Fenwick Elliott

The construction law specialists

Korean Commercial Arbitration Board launches revised Arbitration Rules for June 2016

On 1 June 2016 the Korean Commercial Arbitration Board ("KCAB") launched a revised set of Arbitration Rules. These will apply to KCAB arbitration proceedings commenced after this date.

The KCAB is the only authorised institution of its kind in Korea and is empowered under the Korean Arbitration Act. With offices in both Seoul and Busan it has administered in excess of 4,000 arbitrations and has an extensive range of cooperation agreements with similar arbitration organisations throughout the world. Having last amended its rules in 2011, the latest version of the KCAB Rules is designed to bring their rules more in line with other leading arbitral institutions such as the ICC.

With this in mind, the amendments made to the new rules focus on three main areas:

1. A procedure has been introduced whereby the Secretariat of the KCAB now confirms the appointment of an arbitrator "*in order to ensure the quality, impartiality and independence of the arbitral tribunal*". A screening process is also now in place to achieve this.

2. Joinder and the consolidation of claims have been simplified under the amended rules to enable multi-party arbitrations to take place more easily.

3. Provision of an emergency arbitrator system to facilitate interim relief prior to the constitution of the arbitral tribunal.

Details of the key amendments made within these three areas are set out below. They also allow the expedited procedure to apply where the claim amount does not exceed KRW500,000,000 or both parties agree.

New procedures for arbitrator screening

Under Article 12 of the new rules the parties no longer appoint but instead nominate arbitrators. The Secretariat then reviews the nomination and confirms (or not) the appointment. Before doing so the Secretariat is obliged, under Article 12(4) of the Rules, to "*consider the prospective arbitrator's experience, availability, nationality and residence*". Article 10(1) of the Rules provides that arbitrators appointed under the Rules must remain "*at all times, impartial and independent*".

Article 10(2) then provides that any arbitrator who accepts an appointment or nomination "*shall sign and submit a Statement of Acceptance and a Statement of Impartiality and Independence*" in the Secretariat's prescribed form. If new circumstances arise which give rise to doubts as to the arbitrator's impartiality or independence, then they should immediately disclose such circumstances in writing to the parties and to the Secretariat.

Under Article 10(3) the Secretariat should hand out the statements made by the arbitrators regarding their impartiality and independence to the parties immediately upon receipt.

Article 10(4) then provides that the decision of the Secretariat on any matter related to the appointment, removal or replacement of arbitrators is final and not subject to appeal.

Joinder and the consolidation of claims

Under Article 21 the Arbitral Tribunal "*may*" allow third parties to be joined into ongoing arbitration proceedings if one of two conditions are met. These are:

1. All the parties and the additional party have all agreed in writing to joinder.
2. The additional party is a party to the same arbitration agreement as the existing parties and has agreed to be joined into the arbitration.

Article 21(3) gives the Arbitral Tribunal discretion to refuse a joinder request where there is a "*reasonable ground to do so, such as a delay of the arbitration proceedings*". Article 21 also notes, however, that the joinder provisions only apply where the arbitration agreement was entered into after 1 June 2016 when the rules came into effect.

Article 23 also provides for the consolidation of claims "*made in a separate but pending arbitration*" at the request of a party but only if the arbitration in question is under the same rules and between the same parties. This cannot happen, however, if one arbitrator of an Arbitral Tribunal has already been appointed in the separate proceedings. The window for consolidation is then relatively narrow.
If a request for consolidation is made then the Arbitral Tribunal must allow the parties a reasonable opportunity to make submissions on the consolidation. They must also take into account "*the arbitration agreement(s), the nature of the claims, and any other relevant circumstances*".

Emergency arbitrator system

Appendix 3 lays down the rules on obtaining "*conservatory or interim measures*" (defined as "*Emergency Measures*") via an emergency arbitrator. This procedure can only be used concurrently with, or following the submission of, the Request for Arbitration but before the constitution of the Arbitral Tribunal.[1]

Article 1(2) lays down what should be included within the application for emergency measures and what needs to be attached to the application as well as the fee payable for the arbitrator and the Secretariat.

Article 2 makes it clear that the Emergency Arbitrator must remain impartial and independent at all times and they must also submit a statement to this effect when they accept the appointment. The Secretariat will, under Article 2(4), endeavour to appoint an emergency arbitrator within two working days. Challenges to the appointment made can be lodged within two working days of receipt of the Notice of Appointment and the Secretariat's decision on any such challenge is final.

The powers of the Emergency Arbitrator are listed under Article 3. Under Article 3(4) they must make a decision within 15 days from their appointment and that can only be extended by the Secretariat if all the parties agree or there are exceptional circumstances. Any measures ordered are deemed to be conservatory or interim measures granted by the Arbitral Tribunal once constituted and they will be terminated if the Arbitral Tribunal

1. See Appendix 3 – Emergency Measures by Emergency Arbitration, Article 1 (1).

is not constituted within three months of the decision granted the Emergency Measures or because the arbitration has become "*unnecessary or impossible for any reasons, such as withdrawal of the Request for Arbitration or failure to pay the Advance on Costs*".

Summary

The new KCAB Arbitration Rules add some very useful tools for parties arbitrating their disputes and bring KCAB procedures into line with other international arbitral institutions such as the ICC. As such they are to be welcomed and will no doubt assist the growing reputation of the KCAB as an arbitral institution in Asia more generally.

Nicholas Gould and Claire King
Fenwick Elliott LLP