Part 3 – 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 country-specific commentary on *Checklist, Boilerplate clauses: Cross-border*, and forms part of *Cross-border contracts and boilerplate clauses*.

See also *Country Q&A, Part 1 - Standard clauses "Boilerplate" agreement: South Korea* and *Country Q&A, Part 2- Standard clauses "Boilerplate" agreement: South Korea* for more country-specific commentary.

Force majeure

1. Does *force majeure* have an established meaning in your jurisdiction? If so, what is it? Is it acceptable to define *force majeure* as being any circumstances beyond a party's reasonable control? (see *Standard clause, Force majeure: Cross-border: clause 1.1*)

Force majeure has an established meaning in South Korea. *Bulgahangryeok*, which literally means "being any circumstances beyond a party's reasonable control", is recognised in Articles 308 and 314 of the Civil Code, and other laws, although its definition is not specifically standardised under South Korean law.

It is common practice to specify the events of *force majeure* in the agreement as is done in Standard clause, *Force majeure: Cross-border: clause 1.1*. The list in *Standard clause, Force majeure: Cross-border: clause 1.1* covers all the events one would normally expect to see.

2. In your jurisdiction, can the agreement between the parties provide that the *force majeure* event will (a) release and/or (b) suspend a party from its obligations?

Yes.

3. Is it a legal requirement to notify the other party of any non-performance due to a *force majeure* or similar event in your jurisdiction? If so, is written notice required and are there any other formal requirements or time limits within which notification must take place?

There is no specific statute that requires a party to do this. However, under the principle of good faith, which is generally recognised for all contracts, it is likely that a party would have such an obligation if it was reasonably foreseeable at the formation of the agreement that the other party would expect such notice, because of the characteristics or other terms of the agreement. No formalities are required, although written notice is recommended. *Standard clause, Force majeure: Cross-border: clause 1.4(a)* should be effective as written.

4. In your jurisdiction, is a duty to seek to mitigate loss implied onto parties seeking to rely on a *force majeure* clause?

Parties do not have a specific duty to mitigate their losses. However, if a party seeking damages fails to mitigate their losses in the circumstances of a *force majeure* event, this must be taken into account by the court in determining the amount of damages to be indemnified by the other party. As this duty is not directly imposed by law, it is good practice to expressly state it in the agreement.

This duty can be limited by reasonableness, as set out in *Standard clause, Force majeure: Cross-border: clause 1.4*.

Assignment and other dealings

5. Does the law in your jurisdiction recognise the concept of a personal contract (that is, a contract where the identity of the counterparty is a critical element in addition to simply meeting its contractual obligations)? Can a personal contract be assigned?

Yes, although there is no specifically established legal term for this. A personal contract cannot be assigned if its nature does not so permit this (*Article 449(1), Civil Code*).

6. In your jurisdiction can a party assign its obligations under a contract (also referred to as the burden) or only its rights (the benefit)?

Unless prohibited by the nature of the contract or the law, a party may assign its obligations to a third party, if the counterparty consents to this (*Article 454, Civil Code*). Likewise, unless prohibited by its nature, a contract or the law, a party may assign its rights to a third party, subject to certain formalities such as notification to, or consent of, the obligor.

7. In your jurisdiction, does the law restrict assignments in consumer contracts and contracts relating to land? Are there any other types of contracts where assignment is restricted?

A contract of any type can be validly assigned to a third party, so long as the requirements for assignment, such as a prior consent by the other party, are satisfied and the assignment is not contrary to public order and good morals.

8. In your jurisdiction, will clearly drafted express non-assignment provisions be effective? Can they be circumvented?

Clearly drafted express non-assignment provisions are effective. They may be circumvented only if they are found to be null and void for being contrary to public order and good morals.

9. Does national law provide that assignment needs consent from another party in order to be effective? If so, which other party(ies)?

See *Question 6* and *Question 7*.

Confidentiality

10. Does *Standard clause, Confidentiality: Cross-border* provide the disclosing party with adequate protection in your jurisdiction?

Standard clause, Confidentiality: Cross-border should be effective in South Korea, and more provisions can be added for additional protection. For example, provisions could be included requiring the receiving party to return the documents upon request or upon termination of the contract. The receiving party could also be required to obtain written confidentiality commitments from its personnel who have access to confidential information.

11. In your jurisdiction, is there a standardised or statutory definition of "confidential" in the context of confidential information?

There is no standardised or statutory definition of "confidential". However, the term "trade secret" is defined as information, including a production method, sale method, useful technical or business information for business activities, that:

- Is not known publicly.
- Is the subject of reasonable efforts to maintain its secrecy.
- Has independent economic value.

(*Article 2(2), Unfair Competition Prevention and Trade Secret Protection Law*.)

There is a risk that the court will not uphold a definition of confidential information in a contract if it is too broad and is therefore contrary to public order and good morals.

Announcements

12. Is it common practice to include *Standard clause, Announcements: Cross-border* in contracts in your jurisdiction?

It is not uncommon to do this.

Entire agreement

13. Is it common practice to include such a *Standard clause, Entire agreement: Cross-border* in contracts in your jurisdiction to prevent parties to an agreement raising claims that pre-contractual negotiations constitute additional terms of the agreement?

It is common to include a clause like *Standard clause, Entire agreement: Cross-border*. It is not necessarily common to include *Standard clause, Entire agreement: Cross-border: clause 1.2*.

14. Is the concept of misrepresentation recognised in your jurisdiction (*Standard clause, Entire agreement: Cross-border: clause 1.2*)? Is reliance a required element for a misrepresentation claim? Are there any other requirements?

Yes, this concept is generally recognised in South Korea. A recent Supreme Court decision has held that reliance is not a required element for a misrepresentation claim. There is no other requirement other than misrepresentation, loss and causation between the misrepresentation and the loss.

15. Is a non-reliance statement recognised and usually included in an entire agreement clause in your jurisdiction?

A non-reliance statement will be recognised, but is not usually included in agreements.

16. Are remedies specifically available for innocent and negligent misrepresentation under your laws?

Rescission is available for innocent and negligent misrepresentation, if the other party is mistaken with respect to an element of the contract as a result of the misrepresentation (*Article 109, Civil Code*).

17. Is the concept of fraudulent misstatement or fraudulent misrepresentation recognised in your jurisdiction? Can adding an exclusion for claims of fraudulent misstatement cause the entire *Standard clause, Entire agreement: Cross-border* to be invalid?

Fraudulent misrepresentation may constitute fraud (*Article 110, Civil Code*). Adding an exclusion for claims of fraudulent misstatement may not cause the entire *Standard clause, Entire agreement: Cross-border* to be invalid, according to the legal principle of partial nullity.

The exclusion itself can be null and void for being contrary to public order and good morals. Article 137 of the Civil Code specifically provides for the principle of partial nullity by stating that "where a part of a juristic act is null, the entire part of the juristic act shall be made null; provided, that where it is deemed that the juristic act would have been done even if the null part had not existed, then the rest of the act shall not become null."

No partnership or agency

18. In your jurisdiction, is the risk of an unwanted partnership or agency relationship recognised when parties enter into a commercial agreement? If so, is this *Standard clause, No partnership or agency: Cross-border* an effective and acceptable way to address that risk and exclude any implied authority for one party to an agreement to bind the other?

Yes, so called "apparent authority" is recognised under Articles 125, 126 and 129 of the Civil Code. Including a clause such as *Standard clause, No partnership or agency: Cross-border* in an agreement is an effective and acceptable way to address the risk and to exclude implied authority that may arise, although it is not perfect to address the risk. It is not perfect because, if a third party who is not aware of the existence of the clause reasonably believes a party to the contract has the authority based on the conduct of the other party, an apparent authority may still be recognised.

19. Does your jurisdiction recognise fiduciary duties being owed in partnership and agency relationships?

Articles 681 and 707 of the Civil Code recognise fiduciary duties being owed in partnership and agency relationships.

20. In your jurisdiction, can authority to bind the other party(ies) in a joint venture be implied?

No.

21. Is it common for companies incorporated in your jurisdiction to elect to be treated as partnerships for tax purposes?

This is not common. Only limited liability corporations (*yuhan chaegim hoesa*) can be treated as partnerships for tax purposes.

Third party rights

22.In your jurisdiction, can a third party acquire any rights in a contract? How can a third party acquire such rights?

A third party may acquire rights, if this is agreed by the parties to the contract and the third party declares to the promisor their intention to accept the benefit of the contract (*Article 539(2), Civil Code*). The parties do not need to expressly include or exclude these rights in the agreement, so long as they are ascertainable.

23. In your jurisdiction, can a person who is not a party to a contract have a right to enforce the terms of that contract? If so, can this only be done in accordance with the other contract terms?

Yes, but only when the third party has the right as provided in the contract, and where this would be in accordance with the other contract terms.

24. In your jurisdiction, can the rights of the third party be automatically:

- a) subject to an arbitration clause?
- b) subject to defences that the contracting parties might have used against each other, or against the third party if it had been a party to the contract?

(a) Yes, but only if the third party agrees to accept the benefit of the contract (*Article 539(2), Civil Code*).

(b) Yes, the rights of a third party can be automatically subject to defences that the promisor might have against the other party to the contract (*Article 542, Civil Code*).

25. In your jurisdiction, if a contract creates an enforceable third party right, is that third party's consent required to vary or amend the contract so as to effect any third party right? Can such consent be expressly excluded in the contract terms?

The rights of a third party that have come into existence in accordance with the provisions of Article 539 of the Civil Code cannot be altered or extinguished by the parties without the consent of the third party (*Article 541, Civil Code*). Such consent can be expressly excluded in the contract terms.

26. Under legislation in your jurisdiction, can contract terms impose obligations on a third party?

No.

Multi-tiered dispute resolution

27. Does the law in your jurisdiction recognise an agreement to negotiate or an agreement to settle disputes amicably (*Standard clause, Multi-tiered dispute resolution: Cross-border: clause 1.1*)?

Yes.

28. In your jurisdiction, must the obligation to mediate be expressed as a condition precedent to litigation or arbitration to be enforceable (as set out in *Standard clause, Multi-tiered dispute resolution: Cross-border: clause 1.4*)?

Yes.

Mediation

29. Is CEDR a recognised mediation body in your jurisdiction as referred to in *Standard clause, Mediation: Cross-border: clause 1.1*? Please specify any other national or international mediation organisations in your jurisdiction.

There are no international mediation organisations established in South Korea, although the Korean Commercial Arbitration Board, which is the most commonly used arbitration centre, also conducts mediation. Mediation by the courts is common.

Arbitration

30. In your jurisdiction, does an arbitration have to be conducted within a legal framework? If so, please outline what this is.

The Arbitration Act sets out the legal framework for arbitration in South Korea. Parties to arbitration are free to determine the number of arbitrators by agreement. If there is no agreement by the parties, the number of arbitrators will be three (*Article 11, Arbitration Act*). In arbitral proceedings with not less than three arbitrators, any decision of the arbitral tribunal must be made by the resolution of a majority of its members, unless otherwise agreed by the parties (*Article 30, Arbitration Act*). Questions of procedure may be solely decided by a presiding arbitrator, if this is agreed by the parties or authorised by all members of the arbitral panel.

An arbitral tribunal can make awards in accordance with such rules as are designated by the parties as applicable to the substance of the dispute (*Article 29(1), Arbitration Act*). Any designation of the law or legal system of a given state will be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to the International Private Act of Korea (which is the statute on the conflict of laws, providing general principles for the determination of applicable laws in matters involving foreign factors).

An arbitral tribunal can decide a case *ex aequo et bono* (that is, according to what is fair and just given the particular circumstances, rather than strictly according to the rule of law) only if the parties have expressly authorised it to do so (*Article 29(3), Arbitration Act*). The tribunal must decide in accordance with the terms of the contract and take into account the usages of the trade applicable to the transaction (*Article 29(4), Arbitration Act*).

31. Which arbitration centres are most commonly used for domestic disputes in your jurisdiction? Can this arbitration body deal with international disputes?

The Korean Commercial Arbitration Board is the most commonly used arbitral centre in South Korea. It can deal with international and domestic disputes.

32. When dealing with international disputes do the rules of your arbitration body provide for confidentiality by the parties?

Arbitration proceedings and records of them must be closed to the public (*Article 57(1), KCAB International Arbitration Rules*).

33. Do the rules of your arbitration body provide for a sole arbitrator or a panel of arbitrators to be appointed (*Standard clause, Arbitration: Cross-border*)?

The parties may choose between a sole arbitrator and a panel of three arbitrators (*Article 12, KCAB International Arbitration Rules*).

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