South Korea

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Chapter 1: Introduction

Jiwon Kang, Shin & Kim, Seoul

Since the first edition of this report in Sept 2020, South Korea's economy has experienced significant fluctuations and changes due to various factors including the coronavirus crisis, rising interest rates, increased regulation on big tech companies on a global level and the Korean presidential election which took place in March 2022. At the beginning of 2025, we expect more stability in the market as elections in various countries will come to an end and we expect a gradual drop in the interest rate.

Since 2020, the South Korean shipping industry experienced record-breaking highs. We have seen a global expansion of Korean entertainment industry with the success of BTS, *Squid Game* on Netflix, and other popular music and film. The K-beauty and K-fashion industries have experienced significant growth and attracted substantial investments, with dedicated funds appearing in the market to mainly invest in K-beauty and K-fashion.

Additionally, robust venture capital funding and government financing programmes have significantly boosted South Korea's startup ecosystem in recent years. Venture capital investments in South Korea have more than tripled over the past decade, with the IT sector receiving the highest amount of investment. The number of South Korean 'unicorns' has risen from just three in 2017 to 23 in 2023. Companies like Coupang and Viva Republica (maker of the Toss app) have become major players.

We also saw increased interest in environmental, social and governance (ESG) issues. The Korean government established the ESG Infrastructure Expansion Plan in August 2021 to systematically respond to global ESG discussions. Since then, there has been a notable increase in ESG investments and initiatives by both public and private sectors. The National Pension Service is spearheading the ESG movement by broadening ESG investments and introducing its Integrated ESG Strategy Guidelines in November 2021. Major financial companies are also pushing ESG investments by setting specific targets, forming dedicated teams and joining the UN Principles for Responsible Investment (PRI). As a result, Korea's ESG investments have risen sharply since 2020. Leading companies like Samsung and SK have established ESG management strategies, integrating ESG practices into their supply chain management and broader operations. Listed companies are required to disclose corporate governance reports, and companies with assets surpassing KRW 1tn must provide sustainability management reports.

Notable new legislation since our first edition includes the Serious Accidents Punishment Act (SAPA), which came into force on 27 January 2022 and holds employers criminally liable in the event of serious industrial or public accidents. On 6 April 2023, the first court decision was rendered and a prison sentence of 18 months (with a three-year suspension of execution) on the representative director was imposed. Despite debates on SAPA's effectiveness in ensuring safety management and accident prevention – given that the annual number of fatal injuries did not decrease post-enforcement – the act has undoubtedly heightened workplace safety and health focus, driving companies to adopt more rigorous safety measures and management practices.

There has been notable regulatory movement in regulation on big tech companies. In 2022, the Personal Information Protection Committee fined Google and Meta KRW 69.2bn and KRW 30.8bn, respectively, for collecting personal information for online customised advertisements without the consent of users. This was the first sanction related to customised advertising. There are ongoing efforts by the Korean government to introduce a 'platform law' to effectively regulate big tech companies in the face of opposition from the industry.

M&A activities have slowed down since 2022 with fewer deals and smaller deal sizes, largely due to interest rate increases. While private equity (PE) firms remain active market players, the continuous rise in interest rates since 2022 has led cash-rich companies to dominate the M&A scene over PEs which rely on leveraged models. These companies seek deals that boost revenue growth and business innovation, driven by demands to address geopolitical issues and AI-driven technological advances. Consequently, there is a trend of these companies selling non-core assets to finance new acquisitions. An interesting trend in the M&A market is the increasing use of warranty and indemnity insurance (W&I insurance). Historically, W&I insurance was mainly used when sellers wanted a 'clean exit' to distribute sales proceeds to investors post-closing. However, concerns about a seller's future financial stability have now led investors to more broadly adopt W&I insurance to mitigate counterparty risk.

Lastly, the global emphasis on corporate governance is reshaping markets and companies. South Korea has made some recent strides in improving governance, with an increase in active investors. Still, South Korean companies were not bringing the adequate value back to its shareholders.

In response, early in 2024, Korea's Financial Services Commission (FSC) announced its Corporate Value-up Programme (CVP) initiative to improve corporate governance standards and enhance shareholder returns. This programme requires listed companies to voluntarily disclose important information that may influence their stock price and investors' decisions, including shareholder return, recapitalisation and long-term investments. Activist shareholders and institutional investors might use this opportunity to voice their opinions on management measures and boost shareholder proposals on shareholder return policies. Listed companies should be prepared to respond to minority shareholders and manage general shareholders' meetings accordingly.

Overall, the Korean market is navigating through economic uncertainties, but the government is actively implementing regulations and initiatives to stimulate the market and address the 'Korea Discount' issue. These efforts include fostering transparent corporate governance, enhancing market accessibility for foreign investors, and promoting sustainable growth strategies. With these measures, we are optimistic about seeing significant improvements in the near future.

Chapter 2: General business environment

Jeeseon Choi, Daeryook & Aju, Seoul

'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 all refer to the Republic of Korea. South Korea, which had a national per capita income of only US$45 in the 1950s, has now seen this figure grow to over US$30,000, and today is ranked 12th in the world economic (GDP) rankings.

Furthermore, Korea ranked tenth among the 132 economies featured in the Global Innovation Index 2023 and second among the 16 economies in South East Asia, East Asia and Oceania. People who hailed the growth of Korea's economy as a miracle continue to tout the 'miracle of new investment' going forward. 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, and lies 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 'free trade agreement' network signed with 59 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 excellent business infrastructure. 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 1,893 as of the end of 2023 (the fourth 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 52 per cent from 2017 (KRW 6,470) to 2024 (KRW 9,860), work hours have also been mandatorily reduced, with the 52-hour work week system having been implemented 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. Most notably, in 2022, the SAPA came into effect, aiming to prevent serious accidents and protect the lives and physical safety by stipulating penalties (including criminal penalties) on business owners and corporations (etc) that have caused casualties in violation of their duties to take safety and health measures while operating businesses or places of business, or handling materials or products harmful to human bodies, the application of which has been extended to a sole proprietor or a business with five or more regular employees since 27 January 2024 despite considerable public opposition.

Looking at the penalties for the management of a company, this Act creates great concerns, particularly for smaller companies with limited resources to cope with its requirements. 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

Jeeseon Choi, Daeryook & Aju, Seoul

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 used to comprise the vast majority, accounting for over 90 per cent of corporations that filed a corporate tax return in 2018. As a result, they 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 in 2011, is increasingly gaining interest from foreign investors – although it is less commonly used compared to 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 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 are required, one of whom is 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 require the approval of the board of directors of the relevant company (or the shareholders if no board of directors exists).

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 'units of contribution'.

3.2.2 Management and statutory auditors

A minimum of one director is required; there are no nationality or residency requirements.

In principle, a director represents the company: 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 unit of contribution is counted as one vote, unless otherwise provided in the articles of incorporation. The transfer of units of contribution 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 in principle. However, under the Act on External Audit, limited companies may also be subject to the requirements of publication of annual balance sheets and/or 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 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 'units of contribution'.

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; 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 units of contribution 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 entirely restricted, allowed only up to a ceiling percentage, or be subject to regulatory approval. Foreign investment in a designated defence industry contractor or a company possessing national core technologies or national advanced strategic technologies may also be subject to regulatory review and approval.

As a procedural reporting requirement, foreign investment must be reported to the 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 the Foreign Exchange Transaction Act. However, if the foreign investment results in the acquisition of control over a Korean company engaging in one of the following activities, reporting under the Foreign Investment Promotion Act can only be completed once prior clearance from the Ministry of Trade, Industry and Energy has been obtained:

- producing or manufacturing of defence materials under the Defence Acquisition Programme Act;
- producing or manufacturing of goods, etc or holding of technologies, subject to permission or approval for exportation under Article 19 of the Foreign Trade Act;
- possessing or holding contracts classified as state secrets under Article 4(1)-2 of the National Intelligence Service Act; or
- possessing or holding national core technology.

4.2 Most commonly used acquisition structure

In South Korea, acquiring shares is the most common structure for acquisitions. Business or asset sales and purchases are less common and typically used only to purchase part of a company's assets or business. Mergers can be applied but are not commonly used in M&A (mergers and acquisitions) contexts between unrelated parties.

Generally, 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, aside from any consent requirements due to change of control provisions). In contrast, business or asset transfers entail a more complicated closing procedure (ie, registering for the title transfer of assets; obtaining consent for the transfer of liabilities; reporting or registering the transfer of permits or licences; and transferring employees, business contracts, etc).

4.3 Sale via auction process

A sale through an auction process is frequently used in private M&A. The larger 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 the following steps:

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

The key terms of a share purchase agreement in South Korea include:

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, sellers occasionally request an advance payment deposit to secure certainty for deal closing and potential breach by the buyer. 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 includes the delivery of share certificates and wiring the purchase price into the seller's bank account.

Regarding R&W of the target company, purchasers usually seek fairly extensive R&W (eg, capitalisation, permits and licences, financial statements, absence of undisclosed material liabilities, compliance with laws, taxes, no proceeding, material contracts, insurance, labour, anti-corruption and environmental issues). Specific coverage of R&W is one of the most heavily negotiated issues. Purchasers often request the right to access the target company's books, records and other information before closing, which sometimes raises a 'gun-jumping' issue, especially in acquisitions between competitors.

In relation to indemnification for a breach of R&W, various limitations, such as overall cap, deductible, basket, *de minimis* and time limits, are commonly utilised. Purchasers generally request that the sellers agree to a non-compete convent for a certain period after closing. Such a non-

compete covenant should be reasonable in scope, duration and geographic area, considering the total circumstances.

South Korean law is generally used as the governing law for M&A transactions in the country. Although parties may select a foreign governing law (eg, New York State law), the mandatory requirements of South Korean law, such as the method of transfer of title and regulatory approvals, still apply.

The key terms of a business or asset transfer are similar to those in a share purchase agreement, with some differences such as the transferred assets, liabilities, contracts, permits and licences, 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 Korea Fair Trade Commission (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 is triggered if one party to the transaction has total assets or 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).

If all the parties involved are foreign companies or the target company is a foreign company (regardless of whether the acquiring company is a domestic company), the above thresholds of KRW 300bn and KRW 30bn apply, but each foreign party also needs to have domestic sales of KRW 30bn or more (including those of its worldwide affiliates). The filing of the business combination report is generally required within 30 days from the closing date. 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 pre-closing report will be required. In such a 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 procedures are similar to those in the case of a share transfer transaction, except that (1) the seller's total assets or annual turnover are calculated on a standalone basis (not including those of affiliates), and (2) there are additional requirements on the purchased business or assets. Specifically, the purchaser must acquire all or a substantial part of the business or assets of the seller. A substantial part is defined as one that: (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 10bn (from 7 August 2024 – prior to this date, the minimum threshold for transfer price of the assets or business is KRW 5bn).

4.6 Employee-related issues

As a matter of law, there is no obligation to obtain consent from employees or labour unions for either a share sale or an asset or business transfer, unless specified in the employment contracts,

employment rules or collective bargaining agreements. In the case of a business transfer, employees working 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 employees about the proposed transfer to ensure they have sufficient opportunity to consider opting out. Although there is no legal obligation for M&A transactions, employees and labour unions often request an M&A bonus, especially when the seller earns significant capital gains from the transfer. In some cases, M&A bonuses have been paid to encourage employee cooperation during due diligence and to ensure smooth closing procedures.

4.7 Taxes related to M&A transactions

The seller is responsible for paying the securities transaction tax at (1) 0.35 per cent of the transfer price for the sale of shares in a non-listed company or shares in a listed company traded over-the-counter and (2) 0.18 per cent of the transfer price for the sale of shares in a listed company traded on an exchange (reducing to 0.15 per cent from 2025). 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 non-listed company holding real estate, a deemed acquisition tax is payable by the purchaser. This tax is calculated as 2.2 per cent of the book value of certain assets, such as real estate, proportional to the acquisition.

For business and asset sales, the purchaser is responsible for paying the acquisition tax on certain assets (eg, 4.6 per cent of the purchase price for real estate, but 9.4 per cent for real estate located in Seoul metropolitan areas; 3.4 per cent of the purchase price for mechanical equipment; and 2.2–8.2 per cent of the purchase price for vehicles). In addition, the purchaser may also be required to purchase housing bonds, depending on the value of the real estate. If an asset or 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, including inventory, machinery, equipment, buildings and goodwill. Land and accounts receivable are exempt from VAT. The buyer can generally credit VAT paid against its VAT payable or obtain a refund if there is a shortfall when filing a VAT return.

If a seller earns capital gains from the M&A transaction, the seller is subject to taxes (corporate income tax for corporate entities). However, if the seller is a foreign entity with no permanent establishment in South Korea, it is subject to capital gains tax at the lower of 11 per cent of the transfer price or 22 per cent of the capital gains, including surtax unless otherwise set out in an applicable tax treaty. The purchaser is required to withhold and pay this capital gains tax on behalf of the seller 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 corporation (including a corporation in the process of being established) or a sole proprietorship (while the relevant law states 'a domestic enterprise registered as a business entity', it means a sole proprietorship) through any one of the following means for the purpose of establishing continuous economic relations with the corporation or enterprise through participation in management activities:

- acquisition of newly issued stocks or shares of a Korean corporation or enterprise; or
- acquisition of existing stocks or shares of a Korean corporation or enterprise.

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 (in the case of a corporation, including a corporation in the process of being established) or an enterprise (including a sole proprietorship), 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; 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.

Usage of unappropriated retained earnings

A foreign-invested company's unappropriated retained earnings are recognised as foreign investment if the unappropriated retained earnings are used for one of the following purposes:

- for newly establishing or expanding factory facilities or workplaces (in this case, the business is other than the manufacturing business under the Korea Standard Industrial Classification); or

- for purchasing capital goods or research equipment necessary for performing the business of the foreign-invested company

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 30 categories (the 'restricted categories of business').

Meanwhile, prior authorisation from the Ministry of Trade Industry and Energy is required for foreign investment in the form of subscribing to newly issued shares or purchasing the existing 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* (district) 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 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; (2) a foreign investment report must be filed with KOTRA or a foreign exchange bank; and (3) a 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 within one month from the date of receipt of funds (but such report is exempted for certain types of guarantee agreement-related transactions). If the amount of borrowing exceeds US$50m (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 Ministry 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 free trade zones (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.
- *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.

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 or advanced technology and advanced products;
- where a new factory is built or an existing factory is expanded for the production of parts, materials, and equipment stipulated under the Act on Special Measures to Strengthen Competitiveness and Stabilise Supply Chain of Materials, Components, and Equipment Industry and satisfy one of the following conditions:

- parts, materials and equipment that contribute significantly to the added value of the final product;
- parts, materials and equipment that require advanced technology or core high technology and have a high technology spillover effect or create significant added value;
- parts, materials and equipment that act as the basis of an industry or have high inter-industry linkage effects; or
- parts, materials and equipment that cause difficulties for in main key industry-related production in the event of a supply shortage;

- 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 foreign direct investment (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);
  - where a foreign company is engaged in a local specialised industry as stipulated in Article 2(vi) of the Special Act on Local Autonomy, Decentralisation and Balanced Regional Development or a mega-region industry stipulated in Article 2(viii) of the same act, and where it is recognised that the relevant industry will contribute to the development of the local economy;
  - where it is recognised that the foreign investor will significantly contribute to the development of domestic industry and technology by researching and developing technologies referred to in Article 121-2(i)(1) of the Act on Restriction on Special Cases Concerning Taxation or advanced technologies or advanced products referred to in Article 5(i) of the Industrial Development Act; or

– where the foreign investor intends to replace the existing factory facilities with new facilities that fall under (1) facilities for commercialising national strategic technology, (2) factory facilities to run a business accompanying new growth driver industry technology, or (3) factory facilities to run a business utilising advanced technology and advanced products, and such replacement is deemed to meet the standards publicly notified by the Minister Ministry of Trade, Industry and Energy and to significantly contribute to the development of the domestic industry and technology.

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 a 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 general meeting of shareholders (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.

Litigation

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. However, under the amended Monopoly Regulation and Fair Trade Act which became effective on 7 August 2024, a merger or business transfer between a parent and its subsidiary (with a shareholding of over 50 per cent), an affiliate merger with a merged affiliate entity whose assets and revenue are both less than KRW 30bn and a business transfer with a consideration of less than both ten per cent of the assets of the transferor and KRW 10bn, in each case is exempt from the Korea merger filing requirement;

- 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:
  - in the case of a merger, the employment of the officers and employees of the merged company is comprehensively transferred without separate consent;
  - 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
  - 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; and
- the transfer of personal information to a transferee in the context of a business transfer, merger or spin-off requires an advance notice to the data subjects containing certain requisite information, including the occurrence of a transfer of personal information, certain information regarding the transferee and certain measures available to objecting data subjects. While a public notice containing such information on the transferor's website suffices in lieu of individual notices to data subjects where an individual notice is not possible (eg, unknown contact information of data subject), the prevailing practice is for the transferor to provide both a public notice on its website and individual notices to data subjects with known contact information.

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.

6.5.3 Transaction involving a publicly listed company on the Korea Exchange

Restructuring transactions involving one or more publicly listed companies on the Korea Exchange is subject to additional requirements under the Financial Investment Services and Capital Markets Act (FSCMA) and the Korea Exchange (KRX) regulations, including the following:

- a publicly listed company on the KRX is subject to certain public disclosure requirements under the FSCMA and the KRX regulations for its board approval, execution of definitive agreement or closing of a business transfer, merger or spin-off which affects its management or assets. Further, the Korean government has recently announced its plan and initiatives to further strengthen and expand the public disclosures of such transactions to promote board accountability and protection of minority shareholders;
- The FSCMA sets forth certain standards and formula for calculating the transaction price (or merger or spin-off ratio) in a merger, business transfer or spin-off of a publicly listed company on the KRX to protect minority shareholders' interests, and requires a private (non-publicly listed) company to be valued by an independent valuation agency in a merger between a publicly listed company on the KRX and a private company. While the Korean government's recently announced plan to support and promote M&A includes an initiative to abolish the FSCMA-mandated merger price/ratio calculation formula in third-party mergers involving a publicly listed company, the FSCMA-mandated merger price/ratio determination is nonetheless proposed to be retained for affiliate mergers involving a publicly listed company; and
- A merger between a publicly listed company on the KRX and a private (non-publicly listed) company which results in a change of control of the publicly listed company and the public listing of shares of the private company is required to undergo a KRX review on whether the merger constitutes a backdoor listing transaction. If the KRX recognises the merger to constitute a backdoor listing, the KRX will conduct a full preliminary listing review and potentially delist the publicly listed company upon its determination that its listing criteria and requirements are not satisfied.

Chapter 7: Employment and labour law

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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 Labour 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 a 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 Labour. 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.

'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. In the labour management council, the employee representatives shall be selected through a direct secret ballot by the employees in principle and 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

Taxpayers

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. However, if the revised tax bill announced in July 2024 is passed by the National Assembly as is, starting with tax periods beginning on or after 1 January 2026, a person will be considered a resident even if they are present for more than 183 days over two tax periods.

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 individual income tax (IIT) rates. Dividend and interest income withheld domestically 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 withholding tax at the source.

Tax rates

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

- six per cent of the tax base up to KRW 14m (rate including local income tax: 6.6 per cent);
- 15 per cent of the excess over KRW 14m up to KRW 50m (16.5 per cent);
- 24 per cent of the excess over KRW 50m up to KRW 88m (26.4 per cent);
- 35 per cent of the excess over KRW 88m up to KRW 150m (38.5 per cent);
- 38 per cent of the excess over KRW 150m up to KRW 300m (41.8 per cent);

- 40 per cent of the excess over KRW 300m up to KRW 500m (44 per cent);
- 42 per cent of the excess over KRW 500m up to KRW 1bn (46.2 per cent); and
- 45 per cent of the excess over KRW 1bn (49.5 per cent).

8.1.2 Deductions/credits

Residents may be eligible for a credit based on their dependents. Additionally, 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.

8.1.3 Withholding tax

Interest, dividends, wage and salary income, business and pension income that qualifies as personal services, 'other income', and pension 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 Corporation

Domestic and foreign corporations are both subject to corporate income tax (CIT). A domestic corporation is defined as a corporation with its head or main office or place of effective management in South Korea. The place of effective management refers to the place where the key management and commercial decisions that are necessary for the conduct of the entity's business are made in substance. The determination of the place of effective management is based on all relevant facts and circumstances.

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.

8.2.2 Types of legal entities

All of the below entities are generally taxed as separate legal entities. However, *hapmyong hoesa* and *hapja hoesa* can elect to be treated as transparent for Korean tax purposes, thereby becoming subject to the Korean partnership tax regime.

- *Chusik hoesa* – a corporation incorporated by one or more promoters, with each shareholder's liability limited to the amount of contributed capital. This is the type of entity most commonly used in Korea.
- *Yuhan hoesa* – a corporation incorporated by one or more members, with each member's liability limited to the amount of contributed capital.
- *Yuhan chaekim hoesa* – a corporation incorporated by one or more members, with each member's liability limited to the amount of contributed capital. A *yuhan chaekim hoesa* provides more flexibility and self-control than a *yuhan hoesa*.
- *Hapmyung hoesa* – a corporation incorporated jointly by more than two members who are responsible for corporate obligations if the assets of the corporation are not sufficient to fully satisfy such obligations.
- *Hapja hoesa* – a corporation composed of one or more partners with unlimited liability and one or more partners with limited liability.

8.2.3 Transparent entities

In Korea, entities that are not a corporation and have an agreed method of distributing profits between members (ie, association, foundation, *johap* under the Korean Civil Code (KCC), and *hapja johap* or *ikmyung johap* under the KCC) are tax-transparent entities. A *johap* is similar to a partnership in concept. Trusts formed by a contractual arrangement are generally treated as tax-transparent entities.

In addition, *hapmyung hoesa* and *hapja hoesa* – which are incorporated entities – may choose to be treated as partnerships that are transparent for tax purposes. Under Korean tax law, partnerships are exempt from tax at the partnership level, but each partner is subject to tax on earned income allocated from the partnership.

8.2.4 Consolidation

Consolidation (consolidated tax return) is available for a domestic parent company and its directly or indirectly wholly owned domestic subsidiaries. For fiscal years commencing on or after 1 January 2024, the shareholding requirement is eased to 90 per cent. A taxpayer may elect the consolidated tax filing regime upon approval from the tax authority, but such election cannot be revoked for five years.

8.2.5 Taxable income

In determining taxable income for CIT purposes, expenses (including depreciation and general administrative expenses, such as rental expenses) that are reasonably connected with a company's business can be deducted from the company's taxable revenue. Taxable income is based on the accounting profits, and adjustments are made for tax purposes, as required by the Korean Corporate Income Tax Law.

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.

8.2.6 Tax rates

The applicable CIT rates are as follows:

- taxable income under KRW 200m: nine per cent (rate including local income tax: 9.9 per cent);
- taxable income of KRW 200m to KRW 20bn: 19 per cent (20.9 per cent);
- taxable income of KRW 20bn to KRW 300bn: 21 per cent (23.1 per cent); and
- taxable income over KRW 300bn: 24 per cent (26.4 per cent).

8.2.7 Basic rules on loss relief

Under Korean tax law, tax losses can be carried forward for 15 years, although annual utilisation is capped at 80 per cent of annual taxable income (with an exception granted for SMEs and distressed companies).

8.3 Other taxes

8.3.1 VAT

Value-added tax (VAT) is imposed on the supply of goods and services. The applicable VAT rate is generally ten per cent, but zero-rated VAT is available for exported goods and services rendered outside Korea and for certain services provided to a non-resident in a foreign currency. In addition, VAT is exempted on daily necessities, financial and insurance services, and personal services as prescribed by law. The difference between zero-rated and exemptions is that VAT on goods and services purchased for the supply of goods and services subject to the zero-rated rate is deductible, while VAT on goods and services exempted from the exemptions is not deductible. If a company carries on a VAT-able business in Korea, it must register its business under the VAT Act, file a quarterly VAT return and pay all VAT collected from its customers during the relevant quarter, minus any VAT credit to which it is entitled (input VAT).

8.3.2 Securities transaction tax

Securities transaction tax is imposed on the transfer of shares. The securities transaction tax rate for publicly traded shares is 0.18 per cent (the tax rate will be reduced to 0.15 per cent from 2025 onwards), and the tax rate for unlisted shares is 0.35 per cent.

8.3.3 Acquisition tax

Acquisition tax is imposed on the purchase price of real estate, motor vehicles, construction equipment, golf memberships, etc. The acquisition tax rate varies depending on the type of assets, ranging from 0.96 per cent to 4.6 per cent. Where an investor acquires shares in a company and becomes a controlling shareholder of such company (ie, the investor and its related parties collectively own, in the aggregate, more than 50 per cent of the shares of the company) as a result of the share acquisition, such investor is deemed to have acquired real estate, etc, held by the company and is generally subject to deemed acquisition tax of 2.2 per cent (including surtax).

8.3.4 Registration and licence tax

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

8.3.5 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.

8.3.6 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.

8.3.7 Special excise tax

A special excise tax is levied on the production or trading of certain luxury items, alcohol and tobacco. In addition, property tax (a local tax) is charged on the statutory value of land, buildings, houses, vessels and aircraft, while comprehensive real estate holding tax (a national tax) is charged on the aggregate published value of land, buildings and houses exceeding a certain threshold.

8.4 Special incentives

8.4.1 Special incentives for inbound technology investments

The Special Tax Treatment Control Law provides various tax incentives to stimulate R&D activities. Tax credits are available for qualifying R&D expenditures used in the development of research and manpower. In addition, until the end of 2026, a 50 per cent CIT credit is provided for income resulting from the transfer of patents and eligible technology by SMEs. A ten per cent tax credit (up

to the value of acquired technology) is also provided to qualifying domestic companies merging or acquiring technology-innovative SMEs.

8.4.2 Integrated investment tax credit

Integrated investment tax credit provides a tax credit of one per cent of investment (five per cent for medium-sized enterprises and ten per cent for small and medium-sized enterprises) for fixed assets such as machinery and other fixed assets specified by law. A tax credit of three per cent of the investment (six per cent for medium-sized enterprises and 12 per cent for small and medium-sized enterprises) for new growth source technology commercialisation facilities and 15 per cent of the investment (25 per cent for small and medium-sized enterprises) applies for national strategic technology commercialisation facilities.

8.4.3 Other special incentives

In accordance with base erosion profit shifting (BEPS) initiatives, most direct tax incentives and benefits previously available for foreign direct investment were abolished by the Korean government under the 2019 tax reform. However, for foreign direct investments (excluding loan investments) stipulated by law, the application of a system where the central and local governments jointly pay a certain percentage of the investment amount in cash (up to 50 per cent according to the law, usually around 20 per cent) depending on the investment details and employment scale has been activated. In addition, the existing local tax and indirect tax incentives are maintained for qualifying foreign investors. Foreign investors are entitled to an exemption from acquisition tax and property tax on property acquired and owned for up to 15 years, and to an exemption from customs duties, VAT and individual consumption tax on imported capital goods.

8.5 Taxation of inbound investments

8.5.1 Withholding taxes

In general, interest, dividends and royalties paid to a non-resident company or individual are subject to 22 per cent withholding tax (inclusive of local tax). The rate may be reduced under applicable tax treaties. The Korean tax authority takes a conservative position in relation to the application of reduced treaty rates, which can differ depending on the beneficial owner of the Korean source income. As of July 2024, Korea has concluded double tax agreements with 95 countries. The Korean tax authority tends to challenge the use of treaty countries by non-treaty country residents by aggressively applying the substance-over-form principle to argue that entities established in favourable treaty countries are not the beneficial owners of the relevant Korean source income. A ‘beneficial owner’ is a person who bears legal or economic risk related to Korean source income and who, in substance, holds ownership rights over such income, including disposal rights.

8.5.2 Transfer pricing issues

The Korean tax authority closely monitors companies whose profitability suddenly drops or whose profits fluctuate over a number of years. The Korean tax authority is likely to scrutinise companies that have had significant business restructuring, as well as those paying substantial royalties or management service fees to foreign companies and companies with financial transactions with overseas-related parties. Korea is a member of the Organization for Economic Co-operation and Development (OECD) and generally follows the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines). However, the OECD Guidelines do not have the force of law, while the Law for the Coordination of International Tax Affairs (which governs transfer pricing) does. Accordingly, the Korean tax authority might not accept a taxpayer's arguments if they are based solely on the OECD Guidelines.

Chapter 9: Intellectual property

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9.1 Overview of the intellectual property rights system

Intellectual property refers to 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 (see 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 (for utility model rights, ten years after the filing date of the application for the utility model registration)
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	Marks that are widely known in South Korea Trade secrets	Well-known 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 their death

Table 1: Types of intellectual property

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

Matters pertaining to employee invention schemes are prescribed under Korea's Invention Promotion Act. In Korea, the requirements for an invention conceived by an employee to be

recognised as an employee invention, the following requirements ought to be met: (1) an employee shall create an invention with respect to their 'duties'; (2) the relevant invention shall fall under the 'scope of work' of an employer (user) given its nature; and (3) the relevant act of inventing shall fall under the 'current or past duties' of said employee. The employee invention scheme under the Invention Promotion Act applies to inventions, utility models and designs created by employees.

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.

In practice, Korean courts adopt the following basic formula for calculating employee's invention compensation:

> [Employee's invention compensation = Profits to be gained by the employer X Employee's level of contribution X Joint invention contribution rate]

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 scope of claim in applications shall include one or more claims to be warranted protection. These claims ought to be supported by explanation of the invention, and should be presented in a clear and concise manner. Also, the scope of claim ought to specify the structure, method, function, substance or their combination, as necessary to clarify the invention for clarification of any claim to be warranted protection.

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. 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 (ie, claim seeking damages, claim seeking restitution of unjust enrichment, claim seeking injunction or prevention against infringement, claim seeking restoration of creditworthiness, and claim seeking establishment of patent infringement offence under the Criminal Act).

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.

Under Korea's Patent Act, there exist various assumptive provisions given the substantial difficulty in proving the compensation amount in litigations seeking damages arising from patent infringement. In line with the amendments to the Patent Act in 2019, the 'punitive damages scheme' was introduced according to which a person who deliberately infringed another's patent was liable to compensate up to three times the damages amount. According to the Patent Act amended in 2024 and the UCPA, the compensation amount has increased up to five times the damages amount. Compared to other countries, Korea imposes the highest level of quintuple punitive compensation.

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 Patent Cooperation Treaty (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 World Intellectual Property Organization (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, image (ie, any shape or symbol indicated using digital technology or electronic methods)) 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. In addition, a design that consists solely of shapes essential for securing the function of a product cannot 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 a continuously changing object, such as a neon advertisement 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

In the event that a patent applicant requests said design to be kept confidential from the date of application for registration of design until the date of payment of initial design registration fee, 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.

The Supreme Court of Korea has ruled that, where a person registers a trademark identical or similar to another's previously registered trademark and uses it without consent from the first-to-file trademark holder, this constitutes infringement. This is true even if the invalidation of the later-filed

trademark has not been finalised. This decision overrules previous judicial precedent, which held that the use of a later-filed trademark did not infringe the first-to-file trademark until the invalidation of the later-filed trademark was finalised. The Supreme Court also has held that this finding applies to patent rights, utility model rights and design rights.

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 its 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.

However, notwithstanding the exhaustion doctrine, the lower court holds that trademark rights can be exercised if 'processing or repairs are made to the extent that it undermines the identicalness with the original product', considering it akin to actual production activity. In a related case where a repair service provider was asked by a customer to reform a luxury brand bag, transforming it into a bag and wallet completely different in size, shape and purpose of use from the original. The court determines that such action could be seen as 'processing or repair made to the extent that it undermines the identicalness with the original product'. Based on this, the court rules that the original trademark holder could exercise their trademark right, as exceptions to the exhaustion doctrine applies.

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;
- wrongfully using data;
- using personal identifiable marks, such as a portrait or name of a famous person, without authorisation (infringement of publicity right); 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.

Additionally, following the 2021 amendment, acts involving 'wrongful use of data' and 'unauthorised use of personal identifiable marks, such as a portrait or name of a famous person' are explicitly classified as types of unfair competition. The amendment to the UCPA enables the protection of data essential for learning in the development of artificial intelligence (AI). Furthermore, amidst continuing controversy surrounding the feasibility in the protection of publicity right, Korea's relevant statute is the first-ever to specify a clause on the feasible protection of publicity right.

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 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 Act and, therefore, is null and void. In order to determine the validity of a non-compete agreement, the following should be considered:

- the employer's benefits worthy of protection;
- the position of the employee before their resignation;
- the period, region and business type subject to the non-compete agreement;
- whether compensation was given to the employee;
- circumstances that led to the employee's resignation; and
- the public interest and the relevant circumstances.

9.5.3 Publicity right

Until recently, there were no regulatory provisions in Korea to serve as the basis for publicity rights, leading to divided court findings on whether to recognise publicity right and its legal basis on a case-by-case basis. In 2020, the court ruled that developing and reselling a photo book by using the names and photos of the popular boy band BTS without authorisation constituted an 'act infringing another's economic profit by unauthorised use of other deliverables that another generated based on their considerable investment or effort, for one's own business via means going against fair commercial trade practice or competitive order,' as prescribed as a supplementary general clause under the UCPA.

Under the UCPA amended in 2021, separate from portrait rights as personal rights, any act infringing 'identifiable marks, such as another's name, portrait, voice, or signature, etc that is widely known in Korea and possess economic value' (so-called publicity right) is classified as a type of unfair competition. Such infringement acts may be subject to a claim seeking injunctions, damages, or corrections, but are not subject to any criminal punishment.

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 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.

The Supreme Court ruled on a case where the plaintiff claimed that the defendant infringed on their copyright by imitating, producing, broadcasting and transmitting a video similar to the one created and broadcast by the plaintiff. The court founded that when determining the creativity of a reality TV programme, it is necessary to consider not only the creativity of each individual element comprising the programme but also how these elements are selected and arranged according to a specific production intention or policy. This combination should result in the programme having

a distinctive creative character that differentiates it from other programmes, thus qualifying it for copyright protection.

9.6.3 Responsibility of online service provider

An 'online service provider (OSP)' refers to '(i) a person who transmits or designates or provides connection of a route via an information and communications network, for the purpose of conveying copyrighted works, etc without any changes thereto as selected by a user between sections that the user designated' or '(ii) a person who provides services or who provides or operates relevant facilities to ensure that copyrighted works, etc are reproduced and transmitted by users through or by accessing an information and communications network.'

Pursuant to the Copyright Act, a person claiming copyright infringement through the services of an OSP can present such a fact and relevant evidences and request the OSP to stop the reproduction and/or transmission of copyrighted works. Upon receiving such a request the OSP is obligated to immediately halt the reproduction and/or transmission of the works. However, if the reproducer or transmitter being accused of copyright infringement, asserts that their act was justifiable and requests the resumption of reproduction or transmission to the OSP, the OSP must notify such fact and scheduled resumption date to the person alleging the copyright infringement and resume reproduction or transmission on said scheduled date, provided that the foregoing shall not apply where the person alleging the copyright infringement notifies the OSP on the filing of litigation prior to the scheduled date.

Meanwhile, the liability of an OSP for copyright infringement committed by users of its services, the court has that if the illegality of the infringing content posted on the OSP's internet space is evident, and the OSP has received specific and individual requests from the copyright holder to delete or block such content, the OSP is obligated to take appropriate actions. This obligation applies even if the OSP has not received direct requests from the copyright holder, provided that the OSP was aware of the circumstances of the posting or the existence of the infringing content was clearly apparent. Furthermore, if it is technically and economically feasible for the OSP to manage and control such content, the OSP must delete the infringing content and take measures to prevent similar content from being posted in the future. Failure to do so, thereby facilitating the copyright infringement, can result in the OSP being held jointly liable as an accomplice by omission for the infringing acts committed by the user who posted the content.

9.6.4 Effect and limitation of a copyright

A copyright is protected during the lifetime of the author and for 70 years after their 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 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 35-5) 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 case, the plaintiff may file for an injunction and claim damages against the copyright infringer, and even file a criminal complaint.

Chapter 10: Financing

Kyung Hwa Moon, 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 FSC 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, limitations on credit exposure to a single customer, loan-to-deposit ratios, and liquidity and risk management. Currently, there are no legal controls on interest rates on bank loans, except for the cap of 20 per cent per annum on interest rates under the Act on Lending Business.

10.1.3 Types of financial products

Under the 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:

such a transaction can be freely made without any approval or reporting requirements (eg, a Korean won-denominated 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

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 non-resident borrower, a Korean won-denominated loan from a Korean bank to a non-resident in an amount exceeding KRW 1bn (equivalent to US$750,000) 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 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 securities of a non-Korean issuer will be deemed as a public offering in the case where: (i) the securities (including shares and 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. KRX sends the notice of eligibility clearance within three months (65 business days) in case of an application being filed by a foreign applicant in case of an IPO, but within two months (45 business days) in case of secondary listing of the applicant which is already listed on one of the overseas markets designated by KRX.

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

Taeuk Kang, Bae, Kim & Lee, Seoul

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 Credit Information Use and Protection Act, which specifically regulates credit-related information of a person and industries that process such information.
- the Act on the Protection, Use, etc of Location Information, which regulates location information of things and natural persons; and
- the Act on Promotion of Information and Communications Network Utilisation and Information Protection (the 'IT Network Act'), which regulates transmission of advertising information and accessibility functions on mobile device, etc.

Unless otherwise provided for in industry-specific laws, the protection of personal information is governed by the PIPA. In early January 2020, the first wave of major amendments to the Korean data privacy laws were passed, which took effect on 5 August 2020, and the second wave on March 2023 vastly amended the PIPA, which came into effect on 15 September 2023. As the specific rules and regulations pertaining to the amendments have recently become available, 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

The PIPA applies generally to the collection and processing of personal data. The term 'personal data' refers to any 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 alone, but can be identified through a simple combination with other information) (Article 2.1, 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 consent must meet both formal and substantial requirements. Formal requirement wise, 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.

Substantially:

1. the data subject must be able to decide whether to consent based on their free will;
2. the content of the consent must be specific and clear;
3. plain and easy-to-understand language must be used; and
4. a method must be provided which allows the data subject to clearly indicate their consent or refusal.

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 their legal guardian due to:
   (i) the data subject's inability to express their intentions; or
   (ii) the data subject's address is unknown and so on (Article 15.1, PIPA).

Separate consent is required for collection and use, transfer to third party, use or transfer outside of the original scope of consent, processing of sensitive information and processing of unique identifying information. Separate consent is also required for promoting or soliciting the sale of goods or services, and 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, 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, 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.

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 in 2020

At the start of 2020, South Korea passed major amendments to key statutes governing the protection of personal data, which enabled and largely freed up the use of pseudonymised personal data, helped further clarify the latitude for the use of personal data, enhanced the right of the data subject and provided consolidation of the regulatory authority. These amendments took 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 were 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 allowed 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 also allowed 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 did 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 provided 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 were modelled after Article 5(1)(b) and Article 6(1)(f) of the EU General Data Protection Regulation (GDPR).

11.3.4 Consolidation of the regulatory authority

The regulatory oversight of data protection was divided among the Ministry of Interior and Safety, the Korea Communications Commission and the Personal Information Protection Commission (PIPC). This included such functions as monitoring and policing compliance, and promulgating the recommended practices and privacy policy terms. Under the amended PIPA, however, these functions were all entrusted to the PIPC. The nine-member PIPC comprise of government officials and various law and policy experts. This change in the regulatory apparatus was 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 were granted 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 introduced 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 still requires a host of ensuing rules and standards. Giving effect to these data subject prerogatives also resulted 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.

11.4 Major amendments to PIPA in 2023

11.4.1 Deletion of special provisions for information and communications service providers

The special provisions for telecommunication service providers have mostly been deleted under the principle of 'same activity, same regulation'. Previously, the PIPA had special provisions for telecommunication service providers with regards to consent to collection, notification of leakage, protection measures, deletion of data and overseas transfers, etc. As the regulations have been unified, the special provisions have been integrated and refined into general regulations and expanded to apply to all processors.

11.4.2 Expansion of the upper limit and scope of penalties

In the same context as above, the special provisions concerning penalties that were previously applied exclusively to telecommunication service providers have been deleted and generalised to apply to all data controllers.

Further, the most severe administrative sanction available for primary types of violations, such as collecting or transferring personal information without the required consent, has been an administrative fine of up to three per cent of the data controller's revenues 'relating to the violative conduct', normally meaning revenues relating to the affected service in Korea.

Under the amended PIPA, this maximum penalty has been strengthened to three per cent of the data controller's total revenues altogether – in other words, worldwide and across its entire range of revenues – provided that the total revenue excludes any portions that the PI controller proves are irrelevant to the violation.

11.4.3 Conditions and regulations for overseas transfers

The amended PIPA has broadened the conditions for overseas transfers of personal information by including cases (1) when specific provisions in laws, treaties, or other internation agreements exist, (2) when necessary for the conclusion or performance of a contract with the data subject, (3) when the recipient has received personal information protection certification and (4) when the country or international organisation to which the personal information is being transferred has a level of personal information protection that is substantially equivalent to that of domestic law.

At the same time, the Act imposed stricter regulations for violations by authorising the PIPC to order the suspension of overseas transfers.

11.4.4 Strengthening the rights of data subjects

Data subjects can request the transfer of their personal information to themselves or a third-party meeting certain safety standards. This applies to personal information processed by information devices but not to information separately generated from the collected data by the data processor.

Data subjects now have the right to refuse their personal information from being subject to fully automated decision-making (ie AI-powered decisions), when their rights or obligations are significantly affected. Additionally, data subjects can also demand explanations of automated decisions once such decisions have taken place.

Chapter 12: Competition law

Seung Hyuck Han, Yulchon, Seoul

12.1 Business establishment: merger control

Under the MRFTA, the merger filing obligation to the KFTC is triggered if the following thresholds are satisfied:

- The type of transaction caught:
  - 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/US$257.2m) or more; and
  - worldwide assets or turnover of the other party (including its affiliates) is KRW 30bn (approximately €22.9m/US$25.7m) or more,
- The size-of-transaction test:
  - the transaction value test: the transaction value is KRW 600bn or more; and
  - the Korean nexus text: (1) within the three years preceding the transaction, the target sold products or provided services to at least one million people in Korea in a single month during the period, or (2) within the three years preceding the transaction, the target (i) has leased Korean R&D facilities or has utilised Korean research personnel, and (ii) had an annual 'related budget' of at least KRW 30bn as spent and recognised as such on its financial records in any of the three years.
- For transactions involving a foreign company, the following local nexus test must additionally be met:
- the local nexus test: if both parties to the transaction are foreign companies, or if the notifying company is a Korean company while the counterpart company is a foreign company, each foreign 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. According to the voluntary merger remedy procedure, during the KFTC's merger review process, the merging parties may submit a written proposal to the KFTC outlining a remedy aimed at addressing any anti-competitive concerns stemming from the merger.

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;
- interfering with or restricting the establishment or expansion of facilities or installation of equipment necessary for manufacturing products or providing services;
- restricting the types or specifications of products manufactured or services offered;
- 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 or exchanging price, output or other information, including cost, inventory, sales volume and trade terms, terms of payment, as prescribed by the Presidential Decree.

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 (excluding a business entity with annual sales or purchases of less than KRW 8bn in a particular business area):

- 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.

Prohibitions on abuse of market dominance by online platform operators

Prohibitions on abuse of market dominance by online platform operators are governed by the KFTC's Review Guidelines on Abuse of Dominance by Online Platform Operators (the 'Online Platform Review Guidelines').

Applicability

- 'Online platform operators,' include (1) online platform mediation services, (2) online search engines, (3) SNS, (4) digital content providers, (5) OS providers and (6) online advertisement service providers.
- This extends to actions by foreign entities conducted overseas that impact the domestic (Korean) market.

Assessment

- Relevant market: the KFTC considers unique aspects of online platforms such as multi-sided markets, provision of 'free' services, and dynamic market conditions when defining the relevant market, in addition to standard relevant market considerations.
- Dominance: in assessing market dominance of online platform operators, the KFTC examines barriers to market entry due to cross-network effects, their role as gatekeepers, data collection, retention, use capacities, and potential for developing new services.
- Anticompetitive effects: when assessing the anticompetitive impact of online platform conduct, the KFTC considers:

- unique aspects of online platforms;
- factors beyond changes in prices and production volumes, such as decreases in quality and increases in user costs;
- the effects of bundling or tying products/services;
- relationships between user groups in different relevant markets; and
- impacts on innovation.

The Online Platform Review Guidelines also set out the following representative types of anticompetitive conduct by online platform operators:

- restricting multi-homing: any direct or indirect interference with the use of competing online platform services by users;
- demanding most favoured nation (MFN) treatment: requiring equally favourable or most favourable terms and conditions for its online platform services as offered for competing online platforms;
- self-preferencing: providing direct or indirect preferential treatment for its proprietary products and services on its online platform; and
- tying: conditioning the use of its online platform services on the use or purchase of another product or service.

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

Tony DongWook Kang, Bae, Kim & Lee, Seoul

Civil litigation is the most favoured method of dispute resolution for sizeable commercial disputes in South Korea, notwithstanding the fact that various alternative dispute resolution (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 a 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 motions, 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 United States), 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 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.