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A Review of Arbitrator Disclosure Obligations in Korea through the *Oilhub* Case

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This article provides an overview of the state of affairs of arbitrator disclosure obligations in Korea. It shows how Korean courts will analyze arbitrator conflicts and obligations through an evaluation of Supreme Court judgments and a case-specific analysis of the recent Oilhub case and provides a comparative perspective through a review of recent Japanese case law. Although limited to domestic arbitrations, it assesses the various grounds that courts consider when determining impermissible arbitrator conflicts based on relations with parties and when an award might be set aside as a result. With the 2016 adoption of the KCAB Code of Ethics for Arbitrators and its rigorous standards, great clarity has been brought to the landscape. The Code of Ethics marks a significant milestone in enhancing the robustness of arbitrator disclosures and guaranteeing the fairness, integrity, and transparency of Korean arbitration practice and law.

Key Words : arbitrator, disclosure, challenges, disqualifications, set aside, KCAB, KCAB Code of Ethics, Japan

〈 Contents 〉

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Ⅰ. Introduction

In the span of two decades, Korea has emerged as one of the leading arbitration centers in the world, largely in an unnoticed fashion. After Hong Kong and Singapore, many consider that it has become the third leading international jurisdiction in Asia, the fastest growing arbitration market in the world. As a seat of arbitration, Seoul has become a leading alternative in Asia that is particularly attractive as an advanced civil law jurisdiction that is based on the UNCITRAL Model Law and boasts strong rule of law and a sophisticated judiciary. Despite the number of cases, size of disputes, and diversity and complexity of matters, the sophistication of arbitration practice and law in Korea still remains veiled to many that are less familiar with international dispute resolution in Asia-Pacific.

One important area of development concerns the practice and law concerning the standards that arbitrators should follow and the type of disclosure obligations they should be required to meet. As the ultimate decision-makers who are entrusted to resolve a dispute between the parties, the integrity of the arbitral tribunal and confidence in its arbitrators are integral to the success of arbitration. The role of the courts and arbitral institutions in establishing and defining the applicable contours are important in this regard. Korean court cases and jurisprudence are not widely-known.

This article will seek to review recent case law and developments to highlight the state of affairs in Korea concerning arbitrator disclosure standards and obligations. It will provide a comparative perspective through a review of recent Japanese case law and will then consider the implications of the Code of Ethics for Arbitrators that was adopted in 2016 by the Korean Commercial Arbitration Board (KCAB), Korea's main arbitral institution. The article hopes to shed light on the state of law and practice in Korea with regard to the disclosure obligations of arbitrators and consider the implications for the future.

Ⅱ. Law on Arbitrator Disclosure and Recent Cases

1. Legal Obligations for Arbitrators

In terms of the statutory framework of arbitration law, Korea has adopted the 2016 version of the UNCITRAL International Model Law on International Commercial ("Model Law").[1] Accordingly, the Korean Arbitration Act ("Act") almost follows verbatim the relevant provisions in the Model Law related to arbitrators such as the grounds and procedures for challenging arbitrators with minimal, non-substantive differences. Under the heading "Grounds for Challenge", for instance, Article 13 of the Act provides that when contacted concerning a potential arbitrator appointment a candidate "shall, without delay, disclose any circumstance likely to give rise to justifiable doubts as to his/her impartiality or independence to the parties".[2] Under Article 14.2, challenges against arbitrators should be made within 15 days of the constitution of the tribunal or when a party becomes aware of a grounds for challenge under Article 13. One non-substantive difference with the Model Law is that under Act an arbitrator does not have to disclose circumstances to the parties where "they have been already been informed of them by him/her".[3]

First established in 1966, the KCAB operates as Korea's premier arbitral institution. Since 2007, KCAB has promulgated and operated a separate set of international rules, and, as of April 2018, international cases are handled by the separately established and operated KCAB International. Under the current 2016 KCAB International Rules, Article 10.2 provides that "[a]n arbitrator who accepts an appointment or nomination shall sign and submit a Statement of Acceptance and a Statement of Impartiality and Independence in the form provided by the Secretariat". Furthermore, Article 10.2 reiterates an arbitrator's obligation under the Act and provides that an arbitrator who accepts a nomination or appointment must disclose "any circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence" and

1) Korea adopted the 1985 version on 31 December 1999. Act No. 6083.
2) Non-Model Law countries like the UK do not provide a statutory duty of disclosure for arbitrators but instead such duty is derived from case law. *Halliburton Company v. Chubb Bermuda Insurance Ltd.* [2018] EWCA Civ 817.
3) UNCITRAL Model Law, Article 12.1, second sentence.

stipulates that such disclosure must be first made to the KCAB Secretariat. The arbitrator likewise maintains an ongoing obligation during the arbitration to "immediately disclose" to both the parties and the Secretariat if "new circumstances arise that may give rise to such doubts as to the arbitrator's impartiality or independence". Again, the International Rules closely follow the requirements of the Act. Article 14 provides that challenges should also be made within 15 days.

For international cases, the KCAB International Secretariat may seek the views of the International Arbitration Committee that was established in 2011 to consult on, among other things, arbitrator challenges as provided for under Article 1.3 of the Rules.[4] With regard to the requirements for arbitrators, the KCAB Domestic Arbitration Rules do not differ from the International Rules and stipulate the relevant provisions in Article 18. Similarly, Article 23 provides the comparable rules for arbitrator challenges.

2. Prior Leading Court Cases

At present, the Korean Supreme Court has rendered two cases related to arbitrator disclosures and obligations. Both involved domestic arbitrations under the rules of the KCAB. Both cases also concerned conflicts related to an arbitrator who happened to be an attorney. The first one was under the pre-Model Law version of the Act and the second one occurred after the adoption of the Model Law.

The first leading cases was *Republic of Korea (Seoul Metro Corporation) v. Shinsung Construction*, where the Supreme Court set aside an award for the first and only time due to an arbitrator's conflict.[5] In the arbitration, Shinsung was represented by a consulting firm. One of the co-arbitrators in the case appointed through the KCAB's list method also happened to be a practicing attorney.[6] Subsequently, while the original

4) KCAB International's International Arbitration Committee has provided its views on a handful of cases as provided under Rule 1.

5) 2003 Da 21995, 12 March 2004 (Supreme Court); Bae, Kim & Lee, Arbitration Law of Korea: Practice and Procedure, Juris, 2012, pp. 307-9; Joongi Kim, International Arbitration in Korea, Oxford University Press, 2017, pp. 149-151. At the time of the case, Korea had not adopted the 1985 version of the Model Law and pre-2000 version of the KCAB Rules applied. Korean court case numbers are stated consecutively without spacing, such as "2016Gahap7777" or "2019Da9999" but for readability purposes, a space has been added before and after the court notations, to make the case citations appear as "2016 Gahap 7777" or "2019 Da 9999".

6) The mechanics of the KCAB list method are described on page 7 below.

arbitration was ongoing, the consulting firm representing Shinsung retained the co-arbitrator in his capacity as an attorney to represent another third party in a different case with similar issues to then bring an arbitration against respondent, the Seoul Metro Corporation.[7] While the original arbitration proceedings continued, in the second arbitration, the co-arbitrator worked closely together with employees of the consulting firm that represented Shinsung, attended hearings and actively represented the third party against respondent. The co-arbitrator failed to disclose any aspect of his relation with claimant's representative or his involvement in the second case.

The Supreme Court set aside the award and stressed that an attorney who, in particular, serves as an arbitrator should limit all contact with a party or their counsel outside the context of the arbitral proceedings. They added that in principle an arbitrator should not be referred another case by a party or their representative even it was if not related to the original arbitration. The Court concluded that if an arbitrator who was also an attorney was referred a case by a party or their representative, particularly where the practical or legal issues were the same, then this would constitute a "serious circumstance that would give rise to doubts as to his impartiality or independence".[8] The Court held that an award rendered with such an arbitrator on the tribunal should be set aside on the grounds that the appointment of the arbitrator or arbitral proceedings was not in accordance with the Act or the arbitration agreement.

In comparison, in the other leading case, *Sewoo Technical Industrial Co. v. 2002 World Cup Soccer Organizing Committee*, the Supreme Court upheld a lower court decision not to set aside an award even though a co-arbitrator failed to disclose that he was an attorney working at the same law firm as counsel for the respondent.[9] In the case, the KCAB Secretariat informed claimant's counsel of this relationship at the hearing but claimant's counsel did not raise an issue in this regard until after the award was rendered. Applying the Model Law version of the Act, the Court highlighted the claimant's failure to file a challenge after becoming aware of the conflict and

7) Chang Seog Oh, pp. 373-5; 379-380, 382; Dong Shin Lee, pp. 9-10; Bae, Kim & Lee, p. 306; Joongi Kim, pp. 149-151.

8) Notably, the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") were cited by respondent as an additional basis to set aside the award before the District Court and High Court but they were not mentioned in any of the court decisions.

9) 2004 Da 47901, 29 April 2005 (Supreme Court).

relationship within the required 15-day period and also to file a challenge later with the court. The Court stated that a party could not disregard these challenge procedures and then wait until later to try to set aside an award. The Court added that, to prevent delays, the Act provided that arbitral proceedings may continue even when a challenge is brought. The case confirmed how Korean courts strictly apply deadlines for filing challenges.

Although the Court did not affirmatively hold that the co-arbitrator's relation with the counsel would be grounds to set aside an award, it did indirectly suggest that it would raise justifiable doubts as to the co-arbitrator's independence and impartiality. At the same time, the Court did note that respondent did not retain the law firm where the co-arbitrator worked as their legal counsel. Instead, respondent retained as counsel the co-arbitrator's former colleague who for practical purposes ceased working for the law firm of the co-arbitrator and was only working as a legal advisor to respondent and was acting as counsel in his capacity as an employee of respondent.

The Court also considered the Civil Procedure Act and the standards applied to domestic judges to suggest that if the arbitrator actually served as legal counsel for the respondent then this might constitute grounds to set aside the award even though the challenge was not brought in a timely manner. Article 41 of the Civil Procedure Act disqualifies a judge who also acts as or becomes legal counsel for a party. From a comparative perspective, divergent views exist across various jurisdictions on whether the standard for a judge should be applied to an arbitrator.[10] Some commentators have questioned whether a current court would make such an analogy and refer to the standards applied to domestic judges if the case concerned an international arbitratio n.[11] Based on the *Sewoo* case, it appears that Korean courts may consider the standard applied to a judge when considering the standards to be applied to an arbitrator, especially if it involved a domestic arbitration.[12]

10) Gary Born, International Commercial Arbitration (Kluwer, 3rd edition 2014), p. 1787.

11) Bae, Kim & Lee, p. 308.

12) For a recent overview of the English law view on how the standards applied to judges should be the same as arbitrators see. *Halliburton Company v. (1) Chubb Bermuda Insurance Ltd*, [2017] EWHC 137 (Comm); *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817,

3. Recent Case Law

(1) *Oilhub Korea Yeosu v Hyundai E&C and Byuksan Engineering (Seoul District Court)*

The case of *Oilhub Korea Yeosu v Hyundai E&C and Byuksan Engineering*[13] provides a more recent overview of how Korean courts analyze issues regarding arbitrator disclosure. The case was reviewed by the construction section of the Seoul District Court, the leading district court, and the Seoul High Court, the leading high court. The plaintiff Oilhub was a joint venture between several of Korea's and Asia's largest energy companies, including Korean National Oil Corporation, China Aviation Oil, SK Energy, GS Caltex, and Samsung C&T, and was established to build a facility to manufacture, store and supply petroleum products. The defendants, Hyundai E&C and Byuksan Engineering, were two of Korea's largest contractors that contracted to build part of Oilhub's facilities. After various disagreements arose, the parties entered into a settlement agreement that provided that all disagreements would be settled by arbitration under the KCAB Domestic Rules and that the chair and co-arbitrators would be appointed by the list method under Article 21 of the Rules.

Hyundai E&C and Byuksan commenced arbitration against Oilhub and the arbitrators were to be appointed through the list method. The KCAB provided a list of ten candidates for the parties to rank one through five for the chair and one through ten for the other co-arbitrators. The candidates with the highest ranking based on the parties combined preferences became the chair and the co-arbitrators, respectively. Eventually, chair X and co-arbitrators Y and Z were appointed based upon the combined preferences, and as a tribunal rendered an award in favor of Hyundai E&C and Byuksan on 3 March 2014.[14]

At the Seoul District Court, Oilhub sought to set aside the award based upon the undisclosed conflicts of the two co-arbitrators Y and Z. Oilhub first cited that Y had

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13) *Oilhub Korea Yeosu v Hyundai E&C and Byuksan Engineering*, 2014 Gahap 20498, Seoul District Court, 19 August 2015; Oilhub Korea Yeosu, 2016 Annual Report, p. 73, available at https://bit.ly/2XXD5KH; Oilhub Korea Yeosu, 2017 Annual Report, p. 75, available at https://bit.ly/3aqckTS.

14) X was originally a co-arbitrator but became chair following the resignation of the original chair. Z was subsequently appointed to replace X as one of the co-arbitrators.

failed to disclose to the parties and KCAB that he was a director of claimant Hyundai E&C. In the case of Z, Oilhub based its challenge on Z's failure to disclose the relationship that Z's engineering firm E had with claimant Hyundai E&C and its affiliated companies. Z served as the representative director and a shareholder of firm E.[15]

According to Oilhub, over the years, the firm E had more than 28 contracts with Hyundai E&C, 25 contracts with its affiliates, and seven contracts with Byuksan as well, amounting in value to a total of KRW 53.9 billion (USD 49 million)[16]. While the present arbitration was taking place, firm E even procured three contracts from Hyundai E&C, three contracts from its affiliates and one contract from Byuksan. Finally, E entered into a KRW 2.1 billion (USD 1.9 million) services agreement with Hyundai E&C on 17 April 2014, which was only six weeks after the arbitral award.

Oilhub argued that these undisclosed conflicts of co-arbitrators Y and Z violated Article 13.1 of the Act because they constituted "circumstances likely to give rise to justifiable doubts as to his impartiality and independence". To Oilhub, these violations served as grounds to set aside the award under Article 36.2(1)(b)(not given proper notice of the appointment of arbitrators or of the arbitral proceeding or was otherwise unable to present his/her case), Article 36.2(1)(d)(the composition of the arbitral tribunal or arbitral proceedings were not in accordance with agreement of the parties) and Article 36.2(2)(b)(violation of public policy) of the Act.[17]

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15) In Korea, representative directors are comparable to and usually serve as chief executive officers of a company.

16) For the benefit of readers, an approximation of US Dollars is provided for all Korean Won figures at the rate of USD 1 per KRW 1,100.

17) Article 36 (Lawsuit for Setting Aside Arbitral Awards)
(1) A protest against an arbitral award may be made only by filing a lawsuit for setting aside such arbitral award with a court.
(2) An arbitral award may be set aside by the court only if:
1. The party seeking the setting aside of the arbitral award proves that:
(a) A party to arbitration agreement was under some incapacity under the law applicable to him/her; or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the Republic of Korea;
(b) The party seeking the setting aside of the arbitral award was not given proper notice of the appointment of arbitrators or of the arbitral proceeding or was otherwise unable to present his/her case;
(c) The award has dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration: Provided, That if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains

The Seoul District Court dismissed Oilhub's challenge for multiple reasons. The court first explained that "subjective circumstances that might lead to speculation of an unfair arbitral award" would not be sufficient to satisfy Article 13.1. Instead the court stated that Article 13.1 required "objective circumstances under which it would be reasonable to raise doubts that an arbitral award would be rendered by arbitrators lacking in impartiality and independence". To assess whether such objective circumstances existed, the court stated it should consider the overall circumstances. It gave as examples whether an arbitrator "received financial benefits as a result of the arbitral award", "was employed by or was presently working for one party", "had a direct and actual business or personal relationship with a party", "had a close family relationship with a party", "really acted in a biased manner during the arbitral proceedings", or "had contact with a party or discussed the merits with a party".[18)]

In terms of co-arbitrator Y, the court took into consideration a variety of factors in assessing his impartiality and independence. One of the most prominent factors was that Y served as an outside director of Hyundai E&C from 1998 to 2001, which was 12 years before the commencement of the arbitration. No evidence was presented that Y had any connection or activities related to Hyundai E&C or its affiliates since that time. The court also cited that from September 1994 to November 1998 Y had completed three consulting agreements with one of Oilhub's main shareholders Samsung C&T and its affiliate Samsung Heavy Industries. The court suggested that Y's relations with one of Oilhub's major shareholders and its affiliate that occurred more than 15 years ago over a 4-year period in a way counterbalanced any potential bias concerns associated with Y's relations with Hyundai E&C. The court found that based on these factors it could not find that "objective circumstances" existed "under which it would be

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decisions on matters not submitted to arbitration may be set aside;

(d) The composition of the arbitral tribunal or arbitral proceedings were not in accordance with agreement of the parties, unless such agreement was in conflict with any mandatory provision of this Act from which the parties can not derogate, or failing such agreement, were not in accordance with this Act;

2. The court finds on its own initiative that:

(a) The subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Korea;

(b) The award is in conflict with the good morals and other forms of social order of the Republic of Korea.

18) *Oilhub*, District Court, p. 3.

reasonable to raise doubts that an arbitral award [was] rendered by arbitrators lacking in impartiality and independence".[19]

Interestingly, the court downplayed Y's role as director and noted that he was an outside director in a non-standing position and that Oilhub could not provide any evidence that Y had any "close involvement related to the management" of the company. Furthermore, at the time Y was an outside director it was right after the Asian Financial Crisis when the outside director system was first adopted and made his position that much weaker. To the court, given the business realities of the time, it would have been unlikely for a university professor serving as an outside director of a large company to have handled important matters that directly affected the company's interests.[20] The court concluded that objective circumstances did not exist to raise justifiable doubts over Y's independence and impartiality and hence he did not violate his disclosure obligations.

In the case of Z, the court found that the engineering firm E had contracts with both Hyundai E&C and Byuksan but, at the same, had 210 contracts with the major shareholders of Oilhub and their affiliates since 1990 amounting to a total of KRW 121.6 billion (USD 110.5 million). The court also noted that, although Z was the representative director and the fourth largest shareholder of E with 11.3% in shares, Z was only a "professional manager" employed by the controlling shareholder. Any activities or interests of E could not directly benefit Z given that E was controlled by a family that owned more than 50% of the company. As a general matter, no evidence was presented that Z or E received any type of benefit as a result of the arbitral award.

The court stressed that, although Hyundai E&C and Byuksan were leading market players in the construction industry, as a major engineering firm itself E could not "maintain itself as a company by only procuring service contracts from the defendants [Hyundai E&C and Byuksan]".[21] Instead, if Z made a "biased decision" in favor of Hyundai E&C and Byuksan, this would not "benefit E's interests in the long-run" and could even "lower the reputation of the company in the construction industry as a

19) *Oilhub*, District Court, p. 8.
20) *Oilhub*, District Court, p. 8.
21) Hyundai E&C has been perennially the largest or second largest engineering and construction companies in Korea.

whole".[22] It appears that the court was stressing the specialized and concentrated nature of the industry. Based on Z's disclosure of being the representative director of E, the court suggested that if Oilhub "examined whether E had any specially-close relations with [Hyundai E&C and Byuksan] or any other construction companies and determined that circumstances existed to raised doubts about Z's impartiality or independence, it could have brought a challenge but chose not to do so".[23] Given firm E's prominent position in the industry and the specialized and concentrated nature of the industry, the court appears to suggest that it would be reasonable to expect that a party in Oilhub's position should have conducted such an examination of E.

(2) *Oilhub Korea Yeosu v Hyundai E&C and Byuksan Engineering (High Court)*[24]

On appeal, Oilhub did not raise any further issues regarding Y and focused its challenge against Z. Oilhub stressed that the major contract that Z's engineering firm E won six weeks after the arbitral award was more than 20 times the size of previous engagements that E had with other companies. For that deal, E was not registered as a preferred vendor with Hyundai E&C and was selected over several other leading competitors and that the two companies likely began working together in February 2014 given that the contract was signed in April 2014.[25]

The High Court dismissed the appeal and re-iterated all of the District Court's judgment while adding several observations. The High Court first rejected Oilhub's argument's concerning the most recent contract because the contract between E and Hyundai E&C was not an isolated contract but part of a consortium of constructors hiring a consortium of engineering companies to submit a bid for a major project.

Second, the High Court deemed that Oilhub must have known that E had entered into engineering service arrangements with Hyundai E&C but did not raise any objection. The Court stressed that the selection of an arbitrator is an important part of the arbitral proceedings and Oilhub knew that Z was representative director of the

22) *Oilhub*, District Court, p. 10.
23) *Oilhub*, District Court, p. 10.
24) 2015 Na 25046, Seoul High Court, 2 September 2016.
25) It appears that Oilhub did not raise any issues regarding E's relationship with Byuksan in its appeal.

engineering firm E. The webpage of firm E listed the various engineering projects it was involved in and included a project where defendant Hyundai E&C served as a constructor. The Court found that Oilhub must have sufficiently reviewed and researched the experience of the various arbitrator candidates proposed under the list method when they determined how to rank the ten candidates for co-arbitrator. The High Court appeared to consider that E's projects and relations could have been easily discovered and should have been discovered through E's webpage.

The High Court added that, even if Z violated his obligation to disclose, as long as Oilhub knew that Z's company E had entered into an agreement with Hyundai E&C and did not challenge Z within the applicable period of 15 days after appointment or when they became aware of the circumstances, then the arbitral award could not be subject to a set aside. The Court added that in its view the non-disclosed fact would not even amount to grounds for disqualification of a judge under Article 41 of the Civil Procedure Act. The court thus found that Oilhub was aware of E's relations with Hyundai E&C and a sufficient knowledge threshold was reached accordingly.

(3) Observations

The findings of the courts in the *Oilhub* cases raise a variety of issues that deserve consideration. The implications of the case will be separately evaluated within the context of the KCAB's Code of Ethics in the next section. The implications for future cases will be assessed as well.

One of the first issues concerns how the court determined that Oilhub should be deemed to have been aware of firm E's relationship with Hyundai E&C. It is probably best to view the court's decision as being based on the totality of the circumstances, including that Z disclosed that he was the representative director, the prominence of firm E and Hyundai E&C in the industry, and that it would have been reasonable and easily accessible for Oilhub to have reviewed the webpage of firm E since they also had to rank Z among the potential arbitrators. The fact that all of the arbitrators were selected indirectly through the list method would make it even more reasonable that the parties would have devoted significant efforts to assess the various candidates through easily accessible and publicly available sources. This would suggest that under these circumstances the court deemed that it was reasonable that the parties would

conduct such an inquiry.

Second, although not explicitly stated in either decision, the court's assessment of the adequateness of the arbitrator's disclosure, or lack thereof, most likely was influenced by the nature of the domestic engineering and construction industry. As a concentrated sector, where for large projects a limited pool of players was involved, the small community means that contractors, sub-contractors, engineering firms and other service providers frequently work together and everyone knows everyone else and, to an extent, who they were working with and on what projects. Although no evidence exists that E's engineering projects with defendant Hyundai E&C were common knowledge, yet, within the context of the industry, it was probably deemed reasonable to presume that those in the industry would know that they might have a working relationship with each other or a high likelihood of one existed. The courts probably would not have been as generous in a different, less concentrated industry where such commercial relations were not as typical.

Third, the courts noted that both co-arbitrators had relations directly or through their companies with both parties. To the courts, this counterbalancing of interests appears to have to a degree mitigated concerns over conflicting interests. Again, given the concentrated and special nature of the domestic construction industry, this might be deemed more likely to be reasonable. At the same time, it does not change the fact that full disclosure of the relations with both parties would have been preferable.

Fourth, another factor to note is that both of the challenged arbitrators were not the chair. Although not stated, this may have been considered by the courts. It has been argued that a different standard should apply towards the chair of a tribunal or sole arbitrator compared with a co-arbitrator.[26] The Model Law does not make such a distinction and the issue is bound to arise in the future for the Korean courts to address.

Fifth, as with previous case law, the fact that the plaintiff failed to raise a challenge within the necessary time frame was also considered determinative by the court. The time bar was mechanically applied and deemed to have expired because the party was considered to have been aware but did not take any action promptly.

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26) W.L. Craig, W.W. Park, J. Paulsson, International Chamber of Commerce Arbitration, 3rd ed. (Oxford University Press, 2000), para. 13.05; Born, p. 1812.

Sixth, since no breach of obligations was found, no grounds to set aside was found either. If a breach was found, it remains to be seen what circumstances would have led to a set aside. Most Model Law jurisdictions have found that a breach of disclosure obligations does not automatically amount to grounds for a set aside or even disqualification of an arbitrator and will be assessed based on an objective standard.[27)]

Finally, in terms of the context of an international arbitration, how Korean courts will apply Article 13 of the Act and the relevant disclosure requirements in a case that is not in a specialized sector such as construction industry remains to be determined. Notably, the sections of the Seoul District Court and Seoul High Court that are devoted to handling international cases have a high degree of sophistication and knowledge concerning international arbitration law and practice. While the IBA Guidelines will most likely be considered, whether they will be cited like in some jurisdictions poses an interesting question.[28)]

Ⅲ. KCAB Code of Ethics

As of 2016, KCAB has established a robust Code of Ethics that applies to all potential and acting KCAB arbitrators. The Code of Ethics embodies many features found in the IBA Guidelines and other leading codes of ethics. Rigorous compliance with the Code will enhance the transparency, trust and integrity in arbitration practice in Korea. It will minimize in advance the possibility of disqualifications and challenges against awards to enhance efficiency and avoid waste of time and resources. At the same time, the Code stipulates in its preamble that it "may be taken into account" for challenges but is "not intended to constitute a legal basis for setting aside an arbitral award". Unlike some other institutions, KCAB has yet to disclose any examples of the interpretation or application of the Code.

The *Oilhub* arbitrators' predicament needs to be explored through a hypothetical application of the Code. Considering the case within the context of the Code would

27) Daele, pp. 241-242.

28) Interestingly, in 2015, India became one of the first known countries in the world to incorporate the IBA Guidelines within their arbitration statutory framework by including it within the Indian Arbitration and Conciliation Act of 1996.

most likely have led to the circumstances surrounding the challenge to not arise. Under the Code, the *Oilhub* arbitrators would have been explicitly guided on what type of disclosures they would have had to make. They would have been required to disclose the core issues that were the subject of the challenge to the award.

First, unlike the general disclosure standard of Standard 3.1, under Standard 3.2(i), the *Oilhub* arbitrators would have had to specifically disclose "any past or present financial or business relationship with a party". They would have had to disclose "present relationships…irrespective of their significance" whereas "past relationships need only be disclosed if they were of more than a trivial nature in relation to the arbitrator's professional or business affairs". In addition, under Standard 3.2(ii), they would have had to disclose "the nature and duration of any substantial…professional relationship with a party".

Applying Standard 3.2, the Oilhub co-arbitrator Y would have had to disclose his past experience as an outside-director of Hyundai E&C. It would have been deemed "more than a trivial nature in relation to the arbitrator's professional or business affairs". Standard 2.2(i) that provides that an arbitrator who is a director of a party may be questioned for his or her independence or impartiality but this would not be considered because it appears to only apply to a present position.

In the case of co-arbitrator Z, the representative director of engineering firm E, his obligations would be far more extensive. It may be questioned whether the obligations under the Code are limited to relations between an arbitrator as an individual and with a party and whether they would also apply to relations between the company where an arbitrator works and with a party. The better view would be that the Standards should apply to the latter situation to include relations between the company or entity where an arbitrator works and with a party or its affiliate.

Therefore, under Standard 3.2(ii), Z should have had to disclose his "present financial or business relationship" through his firm E with Hyundai E&C and Byuksan. Under Standard 2.2 (iii), his independence or impartiality would be questioned because he "currently represent[ed] or advise[d] a party" through his firm E. Given firm E's extensive long-term relationship with Hyundai E&C and Byuksan, Z should have disclosed the "nature and duration" of the E's business relationship since it would be a "substantial professional relationship with a party".

Furthermore, under Standard 4.1, Z would have had to "avoid any communication with a party". Not only would Z not be allowed to communicate with Hyundai E&C and Byuksan during the arbitration, the obligation would be deemed to extend to apply to the other employees employed at E, particularly those working under Z's direction. Similarly, Standard 4.4 provides that an arbitrator "shall take precautions to avoid significant professional contact with any party". Under this provision, Z would be under a direct obligation to "avoid significant personal contact" with Hyundai E&C and Byuksan such as procuring business from them. Again, to comply with Standard 4.4, it would not be sufficient to avoid direct contact by using or delegating the authority to another employee. Under Standard 3.4, the duty of disclosure also continues throughout the arbitral proceedings with respect to new facts or circumstances. Hence, arbitrator Z should have disclosed the new contracts that firm E entered into with Hyundai E&C and Byuksan that arose during the arbitral proceedings.

One question remains as to how the KCAB and Korean courts will treat arbitrators who fail to comply with their disclosure obligations under the Code and what would be the ramifications of the awards they rendered. Notably, Standard 3.1 provides that a "[f]ailure to make…disclosure may not be an independent ground for disqualification". One cannot doubt that non-compliance of the Code nevertheless would constitute a basis for considering disqualification and would be seriously taken into account when reviewing an award.

Ⅳ. Comparative Perspective through Japanese Case Law

In 2017, the Japan Supreme Court rendered its first case involving arbitrator disclosure. In *Prem Warehouse LLC, et. al v Sanyo Electric Co., Ltd., et. al*, the Supreme Court ultimately reversed and remanded a lower Osaka High Court decision that had set aside an award in favor of Sanyo and others due to a presiding arbitrator's failure to disclose a conflict. The entire case history has been the subject of much analysis with the remanded High Court case being rendered in March 2019.[29)]

Although another appeal to the Supreme Court was apparently filed, experts do not believe it will be entertained.[30)]

The Japanese Commercial Arbitration Association (JCAA) case concerned an international dispute between Japanese and Singapore parties as claimants and two U.S. parties as respondents. The case was seated in Osaka and involved a presiding arbitrator who was an attorney based in Singapore working at a major international law firm. During the arbitration, a new attorney joined the San Francisco office of the presiding arbitrator's law firm while apparently representing a sister affiliate of one of the claimants, Sanyo, in an unrelated litigation matter in the U.S. The two sister companies shared a common parent company. The representation was not detected by the firm's conflict check system and the chair was unaware of this representation when the tribunal rendered an award in favor of claimants.

After losing in the Osaka District Court, Prem and the other respondents successfully challenged the award in the Osaka High Court, which found that the award should be set aside. They found the chair did not comply with his ongoing duty to investigate any potential sources of conflicts that could have been determined without substantial effort. The Osaka High Court ruled that it did not matter whether the non-disclosure had any effect on the award.[31)]

The Japanese Supreme Court, however, reversed and remanded the judgment. Among other things, they found that it was unclear both whether the chair knew of the conflicts and whether he could have determined the conflict based upon reasonable efforts. They remanded the case back to the Osaka High Court for a determination.

On remand, in March 2019, the Osaka High Court ultimately determined that the arbitrator and the firm did not know and could not have known about the conflict

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29) Young-joo Kim, "An Arbitrator's Duty of Disclosure and Reasonable Investigation: A Case Comment on the Supreme Court of Japan's Decision on December 12, 2017, 2016 (Kyo) 43", Vol. 28. No. 2, Journal of Arbitration Studies, 2018; *Prem Warehouse LLC, et. al v Sanyo Electric Co., Ltd., et. al.*, Osaka High Court, Decision, 11 March 2019, 2017 (Ra) No. 1552; Yoshimi Ohara, "Japan", Asia-Pacific Arbitration Review (2021).

30) Ohara, fn. 10 ("the likelihood of the Supreme Court entertaining the appeal in this case is very low).

31) Another issue involved the viability of an advanced waiver regarding conflicts that the arbitrator submitted. It should be noted that KCAB's Code of Ethics deals with advanced waivers in Rule 3.4 and provides that they do not discharge an arbitrators disclosure obligations.

because a conflict itself did not exist in the first place. The High Court found that the new attorney had ceased representing the company affiliated with the claimant Sanyo when he joined the chair's firm but this fact was not properly updated in the applicable US court's records.[32] The failure of the US court records to be updated created the mistaken impression that the attorney continued to represent the affiliate. The High Court's finding appears to have closed the final chapter in this case.

Several observations should be considered when comparing the cases in Korea and Japan. First, unlike the *Oilhub* case, the Japanese courts did not appear to explore when Prem and the other respondents became aware of the alleged conflict and whether the challenge was brought too late.[33] Similarly, whether Prem and the other respondents should have been or could have been deemed to have had knowledge of the chair's conflict, for instance, was not mentioned, and how they actually became aware of the alleged conflict was not clarified.

Whether knowledge of the conflict could have been also attributed to the chair such that he should have known was not explored directly. The lower court did suggest that he had a reasonable duty to investigate. Of course, there was no way the chair could have known of a conflict since no conflict existed and the law firm's conflict system could not have detected a non-existing conflict. The *Prem* case does elaborate on the duty to investigate of arbitrators and offers potential guidance for Korean courts in the future. The duty to investigate can be found under General Standard 7(d) of IBA Guidelines, which imposes upon an arbitrator a "duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence". The Korean Code imposes a similar duty under Standard 3.3.

Ⅴ. Conclusion

A hallmark of arbitration is that parties must have the utmost confidence in the independence and impartiality of the decision-makers who are entrusted to render fair

32) Ohara.

33) Yoko Maeda and Jeremy Bloomenthal, "Japanese Supreme Court's First Decision On Arbitrator's Non-disclosure", Kluwer Arbitration Blog, 5 February 2018.

and impartial judgments in the resolution of their dispute. Proper arbitrator disclosure provides the necessary transparency for parties to determine whether impermissible conflicts exist and constitute a critical area for an arbitration ecosystem if it wants to thrive in an internationally-competitive environment. Although Korea's legal and regulatory framework and jurisprudence in this regard is noteworthy, it has largely remained veiled to many that are less familiar with international arbitration in Asia-Pacific

This article has provided an overview of the state of affairs of arbitrator disclosure obligations in Korea. It has shown how Korean courts will analyze arbitrator conflicts and obligations through prior Supreme Court judgments and a case specific analysis of the recent *Oilhub* case, while also providing a comparative perspective of recent Japanese case law. Although limited to domestic arbitrations, it has reviewed what issues Korean courts consider when determining impermissible arbitrator conflicts based on relations with parties and when an award might be set aside as a result.

With the recent 2016 adoption of the KCAB Code of Ethics for Arbitrators and its rigorous standards, the likelihood that circumstances surrounding the *Oilhub* case would even arise have become far more unlikely. The Code of Ethics marks a significant milestone in enhancing the robustness of arbitrator disclosures and guaranteeing the fairness, integrity and transparency in arbitration practice and law in Korea.

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