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Korea's "Bali Bali" Growth in International Arbitration

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Korea's "Bali Bali" Growth in International Arbitration

Grant L. Kim*

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I. INTRODUCTION

The Republic of Korea¹ used to be called “the land of the morning calm.”² While pockets of serenity can still be found, Korea has become the land of “bali bali”—Korean for “hurry hurry.”³

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The best known example of “bali bali” is Korea’s transformation from a devastated, poverty-stricken country after the Korean War into one of the world’s leading economies—the so-called “Miracle on the Han River.”⁴ A lesser known example is international arbitration. Korea was barely visible in the international arbitration community just ten years ago; yet, Korea is now a major player.⁵ Korea not only generates numerous, large cases, it has hosted frequent arbitration conferences, has created a new international arbitration center, and is even touted as a new hub for arbitration in Asia.⁶ Korean lawyers have quickly acquired arbitration expertise, are serving as counsel and arbitrators in cases outside of Korea, and have moved into prominent positions in major arbitral organizations.⁷

1. “Republic of Korea” is the official name of the country that is unofficially referred to as “South Korea.” “Korea” is used herein to refer to the Republic of Korea, except that “South” and “North” Korea are used when needed to distinguish the two countries.

2. “Land of the Morning Calm” is a rough translation of “Chosun” (also written as “Joseon”), the dynasty that ruled Korea from 1392 to 1898. See *Names of Korea*, WIKIPEDIA, http://en.wikipedia.org/wiki/Names_of_Korea (last visited Apr. 16, 2015); *History of Korea*, WIKIPEDIA, http://en.wikipedia.org/wiki/History_of_Korea#Joseon (last visited Apr. 16, 2015).

3. For perspectives on Korea’s bali bali culture, see Luc Forsyth, *Korea’s Stressed Masses*, GROOVE (Aug. 20, 2012), <http://groovekorea.com/article/koreas-stressed-masses>. “Bali” starts with an explosive “B” that gives it an onomatopoeic punch. “Zoom zoom” may better capture its flavor.

4. See Mark Curtis Hoffman, *Money, Masks, and Miracles: Reassessing South Korea’s “Miracle on the Han River”*, GROUND VALLEY STATE UNIVERSITY (June 17, 2015, 6:55 PM), <http://www4.gvsu.edu/HOFFMANM/Korea.pdf>. See also BRUCE CUMINGS, *KOREA’S PLACE IN THE SUN: A MODERN HISTORY* (W.W. Norton 2005).

5. See Byung-Chol Yoon & Joel Richardson, *The Legal System for International Arbitration in Korea*, 4 KOREAN ARBITRATION REVIEW 18 (2014) [hereinafter K&C Korea Arbitration] (describing an overview of Korea’s rapid growth in international arbitration); and Kap-You (Kevin) Kim & John S. Bang, , *Arbitration Law of Korea: Practice and Procedure*, BAE, KIM & LEE LLC xix, 1-9, 18-19, 31-34 (2012) [hereinafter BKL Korea Arbitration].

6. BKL Korea Arbitration, *supra* note 5, at 4-7, 28-34. These issues are discussed further in Sections IV and V.B, *infra*.

7. BKL Korea Arbitration, *supra* note 5, at 28-30; K&C Korea Arbitration, *supra* note 5, at 21-22. This subject is discussed further in Section IV, *infra*.

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How has Korea moved so far so quickly? The answer lies in a combination of factors. This paper surveys those factors, which include: (1) a solid legal framework and supportive judiciary; (2) a well-established arbitral institution, the Korean Commercial Arbitration Board, and an openness to other arbitral institutions; (3) numerous international arbitrations, due to the highly international nature of the Korean economy and a willingness to resolve disputes by arbitration; (4) the commitment and highly cooperative approach of Korean lawyers and law firms; and (5) the internationalization of Korean society.

This paper concludes with a look at the future of international arbitration in Korea.

II. THE KOREAN LEGAL FRAMEWORK FOR ARBITRATION

A. *The Korean Arbitration Act*

The roots of international arbitration in Korea date back to the 1960's and 1970's. In 1966, Korea adopted its first Arbitration Act and established a commercial arbitration committee as a section of the Korea Chamber of Commerce and Industry.⁸ That arbitration committee became a separate legal entity, the Korean Commercial Arbitration Board (KCAB), in 1970.⁹ In 1973, Korea ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).¹⁰

In 1999, Korea made comprehensive amendments to its Arbitration Act, so as to adopt the United Nations Commission on International Trade Law

8. Byung-Chol Yoon, Grant L. Kim & Chul-Won Lee, *Arbitration in Korea*, in INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA 263 (2013) [hereinafter *Arbitration in Korea*].

9. *Id.*

10. *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Apr. 16, 2015).

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(UNCITRAL) Model Law on International Commercial Arbitration of 1985 (1985 Model Law), with a few modifications.¹¹ The Korean legislature explained that the purpose of these amendments was to promote international trade and international commercial arbitration by adopting international arbitration standards, minimizing domestic court interference, and facilitating enforcement of arbitral awards.¹²

Similar to the 1985 Model Law, the Korean Arbitration Act generally applies only to arbitrations in Korea.¹³ The only provisions that apply to arbitrations outside of Korea are those concerning interim measures by a court, staying court litigation of a dispute subject to arbitration, and recognition and enforcement of arbitral awards.¹⁴

Unlike the 1985 Model Law, however, the Korean Arbitration Act applies not only to "international" arbitrations involving parties from different countries, but also to arbitrations between Korean parties.¹⁵ As a result, Korean court decisions that concern a domestic arbitration may be relevant to international arbitrations as well. Also, a foreign company whose Korean subsidiary enters into a contract with another Korean company need not take special measures to ensure that there is at least one "foreign" party to the contract, because the procedures for enforcing domestic arbitral

11. BKL Korea Arbitration, *supra* note 5, at 17. Korean Arbitration Act (Act No. 1767 of March 16, 1966, as amended up to Act No. 10207 of March 31, 2010) [S. Kor.], *available at* <http://www.wipo.int/wipolex/en/details.jsp?id=7143>; UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 40/72, art. 1, U.N. Doc. A/40/17 (July 7, 2006) [hereinafter 1985 Model Law], *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

12. Arbitration in Korea, *supra* note 8, at 264.

13. *See* Korean Arbitration Act, *supra* note 11, art. 2; 1985 Model Law, *supra* note 11, art. 1.

14. Korean Arbitration Act, *supra* note 11, arts. 9, 10, 37 & 39; 1985 Model Law, *supra* note 11, arts. 8, 9, 35 & 36.

15. Korean Arbitration Act, *supra* note 11, art. 2. In contrast, Article 1 of the 1985 Model Law applies only to "international" commercial arbitrations, meaning that the parties are based in different countries, or the place of arbitration, the place where substantial obligations are to be performed, or the place most closely connected with the dispute is in a different country. 1985 Model Law, *supra* note 11, art. 1.

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awards are similar to those for enforcing a foreign award under the New York Convention.¹⁶

While the Korean Arbitration Act is similar to the 1985 Model Law, it differs in several respects. For example, in contrast to the 1985 Model Law (but similar to the 2006 Model Law), the Korean Arbitration Act authorizes immediate court review of an Arbitral Tribunal's preliminary ruling that the Tribunal has jurisdiction over the arbitration.¹⁷ The Tribunal may continue the arbitration while court review is pending, but once the court issues its decision, that ruling is final and unappealable.¹⁸ Judicial review applies only to a finding that arbitral jurisdiction exists, and not to a finding of no jurisdiction.¹⁹ Thus, the Korean Supreme Court held that Korean courts lacked authority to set aside an arbitral award that dismissed an arbitration for lack of jurisdiction because this was not a ruling on the merits of the arbitration.²⁰

Another difference is that the Korean Arbitration Act does not include Article 34(4) of the 1985 Model Law, which authorizes a court to suspend a proceeding to set aside an arbitral award so that the Arbitral Tribunal can resume the arbitration or take other action that may eliminate the grounds for challenging the award. Korean courts, however, have inherent authority to stay proceedings. Moreover, in contrast to the Model Law, Article 34(2) of the Arbitration Act authorizes a party to ask the Tribunal to issue an additional award on claims that were presented but were omitted from the award, unless otherwise agreed by the parties.²¹

16. *See infra* Part B. It should be noted that in some other countries, such as China, the grounds for challenging a domestic arbitral award are much broader than those for challenging a foreign arbitral award. Weixia Gu, *Arbitration in China*, INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA 115-18 (2013).

17. Korean Arbitration Act, *supra* note 11, art. 17.

18. *Id.*

19. *Id.*

20. Supreme Court [S. Ct.], 2003Da70249, 70256, Oct. 14, 2004 (S. Kor.).

21. Korean Arbitration Act, *supra* note 11, art. 34(2).

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Article 27(3) of the Korean Arbitration Act allows parties to challenge an expert appointed by the Arbitral Tribunal on the same grounds that apply to an arbitrator, such as lack of impartiality or independence.²² The 1985 Model Law authorizes challenges to arbitrators, but does not expressly authorize challenges to experts.²³

Finally, in contrast to the 1985 Model Law, the Korean Arbitration Act provides slightly different procedures for enforcing arbitral awards, depending on whether the award was made in or outside of Korea, as well as whether the New York Convention applies.²⁴ Under Article 36 of the Korean Arbitration Act, a "domestic" award is an award "made in the territory of the Republic of Korea," which appears to include any arbitration whose seat is Korea, even if one or all of the parties are from other countries.²⁵ Under Article 39, a "foreign" arbitral award involves an arbitration whose seat is outside of Korea.²⁶

The procedure for enforcing domestic awards is very similar to the 1985 Model Law. A Korean court should enforce a domestic award, and cannot set it aside unless one of the following grounds apply: (1) invalidity of the arbitration agreement or lack of capacity of a party to the agreement; (2) lack of proper notice to a party or inability of a party to present its case; (3) an award that goes beyond the scope of the submission to arbitration; (4) improper composition of the Arbitral Tribunal; (5) the dispute cannot be resolved by arbitration under the law of Korea; or (6) enforcement of the award would be contrary to Korean public policy.²⁷ Unlike the 1985 Model Law, however, the Korean Arbitration Act does not expressly state that enforcement may be refused on the ground that the award has not yet

22. *Id.* art. 27(3).

23. *See* 1985 Model Law, *supra* note 11, art. 12 (authorizing challenge of arbitrator but not mentioning experts).

24. Korean Arbitration Act, *supra* note 11, arts. 36 & 39.

25. *Id.* art. 36.

26. *Id.* art. 39.

27. *Id.* arts. 36 & 38; 1985 Model Law, *supra* note 11, arts. 34 & 35.

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become binding or has been set aside by another court.²⁸ The Korean Arbitration Act also added a new provision stating that an arbitral award “shall have the same effect on the parties as the final and conclusive judgment of the court.”²⁹

Similar to the 1985 Model Law, the procedure for setting aside an arbitral award applies only to domestic awards made in Korea, and not to foreign awards made in other countries.³⁰ Thus, the Korean Supreme Court held that Korean courts lack jurisdiction to set aside an award from an arbitration in Hong Kong.³¹ The petitioner argued that Korean courts may set aside a foreign award that applies Korean substantive law because the New York Convention allows enforcement to be refused if the award has been set aside by a court of the country “under the law of which” the award was made.³² The Court rejected this argument, ruling that the law “under which” the award was made is the law of the seat of arbitration and not the substantive law of the contract.³³

Enforcement of a foreign arbitral award depends on whether the award is subject to the New York Convention.³⁴ Korea ratified the New York Convention subject to the “reciprocity” and “commercial” reservations, so the New York Convention applies if the award is made in a country that is a party to the New York Convention and concerns a dispute that arises from a “commercial” relationship.³⁵ If the New York Convention applies, the

28. Compare Korean Arbitration Act, *supra* note 11, arts. 36(2) & 38, with 1985 Model Law, *supra* note 11, art. 36(1)(a)(v).

29. Korean Arbitration Act, *supra* note 11, art. 35.

30. *Id.* arts. 2(1) & 36; 1985 Model Law, *supra* note 11, arts. 1(2) & 34.

31. Supreme Court [S. Ct.], 2001Da77840, Feb. 26, 2003 (S. Kor.).

32. *Id.*

33. *Id.*; see Arbitration in Korea, *supra* note 8, at 295.

34. Korean Arbitration Act, *supra* note 11, art. 39.

35. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I, June 10, 1958, 330 U.N.T.S. 38 (authorizing these reservations), available at <http://www.newyorkconvention.org/texts>; Status: *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNCITRAL,

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Korean Arbitration Act simply states the award should be enforced in accordance with that Convention.³⁶ The grounds for declining enforcement of a foreign arbitral award under the New York Convention are similar to those for declining enforcement of a domestic arbitral award under the Korean Arbitration Act, but the New York Convention also authorizes enforcement to be refused if the award has not yet become binding or has been set aside by a competent authority of the country where the award was made.³⁷

In contrast, if the New York Convention does not apply, foreign arbitral awards are enforced under the procedures that apply to foreign court judgments.³⁸ While some of the grounds for denying enforcement of foreign court judgments are similar to those in the New York Convention, enforcement can also be refused due to lack of "mutual guarantee" (i.e., no reciprocity in enforcement) between Korea and the country in which the award was made.³⁹

Korea is currently considering significant amendments to its Arbitration Act based on the 2006 UNCITRAL Model Law.⁴⁰ Possible revisions include provisions concerning enforcement of interim measures adopted by an Arbitral Tribunal and emergency arbitrator proceedings.⁴¹

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Apr. 16, 2015) (identifying the Korean reservations).

36. Korean Arbitration Act, *supra* note 11, art. 39(1).

37. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V.1(e), June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention], *available at* <http://www.newyorkconvention.org/texts>.

38. Korean Arbitration Act, *supra* note 11, art. 39(2); *see* Minsa sosong beob [Korean Civil Procedure Act], Act No. 6626, Jan. 26, 2002, art. 217 (S. Kor.); Minsa jibhaeng beob [Civil Execution Act], Act No. 6627, Jan. 26, 2002, art. 26(1), 27 (S. Kor.).

39. Arbitration in Korea, *supra* note 8, at 296.

40. K&C Korea Arbitration, *supra* note 5, at 20.

41. *Id.*

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B. Korean Court Enforcement of Arbitral Awards

The Korean legal system is based on the German civil law system.⁴² As a result, court decisions do not have binding stare decisis effect.⁴³ Nevertheless, Korean courts give considerable weight to prior court decisions, especially those of the Korean Supreme Court.⁴⁴ The Korean Supreme Court has generally taken an "arbitration friendly" approach.⁴⁵

For example, the Korean Supreme Court has repeatedly held that in view of the need for foreseeability and stability in international business transactions, the "public policy" exception to enforcement under the New York Convention should be narrowly interpreted to protect only the most basic moral beliefs and social order of the enforcing country.⁴⁶ Based on this principle, the Korean Supreme Court held that awarding interest based on United States rather than English rates did not violate Korean public policy, even though the contract was governed by English law.⁴⁷ The Court has also held that it was not contrary to Korean public policy to apply a Dutch statute of limitations that was longer than the mandatory Korean limitations period.⁴⁸

Similarly, the Korean Supreme Court held that courts should not reexamine "the whole case as to whether the foreign judgment is in substance right or wrong under the pretext of reviewing whether the judgment was procured through fraudulent means"; rather, enforcement may be denied only when "the defendant was unable to allege grounds for fraud . . . in the court of the country where the judgment was issued, and when there

42. BKL Korea Arbitration, *supra* note 5, at 37.

43. *Id.* at 39.

44. *Id.*

45. *See generally id.* at 255-324.

46. Supreme Court [S. Ct.], 89Daka20252, Apr. 10, 1990 (S. Kor.).

47. *Id.*; Arbitration in Korea, *supra* note 8, at 297.

48. Supreme Court [S. Ct.], 93Da53054, Feb. 14, 1995 (S. Kor.); *see* Arbitration in Korea, *supra* note 8, at 298.

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is a high degree of proof such as a judgment that finds one guilty of fraud . . .⁴⁹ In a later case, the Korean Supreme Court held that the challenging party must (1) establish fraud in obtaining an award with clear and convincing evidence; (2) prove that it was unable to defend itself against fraudulent conduct that it could not have discovered with reasonable diligence; and (3) prove that the fraudulent conduct involved a material issue in the arbitration.⁵⁰

The Korean Supreme Court has also interpreted "public policy" narrowly in the context of domestic (rather than foreign) arbitral awards. For example, the Court held that it was not a violation of the public policy for an arbitral award to interpret the law and the contract differently from a prior decision of the Korean Supreme Court.⁵¹

Consistent with these Korean Supreme Court decisions, lower Korean courts have generally applied the public policy exception narrowly. For example, the Seoul District Court held that an arbitral award that required a breaching shareholder to sell its stake in a large company was not contrary to Korean law, but even if it was, it could not be set aside unless it contravened a fundamental principle or value of the Korean domestic legal order.⁵² Similarly, the Seoul High Court rejected a Korean party's argument that an award from an arbitration under California law was contrary to Korean public policy because the contractual mandatory sales quota was inconsistent with Korean competition law.⁵³ The court held that even if the award was

49. Supreme Court [S. Ct.], 2002Da74213, Oct. 28, 2004 (S. Kor.); *see* Arbitration in Korea, *supra* note 8, at 298.

50. Supreme Court [S. Ct.], 2006Da20290, May 28, 2009 (S. Kor.); *see* Arbitration in Korea, *supra* note 8, at 298.

51. Supreme Court [S. Ct.], 2007Da73918, June 24, 2010 (S. Kor.).

52. Seoul District Court [Dist. Ct.], 2009Gahap136849, July 9, 2010 (S. Kor.). The arbitral award required the breaching shareholder to sell its stake in a large Korean company. Arbitration in Korea, *supra* note 8, at 299 n.68. The parties settled after the district court issued its decision, so there is no appellate decision. *Id.*

53. Seoul High Court [Seoul High Ct.], 94Na11868, Mar. 14, 1995 (S. Kor.).

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not consistent with Korean law, this would be insufficient to meet the public policy exception.⁵⁴

While arbitral awards are generally enforced, two recent lower court decisions have been the subject of considerable controversy.⁵⁵ The first case arose from a contract between a European data encryption software provider, NDS Limited, and a state-invested Korean digital satellite broadcaster, KT Skylife.⁵⁶ NDS sought a declaration that the contract had been terminated and an order requiring KT Skylife to comply with Article 14.2 of the contract, which stated that upon termination of the contract, KT Skylife "shall immediately cease using" the NDS software and related materials and "shall return the original and all copies" of the software and related materials to NDS.⁵⁷ A tribunal of three well-known arbitrators issued an award in favor of NDS, declaring that the contract was terminated and ordering KT Skylife to comply with Article 14.2.⁵⁸

In January 2013, the Seoul Southern District Court declined to enforce the arbitral award in favor of NDS on the ground that the award did not describe the Article 14.2 obligation in sufficient detail to allow an administrative official to determine, without referring to other documents, the precise materials that KT Skylife was required to return and to cease using.⁵⁹ The court held that because Article 35 of the Korean Arbitration Act states that arbitral awards "shall have the same effect on the parties as the final and conclusive judgment of the court," an arbitral award cannot be enforced unless it has the same level of specificity that is required for a

54. *Id.*

55. See Tony Dymond & Thomas Walsh, *South Korean Courts Twice Refuse to Enforce International Arbitration Awards*, LEXOLOGY (Sept. 23, 2013), <http://www.lexology.com/library/detail.aspx?g=f277238f-3f0f-4175-a972-cbe26b45ff5f>.

56. Benjamin Hughes, *Enforcement and Execution of Arbitral Awards in Korea: A Cautionary Tale*, *ASIAN DISP. REV.*, April 2014, at 95.

57. *Id.*

58. *Id.*

59. Seoul Southern District Court, 2012 Gahap 15979, Jan. 31, 2013 (S. Kor.).

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Korean court judgment.⁶⁰ This ruling was criticized as imposing a new ground for refusing enforcement that is not part of the applicable law.⁶¹

In January 2014, the Seoul High Court partially reversed the district court ruling.⁶² In a Solomon-like decision, the High Court agreed with the district court that the arbitral award “lacks the level of specificity for compulsory execution.”⁶³ At the same time, the High Court held that lack of specificity was not a ground for refusing to issue an enforcement judgment under Articles 36 and 38 of the Korean Arbitration Act.⁶⁴ Accordingly, the High Court granted enforcement of the award, explaining even if the award could not be executed in practice, the enforcement judgment would show the court’s recognition of the validity of the award and thus may facilitate resolution of the dispute by encouraging the parties to comply voluntarily with the award.⁶⁵ In fact, this dispute settled after the High Court issued its enforcement judgment, so the judgment appears to have had its desired effect.⁶⁶

The second recent lower court decision arose from an arbitral award against the state-owned Korean Resolution and Collection Corporation (KRCC) in favor of a joint venture investment company backed by Lone Star, a U.S. private equity fund.⁶⁷ A tribunal of three eminent arbitrators rejected a jurisdictional challenge and issued an award for the joint venture company.⁶⁸ The Seoul Central District Court, however, denied enforcement as contrary to Korean public policy on the ground that the award was

60. *Id.*; see Korean Arbitration Act, *supra* note 11, art. 35.

61. Hughes, *supra* note 56, at 96.

62. Seoul High Court [High Ct.], 2013Na13506, Jan. 17, 2014 (S. Kor.).

63. *Id.*

64. *Id.*

65. *Id.*

66. Author’s communication with counsel for one of the parties.

67. See Dymond & Walsh, *supra* note 55.

68. *Id.*

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inconsistent with Korean law on asset-based securitization.⁶⁹ On appeal, the Seoul High Court denied enforcement on a different ground: that under Japanese law (the law of the place of arbitration), there was no valid agreement to arbitrate because the Commitment Letter lacked an arbitration clause.⁷⁰

These recent decisions do not seem to reflect a general trend against enforcing arbitral awards. While the Seoul District Court declined to enforce the arbitral award against KT Skylife, the Seoul High Court reversed and entered an enforcement judgment.⁷¹ The High Court declined to enforce the award against the joint venture company formed by Lone Star and the KRCC, but relied on the lack of an arbitration agreement under Japanese law, instead of the public policy exception cited by the district court.⁷² The High Court decision raises some concerns, but is less troubling than the District Court's ruling that an award can be set aside as contrary to substantive Korean law since that ruling suggested that courts can second-guess the merits of the arbitral award. Further, the High Court judgment is currently on appeal to the Korean Supreme Court, so the last word has not yet been spoken.

Moreover, these two lower court decisions should be viewed in the context of the Korean Supreme Court's jurisprudence over the past several decades. The Korean Supreme Court has generally enforced arbitral awards and has articulated principles that are consistent with the fundamental principle that arbitral awards should be enforced unless one of the narrow grounds for declining enforcement is met.⁷³ Thus, the two recent lower court decisions do not seem to reflect a general trend and are at most an

69. Seoul District Court [District Ct.], 2011Gahap82815, Sept. 27, 2012 (S. Kor.).

70. Seoul High Court [High Ct.], 2012Na88930, Aug. 16, 2013 (S. Kor.).

71. Seoul High Court [High Ct.], 2013Na13506, Jan. 17, 2014 (S. Kor.).

72. *Id.*

73. *Supra* notes 46-53 and accompanying text.

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exception to the general rule that most arbitral awards are enforced by Korean courts.

III. THE KOREAN COMMERCIAL ARBITRATION BOARD AND OTHER ARBITRAL INSTITUTIONS

A. *The KCAB*

In addition to a solid legal framework for arbitration, Korea has a well-established arbitral institution, the Korean Commercial Arbitration Board (KCAB).⁷⁴ Established in 1970, the KCAB administers both domestic and international arbitrations and has multiple hearing rooms in the World Trade Tower in the fashionable "South-of-the-River" (Gangnam) part of Seoul.⁷⁵

The KCAB receives several hundred new arbitrations each year, including a substantial number of international cases. For example, between 2011 and 2013, more than 1,000 arbitrations were filed with the KCAB, of which 239 were international in character.⁷⁶ The total claim amount for both domestic and international arbitrations was over US \$2.9 billion, with international arbitrations accounting for about one-third (\$960 million) of this total.⁷⁷

The KCAB also administers mediations. Between 2011 and 2013, the KCAB administered over 2,700 mediations, of which 524 involved international disputes.⁷⁸ This is more than double the number of arbitrations during that period. However, the mediations involved much smaller claim

74. For an overview of the KCAB and its rules and practices, see BKL Korea Arbitration, *supra* note 5, at 164-205, and Arbitration in Korea, *supra* note 8, at 283-90.

75. The KCAB website describes the KCAB hearing facilities and provides other general information. See KCAB, www.kcab.or.kr.

76. These numbers are based on data available from the Korean language version of the KCAB website. KCAB, www.kcab.or.kr (last visited Apr. 16, 2015).

77. *Id.*

78. *Id.*

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amounts than the arbitrations. The 2,700 mediations from 2011 to 2013 involved a total claim amount of \$87 million, in contrast to the \$2.9 billion claimed in the 1,000 arbitrations filed during this period.⁷⁹ This presumably reflects the fact that smaller disputes tend to be easier to settle.

More importantly, the KCAB has amended its arbitration rules to keep up with international standards, including amendments effective in 1989, 1993, 1996, 2000, 2004, 2008, and 2011, which generally adopted in the preceding year.⁸⁰ Particularly significant was the KCAB's creation of an entirely new set of International Arbitration Rules in 2007, which were better suited for international disputes.⁸¹ The original version of the International Rules were rarely used, however, because they applied only if they were expressly mentioned in the arbitration agreement.⁸²

To remedy this problem, the KCAB amended its International Rules in 2011 so that they apply automatically if (a) the parties agree to KCAB arbitration; (b) the dispute is an International Arbitration; and (c) the parties entered into the arbitration agreement after the new International Rules became effective on September 1, 2011.⁸³ "International Arbitration" means that (1) the principal place of business or residence of at least one party was outside of Korea when the arbitration agreement was entered; or (2) the arbitration agreement specifies a place of arbitration outside of Korea.⁸⁴

The KCAB's International Rules are more appropriate for international disputes than the old version of the KCAB rules, which are now called the

79. *Id.*

80. BKL Korea Arbitration, *supra* note 5, at 165.

81. *Id.* at 19.

82. Arbitration in Korea, *supra* note 8, at 283-84.

83. KCAB International Arbitration Rules, art. 3, Supplementary Provisions, KOREAN COMMERCIAL ARBITRATION BD. (June 29, 2011), http://www.kcab.or.kr/jsp/kcab_eng/law/law_02_ex.jsp (containing both the 2011 and the 2007 KCAB International Arbitration Rules).

84. *Id.* art. 3.

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"Domestic Arbitration Rules."⁸⁵ For example, the old rules stated that the arbitration would be conducted in Korean, unless the parties agreed otherwise.⁸⁶ In contrast, the International Rules provide that in the absence of agreement by the parties, "the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract."⁸⁷

The International Rules also made significant changes concerning arbitrator selection and compensation. Under the old rules, the "list method" was the default method of selecting arbitrators, meaning that the KCAB would provide a list of potential arbitrators to the parties, who would rank the candidates in order of preference.⁸⁸ The problem with this method was that the KCAB list was generally limited to arbitrators who resided in Korea.⁸⁹ If a foreign party requested that the Chair of the Arbitral Tribunal be of neutral nationality, the KCAB would appoint a neutral Chair who resided in Korea, but the other two arbitrators were typically Korean nationals.⁹⁰

A related problem with the old KCAB rules was that the compensation paid to arbitrators was extremely low.⁹¹ This was a significant problem in large international disputes because overseas arbitrators were reluctant to serve as KCAB arbitrators, which resulted in the KCAB rarely appointing well-known international arbitrators based outside of Korea.⁹²

85. Arbitration in Korea, *supra* note 8, at 284. For general comments on the new International Rules, see BKL Korea Arbitration, *supra* note 5, at 19-21, 165-69.

86. Arbitration in Korea, *supra* note 8, at 286-87.

87. KCAB International Arbitration Rules, *supra* note 83, art. 24.

88. Arbitration in Korea, *supra* note 8, at 285-86.

89. *Id.*

90. *Id.*

91. *Id.* at 286.

92. *Id.* The author served as lead counsel in a KCAB arbitration under the old rules in 2004, where the parties agreed to pay a higher fee to an Arbitral Tribunal that included distinguished overseas arbitrators. The author is aware of other similar cases, but they tended to be exceptional,

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The International Rules addressed these problems by creating a new fee schedule that is consistent with international standards.⁹³ In addition, the new rules changed the default method of selecting three arbitrators from the list method to the "party-nomination" method, i.e., each party nominates one arbitrator, and those two arbitrators then nominate the Chair.⁹⁴ These changes increase the likelihood that the Arbitral Tribunal will include experienced international arbitrators.

In sum, the KCAB International Arbitral Rules are better suited for international disputes than the older KCAB rules and apply automatically to arbitrations involving a foreign party or place of arbitration, provided that the arbitration agreement was entered into after September 1, 2011.

B. Non-KCAB Arbitrations

In addition to the substantial number of international arbitrations administered by the KCAB, Korean parties are frequently involved in arbitrations administered by major arbitral institutions such as the International Chamber of Commerce (ICC), International Centre for Dispute Resolution (ICDR), and more recently, regional institutions such as the Singapore International Arbitration Centre (SIAC) and Hong Kong International Arbitration Centre (HKIAC).⁹⁵

since once a dispute arises, it is often difficult for the parties to agree on issues such as arbitrator compensation.

93. KCAB International Arbitration Rules, *supra* note 83, app. 2.

94. *Id.* art. 12(2).

95. For information on ICC and KCAB cases, see BKL Korea Arbitration, *supra* note 5, at 3-7. Complete information about arbitrations involving Korean parties is difficult to obtain because arbitrations are generally confidential and many arbitral institutions do not publish such information. However, the author has served as counsel in fifteen ICC, ICDR, and KCAB arbitrations involving Korean parties, and is aware of numerous other arbitrations involving Korean parties, including cases administered by SIAC, HKIAC, and other institutions.

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For example, Korea is one of the largest users of ICC arbitration in Asia.⁹⁶ 266 Korean parties appeared in ICC arbitrations filed between 2004 and 2013. This is the third largest number in Asia, after India (480) and China (467 with Hong Kong and Macau, and 299 without). In contrast, 205 Japanese parties appeared in ICC arbitrations during the same period, even though Japan has a much larger economy than Korea.

While the ICC does not publish information about the disputed amount in cases involving parties of a specific nationality, anecdotal evidence suggests that the total claim amount at issue in these non-KCAB arbitrations is quite large. As one leading Korean law firm has noted, arbitrations involving Korea “have significantly outpaced disputes associated with any other Asian jurisdiction,” reflecting “the fact that ICC arbitrations involving Korean parties tend to be high value and complex.”⁹⁷ In 2010, the Global Arbitration Review selected a multi-billion dollar dispute involving a Korean company as the “Arbitration Win of the Year.”⁹⁸

96. The statistics in this paragraph reflect the author’s aggregation of data from annual statistical reports for 2004 to 2014, published in the ICC Bulletin. The numbers refer to the number of parties of a particular nationality, not the number of arbitrations in which at least one party is of a particular nationality. Some cases involve a large number of parties. For example, the author served as lead counsel in an ICC arbitration involving twenty Korean parties on one side, which made it appear as if Korea suddenly had many more arbitrations that year. Thus, aggregate data over multiple years conveys a more accurate picture.

97. BKL Korea Arbitration, *supra* note 5, at 5. This is consistent with the author’s experience, which includes numerous arbitrations involving Korean parties with claims in the hundreds of millions or tens of millions of dollars. The author also served as counsel in a KCAB arbitration with a claim amount of \$40 million, but KCAB statistics on its website indicate that most cases involve considerably smaller claims.

98. *Id.* at xiii.

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C. Reasons for the Large Number of Korean International Arbitrations

Why does Korea generate more international arbitrations than Japan, and almost as many as China and India? Two key factors seem to be at work.

First, as a relatively small country with virtually no natural resources, Korea depends heavily on international trade and investment.⁹⁹ Historically, most Korean arbitrations arose from inbound investment into Korea, including disputes arising from large M&A deals following the Asian economic crisis that began in 1997.¹⁰⁰ At the same time, outbound trade and investment has increased steadily, including not only overseas sales of consumer goods, but also exports of industrial products and participation in overseas construction projects.¹⁰¹ The highly international character of the Korean economy naturally results in international disputes, some of which are resolved by international arbitration.

Second, while Korean companies share the traditional East Asian aversion to open conflict, many Korean companies are prepared to engage in international arbitration, if necessary.¹⁰² Indeed, once a formal legal conflict begins, it can become difficult to settle the dispute.¹⁰³

Japan presents an instructive contrast to Korea. Despite having a much larger economy than Korea, Japan generates fewer international arbitrations, as evidenced by ICC statistics.¹⁰⁴ While the precise explanation is unclear, one likely reason is that a larger percentage of the Japanese economy is domestic rather than international in nature, when compared to the highly international Korean economy. Second, even if an international dispute

99. K&C Korea Arbitration, *supra* note 5, at 18.

100. BKL Korea Arbitration, *supra* note 5, at 8, 18-19.

101. *Id.*; K&C Korea Arbitration, *supra* note 5, at 22.

102. K&C Korea Arbitration, *supra* note 5, at 8.

103. *Id.* at 9.

104. *Id.* at 4.

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arises, Japanese companies are more averse to conflict than Korean companies and are more likely to settle the dispute.¹⁰⁵

IV. THE DEDICATED, COOPERATIVE APPROACH OF KOREAN LAWYERS AND THE INTERNATIONALIZATION OF KOREA

The international arbitration community is often described as a tight-knit club that is difficult for outsiders to penetrate.¹⁰⁶ Yet, Korean arbitration practitioners and law firms have quickly become members of the club, holding important positions in major international arbitral organizations such as the International Council for Commercial Arbitration (ICCA), ICC, London Court of International Arbitration (LCIA), and SIAC.¹⁰⁷ Koreans are serving as arbitrators not only in cases in Korea, but also in disputes that have no connection with Korea.¹⁰⁸ Korea hosts multiple international arbitration conferences each year, which attract arbitration specialists from Europe, North America, Asia, and other regions.¹⁰⁹ And Korea recently opened a new purpose-built arbitration facility, the Seoul International Dispute Resolution Center, which occupies prime real estate in the traditional "North-of-the-River" heart of Seoul.¹¹⁰

105. BKL Korea Arbitration, *supra* note 5, at 8.

106. *See, e.g.*, Cecilia Olivet & Pia Eberhardt, *Profiting from Injustice*, TNI (Nov. 27, 2013), <http://www.tni.org/briefing/profitting-injustice>.

107. For example, Kap-you (Kevin) Kim has held positions with ICCA, the ICC, and LCIA. BKL Korea Arbitration, *supra* note 5, at xiii. Byung-Chol (B.C.) Yoon has held positions with the ICC and SIAC. K&C Korea Arbitration, *supra* note 5, at 23.

108. BKL Korea Arbitration, *supra* note 5, at 8, 28. The author has spoken with Korean nationals who are serving as arbitrators in disputes that have no connection with Korea and involve countries such as Malaysia and Venezuela.

109. *Id.* at 29-30. The author recalls that international arbitration conferences in Korea used to be infrequent, occurring only once every few years. Yet, when he spoke at a conference in Seoul in December 2012, he was informed that there had been several similar events in the preceding one month.

110. *About Seoul IDRC*, SEOUL INT'L DISP. RESOL. CENTER, <http://www.sidrc.org/about/01.php> (last visited Apr. 16, 2015); *see* K&C Korea Arbitration, *supra* note 5, at 18 n.1. The Seoul IDRC's

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Korea's pro-arbitration legal framework and judiciary, and the large number of Korea-related arbitrations are important factors in Korea's Bali Bali growth in international arbitration. Those factors alone, however, cannot explain the sudden prominence that Korea has attained. Rather, there are at least two additional factors.

The first factor is that Korean arbitration practitioners, law firms, and arbitral organizations have dedicated themselves wholeheartedly to raising Korea's profile in the international arbitration community during the past decade.¹¹¹ For example, in 2006, a newly formed group called the Korea Council for International Arbitration (KOCIA) organized a major conference in Seoul, with support from the Korean Commercial Arbitration Board, the ICC, and other organizations.¹¹² Korean law firms have jumped at this opportunity, forming or expanding arbitration teams, recruiting arbitration specialists from overseas, and sending their lawyers to conferences around the world.¹¹³ Korean law schools and students followed suit, with some of the most talented students aspiring to careers in international arbitration.¹¹⁴

The second factor is the internationalization of Korean society due to an influx of Koreans who have worked, studied, or lived overseas. International arbitration requires high proficiency in English, the *lingua franca* of most arbitrations. Because the structure of the Korean language is completely different from English, it is very difficult for Koreans to become fluent in English without living overseas for an extended time. Recognizing

hearing facilities north of the Han River nicely complement the KCAB's recently upgraded facilities south of the Han River. See BKL Korea Arbitration, *supra* note 5, at 31.

111. See BKL Korea Arbitration, *supra* note 5, at xiv, 1-2, 28-32; K&C Korea Arbitration, *supra* note 5, at 21-22.

112. For the brochure of the conference, see *Arbitration News From Korea*, http://www.kcab.or.kr/jsp/kcab_kor/upload/brochure_en_01.pdf. The author presented a paper at that conference, which was published in revised form as *East Asian Cultural Influences*, in *ASIAN LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION*.

113. See BKL Korea Arbitration, *supra* note 5, at xix, 29; K&C Korea Arbitration, *supra* note 5, at 21-22.

114. See BKL Korea Arbitration, *supra* note 5, at 32.

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this fact, Koreans often study overseas not only at an undergraduate or graduate level, but even at a high school or grade school level.¹¹⁵ As a result, the level of English proficiency in Korea has increased dramatically, allowing many Korean citizens to move seamlessly between two or more languages and cultures.

In addition to the return of Korean citizens who have worked or studied overseas, Korea has benefited from an influx of Koreans who are citizens of other countries. This influx of overseas Koreans who are fluent in other languages and cultures has increased the diversity and international character of Korea. Korean law firms, for example, now include overseas Korean lawyers not only from the United States, but from other countries as well. This internationalization of Korean society has put Korean lawyers and law firms in a better position to compete in international arbitration.

A. Korea as a New Hub for International Arbitration in Asia

As evidenced by the recent opening of the Seoul International Dispute Resolution Center, Korea aspires to become a regional hub for international arbitration, including disputes that do not involve Korea. How likely is Korea to achieve this goal?

As discussed above, Korea has a solid legal framework for international arbitration, a generally arbitration-friendly judiciary, and a rapidly growing community of arbitration specialists. In addition, Korea is conveniently located between China and Japan, within several hours of all major cities in Northeast Asia, and within four to eight hours of major cities in Southeast Asia. Korea also has an excellent international airport as well as first-class hotels and other support facilities. All of these factors suggest that Korea has a strong potential to be a hub for international arbitration.¹¹⁶

115. *Id.* at 32 n.68.

116. *See* BKL Korea Arbitration, *supra* note 5, at 30-31.

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On the other hand, while English proficiency has increased, English is not an official language of Korea. English is an official language of Hong Kong and Singapore, which are already well-established arbitration centers with much deeper benches of arbitration specialists.¹¹⁷ Accordingly, parties from North America or Europe seem unlikely to arbitrate disputes with Asian parties in Korea, instead of in Hong Kong or Singapore.

For disputes among parties from Asia, however, Korea is a natural venue. Seoul is, for example, a far more logical place of arbitration than London or New York for a dispute between parties from China and Japan.

Becoming a hub for international arbitration requires considerable time. Arbitrations arise from contracts that are often signed several years earlier and that usually specify the place of the arbitration. Thus, Korea will not be chosen as a venue unless the parties and their counsel felt, at the time the underlying contract was signed, that Korea already had a good reputation as a venue for international arbitration. Further, it is difficult to obtain this reputation unless a substantial number of arbitrations have already taken place.

Despite these issues, Korea already seems to be on the road to becoming known as one of the most active international arbitration communities in Asia, which bodes well for the future development of Korea as a hub for international arbitration.

117. See *id.* at 6, 31; Justin D'Agostino, *Arbitration in Asia at Full Gallop*, KLUWER ARBITRATION BLOG, (Feb. 10, 2014), <http://kluwarbitrationblog.com/blog/2014/02/10/arbitration-in-asia-at-full-gallop/>.

