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INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

REPUBLIC OF KOREA

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a. Parties' Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the* lex arbitri *of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

The Arbitration Act of Korea ("Arbitration Act"), which is based on the UNCITRAL Model Law (including, partially, the 2006 amendments), sets out the law governing arbitrations seated in Korea, whether "domestic" or "international" in nature. While the Arbitration Act provides for a right to an "oral hearing", it is silent on the question of physical hearings. There does not appear to be any source of law – statutory, judicial or otherwise – that suggests that an "oral hearing" should be interpreted to mean a physical hearing or that expressly establishes a right to a physical hearing in arbitration in Korea.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's* lex arbitri *(e.g., a rule providing for the arbitration hearings to be "oral"; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: Not likely to be inferred; more likely to be excluded.

Article 19 of the Arbitration Act stipulates that parties shall be given a full opportunity to present their case.[1] A party might try to argue that it was unable to fully present its case on the basis that it was denied a physical hearing, but there does not appear to be any case where such an argument has been successfully made.

Article 25 of the Arbitration Act provides that "[s]ubject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be only conducted on the basis of documents: Provided, that unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold

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[1] Arbitration Act, Article 19.

oral hearings at an appropriate stage of the proceedings, if so requested by a party".[2] Under this provision, the tribunal is imbued with full discretion to decide whether to hold an oral hearing or simply decide the case based on the documents, with the following exceptions: (i) where the parties have agreed to dispense with an oral hearing (in which case no oral hearing should be held) or, (ii) where the parties have not agreed, but at least one party requests an oral hearing (in which case an oral hearing *must* be held "at an appropriate stage of the proceedings"). This, in effect, establishes a right to an "oral hearing". As the term "oral hearing" is not statutorily defined, a party might try to argue that it should be interpreted to mean an in-person physical hearing on the basis of industry usage or other grounds. However, there does not appear to be any court case or other basis in Korean law or commentary suggesting that this interpretation would or should be accepted.

b. Parties' Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

3. In case the lex arbitri *does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: A physical hearing is standard in Korean civil proceedings; it is unclear whether a hearing by videoconference would be permitted instead.

Article 134 of the Civil Procedure Act provides that "[t]he parties shall conduct pleadings in the court in regard to the litigation".[3] This is understood to establish a right to an oral hearing in court in civil litigation. That said, the statute does not expressly provide the meaning of the phrase "pleadings in the court" – it is thus unclear whether the parties must appear in person in the courtroom, or the judge may choose to conduct the hearing through use of remote hearing technology.

However, as Article 57 of the Court Organization Act provides that "hearing and judgment of a trial shall be open to the public",[4] unless the court deems there is an exceptional situation which renders public participation in the hearing inappropriate, all court hearings should be open to the public. In practice, this has been satisfied by holding physical, in-person hearings in court. However, there is no rule that would prevent a court from conducting hearings through videoconferencing – but neither is there any rule or precedent permitting it. For the moment, it is unclear whether court hearings by virtual means would satisfy the public-hearing requirement in Korea.

[2] Arbitration Act, Article 25.
[3] Civil Procedure Act, Article 134.
[4] Court Organization Act, Article 57.

4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

Short answer: It is unlikely that any right to a physical hearing in the Civil Procedure Act would extend to arbitration.

As noted, the Arbitration Act does not expressly provide for a right to a physical hearing and the provisions in the Civil Procedure Act providing rules for "pleadings" mentioned in sub-paragraph b.3 above do not apply to arbitration procedures.[5] Given that different statutes govern the respective proceedings and these statutes use different terminology, it is unlikely that the standards with regard to the manner of conducting hearings in court would have any bearing on the standards that apply in arbitration proceedings.

c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

Short answer: Although there is likely no right to a physical hearing in arbitration in Korea, parties can agree not to have a physical hearing.

There is no established right to a physical hearing in arbitration under Korean law, although there is a right to an "oral hearing" pursuant to Article 25(1) of the Arbitration Act.[6]

Parties can waive their right to an oral hearing by agreement amongst themselves, as provided in Article 25 of the Arbitration Act in Korea. For example, parties may be found to have implicitly waived their right to an oral hearing by entering into an arbitration agreement under rules that permit the arbitral tribunal to unilaterally decide not to hold an oral hearing. Of course, by similar means, the parties also can expressly agree not to hold any physical hearing.

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

[5] Civil Procedure Act, Article 134.
[6] Arbitration Act, Article 25(1).

Short answer: If the parties expressly agree to a physical hearing, this is likely to limit the tribunal's discretion.

Korean arbitral law does not directly reference a physical hearing, but does provide a right to an "oral hearing" unless the parties agree not to have one. Pursuant to Article 25 of the Arbitration Act in Korea, where parties have agreed to dispense with an oral hearing, the arbitral tribunal is bound by that agreement and cannot insist on convening an oral hearing.[7] Such an agreement would also preclude the tribunal from convening a physical hearing, which would be a form of oral hearing. And failure by the Tribunal to abide by the parties' agreement could constitute grounds for setting aside.[8]

In the converse case, where the parties have expressly agreed to have a physical hearing, the tribunal's discretion to order a remote hearing seems limited. Article 20 of the Arbitration Act, which is similar to Article 19 of the UNCITRAL Model Law, provides that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate "in the absence of an agreement" [of the parties]. Therefore, the tribunal's decision to hold a remote hearing despite the parties' agreement to a physical hearing may be a violation of the agreed procedure. In that case, the decision to disregard the parties' agreement could amount to a reason to set aside or annul the award.[9]

d. Setting Aside Proceedings

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

Short answer: Failure to raise an objection regarding a breach of the arbitral procedure could prevent the parties from using it as a ground for challenging the award.

As discussed above, there is no express right to a physical hearing under the Arbitration Act and no other apparent basis to conclude that such a right exists. Accordingly, there would be no right that could be waived. That said, if the parties agreed to a physical hearing, then the tribunal's discretion to order a remote hearing would be limited and the parties could be said to have a right to it on that basis.

In setting aside proceedings for a domestic arbitration award in Korea, a court held that even if there was a procedural violation, the award should not be set aside if the

[7] Arbitration Act, Article 25.

[8] Article 36(2)1.(d) of the Arbitration Act requires that an award be annuled where "[t]he composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, which was not in conflict with a mandatory provision of this Act, or, failing such agreement, was not in accordance with this Act".

[9] Arbitration Act, Article 36(2)1.(d).

applicant failed to raise an objection during the arbitral proceeding.[10] In that case, the applicable arbitration rules (i.e., the KCAB Commercial Arbitration Rules) provided that the failure to promptly object to non-compliance with the rules constitutes a waiver of the relevant right. As many arbitration rules have similar provisions,[11] Korean courts would apply such reasoning in other such cases. However, there are no precedents on the effect of the failure to raise a timely objection where such procedural rules do not exist. Consequently, a prudent party should make an objection in a timely manner in order to use it as a ground for challenging the award in Korea.

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute* per se *a ground for setting aside (e.g., does it constitute* per se *a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: Korea does not appear to recognize a right to a physical hearing, so the absence of such a hearing would not likely be a ground to set aside an award.

The Arbitration Act does not expressly provide a right to a physical hearing – rather, it provides a right to an "oral hearing", which is not otherwise defined. There is no established right to a physical hearing in Korean law. Unless there is a valid basis on which such a right could be established under the particular circumstances, e.g., by the parties' agreeing to hold a physical hearing, there would be no basis for setting aside an award for failure to have one.

Article 36(2)1.(b) of the Arbitration Act, which corresponds to the ground for denying enforcement or recognition under Article V(1)(b) of the New York Convention, provides a ground for setting aside arbitral awards where "[t]he party making the action for setting aside was not given proper notice of the appointment of the arbitrator or arbitrators or of the arbitral proceedings or was otherwise unable to present his or her case".[12] Under this provision, the lack of opportunity to participate in a physical hearing, by itself, would not suffice as a ground to set aside an arbitral award. A party would have to prove actual prejudice as a consequence of being deprived of its opportunity to properly present its case or by having insufficient notice of the proceedings.

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

[10] Southern Branch of Seoul District Court judgment 95gahap1218 dated 29 September 1995.
[11] For example, Article 32 of the UNCITRAL Arbitration Rules, Article 40 of the ICC Arbitration Rules, Article 55 of KCAB International Arbitration Rules.
[12] Arbitration Act, Article 36(2)1.(b).

Short answer: It is unlikely that failure to conduct a physical hearing would constitute a basis for setting aside the award.

The Arbitration Act does not appear to establish a right to a physical hearing – rather, it provides a right to an "oral hearing", which is not otherwise defined. Accordingly, failure to conduct a physical hearing would not appear to be a violation of any provision of the law or a ground for setting aside an award. Only if a party was able to persuade a court that the term "oral hearing" implicitly means an in-person, physical hearing or, as noted above, that it was prejudiced by being unable to present its case due to the absence of a physical hearing as provided in Article 36(2)1.(b) of the Arbitration Act, could an award be set aside on that basis.

That said, it appears that there has been no case where a party actually argued that it was deprived of an opportunity to present its case due to the lack of in-person hearing. Even if a party were to make such a challenge, it is not likely to succeed because Korean courts have set a high bar for challenges of arbitral awards. For instance, in an enforcement case in which the interpretation of Article V(1)(b) of the New York Convention was at issue, the Korean Supreme Court held that to set aside an arbitral award the breach of a party's right to due process should be "significant".[13]

Although decisions of Korean courts may differ depending on the details of each case, the mere fact that all or part of the evidentiary hearing was conducted remotely or that minor procedural irregularities arose as a result of the virtual hearing format would not amount to a significant breach of a party's right to due process. For instance, in a case where the respondent's request for re-scheduling of the arbitration hearing was rejected and the witness presented by the respondent could not appear but the written statements were admitted, the Seoul Central District Court refused to set aside the award on the basis of the respondent's argument that it was deprived of the right to due process.[14] The Seoul High Court also refused an award challenge based on the defendant's contentions that the arbitral tribunal had refused its request for production of documents which might have substantiated the plaintiff's fraudulent act, and that therefore the tribunal's decision was contrary to Article V(1)(b) of the New York Convention.[15] Likewise, in another case, this time in the analogous enforcement context, the defendant insisted that it had not received proper notice of the commencement of the arbitration proceedings in violation of the relevant contract which mandated that the parties provide notice within 21 days from the initial notice of dispute and that such non-compliance with the notice requirements in the contract should render the arbitral award unenforceable under Article V(1)(b) of the New York Convention, the Seoul Central District Court rejected the defendant's argument.[16]

[13] Supreme Court Decision 89DaKa20252 dated 10 April 1990.
[14] Seoul Central District Court Judgment 2013Gahap28556 dated 12 September 2013.
[15] Seoul High Court Judgment 94Na11868 dated 4 March 1994.
[16] Seoul Central District Court 94Gahap81280 dated 7 December 1995.

e. Recognition/Enforcement

10. *Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?*

Short answer: Since there is no established right to a physical arbitration hearing, it is unlikely that Korean courts would refuse to enforce a foreign award due to a physical hearing not being held.

As for Article V(1)(b) of the New York Convention, please refer to the explanation in sub-paragraphs d.8 and d.9 above in the context of setting aside. If the parties had agreed to a physical hearing but the tribunal conducted the hearing remotely despite a party's objection thereto, the objecting party may have a defence against enforcement of the award pursuant to Article V(1)(d) of the New York Convention by arguing that "the arbitral procedure was not in accordance with the agreement of the parties".

It is very unlikely that the failure to hold a physical hearing would be considered a violation of public policy in Korea that would constitute grounds for refusing enforcement of an award pursuant to Article V(2)(b) of the New York Convention. Korean courts require a high standard to be met for such a finding. However, if a right to a physical hearing exists under the law of the seat, failure to hold a physical hearing would likely be a defense against enforcement under Article V(1)(d) of the New York Convention, because "the arbitral procedure was not in accordance with the law of the country where the arbitration took place".

f. COVID-Specific Initiatives

11. *To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?*

Short answer: The Korean courts adopted measures to mitigate the spread of COVID-19, including staying proceedings or imposing in-courtroom measures.

Depending on the seriousness of the pandemic at any given time, following the infectious disease authorities' guidance, the courts have adjusted their schedules and controlled the number of participants in the courtroom. No specific measures have been implemented regarding arbitrations.