CIVIL LITIGATION

1. **In what language(s) may court proceedings be conducted? What arrangements can be made for translation/interpreter services?**

   Court proceedings in Korea are conducted in Korean and documents submitted to the court must either be drafted in Korean or accompanied by a Korean translation. Translation must be arranged by the party submitting the document and that party must also meet all costs relating to the required translation. Documents submitted in other languages without translation are unlikely to be considered.

   Proceedings are also conducted exclusively in Korean. Any party can request the services of an interpreter for Court proceedings. The interpreter is appointed by the Court and the costs of the interpreter are considered to be litigation expenses, which are subject to final allocation by the Court. However, the Court can request advanced payment of the interpreter's costs from the party making the request.

2. **What types of pre-action measures are available and what are their limitations? Must you send a warning letter before issuing any proceedings?**

   There are no statutory pre-action proceedings required under Korean law or regulations and there is no formal requirement to send a warning letter to the counterparty prior to commencing proceedings (although an initial warning letter is often sent).

   Common pre-action measures include making an application for provisional attachment of the counterparty's assets (to preserve a monetary claim) or for a preliminary injunction or injunctions (to preserve claims other than a monetary claim). The Korean courts process these *ex parte* (i.e. swiftly and without notice to the other party) and decisions are based solely on evidence presented by the applicant (resulting in a lower burden of proof than in ordinary proceedings). However, if serious loss will result from an application (for example, an injunction to stop infringement of intellectual property rights) or a provisional disposition setting a temporary status may be issued, a hearing or hearings may take place.

   The application will usually be granted if the court decides that such measures are necessary to prevent irreparable damage or imminent violation of legal rights. The applicant may be required to provide deposit security to the court by way of refundable cash deposit and/or security bond.

3. **What are the costs of civil and commercial proceedings? Who bears the costs?**

   The plaintiff in civil and commercial proceedings is required to pay court costs of approximately 0.4% of the claim amount (through stamp duty) together with a small amount to cover administrative costs. Litigation costs include fees for service of process, costs incurred in examination of evidence (including witness expenses, fees for experts providing evidence etc.) and attorneys' fees.

   Litigation costs are generally borne by the losing party. However, where a proceeding results in a partial victory to one party, the court retains the discretion to apportion the litigation costs between the parties as it deems appropriate. The court also retains the power to allocate costs to a successful party, where litigation costs have been incurred as a result of unnecessary actions taken by the successful party or because costs are otherwise attributable to the successful party.

   Recovery of attorneys' fees incurred in relation to proceedings is limited by the Supreme Court regulations, which include a series of caps on the amount recoverable depending on the claim amount. Full recovery of attorneys' fees is usually not possible as a result of these restrictions.

4. **What are the basic rules of disclosure of documents in civil and commercial proceedings? Which documents do not require disclosure? Is electronic disclosure of documents normal?**

   Parties are under no obligation to retain documents when litigation is in prospect and there are no sanctions for failure to retain documents in these circumstances. The Korean Civil Procedure Act does not provide for "discovery" through processes such as depositions and interrogatories and parties are not required to exchange evidentiary documents with each other prior to hearings.

   Parties are supposed to submit documents where they bear the burden of proof but are free to decide what evidence to submit. Parties may choose not to

submit evidence that would be to their disadvantage even if such evidence is in their position.

While there is no formal "discovery" process, parties may acquire evidence through applying to the court for an 'order of document submission,' which orders a party to the lawsuit or a third party to submit particular documents as specified by the applicant and approved by the court. Circumstances under which such an order will be made by the court include, when a party has a document that they have cited in their argument (but not submitted), where the party making the request has the legal authority to request a transfer of, or access to the document requested from the party in possession or where the document was created for the benefit of the requester or as a result of the relationship between the requested and the party holding the document.

Failure to comply with such an order by a third party can result in a fine of up to five million Korean Won. If a party to a dispute refuses a Court order, the Court may find the requesting party's arguments in respect of the relevant document (which the party subject to the order has refused to submit) to be true.

Unlike in the common law discovery system, an order for document submission must at least indicate the document requested and cannot simply seek "all documents that the opposing party possesses in relation to the case". The court can however, request that a party list the documents in its possession. The approval of the order (and the documents requested) is at the sole discretion of the court.

A party or third party may object to the court issuing an 'order for document submission', where the documents may be privileged, involve senior government figures or may contain confidential information relating to technology or a profession. There are no rules or precedents in relation to privilege for attorneys working in-house.

Parties may also acquire evidence through a 'request for document delivery.' Under this system the court makes a request to a third party (usually a public institution) asking the third party to submit a specific document or documents to the court.

There are no particular rules relating to the exchange or disclosure of electronic documents in Korea, as there is no formal discovery stage under the South Korean legal system. However, as of May 2011, parties may elect to submit legal briefs and supporting evidence to the Court electronically in PDF form. Additionally, printed versions of electronic documents (such as emails), may be printed and submitted as evidence.

5. What is the process for witness evidence (namely, is it deposition based in advance, or witness statement, or examination or cross-examination)? Can a witness be compelled to attend to give evidence?

Korean civil litigation procedure has no concept of pre-trial discovery or interrogatories. The central principle is that the court and the judge (or judges) are the chief fact finders and must be present when evidence is presented whether in written or oral form. Therefore, evidence must be submitted to the court directly, either orally at a hearing or in written form.

While South Korea generally has no process for pre-trial depositions or interrogatories, there is a 'preservation of evidence' process by which witness testimony can be collected either prior to filing a complaint or outside of scheduled court hearings. A request for the examination of a witness as part of the 'preservation of evidence' process can be made prior to an action is filed with the court. For example, if a witness is seriously ill or is intending to move overseas, a request can be made to the District Court where the relevant witness to be examined resides to have the evidence collected from the potential witness.

Witnesses are generally only expected to give oral testimony at the hearing in front of a judge. Perjury in the court will result in imprisonment of five years or less, or a fine not more than ten million South Korean won. However, perjury only applies to oral evidence given in court and does not apply to written statements (unless the witness giving the written statement subsequently orally affirms that the statement is correct at a hearing before the judge).

The procedure for the examination of a witness at a hearing provides that a witness will first take an oath to the court. The party who requested that the witness give evidence will then examine the witness first, followed by the opposing party's cross-

examination of the witness. Where a party's questioning is repetitive or is not related to the issue at hand, the court may restrict the party's examination. As parties can submit to the court a list of questions for a particular witness as an attachment to the application for the witness to be called, the parties can plan for the cross-examination of a witness. Following cross-examination, the lawyer for the party calling the witness, will have a further opportunity to redirect the witness.

If there is more than one witness, each witness must be separately examined and only the witness being examined may remain in the courtroom. The court may order the examination of a witness in the presence of other witnesses, if the court finds it necessary. The court may also order a witness to handwrite specific characters or perform a specific act on the witness stand, where necessary.

While examination of a witness is generally undertaken by way of oral examination in court, 'witness testimony in written form' may be accepted in some circumstances. Where 'witness testimony in written form' is accepted by the court, no cross-examination of the witness will be required. 'Witness testimony in written form' may be admitted, if the court determines that the witness and the matter involved in the testimony is appropriate. Generally the testimony will be appropriate if there is no need for cross-examination of the witnesses, as in the following cases: (a) when the statement does not concern the actual dispute but is based on the factual details and the circumstances related to the case, (b) when the statement explains medical or accounting records created based on professional knowledge of the witness, and (c) when the statement explains the chronological development of issues between the parties that have occurred over an extended period of time. As the offence of perjury does not apply to 'witness testimony in written form' as there is no supporting oral testimony, these written statement are generally only given in relation to non-contentious issues.

Additionally, a method called 'submission of a witness statement' may also be used to include written evidence. Where a witness is favorable to particular party to the lawsuit, the direct examination process of that witness by the lawyer introducing the witness's evidence can be simplified. The witness's testimony can be recorded in chronological order and is then signed by the witness. The party then provides the signed witness statement to the court.

A copy of the witness statement is subsequently provided by the court to the opposing party. When the witness gives evidence before the court they will firstly be asked to confirm that the prepared written statement is correct under oath (thus confirming that the evidence given in the written statement is true and triggering a potential offence of perjury if information in the statement is false). Having confirmed the statement, the witness is then be cross-examined by the lawyer for the opposing party.

A person designated as a witness has the obligation to appear in court as witness. There are restrictions on questioning senior political and judicial figures and public officials and consent may need to be obtained in these circumstances. In the event a witness fails to attend court, they may be subject to a fine of up to five million won, and if they fail to attend court even after imposition of fine, they may be sentenced to imprisonment for a term of up to seven days. The court may also arrest a witness who fails to appear in court. Witnesses may refuse to be examined in relation to internal confidential information where: (a) the witness testimony is likely to be used as evidence of guilt on the part of the person themselves, the witness's relative, guardian or ward, or (b) a witness-to-be is a lawyer, patent attorney, public notary, CPA, doctor, or any other person who has duty to keep the information confidential.

6. How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties/counsel privileged (i.e: may not be disclosed to the court)?

There are no specific rules under Korean law restricting how settlement discussions may take place. Direct settlement discussions can be undertaken at any time between legal representatives or directly between the parties.

The court may also promote or encourage settlement to the parties at a hearing. The Court may take a pro-active role in encouraging parties to settle by: (a) asking the parties to settle during a hearing (b) transferring a case to the formal

conciliation process and suspending the suit or (c) making a written recommendation for settlement. If the Court makes a written recommendation for settlement the parties have fourteen days to object, if neither party objects during this time the recommendation becomes binding. Settlement correspondence may be disclosed to the court unless both parties agree to the non-disclosure.

7. How can foreign judgments be enforced?

The Korean Civil Procedure Act and Civil Execution Act set out the requirements for a foreign judgment to be recognized by a Korean Court.

The requirements are that (i) the judgment was finally and conclusively given by a court having valid jurisdiction in accordance with the principles of international jurisdiction under Korean law or applicable treaties, (ii) the counter party was duly served with service of process (otherwise than by publication or similar means) in sufficient time to enable them to prepare a defense in conformity with the applicable laws, or the other party responded to the action without being served with process, (iii) recognition of the judgment is not contrary to the public policy of Korea, and (iv) judgments of the courts of Korea are accorded reciprocal treatment in the jurisdiction of the court which has given the judgment in question.

Reciprocity does not require a formal reciprocal agreement between the countries involved. It is sufficient if the country in question has standards for the enforcement of foreign judgments that are not significantly different or excessively onerous when compared to the standards for enforcement in Korea.

ARBITRATION

1. Are mediation clauses in commercial contracts binding and enforceable?

Yes, mediation clauses in commercial contracts are binding and enforceable.

2. What is the procedure for mediation? Is it a popular method for resolving commercial disputes?

Mediation in civil and commercial matters are governed by the Civil Mediation Act. Under the Civil Mediation Act, there are two scenarios where a dispute may be resolved by the court managed mediation. First is where a party commences mediation by filing a mediation application with a court, which is similar to filing a complaint. The other scenario is where the judge, during the lawsuit, suggests that the parties resolve the case by mediation. The judge him/herself can act as the mediator or he/she can refer the case to the mediation specialized judge. In the case where the case is referred to the mediation specialized judge, he/she has options to mediate the case by him/herself, refer the case to a mediation member, or refer the case to a mediation committee. If the parties, however, cannot reach an agreement under the mediation, the case reverts back to the litigation.

The courts in Korea are encouraging potential parties to use the mediation system, as an alternative to the traditional litigations because it is less expensive in terms of court filing fees and it is quicker than traditional litigations. However, litigations are still the norm for resolving commercial disputes.

3. Are arbitration clauses in commercial contracts binding and enforceable?

Yes, the arbitration clauses in commercial contracts are binding and enforceable.

4. What type of arbitration is commonly used for resolving commercial disputes: ad hoc arbitration or institutional arbitration?

In Korea, institutional arbitration is commonly used for resolving commercial disputes.

5. Which arbitration institutes are most popular?

The Korean Commercial Arbitration Board (the "KCAB") is the only arbitration institute recognized by the Korean Arbitration Act. The KCAB is gaining popularity among both Korean and international parties for many reasons including its efficient and party-friendly manner of conducting proceedings.

However, both Korean and international parties are free to agree, for example, that any dispute between them be resolved by arbitration in Seoul, Korea subject to rules of other international institutions (e.g., ICC, AAA).

6. What influence can the parties have on the identity of the arbitrator(s)?

In principle, the identity of the arbitrator(s) (e.g., number and selection method of the arbitrator(s)) is determined based on the parties' agreement. In the event, the parties did not agree to the identity of the arbitrator(s), then the issue shall be determined based on the Arbitration Act and applicable KCAB arbitration rules.

Currently, the there three rules that are most frequently apply to arbitrations conducted in the KCAB: (1) Arbitration Rules (applies to arbitration agreements entered before September 1, 2011), (2) Domestic Arbitration Rules (applies to domestic arbitration agreements entered on or after September 1, 2011), and (3) International Arbitration Rules (applies to international arbitration agreements entered on or after September 1, 2011).

Because we presume that the readers of this article would most be interested in the International Arbitration Rules of the KCAB, unless noted otherwise, we will answer the remaining questions in this questionnaire based on the International Arbitration Rules of the KCAB.

Under the International Arbitration Rules of the KCAB, where the dispute is to be referred to a sole arbitrator, the parties have to agree upon and appoint a sole arbitrator. Under the same rules, where the dispute is to be referred to three (3) arbitrators, each party appoints an arbitrator and the first two arbitrators agree upon the third arbitrator.

Subject to time and other limitations, a party may also challenge the arbitrator so appointed for lack of impartiality or independence.

7. In what language is an arbitration proceedings conducted?

Under the International Arbitration Rules of the KCAB, the parties can agree the language of the arbitration proceedings. Under the same rules, however, in the absence of an agreement by the parties, the Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

8. What types of pre-arbitration measures are available and what are their limitations?

Under the International Arbitration Rules of the KCAB, before the file is transmitted to the Tribunal, the parties may apply to any competent judicial authority for interim or conservatory measures. Any such application and any measures taken by the judicial authority must be notified without delay to the KCAB Secretariat.

Also, under the same rules, unless the parties have agreed otherwise, as soon as the file has been transmitted to the Tribunal, it may at the request of a party order any interim or conservatory measure it deems appropriate.

9. What are the costs of arbitration proceedings and who bears these costs?

Under the International Arbitration Rules of the KCAB, the arbitration costs include the filing fees, the administrative fees, the fees and expenses of the arbitrators. These costs are calculated based on the applicable KCAB arbitration rules and escalate in proportion to the claim amount. In principle, the losing party bears the arbitration costs.

Other costs incurred by the respective party including fees and costs for experts, interpreters, witnesses, and attorneys shall be borne by the respective party subject to the allocation determined by the Tribunal as set forth in the award.

10. What are the basic rules of document disclosure in arbitration? Which documents do not require disclosure?

The parties can agree on the basic rules of document disclosure in arbitration, including which documents are not required to be disclosed. The International Arbitration Rules of the KCAB provides that unless the parties agree otherwise in writing, the Tribunal may at any time during the proceeding order the parties to produce documents, exhibits or other evidence if deems necessary and appropriate.

11. What is the procedure for witness evidence in arbitration (namely, is it deposition based or witness examination or cross-examination)?

The parties can agree on the procedure for witness evidence in arbitration. Witness direct, cross, or re-direct examinations are commonly used for witness evidence in arbitration. Deposition is not commonly used in Korea. At the hearing date, the parties' counsels ask

questions to the witness under the management of the Tribunal.

12. How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties and/or counsel privileged (i.e., may not be disclosed to the Arbitrator)?

The settlement discussions are usually conducted both orally and in writing (e.g., letters, e-mails). The final settlement agreement, however, is almost always put into in writing. When the parties are represented by counsels, then the counsels generally negotiate the terms of the settlement on behalf of the parties.

Although an attorney is obliged to keep any communication with his/her client confidential, as far as we know, there is no explicit court precedent on this issue as to whether the settlement correspondence between the parties and/or counsel is privileged in that it may not be disclosed to the Arbitrator.

However, in light of the recent Korean Supreme Court case on May 17, 2012, which stated that there is no clear statutory ground for attorney-client privilege under Korean law, we believe that unless both parties agree to the non-disclosure, it is at least possible for the settlement correspondence between the parties and/or counsel to be disclosed to the Arbitrator.

13. Under what circumstances can an Arbitration Award be enforced, challenged or annulled?

Domestic and foreign arbitration awards are enforceable in Korea by filing an enforcement action with a Korean court.

Korea is a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Accordingly, the Korean courts will recognize and enforce arbitration awards rendered in another member state of the New York Convention in accordance with the provisions of the New York Convention.

For arbitration awards to which the New York Convention does not apply, the party seeking enforcement in Korea has to satisfy the requirements under the Korean Civil Procedure Act and the Civil Enforcement Act.

Under the Korean Arbitration Act, provided that the place of arbitration is in Korea, a dissatisfying party may request the Korean court to annul the arbitration award. Any such request must be made within three months of the date on which the party making such a request has received the duly authenticated award.

In addition, in the case a party files enforcement action with a Korean court, either to enforce a domestic or foreign arbitration award, the opposing party may raise a challenge by objecting to the enforcement action.

The court may annul the arbitration award or accept the objection to the enforcement action if it finds defects in the awards, including but not limited to the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator, the award contains decisions on matters beyond the scope of the arbitration agreement, and the enforcement of the award is against the public policy of Korea.