On the Comparison between South Korean and Chinese Commercial Arbitration System

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Abstract: Since the normalization of diplomatic relations between South Korea and China, the economic trade between the two countries made great development which has attracted the world's attention with the very active annual economic and trade activities. However, with the growing frequency economic and trade exchanges between the two countries, the conflicts of interests between the two parties are also increasing. In the trade activities, from the date of signing of the contract, to the day of transferring goods or paying for the goods, trade claims and other disputes often happen on various aspects. Therefore, it is very important to solve the trade disputes caused by the differences of the parties' language, economy, culture, customs and legal concept. In the process of resolving disputes, there are very complex legal procedures, and a lot of problems existing in the state party's law enforcement of the international private law litigation which needs a lot of time and the huge cost. So, the system (ADR) of using the means of settlement, regulation, arbitration and other ways to resolve disputes has been widely used in many countries [1]. Among them, for the most of the time, the problems are solved through arbitration. After consultation between the parties, arbitrator makes the verdict which will get executed in the party state. Arbitration has mandatory binding effect, and being as one of the methods to resolve the disputes, it is the most suitable one for the settlement of trade disputes.

Keywords: Commercial Arbitration System; Arbitration Concerning Foreign Interests; South Korean

1. Introduction

1.1. The Overview of Chinese Commercial Arbitration System

(1) Formulation and present situation

After the founding of the People's Republic of China in 1949, in 1956 the State Council set up Foreign Trade Arbitration Commission (FTAC in short) and China Maritime Arbitration Commission ('CMAC' in short), and bear the international foreign arbitration in order to protect national sovereignty in international trade activities,based on the needs of the international economic and trade development, with the purpose of protecting the rights of Chinese businessmen. The above arbitration institutions as a private institution specialize in dealing with concerning foreign affairs. The major concerning foreign affairs are conflicts and trade disputes among Sino foreign cooperative enterprises, and joint ventures and so on.

China's foreign arbitration system has a history of 60 years since 1950's [2]. In 1954, Government Administration Council of the Central People's Government, at the 215th meeting of the government, decided to set up the FTAC in the internal of China Council for the Promotion of International Trade in order to arbitrate various disputes in the foreign trades. Since then, China Council for the Promotion of International Trade established the FTAC, made the "provisional measures on the arbitration procedures of the Foreign Trade Arbitration Commission", and carried out the arbitration business [3].

With the gradual deepening of China's reform and opening up policy, and the sharp increasing of disputes relating to foreign trades as well as the investment and cooperation with foreign enterprises, China's arbitration law has become a powerful legal basis for the effective implementation of the arbitration business.

(2) Characteristics

The characteristics of China's foreign arbitration system are as follows: the parties must apply for arbitrative mediation through the arbitration; entitle the parties of the right to designate the arbitrator; the people's court decides and implements the preservation measures; the arbitral award shall be final and parties shall not appeal to the people's court; the execution of the arbitral award shall be carried out by the People's Court of China which in the place where the arbitration institution is located or where the property is located; according to the New York convention, it may apply for execution.

There is a very special point in China's foreign arbitration which refers to the special provisions related with the petition for cancellation of the arbitration award. After the people's court accept petition for canceling the arbi-

tration award, if the court believes that it is necessary for the arbitration institution to re-arbitrate, the court can issue a notice requesting the arbitral tribunal to re-arbitrate within a certain period of time. Then the petition for cancellation can be ended. If the arbitral tribunal refuses the request, the relevant petition procedures for cancellation should be restarted. This regulation is undoubtedly a special provision [4].

In China, the arbitration agreement is formed with the arbitration clause, the independent arbitration mediation and other forms. The information inside the agreement reached in these forms is transformed by letters, fax, telegram, telex and other forms. And when arbitration agreement of the parties is confirmed in the written form, it can be identified as an effective arbitration agreement. Moreover, the will of the application for arbitration, the arbitrative matters and the designation of the arbitration commission are prescribed in the arbitration agreement. And if no arbitration commission is designated, the agreement shall not be void.

Arbitration award, as the applicable law of the parties of the arbitration agreement who is one of those refuse to execute the cause in the New York Convention, according to the designated laws or under the circumstance of no designated laws, is regarded as being invalid; or if the parties have not negotiated on the composition of arbitration commission or the arbitration procedure, or the arbitration made without regulation is inconsistent with the state law, the award can be refused to implement. As for the applicable law for the arbitral procedures, although it is said that the applicable law shall de decided by the negotiation of the parties or shall be in accordance with the law of the place where tribunal located, if the parties do not negotiate on the arbitration procedures, it shall be deemed to apply to the law of the country where the court is located.

1.2. The Overview of Korean Commercial Arbitration System

(1) Formulation and present situation

So far, the reason why commercial arbitration has been able to play its due function in South Korea is because of the implementation of the arbitration law in 1966. However, with the increase of export and the business volume year by year, the independence of the arbitration institution becomes more important. The International Commercial Arbitration Commission on March 21th, 1970, established of Association of legal person for the Korean Commercial Arbitration Association through the approval of the Ministry of Ministry of industry and Commerce.

Since then, the business volume of the Korean Commercial Arbitration Association also has been increasing with the expansion of the world economy as well as the increase of the Korean trades. Therefore, it is necessary to reorganize and expand the institution when it was set up. In 1980, the articles of association were amended. With the expansion and restructuring of the organization, its functions have also been enhanced, and the name of the association is also changed to the Korean Commercial Arbitration Board (hereinafter referred to as' KCAB '). Arbitration is divided into two aspects: domestic arbitration and international arbitration.

Since the UNCITRAL International Commercial Arbitration (hereinafter referred as Arbitration) has been formulated in 1985, it has been accepted by the western developed countries, which has formed a systematic and unified arbitration law. Although South Korea accepted the Arbitration in 1990, the voice that speaks for amending the law is very high which leads to a new arbitration law was amended in 1999. And, with the amendment of the arbitration law, the arbitration rules of the KCAB, with the approval of the Grand Court, are amended in 2004 and 2008 respectively.

KCAB, although having not made relevant rules specialized for international arbitration, make relevant rules for the domestic arbitration and international arbitration which are integrated together. In order to meet the needs of international arbitration and further expand the scope of international arbitration, in 2007, “The Rules of International Arbitration for Korean Commercial Arbitration Board” is formulated. These rules do not replace the original arbitration rules or their additional rules, but coexist with them. When the parties go through the international arbitration in a written form according to these rules, these rules shall be applied [5]. Later, in order to meet the requirements for the improvement of South Korean arbitration services, the follow-up amendments are carried out. In 2011, the amended arbitration rules began to implement with the approval of the Grand Court.

(2) Characteristics

South Korea's arbitration system, since 1985 when it accepts the Arbitration, has been possessing the international unity. Although the original 18 provisions are changed into 41 provisions, the autonomy of parties is still the principle. In particular, the detailed procedures, which are required when parties have no mediations or fail to achieve mediation, are completely formulated in the law. Moreover, in the basis of the maximum acceptance of the Arbitration, the arbitration system has been amended or improved according to the South Korean judicial system. At the aspect of amending the arbitration law, if there is a situation when a need for the court to assist or intervene during arbitration procedures, such as the need to confirm the possibility of the implementation or perform the arbitration award, or the need for a preservation measure before or during the arbitration proceedings, or a commission for evidence investigation conducted by the court, the civil procedure law and civil enforcement act are enforceable if there is no clear provisions in the arbitration law [6].

In the performance of the arbitration system, it needs to use the only permanent arbitration agency KCAB. Although the arbitration law does not expressly prescribe the qualification of the arbitrator, the arbitrator may be selected according to the standard of selecting a member of the KCAB.

Other characteristics of the Korean arbitration system are as follows: the first one is the principle of forbidding the direct action. In the terms of the disputes of the contents of the arbitration agreement, the defense which is taken by the defendant and are mentioned in the arbitration agreements should be rejected by the court. However, it differs if the arbitration agreement does not exist, or becomes invalid or the execution becomes impossible because of the loss of efficiency. The second one is the impossibility of the arbitration agreement being canceled. The arbitration agreement shall not be invalid because of the imperfect elements prescribed in the arbitration laws. As long as the parties have not cancelled of the arbitration agreement through mediation, the agreement cannot be unilaterally cancelled. The third one is the autonomy of the arbitration proceedings. The party of the arbitration agreement shall not ignore the resistance or incorporation of the counterparty to apply for arbitration. It will not be affected even if the arbitration agreement does not exist, or it has been beyond the scope of the arbitration agreement. The relevant judgment should be made according the authoritative explanation of the arbitrator.

2. The Comparison between South Korean and Chinese Commercial Arbitration System

2.1. The Qualification of the Arbitrator

The arbitration is characterized by the autonomy of the parties. And the qualification of the arbitrator is not written in law, and it is a general practice of making the specific content by the parties. At this point, the arbitrator should be directly designated by the parties. The qualifications generally in addition to be in accordance with basic legal provisions, should comply with the party's decision. There are no special restrictions on the qualifications of the arbitrator in principle. The arbitrator's qualification is appointed by the parties. The arbitrator by taking fair arbitration procedure, reduce the business of the court. And speaking from this point, the arbitrator plays the role of the judge. Therefore, the arbitrator should at least have the ability to judge social justice and distinguish right from wrong.

South Korea's Arbitration law provides that as long as there is no agreement between the parties, people of any nationality may be selected as the arbitrator, even if he or she is not a lawyer or any other expert. But, in the terms of the arbitrative result, such as a lawyer or a member of an economic interest, the person who has the potential to be contrary to justice or independence may not act as an arbitrator. However, the arbitration rules of the KCAB provide that " it will differ in the case of the parties know the arbitrator owns the above qualities but still designate him or her as the arbitrator in the written form," fully respecting the opinions of parties.

On the contrary, there are strict requirements of the arbitrator in China. The Artical13 of Chpter2 of China's Arbitration law provides the five requirements qualifying the arbitrator. And one of the five requirements must to be satisfied to become an arbitrator. In China, the number of the arbitrators can be determined by the parties. The arbitral tribunal has two types. One consists of three persons and the other one consists of one person. According to the Articla30 of Chinese Arbitration law, when there are three arbitrators, one president arbitrator should be selected. But there are no clear rules for the selection of president arbitrator. Only in the Articla13 of CIETAC arbitration rules, if there is no special negotiation of parties, the arbitral tribunal is composed of three people. When the arbitral tribunal is composed of one person, the arbitrator can be designated through the negotiation of the parties; when the arbitral tribunal is composed of three people, then one party shall designate one person while the third person shall be appointed by through the negotiation of the two parties. As long as any party fails to perform the right of designating arbitrator or the agreement is failed to reach in designating one arbitrator or president arbitrator, the arbitrator shall be appointed by the chairman of the Arbitration Commission. There is one important point that all the Arbitration Commissions in China have a roster of the arbitrators, and the parties can only select from the roster in principle.

2.2. Hearing of Arbitration

As for the hearing of arbitration in South Korea, if there is no further agreement between the parties, the arbitral tribunal shall make an oral or written trial. And even if the parties agree not to do the oral hearing, one party offer the request to carry out the oral hearing then a oral hearing shall be made. Moreover, the date of the oral hearing or the investigation of the evidence should be informed to the parties. In principle, the materials offered by one party to the arbitral tribunal should be informed to the other party. Arbitration tribunals shall notify the parties with the identification book or documentary as award basis. Moreover, if the applicant did not offer the applying paper because of the party's negligence, the arbitral tribunal shall end the arbitration proceedings. And if one of the parties does not participate in the oral trial or offer documentary evidence within the time limit, arbitration procedure should be continued with the presented evidence as the basis and make an arbitral award.

In China, it is principled to take an oral hearing by the arbitral tribunal. And under some special circumstances,

writing hearing can also be recognized. That is, both parties reach an agreement on opposing to the oral hearing, the arbitral award can be made according to the arbitration application paper, the respondent paper and other materials. Moreover, in addition to the agreement reached between the parties, the arbitral tribunal may make the hearing in a way it thinks as a proper manner. In any case, the arbitral award shall be handled fairly and justly and give the parties a reasonable opportunity to make a statement and debate.

The arbitral tribunal may, according to the application or approval of the parties, start the hearing. However, if the arbitral tribunal considers that there is no need to sit at a hearing, a written hearing can be made. Moreover, in addition to the agreement between the parties, the event can be heard in the way of inquiring or debating. Besides, arbitration tribunal can carry out trial program command, holding a meeting of arbitration tribunal before the hearing or during the preparation for the hearing, making a draw up within the scope of the trial and other stuff when it thinks there is a necessity.

2.3. Support and Enforcement of Arbitral Awards

The arbitral award has the same effect as the final judgment of the court. However, the arbitral award is not enforced. The party who wants the implementation must also apply to the court for the execution of the arbitral award.

The arbitration law of Korea, according to the territorial principle, an arbitral award made in the South Korean without cancellation of arbitral award should be recognized and implemented. And the party that applies to the recognition or enforcement of domestic arbitration award must present original arbitration award or a certified copy and the original arbitration agreement or its certified transcript. If the arbitration award or the arbitration agreement is written in foreign language, it should be attached to a piece of certificated Korean translation.

In the arbitration law of in South Korea, if the arbitration tribunal designates the applicable law, the award should be made according to the designated law. If no relevant laws are designated, the arbitral tribunal shall apply the law of the state which is most closely related to the disputed parties. When the parties are expressly privileged, the award should be made according to the principle of fairness and kindness. While, in the arbitration law of China, there are no relevant provisions about the applicable law, the award can only be made according to the law of China.

In The arbitration law of in South Korea, it there is no agreement between the parties, the decision of the arbitral tribunal which is composed of more than three people shall be decided in accordance with the method of over half resolution. However, as for the arbitration procedures, if there is an agreement between the parties, or all the arbitrators are granted the authority, the arbitrator which mainly responsible for the procedures can also make decisions by himself.

On the contrary, in accordance with the arbitration law of China, the arbitral tribunal may make a decision according to the majority of the decision, and the minority opinions of the rest of the arbitrators shall only be kept for the record. Compared with the arbitration law of South Korean, the additional content is that when the award is not to be implemented, the arbitral tribunal can make the implementation according to the decision of president of the arbitral tribunal.

3. Conclusion

With the rapid development of market economy, commercial disputes are increasing gradually. Meanwhile, the rapid growth of trades between South Korea and China has also become the basis of improving the resolutions of the continually growing commercial disputes. Among the solutions of these commercial disputes, the commercial arbitration which solves the non litigation disputes seems more and more important. For mutual benefit and the healthy development of the economic cooperation between the two countries, mutually beneficial strategies must be prepared in advance.

In the future, it is necessary to make a further and careful comparison between Korean and Chinese commercial arbitration system. With accurate grasp of reason of the problems and positive coping, the economic development of South Korea and China is very promising. And South Korean and Chinese arbitration system should learn from each other. It is expected that the arbitration law using as a solution to the commercial disputes between the two countries will be a good system deeply rooted in the hearts of the people. For China, it is hoped that this study can provide a clue to the healthy development of the bilateral economic and trade relations.

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