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## NEWSLETTER

International Arbitration Practice Group

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## Recent Case Law Trends on the Interpretation of Pathological Arbitration Agreements

Recently, the Korean Supreme Court ruled that an arbitration agreement in a contractual agreement can still be valid, even if certain terms in a multilingual arbitration clause is ambiguous, contradictory, or refers to a non-existent arbitral institution or arbitrator, as long as the parties' intent to resolve future disputes through arbitration is recognized (Supreme Court Judgment No. 2024Da243172 dated 23 January 2025). This newsletter analyzes the key aspects of this ruling and its implications.

### 1. Factual Background

The supply contract in question was executed between the plaintiff, a Korean company, and the defendant, a German company, for the procurement of certain equipment.<sup>1</sup> The plaintiff subsequently filed a lawsuit in the Korean courts, seeking a refund of the purchase price paid to the defendant.

In response, the defendant raised a jurisdictional objection, arguing that the supply contract contained an exclusive arbitration agreement requiring all disputes arising in connection with the contract to be resolved through arbitration and contended that the lawsuit was inadmissible and should be dismissed. The defendant argued that the following clause constitutes an exclusive arbitration agreement (**the Clause**).

"8. 통제 법률<sup>2</sup> (Arbitration)

본 합의는 한국법률이나 국제사법재판중재위원회의 통제를 받아야 한다.<sup>3</sup>

*All disputes, controversies, claims, or differences arising out of or in relation to this agreement, or a breath<sup>4</sup> hereof, shall be finally settled by Korean law or in accordance with the Commercial Arbitration Committee of International Commercial Law."*



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## 2. The Court's Ruling

### 1) Original Court Decision

The Seoul High Court (original court) rejected the defendant's argument that an exclusive arbitration agreement existed (Seoul High Court Judgment No. 2023Na2046426 dated 24 April 2024). The original court first interpreted the Clause as requiring the parties to "settle by Korean law or settle by the Commercial Arbitration Committee of International Commercial Law." It then concluded that the part "settle by Korean law" reflected the parties' agreement on the governing law and their intention to proceed with litigation under Korean law, while the part "settle by the Commercial Arbitration Committee of International Commercial Law" reflected their intention to resolve disputes through arbitration.

Furthermore, the original court made the following findings: (i) the use of the Korean term "~0|L-" and the English term "or" are not recognized as errors, and thus, the conjunction in the Clause should be interpreted to mean "or"; (ii) considering that the parties specified a non-existent arbitral institution, such as the Commercial Arbitration Committee of International Commercial Law, it is likely that they did not perceive arbitration as the exclusive means of dispute resolution; and (iii) the parties did not include any language excluding litigation as a means of resolving disputes. Based on these points, the court concluded that the Clause constituted an "optional arbitration clause," which would only become effective if the parties did not object to arbitration and proceeded with the process.

### 2) Supreme Court Decision

However, the Supreme Court overturned the original court's decision and upheld the validity of the Clause as an exclusive arbitration agreement for the following reasons.

First, the Supreme Court found that the English heading of the Clause clearly specifies "Arbitration," and the English text explicitly includes the phrase "shall be finally settled by [...] Arbitration," which confirms that the parties to the contract had agreed to resolve disputes through arbitration.

Furthermore, the Supreme Court made the following findings – (i) based on the wording and structure, the phrase "settled by Korean law" can be read only as an agreement on the governing law and does not appear to reflect an agreement to accept dispute resolution methods, including judicial proceedings, under Korean law; (ii) even if the particular arbitral institution named in the clause does not exist, the arbitration agreement remains valid as long as the parties' intent to resolve disputes through arbitration is clear; (iii) the absence of language excluding litigation from dispute resolution does not suggest that the parties agreed to a non-exclusive arbitration clause – to conclude that the Clause constituted an exclusive arbitration agreement. Consequently, the Supreme Court dismissed the plaintiff's claim.

## 3. Implications

The Supreme Court has previously taken the position that, even if an arbitration clause does not specify the arbitral institution, governing law, or the place of

arbitration, the arbitration agreement may still be deemed valid if the intention to resolve future disputes through arbitration is recognized through an interpretation of the clause (Supreme Court Judgment No. 2005Da74344 dated 31 May 2007).

However, in this case, the court went even further and held that even if certain terms of the arbitration clause is ambiguous or contradictory, or if a non-existent arbitral institution or arbitrator is designated, such defects alone do not necessarily render the arbitration agreement invalid. In other words, this ruling can be seen as affirming the validity of an arbitration agreement, even where there are defects due to inconsistent wording based on multiple languages, as long as the parties' intent to resolve disputes through arbitration is clear.

Additionally, the Supreme Court adopted a more arbitration-friendly stance, recognizing that the inclusion of a separate arbitration clause in the contract serves as strong evidence of the parties' intent to resolve disputes through arbitration, which further affirms that the Korean courts are playing a positive role in promoting the growth of international arbitration.

Therefore, this Supreme Court ruling not only makes a significant contribution to the criteria for determining the validity of an arbitration agreement containing defects but also offers valuable insights for parties who intentionally wish to use an optional arbitration clause as a dispute resolution mechanism and highlights the key considerations to watch out for to ensure that such a clause is not interpreted as an exclusive arbitration agreement.

The International Arbitration Practice Group at Lee & Ko provides market-leading legal services of the highest caliber, drawing upon our extensive experience and expertise in handling a wide range of international disputes, including international arbitration and cross-border disputes. In serving our clients, we develop tailored strategies at every stage of the process, from dispute avoidance to initiation, and all the way to enforcement. If you require advice on any aspect of your dispute, please contact one of our attorneys in the International Arbitration Practice Group.

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- <sup>1</sup> The plaintiff initially entered into the supply contract with a different German company, but following a merger, the defendant assumed the role of the contracting party in the agreement.
  - <sup>2</sup> "Controlling law".
  - <sup>3</sup> "This agreement is controlled by Korean law or the Commercial Arbitration Committee of International Commercial Law."
  - <sup>4</sup> The original text of the contract stated 'breath,' but the court determined it to be a typographical error for 'breach.'

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