South Korea

Chapter 1: Introduction

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South Korea has been a hot spot for foreign investors and has shown great resilience in its economic performance during the past few decades. The GDP in South Korea expanded approximately two per cent year-on-year in 2019, and the combined export-and-import trading volume has exceeded $1tn for three consecutive years since 2017, despite escalated trade tensions between the US and China, the North Korean missile crisis and the unpredictable unfolding of geo-politics in the Asia Pacific region.

During the past three years, the Korean government has eagerly pushed for implementing socio-economic policies under the leadership of President Moon Jae-in. This has inevitably been followed by substantial changes to legislation and legal enforcement practices in South Korea. In light of this, there are some notable developments in South Korea for investors to consider.

Firstly, the Korean government is keeping a closer eye on the overreaching exercise of managerial power by controlling shareholders of certain large business conglomerates; in particular, the failure of respective boards of directors to check and supervise the activities of such controlling shareholders, despite the fact that the majority of such boards are composed of outside directors. Starting from early 2020, the disqualification criteria for outside directors of Korea Exchange (KRX)-listed companies has been greatly expanded and must be publicly disclosed in detail as a way to limit the influence of controlling shareholders over the selection of outside directors. While such measures are expected to help enhance the transparency and soundness of board governance, companies are, to some extent, beginning to worry about a shrinking pool of outside director candidates because those measures are somewhat rigorous and required to be implemented immediately upon the announcement of the relevant legislation. Moreover, the Korean government has been encouraging the National Pension Service and other government-supervised funds actively to monitor and exercise voting rights at general meetings of shareholders of companies in which they hold shares. Since the National Pension Service holds substantial voting shares in many Korean listed companies, its tendency towards the active exercise of shareholder rights would surely affect the dynamics of corporate governance in South Korea.

Secondly,, private equity funds (PEFs) and hedge funds are greatly boosted by an incremental upgrade of laws and guidelines issued by the Korean government. PEFs are a robust player in the Korean M&A markets and a frequent member of buyer consortiums to fund large transactions. In some cases, PEFs are partnering with conglomerate companies to consummate cross-over deals. With deal experience and sophistication accumulated over many years, PEFs are expected to sponsor mega-deal M&As and contribute to the active and stable growth of the M&A markets in South Korea.

Thirdly, while the total amount of overseas investment by Korean companies has greatly exceeded that of inbound investment by foreign companies in recent years, South Korea continues to attract FDI, especially from multinational corporations. South Korea has provided superior infrastructure and resources, such as highly educated skilled workers, relatively cheap electricity bills and a well-established judicial system compared with its competing peer countries. The Moon Jae-in administration has been driving new policies, such as educational reform, to reduce the burden of educational costs for parents; changes to the energy policy towards a lesser dependence on nuclear power; and reshaping judicial bodies by nominating new justices. Investors should closely watch how those policies affect the overall business and legal environment in South Korea.

Further, President Moon's government has assiduously pushed for labour market reform. Two signature policies, among others, are noteworthy. These include the increase of minimum wages from KRW 6,470 in 2017 to KRW 8,590 in 2020, and capping the maximum working hours per week to 52 hours from the previous 68 hours. These policies are controversial, and often criticised for being undue burdens to companies and negatively affecting job growth. Having heard such criticism, the government indicated its intention to slow down the drive. It set a mild annual increase of the minimum wage of 2.9 per cent in 2020 compared with a 10.9 per cent increase in 2019, and proposed alternative working-hour arrangements to alleviate the woes of companies under the 52 working-hour ban. These changes are expected to help boost business activity and thus induce companies to hire more staff for the benefit of the whole nation.

Over the past three years the government has also emphasised higher taxes for individuals with high incomes and profitable companies to fund its social and welfare programmes. While such policies prevail, the government has amended tax codes to reduce the taxes of SMEs. For example, starting from 2020, the scope of deductible liabilities and expenses increased for SMEs and a new incentive for tax credits is allowed for the R&D activity of companies in the material, parts and equipment (MPE) industry. Such an amendment clearly shows the government's policy to further the growth of SMEs and encourage R&D in companies in the MPE industry. It is partly a strategic response to Japan's export embargo of critical industrial materials against South Korea, which has been imposed since 2019 amid diplomatic disputes over the forced labour of Korean workers during the Second World War. As the heads of both countries seem to know that a souring relationship will not help either county, breakthroughs are expected.

Moreover, amendments to three major data laws became effective in July 2020. New amendments allow companies to use more broadly personal data, pseudonymised data and anonymised data, while companies are required to take heightened measures to protect such datasets. Although South Korea has been a leader in IT, semiconductor and 5G industries, with the great potential to develop artificial intelligence (AI) capacity, it oddly lags behind the US and other advanced economies in terms of AI and data science, partly due to strictly set legal limits on the use of personal information. New data laws are expected to promote the growth of the data industry through the encouragement of sharing and utilising data among various entities. Moreover, under the upgraded data protection policy, South Korea is on the right course to receive an adequacy decision (under the GDPR) from the EU.

Also, the Korea Fair Trade Commission (KFTC), which is the country's antitrust authority, has recently been stepping up its enforcement action against market concentration issues. The KFTC carefully reviews merger control and suspicious cartels, and is quite ready to take remedial measures against alleged wrong-doers while diligently coordinating with authorities in other countries. Multinational corporations that have substantial business operations in South Korea should closely follow up with the KFTC's enforcement policies and should report their overseas M&As to the KFTC if such M&As have any potential bearing on the Korean market.

Lastly, many foreign companies now seem increasingly comfortable with adopting Korean laws as governing law and for a Korean court to hear disputes concerning commercial contracts. This trend is fortified by the stable, well-established judicial system, and belief in the high quality and independence of judges. On the other hand, many Korean companies have been accustomed to arbitration procedures, and they are more likely to accept arbitration clauses in contracts with foreign investors. The growing build-up of trust in the dispute resolution system in South Korea will help to encourage foreign investment into and trade with Korean partners.

The spread of Covid-19 at the beginning of 2020 gradually hurt business operations and economic activity in South Korea. The outbreak of the infectious disease has disrupted global supply chains, on which many Korean companies depend, and even caused a partial factory shut-down of some Korean companies. Due to the uncertainty of Covid-19's long-term impact over the business environment, governmental organisations and credit-rating firms have forecast negative growth for South Korea for 2020. As South Korea proved its capability to overcome obstacles and overhauled its system during the Asian financial crisis in the late 1990s, it will surely utilise this challenging moment to reorganise and reshape its governance, labour relations and management practices, and ultimately elevate itself to become a reliable and strengthened business partner of foreign investors.

Chapter 2: General business environment

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'The world's only divided country', '[a] lonely peninsula encircled by four powerful nations: China, Japan, Russia, and the United States', but at the same time, 'the country that achieved the "Miracle on the Han River"'. These phrases refer to the Republic of Korea. South Korea, which had a national per capita income of only $45 in the 1950s, has now seen this figure grow to over $30,000 within 50 years, and today is ranked 12th in the world economic (GDP) rankings. Furthermore, since 2014 Korea has been ranked first in the Bloomberg Innovation Index until just this year (finishing second). People who hailed the growth of Korea's economy as a miracle continue to tout the 'miracle of new investment' going forward. So why did Korea become such an attractive investment destination?

As an investment destination, there are three major advantages enjoyed by Korea.

Firstly, Korea has geographical advantages, which it has carefully exploited for its continued development as a logistics hub for Northeast Asia and Eurasia. South Korea is located in the heart of the Northeast Asian market, which accounts for about 25 per cent of global GDP, lying between China and Japan, two of the world's largest economies. Along with this, Korea has an excellent logistics industry infrastructure, such as Incheon International Airport and Busan Port (both consistently achieving top global rankings), and a 'mega free trade agreement' network signed with 52 countries, making it an ideal investment destination for direct participation in the global market.

Secondly, South Korea is arguably the best 'test bed' market to predict global marketability. Although South Korea is small in territory, it boasts a diverse, savvy and dynamic consumer population of over 50 million that seeks efficiency and makes uniquely quick decisions as proud early adopters.

In practice, leading companies in various fields use the country as a test bed. In particular, global companies in the digital and IT fields, such as Google and Microsoft, actively use South Korea as a test bed for their product launches. This is because 5G, the revolutionary wireless mobile communication network, can be readily accessed anywhere by anyone in the country, and the world's fastest internet speeds are currently found in South Korea.

Thirdly, South Korea has an excellent business infrastructure. In 2019 the World Bank's *Doing Business 2020* ranked South Korea fifth among 190 countries, first among G20 countries and third among OECD countries. As an example of South Korea's business environment, the expansion rate of Starbucks outlets has progressed rapidly compared with other countries, such that the number of directly managed stores reached 1,300 in a very short time (the fifth-highest number globally). A major reason why Starbucks has been able to expand its brand so rapidly is due to South Korea's 'e-government system', which provides government administration tasks to the public quickly by utilising modern information and communication technology. Other reasons for South Korea's sound business environment include its sizeable pool of highly skilled workers, a product of its emphasis on education, and evidenced by high university entrance rates, excellent living conditions marked by safe and orderly cities, convenient transportation infrastructure, accessible residential settings, and affordable rates for food, healthcare and utilities (water and electricity).

On the other hand, because South Korea has achieved phenomenal growth in such a short period of time, the usually rosy portrayal is often marred by intense competition, squabbling among vested interests and discontent about societal ills, particularly wealth inequality. As a result, there are also multiple obstacles for investors to consider, such as corporate regulations and exceedingly worker-friendly regulations aimed at reducing income inequality.

With recent revisions to the labour law, labour costs have risen, and the spectre of increased production costs has similarly risen. While the minimum wage has increased by approximately 33 per cent from 2017 (KRW 6,470) to today (KRW 8,590), at the same time, work hours have been mandatorily reduced, with the 52-hour workweek system in the process of being implemented incrementally based on the number of employees. However, due to the excessive burden such changes are imposing on employers, in particular smaller businesses, it seems that there is considerable room for future policy changes.

Moreover, major legislative and policy changes are increasingly being implemented at breakneck speed. For example, in 2017 the current government suddenly moved governmental policy away from nuclear energy and decisively towards green energy initiatives, and as a result, Korea is now faced with the need to raise electricity rates due to the 'energy conversion policy', which aims to phase out nuclear energy altogether over the next four decades. Most notably, since 2018 the current government has increased the tax burden on large corporations from 22 per cent to 25 per cent, and discussions on further increases are ongoing. In addition, various new regulations are being created in new technological fields, such as 'Industry 4.0'. There is considerable public opposition to such legislative and policy changes, often resulting in sudden reversals due to the government's sensitive reactions to societal opposition (eg, on a single day in 2018, different governmental authorities first banned and then expressed support for cryptocurrency exchanges). Therefore, investors need to be cautious and aware of how such legislation and policies might trend in the future, requiring careful preliminary review by those with expertise and experience in the relevant fields, including those who can help in successfully navigating the country's legal/ regulatory framework.

Overall, South Korea has a demonstrably good business environment that is conducive to investment, but there are various factors, such as the regulatory environment and changes in social mood, to bear in mind before deciding whether and how to invest. Risk checks for such factors should be made in advance in order to identify and adapt to the opportunities and threats both currently in place and anticipated going forward. As always, sound preparation with professional support will be key to investor success.

Chapter 3: Business and corporate structures

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Under Korean law, foreign investors may choose from a range of legal entities, including a joint stock company (*chusik hoesa*), limited company (*yuhan hoesa*), limited liability company (*yuhan chaekim hoesa*), general partnership (*hapmyung hoesa*) and limited partnership (*hapja hoesa*).

Among such choices, joint stock companies comprise the vast majority, accounting for over 90 per cent of corporations that filed a corporate tax return in 2018, and as a result, enjoy somewhat of an advantage in terms of general market perception. That said, foreign and domestic investors are increasingly adopting the limited company or the limited liability company due to their distinct characteristics, including exemption from public reporting obligations that normally depend on the size of the relevant company. In particular, the limited liability company, which was introduced in South Korea relatively recently, is increasingly gaining interest from foreign investors – compared with joint stock companies or limited companies – in light of its exemption from public reporting requirements under the Act on External Audit of Stock Companies (the 'Act on External Audit'). Converting one legal entity into another (eg, conversion of a joint stock company into a limited company) is permissible under Korean law, subject to certain conditions and restrictions.

The following is a more detailed explanation of the three types of companies most commonly used by foreign investors.

3.1 Joint stock company (chusik hoesa)

3.1.1 Incorporation

For joint stock companies, investors are free to determine the amount of capital to be invested; however, in order to qualify as a 'foreign investment' under the Foreign Investment Promotion Act (which may enjoy certain benefits, such as tax reductions, cash grants and industrial site support), an investment of at least KRW 100m per investor is required. The overall incorporation procedures for a joint stock company consist of the following: (1) preparation of articles of incorporation (AoI);

(2) election of one or more directors, representative directors and statutory auditors; (3) payment of the subscription price; and (4) registration with the court and the local business/tax office.

3.1.2 Management and statutory auditors

A minimum of one director is required (or if the registered capital is KRW 1bn or more, then a minimum of three directors is required, one of whom includes the representative director), and there are no nationality or residency requirements. A board of directors is only essential if there are three or more directors (in which case the majority rules, in principle). As for the internal statutory auditor (which is different from an external auditor and does not need to be a certified accountant), at least one statutory auditor is required if the registered capital is KRW 1bn or more (or, as an alternative, an audit committee consisting of three or more directors is possible in lieu of the statutory auditor).

3.1.3 Shareholders

A minimum of one shareholder is required, and each share has one vote unless the articles of incorporation provides for shares that are wholly or partially (depending on the matter) non-voting. Shares may be freely transferred unless the articles of incorporation requires the approval of the board of directors of the relevant company (or if no board of directors exists, then the articles of incorporation may require the approval of the shareholders).

3.1.4 Public reporting and audits

The annual balance sheet as approved by the shareholders must be published in accordance with the methods stipulated in the articles of incorporation. External audits are required for: listed companies, companies that desire to be listed in the current or following fiscal year, and companies having total assets or total sales of KRW 50bn or more, or that otherwise satisfy certain criteria under the Act on External Audit.

3.2 Limited company (*yuhan hoesa*)

3.2.1 Incorporation

The incorporation procedures of a limited company are generally the same as those of a joint stock company, although electing a representative director (if so provided in the articles of incorporation) or a statutory auditor is optional. In addition, instead of 'shareholders', the investors are known as 'members', and instead of 'shares', a limited company has 'contribution units'.

3.2.2 Management and statutory auditors

A minimum of one director is required and there are no nationality or residency requirements. In principle, a director represents the company, but if there are two or more directors, then a representative director should be elected, unless otherwise stipulated in the articles of incorporation. A board of directors for a limited company is not mandatory.

3.2.3 *Members*

The minimum number of members is one and the members may adopt a written resolution if all members of the company consent (such written resolutions are only permitted for a joint stock company with registered capital of less than KRW 1bn, and only if all shareholders consent). Each contribution unit is counted as one vote, unless otherwise provided in the articles of incorporation. The transfer of contribution units may be restricted if such a restriction is stipulated in the articles of incorporation.

3.2.4 *Public reporting and audits*

The publication of annual balance sheets is not required. However, due to recent amendments in the Act on External Audit, limited companies are also subject to mandatory audit by an external auditor if they satisfy certain criteria thereunder similar to those applicable to joint stock companies.

3.3 Limited liability company (*yuhan chaekim hoesa*)

3.3.1 *Incorporation*

The incorporation procedures for limited liability companies are also substantially similar to those of a joint stock company. Like limited companies, instead of 'shareholders', the investors are known as 'members', and instead of 'shares', a limited liability company has 'contribution units'.

3.3.2 *Management and statutory auditors*

In limited liability companies a minimum of one manager should be elected under the articles of incorporation and assume the role of the representative director. It is noteworthy that a legal entity (as opposed to an individual person) may act as the manager of a limited liability company – something that is not allowed for a director of a joint stock company or a limited company – and both a member and a non-member may act as the manager. In addition, no board of directors and no statutory auditor are required.

3.3.3 *Members*

The minimum number of members is one and each member has one vote at the meetings of members. A new member may be registered through an amendment of the articles of incorporation, which requires the agreement of all the existing members. Members may not transfer their contribution units without the approval of other members (in particular, if there is any member acting as the manager, then the approval of such a member, and if there is no member acting as the manager, then the approval of all the members), unless otherwise provided in the articles of incorporation.

3.3.4 *Public reporting and audits*

Limited liability companies are exempt from any mandatory publication of balance sheets and from external audits under Korean law (in particular, the Act on External Audit).

Chapter 4: Private M&A

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4.1 Restrictions or controls on foreign investment

Foreign investment in South Korean companies is regulated in certain industries, including telecommunications, broadcasting, banking, marine, aviation, agriculture and natural resources. In these sectors, foreign ownership may be restricted in its entirety or allowed only a ceiling percentage, or be subjected to regulatory approval. Foreign investment in a designated defence industry contractor or a company possessing national core technologies may also be subject to regulatory review and approval. As a procedural reporting requirement, foreign investment requires reports to competent government authorities (eg, the Bank of Korea and Korea Trade-Investment Promotion Agency (KOTRA)) or designated institutions (eg, foreign exchange banks) under the Foreign Investment Promotion Act or under the Foreign Exchange Transaction Act.

4.2 Most commonly used acquisition structure

The acquisition of shares is the most common structure for acquisition in South Korea. Business or assets sales and purchases are less common and are generally only used to purchase part of a company's assets or business. Mergers can apply, but are not commonly used in an M&A context between unrelated parties. In general, the share purchase structure is preferred due to its simplicity (ie, execution of a share purchase agreement and delivery of the share certificates between the seller and buyer except consent requirements by change of control provisions), whereas business or asset transfer entails a more complicated closing procedure (eg, registration for the title transfer of assets; obtaining consent for the transfer of liabilities; and reporting or registration for the transfer of permits or licences, and transfer of employees, business contracts, etc).

4.3 Sale via auction process

A sale through an auction process is frequently used in private M&A. The bigger the deal size, the more common it is to use the bidding process. Although there are some variations, the bidding process generally used in South Korea includes: (1) distribution of a teaser and information memorandum; (2) preliminary bid; (3) selection of bidders to participate in the final bid; (4) due diligence by selected bidders; (5) final bid; (6) selection of a preferred bidder; (7) negotiation and execution of the definitive agreement; and (8) closing.

4.4 Key terms of the acquisition agreement

Typical key terms of a share purchase agreement in Korea are: (1) purchase price and advance payment deposit; (2) price adjustment; (3) closing and closing deliverables; (4) representations and warranties (R&W); (5) covenants; (6) conditions to closing; (7) indemnification; (8) terminations; (9) non-competition; and (10) governing law and dispute resolution.

In South Korea, an advance payment deposit is occasionally requested by the seller to secure certainty for deal closing and potential breach of the buyer, and various price adjustment mechanisms are often used (eg, net cash/debt, working capital adjustments, locked box and earn-outs). As the Korean Commercial Code requires the delivery of share certificates for title of shares to be transferred (in the case that the share certificates are issued), the closing procedure usually contains delivery of the share certificates and wiring the purchase price into the seller's bank account.

In terms of R&W of the target company, fairly extensive R&W are usually sought by the purchaser (eg, capitalisation, permits and licences, financial statements, absence of undisclosed material liabilities, compliance with law, taxes, no proceeding, material contracts, insurance, labour issues, and anti-corruption and environmental issues) and specific coverage of R&W is one of the heavily negotiated issues in general. The right to access the target company's books and records and other information before closing is usually requested by the purchaser, which might sometimes raise a 'gun-jumping' issue (especially in a situation of acquisition between competitors).

Relating to indemnification from a breach of R&W, various limitations, such as overall cap, deductible, basket, *de minimis* and time limits, are commonly utilised. The seller's non-competition for a certain period after closing is generally requested by the purchaser. Generally, such a non-compete covenant should be reasonable as to the scope, period and area in consideration of the total circumstances.

Korean law is generally used as the governing law for M&A transactions in the country. A foreign governing law (eg, New York State law) may be selected by the parties; however, irrespective of such a foreign governing law, the mandatory requirements of Korean law, such as the method of transfer of title and regulatory approvals, may apply.

The typical key terms of a business (or asset) transfer are similar to those in a share purchase agreement, except for some differences (eg, transferred assets, liabilities, contracts, permits and licensed employees, and specific transfer methods).

4.5 Anti-competition report and clearance

If an M&A transaction meets certain thresholds, the acquirer must file a business combination report to obtain clearance from the KFTC. In a share purchase transaction involving 20 per cent (15 per cent in the case of a listed company) of outstanding voting shares of a company, the requirement for a business combination report will be triggered if one party to a transaction has total assets/annual turnover equal to or greater than KRW 300bn (including its worldwide affiliates), while the other party has total assets or annual turnover equal to or greater than KRW 30bn (including its worldwide affiliates). The filing of the business combination report is generally required within 30 days from the closing date ('post-closing report'). Nevertheless, if one party to the transaction has total assets or annual turnover equal to or greater than KRW 2tn (including its worldwide affiliates), a per-closing report will be required, in which case, the parties will not be permitted to close the transaction until clearance relating to the report is obtained from the KFTC. In a business or asset transfer, the business combination report requirements and procedure are similar to those in the case of a share transfer transaction, other than the requirements on the purchased business/assets (ie, the purchaser acquires all or a substantial part of the business or assets of the seller; a substantial part is where it: (1) can be operated as an independent business unit, or can cause a significant decrease in the seller's revenue following the transfer; and (2) has a transfer price of at least ten per cent of the seller's total assets, or at least KRW 5bn).

4.6 Employee-related issues

As a matter of law, there is no obligation to obtain consent from employees or labour unions on either a share sale, or an asset or business transfer; *provided, however,* these obligations have not been set out in employment contracts, employment rules or collective bargaining agreements. In the case of a business transfer, employees who work for the transferred business will transfer from the seller to the purchaser unless the employees object to the transfer. Practically, it is necessary to inform the employees of the proposed transfer to ensure they have sufficient opportunity to consider opting out. Even though there is no legal obligation in M&A transactions, employees/labour unions have a tendency to request an M&A bonus (especially in the case where the seller earns huge capital gains from the transfer) in practice, and there are some cases where M&A bonuses have been paid to facilitate the employees' cooperation in due diligence and smooth closing procedures.

4.7 Taxes related to M&A transactions

On a share sale, securities transaction tax is payable by the seller at 0.5 per cent (0.45 per cent from 1 April 2020) of the transfer price. If the seller is a foreign entity with no permanent establishment in South Korea, the purchaser is required to withhold and pay the securities transaction tax on behalf of the seller. Also, if the purchaser acquires more than 50 per cent of the equity of a company holding real estate, a deemed acquisition tax is payable by the purchaser. Tax is calculated as the acquisition proportion of 2.2 per cent of the book value of certain assets (eg, the real estate).

On a business and asset sale, a number of taxes are payable: (1) acquisition tax is payable by the purchaser on the acquisition of certain assets (eg, 4.6 per cent of the purchase price for real estate, but 9.4 per cent of the purchase price for those located in Seoul Metropolitan areas; 3.4 per cent of the purchase price for mechanical equipment; and two percent to seven per cent of the purchase price for vehicles). In addition, the purchaser may also be required to purchase a certain amount of housing bonds, depending on the value of the real estate. If an asset/business sale is a comprehensive business transfer, no VAT is imposed. Otherwise, the seller must collect and pay VAT at ten per cent of the purchase price allocated to the assets subject to VAT, which includes inventory, machinery and equipment, buildings and goodwill. However, land and accounts receivable are not subject to VAT. The buyer is generally able to credit VAT paid against its VAT payable (or obtain a refund if there is a shortfall) when it files a VAT return.

If a seller earns capital gains from the M&A transaction, the seller will be subject to paying taxes (when the seller is a corporate entity, as corporate income tax). However, if the seller is a foreign entity with no permanent establishment in Korea, it is subject to CGT at the lower of 11 per cent of the transfer price or 22 per cent of the capital gains, in each case including surtax. The purchaser is required to withhold and pay such CGT on the seller's behalf, unless the seller is exempt under an applicable tax treaty.

Chapter 5: Foreign investment

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5.1 Foreign investment control/restriction

5.1.1 Forms of foreign investment

ACQUISITION OF INTEREST IN A DOMESTIC COMPANY

The 'acquisition of interest in a domestic company' refers to a foreigner's purchase of interest (eg, stocks or shares) of a Korean company (including a company in the process of being established) or a company run by a Korean national through any one of the following means for the purpose of establishing continuous economic relations with the company through participation in management activities:

- acquisition of newly issued stocks or shares of a Korean company or a company managed by a Korean national; or
- acquisition of existing stocks or shares of a Korean company or a company managed by a Korean national.

To be recognised as a foreign investment, the investment amount should be at least KRW 100m per foreigner and the foreigner should own at least ten per cent of either the total number of voting shares issued by a Korean company (including a company in the process of being established) or an enterprise (eg, a sole proprietorship or corporation) run by a Korean national, or its total equity investment. Also, when a foreign investor of a registered foreign-invested company (ie, a company in which a foreign investor has invested, or a non-profit organisation (NPO) to which a foreign investor has contributed) makes an additional investment, no limit shall be imposed on the investment amount or investment ratio. If there are two or more foreign investors involved, each investor should satisfy the above conditions to be eligible as a foreign investor.

While no exceptions are recognised with regard to the investment amount, some exceptions may apply to the foreign investment ratio. Even if the foreign investment ratio is less than ten per cent with the amount of foreign investment being KRW 100m or more, the investment may be exceptionally recognised as foreign investment in the following case: where a foreign investor dispatches or appoints an executive to the domestic company concerned ('executive' refers to directors, representative directors, unlimited liability partners, statutory auditors or persons corresponding thereto holding the right to participate in important management decisions).

LONG-TERM LOANS

Loans with a maturity of not less than five years (based on the loan maturity prescribed in the first loan contract) made to a foreign-invested company by the following entities are recognised as foreign investment:

- an overseas parent company of the foreign-invested company;
- a certain affiliate company of the overseas parent company;
- a foreign individual investor; or
- a certain affiliate company of a foreign individual investor.

Contributions to an NPO

A contribution to an NPO is recognised as foreign investment when the foreign contribution amount is at least KRW 50m and accounts for at least ten per cent of the total contribution amount; the NPO has independent research facilities in the field of science and technology; and the NPO meets any one of the following conditions:

- the number of research staff members who are full-time employees is five or more persons, consisting of persons with a master's degree or higher in the field of science and technology, or persons with a bachelor's degree in the field of science and technology with a research career of not less than three years; or
- the NPO's business should be classified as 'research and experimental development on natural sciences and engineering' under the Korean Standard Industrial Classification.

Other contributions to an NPO by a foreigner are recognised as foreign investment if they: (1) are not less than KRW 50m; (2) account for ten per cent or more of the total contribution amount; (3) are recognised as foreign investment by the Foreign Investment Committee; and (4) meet one of the following conditions:

- an NPO established for the purpose of the promotion of science, art, medical services or education, and which continues to conduct its business with the objective to develop professionals in the relevant fields and to expand international exchanges; or
- an NPO that is a regional office of an international organisation that engages in cooperative international business between civilians or governments.

5.1.2 Restrictions and prohibitions on foreign investment

Out of a total of 1,196 categories of business listed under the Korean Standard Industrial Classification, foreign investment is not permitted in 61 categories, including public administration, diplomacy and national defence (the 'unpermitted categories of business'). Among the 1,135 categories of business in which foreign investment is permitted, restrictions on the investment ratio apply to 29 categories (the 'restricted categories of business').

Meanwhile, prior authorisation from the Minister of Trade Industry and Energy is required for foreign investment in the form of purchasing the shares of defence industry companies.

Unpermitted categories of business

The categories of business in which foreign investment is not permitted generally have public features. Some of the unpermitted categories of business are as follows:

- postal services, central banking, individual mutual aid organisations, pension funding, administration of financial markets and activities auxiliary to financial service activities;
- legislative, judiciary, administrative bodies, foreign embassies, and extraterritorial organisations and bodies;
- education (eg, pre-primary, primary, secondary, higher education, universities, graduate schools and schools for the disabled); and
- artist, religious, business, professional, environmental advocacy, political and labour organisations.

Restricted categories of business

Some examples of restricted categories of business are as follows:

- nuclear power generation, radio broadcasting and over-the-air broadcasting: prohibited;
- hydroelectric/thermal/solar and sunlight/other power generation: the sum of power plant facilities purchased by foreigners from the Korea Electric Power Corporation or its subsidiaries must not exceed 30 per cent of the total domestic power plant facilities;
- farming of beef cattle, wholesale of meat, publication of newspapers, publication of magazines and periodicals and passenger/freight air transport: permitted where the foreign investment ratio is less than 50 per cent (less than 30 per cent for daily newspapers); and
- news agency business: permitted where the foreign investment ratio is less than 25 per cent.

5.1.3 Acquisition of real estate

With the exception of certain real estate that requires government permission for purchase (eg, land in a military base or a military facility protection area), a foreign individual, foreign corporation, foreign organisation, or a corporation or organisation with foreign shareholdings of 50 per cent or more ('foreign party') may acquire land in Korea by following certain procedures and reporting the acquisition to the appropriate authorities.

Reporting obligations under the Act on Report on Real Estate Transactions, Etc

Where a foreign party has concluded a contract for the acquisition of real estate in South Korea, the contract shall be reported to the relevant *city (Si)* mayor, *county (Gun)* governor or head of the relevant *Gu* office within 60 days of the contract's execution date. However, in the case of real estate sales contracts prepared by a practising licensed real estate agent, such a real estate agent should file the report.

Reporting obligations under the Foreign Exchange Transactions Act

Under the Foreign Exchange Transactions Act, non-resident foreigners must first notify the acquisition of real estate to the head of a foreign exchange bank when bringing in funds for real estate acquisition. Afterwards, the real estate acquisition should be notified to the competent *Si/Gun/Gu* office (the same as reporting obligations under the Act on Report on Real Estate Transactions, etc above) and the transfer of ownership should be registered in accordance with the Act on Report on Real Estate Transactions.

5.2 Foreign exchange control

5.2.1 Capital injection/monetary loan

If a foreign parent company wants to increase the capitalisation of its Korean subsidiary through a capital increase: (1) a change of corporate registration must be filed with the court; and (2) a foreign investment report; and (3) change of foreign-invested company registration (or change of such a report and/or registration, if a foreign investment report has already been filed) must be filed with KOTRA or a foreign exchange bank.

If a foreign parent company wants to provide a loan to its Korean subsidiary with a maturity period of five years or longer, a foreign investment report must be filed with KOTRA or a foreign exchange bank (as stated above). Any other type of monetary loans to a Korean subsidiary or a Korean branch office requires the filing of a report of the borrowing of foreign currency funds with a designated foreign exchange bank, but if the amount of borrowing exceeds $30m (including the aggregate amount of borrowing during the period of one year prior to the date of the report), such a report must be filed with the Minister of Strategy and Finance via a designated foreign exchange bank.

5.2.2 Repatriation of funds/payment of dividends

With regard to: (1) proceeds from shares acquired by a foreign investor; (2) proceeds from the sale of shares; and (3) the principal, interest and service charges paid in accordance with the loan contract as prescribed by the Foreign Investment Promotion Act, their remittance to foreign countries shall be guaranteed in accordance with the details of the notified or authorised foreign investment at the time when the said remittance is made.

With regard to loans from a foreign parent company to a Korean subsidiary, the Korean subsidiary may pay the principal and interest back to the foreign parent company upon showing that the reporting requirements pursuant to the Foreign Investment Promotion Act or the Foreign Exchange Transactions Act had been fulfilled at the time of the initial loan transaction.

5.2.3 Settlement of funds in local/foreign currency

The payment currency for ordinary transactions between residents and non-residents (ie, agreements for trade in goods or services) may be decided by agreement between the parties. However, the payment currency for capital transactions (eg, cash loans or stock purchases) must be in accordance with the submission filed with and approved by either the Ministry of Strategy and Finance, the Bank of Korea or the relevant foreign exchange bank.

5.3 Applicable tax incentive or grant

5.3.1 Types of business that can benefit from tax incentives

Type A businesses are:

1. businesses accompanying new growth driver industry technology;
2. companies in a foreign investment zone, which is separately designated upon the individual requests of foreign investors; and
3. companies in areas that have undergone deliberation and received approval by the relevant government committees, such as FTZs, the Saemangeum project area, the Jeju advanced science and technology complexes, and the Jeju investment promotion zone.

Type B businesses are:

1. businesses in free economic zones and those in the Saemangeum project area, which satisfy certain criteria (eg, type of business and investment amount) stipulated under the Restriction of Special Taxation Act and its Enforcement Decree;
2. free economic zone development project entities and development project entities in the Saemangeum project area, which exceed a threshold investment amount or ratio stipulated under the Restriction of Special Taxation Act and its Enforcement Decree;
3. development project entities in the Jeju investment promotion zone, which exceed a threshold investment amount or ratio under the Restriction of Special Taxation Act and its Enforcement Decree;
4. companies in a foreign investment zone (complex type), which satisfy certain criteria under the Restriction of Special Taxation Act and its Enforcement Decree (eg, type of business and investment amount);
5. companies in an enterprise city development zone, which satisfy certain criteria under the Restriction of Special Taxation Act and its Enforcement Decree (eg, type of business and investment amount);
6. development project entities in enterprise city development projects, which exceed a threshold investment amount or ratio stipulated under the Restriction of Special Taxation Act and its Enforcement Decree; and
7. manufacturing businesses (investment amount: US$1m or more) and logistics businesses (investment amount: US$5m or more).

5.3.2 Tax reductions and exemptions

Corporate income tax

Corporate income tax reduction/exemption for foreign investment was repealed in 2019 (however, customs duty and local tax reduction/exemption are still in effect), and applies only to foreign-invested companies that applied for corporate income tax reduction/exemption on or before 31 December 2018.

Local tax

With regard to property acquired or held by a foreign-invested company, in order to engage in a business entitled to tax reduction or exemption, local tax is reduced or exempted, or deducted from the tax base as follows.

For Type A:

- acquisition tax and property tax: the amount calculated by multiplying the computed tax amount on the properties concerned by the foreign investment ratio (tax amount subject to reduction or exemption) shall be exempted for five years from the date of commencing business, and reduced by 50 per cent for two years thereafter; and
- property tax on land: the amount calculated by multiplying the tax base of the properties concerned by the foreign investment ratio (tax amount subject to reduction or exemption) shall be deducted from the tax base for five years from the date of commencing business, and 50 per cent of the amount shall be deducted from the tax base for two years thereafter.

For Type B:

- acquisition tax and property tax: the amount calculated by multiplying the computed tax amount on the properties concerned by the foreign investment ratio (tax amount subject to reduction or exemption) shall be exempted for three years from the date of commencing business, and reduced by 50 per cent for two years thereafter; and
- property tax on land: the amount calculated by multiplying the tax base of the properties concerned by the foreign investment ratio (tax amount subject to reduction or exemption) shall be deducted from the tax base for three years from the date of commencing business, and 50 per cent of the amount shall be deducted from the tax base for two years thereafter.

Customs duties, etc

Under the Restriction of Special Taxation Act, customs duties, individual consumption tax and VAT are exempted for the following capital goods that are used directly in a business that is subject to reduction or exemption of corporate income tax or income tax, and are notified as foreign investment through the acquisition of newly issued stocks or shares:

- capital goods brought in by a foreign-invested company in exchange for a foreign or domestic means of payment it obtained as equity investment from a foreign investor; or
- capital goods that are brought in by a foreign investor as an object of investment.

The above exemptions shall only be applied to capital goods for which an import declaration under the Customs Act has been completed within five years of the date on which the foreign investment notification was filed.

For businesses falling under Type A, customs duties, special excise tax and VAT shall be exempted. For businesses falling under Type B (excluding categories (5) and (6) under Type B in section 5.3.1 above), only customs duties will be exempted.

5.3.3 Cash grant

For foreign investment that satisfies certain conditions, the central and local governments of South Korea may provide cash grants for certain purposes, such as the establishment of a factory. The Korean government takes into account various factors, including the following: whether the relevant foreign investment involves new growth driver industry technology; the effect of technology transfer; the scale of job creation; whether the foreign investment overlaps with domestic investment; and the ownership of the location in which the foreign investment is to be made.

Qualifications

Foreign investment with a ratio of 30 per cent or higher falling under one of the following is eligible for a cash grant:

- where a new factory is installed or an existing factory is expanded (or a business establishment in the case of a non-manufacturing business) for the management of a business accompanying new growth driver industry technology;
- where a new factory is built or an existing factory is expanded for the production of parts and materials stipulated under the Act on Special Measures for the Promotion of Specialised Enterprises, etc for materials and components that satisfy one of the following conditions:
  - parts and materials that contribute significantly to the added value of the final product;
  - parts and materials that require advanced technology or core high technology and have a high technology spillover effect or create significant added value; or
  - parts and materials that act as the basis of an industry or have high inter-industry linkage effects;
- where a foreign-invested company that creates new jobs in excess of a certain number opens a new factory (a business establishment in the case of non-manufacturing businesses) or expands an existing factory;
- where a research facility is newly opened or expanded for R&D activities for a business accompanying new growth driver industry technology, or where an NPO receiving a contribution

that is considered FDI newly establishes or expands a research facility. The research facility should have five or more full-time researchers with a master's degree in a relevant field or a bachelor's degree in a relevant field supplemented with at least three years of research experience; or

- where an investment that makes significant contributions to the domestic economy relative to the amount of investment meets one of the following conditions and is recognised by the Foreign Investment Committee as an investment that needs support in regard to the qualifications required for foreign investors:
  - where a foreign company establishes a regional headquarters having control over two or more countries in Korea (the regional headquarters should hire ten or more employees, invest KRW 100m or more, and obtain the recognition of the Foreign Investment Committee); also, the parent company's stake should be at least 50 per cent and the parent company's average annual sales for the past five years should be KRW 3tn or more (alternatively, the Foreign Investment Committee must determine that the parent company is a leading company in the global market upon considering factors such as its asset size and global market share); or
  - where a foreign company is engaged in a regional strategic industry as stipulated in Article 2(iv) of the Special Act on Balanced National Development or a regional leading industry stipulated in Article 2(v) of the same act, and where it is recognised that the relevant industry will contribute to the development of the local economy.

Maximum amount of a cash grant

The maximum amount of a cash grant shall be decided by a committee comprised of five or more persons from the central government, local government, KOTRA and the private sector. The cash grant amount shall be decided within the maximum amount through negotiations with the foreign investor.

Usage of cash grant

A foreign-invested company should use a cash grant only for the following purposes:

- to purchase or lease land or a building for the installation of a factory or research facility;
- to construct a factory or research facility;
- to purchase capital goods and research equipment to be used in a factory or research facility for business or research purposes;
- to install infrastructure facilities, including power/communication facilities, required for building a factory or research facility; or
- employment subsidies or education and training subsidies.

Chapter 6: Restructuring transactions

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This chapter seeks to provide a general overview of the following transaction structures, which are frequently utilised in restructurings in South Korea: merger, business transfer, spin-off, liquidation and sale of shares.

6.1 Merger

6.1.1 Overview

Similar to many other jurisdictions, a merger in Korea is effected such that one of the merged companies survives, and all assets and liabilities of the counterparty company are comprehensively transferred to the surviving company by operation of law.

In general, a merger is effected through: (1) a resolution of the board of directors and the GMS; (2) the execution of a merger agreement; (3) the exercise of appraisal rights by dissenting shareholders; (4) a one-month creditor protection procedure; (5) the GMS at which the merger is reported to the shareholders; and (6) the registration of a merger. The timeline for the entire process varies, but in general takes approximately two months for unlisted, private companies.

6.1.2 Transfer of legal relationships

In a merger all rights and obligations of the merged company are automatically transferred, without consent or a separate transfer process, to the surviving company by operation of law. However, if any contract of the surviving or the merged company provides for a consent right or a default (or termination) in respect of the merger, the consent of the contract counterparty would be required for the merger to proceed without breach of the relevant contract.

In principle, permits and licences are also automatically transferred to the surviving company. However, the relevant laws and regulations, or the permit or licence registration requirements, may require the transfer of permits or licences from the merged company to the surviving company to be reported and registered with the relevant authority.

6.1.3 Creditor protection procedure

Following the resolution and approval of the merger by the board of directors and shareholders of the surviving and merged companies, individual and public notices are required to be provided to creditors of the merger parties, and the creditors have the right to file an objection and receive repayment or collateral in respect of their claims against the merger companies for at least one month.

In practice, the merger companies typically discuss and commercially resolve the claims of potential objecting creditors prior to the statutory one-month creditor protection period, to avoid the burden and pressure brought by objections from large creditors.

6.2 Business transfer

6.2.1 Overview

Similar to many other jurisdictions, a business transfer involves the assignment and assumption of physical assets, liabilities and human resources, as well as the legal relationships concerning all or part of the business, of the transferor to the transferee.

A business transfer is effected through: (1) a resolution of the business transfer by the board of directors and/or the general meeting of the shareholders of the transferor and/or the transferee, depending on the size of assets and liabilities of the transferor or the transferee as compared against the assets and liabilities of the business transferred in the business transfer; (2) the execution of a business transfer agreement; (3) the exercise of appraisal rights by dissenting shareholders; and (4) the closing of the business transfer. The timeline for the entire process varies, but in general takes approximately two months for unlisted, private companies.

6.2.2 Transfer of legal relationships

A business transfer requires the transferor to transfer its individual assets, liabilities, contracts and personnel to the transferee. Unlike a merger, a business transfer does not benefit from the automatic transfer of assets, liabilities and contracts by operation of law. This means that counterparty consent is required for the transfer of contracts and obligations of the transferor, and the consent of transferor employees is required for their employment transfer to the transferee. Accordingly, a business transfer requires more time and resources to process and effect the transfer of assets, liabilities and contracts compared with transfers in the context of a merger or spin-off, where the legal titles and relationships are comprehensively transferred.

6.3 Spin-off

6.3.1 Overview

A spin-off may be effected in the form of: (1) a vertical spin-off, where the spun-off business becomes a wholly owned subsidiary of the existing company; or (2) a horizontal spin-off, where the spun-off business becomes a sister company of the existing company.

The spin-off is generally effected through: (1) a resolution of the board of directors and the GMS; (2) the public notice of a spin-off plan; (3) the one-month creditor protection procedure, which may be omitted if the existing company and the spun-off company bear joint and several liabilities for all liabilities of the existing company as of the time of the spin-off; (4) the GMS at which the spin-off is reported to the shareholders; and (5) the registration of the spin-off. The timeline for the entire process varies, but in general takes approximately two months for unlisted, private companies.

6.3.2 Transfer of legal relationships

Similar to a merger, and unlike a business transfer, the transfer of individual assets, liabilities, contracts and personnel is effected by operation of law, subject to consent or other requirements under the individual contracts of the existing company.

Further, similar to a merger, the company should undergo a creditor protection procedure, unless the existing company and the spun-off company opt to bear joint and several liabilities for all liabilities of the existing company as of the time of the spin-off.

6.4 Liquidation

6.4.1 Overview

Liquidation refers to a process to dispose of and terminate a company's existing legal relationships to extinguish its legal personality. Liquidation is conditioned upon the company's ability to repay the existing debts in full. If the company is unable to repay its existing debts in full, the company will need to undergo an insolvency proceeding, as opposed to liquidation.

The liquidation of a company requires: (1) the resolution of dissolution by the board of directors and the GMS of the company, appointment of a liquidator, and registration and report thereof; (2) the public notice and individual notices (at least two months prior to liquidation) to creditors of the company to allow the creditors to file claims; (3) the survey and report of properties subject to liquidation; (4) the closure of the company's existing businesses, recovery of claims, repayment of debts and distribution of residual assets; (5) the submission and approval of report on final accounts; and (6) the registration of liquidation. This process generally takes approximately three months.

6.4.2 Key liquidation issues

Termination of agreements

The termination of contracts of the liquidated company may trigger a prepayment or termination fee or compensation of damages. Accordingly, the liquidated company should consider in advance whether, separate and apart from monetary compensation, any affiliated company may offer to step into the shoes of the liquidated company to continue with the terms of the relevant contracts.

Labour

If the liquidation of a company requires the lay-off of existing employees, the company should comprehensively review and plan for the dismissal and/or early retirement programme of its employees (including any deemed employees, such as dispatched workers and in-house subcontractors) in compliance with applicable Korean labour laws and regulations, the rules of employment (ROE) of the company, any effective collective bargaining agreement and any applicable employment agreement.

The liquidation of a company may not be completed and effected until all pending litigations are resolved. Accordingly, any company purporting to commence liquidation should review the status of its potential and pending litigations.

6.5 Key restructuring considerations

6.5.1 Transaction structure

The optimal restructuring transaction structure may vary depending on the purpose and background of the restructuring, targeted timeline, status of permits and licences, contractual relationships and (in the case of mergers and business transfers) dissenting shareholders or (in the case of mergers and spin-offs) creditors. Several factors and considerations are as follows:

- A merger filing (eg, the submission of a business combination report in Korea) may be required for a merger or business transfer (depending on the total assets and sales revenue of the concerned companies).
- The transfer of a company's business or business permits and licences may require an approval of the supervisory governmental authority.
- Based on the transaction structure, the transfer of employees would require one of the following: (1) consent from the transferred employees; (2) consultation with the transferred employees; or (3) automatic transfer of the relevant employees. For example: (i) in the case of a merger, the employment of the officers and employees of the merged company is comprehensively transferred without separate consent; (ii) in the case of a spin-off, the consent of the transferred employees is not required, as long as the company engages in and completes 'sufficient consultation' with the transferred employees; and (iii) in the case of a business transfer, the employees subject to the transfer have the right to refuse and reject the employment transfer.
- Under applicable collective bargaining agreement or agreement(s) with the labour union, the transferred employees may have the right to consent, consult or claim compensation benefits.

6.5.2 Transaction with an insolvent company

The board of directors of a company seeking to transact with an insolvent company should conduct an enhanced review of the appropriateness and fairness of the proposed transaction, taking into account their fiduciary duties towards the company.

For example, the board of directors of a company seeking to merge with an insolvent company should carefully examine the business necessity and the fairness of the merger ratio for the proposed merger, given that the appropriateness of the merger and valuation of the merged companies are more likely to be challenged or questioned later in the process. Further, the business transfer (ie, the sale of a business) of an insolvent company is more likely to be subject to challenge, including legal action seeking to cancel or unwind the business transfer, for fraudulent conveyance.

Chapter 7: Employment and labour law

HC Elizabeth Yu, Bae, Kim & Lee, Seoul

This chapter sets forth a brief overview of the key employment and labour law concepts vital to doing business in South Korea, from start to finish, with all the intricacies in-between.

7.1 Starting a business

If you plan to start a business in South Korea, you will need people to help you to execute the business. Accordingly, you should become familiar with the Korean Labor Standards Act (LSA). The LSA is the foundational document governing employment relationships in South Korea and prescribes various minimum conditions of work, including allowances and benefits, which supersede any provisions of employment contracts, work rules or collective bargaining agreements less favourable to employees.

However, many of the most onerous provisions to employers only apply when the workplace has five or more employees. Before that threshold, the employer has significant flexibility to structure the employment relationship as it sees fit, including with regard to the setting of working hours and compensation for any overtime, provision of paid holidays and establishing standards for the termination of employment.

It is worth noting that a written employment agreement is not mandatory for full-time, regular employees; however, for certain specific provisions relating to wages/compensation, work hours, holidays, annual leave and so on, written terms must be provided to the employee at the time of entering into the employment arrangement. Therefore, it may be a helpful exercise to spend some time up front to draft a well-considered employment agreement, which is likely to make potential subsequent issues less confusing.

7.2 Winding up a business

Choosing to cease doing business in South Korea is a management prerogative. Therefore, liquidating a local entity and closing up shop also entitles the employer to terminate employment relationships with relative ease. Assuming there are no other contractual obligations, company policies or collective agreements to the contrary, an employer can terminate an employment relationship in connection with winding up a business by providing 30 days' advance notice or payment in lieu thereof.

Employers who did their homework up front by investing in a well-considered employment agreement would also know that termination of employment in South Korea (regardless of the reason for the termination) entitles employees to their retirement benefit. What kind of retirement benefit differs depending on what system was implemented earlier in the process (ie, company pension or statutory severance), but the benefit to the employee or cost to the employer is approximately one months' pay per year of service of the particular employee.

7.3 All the intricacies in-between

While it is not possible here to address all the issues that may arise in-between, the below is a helpful tool for understanding the top five action items for your business to maintain a healthy and compliant workplace.

7.3.1 Establish a retirement benefit

It is a legal requirement for all new companies to set up a retirement pension within one year of establishment. If this is not established, the default retirement benefit will be the traditional statutory severance (see section 7.2 above).

7.3.2 Prepare the ROE

Once the workplace reaches ten or more employees, the employer is obligated to prepare and file the ROE with the Ministry of Employment and Labor. The ROE is intended to be a set of work rules governing general working terms, such as the calculation and method of payment of wages, working hours, holidays, annual paid leave and severance pay. Under the LSA, an employment contract must not diverge from the work rules to the employee's disadvantage, and will be found invalid to the extent that it does.

7.3.3 Strictly observe disciplinary procedures and the 'just cause' standard for termination

Once the company reaches the five-employee threshold, it will no longer have the flexibility to terminate employees without 'just cause'. In practice, this is generally a very high standard to meet. In cases of dismissal for disciplinary reasons, labour authorities and courts consider the totality of the circumstances, including the severity and frequency of the alleged misconduct or poor performance, and whether or not the employee was given an opportunity to improve. Even where the substance of the wrongdoing is sufficiently severe, procedural failures (eg, did not provide due process rights or violated notice requirements) may prevent the finding of 'just cause'. The burden of proof rests with the employer to show just cause, if contested.

A 'dismissal for managerial reasons' under the LSA is also contemplated (and 'just cause' is deemed to exist) if the situation satisfies special conditions, including the standard of 'urgent business necessity'. However, in practice, just like the 'just cause' standard, the 'urgent business necessity' standard is very difficult to achieve.

Accordingly, it would not be unusual for companies to negotiate mutual separation agreements and/or implement voluntary resignation programmes, often associated with additional remuneration (eg, retirement bonus), to resolve the complications posed by the 'just cause' and 'urgent business necessity' standards.

7.3.4 To maximise employment flexibility within the 'just cause' framework, evaluate alternative employment options and understand their limitations

Global organisations will be well accustomed to the use of a contingent workforce, also sometimes referred to as outsourced workers. While such equivalents do exist in South Korea, specific legal limitations may apply depending on the type of contingent workforce/outsourced worker being contemplated. Accordingly, it is very important to understand and apply the correct concept to your particular business. For example, are you referring to part-time employees; fixed-term contract employees; dispatched workers from manpower companies; or independent contractors either from a subcontractor or as individuals? Failure to satisfy the relevant requirements may render the contingent workforce/outsourced worker a regular employee entitled to rights and benefits under the LSA, as well as subject the involved companies to criminal penalties under applicable legislation.

7.3.5 Establish a labour management council

Once the company reaches the 30 employee threshold, it will be required to establish and conduct regular meetings of the labour management council. Unlike a union, which is established by the employees, a labour management council is intended to be a cooperative body shared between the employees and management. By-laws will need to be filed with the Ministry of Employment and Labour.

Chapter 8: Tax law

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8.1 Taxes applicable to individuals

8.1.1 Income tax

TAXPAYER

An individual is subject to income tax in South Korea on income derived from sources in South Korea, whether a resident or non-resident. Resident individuals are taxed on worldwide income. A resident is a person who maintains a domicile or has resided in South Korea for 183 days or longer during one taxable year.

TAXABLE INCOME

Income tax is levied on items of taxable income specifically listed in the tax code. Income is categorised as global income (interest, dividends, business income, wages and salaries, pension income and other income), retirement income and capital gains. Global income is aggregated and taxed at regular IIT rates. Dividend and interest income amounting to less than KRW 20m are taxed separately. Retirement income and capital gains are also taxed separately.

Non-resident taxpayers are required to file a Korean IIT return for income associated with a Korean place of business or Korean real estate. All other forms of Korea-sourced income attributable to non-resident individuals is subject to WHT at the source.

TAX RATES AND CREDITS

Global income is taxed at progressive tax rates, as follows:

- six per cent of the tax base up to KRW 12m;
- 15 per cent of the excess over KRW 12m up to KRW 46m;
- 24 per cent of the excess over KRW 46m up to KRW 88m;
- 35 per cent of the excess over KRW 88m up to KRW 150m;
- 38 per cent of the excess over KRW 150m up to KRW 300m;
- 40 per cent of the excess over KRW 300m up to KRW 500m; and
- 42 per cent of the excess over KRW 500m.

CGT rates vary depending on the type of asset. Residents are generally able to claim tax credit for wage and salary income, child tax credit and credit for contributions to eligible pension accounts. Individuals with business income may claim tax credit for casualty losses. A foreign tax credit is generally available for residents paying foreign taxes on global income or retirement income.

WITHHOLDING TAX

Interest, dividends, wage and salary income, and 'other income' is subject to WHT, whether derived by a resident or non-resident. The withholding agent collects the tax at the time of payment and submits it to the district tax office by the tenth day of the following month.

8.2 Taxes applicable to businesses

8.2.1 Corporate income tax

TAXPAYER

Domestic and foreign corporations are both subject to corporate income tax. A domestic corporation is defined as a corporation with its head or main office or place of effective management in South Korea. A foreign corporation is a corporation established outside South Korea with its head or main office in a foreign country. Domestic corporations are liable to corporate income tax on worldwide income. Foreign corporations are liable to corporate income tax on domestic source income. State and local governments are not subject to corporate income tax.

Taxable income

Income subject to corporate income tax includes gross business income derived during the tax year, income from the sale of real estate and liquidation income, less all associated deductible expenses.

A foreign corporation is liable to tax on domestic source income recognised during the tax year. Domestic NPOs are liable to tax on revenue derived from profit-making activities during the tax year. Foreign corporations and NPOs are not subject to tax on liquidation income.

Tax rates and credits

Corporate income is taxed at progressive tax rates, as follows:

- ten per cent of the tax base up to KRW 200m;
- 20 per cent of the excess over KRW 200m up to KRW 20bn;
- 22 per cent of the excess over KRW 20bn up to KRW 300bn; and
- 25 per cent of the excess over KRW 300bn.

Tax credits include foreign tax credit, tax credit for disaster losses and tax credit for R&D.

Withholding tax

Taxpayers paying interest, as prescribed by the Financial Investment Services and Capital Markets Act, to domestic corporations are required to withhold corporation tax on such interest at 14 per cent (for non-commercial loans, the withholding rate is 25 per cent). The withheld taxes are paid to the government by the tenth day of the following month.

8.3 Other taxes

8.3.1 VAT

Ten per cent VAT is levied at each stage of the supply chain for both goods and services, whether or not the transacting parties are engaged in non-profit activities. VAT is levied on the supply of goods or services, or who imports the goods. Zero-rate VAT is available for eligible export goods and services.

8.3.2 Securities transaction tax

Securities transaction tax is levied on the value of stock transferred (based on the fair market value at the time of alienation). The securities transaction tax rate is currently 0.5 per cent (0.45 per cent from 1 April 2020).

8.3.3 *Local tax*

Ten per cent VAT is levied at each stage of the supply chain for both goods and services, whether or not the transacting parties are engaged in non-profit activities. VAT is levied on the supply of goods or services, or who imports the goods. Zero-rate VAT is available for eligible export goods and services.

ACQUISITION TAX

Taxpayers acquiring real estate, motor vehicles, heavy equipment, trees, boats, aircraft, golf membership, condominium membership, health club membership, mining rights and fishery rights through purchase or inheritance are subject to local tax. The tax base is generally the acquisition cost, and the tax rates vary depending on the type of asset and business purpose.

REGISTRATION AND LICENCE TAX

A taxpayer registering real estate, vessels, aircraft, automobiles and heavy equipment, and obtaining certain licence is subject to licence tax. The rate of the tax varies depending on the type of asset or licence.

PROPERTY TAX

A taxpayer who owns real estate, vessels or aircraft is subject to property tax, which is due on 1 June each year. The rate of property tax varies depending on the type of asset.

LOCAL INCOME TAX

Taxpayers who are subject to corporate income tax or IIT are also subject to local income tax. The tax base for local income tax is generally the same as for corporate income tax or IIT, and the rate is ten per cent of the corporate income tax or IIT amount.

Chapter 9: Intellectual property

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9.1 Overview of the intellectual property rights system

Intellectual property refers to the knowledge, information or technology; expression of an idea or emotion; mark of a business or product; type or genetic source of an organism; or other intangible object created or discovered through human creative activity or experience whose value as property could be realised. Intellectual property rights refer to the rights to intellectual property that are recognised or protected under laws and regulations or treaties.

In Korea, intellectual property rights are broadly classified into industrial property rights, which are managed by the Korean Intellectual Property Office, and copyright, which is managed by the Ministry of Culture, Sports and Tourism. Meanwhile, well-known marks or trade secrets, which have become subject to protection as a result of the prohibition of unfair competition and trade secret infringement under the Unfair Competition Prevention and Trade Secret Protection Act (UCPA), are now being perceived as new types of intellectual property.

When conducting business in South Korea, it is crucial to understand the types of intellectual property and protected subject matter, protection requirements and protection periods to determine how to manage and use one's intellectual property.

Table 1

	Protected subject matter	Protection requirements	Protection period
Patent rights **(utility model rights)**	Inventions (creation of a technical idea using the rules of nature)	Industrial applicability/novelty/ inventive step	From the registration of the establishment of patent rights to 20 years after the filing date of the patent application
Design right	Designs (shape, pattern or colour of a product, or the combination thereof)	Industrial applicability/novelty/ creativity	From the registration of the establishment of design rights to 20 years after the filing date of the design application
Trademark rights	Trademarks (a mark that is used to distinguish one's products from the products of others)	Intention to use, distinctiveness and lack of reasons for trademark registration refusal	Ten years from the registration of the establishment of trademark rights (renewals are possible)
Other protected subject matter under the UCPA	(1) Marks that are widely known in South Korea (2) Trade secrets	(1) Well-known (2) Not generally known or readily ascertainable, independent economic value and maintain confidentiality	Period during which the protection requirements are satisfied
Copyright	Works (creative work expressing human idea or emotion), computer programs, edited works or databases	Creativity	During the author's lifetime and for 70 years after his/her death

Intellectual property rights aim to protect intellectual property by granting exclusive rights to the right holders. However, the Monopoly Regulation and Fair Trade Act (MRFTA) aims to prevent monopolies and promote competition, thereby conflicting with the purpose of intellectual property rights. In contemplating such a situation, Article 59 of the MRFTA stipulates that 'this Act shall not apply to any act that is deemed the legitimate exercise of any right under the Copyright Act, Patent Act, Utility Model Act, Design Protection Act or Trademark Act'.

9.2 Patents

9.2.1 Patentable subject matter and patentability requirements

As a patentable subject matter, an 'invention' refers to an advanced creation of a technical idea using the rules of nature. In order for an invention to be registered as a patent, it: (1) should be applicable to an industry (industrial applicability); (2) cannot be technology that is already publicly known before its patent application (novelty); and (3) cannot easily be invented from prior art, even if it differs from prior art (inventive step).

9.2.2 Employee inventions

The 'right to obtain a patent' originally belongs to the inventor upon the completion of an invention, and such a principle also applies to an employee who creates an invention in connection with his/her duties at the employer company. However, the employer company has a non-exclusive licence to the patent held by its employee by law and should provide proper compensation to the employee if it succeeds the employee's 'right to obtain a patent' or patent right, or if it obtains an exclusive licence to the patent of the relevant employee invention by contract or employment policy. In such a case, the appropriateness of the compensation is determined by considering, among others, benefits to be obtained by the employer from such an invention and the respective contribution levels made by the employer and the employee to the completion of such an invention.

9.2.3 Patent application and registration

If there are two or more patent applications for the same invention, only the first person to file the application may obtain the patent. However, a person who intends to obtain a patent should submit a patent application form, detailed description of the invention, specification setting forth the claims, required drawings and abstract. The patent application will be examined only when a request for examination is made within three years from the date of application, and if no request for application is made within such a period, the application will be deemed to be withdrawn. Before refusing an application, the examiner notifies the applicant of the ground for refusal in order to provide the applicant with the opportunity to revise the application and submit an opinion, and determines whether or not to grant a patent by following this procedure. A person whose patent application has been refused may request a trial seeking the cancellation of the refusal decision by claiming the illegitimacy of such a decision at the Intellectual Property Trial and Appeal Board (IPTAB).

If a decision to grant a patent is rendered, the applicant should register the establishment of the patent right by paying the registration fee, and such a patent right will then be created. The content of the application of the registered patent will be publicly disclosed via the patent registration gazette. Upon the registration of its patent, the patent holder will have the exclusive right to use the patent invention as a business from the date of patent registration until 20 years from the date of patent application.

9.2.4 Patent infringement and relief

If: (1) a valid patent right exists; (2) the infringing product or method falls under the scope of protection of the patent invention; and (3) the infringer uses the infringing product or method as a business, despite the fact that it lacks legitimate authority to use the patented invention, this constitutes patent infringement. If a patent dispute arises, the relevant parties may seek relief through various methods.

A patent holder may argue that the infringing product falls under the scope of protection applicable to the patent that it owns and thereby request a positive confirmation trial for the scope of the right at the IPTAB. A relatively more proactive method would be to file a suit for injunction against patent infringement, which aims to suspend the act of patent infringement together with a suit for damages.

There are various presumptive provisions in the Patent Act due to the practical difficulty of proving the amount of compensation in a damages suit resulting from patent infringement. In 2019 the Patent Act was amended to introduce a 'punitive damages system' where a person who intentionally infringes another person's patent will be liable to pay up to three times the recognised amount of damages. Thus, it has become slightly easier for patent holders to receive compensation for damages.

Meanwhile, a person accused of patent infringement may argue that its product does not fall under the scope of protection of the patent held by the counterparty and thereby request a defensive confirmation trial for the scope of the right at the IPTAB. A more proactive measure would be to request a patent invalidation trial by arguing that the relevant patent has been registered, despite its failure to satisfy the patent requirements.

9.2.5 International application system

The PCT is a multilateral treaty executed in 1970. The PCT came into effect in 1978 to unify and streamline the international application procedures for patents and utility models. As South Korea has been a contracting state to chapters I and II of the PCT since 1984 and 1990, respectively, a patent applicant who intends to obtain a Korean patent may file an international application with the WIPO or directly with the Korean Intellectual Property Office.

When selecting South Korea (Republic of Korea) as the designated state, the applicant should be cautious not to select North Korea (People's Republic of Korea). There have been instances of applicants only becoming aware of such an error after the deadline for correcting the designated state has elapsed or after entering the South Korean procedure. In such a case, the application cannot be submitted again as a new application in South Korea because it has lost novelty.

9.3 Design

9.3.1 Concept of design and design rights

A 'design' is the shape, pattern or colour of a product (including a part or the font type of a product) or the combination thereof that creates an aesthetic impression. A person who registers a design, that is, a creative work related to the product appearance, may enjoy exclusive rights to such a registered design. The basic framework of design registration is similar to that of patents.

9.3.2 Registration requirements of a design

Similar to patents, the registration requirements of a design are industrial applicability, novelty and inventive step; the only difference is that a design also requires creativity. However, even if a design satisfies all such requirements, its registration would not be permitted for the reason of public interest if it contravenes public order or morality. Also, only those designs without any concern of causing confusion with a product related to another person's business may be registered.

Industrial applicability means the ability to produce the design using industrial methods. An artwork, for example, which cannot repeatedly be produced in a simple manner cannot be subject to a design right, and an abstract design, musical note, ore or scent, etc cannot be registered as a design right either.

Furthermore, a design should have a fixed form. It cannot be continuously changing objects, such as neon advertisements and colours of a flame. In addition, a design should be creative. A design that can be easily created using a shape, pattern or colour, or the combination thereof, that is widely known domestically or internationally, cannot be registered as it lacks creativity.

9.3.3 Unique systems under the Design Protection Act

Related design system

This system pre-emptively prevents the infringement and imitation of a registered design by allowing a person who has already registered or filed an application for a design (principal design) to change such a design by modifying the shape, pattern, colour and so on of the product and to register such a changed design as a related design.

Set item design system

To register a design, an application should be filed per design. However, in case two or more articles compose one set, the design of the entire set may be registered as one design if the design of the entire set constitutes a coordinated whole.

Secret design system

If an applicant applies for a secret design when filing a design application, the secrecy of its design will be maintained without being disclosed through the design gazette for up to three years from the registration of the establishment of the design right.

9.4 Trademarks

9.4.1 Source indicator protection system

A 'trademark' is a mark used to distinguish one's own product from the products of others. Deceiving consumers through the unauthorised use of another person's source indicators, including trademarks and stealing the reputation and credibility of the owner of such a source indicator, violates the law and is therefore not permitted. In order to prevent such conduct, the UCPA, which is the general law on the protection of source indicators, prohibits the act of confusing consumers by using a mark that is identical or similar to a well-known mark, thereby protecting well-known marks. On the other hand, the Trademark Act protects source indicators in a more efficient way by granting trademark right holders exclusive rights to their registered trademarks.

9.4.2 Registration requirements of a trademark

To obtain a trademark right under the Trademark Act, a trademark should be registered. The requirements of trademark registration are: the intention to use, distinctiveness and the lack of reasons for trademark registration refusal. The Trademark Act lists the following as marks lacking distinctiveness: common name of goods; mark customarily used on goods; mark describing the features of goods; mark consisting of a conspicuous geographical name and so on; and simple and commonplace names and signs. Further, the reasons for trademark registration refusal include the following: trademark that includes the name of a famous person other than the applicant; trademark that is identical or similar to a well-known trademark; and trademark with an unlawful purpose.

While there is no need to prove the intention to use the trademark at the time of trademark application and registration, not using the registered trademark on the designated product for at least three consecutive years before an objection is raised may result in the cancellation of the trademark registration. Trials seeking the cancellation of unused trademarks are a commonly used solution against trademark brokers that register famous foreign trademarks in South Korea in advance.

9.4.3 Effect of a trademark and trademark infringement

A trademark right is created upon the registration of its establishment and is effective for ten years, which can be renewed. The holder of a registered trademark right has the exclusive right to use such a registered trademark on the designated product. Therefore, the act of using an identical or similar trademark on an identical or similar designated product constitutes trademark infringement, and the holder of the trademark right may file a suit for injunction against trademark infringement and a suit for damages.

However, the Trademark Act also stipulates the scope in which a registered trademark is ineffective. More specifically: (1) a trademark that indicates one's own name, trade name and so on pursuant to business practice; (2) a trademark that indicates the common name, place of production, quality and so on in a common manner; (3) a trademark with an undistinctive three-dimensional shape; (4) a trademark consisting of a geographical name; or (5) a functional mark is not subject to the effect of a trademark right and, therefore, does not constitute trademark infringement.

Meanwhile, a concerned party may request a trademark registration invalidation trial even after a trademark has been registered, claiming that such a trademark does not satisfy the registration requirements.

9.4.4 Doctrine of the exhaustion of trademark rights

If the holder of a trademark right or a person authorised by such a right holder transfers products indicated with a trademark registered in South Korea, the trademark right on such products will be exhausted as it has achieved it purpose, and the effect of such a trademark right will not affect the use, transfer or lending of such products.

Meanwhile, as the scope of a non-exclusive licence, including the designated product, survival period and region, depends on the relevant non-exclusive licence agreement, the use of a trademark by a non-exclusive licensee exceeding such a scope may be deemed to be an unauthorised use of such a trademark. However, the Korean Supreme Court recently held that the doctrine of exhaustion of trademark rights cannot be deemed inapplicable to all cases where the non-exclusive licensee transfers products in breach of an ancillary condition under the agreement, which is an unauthorised use of a trademark.

9.5 Protection under the Unfair Competition Prevention and Trade Secret Protection Act

9.5.1 Prohibition of acts of unfair competition

The Unfair Competition Prevention and Trade Secret Protection Act (USPA) protects source indicators, consumer trust and safety of transactions by stipulating and prohibiting certain types of conduct as acts of unfair competition, including those that cause confusion about the source or mislead consumers about the place of origin. The acts of unfair competition prohibited by the UCPA are as follows:

- causing confusion with another person's products by using a mark identical or similar to another person's product mark or business mark that is widely known in South Korea or selling, distributing, importing or exporting products bearing such a mark;
- damaging the distinctiveness or reputation of another person's mark by using a mark identical or similar to another person's product mark or business mark or selling, distributing, importing or exporting products bearing such a mark, as mentioned above;
- falsely marking the place of origin on products or by means of advertisements, or misleading consumers about the place of origin related to a product's place of production, manufacture or processing;
- falsely assuming another person's products or advertising, or marking on products or advertisements thereof, in a way that misleads consumers about the product quality and so on;
- act by a current or former agent of the relevant trademark right holder under the Paris Convention using a trademark identical or similar to the relevant trademark without a justifiable reason;
- unfairly obtaining a domain name in advance;
- transferring, lending, displaying, importing or exporting products that imitate the shape/form of products produced by another person;
- unfairly using economically valuable information that includes a technical or business idea of another person obtained in the course of negotiating or transacting with the other person for its own or a third party's business benefit in breach of the purpose of provision; and
- infringing the economic benefit of another person by the unauthorised use of output achieved as a result of the considerable effort and investment of the other person and so on for its own business in breach of fair business practice or competition order.

Based on the 2018 amendment of the UCPA, the 'overall appearance of a business place, including signs, exterior appearance and interior decorations' became expressly included in a 'mark indicating another person's business that is widely known in Korea' prescribed in Article 2(i)(b) and (c) of the UCPA. Therefore, it has become easier to impose legal sanctions against a competitor who copies trade dress, such as the interior of a business place, with the enforcement of the foregoing amendment of the UCPA.

9.5.2 Prohibition of trade secret infringement

The unauthorised use of intellectual property developed by an investment made by another person also falls under an act of unfair competition in a broad sense. Under the UCPA, 'trade secret' is defined as production methods, sales methods or any other useful technical or business information in other business activities that are not publicly known, have independent economic value and have been kept confidential.

In order to protect its economically valuable technical or business information from competitors, after applying for and registering a patent, after which the information will be publicly disclosed, a company should decide whether to license the patent or maintain/manage the information as a trade secret. If the company decides to maintain and manage the information as a trade secret, for the company to maintain the confidentiality of the information, it is common practice to have employees who could access such information sign a non-disclosure agreement together with a non-compete agreement.

However, it should be noted that court precedents have held as follows: even if a non-compete agreement exists between an employer and its employees, if such a non-compete agreement excessively limits the employees' freedom to choose an occupation and right to engage in work guaranteed by the Korean Constitution or excessively restricts free competition, then such an agreement falls under juristic acts contrary to good morals and other social order under Article 103 of the Korean Civil Code and, therefore, is null and void. In order to determine the validity of a non-compete agreement, the following should be considered: (1) the employer's benefits worthy of protection; (2) the position of the employee before his/her resignation; (3) the period, region and business type subject to the non-compete agreement; (4) whether compensation was given to the employee; (5) circumstances that led to the employee's resignation; and (6) the public interest and the relevant circumstances.

9.6 Copyright

9.6.1 Concept and establishment of a copyright

A 'work' refers to a creative product that expresses human ideas or emotions. There is a wide variety of works, including literary works, music, art, architecture, cinematographic works and computer programs. A copyright is established once the author creates a piece of work, and no procedure or form is needed to establish such a right. Thus, although there is a separate system for registering copyrights, the registrant is merely presumed to be the copyright holder. Meanwhile, unlike inventions, the copyright to works is reserved to the employer company of the original creator of such works.

Copyright can be broadly classified into the author's economic rights and the author's moral rights. The author's moral rights, including the right of disclosure, right of attribution and right of integrity, cannot be transferred as they are personal rights attached to the author. On the other hand, the author's economic rights, including the right of reproduction, right of public performance, right of broadcasting, right of exhibition, right of distribution, right of lending and right of the production of derivative works, are transferable and may be assigned or inherited.

9.6.2 Protection of programme formats

As the subject matter for copyright protection is limited to specific creative external expressions of human ideas or emotions using speech, letters, musical notes or colours, among others, ideas do not receive legal protection. However, it has been a seriously debated issue whether the law could prevent a third party committing the unauthorised use of a significant constituent element/component that forms the identity of the relevant company's representative game or television programme as a format and developing a work that copies the original with some modifications to the method of expression. The Korean Supreme Court has recently rendered a decision regarding this issue that increases the likelihood of such legal protection.

More specifically, the Korea Supreme Court held as follows in a case where the plaintiff ('King.com'), which developed and released a mobile game with a match-three game format, claimed that the defendant's mobile game infringed its copyright and sought an injunction:

> 'On the basis of the game development experience and knowledge accumulated by the plaintiff developer, the plaintiff selected elements that were deemed necessary in light of the characteristics of the game and arranged/combined those elements at its discretion according to the intention of game development. Apart from the issue of creativity of each element, the game possesses a sufficiently creative characteristic that distinguishes it from other existing games, wherein such creative characteristic was manifested by selecting, arranging and organically combining its major elements that were converted into a digital format pursuant to the specific intention of game development and scenario. Therefore, this game is a work entitled to protection under the Copyright Act.'

After rendering such a decision, the Korean Supreme Court found that these games were substantially similar and recognised that there was copyright infringement by the defendant.

9.6.3 Effect and limitation of a copyright

A copyright is protected during the lifetime of the author and for 70 years after his/her death. During such a period, the copyright holder reserves the exclusive right to use the work.

However, the author's economic rights are not limitless; there exist certain limitations as set forth below. In each of the following cases, a user may use a work without having to obtain the author's permission, and such use will not constitute a copyright infringement:use of public works:

- use for the purpose of a trial proceeding, political speech, school education, press release and so on;
- reproduction of current event articles and commentaries;
- quotation of publicly disclosed works – in the case in which works are being quoted for the purpose of media reporting, review, education and research within a legitimate scope pursuant to fair practices;

- performance or broadcasting for a non-profit purpose;
- reproduction for private use;
- reproduction at a library, reproduction as test questions or reproduction for the visually or hearing impaired and so on; or
- temporary audio/video recording by a broadcaster or temporary reproduction during the process of using the works.

Aside from the foregoing provisions, comprehensive fair use of works provisions were incorporated in the Korean Copyright Act (Article 35-3) during the process of executing the United States–Korea Free Trade Agreement in 2011. Such provisions provide the following standards for determining fair use: (1) purpose and nature of use; (2) type and purpose of the work; (3) proportion of the used part from the entire work and importance thereof; and (4) impact that the use of the work will have on the current or potential market, or value of such a work.

Therefore, if the defendant in a copyright case produced or handled a work that is identical or substantially similar to the works of the plaintiff without obtaining the permission of the plaintiff, that is, the copyright holder, there is no legitimate reason for the limitation of rights to take effect, and the defendant will be deemed to have committed copyright infringement if it cannot prove that it independently produced the work. In such a case, the plaintiff may file for an injunction and claim damages against the copyright infringer, and even file a criminal complaint.

Chapter 10: Financing

Sang Man Kim, Shin & Kim, Seoul

10.1 Banking and finance

10.1.1 Financial regulatory framework

In order to conduct financial business in South Korea, a financial business licence or financial business registration is required. Korean financial institutions are subject to the supervision of the Financial Services Commission and its administrative body, the Financial Supervisory Service.

10.1.2 Banking regulations

The primary statute governing the banking industry in South Korea is the Bank Act, which provides for licensing requirements for and regulations on the banking business. A Korean bank must comply with prudential regulations on its banking activity, including capital adequacy, loan loss provisions, limitation on credit exposure to a single customer, loan-to-deposit ratio, and liquidity and risk management. Currently, there are no legal controls on interest rates on bank loans, except for the cap of 24 per cent per annum on interest rates under the Act on Lending Business.

10.1.3 *Types of financial products*

Under the Financial Investment Services and Capital Markets Act (FSCMA), financial products are broadly classified into two categories, 'securities' and 'derivatives', depending on the nature of the risk of loss involved. A 'security' is an investment product that carries a possibility of loss up to the amount of the investment principal. A 'derivative' is an investment product that carries a possibility of loss over and above the amount of the investment principal.

10.1.4 *Foreign exchange regulations*

All transactions between residents and non-residents of South Korea are subject to regulations under the Foreign Exchange Transaction Act, and depending upon the nature of the relevant transaction: (1) such a transaction can be freely made without any approval or reporting requirements (eg, a Korean won or foreign currency-denominated loan from a Korean bank to a resident of South Korea or a foreign currency-denominated loan from a Korean bank to a non-resident of South Korea without any guarantee or collateral provided by a resident); or (2) a report to a foreign exchange bank, the Bank of Korea or the Ministry of Finance and Economy (eg, a foreign currency-denominated loan from a Korean bank to a non-resident with a guarantee or collateral for the benefit of such a non-resident borrower, a Korean won-denominated loan from a Korean bank to a non-resident to an amount exceeding KRW 1bn (equivalent to US$800,000) or the issuance of securities by a non-resident of South Korea).

10.2 Equity financing

10.2.1 *Public offering*

The FSCMA defines the 'public offering' of securities as the offering of securities to 50 or more of offerees (including the total number of offerees for the same kind of securities privately placed during the past six months). The number of offerees does not include certain related persons of the issuer and professional investors as designated under the FSCMA. Even if the number of offerees is less than 50: (1) the offering of newly issued shares of a Korean issuer will be deemed as a public offering of securities where: (i) the issuer has conducted the public offering of the shares in the past; or (ii) the shares of the issuer are listed on KRX; and (2) the offering of newly issued shares of a non-Korean issuer will be deemed as a public offering in the case where: (i) the securities (including the shares and the debt securities) issued by the issuer are listed on the KRX; or (ii) Korean residents own 20 per cent or more of the total issued shares of such an issuer as of the most recent fiscal year end.

A public offering of securities with an aggregate offering amount of KRW 1bn or more, including: (1) the total amount of the same kind of securities publicly offered without filing a registration statement during the past year; and (2) the total amount of the same kind of securities privately offered during the past six months, requires the filing of a registration statement with the FSC. A failure to file the registration statement may result in the imposition of an administrative sanction and/or criminal sanction, including imprisonment or the imposition of a criminal fine.

10.2.2 Listing

A company must apply to list its shares on the KRX. In the case of a non-Korean company, it should conduct a prior consultation with the KRX at least one month prior to filing the application for a preliminary eligibility review. As part of the consultation process, the non-Korean applicant must submit its constitutive document incorporating certain mandatory matters under Korean law as prescribed in the KRX rules for investor protection. The KRX will notify the result of its decision on application for the preliminary eligibility review within 60 days. If the applicant satisfies the preliminary eligibility review requirements (including the quantitative and qualitative criteria), it can proceed with the public offering of the shares and submit the primary listing application to the KRX. The shares of the applicant will be traded on the KRX once the KRX grants its listing approval. The company, the shares of which are listed on the KRX, will be subject to various disclosure requirements under the FSCMA and the KRX rules.

Chapter 11: Privacy laws and data protection

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The legal framework of privacy in South Korea consists of the Personal Information Protection Act (PIPA) as the overarching law, accompanied by various industry-specific laws, including the following key legislation:

- the Act on Promotion of Information and Communications Network Utilisation and Information Protection (the 'IT Network Act'), which generally regulates the processing of personal information collected online by IT service providers (ie, service providers conducting business online);
- the Act on the Protection, Use, etc of Location Information, which regulates location information of things and natural persons; and
- the Credit Information Use and Protection Act, which specifically regulates credit-related information of a person and industries that process such credit-related information.

Unless otherwise provided for in industry-specific laws, the protection of personal information is governed by PIPA. In early January 2020, major amendments to the Korean data privacy laws were passed, which are set to take effect on 5 August 2020. As the specific rules and regulations pertaining to the amendments will become available in the coming months, close monitoring of the legal developments on this front is necessary for a full appreciation of the practical implications of these amendments.

11.1 Personal Information Protection Act

PIPA applies generally to the collection and processing of personal data. The term 'personal data' refers to information pertaining to a living person (ie, a data subject), such as the name, resident registration number and images by which the individual in question may be identified (including information by which the individual in question cannot be identified, but can be identified through a simple combination with other information) (Article 2.1 of the PIPA).

11.2 Key principles

11.2.1 Lawful bases for collection and processing

The collection and processing of personal data must have a lawful basis, and this generally means explicit, opt-in consent unless another lawful basis is applicable. To be valid as consent, the data subjects must be notified of and consent to the following prior to the collection and processing of their personal data: (1) the purpose for which the data will be collected and used; (2) the items of personal data to be collected; (3) the length of time the personal data will be retained and used; and (4) the fact that data subjects have the right to refuse consent to having their personal data collected and used and the consequences of refusing consent.

Other instances of lawful bases include where: (1) the collection is necessary to enter into or to perform a contract with the data subject; (2) the collection is necessary to protect the data handler's legitimate interests (which take precedence over the data subject's rights), provided that the information is substantially relevant to the data handler's legitimate interests and the scope of the collection is reasonable; (3) the collection is necessary to comply with law or to fulfil a legal obligation; or (4) the collection of personal data is clearly necessary for the protection of life, personal or proprietary interests of the data subject or a third party, but where it is not possible to obtain informed consent from the data subject or his/her legal guardian due to: (i) the data subject's inability to express his/her intentions; or (ii) the data subject's address is unknown and so on (Article 15.1 of the PIPA).

Further, separate consent is required for any third-party transfer of personal data from the data handler to the recipient, for which consent must be obtained after notifying the data subject of the following: (1) the name or title of the third party; (2) the purpose of the transfer of personal data; (3) the items of personal data to be transferred; (4) the length of time the personal data will be retained and used by the third party; and (5) the right of refusal by the data subject and the consequences of refusal.

11.2.2 Purpose limitation

A data handler must clearly identify the purpose of data processing (Article 3.1 of the PIPA). At the time of the collection of personal data, the data handler must inform the data subject of the purpose of the collection and obtain the data subject's consent thereto (Article 15.2 of the PIPA). In order to use personal data outside the scope of the intended purpose or to transfer personal data to a third party, the data handler must inform the data subject of such a purpose and obtain the data subject's consent thereto. Moreover, particularly for the processing of personal data for marketing purposes, the following additional restrictions apply:

- in order to obtain the data subject's consent for the collection and use of personal data for the purpose of publicising or soliciting the sale of goods or services, the personal data handler must notify the data subject thereof, so that the data subject can clearly understand the purpose (Article 22.3 of the PIPA); and
- in order to outsource the affairs of publicising or soliciting the sale of goods or services, the data handler must inform the data subject of the details of the entrusted (outsourced) affairs and the entrustee (ie, the outsourcing entity) (Article 26.3 of the PIPA).

11.2.3 Retention

Prior to collecting and using any personal data, the data handler must notify the data subject of the purpose of the collection and use of the collected data, as well as the period during which such data would be retained by the data handler. Upon the achievement or exhaustion of the specific purpose, or the expiration of the retention period for the collected data, the data handler must destroy the personal data without delay.

11.3 Major amendments to data privacy laws

At the start of 2020, South Korea passed major amendments to key statutes governing the protection of personal data, which will enable and largely free up the use of pseudonymised personal data, help further clarify the latitude for the use of personal data, enhance the right of the data subject and provide consolidation of the regulatory authority. These amendments will take effect on 5 August 2020.

11.3.1 Consolidation of the related laws

The majority of data protection-related provisions in the IT Network Act will be consolidated into the PIPA, thereby making the PIPA the primary data privacy law applicable to the handling of personal data by IT service providers.

11.3.2 Use of pseudonymised personal data

The amended PIPA allows pseudonymised personal data to be used – without the need for the individuals' consent – for the purpose of generating statistical information, scientific research or public record-keeping. The statute will also allow the compilation of pseudonymised personal data (sourced from different data controllers) by specialised institutions, designated for such purposes by the Personal Information Protection Commission and other central government agencies. Meanwhile, it should be noted that the amended PIPA does not expressly allow for the use of pseudonymised personal data for commercial purposes.

11.3.3 Expanded latitude for the use of personal data

Filling what had been a significant gap in the PIPA framework, the amendments provide that personal data may be used without need of further consent from the data subject, 'within a scope reasonably related to the original purpose of collection' of the personal data, subject to factors including the absence of detriment to the data subject, the taking of necessary security measures (eg, encryption) and other criteria. These provisions are modelled after Article 5(1)(b) and Article 6(1)(f) of the EU GDPR. The scope of such permitted use needs further definition, however, and this will be forthcoming in the Presidential Enforcement Decree, which will be issued at some point before the effective date of the amendments.

11.3.4 Consolidation of the regulatory authority

Currently, regulatory oversight of data protection is divided among the Ministry of Interior and Safety, the Korea Communications Commission and the Personal Information Protection Commission (PIPC). This includes such functions as monitoring and policing compliance, and promulgating recommended practices and privacy policy terms. Under the amended PIPA, however, these functions will all be entrusted to the PIPC. The nine-member PIPC will be comprised of government officials and various law and policy experts. This change in the regulatory apparatus is evidently intended in part to meet GDPR standards for an 'independent regulator', so as to help obtain an 'adequacy' decision from the European Commission, which would relax the data flow from the EU to South Korea.

11.3.5 Data subject prerogatives augmented, including data portability

Individual data subjects will enjoy portability rights, including to require financial institutions (as well as public sector bodies) to transfer their credit personal data to various kinds of credit personal data management companies and other financial institutions, or to the data subjects themselves. Aiming to bolster data subjects' autonomy when it comes to personal data, the law will introduce a right to respond to automated assessments, including requiring the financial institution to explain the results and to furnish, correct or delete relevant data. The amended framework in this respect will, clearly, entail a host of ensuing rules and standards. Giving effect to these data subject prerogatives will also result in a considerable scope of expense and technical/system implementation, including, for example, protocols and tools to minimise bias/error in AI-based assessment processes.

Chapter 12: Competition law

Seung Hyuck Han, Yulchon, Seoul

12.1 Business establishment: merger control

Under the Monopoly Regulation and Fair Trade Act (MRFTA), the merger filing obligation to the KFTC is triggered if the following thresholds are satisfied:

- the type/size-of-transaction test:
  - a merger with another company;
  - acquisition of all, or a substantial part, of another company's business or assets for business;
  - acquisition of 20 per cent (or 15 per cent for domestic listed companies) or more of voting shares;
  - share acquisition whereby a company, having 20 per cent or more of shares in another company (or 15 per cent for a domestic listed company), becomes the largest shareholder in that company;
  - participation in the joint establishment of a new company (ie, establishment of a joint venture); or
  - creation of an interlocking directorate relationship;
- the size-of-party test:
  - worldwide assets or turnover of at least one of the parties (including its affiliates) is KRW 300bn (approximately €229.8m/$257.2m) or more; and
  - worldwide assets or turnover of the other party (including its affiliates) is KRW 30bn (approximately €22.9m/$25.7m) or more; and
- local nexus test:
  - If both parties to the transaction are foreign companies, each party's turnover in South Korea must be KRW 30bn (approximately €22.9m/$25.7m) or more.

The MRFTA prohibits a merger that substantially restricts competition in a certain market.

12.2 Conducting business operations

12.2.1 Cartel

A company shall not agree with other companies by contract, agreement, resolution or any other means to jointly engage in, or solicit any other companies to perform, any of the following conduct, if such conduct unfairly restricts competition:

- fixing, maintaining or changing prices;
- determining terms and conditions of trade;
- restricting production or distribution of goods or services;
- market allocation;
- jointly carrying out the main parts of a business, or jointly establishing a company for the same purpose;
- bid rigging; and

- any other practices that substantially restrict competition in a particular market by interfering with other companies' businesses.

The KFTC may impose penalties for any cartel activities, such as remedial orders, administrative fines (up to ten per cent of the sales of the relevant goods or services), or may make a criminal referral against an individual or company that engages in such activities.

12.2.2 Abuse of dominance

A company with a dominant market position must not engage in any of the following:

- unfairly determining, maintaining or changing the price of goods or services;
- unfairly controlling the sale of goods or the provision of services;
- unfairly interfering with the business activity of any other company;
- unfairly interfering with market entry of another company;
- unfairly excluding competitors; or
- other business activity that may substantially undermine consumer interests.

A market dominant position is presumed if:

- a single company owns more than a 50 per cent market share; or
- three or fewer companies collectively own more than a 75 per cent market share.

Otherwise, dominance is determined based on factors such as: (1) concentration of the market; (2) entry barrier; (3) possibility of collusion among competitors; (4) similarity between products or adjacent markets; and (5) relative size of competitors.

The KFTC may impose penalties for any abuse of dominance, such as remedial orders, administrative fines (up to three per cent of the sales of the relevant goods or services), or may make a criminal referral against an individual or company that engages in such activity.

12.2.3 Resale price maintenance

No company may engage in resale price maintenance, except for the maximum price maintenance with justifications.

12.2.4 Unfair trade practice

A company shall not engage in the following unfair trade practices:

- unfairly refusing to transact or do business with others or discriminating against certain companies;
- unfairly excluding competitors;
- unfairly soliciting or coercing customers from other companies;
- unfairly abusing one's superior bargaining position in a transaction;

- imposing unfair terms and conditions that restrict the business activity of another company or otherwise disrupting the business activity of another company;
- providing funds, assets, manpower and so on to other companies or specially related companies under commercially unreasonable terms and conditions; or
- other business activity that may restrain competition and fair trade.

Special regulations may apply prior to the MRFTA for abuse of superior bargaining power among certain business relationships:

- Fair Transactions in Subcontracting Act (applies to a subcontract transaction with small to medium-sized subcontractors);
- Franchise Business Promotion Act (applies to franchisor-franchisee relationships and transactions);
- Act on Fair Transactions in Large Retail Business (applies to transactions between a large retail business and a supplier); and
- Fair Agency Transactions Act (applies to transactions between a supplier and an agency).

Chapter 13: Initiating and conducting a civil action

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Civil litigation is the most favoured method of dispute resolution for sizable commercial disputes in South Korea notwithstanding the fact that various ADR methods have grown increasingly popular in recent years. This chapter on dispute resolution seeks to provide a brief overview of initiating and conducting civil litigation in South Korea.

13.1 General overview

13.1.1 Legal system

Originally modelled on the German legal system, South Korea adopts a civil law litigation procedure designed primarily to be adversarial, although it also has some inquisitorial components. For instance, Article 136(1) of the Civil Procedure Act explicitly allows the judge to assume an active and inquiring role by directly asking parties questions on or requesting them to prove factual or legal matters.

13.1.2 Court structure and composition

South Korea has a three-tiered judicial system: (1) the courts of first instance; (2) the courts of the appellate level; and (3) the Supreme Court. As South Korea is not a federal state, it has a single judicial system across the nation. The district and high courts of appeal are subdivided into individual courts that hear civil, criminal, family, juvenile, administrative, intellectual property and bankruptcy matters.

13.2 Pre-action conduct

Compared to courts in other jurisdictions, South Korean courts are known to be more willing to allow interim measures, such as preliminary attachments and provisional injunctions.

13.2.1 Preliminary attachment

An applicant requesting a preliminary attachment, which is a widely sought form of measure, must satisfy the following: (1) establish a *prima facie* case; (2) prove that the assets are owned by the debtor; and (3) prove that the enforcement of the judgment would be difficult, if not impossible, unless the order is granted by the court.

13.2.2 Summary motion

Pre-action motion, such as a motion for summary judgment or motion to dismiss, are not available in South Korea.

13.3 Initiation of a civil action

13.3.1 Process

As in most jurisdictions, a civil action in South Korea commences with the filing of a complaint with the court that has jurisdiction over the case. It should be noted that class actions are not available in South Korea, except under the Securities-Related Class Action Act for disputes involving securities transactions. Save for the aforementioned exception, each claimant, therefore, should file an individual action.

Service of process is carried out only by the court. Unless served via public notice, a defendant is allowed 30 days from the receipt of the complaint to file a statement of defence.

13.3.2 Fees and third-party funding

Court costs generally consist of the following: (1) stamp fees or filing fees (approximately 0.5 per cent of the total claim amount); (2) service of process fees; (3) other out-of-pocket expenses such as *per diem* fees for witnesses; and (4) attorneys' fees.

There are currently no Korean laws or regulations on third-party funding. It should, however, be noted that Article 32 of the Attorney-at-Law Act prohibits an attorney from becoming an assignee of any right in a legal dispute.

13.4 Conduct of a civil action

13.4.1 Evidence gathering

Compared with the discovery process in common law jurisdictions (eg, the US), the discovery process in South Korea is extremely limited in its manner and method. For instance, a party seeking certain documents should make an application to the court rather than making requests through direct *inter partes* communication. Further, a party cannot make general applications for documents, but should identify specific documents sought. For instance, Article 345 of the Civil Procedure Act provides that a document production request should include the following: '(i) indication of the document; (ii) purport of the document; (iii) holder of the document; (iv) facts to be proved; and (v) causes of an obligation to submit the document'. After such a specific request has been submitted, the presiding judge has full discretion to accept or reject the application, and determine the scope and method of discovery, if such an application is accepted. In this way, all of the discovery process is conducted under the direct supervision of the court.

13.4.2 Evidentiary standard

The evidentiary standard in a civil litigation in South Korea is 'preponderance of evidence', while the 'beyond reasonable doubt' standard is used for criminal cases.

13.4.3 Hearing

In lieu of concentrated hearings (ie, hearings for a set period of consecutive days or weeks), a civil action in South Korea proceeds by holding multiple hearings generally in four-week to six-week intervals. As the entity with sole and exclusive authority to manage a litigation case, South Korean courts determine the procedural timetable of a given case, including the submission dates of various briefs and court hearings. Generally, a written judgment is rendered approximately four to eight weeks after the closing of the last hearing.

13.4.4 Confidentiality

Save for exceptional instances in which a court determines that a public hearing would be detrimental to national security or public policy, all civil case hearings are not confidential and are open to the public.

13.4.5 Jury trial

A limited number of criminal cases have adopted some aspects of a jury trial. As for civil actions, however, there is no jury trial.

13.4.6 Duration of a civil action

The duration of a civil action understandably depends on the nature and complexity of the given case. Generally speaking, the timeframe could be estimated as follows: (1) six to 18 months at the first instance court; (2) six to 12 months at the appellate level; and (3) four months to two years at the Supreme Court level.

13.5 Grounds and standard of review for appeals

Korean civil procedure allows for broad grounds for appeals.

13.5.1 An appeal to a High Court of Appeal

An appeal to a High Court of Appeal could be made on both points of law and fact. During the appeal, parties are allowed to submit new evidence and arguments. As to the standard of review, the appellate level reviews the judgment rendered by the court of first instance *de novo*.

13.5.2 An appeal to the Supreme Court

The judgment of the appellate level, on the other hand, can only be brought before the Supreme Court on questions of law.

13.6 Judgment and enforcement

13.6.1 Available final remedies

In a civil action in South Korea, the parties can seek and the courts can grant the following remedies: (1) specific performance; (2) expression of intention constituting a juridical act; (3) damages; (4) injunction; and (5) declaratory relief.

13.6.2 Allocation of costs

South Korean courts determine the allocation of costs incurred by the parties in a civil action. In principle, the court orders the losing party to bear all litigation costs.

13.6.3 Enforcement

After the issuance of a final judgment on monetary claims, the prevailing party can enforce the judgment against the property or assets of the losing party by requesting the court to place the property or assets in a public auction and to distribute the proceeds from the foregoing process.

13.7 Settlements

Both out-of-court and in-court settlements are available. Parties may opt for settlement at any stage of the civil proceedings. In the event that the parties settle their dispute through an in-court settlement, it will be recorded in the court protocol. Having the identical effect of a final judgment, the recorded settlement becomes fully enforceable.