

Part 1 - Standard Clauses "Boilerplate" agreement: South Korea

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South Korea specific information concerning the key legal and commercial issues to be considered when drafting standard "Boilerplate clauses" for cross-border agreements.

This Q&A provides jurisdiction-specific commentary on *Checklist, Boilerplate clauses: Cross-border*, and forms part of *Cross-border contracts and boilerplate clauses*.

See also *Country Q&A, Part 2 - Standard Clauses "Boilerplate" agreement: South Korea* and *Country Q&A, Part 3 – Standard clauses "Boilerplate" agreement: South Korea* for more jurisdiction-specific commentary.

Recitals

1. In your jurisdiction, what information needs to be included about the parties at the start of an agreement?

The following information is usually included for both individuals and corporate entities:

- Name.
- Residential address or principal place of business.

In addition, the jurisdiction of incorporation or formation of a corporate entity is usually included.

No information is mandatorily required. It is sufficient to include any information which can identify the parties.

Interpretation

2. Is an Interpretation section usually included at the start of contracts in your jurisdiction?

An interpretation section is usually included for contracts that contain a number of defined terms. Defined terms are usually listed in alphabetical order. If the contract is in the English language, defined terms usually start with an upper case letter (the Korean language does not have upper case letters).

3. If Schedules are used, should they be expressly stated to form part of the agreement as set out in *Standard clause, Interpretation: Cross-border: clause 1.4* so that they are given full contractual effect?

This is advisable, but not mandatory.

4. In your jurisdiction, can an Interpretation section be set out in a Schedule attached to the main agreement?

Yes.

5. If non-technical terms are not defined in the agreement, will the court interpret them in accordance with their ordinary and natural meaning?

The court will interpret non-technical terms in accordance with their ordinary and natural meaning, unless it is clearly proven that the parties had a different meaning in mind. The court may require expert evidence for non-defined technical terms.

6. Are holding company and subsidiary defined under the laws of your jurisdiction?

The terms "holding company" and "subsidiary" are defined under the law, but the definitions may vary depending on the relevant statute. Examples of definitions include those in the Commercial Code and the Monopoly Regulation and Fair Trade Act.

Under the Commercial Code, a "parent company" is defined as "a company holding more than a half of the total issued and outstanding shares in another company", in which case the other company will be deemed a subsidiary of the parent company.

Under the Monopoly Regulation and Fair Trade Act:

- A "holding company" is defined as a company that, as its main business, controls any domestic company's business through the ownership of shares. To qualify as a holding company, the following conditions must be met:
 - the total assets of the company must exceed KRW500 billion;
 - the aggregate value of shares of subsidiaries held by the company must exceed 50% of the total amount of its assets; and
 - the company must own not less than 40% (20% if the subsidiary is a listed company) of the total number of shares in a subsidiary.
- A "subsidiary" is defined as a domestic company the business of which is controlled by the holding company. "Control" is established either:
 - when a person holds, independently or in concert with affiliated parties, not less than 30% of a company's total number of shares, and the person is the largest shareholder of the relevant company; or
 - by exercising a controlling influence on the management of a company (for example, by appointing representative directors or the majority of directors).

The term "Affiliate" is often used to define both holding company/ies and subsidiary/ies. The parties are free to define this term as they choose in commercial contracts.

7. Is it common in your jurisdiction to define "Business Day" for notice provisions by reference to days when banks are closed/open?

Yes.

8. Are moral rights recognised in your jurisdiction? If so can moral rights be assigned or licensed in your jurisdiction? If so, can they be included in the definition of "Intellectual Property Rights" in *Standard clause, Interpretation: Cross-border*?

Moral rights are recognised in South Korea. Moral rights cannot be assigned or licensed. Along with economic rights, they are generally included in the definition of "Copyrights", which are part of "Intellectual Property Rights". Therefore, the definition of "Intellectual Property Rights" in *Standard clause, Interpretation: Cross-border: clause 1* cannot be used as the basis of an assignment or licence of intellectual property without excluding moral rights.

9. Are warranties understood and commonly used in your jurisdiction? If not, is there any other legal concept or wording that is used to similar effect? Can the definition of "Intellectual Property Rights" in *Standard clause, Interpretation: Cross-border* be used in a warranty that IP rights have not been infringed?

Warranties are understood and commonly used. The definition of "Intellectual Property Rights" in *Standard clause, Interpretation: Cross-border: clause 1* can be used in a warranty that IP rights have not been infringed.

10. Is value added tax (VAT) or another service tax payable in your jurisdiction? Please state the name of the service tax, if any.

Value added tax (VAT) applies in South Korea.

11. What is the legal definition of "a person" in your jurisdiction? Does the wording in *Standard clause, Interpretation: Cross-border: clause 1.3* cover this or does it need to be amended in any way?

Standard clause, Interpretation: Cross-border: clause 1.3 can be used without amendments. However, "governmental institution" is sometimes included in the definition.

12. Does the wording in *Standard clause, Interpretation: Cross-border: clause 1.5* provide an effective definition of "company" in your jurisdiction?

The wording in *Standard clause, Interpretation: Cross-border: clause 1.5* can be used as a definition of "company" in South Korea. The following types of legal entity are recognised, in addition to sole proprietorships:

- General partnership.
- Limited partnership.
- Limited liability company.
- Limited company.
- Corporation.

(Article 170, Commercial Code.)

Unincorporated associations are not included in the definition of "a company" under the Commercial Code. However, they can qualify as persons depending on their organisation. Cooperative is another form of the company recognised by the Cooperative Act. In addition, there are also special corporations recognised under various statutes.

13. If an agreement is silent on whether fax or email or other forms of electronic communication is to be treated as writing (for example, for the purpose of giving written notice), do the laws in your country infer that fax and email are included?

The Act concerning Electronic Documents and Electronic Transactions recognises electronic documents as writing, unless otherwise provided for in a relevant law.

However, there is at least one Supreme Court case which held that email may or may not, depending on circumstances, satisfy the statutory requirement that notice of dismissal be given in writing.

No other wording is required to make *Standard clause, Interpretation: Cross-border: clause 1.12* effective.

14. *Standard clause, Interpretation: Cross-border: clause 1.19* seeks to address the risk of the *ejusdem generis* rule. Does your jurisdiction apply the *ejusdem generis* (or *eiusdem generis*) rule (that is, where a general provision is qualified in any way by confined examples, the court will interpret the general words only to relate to matters of the same class as the examples given)?

South Korea does not expressly recognise the *ejusdem generis* rule. When interpreting contractual provisions, the South Korean courts will consider the overall context and language. However, it is good practice to include the wording of *Standard clause, Interpretation: Cross-border: clause 1.19*.

Conflicts

15. In your jurisdiction, where a contract is based on a standard form, but the parties have added special conditions, if any conflict arises between the standard terms and the special conditions, will the standard terms or the special conditions prevail in the absence of specific wording in the agreement (*Standard clause, Conflicts/Priority: Cross-border: Option 1*)?

The special conditions will prevail, even in the absence of specific wording in the agreement.

16. Where there is a genuine discrepancy between the contractual documents before the court, how does the court approach the order of precedence?

If there is a priority clause, the court will apply it. If there is no priority clause, the court will consider factors such as the:

- Wording of the clauses at issue.
- Extent and nature of the discrepancy.
- Context in which the discrepancy arose.

The court will decide which clause more closely reflects the intention of the parties on a case-by-case basis.

Variation

17. In your jurisdiction, are there any specific barriers to the effectiveness of this variation, *Standard clause, Variation: Cross-border*? Can the conduct of the parties override the contractual requirement for a variation to be agreed in writing?

There is no specific barrier to the effectiveness of the variation *Standard clause, Variation: Cross-border*. However, depending on circumstances, the court may hold that the agreement has been changed by the conduct of the parties, even if the contract contains a variation clause such as *Standard clause, Variation: Cross-border*.

18. What are the requirements in your jurisdiction for a valid variation of an agreement?

No particular formalities are required (other than as required under the contract for a variation to be effective). No payment or other consideration is required. No formal execution by deed is required.

Severance

19. Does illegality render a contract valid but unenforceable or would the contract become invalid for illegality in your jurisdiction?

Illegality may render the contract invalid or unenforceable, depending on the nature and degree of the illegality.

20. In your jurisdiction is some degree of severance applied by the courts even if no severance clause is expressly written into the contract? If so, in what circumstances?

The South Korean courts may apply some degree of severance, even if no severance clause is included in the contract. It is however advisable to include an express severance clause in commercial contracts.

If only part of a legal act is invalid, the entire legal act will be invalidated (*Article 137, Civil Code*). However, the valid part will remain effective if the parties would have proceeded with the legal act regardless of removal of the invalid part.

21. Is an obligation to negotiate a substitute of an equivalent but valid clause enforceable in your jurisdiction (*Standard clause, Severance: Cross-border: clause 1.2*)? Is it only enforceable if the substitute wording is easily ascertainable?

Such an obligation is generally enforceable. However, the courts will consider on a case-by-case basis whether, in the specific circumstances, it is reasonable to enforce the provision against the parties. If substitute wording is not easily ascertainable, the inclusion of the obligation to negotiate will provide some leverage to the party seeking to rely on it.

22. Are there any legal provisions in your jurisdiction that deal with severance of certain terms?

See [Question 20](#).

Counterparts

23. Is a document signed in counterpart validly executed in your jurisdiction? Are the counterparts treated as a single document? Is each copy of the agreement signed in counterpart considered to be an original?

Documents can be validly executed in counterparts. Each copy of the agreement signed in counterpart will usually be considered to be a single original document. The absence of a counterparts clause will not invalidate an agreement executed in counterparts.

24. In your jurisdiction, are there any limitations to the methods of electronic delivery of counterparts? Is delivery of the whole counterpart required or can only delivery of the signature page be acceptable (see *Standard clause, Counterparts: Cross-border, clause 1.2*)?

There are no limitations to the methods of electronic delivery of counterparts. Delivery of the signature page is acceptable if the rest of the documents are ascertainable.

25. Where an agreement provides for the agreement not to take effect until each party has executed one counterpart, as set out in *Standard clause, Counterparts: Cross-border, clause 1.3*, could this create a risk that the parties do not intend to be bound by the written agreement until it is executed by each party?

Such a provision will create a risk that the parties do not intend to be bound until the written agreement is executed by each party. This is likely to have an effect similar to a "subject to contract" effect, although "subject to contract" effect is not generally an issue in South Korea. There is no equivalent terminology for "subject to contract".

26. Is a duty or other tax payable on counterparts or duplicates of contracts in your jurisdiction?

Certain documents listed in the Stamp Duty Law are subject to stamp duty on each counterpart (for example, a loan document to which a financial institute is a party).

Language

27. Is there any requirement in your jurisdiction that commercial contracts must be written in the local language in order to be valid and enforceable?

There are no language requirements.

28. Under the laws of your jurisdiction, will the local language version of any agreement prevail or can the parties agree which version will prevail over the other (*Standard clause, Language: Cross-border: clause 1.3*)?

The parties can agree on which version will prevail (that is, the local language version is not given any priority).

29. If a commercial agreement needs to be submitted for government approval in your jurisdiction, in what language should it be submitted? Could an English version of the document be approved?

A contract in a foreign language that needs government approval must generally be submitted with a Korean translation, subject to some exceptions. Therefore, an English version of the document can be generally approved if submitted with a Korean translation.

Governing law and jurisdiction

30. Does the law in your jurisdiction dictate (a) which governing law will apply to commercial agreements and (b) in which jurisdiction any dispute will be heard?

In general, the parties can freely agree on the governing law, competent jurisdiction and dispute resolution method, subject to certain restrictions under the Law of Conflicts.

Mandatory provisions of South Korean laws will prevail over the governing law stated in the agreement pursuant to Article 7 of the Act on Private International Law. Mandatory provisions in South Korean law usually concern public policy or social norms.

An agreement that provides for the exclusive jurisdiction of a foreign court will be effective if the following conditions are met:

- The dispute must not be subject to the mandatory exclusive jurisdiction of a South Korean court.
- The foreign court must have jurisdiction over the dispute under the applicable foreign law.
- The dispute must have a reasonable nexus with the foreign court.
- The agreement must not violate public policy or social norms.

In general, an agreement that provides for the exclusive jurisdiction of the courts of the country of one party is very likely to be enforceable.

31. Are jurisdiction clauses that are for the benefit of one party (as in *Standard clause, Jurisdiction: Cross-border, Option 2 of clause 1.1*) enforceable in your jurisdiction?

Jurisdiction clauses that are for the benefit of one party are enforceable.

32. In your jurisdiction, would the courts give effect to *Standard clause, Jurisdiction: Cross-border, Option 3 of clause 1.1*, where the parties set out a reciprocal agreement to bring proceedings in the court wherever the defendant is domiciled?

This provision would be enforceable.

Execution and other formalities

33. How does this agreement need to be executed in order to ensure that it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

Execution formalities

Contracts are generally not required to be executed in any particular manner. Contracts need not be notarised or apostilled.

Registration formalities

Contracts are generally not required to be registered with any authority.

General

34. Are there any standard clauses in *Cross-border border contracts and boilerplate clauses* that are not legally valid or not standard practice in your jurisdiction?

All the "boilerplate" clauses would be legally enforceable and standard practice in South Korea.

35. Are there any other standard clauses that would be usual to see in an agreement and/or that are standard practice in your jurisdiction?

There is no other clause that would be usual to see in a "boilerplate" agreement and/or that is standard practice in South Korea.

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