Kluwer Arbitration Blog

When Is It Too Late To Object: The Seoul Central District Court's Judgment Regarding The Waiver Of The Right To Object

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A recent decision of the Seoul Central District Court provided guidance as to when a party should be considered to have waived its right to object to instances of non-compliance in arbitration proceedings. This post provides a summary of the Court's judgment case and considers the possible ramifications of the Court's reasoning for parties involved in arbitration proceedings in Korea.

The Arbitration Proceedings

The decision arose out of a challenge to an arbitration award issued under the Korean Commercial Arbitration Board's ("KCAB") Domestic Arbitration Rules 2011. Two Korean companies (the "Claimants") had initiated arbitration proceedings against a Russian national (the "Respondent") pursuant to a Joint Guarantee Agreement between the parties. The Joint Guarantee Agreement referred any disputes arising thereunder to arbitration by the KCAB, but did not specify which set of the KCAB's rules would apply.

The KCAB has two sets of arbitration rules: domestic and international. One of the ways in which the domestic and international rules differ is the method of appointing the arbitral tribunal. Under the KCAB Domestic Arbitration Rules 2011, the KCAB provides each of the parties with a list of candidate arbitrators that the parties are required to rank in order of preference. The tribunal is then appointed by the KCAB based on the parties' cumulative ranking of the candidate arbitrators. On the other hand, under the KCAB International Arbitration Rules 2011, the tribunal is appointed in a much more familiar fashion, with each side appointing a co-arbitrator, followed by the two co-arbitrators agreeing upon the chair-arbitrator. If the co-arbitrators are unable to agree, the chair is appointed by the KCAB.

Normally, an arbitration involving at least one party with its principal place of business outside Korea will be considered an "international arbitration," and will therefore be subject to the KCAB International Arbitration Rules 2011. (Since the arbitration in this case was filed before the KCAB International Arbitration Rules 2016 came into effect, those rules are not considered in this post.)

However, in the present case, the Respondent, a Russian national, was a second generation Korean Russian with a Korean name. In addition, the Claimants' Request for Arbitration had indicated that

the Respondent was domiciled in Korea (the address had been provided to the Claimants by the Respondent for the purpose of the parties' transaction). Based on the information available to it immediately after the Request for Arbitration was filed on 9 December 2014, the KCAB designated the dispute as one governed by the KCAB Domestic Arbitration Rules 2011.

In accordance with the Domestic Arbitration Rules 2011, on 11 December 2014, the KCAB wrote to the Respondent informing him of the arbitration and presenting him with a list of arbitrator candidates that he was asked to rank. The Respondent appointed its legal counsel on 24 December 2014 and returned the ranked list of arbitrators to the KCAB on 26 December 2014, without making any mention of the applicable rules or reserving his rights in this regard. The arbitral tribunal was constituted on 2 January 2015, pursuant to list-and-rank method under the KCAB Domestic Arbitration Rules 2011. On the same day, the KCAB informed the parties of the formation of the tribunal and that the first hearing date had been fixed for 26 January 2015. Upon a request by the Respondent, the date of the first hearing was changed to 9 February 2015. On 5 February 2015, the Respondent submitted its Answer to the Request for Arbitration.

In its Answer, the Respondent stated that since his principal place of business was located in Russia, the formation of the arbitral tribunal in accordance with the Domestic Arbitration Rules 2011 was against the parties' arbitration agreement and the arbitral rules that should properly apply to the proceedings, i.e., the KCAB International Arbitration Rules 2011. The Respondent's Answer requested an interim award in connection with this issue.

On 14 July 2015, the tribunal issued its final award in favor of the Claimants, together with its decision on the pre-merits issue of the constitution of the tribunal. Regarding the issue of the constitution of the tribunal, the tribunal found that the arbitration was properly subject to the KCAB International Arbitration Rules 2011, therefore the tribunal should have been constituted in accordance with those rules. However, the tribunal held that pursuant to Article 50 of the International Arbitration Rules 2011, if a party was aware of any non-compliance with the rules but still proceeded with the arbitration without promptly raising an objection, the party would be deemed to have waived its right to object. Since the Respondent had taken until the filing of its Answer on 5 February 2015 to make its objection, the tribunal found that the Respondent had waived its right to object to the constitution of the tribunal.

The Court's Judgment in Set-Aside Proceedings

The Respondent sought to set aside the award in the Seoul Central District Court (the "Court") pursuant to Article 36(2)(1)(d) of the Korean Arbitration Act (i.e., on the basis that the composition of the arbitral tribunal was not in accordance with the agreement of the parties).

The Court based its decision on Article 5 of the Korean Arbitration Act, which states that if a party knows that a non-mandatory provision of the Arbitration Act or an arbitration agreement has been breached, and still proceeds with the arbitration without raising an objection without delay, it *"shall be deemed to have forfeited its right to object."*

The Court held that, based on the facts before it, it appeared that the Respondent had not been aware that the application of the KCAB Domestic Arbitration Rules 2011 was in violation of the parties' agreement when he returned the ranked list of candidate arbitrators to the KCAB on 26 December 2014. The Court considered that the purpose of Article 5 of the Arbitration Act – to ensure the stability and economy of arbitral proceedings – had to be carefully balanced with need

to ensure that the parties were afforded their right to select a tribunal in accordance with their agreed procedure. Since depriving a party of its rights in connection with the constitution of the tribunal formed grounds to annul an award, the waiver of such a right had to be considered very carefully.

Based on the foregoing findings, the Court held that raising an objection by the time of the Answer did not risk harming the stability and the economy of the proceedings, because of which the Respondent should not be considered to have waived its right to object to the constitution of the tribunal. Under the circumstances, the Court set aside the arbitral award on the ground that the composition of the tribunal was not in accordance with the parties' agreed procedure.

Possible Ramifications

Given the novel situation that was before the Court, it is probable that the Court's decision will serve as an important reference to parties involved in international arbitration proceedings in Korea.

In this regard, the Court's decision raises several interesting issues, two of which are briefly discussed below:

(i) At first sight, the Court's reasoning seems to suggest that a high standard should be applied to determining whether a party has waived its right to object by reason of a delay in raising the objection. It is possible that the Court's reasoning will be referred to in future cases to suggest that a mere failure to raise an objection promptly is not enough to waive the right to object, but that the delay should be such as to indicate an intention by the delaying party that it waives its right to object to the non-compliance in question. In this regard, it would be important to note that while the Court did state that one had to be careful in applying Article 5, it does not seem to have expressly stated that such caution would necessarily mean applying a higher standard to whether there was delay in raising an objection or not. The Court's decision in this regard seems to be based on the factual finding regarding the Respondent's knowledge of the non-compliance, and not on a particular interpretation regarding the permissible duration of delay.

(ii) In considering the purpose of Article 5 of the Arbitration Act, the Court considered that Article 5 of the Arbitration Act was intended to ensure the stability and economy of arbitration proceedings. In addition to the purpose enunciated by the Court, it is also possible that Article 5 serves the purpose of preventing parties from taking a wait-and-see approach with respect to important stages in the proceedings. For example, there may be cases where a party would be required to object to the procedure for the constitution of the tribunal before the names of the arbitrators have actually been disclosed to the parties, to ensure that a party does not withhold its objection with the intent of raising it only if it does not like the tribunal resulting from the relevant procedure. While the present case was one in which the Respondent had very limited time to respond to the KCAB's notice after engaging its counsel, it is possible that the reasoning in the present case can be referred to in other cases where this is not the case. In such cases, it may be necessary for the Court to consider whether Article 5 of the Arbitration Act should serve to prevent such wait-and-see tactics.

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