A New Era of International Arbitration in Korea and Austria

- Current Trends of International Arbitration as Reflected in the Arbitration Rules of KCAB and VIAC

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1. Tight-Knit Friendship between Korea and Austria

Even though located far from Korea in Central Europe, Austria is highly reputed in East Asia for its proud musicians and high musical culture. It is probably less known, however, that Korea and Austria are also strong economic and diplomatic allies.

In brief, Korea is Austria's third-largest trading partner in Asia, with, in 2015, an annual export volume of about 789 million USD from Korea to Austria, and an import volume of about 907 million USD into Korea.[1] The flow of trade and investments between Austria and Korea has increased significantly since the Free Trade Agreement between the European Union and Korea entered into force in 2011, and it will further grow. With regard to international arbitration in particular, the official cooperation between the arbitral institutions of these two nations – the Korea Commercial Arbitration Board ("KCAB") and the Vienna International Arbitral Centre ("VIAC") – started in 1996 with the entering into force of a MOU signed by these institutions.

In what has been called the Year of Revision in Arbitration in Korea,[2] 2016 brought several new developments with regard to international arbitration. In step with the recent amendments to the Arbitration Act of Korea[3] and the celebration of the 50th year anniversary of KCAB, the latter amended also its International Arbitration Rules, which came into force as of 1 June 2016 ("KCAB Rules"). Also fairly recent, VIAC made its latest amendments to its Rules of Arbitration ("Vienna Rules") earlier in 2013. As with most rules of arbitral institutions, the rules of KCAB and VIAC share common features and have largely developed in the same direction.

On 29 November 2016, KCAB and VIAC, together with the Seoul International Dispute Resolution Center, held a conference in Vienna debating "A New Era of International Arbitration in Korea and Austria". In celebration of this conference, this paper aims at highlighting current trends that can be observed with regard to the recent amendments to and developments of the institutional arbitration rules of KCAB and VIAC. The focus will thereby be on the key innovations that can be found in the new KCAB Rules, as well as on a number of specifications and distinctions between the two institutions' arbitration rules and practice.

2. Enhanced Protection and Efficiency : Emergency Measures

It is a long-standing concern in international arbitration that the rules on conservatory or interim measures, provided for by most arbitration rules, serve no practical purpose as long as the tribunal has not yet been established. To bring parties in international

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* The views expressed are those of the author alone and should not be regarded as representative of or binding upon the author's law firm.

1) International Trade Center (ITC) http://www.trademap.org/Bilateral_TS.aspx?nvpm=1|040||410||TOTAL|||2|1|1|1|2|1|1|1|1 (last visited on 11 December 2016).

2) *Sippel* and *Minkkinen*, The New KCAB Rules, ASA Bulletin, Volume 34 Issue 3.

3) The Arbitration Act of Korea was amended by Act No. 14176, promulgated on 29 May 2016 and enter into force as of 30 November 2016.

arbitration an equivalent level of protection to the level that would be available in civil litigation, a large number of arbitral institutions has introduced, in the past decade, emergency arbitrator mechanisms in order to enhance the interim measures' effectiveness and efficiency.

One of the earliest examples of a mechanism for emergency measures can be found in the *Pre-Arbitral Referee* Procedure launched by the ICC in 1990, which empowered a referee to grant urgent provisional measures, prior to the referral of the case to arbitration. Two decades later, in 2010, both the Stockholm Chamber of Commerce ("SCC") and the Singapore International Arbitration Centre ("SIAC") set up pioneering rules for an emergency arbitrator mechanism. The ICC Arbitration Rules adopted such a mechanism as well in the context of the 2012 revision. Numerous other institutions followed this trend.[4)]

In line with this development, the new KCAB Rules now also provide for Emergency Measures to be granted by an emergency arbitrator in Appendix 3, similar to other institutional rules. The mechanism provides the parties with an access to conservatory and interim measures early on, which previously, i.e. prior to the 2016 revision, had been feasible only after the constitution of the arbitral tribunal. An application for conservatory or interim measures can now be brought as early as the filing of the Request for Arbitration. The types of conservatory or interim measures permitted in the KCAB Rules are enumerated in Article 32: (i) to maintain or restore the status quo pending determination of the dispute; (ii) to take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitration proceedings themselves; (iii) to provide a means of preserving assets out of which a subsequent award may be satisfied; or (iv) to preserve evidence that may be relevant and material to the resolution of the dispute.[5)]

The KCAB Secretariat *shall endeavour* to appoint a sole emergency arbitrator within two business days of receipt of the application,[6)] and within two business days of that appointment, the emergency arbitrator must set a procedural timetable. Subsequently, the emergency arbitrator will have 15 days from his or her appointment[7)] to decide on the emergency measure requested. Given the current and imminent needs for emergency measures, no extension of this time limit is permitted unless all parties agree or exceptional circumstances are present. The decision shall take the form of an order.

While an arbitral tribunal, once constituted, may grant conservatory or interim measures under Article 32, it has to be noted that the conservatory or interim measures granted by an emergency arbitrator as emergency measures under Appendix 3 of the KCAB Rules are separate from those granted by an arbitral tribunal under Article 32. An arbitral tribunal is not bound by the emergency measures previously ordered by an emergency arbitrator. An arbitral tribunal may modify, suspend or terminate the emergency measures granted by the emergency arbitrator in their entirety or partially. Therefore, the emergency measures granted by an emergency arbitrator have potentially limited effect.

4) Article 29 of the ICC Rules (2012); Appendix II of the SCC Rules (2010); Rule 30.2 and Schedule 1 of the SIAC Rules (2016); Article 9B of the LCIA Rules (2014); Schedule 4 of the HKIAC Rules (2013).

5) Article 32.1 of the KCAB Rules.

6) Cf. ICC states "as short a time as possible, normally within two days from the Secretariat's receipt of the Application."; SCC and SIAC limit the appointment of an emergency arbitrator to be made within "24 hours", or "one business day".

7) Cf. Under SCC Rules, the emergency arbitrator has just five days to issue a decision.

Under the Vienna Rules, on the other hand, the provision on conservatory and interim measures, Article 33, does not define them. It is worth looking into the terminology, *preliminary or conservatory measures* ("vorläufiger oder sichernder Maßnahmen") as specified identically under Article 33 of the Vienna Rules and Article 593 of the Austrian Arbitration Act. Neither the Austrian Arbitration Act provides a definition of interim measures, however, how UNCITRAL Model Law ("Model Law") defines interim measures has some relevance since the drafters of the Austrian Arbitration Act initially, and largely, based their understandings of interim measures from the Model Law (Article 17).[8)]

It is, however, notable that the drafters of the Vienna Rules made a conscious decision not to adopt an emergency arbitrator system in the context of the 2013 amendments to the Vienna Rules. One of the main considerations for this solution was that emergency measures as such would not be necessary in practice, as the Austrian courts have the reputation for being prompt in their interim measure decisions – reacting within hours in case of extreme urgency. Another, and perhaps a more important consideration, relates to the intricacies surrounding the notion of an emergency arbitrator, i.e. whether he or she can be considered an arbitrator within the meaning of Austrian law. Doubts arise due to the diminished involvement of the parties in the appointment of an emergency arbitrator and due to the lack of finality of the decision on the emergency measures for the resolution of the parties' dispute. In other words, considering that the opportunity to nominate/appoint one's own arbitrator is often considered a key foundation and attraction of international arbitration, emergency arbitrators appointed by, e.g., the Board, raise questions with regard to the transparency of the appointment process and potential conflicts. Furthermore, the enforceability of any decisions rendered by an emergency arbitrator is in question,[9)] which is why VIAC ultimately decided not to introduce such mechanism. Finally, while the matters can be complex and challenging to decide within the timeframe provided for such emergency measures, it was also noted as problematic that the fixed fee for the emergency arbitrators under some rules[10)] would not make such cases attractive for potential arbitrators as discussed during the conference.

The conscious rejection of the emergency arbitrator mechanism made in the example of the Vienna Rules may provide some insights in analogy on the points where the mechanism is still vulnerable and needing further evolution. For Korea, the effectiveness of the emergency arbitrator mechanism adopted under the 2016 revision will soon be reckoned.

3. Guidelines for Multi- Claims and Parties

Together with changes made to allow electronic submissions (Article 4), and to broaden the scope of application of the expedited procedure, now covering claims up to 500,000,000 KRW (about 400,000 EUR) (Article 43; documentary proceedings), the new KCAB Rules accommodate multi-party and multi-contract disputes to increase the efficiency in case management. The KCAB Rules thus contain provisions on the joinder of third parties, the conduct of a single arbitration under multiple contracts, as well as the consolidation of claims.

A. Joinder of Third Parties

The mechanism of a joinder of third parties is now

8) *Zeiler*, Schiedsverfahren (2014), Section 593 ZPO, mn 16 et seq.; *Zeiler*, Interim and Conservatory Measures, in: Handbook Vienna Rules, A Practitioner's Guideline (2014), mn 4-5.

9) *Zeiler*, Interim and Conservatory Measures, Ibid, mn 3.

10) E.g. 15,000,000 KRW (about 12,000 EUR) under the KCAB Rules (Appendix 2. Article 3); 30,000 USD under the ICC Rules (Appendix V, Article 7.1); 12,000 EUR under SCC (Appendix II, Article 10.1.i); 5,350 SGD (about 3,560 EUR) under SIAC (Schedule of Fees).

available under both the new KCAB Rules (Article 21) and the Vienna Rules (Article 14). As arbitration cases grow increasingly complex, involving more and more stakeholders, there is little doubt that joinder and rules providing for joinder are relevant.[11)]

Under both rules, in a nutshell, the arbitral tribunal has the power to order a joinder upon request by a party to the proceedings. While the 2011 KCAB Rules were silent on this issue, the new KCAB Rules bolster the competence of the arbitral tribunal in the case of multi-party proceedings by introducing in Article 21 the possibility to join third parties to the arbitration proceedings. Unlike the KCAB Rules, the Vienna Rules allow a request for joinder to be made also by a third party itself. Furthermore, while the Vienna Rules are silent on the explicit requirements of joinder, leaving the arbitral tribunal with discretion to decide, the KCAB Rules provide that either (i) all parties and the third party must have agreed in writing to the joinder, or (ii) the third party must be a party to the same arbitration agreement as the parties in the proceedings and the joinder must have been agreed by the third party. However, if the tribunal has concerns with regard to delay of the arbitration proceedings, or if any other reasonable ground is met, the arbitral tribunal may refuse a joinder even in cases where the above requirements are met.

There are also differences with regard to the opportunity given to the third party to participate in the nomination of an arbitrator. Under the Vienna Rules, a party may make a request for joinder as early as with a request for arbitration, i.e. at a moment when the arbitral tribunal is yet to be constituted. In this case, the third party to be joined may also then participate in the constitution of the arbitral tribunal. However, such participation does not necessarily mean consent to multi-party arbitration (Article 18.3). The KCAB Rules, on the other hand, note explicitly that it will have no effect on the constitution of the arbitral tribunal if a third party is ultimately joined by the arbitral tribunal (Article 21.2). It is therefore envisaged that a request for joinder may be filed after the formation of the tribunal. This provision also means that the third party does not necessarily have to have an opportunity to participate in the appointment of the arbitral tribunal in cases where a request for joinder is filed before the constitution of the arbitral tribunal. In practice, however, a third party's opportunity to participate in the appointment of the arbitral tribunal seems to be less of a concern; the additional party, as it necessarily has to agree to the joinder itself, will in this context very likely also agree to the appointment made by the party it joins, or otherwise the third party will refuse to be joined in the first place.

B. Single arbitration under Multiple Contracts

Besides for multi-party disputes, the KCAB Rules furthermore enhance their procedural support for multi-contract disputes (Article 22). Multiple claims under different contracts may be heard within a single arbitration, provided that (i) the claims arise out of the same transaction or a series of transactions, (ii) the arbitration agreements are compatible, and (iii) the KCAB Secretariat is satisfied that all of the contracts provide for arbitration under the KCAB Rules.

While similar provisions can be found in the rules of other institutions,[12)] the Vienna Rules considered such provision unnecessary, as it is undisputed that claims arising out of multiple contracts may be pursued in a single arbitration.[13)] In practice, multi-contract disputes

11) E.g. Article 7 of the ICC Rules; Article 7 of the SIAC Rules; Article 22 (viii) of the LCIA Rules; Article 27 of the HKIAC Rules.

12) Article 6.3-7 of the ICC Rules; Article 6 of the SIAC Rules; Article 29 of the HKIAC Rules.

13) *Heider* and *Fremuth*-Wolf, Vienna International Arbitral Centre, in: Arbitration World International Series (5th edition), Thomas Reuters (2015) p.273.

may not pose a specific problem if all parties consider a single arbitration beneficial and agree thereupon in order to avoid separate proceedings.

C. Consolidation of Claims

Together with the joinder of an additional party, consolidation of multiple disputes contributes to the efficiency of the arbitration process and to avoid having any potential contradictory awards. Incidentally, consolidation is one of the key innovations that both the KCAB Rules (Article 23) and the Vienna Rules (Article 15) introduced in the context of their most recent amendments, a mechanism that is provided also in many other rules.[14] The KCAB Rules and the Vienna Rules differ, however, with regard to the competent authority for ordering consolidation, and with regard to the requirements for consolidation.

First, the arbitral tribunal is competent to order consolidation under the KCAB Rules, whereas the Board is the deciding authority under the Vienna Rules. In general, arbitral institutions follow two different models for consolidation: while, e.g., the London Court of International Arbitration ("LCIA") Rules also let the arbitral tribunal order consolidation, like the KCAB Rules, although subject to the approval of the LCIA Court, many other institutions rather grant the respective authority to the institution itself or its *Court, Registrar*[15] etc., like, e.g., the Vienna Rules appointing the Board to decide on the matter. Which model is adopted will have an influence on how early such consolidation can be ordered, as an arbitral tribunal has to be appointed first before it is in a position to consider a request for joinder under, e.g., the new KCAB Rules.

Secondly, the requirements for consolidation of several disputes into a single arbitration under the KCAB Rules and the Vienna Rules differ slightly. Under the KCAB Rules, Article 23.1, the arbitral tribunal may consolidate claims provided that (i) no appointment on the arbitral tribunal has been made in a separate pending arbitration, (ii) the separate claim also arises under an agreement to arbitrate pursuant to the KCAB Rules, (iii) the parties to the separate but pending arbitration are those to the existing arbitration. Under the Vienna Rules, consolidation can be ordered either if the parties agree, or if the same arbitrator(s) was/were nominated or appointed for the separate arbitrations, provided that the place of arbitration in all of the arbitration agreements on which the claims are based is the same.

Comparing the two approaches, the Vienna Rules provide more flexibility as to the moment in time for ordering consolidation, allowing consolidation even when the arbitral tribunal, or one of its members, in the separate arbitration has already been nominated or appointed. Thus, in cases where one or more arbitrators are already appointed in the separate arbitration, consolidation will not be possible under the KCAB Rules, whereas remains an option under the Vienna Rules, provided that the same arbitrators have been appointed, unless the parties agree otherwise. In this context, it should be noted that the ICC, as well as the Hong Kong International Arbitration Centre ("HKIAC"; adopted almost verbatim the corresponding ICC provision on consolidation), have taken an even more liberal approach. According to this approach, it is not even a prerequisite that the same arbitrators have been appointed in the separate arbitration. Nevertheless, and in addition to the criteria already discussed, all relevant circumstances must be taken into account when deciding on consolidation, including the arbitration agreements, and the respective stage of the proceedings or the nature of the

14) Article 10 of the ICC Rules; Article 11 of the SCC Rules; Article 8 of the SIAC Rules; Article 22.ix of the LCIA Rules; Article 28 of the HKIAC Rules.

15) The deciding authority in other rules are the institution itself (HKIAC), or its Court (ICC; LCIA), Board (SCC), or Registrar (SIAC).

claims, as depicted under the Vienna Rules and KCAB Rules respectively.

4. Scrutiny of the Composition of Arbitral Tribunal: The Secretariat's Confirmation

Following the revision of the KCAB Rules, the parties now nominate the arbitrators, but they do not *appoint* them (Article 13). Under the previous 2011 Rules, the parties' choice had become immediately effective upon selection ("appointment") of an arbitrator. Under the new Rules, the parties' nomination of the arbitrators is subject to a final confirmation by the KCAB Secretariat. When the Secretariat finds a nomination "clearly inappropriate", it can refuse to nominate a party's choice. An alternative nomination by the nominating party will have to be made.

A similar regime applies under the Vienna Rules, except that it is the Secretary General or the Board that confirms nominations. The arbitrators are deemed appointed upon confirmation. Further, when the alternative nomination following the refusal of confirmation is also refused, the Board will make an appointment of an arbitrator, not the nominating party.

Such confirmation process leads to increased engagement of the arbitral institutions and provides for an additional opportunity for a preliminary review and audit of the arbitrators' appointment. Such process also contributes to securing the impartiality and independence expected from arbitral tribunals. Therefore, the introduction, in the new KCAB Rules, of the confirmation step by the Secretariat is consistent with best practice in international arbitration.[16)]

5. Conclusion

It is the shared interest of all international arbitral institutions to combat procedural inefficiency, while guaranteeing the integrity and fairness of the proceedings. The result is that, in many respects, all the major institutional rules appear to be virtually identical. However, the specificities of each individual rules should not be neglected, and minor variations should be appreciated. In view of a continued effort to serve the users' needs, it will be critical to closely follow the implementation of the above key features in the new KCAB Rules, so that the reform of the Rules is taken to an even more advanced level by application. For the moment, however, let us congratulate the promulgation of the new KCAB Rules and KCAB's very first visit to Austria.

16) Other major institutions including ICC, SIAC, LCIA, HKIAC (a term *designation*, instead of nomination, is used), except SCC, have the identical confirmation step in the appointment of arbitrators.

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