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## Settling Business Disputes with North Koreans in the Advent of the External Economic Arbitration Law

Kwang-Rok Kim\*

### I. INTRODUCTION

The reorganization of the global economy since the collapse of the East European bloc has spurred a global trend toward the internationalization of politics, cultures, and economics. North Korea has not been immune from this trend and has taken drastic measures intended to improve its domestic economy, as well as its international economic presence.<sup>1</sup> In addition, these measures are aimed at improving the standard of living in North Korea as well as making the North Korean market more attractive to foreign investors. In 1991, North Korea's government proclaimed the Rajin-Sonbong<sup>2</sup> area a Free Economic and Trade Zone.<sup>3</sup> In 1992, the government initiated economic trade relations with South Korea,<sup>4</sup> and in 2002, they introduced a 'Hong Kong-type' special zone in Sinuiju City.<sup>5</sup> Other measures include the revision of its Constitution<sup>6</sup> and the amendment of numerous foreign business related laws.<sup>7</sup> In spite of these efforts, however,

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1. See Sang-Jick Yoon, *Critical Issues on the Foreign Investment Law of North Korea for Foreign Investors*, 15 WIS. INT'L L.J. 325 (1997) (noting that this 'open door' policy is aimed at attracting technology, as well as foreign capital).

2. See *Rajin-Sonbong Free Economic and Trade Zone*, at <http://www.nix.go.kr/eng/north/economy/05.html> (last visited Apr. 4, 2003) (copy on file with *The Transnational Lawyer*).

3. See Yoon, *supra* note 1, at 325 (highlighting the fact that the FETZ is part of the Tumen River Plan aimed at transforming the northern borders of the country into a center for international trade between itself, China, and Russia); see also Bryan et al., *Foreign Investment Laws and Regulation of the Democratic People's Republic of Korea*, 21 FORDHAM INT'L L.J. 1677, 1710 (1998) (noting that "all businesses located in FETZ are taxed at a flat rate" lower than elsewhere around the country). Moreover, the "FETZ exempts customs duties on goods for the various needs of the enterprise." *Id.*

4. North Korea and South Korea concluded the "Agreement on Reconciliation, Non-Aggression, and Cooperation and Exchange between the North and the South." North Korea has continued to make economic agreements with South Korea. The Agreement was adopted at the third day session of the fifth north-south high-level talks in Seoul on December 13, 1991. The Agreement includes nine articles related to economic cooperation and exchanges among 25 articles of all.

5. Agreement on the Sinuiju Special Administrative Region on September 23, 2002

6. The first North Korean Constitution was established in 1948.

7. See Eric Yong-Joong Lee, *Development of North Korea's Legal Regime Governing Foreign Business Cooperation, A Revisit Under the New Socialist Constitution of 1998*, 21 NW. J. INT'L L. & BUS. 199, 242 n.101 These revisions are as follow:

- 1) the Law on Free Economic Trade Zone,
- 2) the Foreign Investment Law,

foreign capital still has not materialized within North Korea. Among the reasons for this predicament is the lack of clear and understandable mechanisms to settle business disputes.<sup>8</sup>

North Korea does not publish a complete collection of its official laws so it is difficult for foreigners to fully understand North Korea's legal system.<sup>9</sup> This makes it difficult for commercial enterprises to conduct business let alone settle disputes. However, this predicament has changed since the Constitutional revision of 1998. Rules were made clearer for North Koreans and foreign investment enterprises, and one year later, the North Korean government established the External Economic Arbitration Law ("EEAL").<sup>10</sup> The EEAL was aimed at stimulating business transactions between itself and foreign enterprises by adding certainty to the dispute resolution process in a cost effective manner. Moreover, the EEAL seeks to confirm the commitment of the North Korean government to its other international business law obligations.<sup>11</sup>

The purpose of this essay is to contribute to the little commentary about North Korean commercial arbitration and the EEAL. Therefore, I survey the EEAL's provisions, its effect on international disputes, and examine problems that may stem from this law. I also make recommendations for improving the EEAL where applicable.

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- 3) the Foreign Enterprise Law,
  - 4) the Contractual Joint Venture Law,
  - 5) the Law on Foreign-Invested Enterprises and Foreigners' Tax,
  - 6) the Foreign Exchange Control Law,
  - 7) the Land Lease Law,
  - 8) the Law on Foreign-Investment Bank, and
  - 9) the Equity Joint Venture Law.

In addition, in 1999, two other amendments were made that include the External Economic Arbitration Law and Foreign Company Labor Regulations. *Id.*; see also Eun Sook Kim, *Challenges in Expanding External Economic Relations with North Korea . . . North Korea System at the Dawn of the 21st Century*, at <http://216.239.33.100/search?q=cache:AmthfrldfWMC:www.nautilus.org/papers> (Apr. 7, 2000) (copy on file with *The Transnational Lawyer*).

8. See Yoon, *supra* note 1, at 325 (highlighting the fact that "capitalist business activities in a socialist bureaucratic regime" causes fear among these business, which is further compounded by the threat of military and political instability).

9. See Bryan et al., *supra* note 3, at 1694 (noting that "[b]ecause so little is known about the court system in [North Korea], alternative dispute resolution options become essential considerations for all potential foreign investors"); see also Yoon, *supra* note 3, at 326 (supporting the proposition that "the lack of legal structure may also become one of the important obstacles [to] foreign investors").

10. See External Economic Arbitration Law of DPRK, available at [http://www.korea-np.co.jp/pk/109th\\_issue/99082601.htm](http://www.korea-np.co.jp/pk/109th_issue/99082601.htm) (last visited Apr. 3, 2003) [hereinafter EEAL] (copy on file with *The Transnational Lawyer*).

11. See *id.* at art. 11. However, its obligation to international treaties pertaining to the proliferation of nuclear weapons would not fall in this category. *Id.*

## II. NORTH KOREAN EXTERNAL ECONOMIC ARBITRATION LAW

### A. *An Overview*

The Presidium of the Supreme People's Assembly of North Korea adopted the EEAL on July 21, 1999 and announced its enactment through the North Korean Central Broadcast on August 2, 1999.<sup>12</sup> The EEAL mandates that international business disputes be settled in the business arbitration system and not by the national arbitration system. This is helpful because previously it was confusing as to where and how an international dispute would or could be settled, as neither of North Korea's arbitration systems clearly had jurisdiction to hear such a dispute. Although both of these systems used the same term "arbitration," each operates quite differently from the other and each has a different purpose. Since the passage of the EEAL, however, this ambiguity has been clarified. Today, one system is clearly directed to domestic disputes and the other to disputes involving foreigners.

The national arbitration system usually addresses breach of contract disputes between domestic business enterprises.<sup>13</sup> This mandatory system is the first step towards dispute resolution. In his deliberation, the arbitrator looks to the rights and obligations under the contract and then tries to harmonize his decision with the use of government philosophy.<sup>14</sup> This process appears to be a 'hands on' approach to accomplishing its economic policy.

The business arbitration system, on the other hand, is almost exclusively directed at commercial disputes between foreigners and Korean nationals.<sup>15</sup> In fact, without special circumstances, no national arbitration body can play a part in resolving business problems concerning disputes between foreigners and North Koreans. The EEAL is specifically aimed at the business arbitration system.

### B. *Chapter I: Essence of EEAL*

Chapter 1 of the EEAL provides the guidelines for using the EEAL. Its stated purpose is to establish a systematic approach for solving international business disputes and "contribute toward protecting the rights and interests of the parties concerned in a dispute."<sup>16</sup> The EEAL functions within two specialized

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12. See *Law on External Arbitration Adopted*, Korean Central News Agency, at <http://www.kcna.co.jp/index-e.htm> (last modified Aug. 2, 1999) (copy on file with *The Transnational Lawyer*).

13. CIVIL LAW DICTIONARY [*Minsabeobsajeon*], PYEONGYANG, SOCIAL SECURITY PRESS 71-72 (1997); see also Jeong-Won Park, *A Study on the North Korean Arbitration Law* [*Bukhanui Daeweigyeongjaebeobe Kwanhan Yeongu*], RESEARCH REPORT NO. 2000-02, KOREA LEGISLATION RESEARCH INSTITUTE 22 (2000).

14. CIVIL LAW DICTIONARY [*Minsabeobsajeon*], *supra* note 72; Park, *supra* note 13, at 23.

15. LAW DICTIONARY [*Beobhaksajeon*], PYEONGYANG: SOCIAL SCIENCE PRESS 83 (1971); Park, *supra* note 13, at 87.

16. EEAL, *supra* note 10, at art. 1.

committees, namely the Korea International Trade Arbitration Committee and the Korea Maritime Arbitration Committee.<sup>17</sup> Specifically, the Korea International Trade Arbitration Committee takes disputes related to trade, investment, and service; on the other hand, the Korea Maritime Arbitration Committee settles disputes relating to marine transportation, marine aid, and general averages.<sup>18</sup> The EEAL mandates that both committees consist of a chairman, vice chairman, secretary, and committee members.<sup>19</sup>

### C. Chapter II: Arbitration Proposal

Chapter 2 of the EEAL outlines what the arbitration proposal must contain in order to trigger the arbitration process. For example, “a written arbitration proposal<sup>20</sup> with the required papers<sup>21</sup> attached must be delivered to the arbitration committee within a specified period.”<sup>22</sup> The arbitration applicant must pay arbitration expenses when a written arbitration proposal is submitted,<sup>23</sup> and the fees “are calculated in accordance with a rate applicable to the amount of [the] claim.”<sup>24</sup> The arbitration committee must examine the written arbitration proposal and decide whether to accept or refuse it within ten days.<sup>25</sup>

Should the committee accept the proposal, it must send a list of judges to the applicant and the other party within a specified period.<sup>26</sup> Upon receiving this notice, the other party submits ‘papers of proof’ and a reply to the applicant’s arbitration proposal as well as a selection of judges to the committee within thirty days.<sup>27</sup>

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17. *Id.* at art. 2.

18. *Id.*

19. *Id.* at art. 3.

20. See EEAL, *supra* note 10, at art. 9. The contents of a written arbitration proposal should include the following: first, the name, legal address, and a court representative or his (or her) agent of the parties concerned in a dispute; second, the content of the agreement on arbitration such as an arbitration entity and the law on which it is based; third, the content of the claim and the damages sought; fourth, expression of will concerning the selection of judges or the names of judges; and fifth, other important matters. *Id.*

21. See EEAL, *supra* note 10, at art. 10. The attached papers should contain: first, arbitration clauses or the original text of an arbitration contract; second, a document which confirms payment for arbitration expenses; third, a document specifying the amount to be delivered to the other party before an arbitration proposal is made; fourth, a document which proves that the other party violated a contract obligation; and fifth, other important matters.

22. *Id.* at art. 8.

23. *Id.* at art. 11. Arbitration expenses are calculated in accordance with a rate applicable to the amount of the claim, and the arbitration committee, if needed, may use some of the arbitration expenses. *Id.*

24. See Chin Gil Sang, *DPRK’s Dispute Solution System for Foreign Investment Enterprises*, at [http://www.korea-np.co.jp/pk/123rd\\_issue/99129801.htm](http://www.korea-np.co.jp/pk/123rd_issue/99129801.htm) (last visited Apr. 4, 2003) (copy on file with *The Transnational Lawyer*).

25. EEAL, *supra* note 10, at art. 12.

26. *Id.*

27. However, the absence of the other party’s reply or papers of proof do not influence the arbitration trial. *Id.* at art. 13.

The EEAL also allows for the defendant to raise a “counter-arbitration” proposal, but it must be directly related to the main arbitration proposal, and the counter proposal must be addressed to the committee before the arbitration trial finishes.<sup>28</sup>

The applicant may amend or withdraw its proposal or simply abandon its claim, and the applicant may even resubmit the proposal if it occurs within a specified period. However, if the claim is abandoned, an identical claim cannot be made again.<sup>29</sup> The EEAL also enables the parties to offer and reply to the arbitration proposal through their agents.<sup>30</sup> The agent may be a North Korean citizen or a foreigner, but in either case the agent must submit a power of attorney to the arbitration committee.<sup>31</sup>

However, if one of the parties initiates a civil action relating to a matter already pending in international business arbitration or decided through an arbitration proceeding, the court must return the related documents to the party who brought the action.<sup>32</sup> Therefore, international business arbitration has priority over court proceedings.

#### *D. Chapter III: Arbitration Trial*

The EEAL also sets out the procedures for arbitration trials. Each arbitration panel consists of either one or three judges as chosen by the parties. However, if an agreement between the parties is not reached, the arbitration committee may decide the number of judges.<sup>33</sup> As stated above, the arbitration committee must prepare a list of judges<sup>34</sup> along with documents relating to the disclosure of the judges’ past and present occupations, professional knowledge, and careers as arbitration judges.<sup>35</sup>

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28. *Id.* at art. 14.

29. *Id.* at art. 15.

30. *Id.* at art. 16.

31. *Id.*

32. *Id.* at art. 17

33. *Id.* at art. 21. However, the judge or judges who examine a dispute are selected by the parties concerned in the dispute from the list of arbitration judges. *Id.* at art. 22. In case the selection is not made within a specified period, the arbitration committee selects the judges. *Id.* When the parties propose a change in arbitration judges to the arbitration committee, the arbitration committee examines the proposal and announces the result of its deliberation to the one who made the proposal. *Id.* at art. 23. Additionally, if the judge cannot fulfill his or her duties and cannot examine a dispute due to an unavoidable circumstance, he can request to resign from his arbitration work. *Id.* at 24. In this case, the arbitration committee announces the fact to the parties concerned in a dispute and lets them select another judge. *Id.*

34. However, under Article 34, the EEAL also provides that international business disputes may be solved through consensual mediation.” *Id.* at art. 34.

35. *Id.* at art. 20. In addition, the profiles of judges can be made public through a publication. *Id.*

Conflict of interest provisions prevent judges from representing either of the parties concerned in the dispute.<sup>36</sup> However, the judges of the council must meet at least one of the following qualifications: first, be a member of the arbitration committee; second, be either a lawyer or economic expert with the ability to examine and solve the dispute; third, be either an attorney or a judge; and fourth, be “a well-known overseas Korean compatriot or a foreigner experienced in arbitration affairs.”<sup>37</sup>

The arbitration committee must decide on the date, time, and place of an arbitration trial<sup>38</sup> and announce it no less than thirty days before the arbitration begins. Parties may request an alternative to the committee’s decision within ten days of the trial.<sup>39</sup> The EEAL enables a court representative or his agent to participate in the trial.<sup>40</sup> However, these proceedings are not open to the general public. This requirement is intended to be a privacy measure for the parties in the dispute.<sup>41</sup>

At the beginning of the trial, the arbitration judges permit opening statements by both parties. Each side has an opportunity to present facts relating to the dispute and each may call witnesses to testify on their behalf. Thereafter, the judges are permitted to examine both parties and may even require further investigation.<sup>42</sup> Nonetheless, the arbitrator must come to a decision in the dispute within five months after the written arbitration proposal is accepted.<sup>43</sup> During the interim, however, the parties may agree on reconciliation and if this option is exercised the arbitration trial is terminated.<sup>44</sup>

#### *E Chapter IV: Decision and Implementation*

The decision should be announced within thirty days of the conclusion of the arbitration trial.<sup>45</sup> The decision need not be unanimous, however. If one of the judges does not agree with the majority opinion, a dissenting opinion is

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36. *Id.* at art. 18.

37. *Id.* at art. 19.

38. The arbitration trial is conducted in the place of the arbitration committee concerned and is not open to the public. *Id.* at art. 26. However, if the parties desire, the trial can be made open or conducted in a different place. *Id.*

39. *Id.* at art. 25.

40. However, the court representative or the agent can participate in a trial together, if needed. *Id.* at art. 27.

41. *See id.* at art. 26.

42. *Id.* at art. 28. The parties can present evidence and request the judges to call a witness or an identifier to the court. *Id.* at art. 29. If the request is well grounded, judges apply to the arbitration committee for the attendance of a witness or an identifier in the court. *Id.* The parties can form an opinion on the preservation of evidence and disposal of property offered as a surety. *Id.* at art. 30. In this case, the arbitration committee confirms the content of the proposal and entrusts the matter to the court organ concerned. *Id.*

43. *Id.* at art. 31.

44. *Id.* at art. 33.

45. *Id.* at art. 35.

submitted to the arbitration committee.<sup>46</sup> If the judges cannot come to an opinion, they may request an extension to submit the decision.<sup>47</sup> Nevertheless, under Article 37, the decision must be written in Korean and may be accompanied by a translated version upon demand of the parties.<sup>48</sup> Where there is a discrepancy between the Korean document and the translated version, the Korean document has priority.<sup>49</sup> This document becomes effective when executed by the judges and then endorsed by the arbitration committee.<sup>50</sup>

The final decision is sent or directly delivered to the parties.<sup>51</sup> After receiving the decision, the parties must execute its terms within the period specified in the decision document. If the decision is ambiguous, the parties may request “the arbitration committee to revise, supplement or explain expressions” in the decision within thirty days. The parties may also request a court to withdraw the decision as incorrect within six months of being issued.<sup>52</sup> However, if the party held accountable fails to perform or does not act in good faith, the other party may apply for a court order to force implementation.<sup>53</sup> If the object of the dispute is property outside of North Korea, the implementation of the decision may be entrusted to a court in a foreign country.<sup>54</sup>

### III. REVIEW OF THE EXTERNAL ECONOMIC ARBITRATION ACT

The EEAL has some distinguishing aspects from other North Korean laws. The purpose of most North Korean laws is focused on the realization of the principle of democratic centralism. However, the EEAL declares its purpose as strictly establishing a system to solve international business disputes while protecting the “rights and interests” of the parties.<sup>55</sup> The EEAL stresses the independence of the judging council and guarantees the privacy of the parties by making arbitration closed to the public.<sup>56</sup> Specifically, the EEAL changed the existing principle of democratic centralism in dispute resolution to a focus on the parties’ rights and interests.<sup>57</sup> Moreover, the EEAL attempts to protect foreigners

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46. *Id.* at art. 38.

47. *Id.*

48. *Id.* at art. 37.

49. *Id.*

50. *Id.* at art. 38.

51. Therefore, if the legal address is changed after the arbitration trial is proposed, the party must report the new address to the arbitration committee within a specified time. *Id.* at art. 40.

52. *Id.* at art. 41.

53. *Id.* at art. 42.

54. *Id.* at art. 43.

55. *Id.* at art. 1.

56. *Id.* at arts. 18, 19, 26.

57. *Id.* art. 6.

and foreign enterprises by emphasizing fairness and rapidity.<sup>58</sup> Therefore, the EEAL is an appropriate device to induce foreign investment in North Korea.

Even though the EEAL functions as a basic law to solve problems related to international business disputes, it is still very difficult to apply the EEAL to every situation. For example, the EEAL does not expressly provide concrete provisions for arbitration fees, the procedure of the arbitration trial itself. In addition, some of its terms are vague. Specifically, the EEAL uses the expression "other important matters" in accordance with the arbitration proposal and attached papers to the arbitration proposal.<sup>59</sup> These obscure provisions put foreign enterprises in a disadvantageous position because it is hard for them to anticipate what the nature of the requests will be. Furthermore, the EEAL does not expressly describe procedures for dissatisfied parties. While a request to the arbitration committee to revise a decision and a request to a court to withdraw the decision may be made,<sup>60</sup> the EEAL contains no provision for the request process. Consequently, any attempt to appeal from arbitration is severely complicated by the lack of specified procedures. The EEAL also provides for court ordered enforcement of arbitration decisions. However, since the EEAL does not provide the material elements for the process of implementation, the consequences of unfaithful implementation are unclear. As a result, this lack of concrete provisions leaves implementation to the North Korean government. Finally, even though the EEAL declares that North Korea must respect international treaties and practices in its arbitration activities,<sup>61</sup> it is uncertain if North Korea does so because it has not yet ratified major international treaties, such as the UNCITRAL Model Law.<sup>62</sup> Therefore, in order for North Korea to secure the confidence of other nations that it will follow international standards, the international community must monitor the efforts of the North Korean government closely.<sup>63</sup>

#### IV. CONCLUSION

An international trade dispute between North Korean and non-North Korean entities or individuals may be resolved through use of either the court or the arbitration system. However, resolution of the dispute through international litigation is sure to meet many intricate problems. Therefore, parties in an

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58. See *id.* at arts. 12-13, 31, 33, 41.

59. See *id.* at arts. 9-10.

60. See *id.* at art. 41.

61. See *id.* at art. 7.

62. United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration, June 21, 1985, UN Doc. A/40/17, Annex 1, reprinted in 24 ILM 1302 (1985).

63. See Bryan et al., *supra* note 3, at 1692 (noting that North Korea has not signed on to the New York Convention or other conventions that recognize and enforce arbitral awards). For a general discussion of recent revisions to major international arbitration rules, see Michael P. Malloy, *Current Issues in Arbitration*, 15 TRANSNAT'L LAW. 43, 44-45 (2002).

international business dispute should aspire to use the international arbitration system as a method of alternative dispute resolution because it is efficient, saving both time and money.

Before the enactment of the EEAL in 1999, there was no clarity in settling international business disputes. After North Korea acknowledged this problem, it finally enacted the EEAL as an intermediary between the old fashioned and closed socialist state, and the new capitalistic and democratic people's state. However, more needs to be done in order for North Korea to catch up to the world standard for international business arbitration systems.

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