Articles

Changing Scene in International Arbitration and Notable Developments in Korea

By Hi-Taek Shin

I. Changing Scene in International Arbitration

In recent years, there has been a notable boost of major cities in Asia as a hub of international arbitration. According to the "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration"[1], Singapore and Hong Kong ranked as the third and fourth most popular seats respectively and ranked as the first and second place which have most improved over the past five years. The survey co-conducted by the Seoul International Dispute Resolution Center (Seoul IDRC) and the Korean Commercial Arbitration Board (KCAB) in 2016 showed similar result. The results of these two surveys indicate that the users are diversifying their choice of arbitration seats from what used to be considered as traditional seats in international arbitration such as Paris, London, Geneva or New York.

This trend of diversification of arbitration seats, especially to the Asia Pacific region, reflects the following factors: (i) first, the growing number of Asian parties involved in international arbitration; (ii) second, the enhanced understanding of the importance of arbitration clause by transaction counsels and in-house counsels of Asian parties, (iii) third, closely related to the second factor, is the enhanced awareness of, and exercise by, Asian parties of their bargaining leverage in the negotiation of the dispute resolution clauses in international business contracts; and (iv) finally, the availability of diverse options to the business parties in disputes in terms of the choice of arbitral institutions, arbitral rules, seats of arbitration and hearing venues.

The significant surge in the number of Asia parties in international arbitration is clearly demonstrated in the annual case statistics of many arbitral institutions in recent years and points toward the fact that this trend will only intensify in the years to come. For instance, the number of new arbitration cases filed to the Singapore International Arbitration Centre (SIAC) has increased from 90 cases in 2006 to 343 cases in 2016, almost four times increase during the last ten year period[2]. In 2016, the top 10 users of SIAC arbitration was led by India with 153 cases, with China

1) *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, Queen Mary University of London(QMUL) & School of International Arbitration (SIA)

2) *Singapore International Arbitration Centre (SIAC) Annual Report 2016, p.13*

in the second places with 76 cases, and Korea and Indonesia in the fourth place with 38 cases each. The International Chamber of Commerce (ICC) Report published in 2016 states that "the number of parties from Asia [...] was higher than ever before"[3]. In 2015, 801 cases were filed with ICC Court of International Arbitration which involved a total of 2,283 parties. The parties from Asia and the Pacific amounted to 543 which accounts for 23.8% of the total of 2,283 parties[4].

In response to the growing number of Asian parties as users of international arbitration, reputable international arbitral institutions are actively opening regional offices in Asia. For example, ICC Court of International Arbitration and SIAC have opened offices in Shanghai. ICC is expected to open a case management office in Singapore in addition to its existing case management office in Hong Kong[5]. Also, International Centre for Dispute Resolution (ICDR) and Hong Kong International Arbitration Centre (HKIAC) and SIAC have maintained an office at the premises of Seoul International Dispute Resolution Center (Seoul IDRC). Likewise, Asian arbitral institutions such as SIAC, HKIAC, and Kuala Lumpur Regional Centre for Arbitration (KLRCA) as well as Korean Commercial Arbitration Board (KCAB) have been proactive in their promotional efforts to entice international arbitration cases. Apparently, Asia is becoming an attractive market in international arbitration for arbitral institutions.

With the proliferation of arbitration-related conferences, seminars and training workshops, the level of sophistication of transaction counsels and in-house lawyers on the dispute resolution clauses in international business transactions has substantially increased in recent years. Governing law and dispute resolution clauses were often treated as boilerplate provisions which are disposed at midnight hours shortly before the conclusion of the deal documents. fine differences between the governing rules and the implication of accepting one place as the seat of arbitration as compared to other options were not appropriately appreciated. There was a tendency for the seat of arbitration to usually follow the location of the designated arbitral institution; Hong Kong in the case of HKIAC arbitration, London in the case of LCIA arbitration, and Paris for ICC arbitral cases. Nowadays, we notice a growing trend to designate a seat or a hearing venue different from the location of the designated arbitral institution. ICC delocalized the place of arbitration and some institutions such as SIAC are positively embracing this new trend by delocalizing the default seat of arbitration in its arbitral rules[6]. The IBA Guidelines for Drafting International Arbitration Clauses also provides that "the major arbitral institutions can administer arbitrations around the world, and the arbitral proceedings do not need to take place in the city where the institution is headquartered"[7] and also emphasizes that there are many factors to consider when choosing a seat, such as whether the place of arbitration is a jurisdiction signatory to the New York Convention, its legal arbitral regime and neutrality of the court system, as there are legal consequences to be followed by designating a seat. Such new trend is supported by greater options offered by proactive efforts of governments, cities, arbitral institutions and hearing facility providers to attract international arbitration cases. As a result, the users of international arbitration are now able to choose from

3) 2015 ICC Dispute Resolution Statistics, *ICC Dispute Resolution Bulletin 2016 – Issue 1,* International Chamber of Commerce, p. 10.

4) *Ibid.*

5) http://globalarbitrationreview.com/article/1143672/icc-court-to-open-in-singapore#.WVmeaCV4zK4.mailto

6) ICC Arbitration Rules Art 18, SIAC Arbitration Rules Art 21.

7) IBA Guidelines for Drafting International Arbitration Clauses 2010, p. 12. The publication can be accessed at https://www.ibanet.org/ENews_Archive/IBA_27October_2010_Arbitration_Clauses_Guidelines.aspx

the various combination of options concerning an arbitral institution and rules, the seat of arbitration, and the venue for arbitration hearings to better accommodate the practical and strategical needs of the parties. Users can maximize efficiency and reduce costs by finding the most optimal, custom-tailored option to carry out their own arbitration.

While transaction counsels and in-house counsels has become much more savvy in choosing the right combination of dispute settlement clauses as compared in the past, given the frequency of disputes arising from a variety of cross-border transactions such as agency, distributorship, licensing, joint venture, post M&A transactions, and major infrastructure projects, to name a few, it is of paramount importance for the transaction counsels and in-house counsels to get familiar with core concepts of international arbitration and the options they have. A prominent arbitrator who is an English QC once commented that unless there are legitimate practical concerns for choosing a seat far distant from Seoul, Korean companies should try to optimize the optional elements of an arbitration clause to their best interest, and strongly echoed on the importance of knowing the difference between the seat and hearing venue and utilizing the bargaining leverage in an assertive manner to achieve an optimal feature in dispute resolution clauses.

II. Recent Notable Developments on Arbitration in Korea

According to the 2015 International Arbitration Survey mentioned earlier in this article, the users of international arbitration highlighted three most important factors in choosing the preferred seat of arbitration. Those were (i) neutrality and impartiality of the local legal system, (ii) national arbitration law, and (iii) track record of recognizing and enforcing agreements to arbitrate and arbitral awards. These are top three factors which were categorized as the "formal legal infrastructure". There are many facets to promoting one nation as an arbitration-friendly jurisdiction and the survey results well support that the recent developments in the Korean arbitration regime were indeed in the right direction.

With the changing trends in international arbitration, there have been concerted efforts in Korea to further develop Seoul as a neutral and convenient international arbitration hub. First, the Korean judiciary, which has earned an international reputation as one of the most efficient and cost-effective judiciary, has consistently maintained the pro-arbitration stance. The recent World Bank's Doing Business 2017 results reflect the efficiency of the Korean judiciary, with Korea having ranked the first place in Enforcing Contracts indicator and the fourth in the Ease of Doing Business indicator[8]. The Korean court has a consistently good track record in enforcing arbitral awards, both domestic and foreign. It has usually taken 4-6 months for the winning party to be able to enforce the award before Korean courts as the first instance court typically grants provisional enforcement order.

Moreover, the Korean Supreme Court has a proven record of pro-arbitration attitude. By far no single foreign award has ever been refused enforcement on the reasons of the public policy at the Supreme Court level. There were some instances where the lower courts refused to enforce foreign arbitral awards for public policy reasons, but the Korean Supreme Court has consistently corrected such outlier lower court judgements. In an effort to help the international arbitration community better understand the Korean jurisprudence and practice, Seoul IDRC annually publishes English translations of major Korean court

8) More information available at http://www.doingbusiness.org/rankings

decisions relating to international arbitration.[9)]

Second, the legal framework governing arbitration in Korea has recently been further upgraded to better accommodate the recent trends in international arbitral practices. The Korean Arbitration Act, which adopted the 1985 UNCITRAL Model Law to a very substantial degree, has been amended effective in November 2016. The 2016 amendment to the Korean Arbitration Act closely incorporates major features of the 2006 UNCITRAL Model Law., in particular, the provisions relating to the interim measures. Another major change made in the 2016 amendment is that the enforcement of arbitral award is now done through the court decision process rather than the standard judgment process which is stricter in procedure. This change will expedite the enforcement process.

In line with the changing trends in international arbitration, KCAB has also revised its international arbitration rules, which went into effect in June 2016. The new KCAB international rules introduced Emergency Arbitrator proceedings[10)] to cater the needs for an expedited process, and the rules on multiple-party arbitration.[11)] It also adopted the Secretariat's confirmation process on a party nominated arbitrator, in a manner similar to the ICC Rules[12)]. Moreover, the newly added Code of Ethics for Arbitrators, which has also been in effect since June 2016, will better ensure the integrity of arbitrators, and thereby the neutrality and impartiality of KCAB proceedings.

Other than the legal frameworks, on a practical point, the existence of a dedicated hearing facility seems to have become another decisive factor at least in the Asia Pacific region. Numerous arbitration-related institutions or have been investing in the creating or upgrading hearing facilities. Maxwell Chambers in Singapore will be expanding its facility in next year[13)]; KLRCA has been relocated in the spacious Bangunan Sulaiman in 2014[14)]. The need for dedicated quality facilities for arbitral hearings is also indicated in the aforementioned survey. The same is echoed in the Hearing Centres Survey conducted by the Global Arbitration Review in 2016[15)], which reveals that hearing centers are overwhelmingly preferred over hotels as a hearing venue[16)].

In response to the practical needs of the users of international arbitration, Korea has also established neutral and arbitration-friendly hearing facilities. The very establishment of Seoul IDRC in May 2013, as a multi-purpose hearing facility dedicated to international arbitration, was part of such efforts. The cutting-edge hearing facility, fully equipped with conference systems and experienced staff, aims to effectively cater the practical needs of the parties involved in the arbitration proceedings in a most cost-effective and professional manner. Having entered its fifth business year, more than 90 hearings have been conducted at Seoul IDRC. To date, Seoul IDRC has now entered into 14 cooperation agreements with reputable arbitral institutions such as the Permanent Court of Arbitration (PCA), International Centre for Settlement of Investment Disputes (ICSID), HKIAC, ICC, LCIA, SIAC, World Intellectual Property Office (WIPO) as well as KCAB, to name of a few. With

9) Pdf versions of the translations are available at the archive at www.sidrc.org

10) KCAB International Rules Art. 32 and Appendix 3

11) Ibid, KCAB Rules Art. 21.

12) Ibid, KCAB Rules Art 13.

13) More information available at: http://www.maxwell-chambers.com/event/Maxwell-Chambers-Press-Release-050117.pdf

14) More information available at: https://klrca.org/About-Bangunan-Sulaiman-Bangunan-Sulaiman

15) Guide to Regional Arbitration (volume 4-2016), Global Arbitration Review, More information available at: http://globalarbitrationreview.com/benchmarking/guide-to-regional-arbitration-volume-4-2016/1037013/hearing-centres-survey

16) Ibid, by 83%, hotels were preferred venue only by 15%

the presence of Seoul IDRC, international arbitration community now has an option to have a hearing in Seoul regardless of the designated place of arbitration or the designated arbitral institutions.

As the diversification of the arbitral seat intensifies, Seoul would also face many new competition and challenges in the region. Nevertheless I believe the future of international arbitration in Korea is very promising. The new Act on the Promotion of the Arbitration Industry (the Arbitration Promotion Act) has been passed in December 2016 with an objective to provide long-term planning and financial support to promote the establishment and development of arbitration in Korea. The new Act mandates the Korean government to make a long-term plan for the further development of international arbitration in Korea in every five years. There will certainly be a boost in promoting international arbitration of Korea, by enriching the field with increased research and studies, nurturing the next generation of practitioners as well as establishing consolidated dispute resolution facilities.

Nonetheless, what is more important to note is that while the Korean government and the judiciary have been arbitration-friendly in recent years, the new Act made it clear that it guarantees the independence and autonomy of related institutions and individuals[17]. Many initiatives to further develop Seoul as the confident seat in international arbitration are taking place and will unfold in the new year. With the collaborative efforts from the government, practitioners, arbitration related institutions and the academia, Seoul is ready to step up as the hub of arbitration in the region by maintaining a pro-arbitration legal regime and providing an efficient and supportive environment.

17) Arbitration Promotion Act Art 10. English version of the Act available at http://elaw.klri.re.kr/kor_service/lawView.do?hseq=42311&lang=ENG

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He chaired special commissions organized by the Ministry of Justice of the Republic of Korea for the enactment of Arbitration Promotion Act. He also participated in the task force commissioned by the Ministry of Justice for the amendment of the Arbitration Act of Korea. He received the LL.M. and J.S.D degrees from Yale Law School and LL.B. and LL.M degrees from Seoul National University.