since we have our K.O. metaphor: My sense is the Koreans will tend to jab for a while, and then once the jabbing does not work they will just throw off the gloves, and once they take off the gloves they are not coming back. So generally speaking, I would tend to think there is not as much settlement once the case has commenced to arbitration, but just my general sense.

Tom Stipanowich: Speaking of settlement, I would now like to shift briefly to talk a little about mediation. Mediation is now extensively used in the United States. What began with great impetus from the court system and from a host of pilot programs around the country, has become an important element of the U.S. legal/justice system. As noted earlier, a lot of companies are embracing mediation through internal programs, including employment programs, and are also putting mediation provisions in commercial contracts. Now I am hearing you say that Korea has not made a leap beyond the court system or certain administrative applications, and that even though there is the opportunity for private providers, the fact is that companies have not really embraced this in any proactive way. I would invite Judge Lim, who has observed U.S.-style mediation and is also participating in mediation efforts in the courts in Korea, to offer his perspective.

Judge Kwang Ho Lim: [When I came to the U.S.] I was shocked to learn that there [was mediation] in the private sector. I did not have any fundamental information about American market or the American way to mediate. So I see that and reflect on it and think about Korean mediation, [and] I think it is similar. Mediation in Korea was very independent in the setting; judges [were] doing everything and the parties [were] looking at the judges in the end, looking for the outcome. Judges [used to use] very authoritative techniques, sometimes even oppressive, five or ten years ago, but now people are changing and courts are changing, too. I think that

people, more and more, want to control their cases by themselves and control the fate of their dispute, and resolve it by themselves. So, they want to have more of a voice in the process and want more participation in the process. Judges' attitudes on mediation and how it is done in the Korean courts are changing, too. They are becoming more facilitative and they are very soft; they will not evaluate something, or evaluate evidence, that just suggests anything they want, or anything the parties are interested in. This is the way it goes in Korea, too. So, for the mediation market, I think [it] is very important to know the culture where the mediation takes place and to know the people you are dealing with, so when it is adjusted, all the things and special attitudes toward mediation, and [the] special way to do that, is created in that society. I think that there is some prospect in that way in Korea, too. Like Judge Lee said, if the court mode in Korea is very successful, then we can expect the growth in the whole mediation market or ADR market.

Tom Stipanowich: What is it going to take to demonstrate the kind of value that companies would be looking for before they embrace mediation more broadly and proactively? What would they be looking for?

Beomsu Kim: I have been taking instructions from clients, I always advise them, if possible, or to the extent possible, it would be best for you to get out of these dispute situations. So in that regard I always personally encourage parties to think in a very creative way to get out of this situation including mediation, or the case management assessment, or whatever the risk evaluation process is. So my sense is the more Korean companies that are developed, the higher chances of getting involved in mediation in international settings, and domestic settings as well. So my view is quite positive for this practice.

E.Y. Park: Well, I will share two experiences that I had. In the arbitration dispute resolution clauses, at some point, they are multilayer dispute resolution clauses. So once the party encounters the dispute you need to go to the mediation. If the mediation fails, then you go to the arbitration. So I had a one case where a party had been involved in that and

they came to do an arbitration. They actually failed in the mediation before they came over to me. What I had learned was very interesting because the mediation had to take place in Hawaii, which they made a very nice setting, and the clients did not know what to do because the only mediation they had done in Korean court is when they filed litigation and then the judges sent it to the mediator and it failed in judgment. But in this [situation], [the] mediator does not make any decisions; they just simply facilitate it. So they thought, "It is not binding, why spend money?" but if you do not do that then someone will challenge it later in the phase of arbitration. So they actually went to Hawaii and the mediator was very diligent to facilitate; they went out to play golf and just finished the whole week, which was agreed, and they failed, and they did the arbitration because they did not have any voluntary mediation experience at all.

Another experience that I had is [when] we did conduct mediation, because a dispute arose and parties agreed to mediate it. Because of high confidentiality issues, they did not want to go to arbitration; they just wanted to have confidentiality. The problem was, again as mentioned, if [the case] is filed at the court and the judge looks at the matter and refers to the specialist mediator, the confidentiality is all gone. So they wanted to do it privately. The problem was that it is very hard to draw up the terms of the mediation clause with the other party when the two parties are in dispute. Secondly, it is hard to find a mediator because we do not have such a mediation market. So we were able to do it, but then it took weeks and months to explain what his role is, because it was his first time doing this mediation not as someone commissioned by the court or something like that. So it took quite a long time to set the terms and immediately when we started to do so, the parties—I guess they settled. So I think that is good. I think there is a demand. In terms of your question, I think what we need is really an issue of hands and sequence, but we need to have some voluntary mediation practices. And we need to have professional mediators who understand what their role is. And thirdly, in-house counsel should think

about and make an assessment as to which one would be the best suit their cases.

Joongi Kim: I tend to be a bit more skeptical in the short run. I think it would be ideal if we had a more developed mediation market. I think the one thing that would maybe kind of push it over the hump, if you will, would be the Park Se-Ri or Yuna Kim arising. If there is this incredible, able mediator who handles beautifully a very controversial case and everyone is happy with it, then others would say, "Oh wow that could work." But absent that, I think it is going to take some time.

Tom Stipanowich: So there is a need for prominent success stories, and proven professionals?

Joongi Kim: Yes, something like that.

Audience: We have been hearing about the existence of reforms to the justice system like the Wolff reforms in England that created incentives for the lawyers and their clients to participate in mediation or explore settlement opportunities? Is there any conversation started yet in Korea along those lines?

E.Y. Park: Yeah, that is a very interesting perspective. Actually, I had those experiences because when our client had issues, especially in the U.K., as well as in Hong Kong, they had to conduct some efforts to exhaust the possibility of settlement, otherwise they would be sanctioned in terms of the cost and so forth. So, if you are dealing with those issues in the U.K. and Hong Kong, we are advising them to do a mediation. But in Korea, there are no such sanctions. Again, unless parties actually file a litigation and a court imposes or suggests mediation, there is no obligation to do a mediation. But if—as Judge Lee and Judge Lim have made enormous efforts—mediation becomes much more common, and then you go the next step, so that if you do not make an effort to mediate the judge will think about that in the decision—not as to what has happened, but as to whether you have dispersed all the efforts to try to settle—then you would assess some of the cost or something like that. That might be the next step.

Audience: I have a question for Judge Lim. I was just wondering about the posture of Korean courts and judges towards private judging?

Judge Kwang Ho Lim: Private judging? I do not think Korean people want that. In a sentiment of Korean people, it is very important that someone who is dealing with my case has some authority that the public acknowledges and can turn to. So, thinking about the Korean people's sentiment and the culture there, I do not think private judging has much prospect. Rather than that, when we visited JAMS yesterday—Judge Lee and I went there together—and we heard a lot about that institute. We had so many questions for them, too. And I think, rather than private judging, we can think about private mediation institutes. Like Professor Kim said, if there is a superstar in the mediation market, the private market, and Korean public is properly educated for that, private mediation can have prospects, I think. When I do cases at the administrative court of Korea, the cases are very huge. For example, the tax cases amount to a million or more than that. I have experienced that those kinds of cases were resolved through mediation. Actually, in Korean law, there is no mediation—in the administrative cases, there is no clear stipulation in the law [requiring mediation], but Korean courts do recommend conciliation, which is kind of a court recommendation in an official forum. I have experienced those kinds of huge cases being mediated in that way. So when I see that, if there is a specialist who has a lot of knowledge about that industry and that specific issue, then he can have a prospect in dealing with private mediation. That is my thinking.

Audience: I know that you said earlier that Korean companies are embracing the international arbitrators. So aren't there international commercial mediators? Have any companies tried international mediation, and [experienced successes that might be] translated into some changes in the Korean law?

E.Y. Park: Yeah, I think that it is a fair observation. One issue is remuneration for the mediator, because, as we discussed, in the court-supervised mediation, the mediators' job, although they are paid, it is almost

like pro bono services—very low payment. It is the same in the domestic arbitration under the roof of the Korean Commercial Arbitration Board. Normally, in international arbitration it is high-paid services, but in a domestic arbitration it is very much a pro bono. You are paid only $2,000 for your two-year service; something much like pro bono work. So, you are right that we could encourage a number of professionals—former judges or retired lawyers—to serve as mediators, but then the issue we have to deal with is whether we have to subsidize the fees of recruiting those highly qualified mediators by the government budgets—judicial budgets—or we would have to impose fees on the users who are mostly benefitted. That is very much like fundamental judicial policy issues: whether you would ask the government, which spends money furthering the peace as a judicial justice, or you would ask the parties to pay for their services. That is something we have to determine in terms of the judiciary as well as the legal professions and communities.

Audience: This goes back to arbitration and some of the data that you shared to show a concern about splitting the baby or not having an understanding about the basis for an award. Under the model rules, most international arbitration rules provide that you cannot make a decision *ex aequo et bono* or as *amiable compositeur*. In the U.S., where we have some rules domestically, there is no such restriction. In Korea, in domestic arbitration, question one: is there a restriction or do arbitrators have free reign to decide per the law or per justice and equity? And question two: have you ever seen, in an international case, the parties agree that the arbitrator can decide *ex aequo et bono*, as opposed to according to the rules.

E.Y. Park: Well, I had a very interesting experience; we had a very highly respected former judge who served as an arbitrator. For as long as he was appointed, he believed he had the power to impose settlement. He used his power as an arbitrator to facilitate mediation—that is what he did in the court. But under the Korean Arbitration Act [that conduct] is prohibited unless the two parties actually specifically empower him to do so. Nevertheless, it is hard to stop those habits and perspectives, [and] he was

very highly regarded judge, so how can you stop a former judge? And he actually nevertheless did it, mentioning that if you do not settle, then I will think about that in rendering my award. So then the parties actually failed to settle, and then he actually did it. So, we were very serious to raise this issue with the court because of the concern of his power [going] beyond the scope under the law. But then we were [also] concerned that he was a highly regarded former judge, whether the judges in the Korean court would think differently, but the client was a bit concerned about going through the whole litigation process, so they just gave up. That is an issue when you have a domestic arbitration because in the legal regime, in answering your question, we have a division of the arbitration versus *ex aequo et bono*, or the settlement power or mediation power. But there are some practices and habits driven from court habits, so that is another issue that we have to deal with.

Tom Stipanowich: It is time to conclude our discussion. Please join me in thanking our outstanding panelists.