

A VIEW FROM SEOUL: HOW IS ARBITRATION VIEWED IN KOREA AND HOW IS IT CHANGING?

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Over the past four decades, South Korea has experienced unprecedented growth, transitioning from a modest economy in the 1960s, to the world's 11th-largest economy and 6th-largest exporter today. As the number of Korean cross-border deals has increased, so has the number of cross-border disputes involving Korean parties. Recognising this, Herbert Smith Freehills opened its doors in Seoul in 2013 – one of the first international law firms to do so – with a team of both transactional and disputes specialists. [Mike McClure](#), Head of Seoul Disputes, and [Briana Young](#), Professional Support Consultant, tell us more about the disputes landscape in South Korea, and Seoul's continuing efforts to join Hong Kong and Singapore as a top Asian seat.

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KOREA ON THE RISE

Driving Korea's growth are the nation's chaebols, the family-owned conglomerates, including Samsung, Hyundai Group, LG Corporation, SK Group and Lotte Group, that are some of the largest and fastest growing companies in the world. The expansion and diversification of these companies has seen cross-border investment and trade increase exponentially in South Korea. The use of arbitration has increased in turn, with international arbitration emerging as the dispute resolution mechanism of choice for Korean companies in pursuit of international export markets.

Today, South Korean companies are among the world's biggest users of international arbitration. In 2017, South Korea ranked 6th in the list of nationalities of parties participating in Hong Kong International Arbitration Centre ("**HKIAC**") arbitration and 9th in the top foreign users of Singapore International Arbitration Centre ("**SIAC**") arbitration. In 2016, South Korean parties were involved in 82 new International Chamber of Commerce ("**ICC**") arbitration cases. "Our Korean clients have long been aware of the advantages associated with using arbitration to facilitate deals, with the top draws being the finality and enforceability of arbitral awards, the private and confidential nature of proceedings and the ability to use arbitration as a negotiation tool when dealing with potential disputes" states Mike McClure, Partner and Herbert Smith Freehills' Head of Disputes in Seoul.

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South Korea's legal system is also pro-arbitration. Enacted in 1966, the South Korean Arbitration Act substantially incorporates the 1985 UNCITRAL Model Law on International Commercial Arbitration, including the latest amendments adopted in 2006. The Arbitration Act also incorporates the New York Convention on the recognition and enforcement of awards, to the extent the award was made by another contracting state and relates to a commercial dispute as defined by Korean law. Korea is also a party to the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**") as well as a number of bilateral investment promotion and protection agreements that assure enforcement of arbitral awards relating to investor-state disputes. Further, the Korean Commercial Arbitration Board ("**KCAB**"), South Korea's sole arbitral institution, has signed over 50 arbitration agreements (24) and cooperation agreements (27) worldwide, including with major arbitral institutions such as SIAC, HKIAC, ICC and the American Arbitration Association.

LIBERALISATION AND DEVELOPMENT OF THE ARBITRATION INDUSTRY

Despite South Korea's strong legal framework and active interest in international arbitration, the majority of arbitrations involving South Korean parties are currently seated outside the country. However, the South Korean government has shown a commitment, particularly over the last five years, to building an arbitral framework to replicate – and eventually rival – that of the major global seats. "Although Seoul has not had the international profile of other key arbitral seats in the region such as Singapore or Hong Kong, we expect this will shift in the short to medium term, due to the government's drive to liberalise the legal market and mandate to develop arbitration as a key industry" notes Mike.

The latest bid to promote Seoul as a hub for international arbitration started with the launch of the Seoul International Dispute Resolution Centre in 2013 and culminated in a series of government mandates concerning South Korea's arbitration industry and related amendments to its Arbitration Act and KCAB arbitration rules in 2016. The legal basis for the promotion of arbitration in South Korea is set out in the Arbitration Industry Promotion Act. Enacted on 27 December 2016, the Act provides a legislative framework for the promotion of Korean arbitration by mandating the development of infrastructure such as dispute resolution facilities and key arbitral institutions (Seoul IDRC is home not only to the KCAB, but to the Korean offices of international institutions including the ICC, LCIA, ICDR, SIAC and HKIAC) and industry professionals. In order to achieve this, the legislation provides the Korean Ministry of Justice with authority to establish and implement a basic plan for promoting the arbitration industry every five years.

In line with this goal, in September 2016, South Korea amended the Arbitration Act further to reflect the Model Law regime. The key amendments included expanding the scope of arbitrable disputes to include non-monetary disputes (such as intellectual property disputes) and modifying the interim measures regime to allow enforcement by Korean courts. Other key amendments included expanding the tribunal's ability to gather evidence with the assistance of Korean courts and simplifying the procedure for enforcement of arbitral awards. As a result, Korean courts can now assist by ordering witnesses to appear before the tribunal or to submit relevant documents. Further, recognising and enforcing arbitral awards now only requires a court order, rather than a court judgment (which requires an oral hearing), significantly reducing the time and cost associated with the process. These amendments evidence the government's push to increase cooperation between Korean courts and tribunals, and to build on the already pro-arbitration, non-interventionist stance of the Korean judiciary.

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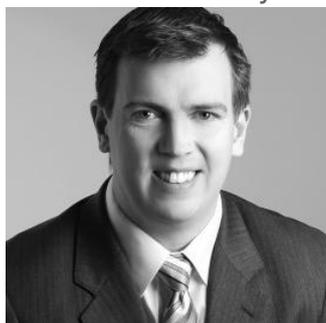
Finally, 2016 also saw the KCAB amend both its domestic and international Arbitration Rules, and issue a new Code of Ethics for Arbitrators – all with a view to enhancing reliability, increasing efficiency, and expediting tribunal processes. “Korea has shown complete dedication to developing its arbitral framework and we are starting to see the results reflected in the expansion of the KCAB's case load” says Mike, who has accepted two KCAB appointments to act as arbitrator in the first quarter of 2018. In 2016, the KCAB handled 381 arbitrations, reporting an increase in arbitrations with more than KRW 100 billion (approx. US\$ 86.1 million) in dispute, and a 124% increase in total amounts in dispute. The KCAB has also reported an increase in the average claim per case to KRW 4.9 billion (approx. US\$ 4.2 million). In 2017, the KCAB expanded to open offices in Shanghai and Los Angeles and held promotional workshops, forums and seminars both at home and abroad. Among these was the Seoul Arbitration Festival, an annual event focusing on the development of arbitration in the Asia Pacific region, which last year played host to more than 900 attendees.

While it remains to be seen whether Seoul will become a new hub for international arbitration, Mike is optimistic: "The latest suite of amendments has seen Seoul develop as a real alternative to the more established seats in the region. Although the transition is in its early stages, Korea is well placed to service the needs of global parties and it is only a matter of time before it will do so on broader scale. When it comes to challenging the major arbitral institutions in the future, what will set Korea apart from the likes of Singapore and Hong Kong is that it is a civil law jurisdiction. The KCAB is the currently the only arbitral institution in the Asia Pacific region vying for international arbitration which is governed by a civil law system – this is a key market differentiator for Seoul which may attract parties with a civil law preference. More importantly, as the perceived difficulties with Korean arbitration continue to fall away, we can expect to see Korean parties to insist more and more on arbitrations seated at home. It is certainly an exciting time for arbitration in Korea, and we are looking forward to continuing to be involved as the industry develops." Mike concludes.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



MIKE MCCLURE
HEAD OF SEOUL,
FOREIGN LEGAL
CONSULTANT
(ENGLAND & WALES,
UK), AUSTRALIAN
REGISTERED
FOREIGN LAWYER,
SEOUL
+82 2 6321 5701
Mike.McClure@hsf.com



BRIANA YOUNG
FOREIGN LEGAL
CONSULTANT
(ENGLAND &
WALES)/PROFESSION
AL SUPPORT
CONSULTANT, HONG
KONG
+852 21014214
Briana.Young@hsf.com



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