

Kluwer Arbitration Blog

Time for Class Action Arbitrations in Korea?

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In a class action lawsuit, a plaintiff or group of plaintiffs bring claims on behalf of similarly situated individuals. The legislatures in some civil law countries including Korea, have recently proposed or implemented measures allowing or expanding the use of class actions in their court systems.

Considering that Korea currently does not have in place the framework or rules for class arbitrations, introducing class actions in the Korean courts could encourage and provide a legal basis for permitting class action arbitrations in Korea.

Recent Development of Class Actions in Korea

Currently, class actions are available in Korea only for securities related cases. However, in September 2020, the [Korean government proposed a bill](#) (the “Bill”) that would allow a plaintiff to initiate a class action in any area of law. Further, class action lawsuits in Korea currently have stringent requirements, such as the requirement that the class representative shall be the person with the greatest economic interest in the outcome, which render it arguably difficult to file a class action lawsuit.

The Bill, if passed as a legislative act (“**Act**”), is expected to loosen up several requirements for filing of class action lawsuits, which includes key proposed provisions such as: (1) easing of requirements on class and class representatives; (2) expansion of venues which permits class action claims to be brought before a district court under a high court with jurisdiction over one of the defendants, and not only before the district court with jurisdiction over one of the defendants; (3) introduction of pre-litigation discovery; and (4) permission of jury trials.

Significantly, the Act would apply retroactively, thus allowing potential plaintiffs to file class action lawsuits for claims that are filed before the Act to take effect, if they are within the prescriptive period under the statute of limitations. The intent behind this proposal is to expand the availability of class action lawsuits to a wider scope of similarly situated individuals.

While the Act will exclusively apply to court litigation, it begs the question of what impact it would potentially bring to arbitration in Korea, considering that class action arbitrations could likewise provide relief to a larger number of aggrieved parties and fulfill the intent behind the Bill.

The passage of the Bill would perceivably favor the argument for permitting class action arbitrations in Korea.

Possible Framework for Class Action Arbitrations in Korea

While the Bill is still in its early stages of implementation, it is now an appropriate juncture to consider its implications for arbitrations given that it will take considerable time to set up the framework for class action arbitrations.

As a first step, the Korean arbitration community may propose arbitration rules tailored to class action arbitrations in Korea. To establish the legal foundation and specific arbitration rules for class action arbitrations, key issues and challenges to be aware of must be identified which may begin by referring to existing rules on class arbitrations.

One example of such framework is the American Arbitration Association (the “AAA”) which administers class arbitrations according to its [Supplementary Rules for Class Arbitrations](#) (the “**Supplementary Rules**”). According to Article 1 of the Supplementary Rules, they apply where a party submits a dispute to arbitration on behalf of a purported class by supplementing any other applicable AAA rules. It also contains rules on key topics such as “*Class Certification*” (Article 4), “*Class Determination Award*” (Article 5), and “*Form and Publication of Awards*” (Article 10), all of which will be valuable resources to the Korean arbitration community when it seeks to develop and implement its own class action arbitration rules.

Once the draft class action arbitration rules are put together, the Korean arbitration community may be consulted for comments and suggestions on changes to the proposed class action arbitration rules, especially on arguably the most challenging aspects in any class action arbitration which is class certification where it is often a point of contention as to whether a class should be certified and whether the claimant is an appropriate class representative. Accordingly, the draft class action arbitration rules should provide a list of clear and detailed conditions that the tribunal and parties may consider when determining whether a class should be granted certification.

Training and Nurturing

Next, the Korean arbitration community may develop a long-term plan to nurture and train local arbitrators and practitioners to handle class action arbitrations in order to ensure the fair and efficient conduct of class action arbitration proceedings. One consideration may be that arbitrators are required to possess the requisite knowledge and experience to resolve the issues at disputes.

For example, a prerequisite for class action arbitrations is the determination of whether a class can be certified. This would require the arbitral tribunal to consider (1) numerosity of the class; (2) whether questions of law or fact are common to the class; (3) whether the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) whether the representative parties will fairly and adequately protect the interests of the class; (5) whether counsel selected to represent the class will fairly and adequately protect the interests of the class; and (6) whether each class member has entered into an agreement containing an arbitration clause that is substantially similar to that signed by the class representative(s) and each of the other class

members.

However, given the inherent complexity of certifying class actions as demonstrated by the abovementioned multifaceted consideration required, it is unlikely that the Korean arbitration community will be equipped with such experienced arbitrators or practitioners at the initial stage.

It is thus inevitable that in the early stages of class action arbitration in Korea, arbitrators and practitioners from other countries who already have relevant experience will probably play key roles in the community. It will likely take several years for Korea to see its first group of local class action arbitrators. A long-term plan to nurture and train class action arbitration arbitrators and practitioners is needed.

Conclusion

There is no doubt Korea will rise to the challenge. Korea has swiftly become a dynamic, global economic powerhouse and has arisen as a recognized arbitration hub for parties conducting business in Asia. Once the Act becomes effective and supports the growth of class action arbitrations in Korea, a heightened need and demand for dispute resolution in Korea through class arbitrations would be foreseeable.¹⁾

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References

- ?1 The authors would like to thank Caroline Yoon of Barun Law LLC for her invaluable assistance in the preparation of this article.

This entry was posted on Monday, August 9th, 2021 at 8:00 am and is filed under [Class arbitration](#), [Institutional Rules](#), [KCAB](#), [Korea](#), [Legislation](#)

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