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Authorities and Duties of Arbitrators Under the Korean Arbitration Act and the American Arbitration Acts

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〈목 차〉

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Ⅰ. Introduction

Since the Federal Arbitration Act (FAA) of the United States was enacted in 1925, numerous theories and cases regarding arbitration have developed, and the environments surrounding the arbitration issues have changed drastically. Although the FAA reflected the international and regional demands by adopting new chapters to enforce not only the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 but also the Inter-American Convention on International Commercial Arbitration of 1975, it has not evolved legislatively and, particularly, its general provisions remain unchanged from the state of 1925 version without accepting the development of arbitration issues.

The Uniform Arbitration Act(UAA) has never been amended since it was adopted by the National Conference of Commissioners on Uniform State Laws(NCCUS) in 1955. Recently, the NCCUS adopted the Revised Uniform Arbitration Act (RUAA) of 2000, responding to the changed demands of legal environment.[1] Reflecting the developments of arbitration and the greater complexity of disputes, the Conference modernized outdated provisions of the old UAA, resolved ambiguous matters, and codified case law developments.[2] As a result, the RUAA addressed many new issues that were not included in the UAA of 1955, such as consolidation of separate arbitration proceedings, provisional remedies, immunity of arbitrators, and the use of electronic information. Particularly, the RUAA expanded authorities of arbitrators and reinforced their ethical duties. After its

1) National Conference of Commissioners on Uniform State Laws, *Policy Statement, at* http://www.upenn.edu/bll/ulc/uarba/arbps0500.htm.

2) Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. Disp. Resol. 1, 2 (2001).

promulgation, the Revised Uniform Arbitration Act is being adopted by many states faster than expected.[3)]

In Korea, there were almost no records of arbitration cases before the first legislation in 1966. For that reason, in-depth studies regarding arbitration history before the legislation are also scarce. There were fewer than 100 cases of arbitration during the 10 years (1967-1976) even after the arbitration act was enacted.[4)] Although Korean people have for a long time preferred alternative dispute resolution methods since ancient times, the traditional dispute resolution methods were, in terms of its character, different from the current arbitration system. The original Arbitration Act of 1966 consisted of 18 provisions. Although it was revised in 1973, 1993 and 1997 prior to the major change of the Act in 1999, the revisions were nominal arrangements of related provisions without substantial change of the content. Since the old arbitration act had scanty provisions and did not cover international commercial arbitration procedures, there was plenty of criticism regarding inefficiency of the out-of-date arbitration act and non-conformity with international criteria. Reflecting the changed international legal environments and new demands, Korea revised the old arbitration law comprehensively in 1999. The Arbitration Act of 1999 adopted the UNCITRAL model law, although it modified and complemented the model law pursuant to the Korean legal system.[5)] It was

3) As of 2005, Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington adopted the 2000 Uniform Arbitration Act. Nine states including Arizona are reviewing it in the state legislatures. National Conference of Commissioners on Uniform State Laws, *Legislative Fact Sheet, at* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp.

4) Soonwoo, Lee, A Study on the Legal Structure of Commercial Arbitration, 46 (2001) (Doctoral Dissertation, Sungkyunkwan University). *See also* The Korean Commercial Arbitration Board, A 30 Year-History of Commercial Arbitration, 76-83 (1996).

5) In principle, the UNCITRAL model law covers international commercial arbitration, but the Korean Arbitration Act of 1999 deals with civil disputes as well as

almost a new legislation, in terms of its scope and content, which introduced an international and advanced arbitration system to Korea, leading the country into the 21st century.

This article focused on comparing and analyzing authorities and duties of arbitrators under the current American arbitration acts and the new Korean arbitration act.

Ⅱ. Arbitration Process and Hearings

1. The RUAA

Whereas the Arbitration Act of Korea(KAA) has a provision manifesting that the parties may agree on the procedures to be followed in the arbitral proceedings, the RUAA has no such provision. Nonetheless, Section 15(Arbitration Process) of the RUAA is interpreted as being subject to the parties' agreement pursuant to Section 4(Effect of agreement to arbitrate; nonwaivable provisions), which means that since Section 15 is waivable, the parties may fashion the arbitration process as best fits their needs. Unless the parties agree on the procedures specifically, arbitrators have a broad discretion: the arbitrator can hold conferences with the parties before the hearing and determine the admissibility, relevance, materiality and weight of any evidence. Although the UAA of 1955 had no provision concerning arbitrators' authority for pre-hearing matters, they have been deemed to have the inherent power to perform those tasks.[6]

commercial ones, and not only domestic arbitration but also international one is covered by the single arbitration act. See Moonchul Chang, The Understanding of Modern Arbitration Law, 14-15 (2000).

The RUAA established a new provision regarding an arbitrator's summary disposition, which has been upheld by many courts.[7] It is available if all interested parties agree, or only after the requesting party gives notice to all other parties so that the other parties may have a chance to respond. Although numerous courts have upheld the necessity of summary disposition, they also have been reluctant to broadly endorse it.[8]

Arbitrators need to be cautious in enforcing their power concerning summary disposition and the court should closely examine their decision so that the opposing party may have a fair opportunity to present its position.

Where arbitrators order a hearing, the arbitrators may hear and decide the controversy upon the evidence produced, even though a party who is duly notified of the arbitration proceeding does not show up. In that case, although arbitrators have broad discretion, if arbitrators refuse to consider necessary evidence for the arbitration, it can be a ground for vacatur of the arbitral award under Section 23(Vacating Award).[9] Moreover, the court, on request, may direct the arbitrators to conduct the hearing promptly and render a timely decision under Section 15(c); the KAA does not have such a provision.

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6) National Conference of Commissioners on Uniform State Laws, *Revised Uniform Arbitration Act(2000), at 47, available at* http://www.law.upenn.edu/bll/ulc/uarba/arb1031.htm. See Stop & Shop Cos. v. Gilbane Bldg. Co., 364 Mass. 325, 304 N.E.2d 429 (1973); Gozdor v. Detroit Auto. Inter-Insurance Exchange, 52 Mich. App. 49, 214 N.W.2d 436 (1974); Upper Bucks Cnty. Area Vocational-Technical Sch. Joint Comm. v. Upper Bucks Cnty. Vocational Technical Sch. Educ. Ass'n, 91 Pa.Cmnwlth. 463, 497 A.2d 943 (1985).

7) *Id.* at 48.

8) *Id. See* Stifler v. Seymour Weiner, 62 Md. App. 19, 488 A.2d 192 (1985); Intercarbon Bermuda, Ltd. V. Caltex Trading and Transp. Corp. 146 F.R.D. 64 (S.D.N.Y. 1993); Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal. App.4th 1096, 47 Cal. Rptr. 2d 650 (1995); *but see* Prudential Sec., Inc. v. Dalton, 929 F. Supp. 1411 (N.D. Okla. 1996).

9) *Id.* at 49.

2. The KAA

As mentioned above, the KAA explicitly provides that the parties' agreement on the arbitral proceedings has priority over the arbitral tribunal. Absent the parties' agreement, the arbitral tribunal proceeds with the arbitration process in such manner as it considers appropriate. Where the parties belong to different countries and persist in applying their own country's law to the arbitration proceedings, the arbitral tribunal may conduct the proceedings appropriately after considering their arbitration systems. Both the RUAA and the KAA provide that the arbitral tribunal (the arbitrator) has the power to determine the admissibility, relevance, and weight of any evidence, which appears to refer to the UNCITRAL model law.[10]

Article 22(Commencement of Arbitral Proceedings) of the KAA provides that, absent the parties' agreement otherwise, the arbitral proceedings commence on the date on which a request for that dispute to be referred to arbitration is "received by the respondent," whereas Section 9(Initiation of Arbitration) of the RUAA provides that a party initiates an arbitration proceeding "by giving notice" in a record to the other party in the agreed manner between the parties or, in the absence of agreement, "by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action." The date of commencement is material in confirming the point in time for application of the arbitration period.

The RUAA specifically provides that if an arbitrator orders a hearing, the arbitrator should set a time and place and give notice of the hearing

10) *See* UNCITRAL model law on International Commercial Arbitration Art. 19.

"not less than five days" before the hearing begins. Yet, under Article 25(Hearings) of the KAA, the arbitral tribunal should give the parties "sufficient" advance notice of any oral hearing and of any meeting for the purpose of inspection of evidence. The KAA seems to consider the elasticity of notice, but since the term "sufficient" can be a relative notion, the specific period should have been provided.

What if a party asserts that the arbitral process is not appropriate and requests a provisional disposition staying the arbitral process to a court? The Supreme Court of Korea held that a party cannot directly seek a provisional disposition staying the arbitral process from a court during the course of the arbitral process, apart from a petition to a court to set aside the award after the end of the arbitral proceedings.[11] This appears to be a court's consideration and restraint to grant more independence of the arbitral proceedings and is in marked contrast to Section 15(c) of the RUAA, which contains "the court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision."

Ⅲ. Witnesses, Subpoenas, Depositions, Discovery

1. The FAA

Early on, the FAA gave arbitrators a power to summon any person to attend before them as a witness, or to bring with him any document which may be deemed material as evidence in the case. The FAA differentiated

11) Supreme Court Decision No. 96Ma149 dated June 11, 1996.

"summons" from "subpoenas" by providing that the "summons" shall be served in the same manner as "subpoenas" to appear and testify before the court. This appears to be intended to indicate a difference between the summons by arbitrators and the subpoenas by courts, but they are essentially the same.[12]

2. The RUAA

Section 17(Witnesses Subpoenas Depositions Discovery) of the RUAA emphasizes arbitrators' role to make the arbitration proceedings "fair, expeditious, and cost effective." Especially, under the RUAA, the arbitrators' power not only to secure witnesses and records but also to depose a witness who is unable to attend a hearing is deemed to be inherent for a fair arbitral proceeding. The courts have recognized under the FAA and the UAA that arbitrators had a power for subpoenas and depositions.[13] In addition to such subpoenas and depositions power, Section 17(c) of the RUAA grants arbitrators discovery power, but tries to keep the balance by maintaining the section to be subject to the parties' agreement, which means Section 17(c) is waivable. This reflects a number of commentators' and courts' concerns that extensive discovery can eliminate the important advantages of arbitration in terms of cost, speed and efficiency. Further, Section 17(c) requires arbitrators to consider the interests of the other affected persons as well as the parties in permitting discovery.[14] Section 17(d) recognizes the authority of arbitrators to issue subpoenas for discovery and to take action against a non-complying party to the extent a court could

12) Steven C. Bennett, Arbitration: Essential Concepts, 24 (2002).
13) National Conference of Commissioners on Uniform State Laws, *supra* note 7, at 54.
14) *Id.* at 53.

if the controversy were the subject of a civil action, thereby minimizing the involvement of the courts during the discovery process.[15] Section 17(d) has an effect to drive a wedge in unclear holdings of courts regarding arbitrators' power to issue subpoenas for the attendance of non-parties and for the production of records and other evidence at a discovery proceeding prior to the arbitration hearing.[16] Since arbitrators' discovery-related orders or subpoenas are not self-enforcing, a party to arbitration agreement needs to seek a court's aid to enforce the arbitral orders. In the process, the nonparty should be given a right to file a motion to quash the subpoena or the arbitral order for the balance of the rights between the party to arbitration and the nonparty. Because non-parties have never participated in making an arbitration agreement, more protections from unexpected interference are required.

Section 17(e) permits arbitrators to issue a protective order to prevent the disclosure of privileged information and other information protected from disclosure to the extent a court could. Section 17(g) curtails duplicative court proceedings between two states by permitting a court in a state to enforce a subpoena or discovery-related order that is issued by

15) *Id.* at 54.

16) National Conference of Commissioners on Uniform State Laws, *supra* note 7, at 54. The positions of the courts concerning arbitrators'subpoena power for pre-hearing discovery have not been consistent. The holding in *COMSAT Corp. v. National Science Foundation,* 190 F.3d 269 (4th Cir. 1999) that arbitrators have no power to issue subpoenas to non-parties to produce materials prior to the arbitration hearing was contrary to those of three federal district courts (Amgen, Inc. v. KidneyCtr. of Delaware County, 879 F. Supp. 878 (N.D. Ill. 1995); Meadows Indemnity Co. v. Nutmeg Ins. Co., 157 F.R.D. 42 (M.D. Tenn. 1994); Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241 (S.D. Fla. 1988)). Furthermore, in *Integrity Insurance Co. v. American Centennial Insurance Co.*, 885 F. Supp. 69 (S.D. N.Y. 1995), the court enforced a subpoena for documents of a nonparty but refused to enforce a subpoena to depose that person with the reason that to do so could result in requiring the person to appear twice-once for the hearing and once for the deposition.

an arbitrator in connection with an arbitration proceeding in another state. Before the adoption of Section17(g), two court actions were needed. Since this procedure is a new scheme, a party attempting to use the process in another state needs to call attention to Section 17(g) so that the parties, persons served, and the court are aware of this authority.[17]

In sum, Section 17(Witnesses Subpoenas Depositions Discovery) of the RUAA gives arbitrators more discretion for efficient arbitration proceedings, while balancing the rights between parties to arbitration and non-parties. It also "adapts discovery to evolving arbitration practice."[18]

3. The KAA

The position of the KAA concerning arbitrators' power to witnesses, subpoenas, or discovery is not so articulate, although it is interpreted that the arbitral tribunal may "request" the production of evidence or the "voluntary appearance" of a witness at the hearings. In this regard, arbitrators' power under the KAA is more limited than that under the RUAA. This appears to derive from Korean lawmakers' rooted conception that arbitrators' authority is not an exercise of public power. As a result, there is a significant difference of arbitrators' procedural authority between the KAA and the RUAA: the latter extensively recognizes arbitrators' power to issue orders for subpoenas, depositions, and discovery, and to take action against a non-complying party.

Arbitrators in Korea cannot administer oaths. However, the United States has recognized the arbitrators' power to administer oaths, which were codified in the UAA of 1955 as well.

17) *Id.* at 56.
18) Heinsz, *supra* note 3, at 51.

The KAA has a provision that the arbitral tribunal may request to a competent court assistance in taking evidence if a party so requests or if the arbitral tribunal considers it necessary, in which case the requested court "should," after taking evidence, send the records with respect to the taking of evidence "without delay." Nevertheless, considering the process in Korean courts, arbitral proceedings without substantial procedural power of the arbitral tribunal will have limitations in seeking expeditious process.

Ⅳ. Provisional Remedies[19]

1. The RUAA

Section 8(Provisional Remedies) of the RUAA has a fairly detailed clause concerning provisional remedies. The courts, commentators, rules of arbitration organizations, and some state statutes have recognized the arbitrators' broad authority for provisional remedies, which include "the issuance of measures equivalent to civil remedies of attachment, replevin, and sequestration to preserve assets or to make preliminary rulings ordering parties to undertake certain acts that affect the subject matter of the arbitration proceeding."[20]

Reflecting the trend, the RUAA manifestly provides provisional remedies. It subdivides the situation into before and after an arbitrator is appointed.

19) The RUAA arranged "SECTION 8. PROVISIONAL REMEDIES" prior to SECTION 9. INITIATION OF ARBITRATION. The KAA arranged "Article 10. Arbitration Agreement and Interim Measures by Court" and "Article 18. Interim Measure (by arbitrators)" separately.

20) National Conference of Commissioners on Uniform State Laws, *supra* note 7, at 23.

Before an arbitrator is appointed or is authorized or able to act, the court, upon motion of a party to an arbitration proceeding, may grant provisional remedies to preserve the status quo of the property that is the subject of the arbitration. After an arbitrator is appointed, however, the arbitrator, not the court, has the initial authority to decide the propriety of provisional remedies and thus may issue orders providing for provisional remedies. In such a case, a party can seek a court enforcement of the arbitrator's pre-award ruling pursuant to Section 18(Judicial Enforcement of Preaward Ruling by Arbitrator) of the RUAA. Moreover, even after an arbitrator is appointed, a party may seek relief from a court under Section 8(b) only if a matter is urgent and an arbitrator's response is not timely, or the arbitrator cannot provide an adequate provisional remedy.

2. The KAA

Article 10(Arbitration Agreement and Interim Measures by Court) of the KAA provides succinctly interim measures by courts, which are available "before" or "during" arbitral proceedings. Article 18(Interim Measure) grants the arbitral tribunal authority to make interim measures at the request of a party. In particular, the KAA prescribes that the arbitral tribunal may let the respondent provide appropriate security in lieu of such measures. Practically, interim measures by courts are useful before the arbitral proceedings commence or arbitrators are appointed because courts' decision is self-enforcing. By contrast, interim measures by the arbitral tribunal can be conveniently available during the arbitral proceedings without the courts' involvement. A party who wants to seek interim measures may select the court or the arbitral tribunal according to his situation and convenience under the KAA.

A question may arise whether parties can agree to waive interim measures in their arbitration agreement. Considering the character of interim measures as the function of public interest, it should be interpreted to mean that the parties may not waive interim measures in their arbitration agreement before a controversy arises. By contrast, Section 4 of the RUAA expressly prohibits a waiver of provisional remedies in a pre-dispute context.

V. Arbitral Award

1. The RUAA

Under the RUAA, if there is more than one arbitrator, the arbitral award must be rendered by a majority of the arbitrators, but all of them should conduct the hearing under Section 15(c). Since the requirement of "action by majority" is subject to the parties' agreement, the parties are free to change the majority requirement. Similarly, the manner of the hearing can be changed by the parties' agreement. Where an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with Section 11(Appointment of Arbitrators).

Under Section 18(Judicial Enforcement of Preaward Ruling by Arbitrator) of the RUAA, if an arbitrator makes a pre-award ruling or a decision for provisional remedies and the other party refuses to comply with any of them, the prevailing party may apply to a court for an expedited order to confirm the award. Generally, courts have been very reluctant to review

arbitrators' interlocutory orders,[21] and have more carefully reviewed challenges to arbitrators' pre-award rulings in the case of the involvement of important legal rights, such as claims of confidentiality, trade secrets, privileges, etc.[22] Considering the basic purpose of arbitration, the court should not be "entangled in a substantial appraisal of the merits of the arbitrator's decision on preliminary relief."[23] Because Section 28(Appeals) does not provide as an object of appeals the court's decision on arbitrators' pre-award ruling, the party cannot appeal it.

Where arbitrators render the award, they should give notice of the award, including a copy of the award, to each party, but the RUAA does not require the award to include the reason for rendering the award, although the KAA calls for its inclusion in the award. Arbitrators must render the award within the time specified by the parties' arbitration agreement or, if not specified therein, within the time ordered by the court.

2. The KAA

Article 29(Rules Applicable to Substance of Dispute) of the KAA provides rules applicable to the substance of dispute. The arbitral tribunal should decide the dispute pursuant to the rules of law chosen by the parties. If the parties fail to designate the applicable law, the arbitral tribunal should apply the law of the nation which it considers having the closest connection with the subject-matter of the dispute. This provision is intended to apply to international cases because the KAA covers not only domestic but also international arbitration, while the RUAA does not address international

21) National Conference of Commissioners on Uniform State Laws, *supra* note 7, at 57.
22) *Id.* at 58.
23) Heinsz, *supra* note 3, at 22.

arbitration. Like the RUAA, the KAA requires the majority of arbitrators to make a decision unless the parties agree otherwise.

In particular, the KAA provides a settlement during the arbitral proceedings. If the parties want to settle the dispute, the arbitral tribunal should terminate the arbitral proceedings, in which case, upon request by the parties, the arbitral tribunal may record the settlement in the form of an arbitral award on agreed terms. The arbitral award has the same effect as any other award, but it should be noted that mentioning the reason for the award is not needed, unlike any other awards under Article 32(Form and Contents of Award). Where the arbitral award based on the settlement violates the public policy, it can be set aside by a court under Article 36(Petition to Court to Set Aside Award) or so contended by a party under the principle concerning recognition or enforcement of a foreign award.

Under the KAA, the arbitral award should be made in writing and state the reasons upon which it is based unless the parties agree otherwise. Further, the award should describe its date and place of arbitration.

Ⅵ. Modification or Correction of Award

1. The FAA

The FAA grants "a court" authority to make an order modifying or correcting the award, which is stipulated to secure the enforceability of an award that is valid but has technical mistakes that are apparent on its fac e.[24] The grounds to modify or correct the award are an evident material

24) Bennett, *supra* note 13, at 28.

mistake of figures or of the description of any subject in the award, arbitrators' award upon a matter not submitted to them, and imperfect awards in matter of form not affecting the merits of the controversy. The court may confirm the part of the award that is viable, and modify or correct the rest of the award.[25] Particularly, under the FAA, the court may "modify or correct" the award if arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted, which was followed by the RUAA.

In contrast, under Article 36(Petition to Court to Set Aside Award) of the KAA, the court may "set aside" if the award has dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration.

2. The RUAA

Section 20(Change of Award by Arbitrator) of the RUAA provides modification or correction of the award by "arbitrators" as well as by "a court," while the FAA provides modification or correction of the award by "a court." The KAA grants arbitrators, not a court, such authority. This scheme to give arbitrators authority to modify or correct the award is a proper legislative development in that such actions by arbitrators prior to the involvement of the court can reduce the time and costs.

Meanwhile, Section 20(d) provides that if a motion to the court is pending under Section 22 (Confirmation of Award), 23 (Vacating Award), or 24 (Modification or Correction of Award), the court may submit the claim to the arbitrator to consider whether to modify or correct the award

25) *Id.*

where any specified ground above arises. Section 20(d) is problematic in terms of a legislative technique. The section can infringe the finality of arbitration by the court's ordering the reiteration of the arbitral award, which undermines the doctrine of functus officio.[26] Section 20(d) that permits the court to remand the claim back to the arbitrators is circulative. Since Section 20(a) of the RUAA, unlike the FAA, first grants the arbitrator a chance to change the award and then the unsatisfied party can move for modification or correction of the award to a court, Section 20(d) causes reiteration and thus infringes the purpose of arbitration. Further, where a motion to vacate the award is pending, the effect of Section 20(d) is doubtful. Except for Section 20(d), Section 20 of the RUAA will contribute to enhance the efficiency of the arbitral proceedings by minimizing the involvement of the court through the internal filtering effect.

3. The KAA

Article 34(Correction or Interpretation of Award or Additional Award) of the KAA provides correction or interpretation of an award, or an additional award by arbitrators. Since recourse against an arbitral award is available only by a petition to a court for setting aside the award under Article 36(Petition to Court to Set Aside Award), the party who wants to modify or correct the award should request it to arbitrators, not to a court. In fact, since the grounds for modification or correction of the award are usually apparent mistakes, the effectiveness of the motion for modification

26) National Conference of Commissioners on Uniform State Laws, *supra* note 7, at 61. The doctrine of *functus officio* is "a general rule in common law arbitration that when arbitrators have executed their awards and declared their decision they are *functus officio* and have no power to proceed further."

or correction of the award to a court is doubtful.

While the FAA and the RUAA don't provide the time limit within which arbitrators or courts should decide the motion for modification or correction of the award, the KAA sets the period. Hence, the arbitral tribunal should decide within thirty days of the receipt of the request for correction of errors of the award. This time limit appears to be intended for efficiency and rapidity of the arbitral proceedings. The arbitral tribunal under the KAA is allowed to correct any error on its own initiative even though there is no request by the parties.

Ⅶ. Disclosure by Arbitrators

1. The RUAA

Section 12(Disclosure by Arbitrator) of the RUAA provides an ethical duty of arbitrators, patterning on AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (1977).[27] An individual who is requested to serve as an arbitrator should disclose to all parties and other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator, which include a financial or personal interest in the outcome and an existing or past relationship with any of the parties. This is an objective standard. The disclosure standards apply to neutral and non-neutral arbitrators, but, unlike the situation of disclosure requirements by neutral arbitrators, the parties may agree to waive the requirements by non-neutral arbitrators.[28] The RUAA excludes vague expansion of the

27) National Conference of Commissioners on Uniform State Laws, *supra* note 7, at 36.

requirements of disclosure by arbitrators by substituting "a" financial or personal interest in the outcome or "an" existing or past relationship for the terms of "any" financial or personal interest in the outcome or "any" existing or past relationship. It is to avoid including de minimis interests or relationships.[29] So, the provision draws a distinction between the RUAA and the KAA because the latter simply provides "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence" without specificity.

The arbitrator has a continuing obligation even after accepting appointment. Where the arbitrator fails to disclose the interest or relationship and proceeds with the arbitral proceedings despite a party's timely objection, the party's objection may be a ground for vacating an award.[30]

2. The KAA

Under Article 13(Grounds for Challenge against Arbitrator) of the KAA, an

individual who is requested to be an arbitrator should disclose any circumstances likely to give rise to justifiable doubts concerning impartiality or independence. The KAA expands the grounds for challenge against arbitrators by using the term "any circumstances." However, since it does not show their specificity, a matter of interpretation regarding the term can arise. A financial or personal interest in the outcome, or an existing or past

28) Heinsz, *supra* note 3, at 18.

29) National Conference of Commissioners on Uniform State Laws, *supra* note 7, at 37.

30) "Section 23. Vacating Award" provides grounds for vacatur. *See* Revised Uniform Arbitration Act § 23.

relationship with any of the parties under Section 12 of the RUAA can be interpreted as parts of the circumstances.

If there is a ground for challenge against an arbitrator,[31] the parties are free to agree on a procedure to challenge the arbitrator under Article 14(Procedure to Challenge Arbitrator). Failing such agreement, a party may send a written statement of the reason for the challenge to the arbitral tribunal. The KAA is different from the RUAA in that the challenging party needs to submit the request first to the arbitral tribunal before the party goes to a court. It seems to be a consideration to seek rapidity of the procedure to challenge arbitrators. If the challenged arbitrator does not withdraw from his office or the arbitral tribunal does not decide on the challenge, the party may request the court to decide on the challenge. The decision of the court on the challenge is subject to no appeal.

Unlike the RUAA, the KAA does not recognize the vacatur by courts where an arbitrator made an arbitral award despite a party's timely objection. According to Article 36(Petition to Court to Set Aside Award), recourse against an arbitral award may be available only by a petition to a court for setting aside the award and the grounds for the petition do not include the cause.[32] Instead, the KAA allows the challenging party to directly request the court to decide on the challenge of arbitrator according to the stated procedure above, without waiting until the arbitrators render the award.

31) There are two grounds under Article 13: any circumstances likely to give rise to justifiable doubts as to his impartiality or independence and where the arbitrator does not possess qualifications agreed to by the parties.

32) *See* The KAA Art. 36.

Ⅷ. Conclusion

In sum, in relation to authorities of arbitrators, the arbitration law in the USA grants arbitrators more procedural powers than that in Korea does. Under the FAA, arbitrators have a power to summon any person to attend before them as a witness and to bring with him any material evidence in the case. In the event that a person who was so summoned refuses or neglects to obey the summons, he is subject to an order of enforcement or punishment by the court. The RUAA gives arbitrators a broader authority. In addition to a subpoena power for the attendance of a witness and for the production of records and other evidence, arbitrators are expressly granted a power to permit depositions and discovery. This means that arbitrators are given more discretion in finding necessary and critical evidences to render a proper award. To insure the purpose, under Section 17(Witnesses Subpoenas Depositions Discovery), the same rules as that of the civil action apply to arbitral proceedings for compelling a person under subpoena to testify and for compelling the witness fees. Section 21 (Remedies; Fees and Expenses of Arbitration Proceeding) shows how the RUAA stipulates to broaden arbitrators' power. It provides that arbitrators may not only award punitive damages or other exemplary relief if such an award is authorized by law and the evidence justifies the award under the legal standards, but also award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law or by the agreement of the parties. Therefore, the RUAA expands arbitrators' creativity in fashioning remedies by granting them broad remedial discretion.[33]

33) National Conference of Commissioners on Uniform State Laws, *supra* note 7, at 66.

In contrast, arbitrators' authority under the arbitration law in Korea is more restricted than that of arbitrators under the arbitration law in the USA. Unlike the RUAA, the KAA does not have a specific provision regarding arbitrators' authority for the arbitral process to procure evidences. Instead, the KAA has a provision that the arbitral tribunal may request to a competent court assistance in taking evidence if a party so requests or if the arbitral tribunal considers it necessary. The KAA contains a dilemma. If arbitrators request to a court assistance in taking evidence, the involvement of a court is inevitable and it can cause delay and inefficiency of arbitral proceedings. To the contrary, if arbitrators proceed with the proceedings without procuring necessary evidences to avoid the court's involvement and delay of arbitral proceedings, it can be difficult for them to approach the essence of the dispute that is a prerequisite for rendering a good award.

Accordingly, Korea needs to complement provisions regarding arbitrators' authority for the arbitral process and to reinforce arbitrators' procedural powers under the KAA.

In relation to duties of arbitrators, the arbitration laws in Korea and the USA show similar demands. Under the RUAA, Section 12(Disclosure by Arbitrator)makes clear that before or even after accepting appointment, an arbitrator should disclose to all parties and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding. If the arbitrator did not disclose the required facts, the violation is subject to vacatur by a court.

Similarly, under the KAA, Article 13(Grounds for Challenge against

Arbitrator) lays arbitrators a duty to disclose, without delay, any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

On the other hand, under the RUAA, Section 14(Immunity of Arbitrator Competency to testify Attorney's fees and Costs) of the RUAA grants immunity of civil liability by giving the "functional comparability"[34] of the arbitrators' acts and judgments to those of judges. Further, where a party makes a claim against arbitrators, they are immune from testifying or producing records as to any decision occurring during the arbitral proceeding unless they assert a claim against a party or their decision is subject to vacatur. However, the KAA does not provide immunity of arbitrators which is established in the RUAA.

Finally, considering the importance of arbitrators's role for the success of arbitration, the expertise of arbitrators and their training in Korea should be reinforced. Although Korea has a lot of industrial experts in various fields, there are frequent situations in which they are not familiar with the arbitration systems. On the other hand, lawyers and professors, who are a majority of arbitrators, are short of industrial practical expertise. Another reason that the pool of arbitrators with expertise is limited is the short history of the Korean arbitration system. In order for Korea to join a line of leading countries in international commercial arbitration, it needs to secure a great number of experienced arbitrators who are bilingual or multilingual. For those reasons, continuous publicity concerning arbitration

34) *Id.* at 43. See also Butz v. Economou, 438 U.S. 478 (1978); Corey v. New York Stock Exch., 691 F. 2d 1205 (6 th Cir. 1982); Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993).

is required. Not only qualifications of arbitrators, but their ethics are decisive factors of successful arbitration. Unlike the American Arbitration Association (AAA), the Korean Commercial Arbitration Board (KCAB) does not maintain an ethical code for the Panel of Arbitrators except for a duty of disclosure pursuant to the Korean Arbitration Act. Since random emphases through training are insufficient to establish consistent ethics for impartiality and fairness, an ethical code that contains standards and specific ethical guides should be developed.

References

(Korea)

Chang, Moonchul. The Understanding of Modern Arbitration Law. Sechang Pub., 2000.

Lee, Soonwoo. A Study on the Legal Structure of Commercial Arbitration, 2001 (Doctoral Dissertation, Sungkyunkwan University).

The Korean Commercial Arbitration Board, A 30 Year-History of Commercial Arbitration, 1996.

The Arbitration Act of Korea, 1999.

Supreme Court Decision No. 96Ma149 dated June 11, 1996.

(The United States)

Bennett, Steven. Arbitration: Essential Concepts, 2002.

Born, Gary. International Commercial Arbitration In The United States: Commentary And Materials, 1994.

Heinsz, Timothy. The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law, J. Disp. Resol., 2001.

Macneil, Ian. American Arbitration Law, 1992.

Terry, Jeffery. A new US Arbitration Statute for the 21st century: An English Perspective in the wake of the English Arbitration Act 1996 in Arbitration Now(Paul H. Haagen ed., American Bar Association), 1999.

The Federal Arbitration Act, 1925.

The Revised Uniform Arbitration Act, 2000.

UNCITRAL, Model Law on International Commercial Arbitration, 1985.

15 U.S.C.A. § 7001.

COMSAT Corp. v. National Science Foundation, 190 F.3d 269 (4th Cir. 1999).

349 Mass. 659, 212 N.E. 2d 243 (1965).

393 U.S. 145 (1968).

National Conference of Commissioners on Uniform State Laws, Legislative Fact Sheet, at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp.

National Conference of Commissioners on Uniform Sate Laws, Policy Statement, at http://www.upenn.edu/bll/ulc/uarba/arbps0500.htm.

National Conference of Commissioners on Uniform State Laws, Revised Uniform Arbitration Act(2000), available at http://www.law.upenn.edu/bll/ulc/uarba/arb1031.htm

국 문 요 약

한·미 중재법상의 중재인의 권한과 의무

박 철 규

이 논문은 1999년에 전면 개정된 한국의 중재법과 1925년에 제정된 미국의 연방중재법 및 2000년에 제시된 개정통일중재법의 내용 중 중재인의 권한과 의무들에 관한 규정들을 비교·분석한 것이다.

우선, 미국 중재법의 기본법이라 할 수 있는 연방중재법은 1925년에 제정된 이래 중재 이슈에 관한 발전들을 담아내지 못한 채 진부한 과거의 법률을 그대로 유지하고 있다. 따라서, 중재인의 권한과 의무에 대해서도 중재판정과 같은 기본적인 권한 규정 외에 중재인의 임시적 처분이나 민사책임의 면제, 고지 의무등 새롭게 진전된 중재 환경의 변화나 논의들이 다루어지지 않고 있다.

그러나, 미국의 통일주법위원전미협의회가 주체가 되어 제시한 2000년의 개정통일중재법은 중재이론이나 케이스의 발전들을 반영하였을 뿐만 아니라, 중재인의 권한과 의무에 대해서도 훨씬 구체적인 규정들을 담아내고 있다. 개정통일중재법은 중재인의 권한을 개정 이전보다 훨씬 강화하는 대신, 보다 엄격한 윤리적 의무를 부과함으로써 균형을 유지하려 하고 있다. 특히, 중재인의 올바른 중재판정을 이끌어 내기 위해 증거 확보에 있어 보다 강한 절차적 권한을 부여 하고 있는 것이 특징이다. 아울러, 중재인으로 하여금 임시적 처분을 내릴 수 있는 권한을 부여하고 있을 뿐만 아니라, 징벌적 배상을 결정할 수 있게까지 규정하고 있다. 그러나, 중재인의 절차적 권한의 강화는 동법이 의도한 바와는 달리 중재를 재판에 유사한 구조로 만듦과 동시에, 중재의 신속성과 최종성을 해치는 결과를 초래하는 것이 아닌가 하는 우려와 지

적을 낳기도 한다.

한편, 한국의 중재법은 중재인의 임시적 처분권한과 고지의무를 규정하고 있지만, 미국의 개정통일중재법과 달리 민사적 책임면제 규정을 두고 있지는 않다. 특히, 한국 중재법에서 중재인은 증거를 수집하기 위하여 당사자의 임의적 협조에 의존하지만, 미국의 개정통일중재법에서는 증거개시제도까지 채택하고, 제3자도 소환할 수 있는 등 중재인의 절차적 권한이 훨씬 강하므로 한국 중재법에서 중재인의 절차적 권한은 미국의 개정통일중재법에서의 그것보다는 훨씬 제한적이다. 한국의 중재를 더욱 실효성 있게 하기 위해서는 중재법에서 중재인의 절차적 권한에 관한 규정을 보완해 주어야 할 것이다. 또 성공적인 중재를 위해서는 중재인의 전문성과 함께 윤리의식이 중요하므로 상사중재원은 별도의 중재인 윤리규정을 제정해야 할 것이다.

주제어 : 중재인의 권한과 의무, 연방중재법, 개정통일중재법, 한국 중재법, 중재절차, 임시적 처분, 중재 판정, 중재인에 의한 고지