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## Chinese Court Recognizes and Enforces a KCAB Award: A Closer Look at the Jurisdictional Decision

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### Introduction

In March 2019 China's Tianjin 1<sup>st</sup> Intermediate Court ("**Tianjin Court**") rendered a [decision dated 4 March 2019](#) (2018 Jin-01-Xie-Wai-Ren No. 1), granting an application for recognition and enforcement of a foreign arbitral award rendered by a sole arbitrator under the rules of the Korean Commercial Arbitration Board ("**KCAB**").

The decision reflects an increasing trend of Chinese courts enforcing foreign arbitral awards. It is also noteworthy in that the Tianjin Court firmly rejected the award debtor's attempt to resist enforcement based on the imprecise drafting of the underlying arbitration agreement and by reference to Articles V.1(a) and V.1(d) of the New York Convention. In doing so, the court accepted that Korean law was relevant to determine this issue as the law of the seat.

### Nature of the Dispute

The underlying dispute was between a Korean food and beverage enterprise specialized in Korean-style fried chicken ("**Rich Foods Co., Ltd**") as the Claimant and a Chinese national individual ("**Yuan Chunqiu**") as the Respondent (*i.e.*, the award debtor) under a master franchise agreement ("**Franchise Agreement**").

Under the Franchise Agreement, the Respondent had the right to use the brand name of "Chir Chir Chicken" when operating a chain of fried-chicken restaurants in the city of Tianjin, China.

However, the Respondent opened further stores outside of Tianjin and failed to pay royalties. In the arbitration, the Claimant sought payment franchise fees, royalties and reputational damages.

### The Arbitration Clause in Question

Article 19(2) of the Franchise Agreement stipulated that:

*"In event of a dispute, disagreement, objection or breach of contract related to this contract, the*

*parties may resolve [the dispute, disagreement, objection or breach] through friendly negotiation. If the negotiation fails, final resolution will be through arbitration at the **Korean Trade Arbitration Commission which is based on the laws of the Republic of Korea***". (Author's note: translated into English from the original Korean)

The contentious part of the clause was the part in bold, in particular what the parties meant by "Korean Trade Arbitration Commission" and by "based on the laws of the Republic of Korea" and whether the clause was defective to the extent that there was no agreement to refer the relevant disputes to arbitration at the KCAB, which is the arbitral institution where Claimant commenced proceedings.

### **Respondent's Jurisdictional Objections**

In the arbitral proceedings, the Respondent raised a jurisdictional objection and argued that as a matter of Korean law the arbitration agreement was null and void because:

- First, the reference to "Korean Trade Arbitration Commission" was clearly not a reference to the KCAB.
- Second, the arbitration agreement provided for an institution which was established based on Korean law, but no direct legislation in Korea mandates the creation of the KCAB.

### **KCAB Tribunal's Ruling on the Jurisdictional Objections**

The KCAB tribunal ("Tribunal"), as part of the arbitral award, addressed the jurisdictional objection and found that the arbitration agreement was valid and binding on the parties.

In relation to the relevant institution and rules:

- The Tribunal found that at the very least the parties intended to refer their disputes to some sort of institutional arbitration within Korea.
- Although the Tribunal recognized that the expression "Korean Trade Arbitration Commission" was ambiguous, it ruled that the ambiguity itself did not amount to indicating a sham or fictitious arbitral institution. On the contrary, considering that the only Korean institution that realistically provided an effective dispute resolution process is the KCAB, it is only reasonable to conclude that the arbitration agreement was drafted with KCAB arbitration in mind.

Regarding the Respondent's argument that there is no explicit law in Korea that directly mandates the establishment of KCAB:

- The Tribunal reasoned that KCAB was established in accordance with the Korean Civil Code and receives government support through the Korean Arbitration Act, both of which serve as either direct or indirect legal grounds for KCAB's existence.
- It also noted that Respondent did not offer any evidence that the parties had considered another arbitration institution in Korea besides KCAB.

More generally, the Tribunal noted that the prevalent principle of interpretation applied by the

Korean courts is to give valid effect to the arbitration agreement and that this was the case even where it suffers from the lack of specifics on the institution, the governing law or the seat of arbitration (*e.g.*, Supreme Court decision dated 31 May 2007, 2005 Da 74344).<sup>1)</sup>

Alongside dismissing the jurisdictional objection, the final award on the merits was rendered in favor of Claimant.

### **The Tianjin Court Judgment**

The Claimant then sought to enforce the monetary award in Tianjin. The Respondent resisted enforcement before the Tianjin Court on the basis that the arbitral award was in violation of Articles V.1(a) and V.1(d) of the New York Convention.

The Tianjin Court did not accept the Respondent's position and granted recognition and enforcement. In determining the validity of the arbitration agreement:

- The court relied on the Korean Arbitration Act in its analysis and observed (in translation) “*The Korean Arbitration Act does not stipulate that if the agreement on arbitral institution is ambiguous, it shall render the consensus of arbitration or the arbitration clause invalid*”.
- The court further accepted that the arbitration agreement in the Franchise Agreement indicated the parties' intention to resolve future disputes through arbitration, and took note that Article 3 (2) of the Korean Arbitration Act states that “arbitration agreement” refers to an agreement between the parties intending to resolve all or part of their disputes, whether contractual or not, which already exist or may arise in the future related to their legal relationship, by means of arbitration. The court appeared satisfied that the arbitration clause in the Franchise Agreement did indeed meet this definition.
- Next, and possibly more importantly, the court based its decision on Article 17 (1) of the Korean Arbitration Act which stipulates that an arbitral tribunal may decide on its own authority and rule on any objection to the existence or validity of the arbitration agreement. As such, the court ruled that as long as the Tribunal had the legal authority to decide on the validity of the arbitration agreement, and that the decision was reasoned, the arbitration agreement was not in violation of Korean law.
- The court also held that the Respondent was unable to provide evidence indicating that the Tribunal's decision violated Korean law and therefore rejected Respondent's argument that the arbitration agreement was somehow invalid under the laws where the award was made.

### **Analysis**

It bears noting that the Tianjin Court did not directly analyze or comment the KCAB tribunal's reasons for declaring the arbitration agreement valid, but instead referred to Article 17 of the Korean Arbitration Act, which provides for competence-competence of an arbitral tribunal. Based on this Article 17, the Tianjin Court's decision noted that the Tribunal's decision on its jurisdiction was in accordance with the Korean law, and that the Tribunal elaborated on the reasons for its decision. It is not clear whether there were any criteria applied by the Tianjin Court when deciding whether the reasons were sufficiently elaborated, or whether the conclusion would have been the

same if the reasons were not given, or sparsely given.

All in all, the Tianjin Court's decision recognizing the enforcement of a KCAB Award is a welcome development not only for the Korean arbitration community but for the international community in general, many of whom are keen to see if the Chinese courts will continue to take an increasingly pro-arbitration attitude in recognising and enforcing foreign arbitral awards.

For KCAB, it is particularly welcoming as this Tianjin Court case, in conjunction with the many KCAB awards that were successfully enforced in China during the past years, helps counter the long shadow the 2013 enforcement rejection decision by the Chinese Supreme Court against the KCAB Award, widely known as the Chaolai Xinsheng Sport case.

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### References

- <sup>21</sup> Decision available in Korean [here](#) and in English here (see publication titled “2005-2009 Arbitration Related Decisions of the Korean Courts”).

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