

Korea

Kim & Chang

Litigation

1 What is the structure of the legal profession?

All qualified lawyers have rights of audience in Court, and there is no distinction between barristers and solicitors. Presently, to qualify as a lawyer, one must pass the bar exam and then complete two years of training at the Judicial Research and Training Institution run by the Supreme Court. Public prosecutors or trainee judges are appointed from the qualified lawyers. Judges are appointed from lawyers, public prosecutors or trainee judges who have completed two years of legal work. Judges generally sit for a guaranteed 10-year term, after which they undergo a review (Supreme Court justices sit for six-year terms). There is a reshuffling of judges every two to four years.

Korea is, however, currently moving towards changing its legal education and qualification system, as well as its criminal trial system and rules of evidence. There are discussions on adopting a law school system, similar to the US law school system, which would entail remodelling the bar exam completely. If these proposals are implemented, then they would not take effect until the necessary legislation is enacted. This could occur in late 2005.

2 What is the structure of the Court system?

There are currently three levels of Court: the District Court (Court of first instance), the High Court (appellate Court) and the Supreme Court (the highest Court). Cases in the District Court are heard by either one or three judges. An appeal from the District Court with a three-judge bench should be made to the High Court, while an appeal from a one-judge bench should be made to a three-judge appellate division of the District Court. Appeals from the High Court or the appellate division of the District Court should be made to the Supreme Court. In addition to these Courts, the government is presently in the process of establishing a special "upper level" tribunal at the High Court level, which will hear appeals from the High Court and in turn reduce the caseload of the Supreme Court. The relevant legislation is not yet in place. It might be enacted by the end of 2005 (at the earliest), but even in that event the proposals themselves will not take effect until some time later.

There is a small claims division within the District Court, which has a one-judge bench and reviews claims of less than 20 million Korean Won. The judge of the small claims division renders judgments without detailed reasons.

There are also specialty Courts: the Administrative Court, the Family Court and the Patent Court. Appeals from the Administrative Court and the Family Court should be made to the High Court, and then the Supreme Court. While an appeal from the Patent Court (considered an appellate-level Court) should be made to the Supreme Court.

3 What is the role of the judge (and, where applicable, the jury) in civil proceedings?

Judges are usually passive, ruling on matters of fact and law after hearing evidence and submissions from the parties. However, the Court may intervene to obtain clarification should it consider necessary and appropriate. Judicial decisions are not considered to be a source of law and are not binding in future cases, although Supreme Court precedents are given *de facto* recognition as being binding on lower courts. There are presently no juries in civil or criminal cases. However, Korea is considering introducing a jury system for criminal cases.

4 What are the time limits for bringing civil claims?

General contract claims must be brought within 10 years from the time when the obligation becomes due. However, where one or both parties are merchants, the time limit is five years. Tort claims are barred after three years from the time when the claimant knew or should have known of the tort and the tortfeasor, or 10 years from the time when the tort occurred, whichever is earlier. The time limit for enforcements is 10 years from the date when a judgment became final and conclusive.

The filing of an application for prejudgment attachment suspends the time limit for filing a suit. The issuance of a claim letter also suspends the time limit for six months, provided that it is followed by a lawsuit or prejudgment attachment. Some laws provide for shorter time limits, eg, one or three years for certain types of claims, such as claims against attorneys-at-law or for interest payments. Parties can agree to shorten (but not extend) the statute of limitations.

In some cases, the laws provide for time limits for filing lawsuits, such as a one-year time bar involving contract of carriage by sea cases. This time bar may be extended by agreement.

5 How are civil proceedings commenced, and what is the typical procedure which is then followed?

Civil proceedings are commenced by filing a complaint with the Court. The complaint should set out the parties, the tenor of the claim and the grounds for the claim, together with the relevant evidence.

After the complaint is filed, the defendant is required to file a reply within 30 days of the receipt of service. After this, there are usually two rounds of exchanging pleadings and documentary evidence. The Court then holds a preparatory hearing, during which it reviews the issues and how the respective parties will support their assertions with evidence.

Thereafter, witness statements (or proposed questions for witnesses) and further documentary evidence, as well as other types of evidence (such as expert reports and interrogatories for the relevant parties) will be presented to the Court. Then the hearing is set, mainly to hear the testimony of the factual and expert witnesses. The complexity of a case determines the length of the hearings. When the hearings are closed, the Court renders a judgment.

6 What is the extent of pre-trial exchange of evidence, and how is evidence presented at trial?

When the parties submit pleadings, the relevant evidence referred to in the pleadings is attached. The objective is to have the parties submit the bulk of their documentary evidence before the preparatory hearing or, at the latest, before the main hearing. The examination and cross-examination of witnesses is conducted during the main hearing(s).

7 To what extent are the parties able to control the procedure and the timetable? How quick is the process?

Since the amendment of the Code of Civil Procedure in 2002, Courts have become more stringent in setting the timetable for the proceedings. Parties consequently have less flexibility in controlling the procedure and timetable, though they still have some scope for seeking extensions or the re-scheduling of hearings. For the submission of pleadings and evidence, the Court may determine a time period within which the parties may make their submissions. After this period the parties may not be permitted to submit any further arguments or evidence unless it can be shown that there was just cause for failing to submit within the set period.

Assuming that there are usually two rounds of exchanged pleadings and that only one or two hearings must be held for the examination of witnesses, the Court of first instance may be able to render a decision within eight to 12 months of the filing of the complaint. In the case of a foreign defendant, however, the proceedings could take longer than 12 months if service has to be made abroad (overseas service could take two or three months).

8 What interim remedies are available to preserve the parties' interests pending judgment?

There are three types of interim remedies:

- (i) prejudgment attachment to secure monetary compensation;
- (ii) prejudgment injunction to maintain the status quo; and
- (iii) rejudgment injunction for a mandatory/prohibitory order.

A prejudgment attachment to secure monetary compensation may be obtained through application to the Court. The application must provide the details of the basis of the claim and the necessity of a prejudgment attachment. It must also indicate whether an action on the merits has been or will be filed and whether a prejudgment attachment was previously obtained for the same claim. The proceedings are *ex parte*. The Court will require the posting of counter-

security, the amount of which ranges from one-eighth to four-fifth of the claim amount, depending on the asset to be attached. The counter-security may be posted in cash, by surety bond, or a combination of cash and bond, subject to the Court's approval.

A prejudgment injunction to maintain the status quo may be obtained through application to the Court if a *prima facie* claim and the necessity for the remedy are established. An application, together with the evidence that establishes a *prima facie* case, must be filed with the Court. These proceedings are also conducted *ex parte*. The Court usually requires a counter-security to be posted, the amount of which is set at the Court's discretion, but this is usually between one-tenth to one-third of the claim amount in the case of a prejudgment injunction. The counter-security may, in many cases, be posted by way of surety bonds, subject to the Court's approval.

For the provisional injunction for a mandatory/prohibitory order, the party also has to establish a *prima facie* case and the necessity for the injunction. For such injunctions, the Court normally holds hearings (compulsory in some cases) and/or requires a deposit.

9 What substantive remedies are available?

There are three types of remedies:

- (i) declaratory judgments;
- (ii) judgments making a prohibitory or mandatory order (which includes a judgment for monetary compensation); and
- (iii) judgments creating a new legal relationship.

In the case of personal injury or defamation claims, compensation for "pain and suffering" would be awarded. Non-compensatory damages, such as punitive and special damages, are not recognised under Korean law.

10 What means of enforcement are available?

A declaratory judgment or a judgment creating a new legal relationship does not need enforcement. Only judgments making mandatory or prohibitory orders need enforcement.

If a judgment debtor does not pay a mandatory order for monetary compensation, then the assistance of the Court may be obtained. For example, the Court may require an auction sale of assets to satisfy the judgment and/or issue an order for an examination of the debtor (or a corporate debtors' directors) to disclose all assets (the failure of which will result in criminal sanctions). The procedure for enforcement will depend on the type of assets against which the judgment is to be enforced.

For judgments making prohibitory or other mandatory orders, however, there is little practical means of enforcement in the instance of non-compliance. The only means of enforcement is through sanctions. There is no contempt of Court in Korea, so the Court indirectly compels the judgment debtor by way of a monetary penalty. For example, the Court can impose a penalty payment for each day the order is not honoured, which is paid to the judgment creditor.

11 Does the Court have power to order costs? Are foreign claimants required to provide security for costs?

The Court usually orders the losing party to pay the winner's Court costs, which include the stamp tax (filing fees that are based on the claim amount), and service or processing fees and witness fees (if a witness, including an expert, is summoned by the Court and the party has advanced the costs). However, attorneys' fees are recoverable only to the extent specified by the tariff schedule set by the Supreme Court, which is calculated using a formula and based on the claim amount. The recoverable attorneys' fees are often far less than the amount expended. In cases where there has been an obvious abuse of the process by one party, the other party can claim for reimbursement of reasonable attorneys' fees incurred as a result of the abuse by way of a separate action.

Upon motion by the defendant, a plaintiff who does not have a presence in Korea can be ordered to post security for Court costs. The amount of security for Court costs is set at the Court's discretion, but is usually about 3% of the claim amount. The security may be posted by way of a surety bond, subject to Court approval. Domestic claimants are not required to post security.

12 On what grounds can the parties appeal, and what restrictions apply? Is there a right of further appeal? To what extent is enforcement suspended pending an appeal?

An appeal to the appellate Court may be made on findings of both fact and law. The appellate proceedings are considered a trial *de novo* and new evidence and/or arguments can be produced. However, an appeal to the Supreme Court is generally restricted to arguments on law. For a monetary compensation judgment, a provisional enforcement of the whole or part of the judgment amount pending an appeal should be granted unless there are reasonable grounds for refusal. At the Court's discretion, the provisional enforcement may sometimes be suspended upon application on the condition that a deposit (usually equal to the amount suspended) is posted into Court, usually in cash, but sometimes by way of a government bond or certain types of negotiable instruments.

13 To what extent can domestic and/or foreign state entities claim immunity from civil proceedings?

Korea recognises the doctrine of restrictive state immunity, whereby immunity of a domestic and foreign state or state entity from civil proceedings is restricted to acts of a governmental nature. Immunity does not extend to acts of a commercial nature which could be performed equally well by a private individual or trading corporation.

14 What procedures exist for recognition and enforcement of foreign judgments?

Korea is not a party to any convention, treaty or international agreement on the recognition and enforcement of foreign judgments. In order for a foreign judgment to be recognised and enforced in Korea, a recognition and enforcement judgment must be obtained from a Korean Court. The Court will consider whether the foreign judgment satisfies the conditions required under Korean law for recognition and enforcement, as noted below:

- (i) the foreign judgment is final;
- (ii) the jurisdiction of the foreign Court is recognised under the principles of jurisdiction as provided for in Korean law or treaties;
- (iii) the Korean defendant had responded to the suit without being served, or was served by legal methods (other than public notice or similar methods) with the summons and any orders necessary for the commencement of the suit in advance so that he had sufficient time to prepare the defence;
- (iv) the judgment is not contrary to Korean public policy; and
- (v) there is a guarantee of reciprocity by the foreign state in which the judgment was rendered.

15 Is it permissible for lawyers to charge contingency or conditional fees, or other fee arrangements based on the result of the litigation/arbitration?

Contingency fees or results-based fee arrangements are permitted in Korea. Lawyers and their clients are generally free to agree on fee arrangements without any restrictions. However, if the matter of an attorney's fees is brought before the Court, and the Court considers that the amount of the fees is manifestly inappropriate in view of the work performed by the lawyers, the amount at stake and the outcome of the case, then the Court can intervene and adjust the fees agreed upon to an amount that the Court considers appropriate.

Arbitration

16 Is the arbitration law based on the UNCITRAL Model law?

The Arbitration Act, which became effective on 31 December 1999, more or less adopts the UNCITRAL Model Law ("Model Law"). The Act is available online at the website of the Korean Commercial Arbitration Board (see below).

17 What are the main national arbitration institutions?

The only local arbitration institution recognised in Korea is the Korean Commercial Arbitration Board ("KCAB") (<http://www.kcab.or.kr>). However, the Arbitration Act applies not only to institutional arbitrations but also to *ad hoc*

arbitrations. Thus, there is no formal or significant distinction between the two, and parties may pursue *ad hoc* or institutional arbitration subject to such rules as they may agree on, or as the arbitrator may direct.

18 Are there any restrictions on who may represent the parties to an arbitration?

There is no specific provision in the Arbitration Act as to who has rights of audience in an arbitration. In practice, there is no limitation on parties representing themselves or being represented by any advocate of their choice, legally qualified in Korea or elsewhere. It is assumed that such a practice will continue. The Arbitration Act also allows parties to agree upon the language to be used in the arbitration, whether it be English, Korean, both English and Korean, or another language(s) altogether.

19 What are the formal requirements for an enforceable arbitration agreement?

An enforceable arbitration agreement must be in writing, either as an arbitration clause in a contract or as a separate agreement. An agreement is considered to be in writing if:

- (i) it is contained in a document signed by the parties; or
- (ii) an exchange of letters or other means of communication providing a record of the agreement exists; or
- (iii) an exchange of statements of claim and defence exists in which the existence of the agreement is alleged by one party and not denied by the other.

A reference in a contract to a document (eg, standard general terms) containing an arbitration clause constitutes an arbitration agreement, provided that the contract is in writing and the reference is such as to make that clause part of the contract.

20 Can the Court refuse to stay litigation if there is a valid arbitration clause?

The Court shall dismiss a case if there is a valid arbitration clause and if the arbitration clause is invoked as a defence by the defendant, prior to raising any substantive defence in the case.

21 If the arbitration agreement and any relevant rules are silent, how many arbitrators will be appointed, and who is the appointing authority?

The parties are free to determine the number of arbitrators. However, in the absence of an agreement, three arbitrators will be nominated. Under the Arbitration Act, unless otherwise agreed, each party selects one arbitrator, and the two arbitrators then appoint a third. If no agreement can be reached within 30 days, the Court may appoint the arbitrator upon motion by either party. No appeal in relation to the Court's appointment is allowed.

If the arbitration agreement provides for the arbitration to be conducted pursuant to the rules of the KCAB, then the nomination of the arbitrators will be done as follows: the parties are provided with a list of 10 candidates from the KCAB roster of arbitrators; the parties then rank the arbitrators on the list in order of preference; the three arbitrators with the highest rankings between the two parties are then nominated to be the arbitration panel.

22 Are restrictions placed on the right to challenge the appointment of an arbitrator?

The appointment of an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if they do not possess the qualifications agreed to by the parties. Further, if the party appointing an arbitrator challenges the appointment of such an arbitrator, the reasons for the challenge must be those of which the party became aware after making the appointment. The challenge is first reviewed and decided upon by the arbitration tribunal. If the tribunal rejects the challenge, the challenging party may then request that the Court decide on the challenge within 30 days of receiving notice of the tribunal's decision.

23 Does the domestic law contain substantive requirements for the procedure to be followed?

Korean law does not contain substantive requirements for the procedure to be followed. However, the law does require that the arbitrator act fairly and impartially; give the parties reasonable opportunity to present their cases; use procedures appropriate to the particular case, and avoid unnecessary cost and delay.

24 On what grounds can the Court intervene during an arbitration?

The Court has supportive powers and may assist in taking evidence, or in making orders for interim protection, if either of the parties so request. Additionally, upon request by any party, the Court may intervene with respect to the arbitration tribunal's jurisdiction in the matter. The application for this request must be made within 30 days of receiving notice of the tribunal's decision acknowledging its jurisdiction.

25 Do arbitrators have powers to grant interim or conservatory relief?

Upon motion by the parties, the arbitrators have the power to make an interim protective order, including the power to provide appropriate security, unless otherwise agreed to by the parties. There is, however, no practical means of enforcing such interim protective orders made by the arbitrator(s).

26 When and in what form must the award be delivered?

The award must be in writing and signed by the arbitrator(s). In addition to the date of the award and place of arbitration, the award must also contain the reasoning behind the decision, unless the parties agree otherwise or it is a consent award.

27 On what grounds can an award be appealed to the Court?

The parties' rights to set aside an arbitration award are limited to those listed in the Arbitration Act. These are the same as in the Model Law and include cases where there is an incapacity of a party to the agreement, or where a party was not given proper notice of the appointment of an arbitrator. Any challenge must be made within three months of the service of the award. The rights are very limited, and it is only in very obvious cases of breach of those provisions that the Court will review an appeal of the arbitration award.

28 What procedures exist for enforcement of foreign and domestic awards?

In cases involving domestic awards, the Court issues a recognition and enforcement judgment without reviewing the merits of the case, if the award was made pursuant to the provisions of the Arbitration Act.

As Korea is a party to the New York Convention (subject to the commercial and reciprocity reservations), Korean Courts issue recognition and enforcement judgments on foreign arbitration awards rendered in contracting states pursuant to the provisions of the Convention. An application for an enforcement judgment must be made, and the Court will open hearings to hear both sides, although the Courts should not look at the merits of the case.

Awards rendered in a non-contracting state will have to be reviewed as in the case of a foreign judgment (see question 14 above).

29 Can a successful party recover its costs?

There are no specific provisions in the Arbitration Act dealing with this. However, in practice, the successful party can recover the costs of the arbitration (filing fees, arbitrators' costs, etc). Attorneys' fees, however, are generally not awarded in arbitration and are borne by each party.

Alternative dispute resolution

30 Are the parties to litigation or arbitration required to consider or submit to any alternative dispute resolution before or during proceedings?

The Civil Dispute Mediation Act establishes a mediation committee within the Court system: there are no private mediation boards or committees. Instead of filing a lawsuit, parties may make an application for mediation to the mediation committee. Only one-fifth of the stamp tax (filing fees) must be paid with such an application and the mediation is carried out by the tribunal that handles mediations. In the mediation, the mediation tribunal tries to facilitate an agreement by the parties. If an agreement is reached, the agreement is recorded in the form of a mediation protocol, which will have the effect of a judgment. If the parties are not able to reach an agreement, but their differences are not substantial, the mediation tribunal may then issue a mediation order, taking into account all the circumstances. If the mediation order is not objected to by either party, it will have the effect of a judgment. If the parties cannot achieve a successful mediation, then the mediation tribunal will declare that the mediation has failed, and the applicant, in order to further proceed, will have to pay the remaining balance of the stamp tax (four-fifths), upon which the Court proceedings will proceed as a normal lawsuit.

During a lawsuit, if the Court believes that there is a possibility of the parties resolving the dispute without proceeding to judgment or that it is more appropriate to resolve the case by mediation, the Court may order the parties to attempt mediation. The legal proceedings are paused during the mediation, and then resumed if the mediation fails. The Court hearing the case may refer the case to the mediation tribunal, as discussed above, or it may conduct the mediation itself. There has been a growing trend among courts to order the parties to attempt mediation in this manner, instead of rendering a judgment.

Kim & Chang

Contact	B.S. Chung Seyang Building, 223 Naeja-dong, Chongro-ku, Seoul, Korea 110-720
Phone	+82 2 3703 1100
Fax	+82 2 737 9091~3
Email	lawkim@kimchang.com
Website	www.kimchang.com

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