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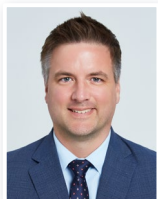
# NEWSLETTER

International Arbitration Practice Group

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## Indirect Compulsion in Arbitration: Korean Court Draws the Line

### ••• Review of Seoul Central District Court Decision No. 2025 KaGi139 dated 21 March 2025

#### 1. Significance of the Court Decision

Korean courts have recently attracted attention within the international arbitration community, with the Seoul Central District Court ruling that an arbitral tribunal in an ICC arbitration exceeded its authority by conditionally imposing pecuniary penalties to compel specific performance, a practice known as indirect compulsion.<sup>1</sup>

Notably, this ruling is significant as it provides long-awaited clarity as to whether tribunals seated in Korea have the inherent power to impose pecuniary penalties, a matter that has been the subject of ongoing debate. Legal practitioners should now revisit their drafting practices accordingly. This newsletter outlines the decision and its implications.

#### 2. Background and Facts of the Dispute

This case arose from a shareholders' agreement concluded between the largest shareholder and CEO of Kyobo Life Insurance (the **Applicant**), and a group of foreign investors (the **Respondents**).<sup>2</sup> Under the agreement, the Respondents claimed they were entitled to exercise a put option against the Applicant if Kyobo Life failed to complete an IPO within a specified timeframe. Upon exercise of the put option, both parties were to appoint valuation experts (appraisers) to determine the fair market value of the relevant shares.



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Kyobo Life did not complete an IPO within the agreed timeframe, and the Respondents purported to exercise their put option. However, the Applicant disputed the validity of the put option and refused to appoint an appraiser. The Respondents initiated an ICC arbitration, in which the tribunal ruled that although the put price had not been validly determined, the put option itself had been validly exercised. The tribunal also added that the Applicant had no duty to purchase the Respondent's shares, but that the Applicant had an obligation to appoint an appraiser.

Despite the tribunal's ruling, the Applicant did not appoint an appraiser. As a result, the Respondents initiated a second ICC arbitration (the **Arbitration**), seeking an order for specific performance of the Applicant's obligation to appoint an appraiser and to take all necessary steps to ensure that its appraiser furnishes a valuation report. In addition, the Respondents requested an order for payment of penalties to compel the Applicant's specific performance.

In a partial award dated 17 December 2024 (the **Award**), the tribunal (**Tribunal**) ruled as follows:

- (i) Under Article 19 of the ICC Rules, the Tribunal had discretion to make an order for pecuniary penalties (para. 676 of the Award);
- (ii) The Applicant was ordered to pay pecuniary penalties of USD 200,000 per day until it appointed an Appraiser (para. 736(iii)); and
- (iii) The Tribunal reserved its decision on whether pecuniary penalties would be payable if the valuation report was not issued within 30 days (paragraph 736(iv))

On 10 January 2025, the Applicant filed an application before the Seoul Central District Court under Article 17 of the Arbitration Act, asserting that the Tribunal had exceeded the scope of its authority by ordering the payment of pecuniary penalties.

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1 Under Korean law, "indirect compulsion" is a court-imposed monetary sanction for the purpose of compelling a debtor to perform a non-monetary obligation. Pursuant to Article 261 of the Korean Civil Execution Act, upon the request of the creditor, the court of first instance must render a ruling for indirect compulsion. Where the debtor fails to render performance within the period specified in the ruling, the court may order the debtor to pay compensation or reimburse the debtor for the period in default.

2 The Applicant was the respondent in the arbitration, while the Respondents were the claimants.

### **3. Whether the Award is Subject to Judicial Review under the Korean Arbitration Act**

Article 17 of the Korean Arbitration Act incorporates Article 16 of the UNCITRAL Model Law. It allows parties to raise jurisdictional objections before the tribunal and, where the tribunal rules on jurisdiction as a preliminary matter, to request a court to review the decision within 30 days.

The Court reviewed whether the partial award satisfied the requirements for judicial review under Article 17. It focused particularly on whether the Tribunal had made a preliminary ruling on jurisdiction. The Court found that paragraph 736(iii) of the Award – which imposed daily penalties for failing to appoint an appraiser – was not a ruling on jurisdiction but rather a decision on the merits. Accordingly, this part of the Award could not be challenged under Article 17 and could only be contested through an application to set aside or deny enforcement of the award.

In contrast, the Court held that paragraphs 676 and 736(iv) did concern the Tribunal's jurisdiction, as the Tribunal had expressly reserved determining the imposition of pecuniary penalties to a later point in time. As such, these parts of the Award were reviewable under Article 17.

### **4. Court's Decision on Tribunal's Jurisdiction**

Before assessing whether the Tribunal exceeded its authority, the Court considered whether a Korean-seated arbitral tribunal could order indirect compulsion, viz. could impose financial penalties for a failure to comply with an order for specific performance. It held that such pecuniary penalties are a method of enforcement reserved to the Courts under Korean law and that arbitral tribunals, being private bodies, cannot exercise such authority unless expressly authorised by the parties.

The Court rejected the notion that consent to arbitration per se confers such power on tribunals. It further observed that there is no settled international practice or uniform theory of interpretation supporting that proposition. On this basis, the Court held that the Tribunal had exceeded its authority in finding that it was empowered to make the orders it had in paragraphs 676 and 736(iv) of the Award. Accordingly, the Court granted the Applicant's request in part.

### **5. Conclusion and Implications**

While this decision reaffirms that Korean courts remain arbitration-friendly, it also shows they are willing to intervene where tribunals clearly

exceed the scope of their authority. The Tribunal in this case had relied on its inherent powers under Article 19 of the ICC Rules and Korean law. However, the Court found that, absent express statutory authority or party agreement, the Tribunal did not have the power to order indirect compulsion under Korean law.

The Court's decision provides important clarity as to the inherent powers of an arbitral tribunal in a Korea seated arbitration. It also demonstrates that Korean courts will remain pro-arbitration and respectful of party autonomy – a cornerstone of the arbitral process – by recognising that parties may, by consent, confer upon tribunals the power to order indirect compulsion.

While the salient parts of the ruling are still subject to reconsideration in set-aside or enforcement proceedings (especially regarding paragraph 736(iii), imposing pecuniary penalties), it provides the first judicial precedent in Korea to expressly address and deny an arbitral tribunal's authority to impose pecuniary penalties. In light of the Court's decision, parties choosing Korea as the seat of arbitration should ensure that, if desirable, arbitral jurisdiction to impose pecuniary penalties is clearly set out in the arbitration agreement.

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