The anti-arbitration injunction under Korean law: the Korean Supreme Court Decision of 2018
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INTRODUCTION

The arbitration system is premised on the agreement of the parties in dispute to refer their dispute to arbitration instead of a national court. The efficacy of the arbitration system depends on the mechanism to enforce the arbitration agreement as agreed by the parties or to shield the arbitration from a party’s attempts to obstruct the proceeding by using measures through a national court. In international arbitration, where multiple national courts might claim jurisdiction over the subject matter in dispute, it is all the more important to delineate the limits of the authority of national courts to interfere with the enforcement of an arbitration agreement when a challenge to the validity or effectiveness of such an agreement and thus the validity or effectiveness of an arbitral tribunal’s jurisdiction is presented to a court.

A typical situation in which a national court faces such a challenge is when one of the parties to an arbitration agreement brings a dispute to the court, claiming the non-existence or invalidity of the arbitration agreement. In such a situation, the party bringing the dispute before the court may also attempt to apply for an anti-arbitration injunction to prevent the other party from initiating or continuing arbitration proceedings.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 1 (the ‘New York Convention’), whose primary focus is to ensure recognition and enforcement of international arbitration awards, is silent on this issue. Therefore, how to deal with this issue is left to national legislation and the judicial practice of the state where such a challenge is presented.

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1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, in force 7 June 1959, 330 UNTS 4739 [NYC]. In acceding the New York Convention as the 43rd Contracting State with effect from 9 May 1973, Korea has made the reciprocity and commercial reservations.
In a decision in 2018, the Korean Supreme Court held that an anti-arbitration injunction is not allowed under Korean law. This decision was the first decision the Korean Supreme Court rendered on this issue after the Korean Arbitration Act (‘KAA’) substantially incorporated the UNCITRAL Model Law on International Commercial Arbitration (‘UNCITRAL Model Law’) in its amendment of 1999. This article reviews this decision, the underlying reasoning, and its implications for international arbitration cases seated in Korea under Korean law.

THE KOREAN SUPREME COURT DECISION (CASE NO. 2017MA6087 DATED 2 FEBRUARY 2018)

Factual background

The case concerned a dispute arising out of an installation and construction agreement (the ‘Agreement’) for power plant boilers between Korean companies, namely, Korea Southern Power Co., Ltd. (‘KOSPO’) and Hyundai Engineering & Construction Co., Ltd., and others (the ‘Contractors’). The Agreement, written in Korean, contained a dispute resolution clause which is translated into English as follows:

If any factual issues arising out of this agreement cannot be resolved by agreement between the parties, such factual issues shall be determined by KOSPO. Such decision shall be conclusively effective unless the Contractors raise an objection to KOSPO within thirty (30) days of receiving a notice of the decision. If the parties cannot reach an agreement and the Contractors object to the decision of KOSPO and give written notice (‘Notice of Dispute’) that it will resolve the dispute by arbitration, the dispute shall be resolved by arbitration as set forth in this provision; provided, however, that if KOSPO notifies that it has elected, at its sole discretion, to settle the dispute by litigation procedures in the courts of the Republic of Korea under the laws of the Republic of Korea within thirty (30) days of receiving the Notice of Dispute, such dispute shall, notwithstanding this provision, be subject to the jurisdiction of the Seoul Central District Court as the court of first instance under the laws of the Republic of Korea, without regard to its conflict of law rules.

On 24 May 2016, the Contractors filed an arbitration with the Korean Commercial Arbitration Board (KCAB) against KOSPO, seeking payment of additional construction costs and damages as well as a declaration that they were not liable for any liquidated damages for delay. The request for arbitration was served on KOSPO on 23 June 2016. Within 30 days, on 8 July 2016, KOSPO submitted an answer to the KCAB stating that the Contractors’ request for arbitration was unlawful and that the dispute ought to be resolved through court proceedings in accordance with the proviso of the dispute resolution clause in the Agreement.

Nevertheless, the KCAB tribunal constituted under KCAB’s domestic arbitration rules proceeded with the arbitration and held multiple hearings. Subsequently, KOSPO sought an injunction from the Seoul Central District Court to suspend the KCAB arbitration proceedings, contending that the arbitration agreement was no longer effective as KOSPO had elected litigation for resolving the dispute and thus, the KCAB arbitration proceeding was unlawful.

Decision of the Korean Courts

The Seoul Central District Court, the first instance court, rejected KOSPO’s application for an anti-arbitration injunction, holding that that type of injunction is not permitted under the KAA.

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2 Supreme Court Decision case no. 2017Ma6087 dated 2 February 2018, see Korean Supreme Court, Official Gazette of Supreme Court Decisions, 2018-Sang, 551.
3 The KAA was comprehensively amended again in 2016 to incorporate the key provisions of the UNCITRAL Model Law as amended in 2006.
4 The English translation is the authors’ own.
KOSPO appealed, but the Seoul High Court sided with the Seoul Central District Court. Upon KOSPO’s appeal to the Supreme Court, the Korean Supreme Court endorsed the lower courts’ holding that courts are not empowered under Korean law to suspend an arbitral proceeding through an injunction or provisional measure.

As a threshold matter, the decision of the Supreme Court (the ‘SC Decision’) cited article 6 of the KAA, which stipulates that ‘[i]n matters governed by this Act, no court shall intervene except where so provided in this Act’. The Supreme Court opined that the purpose of this provision is to guarantee the independence of arbitral proceedings.

Thereafter, the SC Decision referred to articles 9(1) and 9(3) of the KAA. Article 9(1) provides that ‘[a] court before which an action is brought in a matter which is the subject of an arbitration agreement shall dismiss the action when the defendant raises as a defense the existence of an arbitration agreement, provided that this shall not apply in cases where it finds that such arbitration agreement is null and void, inoperative or incapable of being performed’. Article 9(3) states that when an action referred to in article 9(1) above has been brought, ‘arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court’.

The Supreme Court observed that these provisions operate on the premise that a party claiming the non-existence or invalidity of an arbitration agreement may file a lawsuit regarding a dispute subject to the arbitration agreement, even if the arbitration procedure is pending. In such cases, the court may determine the non-existence or invalidity of the arbitration agreement in the litigation procedure. Nevertheless, the Supreme Court noted that under article 9(3), an arbitral tribunal might independently commence and proceed with arbitration proceedings without being affected by the pending parallel litigation procedure before the court.

The SC Decision also cited article 17(6) of the KAA as one of the occasions the KAA allows interference by a court in pending arbitration proceedings. This provision provides that if an arbitral tribunal has decided on its jurisdiction as a preliminary question, ‘the party who objects to the decision may file a petition with a court to examine the jurisdiction of the arbitral tribunal’. The Supreme Court stated that article 17(6) is one of the provisions of the KAA that allows courts to interfere directly with pending arbitration proceedings.

As another occasion when the KAA allows a court to scrutinize arbitration proceedings, the SC Decision referred to article 36(1) of the KAA, which provides the court’s authority to set aside an arbitral award if the arbitration agreement is found to be invalid.

After reviewing those provisions mentioned above, the SC Decision stated that in light of the text, content, and system of articles 6, 9, and 17 of the KAA and the legislative intent behind them, courts may interfere with arbitration proceedings only where so provided in the KAA. Pointing out that the KAA has no provision empowering a court to enjoin arbitration proceedings, the Supreme Court concluded that a party cannot seek a court injunction to suspend arbitration proceedings by arguing the non-existence or invalidity of an arbitration agreement.

Additionally, referring to article 10 of the KAA, which provides that ‘[a] party to an arbitration agreement may apply to a court for injunctive relief before the commencement of or during arbitral proceedings’, the Supreme Court opined that the purpose of article 10 is to ensure the effectiveness of an arbitral award by allowing a party to file a petition for preservative measures
with a court to maintain the status quo or to avoid significant damage or imminent danger that may be inflicted on the disputed rights before an arbitral award is rendered. Thus, the Supreme Court expressed its view that this provision cannot be relied upon for allowing anti-arbitration injunctions on the ground that the arbitration agreement does not exist or is invalid.

IMPLICATIONS OF THE SC DECISION ON INTERNATIONAL ARBITRATION

An anti-arbitration injunction is not an unfamiliar concept in common law jurisdictions. Common law courts have frequently acknowledged the court’s power to enjoin arbitral proceedings and held that allowing arbitration to proceed where there is no valid or enforceable arbitration agreement would be oppressive or inequitable.\(^{10}\) In contrast, civil law jurisdictions, in general, are not familiar with the notion of an injunctive relief that prohibits or suspends either litigation or an arbitration procedure.

Korea is a civil law jurisdiction. Korea acceded to the New York Convention as early as 1973. The 1999 amendment to the KAA faithfully adopted most of the core provisions of the 1985 UNCITRAL Model Law. As noted earlier,\(^{11}\) in 2016, the KAA was again comprehensively amended to incorporate the key changes made in the 2006 UNCITRAL Model Law. In line with these changes, the Korean judiciary has consistently shown a pro-arbitration tendency in its decisions under the KAA. Thus, the SC Decision rendered in 2018 is noteworthy in understanding the approach of a typical pro-arbitration civil law jurisdiction toward anti-arbitration injunctions and its underlying rationale.

The core rationale of the Korean Supreme Court’s decision that anti-arbitration injunctions are not permissible is based on article 6 of the KAA, which limits the court’s intervention into matters governed by the KAA to what is allowed by the KAA itself. Article 5 of the Model Law, which is adopted verbatim in article 6 of the KAA, emphasizes that courts’ intervention in arbitrations is strictly limited to matters as expressly provided in the Model Law.\(^{12}\) National courts have also upheld article 5 of the Model Law (or enactments thereof) as a mandatory provision, confirming that it is the basic rule for determining whether court intervention in arbitrations is permissible.\(^{13}\) The travaux préparatoires on article 5 adopted in 1985 further provides context for understanding the provision:

The purpose of article 5 was to achieve certainty as to the maximum extent of judicial intervention, including assistance, in international commercial arbitrations, by compelling the drafters to list in the (model) law on international commercial arbitration all instances of court intervention. Thus, if a need was felt for adding another such situation, it should be expressed in the model law.\(^{14}\)

In this regard, it is worthwhile to note that the Seoul High Court rejected KOSPO’s argument that, notwithstanding article 6 of the KAA, article 300 of the Korean Civil Execution Act\(^{15}\)


\(^{11}\) See (n 2) above.


\(^{13}\) Ibid.


\(^{15}\) Article 300 of the Korean Civil Execution Act:

1. Provisional dispositions with regard to the objects of dispute may be effected where, if the existing situations are altered, the party is unable to exercise his/her rights, or there exists a concern about a substantial difficulty in exercising it.

2. Provisional dispositions may also be effected in order to fix a temporary position against the disputed relation of right. In this case, such provisional dispositions shall be effected specially where intending to avoid a significant damage on a continuing relation of right or to prevent an imminent danger, or where other necessary reasons exist.
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grants broad authority to a court to issue preliminary measures to preserve a status quo, which authority should include the issuance of an anti-arbitration injunction. The Seoul High Court maintained a strict interpretation of the text of article 6 of the KAA reading ‘except where so provided in this Act’.16

The Korean Supreme Court’s decision affirming the lower courts’ decision not to allow anti-arbitration injunctions based on the strict reading of the text of article 6 of the KAA is faithfully in line with the purpose of article 5 of the UNCITRAL Model Law. The SC Decision is also an excellent example of showing judicial restraint not to lean toward an expansive interpretation of the scope of the judicial scrutiny over arbitration based on a general law granting broad authority to courts to issue preliminary or interim measures. In this regard, the SC Decision illustrates the Korean courts’ consistent pro-arbitration attitude, giving the utmost deference to arbitration proceedings within the boundaries of the KAA, with an in-depth understanding of the legislative intent behind them as reflected in the UNCITRAL Model Law and the New York Convention.

As mentioned above, the SC Decision dealt with an application for an anti-arbitration injunction against a domestic arbitration. As the KAA applies to both domestic and international arbitrations seated in Korea,17 an anti-arbitration injunction targeting international arbitration proceedings whose agreed seat is in Korea would be treated in the same manner.


17 Article 2(1) of the KAA: This Act shall apply to cases where the place of arbitration under Article 21 is in the Republic of Korea.