Kluwer Arbitration Blog

Governing Law of the Arbitration Agreement: A Korean Perspective

Shul Park (Kim & Chang) · Saturday, April 15th, 2023

The issue of the governing law of the arbitration agreement was brought into the spotlight with the U.K. Supreme Court decision in *Enka v. Chubb* (discussed on the Blog here and here), and it became a hotly debated topic following the conflicting decisions from French and English courts on *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)* (also discussed on the Blog here and here). This has led arbitration practitioners from various jurisdiction to take a fresh look at how their own courts have addressed the same issue (*see also* here and here).

Courts have referred to Article V(1)(a) of the New York Convention as the relevant provision for determining the governing law of the arbitration agreement. Article V(1)(a) states that recognition or enforcement of an award may be refused if "[the arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." That is to say, the two prongs to determining the governing law of the arbitration agreement are (i) the law that the parties have agreed to and (ii) the law of the seat if there is no such agreement.

While this seems simple enough, different jurisdictions have come to different conclusions on the issue of what qualifies as the parties agreeing to the governing law of an arbitration agreement. For example, does this include both explicit *and implicit* agreements? If the parties have agreed on the governing law of the main contract or the seat of arbitration, should this be construed as an implicit agreement between the parties to have the governing law of the main contract or the *lex arbitri* be the governing law of the arbitration agreement? Or are other factors necessary for such an implicit agreement to be formed? The U.K. Supreme Court decided in *Enka* and reaffirmed the principle in *Kabab-Ji* that where the parties have not specified the law applicable to the arbitration agreement, the governing law of the main contract will generally apply to the arbitration agreement. The French courts, however, have held repeatedly (including in *Kabab-Ji*) that the choice of governing law of the main contract was not sufficient to establish that the parties have agreed to it being the governing law of the arbitration agreement. Instead, they have held that the *lex arbitri* was the governing law of the arbitration agreement.

Unfortunately, the Korean courts have arguably not yet had the opportunity to delve deeply into the issue of the governing law of the arbitration agreement; however, they have explored the issue to some extent and have provided some clues in at least three decisions over the past 30 years. In light of the most recent decision from the French Cour de Cassation in *Kabab-Ji*, this may be an opportune time to look back at the decisions of the Korean courts and attempt to iron out the

Korean Supreme Court's position on this issue.

Korean Supreme Court Decisions on the Governing Law of the Arbitration Agreement

The Supreme Court started to refer to the New York Convention in the context of the governing law of the arbitration agreement in the Supreme Court Decision No. 89DaKa20252 dated 10 April 1990 ("**1990 Decision**"). Referring to Article V(1)(a) of the New York Convention, the Supreme Court stated that the governing law of the arbitration agreement shall be firstly "the law to which the parties have subjected it or, failing any indication thereon, the law of the country where the award was made." Then, the Supreme Court found, on the basis that the parties had agreed to resolve disputes arising from the contract by arbitration pursuant to the LCIA rules, that the parties had indicated English law as the governing law of the arbitration agreement. That is to say, the Supreme Court seems to have found that the parties' selection of the LCIA rules indicated the parties' agreement that English law was the governing law of the arbitration agreement.

The issue was again brought into the spotlight only in 2016 with Supreme Court Decision No. 2012Da84004 dated 24 March 2016 ("**2016 Decision**"). The defendant was the representative director of Company X, and Company X (but not the defendant) had entered into a contract with the plaintiff. The contract selected California law as the governing law of the contract and included an arbitration clause. The issue of governing law of the arbitration agreement came into play in the context of determining the existence and validity of an arbitration agreement between the plaintiff and the defendant, i.e., whether the plaintiff's offer to resolve the dispute through an arbitration and the defendant's alleged consent constituted an arbitration agreement.

The Supreme Court found that it could not find an agreement between the plaintiff and the defendant on the governing law of the arbitration agreement because the defendant was "not a party to the contract." Instead, the Supreme Court decided, per the second prong of the Article V(1)(a) of the New York Convention, that "the law of the country where the award was made" — i.e., the law of the United States, and specifically the law of California — was to be the governing law of the arbitration agreement.

The most recent case to deal with this issue is the Supreme Court Decision No. 2017Da225084 dated 26 July 2018 ("**2018 Decision**"). In this case, the governing law of the main contract was California law. The contract included a dispute resolution clause in which all disputes arising from the contract would be resolved by an arbitration under the ICC rules seated in Los Molinos, California. Notably, the lower court decided (in Seoul High Court Decision No. 2016Na2040321 dated 4 April 2017) that, while the parties have not explicitly determined the governing law of the arbitration in the arbitration clause, considering that the governing law of the main contract is California law, there was an implicit agreement between the parties to indicate California law as the governing law of the arbitration agreement. The court specifically mentioned that there was an "implicit" agreement regarding the governing law of the arbitration agreement and based such implicit agreement on the governing law of the main contract.

The Supreme Court accepted and refused to overturn the lower court's decision: however, instead of simply repeating the analysis of the lower court, the Supreme Court found that "[the governing law clause] provides that the laws of the State of California, U.S.A., shall govern the contract, and [the dispute resolution clause] provides that all disputes arising out of the contract shall be finally

settled by arbitration in Los Molinos, California, U.S.A., in accordance with the arbitration rules of the International Chamber of Commerce. Therefore, the plaintiff and the defendant can be deemed to have indicated California law as the governing law of the arbitration agreement." The Supreme Court did not explicitly note that it was finding an "implicit" agreement.

Through these cases, the Korean Supreme Court has provided its views on how to determine the governing law of the arbitration agreement where the parties have not specified it in the contract.

What Is the Korean Supreme Court's Position?

Starting with the 1990 Decision, the Korean Supreme Court has consistently referred to and applied Article V(1)(a) of the New York Convention to determine the governing law of the arbitration agreement. What is interesting is that, aside from the 2016 Decision (where no contract existed between the plaintiff and the defendant before the arbitration, making it difficult to find any explicit or implicit agreement on the governing law of the arbitration), the Supreme Court has found that the parties can be deemed to have agreed on the governing law of the arbitration agreement despite the lack of the parties' explicit agreement. While the Supreme Court has not specifically used the term, it seems that, when there is no explicit agreement on the governing law of the arbitration agreement, the Supreme Court has been prone to find that there was an "implicit agreement" between the parties on the governing law of the arbitration agreement, rather than moving on to the second prong of Article V(1)(a) of the New York Convention (i.e., the *lex arbitri*).

The question then becomes what factors are considered when determining that there is an "implicit agreement" on the governing law of the arbitration agreement. On this, the Korean courts have not taken a consistent position: there have been cases where the court relied on the arbitral institution (the 1990 Decision), the governing law of the main contract (the lower court decision of the 2018 Decision), and both the governing law of the main contract and the seat of arbitration (the 2018 Decision) to find an implicit agreement on the governing law of the arbitration agreement. The Korean courts may not have put much thought into this considering that these various factors pointed to the same governing law of the arbitration agreement in these cases.[1)] This meant the courts could add (almost as an afterthought) which of the various factors to consider when finding an implicit agreement between the parties.

As such, it remains unclear how the Korean courts would decide when the parties have not explicitly agreed on the governing law of arbitration agreement, and the governing law of the main contract and the *lex arbitri* are different: whether they would place the governing law of the main contract over the law of the seat, or vice versa, in finding an implicit agreement on the governing law of the arbitration agreement, or if they would move on to the second prong of Article V(1)(a) of the New York Convention by finding that there was no implicit agreement on the governing law of the arbitration agreement. The Korean courts have determined this issue on a case-by-case basis instead of establishing a clear and consistent rule under different scenarios as that provided in *Enka* or *Kabab-Ji* by English and French courts. Such decisions may have been appropriate for the cases at hand, but there remains legal uncertainty and lack of foreseeability to parties in dispute over the governing law of arbitration agreement. This absence of a clear standard may be due to the limited number of cases brought forward to the Korean Supreme Court so far: in any case, a decision from the Korean courts that provides some clarity as to their position on this issue would be welcome.

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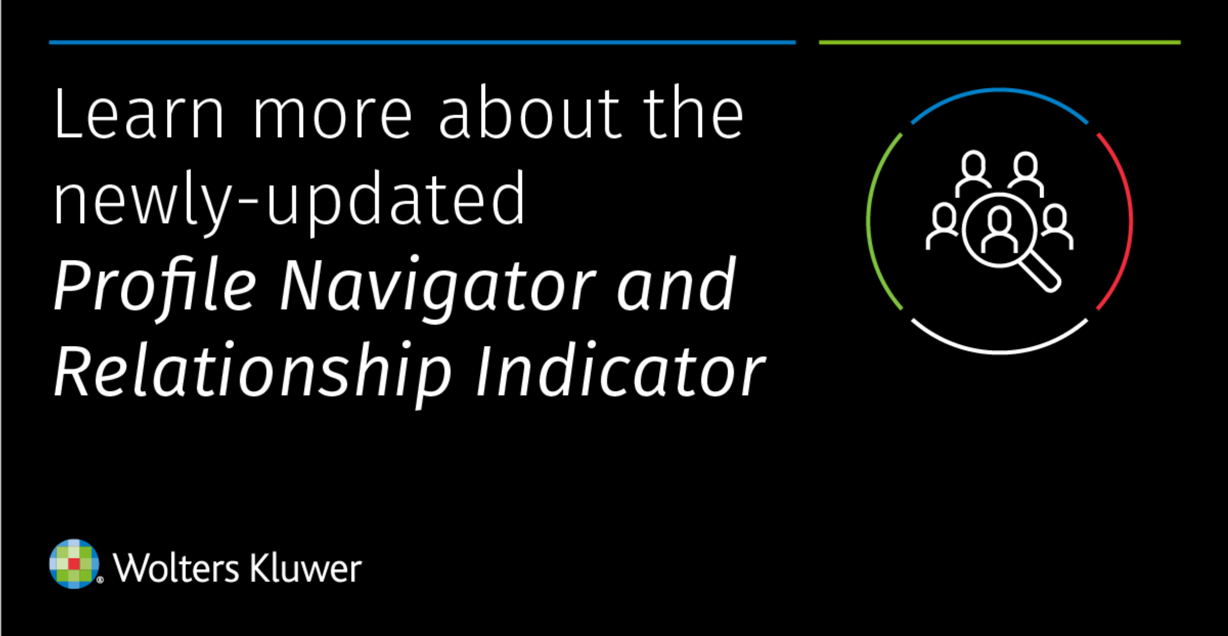

References

?1 Notably, the governing law of the main contract in the 1990 Decision was English law.

This entry was posted on Saturday, April 15th, 2023 at 8:00 am and is filed under Arbitration Agreement, Korea, Law governing the arbitration agreement, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Proper law of arbitration agreement
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