Deadlock and termination Q&A: South Korea

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Country Q&A | Law stated as at 31-Aug-2021 | South Korea

This Q&A provides country-specific commentary on *Practice note, Deadlock and termination: Cross-border*.

Statutory remedies to deadlock

1. In the absence of specific provisions in a company's bye-laws or a shareholders' agreement, are any remedies available at law in the event of an unresolved dispute between shareholders resulting in deadlock?

In contrast to the laws of other jurisdictions where the courts have certain powers (such as, appointment of custodian or equitable relief) or a person is entitled to decision rights (for example, casting vote by the chair of the board of directors), under South Korean law, there are no statutory remedies specifically designed for deadlock situations, except for the dissolution (winding up) of a company.

Dissolution can be achieved either voluntarily or through a court decision. A voluntary dissolution requires a special resolution approved by the shareholders (an affirmative vote of at least two-thirds of voting shares present at the shareholders' meeting, which in turn must represent at least one-third of the total voting shares of the company). For dissolution by court order, a shareholder holding at least 10% of the total shares can file an application with the court to have the company compulsorily dissolved if there is an "unavoidable cause" combined with either of the following circumstances:

- The company's business operations continue to be in deadlock, and as a result irreparable damage to the company is caused or threatened.
- The management or disposal of the company's assets is irregular, and as a result the existence of the company is at risk.

Although the court has interpreted a deadlock between the directors or between the shareholders to be a situation that satisfies the first circumstance above (there are no court cases expressly dealing with the second circumstance or its meaning), the "unavoidable cause" requirement has been subject to narrow interpretation to the effect that dissolution by court decision is only permitted when it is considered to be the only remaining option to protect the interests of the shareholders. For example, dissolution by court order was approved where the difference in shareholdings of a closed company between the majority shareholder(s) and the minority shareholder(s) was very small (51:49) and the deadlock between those shareholders was so severe that management of the company by a

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majority rule was no longer deemed to be fair or reasonable considering the rupture of trust between the shareholders on which the joint venture company founded. However, caution should be exercised in applying this rule to deadlocks in general since there are only a few cases dealing with dissolution by court order.

Contractual remedies to deadlock

2. Is it common practice expressly to provide for a dispute resolution process in a joint venture company for an unresolved dispute between shareholders resulting in deadlock? If so, are any procedures commonly adopted? In which document would the relevant provisions commonly be drafted?

It is common for joint venture partners to agree on a dispute resolution mechanism in the event of a deadlock. This is usually set out in the shareholders' agreement and the mechanism employed significantly varies depending on the nature of the joint venture, the corporate governance structure of the joint venture company, the business relationship between the joint venture partners, the number and the respective shareholding ratios of the joint venture partners, and various other circumstances concerning the joint venture. Dispute resolution mechanisms typically found in practice may include any one or a combination of the following methods:

- Specifying an agenda to follow when the parties cannot reach an agreement.
- Requiring the parties' best efforts to resolve the deadlock, and (if there is no resolution as a result of these efforts) "escalation" procedures where the dispute is referred to discussion and resolution between the senior management of the joint venture partners.
- Issuing a declaration of deadlock.
- Shares transfer or exit mechanisms such as Russian roulette, Texas shoot-out, Dutch auction or other variations of call/put options. These can also include valuation formulas and procedures.
- Mediation by a third party or arbitration.
- Dissolution of the company.

Different dispute resolution mechanisms may be put in place depending on different types of deadlocks (for example, dispute resolution for a deadlock on the annual budget may be different from a deadlock on distribution of dividends or long-term business plans, and so on).

Compulsory transfer of shares

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3. Is it common to provide for the compulsory transfer of shares in a joint venture company in any of the following circumstances? In which document are the relevant provisions likely to be drafted and are they likely to be enforceable?

- Insolvency of shareholder.
- Change of control of shareholder.
- Material breach of the shareholders' agreement or bye-laws.

  Would the compulsory transfer be potentially subject to “claw-back” in case of insolvency of the transferor, if the latter were incorporated in your jurisdiction and local insolvency law applied?

General note

It is common for the shareholders' agreement to provide for the circumstances which are causes for termination. On termination, a compulsory transfer of shares held by the defaulting party is often included as one of the measures (effects) available to the non-defaulting party on termination. This transfer is usually initiated by the non-defaulting party exercising a call option. The exercise price is set at certain percentages below the fair market value, which is typically determined by an independent valuer.

These mechanisms are typically inserted in the shareholders' agreement and not in the articles of incorporation (in South Korea there is no concept of bye-laws and the articles of incorporation are the only constitutional document of companies). Depending on the method agreed between the parties, many of the provisions in *Standard documents, Joint venture shareholders agreement: 50:50 deadlocked joint venture: Cross-border: clauses 13 and 14* and *Joint venture shareholders agreement: majority and minority shareholder: Cross-border: clauses 13 and 14* could be applicable in South Korea.

Insolvency of shareholder

It is quite common to set out the insolvency of a shareholder as a cause for termination of the shareholders' agreement. However, even if the shareholders' agreement provides for the compulsory transfer of shares as one of the effects of the termination, there may be an enforceability issue. Under the Debtor Rehabilitation and Bankruptcy Act, this depends on the timing of the:

- Commencement of the insolvency proceedings.
- Exercise of the call option by the non-defaulting party.
- Closing of the shares transfer transaction on such exercise.

If the transfer of shares is completed before the insolvency proceeding commences, the transfer would be valid. However, if the transfer price is deemed to be below the fair market value, the transfer may be clawed back by the insolvency court through the "power of avoidance" (that is, the power granted to an insolvency administrator

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(liquidator) to void, set aside or cancel certain transactions of the company made before the insolvency proceedings), even if the compulsory transfer was completed in accordance with the shareholders' agreement (see *Question 9*).

If the call option by the non-defaulting party was exercised but the transfer of the shares is not completed before the commencement of the insolvency proceeding, the insolvency administrator (liquidator) has the sole discretion to either proceed with or cancel (terminate) the shares transfer.

If the call option by the non-defaulting party is exercised after the commencement of the insolvency proceeding, the insolvency administrator (liquidator) has the sole discretion to either proceed with or to cancel (terminate) the shares transfer.

Change of control of shareholder

This depends on the purpose and context of the joint venture. If the continuing control of a shareholder by a certain entity or person is crucial to the joint venture itself (for example, if the shareholder is an affiliate of a conglomerate and the joint venture company's business relationship with the conglomerate as a whole is vital to the joint venture company), this could be included as a cause for termination. This provision would not generally raise enforceability issues.

Material breach of the shareholders' agreement or bye-laws

While it is quite common to set out the material breach of the shareholders' agreement as a cause for its termination, it would not be so common to include the material breach of the articles of incorporation of the company as a cause for terminating the shareholders' agreement.

Material breach of the shareholders' agreement which is a cause for termination and in turn results in a compulsory transfer of the defaulting party's shares would not generally raise enforceability issues. However, the courts have traditionally taken a relatively strict and narrow approach when interpreting the "materiality" of a breach that can be considered a cause for terminating contracts.

Standard documents, Joint venture shareholders' agreement: 50:50 deadlocked joint venture: Cross-border: clause 16 and *Joint venture shareholders' agreement: majority and minority shareholder: Cross-border: clause 16* could be applicable in South Korea. However, as discussed above, circumstances (a), (b) and/or (c) would usually be treated as causes for termination and the compulsory transfer may be included as one of the effects of termination. Also, the compulsory transfer procedures set out in clause 16 could be somewhat different in form and substance depending on the negotiations between the parties.

Standard documents, Bye-laws: majority and minority shareholder: Cross-border: bye-law 34 and *Bye-laws: 50:50 deadlocked joint venture: Cross-border: bye-law 34* is irrelevant or inapplicable since these provisions are not usually included in the articles of incorporation.

Restrictions on transfer of shares

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4. Is it common in a joint venture company to impose restrictions on the transfer of shares? If so, what sort of restrictions are commonly imposed and in which document are they likely to be drafted?

It is relatively common to impose certain restrictions on the transfer of shares in a joint venture company. The common approach is to include any one of or a combination of the following restrictions (with certain permitted transfer exceptions, such as a transfer to affiliates of the selling shareholder being allowed). Except for the restriction that requires an approval of the board of directors, which is included in both the shareholders' agreement and the articles of incorporation, the other restrictions are generally provided in the shareholders' agreement.

Approval of the board of directors. If expressly provided for in the articles of incorporation, transfer of shares can take effect only if approved by the board of directors. This restriction must also be stated in the share certificates.

Consent of the other party. Prior written consent of the other party is the most common restriction. As this restriction is not enforceable against third parties (that is, it would only be effective between the parties to the shareholders' agreement), it is common practice to combine the requirement of the approval by the board of directors with this restriction.

Right of first refusal or right of first offer. A shareholder wishing to sell its shares must first offer the shares to other shareholders before selling the shares (right of first refusal) or commencing to negotiate with the third party (right of first offer).

Tag-along. A shareholder wishing to sell its shares must give other shareholders the opportunity (right) to sell their shares to the potential buyer on the same terms as the selling shareholder.

Standard documents

Standard documents, Joint venture shareholders' agreement: 50:50 deadlocked joint venture: Cross-border: clause 15 and *Joint venture shareholders' agreement: majority and minority shareholder: Cross-border: clause 15* are generally applicable in South Korea. However, different combinations of various restrictions could be provided in the shareholders' agreement.

Standard documents, Bye-laws: majority and minority shareholder: Cross-border: bye-laws 32 and 33 and *Bye-laws: 50:50 deadlocked joint venture: Cross-border: bye-laws 32 and 33* is irrelevant or inapplicable since these provisions are usually provided for only in the shareholders' agreement.

For a sample provision typically inserted in the articles of association of a South Korean company to replace *Standard documents, Bye-laws: majority and minority shareholder: Cross-border: bye-law 31* and *Bye-laws: 50:50 deadlocked joint venture: Cross-border: bye-laws 31*, see *Standard document, Bye-laws: 50:50 deadlocked joint venture: Cross-border: Drafting note, Share transfers: general*.

Article [X] Alteration of Entries in the Shareholders' Registry with Respect to Shares
(1) A shareholder desiring an alteration of entry in the shareholders' registry due to transfer of shares shall submit an application therefor to the Company, in the form prescribed by the Company (which shall be signed or sealed), together with the share certificates involved.
(2) A shareholder desiring an alteration of entry due to inheritance, bequest or other non-contractual causes shall submit an application therefor to the Company, in the form prescribed by the Company, together with the share certificates involved and documents certifying the cause of acquisition.

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(3) A shareholder desiring a registration or cancellation of pledge or transfer with respect to his/her shares shall submit an application therefor to the Company, in the form prescribed by the Company, together with the share certificates involved.
(4) Upon receipt of an application under any of the preceding Paragraphs, the Company shall enter the prescribed matters in the shareholders' registry, and affix the seal of the Representative Director on the back of the share certificates concerned before returning such share certificates to the applicant concerned.
Article [X] Transfer of Shares
The transfer of any shares is not effective against the Company unless the full name and address of the person who acquires such shares have been entered in the shareholders' registry.

5. In a transfer of shares following exercise of pre-emption rights, what are the warranties that the transferor usually gives to the transferee (apart from full title guarantee)?

It is not common to explicitly include warranties in the transfer notice (delivered by the selling shareholder to the other existing shareholders) for the transfer of shares between existing shareholders of the joint venture in case of exercise of pre-emption rights.

If the shareholders' agreement provides that the terms and conditions in the transfer notice also apply to the transfer between the existing shareholders, the warranties are likely to include warranties typically found in transactions between third parties.

If the shareholders' agreement is silent on the warranties to be provided for the transfer, this would depend on the negotiations of the parties (that is, the existing shareholders). In this regard, since the shareholders (joint venture partners) would have exercised a certain form of joint control over the joint venture company, warranties are likely to be limited to those that are more fundamental in nature (such as, title guarantee and required approvals) or greatly limited compared to the warranties that would have been provided to a third-party buyer.

Standard documents, Bye-laws: majority and minority shareholder: Cross-border: bye-laws 31.9 and 32 and *Bye-laws: 50:50 deadlocked joint venture: Cross-border: bye-laws 31.9 and 32* is irrelevant or inapplicable in South Korea since these provisions are usually provided for only in the shareholders' agreement.

Remedies for breach of transfer restrictions

6. If shares are transferred to a third party in breach of restrictions on transfer (in a shareholders' agreement or bye-laws) what remedies are available to the remaining party?

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A share transfer in breach of the restriction requiring an approval of the board of directors, which is provided for in the articles of incorporation, is void and unenforceable against the company.

A share transfer in breach of other restrictions, regardless of whether these restrictions are stated in the shareholders' agreement and/or the articles of incorporation, is enforceable against the company. Therefore, the company cannot refuse to recognise the transferee (even if the company and/or the transferee knew of such restriction) as a shareholder of the company. In this case, the remedy for the non-defaulting (remaining) shareholder is generally a claim for damages (unless it can file for an injunction with the court before the transfer is completed). Considering the difficulty in proving damages incurred by this kind of breach, it is relatively common to insert a specified amount of liquidated damages or penalty in the shareholders' agreement.

7. In a compulsory transfer of shares, if the parties fail to agree on a valuer, which (professional) body is usually requested to nominate a valuer? Is it usual for this body to agree the valuer's terms of appointment? Is there any statutory provision that applies? In which document are the relevant provisions likely to be drafted and are they likely to be enforceable?

It is common to agree on a valuer or valuation process from the outset and provide any of the following in the shareholders' agreement:

- A pre-determined valuer or multiple valuers.
- A valuer to be agreed between the parties.
- A valuer or multiple valuers to be determined by the non-defaulting party.
- Each party appointing a valuer and setting out formulas for the final valuation based on the valuations by each valuer (for example, average, excluding the highest/lowest valuation or valuation exceeding certain range from the average and so on).

Generally, preferred valuers are the internationally recognised accounting firms (for example, the "Big Four" accounting firms are often used) or global investment banks. Accounting firms or investment banks that have conflict of interests with either the company or the shareholders are generally excluded.

It is uncommon to provide for a professional body to nominate a valuer in case of a disagreement between the shareholders. In some limited cases, if a valuer is to be appointed among accounting firms, the Korean Institute of Certified Public Accountants may be requested to nominate a valuer accounting firm. There are no statutory provisions that govern the valuer's terms of appointment.

These provisions would be included in the shareholders' agreements; since there are no statutory restrictions applicable to the appointment of a valuer, these provisions are generally enforceable.

Most of *Standard documents, Joint venture shareholders' agreement: majority and minority shareholder: Cross-border: clause 17* (except for *clauses 17.1* and *17.2,* which are rarely used in South Korea) and *Joint venture*

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shareholders' agreement: 50:50 deadlocked joint venture: Cross-border: clause 17 (except for *clauses 17.1* and *17.2*, which rarely used in South Korea) is generally applicable in South Korea.

Standard documents, Bye-laws: majority and minority shareholder: Cross-border: bye-law 35 and *Bye-laws: 50:50 deadlocked joint venture: Cross-border: bye-law 35* is included only in the shareholders' agreement.

Transfer of IP rights following winding-up of the JV

8. Is it possible to provide that in the event of a joint venture company being wound up, certain assets (such as intellectual property rights) will be transferred to a specific shareholder? Will such a provision be enforceable in the winding-up of the company?

Except for the class of shares with different (preferential) rights on liquidation, remaining assets of a dissolved company must be distributed equally to all shareholders (proportionally to each share) on liquidation. While it may be theoretically possible to distribute a certain asset to a particular shareholder if the value of the asset corresponds exactly to the amount to be distributed to the shareholder, this would be very difficult to achieve in practice. The more practical approach is for the articles of incorporation to provide for a class of shares with preferential rights to certain assets. This approach is enforceable as long as the preferential rights are stated in the articles of incorporation, except in cases where a company is dissolved as a result of insolvency.

Insolvency: claw-back

9. On an insolvency of the joint venture, can a liquidator set aside transactions carried out by the joint venture within a particular time frame (so called "suspect period")? Which features do these transactions need to present in order to be set aside (for example, being below market value)?

Under the Debtor Rehabilitation and Bankruptcy Act, the insolvency administrator (liquidator) may opt to set aside certain transactions entered into by the company (debtor) before the insolvency proceedings by exercising its "power of avoidance". If the exercise of power of avoidance is accepted by the insolvency court, the applicable transactions will be void. The following acts can be set aside by the power of avoidance:

- An act of the debtor with knowledge of harm to the creditors (if the beneficiary is aware that the act causes harm to other creditors).

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- An act harmful to the creditors that occurred during the suspect period (which is defined as the period after the suspension of payment or the application for the insolvency proceedings). The beneficiary must be aware that the act causes harm to other creditors.
- An act of the debtor with no obligations within the suspect period or the preceding 60 days, if the beneficiary is aware that the act causes harm to other creditors.
- A gratuitous act of the debtor during the suspect period or the preceding six months.

The threshold for exercising the power of avoidance is primarily determined by the transaction's harmful effects on creditors. If a transaction either decreases the creditors' assets (fraudulent transfers) or results in unequal treatment of creditors (preference), it may be considered harmful and may be subject to the power of avoidance.

Technically, all transactions that took place during the ten years preceding the rehabilitation proceedings (similar to the Chapter 11 process) or the bankruptcy declaration can be set aside. In practice, transactions that took place in the previous couple of years from the commencement date of the rehabilitation proceedings or the bankruptcy declaration date are set aside.

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Shareholders' agreement and bye-laws Q&A: South Korea

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This Q&A provides country-specific commentary on *Practice note, Shareholders' agreement and bye-laws: Cross-border*.

Shareholders' agreement and bye-laws

1. What are the main documents that regulate the constitutional arrangements and day-to-day operation of a joint venture company incorporated in your jurisdiction?

In South Korea, the most common corporate vehicle used for a private joint venture is a joint stock company (*chusik hoesa*). For the purposes of analysis below, it is assumed that the private joint venture is a joint stock company.

Articles of incorporation

The articles of incorporation (AOI) are the basic constitutional document of a company. They are prepared by the promoters of the company and serve as the fundamental rules regulating the company. Under the Commercial Code (the body of law which regulates joint stock companies), AOI must contain the following:

- Basic corporate information (business purpose, name of company, location of principal office and method of public notice).
- Number of authorised shares.
- Number and classes of shares to be issued on incorporation.
- Par value per share (for shares with a par value).
- Names, identification numbers and addresses of promoters.

In addition to these mandatory provisions, it is common to include other items such as corporate governance matters regarding shareholders' meetings, the board of directors and the representative director (see *Question 17*), distribution of profits, fiscal year, and other matters that promoters or shareholders have agreed to reflect in the AOI.

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Shareholders' agreement (joint venture agreement)

A shareholders' agreement or joint venture agreement is a private agreement executed between the shareholders of the company. The company may or may not be a party to this agreement. Even if the company is a party to the agreement, it is generally not treated as a constitutional document of the company.

There is no limit on or rule specifying the provisions to be included in the shareholders' agreement. Provisions typically touch on the following:

- Corporate governance matters (board composition, approval items for the shareholders' meeting and the board of directors and minority shareholders' veto items).
- Rights, obligations and certain covenants of the shareholders (for example, non-compete provisions).
- Initial contribution amount by the parties, additional capitalisation and financing commitment.
- Restriction on transfer of shares, including drag-along or tag-along right and the right of first refusal.
- Dividend policy, accounting, information and inspection rights.
- Deadlock, dispute resolution and termination.
- Miscellaneous provisions (for example, assignment, governing law, notice and amendment).

Company's internal rules

Although not mandated by law, a company may also have its own internal rules which govern its day-to-day operations or procedural matters.

> 2. Is it possible to amend the constitutional documents of a company? If so, what are the relevant voting requirements? Can the shareholders amend the relevant voting majorities and, if yes, to what extent?

Yes. The AOI can be amended by a special resolution approved at a shareholders' meeting. This requires approval by at least two-thirds of voting shares present at the meeting, which in turn must represent at least one-third of the total voting shares of the company.

The Commercial Code is silent on whether companies can change the number of voting shares required to amend the AOI; as general practice, increasing the above threshold is allowed, while decreasing the above threshold is not.

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3. Is every shareholder automatically bound by a company's constitutional documents?

Yes. The AOI are generally considered to be rules that bind each shareholder (regardless of whether they were a shareholder at the time of the company's incorporation or at the time of the amendment of the AOI).

4. Is it necessary for a company's constitutional documents to be registered and open to public inspection?

While the AOI are registered with the Commercial Registry Office, they are not available for public inspection, unless the company is a public company or is subject to certain disclosure requirements. Some of the corporate information included in the AOI is also included in the corporate registry of the company, which is available to the general public. The corporate registry of a company makes the following information public:

- Basic corporate information (business purpose, name of company, location of principal office and method of public notice).
- Par value per share.
- Number of authorised shares.
- Number and classes of shares issued.
- Terms and conditions of class shares (if class shares are issued).
- Share transfer restrictions requiring approval by the board of directors (if stated in the AOI).
- Names of representative director, director and statutory auditor.
- AOI regulations on stock options (if any).

5. Is it necessary for a shareholders' agreement to be registered and open to public inspection?

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No. The shareholders' agreement does not have to be registered and is not open to the general public.

6. Is a company bound by its constitutional documents?

Yes. The AOI are binding on the company.

7. Is it common practice for a joint venture company to be a party to a shareholders' agreement relating to the joint venture?

While it may not be a prevailing practice, it is not uncommon for the joint venture company to be a party to a shareholders' agreement. Whether the joint venture company joins as a party to the agreement depends on various factors, such as:

- Whether the shareholders want the ability to enforce certain provisions related to the operation of the joint venture against the company (although the fact that the company is a party to the agreement does not automatically guarantee enforcement against the company.
- Whether the scope of the shareholders' agreement is primarily focused on the rights and obligations between the shareholders or whether it also includes substantial provisions related to the company's operations and business.
- Whether substantial parts of the shareholders' agreement are reflected in the company's AOI.
- Whether the shareholders want to keep certain provisions of the shareholders' agreement confidential and not disclose them to the joint venture company.
- Whether the shareholders' agreement provides for specific performance or obligations of the company, such as capitalisation plans, initial and ongoing financing milestones, business milestones and IPO.

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8. What are the remedies for breach of a shareholders' agreement?

Claims for damages are the usual remedy for breach of the shareholders' agreement, but requests for specific performance or injunctions may also be considered, depending on the nature of the breach or performance being sought.

The courts have generally interpreted the rules of civil procedure and other relevant rules rather strictly when enforcing injunctions or specific performance relating to provisions of shareholders' agreements. Also, the party claiming damages bears the burden of proving the actual amount of damages incurred as a result of any such breach. It is generally advisable for the shareholders' agreement to include specific provisions regarding breach, and its consequences and remedies (for example, liquidated damages, penalty and call options or put options which are triggered on default).

9. What are the remedies for breach of a company's constitutional documents?

A breach of the AOI by a company generally constitutes a breach of fiduciary duties that the directors owe to the company. If the company incurs harm due to such a breach, it may bring a claim against the directors; if the company itself does not bring a claim, a shareholder may bring a derivative suit against the directors.

Any corporate actions made in breach of the AOI which causes any damage to the company may be subject to preliminary injunction and cancellation or nullification.

10. In which document would you commonly insert the following provisions:

- Object and scope of the venture.
- Capitalisation and funding.
- Board composition and management arrangements.
- Distribution of profits (including dividend policy).
- Provisions for dealing with deadlock.
- Termination provisions.
- Restrictive covenants.

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- Rights to appoint and remove directors.
- Quorum for board and shareholder meetings.
- Procedures for shareholders' meetings.
- Division of shares into classes.
- Chair's casting vote.
- Notice provisions.
- Share transfer provisions.
- Minority protection (veto rights and so on).
- Drag along rights.

Object and scope of the venture

The AOI and the shareholders' agreement.

Capitalisation and funding

The shareholders' agreement (other than the number of authorised shares, classes of shares, ground for equity-linked securities, which should also be inserted in the AOI).

Board composition and management arrangements

The shareholders' agreement (other than the basic rules for the board composition such as the number of directors and representative directors, which should also be inserted in the AOI).

Distribution of profits (including dividend policy)

The AOI and the shareholders' agreement. The AOI would generally include high-level provisions while the specific provisions would be included in the shareholders' agreement.

Provisions for dealing with deadlock

The shareholders' agreement.

Termination provisions

The shareholders' agreement.

Restrictive covenants

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The shareholders' agreement.

Rights to appoint and remove directors

The shareholders' agreement.

Quorum for board and shareholder meetings

The AOI and the shareholders' agreement.

Procedures for shareholders' meetings

The AOI and the shareholders' agreement.

Division of shares into classes

The AOI and the shareholders' agreement. The AOI generally include shareholder-neutral provisions while the specifics of the different classes of shares would be included in the shareholders' agreement or in a separate subscription agreement.

Chair's casting vote

This is not allowed under South Korean law.

Notice provisions

The shareholders' agreement.

Share transfer provisions

Share transfer and pre-emptive rights are included in the AOI and the shareholders' agreement. The AOI generally include shareholder-neutral provisions while the specific provisions relating to shareholders' rights and obligations are included in the shareholders' agreement.

Transfer of shares provisions (for example, tag-along) are generally included in the shareholders' agreement. However, if the transfer of shares is subject to the board's approval, then these provisions are also included in the AOI.

Minority protection (veto rights and so on)

The shareholders' agreement (other than the voting requirements (veto rights) related to the board of directors' meeting or shareholders' meeting, which should also be inserted in the AOI).

Drag-along rights

The shareholders' agreement.

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11.In a conflict between a shareholders' agreement and a company's constitutional documents, which document is likely to prevail?

The AOI are likely to prevail over the shareholders' agreement, to the extent that the conflict is related to or involves the company in any way.

To resolve these conflicts, the shareholders' agreement typically provides that if there is a conflict between the shareholders' agreement and the AOI, the shareholders will cause the company to amend the AOI in alignment with the shareholders' agreement.

12. Which conditions are commonly inserted in a shareholders' agreement?

Typical conditions included in the shareholders' agreement are:

- The completion of the transaction (for example, sale and purchase of shares, subscription of new shares).
- Matters subject to approval by the board of directors or shareholders' meetings of each joint venture partner.

The conditions in *Standard document, Joint venture shareholders' agreement: majority and minority shareholder: Cross-border: clause 4* may be included if the parties desire to do so, depending on the effective date of the shareholders' agreement, the timeline of the execution of the shareholders' agreement, share subscription/ purchase agreement and the formation of the joint venture company. The conditions in clause 4 do not pose any problems from a South Korean law compliance perspective.

13. Is there any restriction under the law of your jurisdiction on the method that the joint venture partners may use to finance the joint venture?

In South Korea, there are no general statutory restrictions on the methods of financing that a private company can procure, both from an equity and a debt financing perspective. However, the following factors may need to be considered:

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- With shareholder loans, thin capitalisation rules need to be taken into account from a tax perspective.
- On the issuance of new shares, shareholders have pre-emptive rights to subscribe for new shares in proportion to their respective shareholdings, unless provided otherwise in the AOI. The joint venture partners may therefore need to insert a carve-out from this default rule in the AOI to allow for future capitalisation plans, or if they wish to procure third-party equity financing in the future.
- To issue equity-linked securities, such as convertible bonds or bonds with warrants, the company needs to either include such provision in the AOI or hold a shareholders' meeting to approve the issue. Also, if the company needs to issue these bonds to a third party (other than its shareholders), this must be provided for in the AOI.

Standard document, Joint venture shareholders' agreement: majority and minority shareholder: Cross border: clause 8 does not pose any problems from a South Korean law compliance perspective.

14. What are the consequences under the law of your jurisdiction for provisions in the shareholders' agreement and/or in a company's constitutional documents that are in breach of company law (for instance, are they void)?

The validity of provisions in the shareholders' agreement or a company's constitutional documents that are in breach of company law generally depends on whether the provisions are in breach of the mandatory rules or the non-mandatory rules of the Commercial Code or other relevant laws. If the provisions are in breach of the mandatory rules, they are generally deemed void, while the provisions that are only in breach of the non-mandatory rules are generally enforceable.

It is not always clear which rules of the Commercial Code or other relevant laws are deemed to be mandatory, but the following rules are generally interpreted as being mandatory:

- Limited liability of a shareholder up to the shareholder's capital contribution.
- Minimum par value of at least KRW100 for shares with par value.
- For voting shares, one vote per share.
- Shareholders' rights to approve the following at the shareholders' meeting (although the documents may include voting requirements which are different from the default rules of the Commercial Code):
  - election and dismissal of directors and statutory auditors;
  - amendment of the AOI; and
  - mergers, business transfers, spin-offs, capital reduction, share exchange and dissolution.

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15. Are the limitations set out in the objects clause in the constitutional documents of the joint venture enforceable against third parties (for instance, if the company enters into a transaction outside the scope of its objects clause, could the relevant transaction be set aside on the basis that the company acted *ultra vires*)?

The company's business purpose must be set out in its AOI and also be reflected in its corporate registry entry, which is open for public inspection (see *Question 1* and *Question 4*). Although there is academic discussion on whether an act of the company which is beyond the business purpose stated in its AOI is void, this is rarely an issue in practice.

This is because the courts have interpreted the business purposes stated in the AOI very broadly, and there have not been any recent court cases where an act of a company was deemed void for falling outside the boundaries of the company's business purposes. Also, in practice, companies typically set out their business purposes very broadly and include objectives that they do not currently perform but may perform in the future.

16. Is the shareholders' liability limited to the amount of their respective equity contributions to the joint venture?

Yes. Shareholders' limited liability is one of the mandatory requirements under the Commercial Code that cannot be circumvented by amending the AOI (see *Question 14*).

It is rare to explicitly state the limited liability of shareholders in the AOI since it is an obvious requirement. If the AOI includes a provision similar to *Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border: bye-law 2*, this provision should be amended as follows, as an unpaid share is not allowed in South Korea:

The liability of the Shareholders is limited to the amount paid on the shares held by them.

17. Are there any statutory requirements applicable to the directors' authority and powers, such as to their ability to delegate to committees or individual directors?

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In South Korea, only the term "board of directors" is used when referring to the corporate body consisting of directors.

The board of directors is authorised and responsible for the management of the company (other than the items which are reserved to the shareholders' meeting), and for the monitoring and supervision of the directors' performance of their fiduciary duties:

- The Commercial Code states that the following matters fall specifically under the purview of the board of directors:
    - sale of major assets;
    - major loans or borrowing;
    - convocation of shareholders' meetings;
    - approval of a director's transaction with the company (self-dealing);
    - appointment and dismissal of a representative director (unless the AOI provide that such director is to be appointed and dismissed at the shareholders' meeting); and
    - issuance of new shares.
- The board of directors has broad general authority to monitor and supervise the directors' performance of their duties.

The board of directors may delegate some of its powers to certain committees of the board of directors, a representative director or executive officers (if an executive officers system is adopted in the AOI). Delegation to an individual director is not allowed unless the director is a representative director or an executive officer. Therefore, powers can be delegated to the following:

- **Committees.** The board of directors may delegate its power to committees of the board, of which the members are directors, except for items requiring shareholders' approval, the appointment and dismissal of a representative director, the establishment of committees of the board, and any other items specified in the AOI.
- **Representative director.** The board of directors may delegate its power to conduct the company's day-to-day operations (ordinary course of business matters) to the representative director. A representative director is statutorily required by the Commercial Code to be appointed among the directors and is given authority to act on behalf of the company in its business affairs (the representative director's role is similar to that of a chief executive officer (CEO), in that a representative director executes the decisions of the board of directors or shareholders and represents the company to third parties).
- **Executive officers.** If the AOI provide for "executive officers", the board of directors may delegate to the executive officers its power to conduct day-to-day operations (ordinary course of business matters) and to make decisions on matters set out in the AOI (except for matters requiring the approval of the board of directors under the Commercial Code) or on matters set out by the decision of the board of directors.

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The structure of *Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border* differs from the typical AOI for a private South Korean company. As a result, it is difficult to amend *bye-law 3* to *bye-law 6* in isolation. However, the following may be stated:

- *Bye-law 4* should be deleted in its entirety.
- *Bye-law 5* should be replaced with separate sections on "committees", "representative director" and/or "executive officers".
- The term "board of directors" should be used instead of "directors".
- *Bye-law 6* should be replaced with the wording set out below:

  Committees

  6.1 The Board of Directors may create any committees thereof as the Board of Directors deemed necessary or appropriate.

  6.2 By a resolution of the Board of Directors, the specifics of a committee, including its composition, authority and operation, shall be determined.

  6.3With respect to committees, the provisions of Articles [NUMBER], [NUMBER], and [NUMBER] shall apply mutatis mutandis.

18. Are there any statutory requirements applicable to the board of directors' meeting, such as:

- The country in which they should be held.
- The procedure to call and adjourn a meeting.
- The procedure to participate and vote in a meeting.
- Who should chair a meeting.
- The role, if any, of the company secretary.
- How the board decisions should be recorded.

The country in which they should be held

No, there are no statutory requirements of this kind.

The procedure to call and adjourn a meeting

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The meeting can be convened by the representative director, or by a director given the power to convene the meeting by a decision of the board of directors, by giving notice to each director and statutory auditor at least seven days (which can be shortened by the AOI) before the scheduled date of the board of directors' meeting. The notice can be made either personally, by telephone, mail, electronic mail, or by any other means of communication previously consented to by the relevant director. The notice requirement and notice period may be waived or shortened by unanimous consent of all the directors and the statutory auditors.

As there are no default rules in the Commercial Code on adjournment of a board of directors' meeting, adjournment should generally follow the company's internal rules or regulations on the board of directors and/or procedures for its meetings, if any.

The procedure to participate and vote in a meeting

Participation and voting in person is the default rule. However, the meeting may be held by telephone or video conference if provided for in the AOI. There are no statutory requirements for voting procedures for the board of directors' meetings, however, voting by proxy or voting in writing is not allowed.

Who should chair a meeting

Since there is no statutory rule on who should be appointed the chair of a board of directors' meeting, any director can be the chair as decided by the board of directors or determined by the AOI.

The role, if any, of the company secretary

In South Korea, there is no statutory office or concept of a company secretary.

How the board decisions should be recorded

The minutes of the meeting must be recorded. The Commercial Code provides that the agenda, proceedings, resolutions of a board of directors meeting, and the names of any directors voting against resolutions passed at the meeting (objectors) and the reasons for their objections must be recorded in the minutes. The minutes must be affixed with the names and seals of, or signed by, the directors and the statutory auditor present at such meeting.

In practice, the specificity of the minutes varies from company to company, depending on whether the company is listed or not and whether the minutes must be disclosed or registered.

The structure of *Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border* differs from the typical AOI for a private South Korean company. As a result, it is difficult to amend *bye-law 10*, *bye-law 11*, *bye-law 13* and *bye-law 16* in isolation. The following are typical articles on the same matters:

Article [X] (Convening of Meetings of the Board of Directors)
(1)The Board of Directors shall hold a minimum of four (4) meetings every fiscal year. Meetings of the Board of Directors shall be convened by the Representative Director or any Director separately determined by the Board of Directors, by giving notice to each Director and Statutory Auditor at least seven (7) business days prior to the scheduled date of such meeting, either personally, by telephone, by mail, by facsimile, by electronic mail or by any other means of communication previously consented to by the relevant Director. However, the said procedures may be omitted with the unanimous consent of all the Directors and the Statutory Auditor(s).
(2)The Representative Director shall be the chairman of the Board of Directors, and the chairman of a Board of Directors' meeting shall be the person who has the authority to convene such meeting under Paragraph (1) above.

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Article [X] (Resolution by Means of Communication)
(1)A meeting of the Board of Directors may be convened by means of a communication system transmitting and receiving live audio communications by means of which all persons participating in the meeting can hear and speak to each other, whereby all Directors may participate in the meeting, without the actual presence of the Directors at the meeting. Directors participating in the meeting in the aforesaid manner shall be deemed to be present in person at such meeting.
(2)If a Board of Directors meeting is held in the aforesaid manner, such fact shall be recorded in the minutes of such Board of Directors meeting.
Article [X] (Minutes of Meetings of the Board of Directors)
(1)The substance of the course of proceedings of a meeting of the Board of Directors shall be recorded in the minutes in English and Korean.
(2)The agenda, proceedings, resolutions of a Board of Directors meeting and objectors and the reasons for their objections shall be recorded in the minutes in English and Korean, which shall be affixed with the names and seals of, or signed by, the Directors and the Statutory Auditor present at such Board of Directors meeting.

19. Are there any statutory provisions regulating directors' conflicts of interest?

The Commercial Code provides that a director of a company owes a duty of loyalty to the company. In addition to this overarching principle, the Commercial Code sets out three separate provisions that regulate potential circumstances of conflicts of interest between a company and its directors.

Non-compete

A director must obtain approval from the board of directors to engage in transactions in the line of the company's business (whether for the director's own or a third party's account), or to become a general partner or a director of another company with a business purpose that is identical to the business purpose of the company of which they are a director.

Usurpation of corporate opportunities

Without approval of the board of directors, a director may not usurp (take advantage of), for their personal gain or to benefit a third party, corporate opportunities learned in the course of performing their duties or obtained with the company's information, or corporate opportunities closely related to business that the company is currently engaged in or will be undertaking.

Approval requires a two-thirds majority vote by the board of directors and the director concerned is prohibited from voting at the meeting. Since this rule was adopted in 2012, the exact implications of vague terms such as "corporate opportunity'", "closely" or "usurpation" have yet to be tested vigorously in the courts.

Self-dealing

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A director who wishes to engage in a transaction with any of the following parties for their own or a third party's account must disclose the material facts of the transaction and obtain approval of the board of directors with at least a two-thirds majority vote (the director concerned is prohibited from voting at the meeting):

- A director or a major shareholder of the company.
- The spouse and lineal ascendants or descendants of a person falling under the first bullet point above.
- Lineal ascendants or descendants of the spouse of a person falling under the first bullet point above.
- A company in which at least 50% of the total shares are held by a person falling under any of the bullet points above, solely or jointly with others, or its subsidiary company.
- A company in which at least 50% of the total shares are held by a person falling under any of the first three bullet points above, together with a company falling under the fourth bullet point above.

In addition, the transaction in question must be fair in terms of its substance and procedures.

In South Korea, it is not common to insert a separate section on conflicts of interest in the AOI since it is explicitly provided for in the Commercial Code. Even if the articles include a provision, it is likely only a paragraph stating that an approval on "self-dealing" and/or "usurpation of corporate opportunities" requires a two-thirds vote of the board of directors.

20.Are there any statutory requirements in relation to the directors' remuneration?

Under the Commercial Code, director remuneration is to be determined by either the AOI or by resolution at a shareholders' meeting. It is the prevailing practice for the general (annual) shareholders' meeting to approve a cap (ceiling) for the remuneration of all the directors and for the board of directors to determine the specific remuneration for each director within that cap.

As directors' remuneration is typically determined at the shareholders' meeting (and afterwards at the meeting of the board of directors), it is uncommon to have a provision such as *Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border: bye-law 15* on directors' remuneration in the AOI.

21. Are there any statutory requirements applicable to the appointment and removal of the directors? Can alternate directors or board observers be appointed?

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Appointment and removal

Directors are appointed by an ordinary resolution (requiring the affirmative vote of a majority of the shareholders present, who in turn must represent at least a quarter of the total voting shares) at the shareholders' meeting. If the AOI allow cumulative voting (which gives a shareholder a number of votes equal to the number of shares it holds multiplied by the number of directors up for election and allows the shareholder to cast such votes for one or more directorial candidates), shareholders holding at least 3% of the total voting shares may request cumulative voting where two or more directors are to be appointed. In practice, it is common for the AOI to exclude the possibility of cumulative voting.

Directors can be removed at any time (during their term) by a special resolution (requiring the affirmative vote of at least two-thirds of voting shares present at the shareholders' meeting, which in turn must represent at least one-third of the total voting shares). However, if a director is dismissed without just cause during their term in office, that director may claim damages against the company, which typically include remuneration for the remaining period of the term.

Alternate directors and board observers

Alternate directors are not allowed in South Korea. If there is a dispute on the validity of appointment or removal of a director, the court may appoint an acting director on request by the affected party. If a director resigns or a term expires and the minimum number of directors required for the formation of the board of directors is not satisfied, the resigned or expired director still has the rights and obligations of a director.

The Commercial Code is silent on board observers but it is not uncommon for a shareholder to designate a board observer. Shareholders can reach an agreement on the role of board observers. Generally, the role of board observers is limited to attendance at board of directors' meetings, without any power or authority related to any operation or decision of the board of directors.

The structure of *Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border* differs from the typical AOI for a private South Korean company. It is therefore difficult to amend *bye-law 17* in isolation. For an example of a typical article on the same matter, see below:

Article [X] (Election of Directors)
The Directors shall be elected at the General Meeting of Shareholders.
The Directors shall be elected by the affirmative vote of a simple majority of the voting shares represented by the shareholders present; provided that such votes shall, in any event, represent more than one-fourth (1/4) of the total number of issued and outstanding shares.
In electing two or more Directors, the cumulative voting as prescribed by Article 382-2 of the Commercial Code shall not apply.
Standard document, Bye-laws: 50:50 deadlocked joint venture: Cross-border: bye-law 19 on "Alternative Directors" should be deleted in its entirety as it is not allowed in South Korea.

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22. What is the procedure to be validly recognised as a shareholder? Are share certificates issued and, if they are, what is the procedure to replace them?

A holder of a share certificate is presumed to be the owner of the shares represented by the certificate. However, to enforce (if necessary) the ownership of the shares against the company, the shareholder and its shareholding must be included in the company's shareholder registry. The company usually takes care of this at the time of subscription or transfer of shares.

There are two procedures for replacement of share certificates. The applicable procedure depends on the reason for replacement:

- **Damage to share certificates or split or consolidation of shares.** The shareholder can request that the company re-issues the share certificates.
- **Damage so extreme that the share certificates are not legible, or loss or theft of share certificates.** The shareholder must obtain a court decision invalidating (making void) the original share certificates and submit the decision to the company for re-issue of the share certificates.

It is difficult to amend *Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border: bye-law 20* as it deals with different aspects of shares that are usually scattered in various sections of the AOI. For examples of replacement articles for *bye-law 23* and *bye-law 24*, see below:

Article [X] (Types of Share Certificates)
(1)The shares to be issued by the Company shall be [common] shares.
(2)The share certificates of the Company shall be issued in the following denominations: one (1), five (5), ten (10), one hundred (100), one thousand (1,000), five thousand (5,000), and ten thousand (10,000) shares.
Article [X] (Re-issuance of Share Certificates)
(1)A request for re-issuance of share certificates due to, among others, damage to the original share certificates or stock split or stock consolidation shall be made by submitting an application in such form as may be prescribed by the Company (with the requesting shareholder's seal or signature affixed thereon), together with the original share certificates. However, when the damage or soiling is so extreme that the share certificate is not legible, the following Paragraph regarding re-issuance of share certificates due to loss thereof shall apply for its replacement.
(2)A request for re-issuance of share certificates due to the loss thereof shall be made by submitting an application in such form as may be prescribed by the Company, together with a decision issued by the court to the effect of invalidating the original share certificates.

23. Are there any statutory provisions governing the declaration and payment of dividends and other distributions? Is it possible for a shareholder to waive its right to receive a dividend?

Corporate actions

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Declaration of dividends can be made either through an ordinary resolution approved at a shareholders' meeting, or by the board of directors if the AOI provide that the board of directors have the power to approve the company's financial statements.

Form of dividends

Dividends may be made in the form of cash, stock, or other property. To declare a dividend in the form of properties other than cash or shares, there has to be a relevant provision in the AOI. Where this is possible, it is for the shareholders' meeting or the board of directors to decide on the procedure to be followed, including as to valuation of the property. No valuation procedure is prescribed by law, however there are some shareholder protections in place where dividends made are illegal or unfair.

Interim dividends

Annual declaration of dividends is the default rule. Interim dividends may be allowed once a year (in addition to the annual dividend) for unlisted companies, if provided for in the AOI.

Equal treatment of shareholders and waiver

Although equal distribution of dividends for each share of a same class is the default rule under the Commercial Code, if a shareholder consents to unequal distribution or waives its right to dividends, an arrangement for unequal distribution may be allowed.

In this connection, different classes of shares are allowed in South Korea, and it is permitted to have a class of shares which hold preferential rights to dividends, although the scope of preference (for example, whether shares of a certain class can receive a dividend ten times more than shares of a different class) has not been vigorously tested in the courts.

It is difficult to amend *Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border: bye-law 25* to *bye-law 30* word-by-word or line-by-line. For examples of replacement articles, see below:

Article [X] (Dividends)
(1)Dividends may be distributed in the form of cash, stock or other assets.
(2)Dividends of Paragraph (1) above shall be paid to the shareholders registered in the Company's registry of shareholders or the registered pledgees as of the last day of each fiscal year.
Article [NUMBER](Expiration of Right to Payment of Dividends)
(1)If dividends are not received by shareholders as of the expiration of five (5) years after the date on which a resolution approving payment of the dividends was adopted, the Company shall be exempted from the obligation to pay such dividends.
(2)The dividends of which the right has been extinguished under Paragraph (1) above shall be kept by the Company.
(3)No interest shall be paid on dividends.

24. Are there any statutory requirements applicable to the shareholders' meeting, such as:

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- The country in which they should be held.
- The procedure to call and adjourn a meeting.
- The procedure to participate (in person or by proxy) and vote in a meeting.
- Who should chair a meeting.
- The role, if any, of the company secretary.
- How the shareholders' resolutions should be recorded and amended.

The country in which they should be held

The principal office of the company or a nearby place, unless the AOI provide otherwise.

The procedure to call and adjourn a meeting

A shareholders' meeting is convened by resolution of the board of directors. A shareholder with at least 3% of the total shares may also request the board of directors to convene a shareholders' meeting; if the board of directors does not comply with such a request, the shareholder may convene the shareholders' meeting on obtaining a court decision to that effect.

A notice stating the date, time and agenda of the shareholders' meeting must be provided to each shareholder at least two weeks before the date of the shareholders' meeting. The notice should be in writing, but email may be used for shareholders who have provided consent. This notice requirement may be waived or shortened by unanimous shareholder consent.

The shareholders' meeting may decide on the adjournment of the meeting. The notice requirement is not necessary for an adjourned meeting.

The procedure to participate (in person or by proxy) and vote in a meeting

Participation and voting in person is the norm, but proxy voting is also allowed under the Commercial Code. Voting in writing is allowed if provided for in the AOI, and electronic voting is allowed pursuant to a resolution to that effect approved by the board of directors.

For a company with capital less than KRW1 billion, a written resolution is allowed with unanimous shareholder consent.

Who should chair a meeting

The chair is usually determined in the AOI. If there is no provision in the AOI, the chair is determined at the shareholders' meeting by an ordinary resolution.

The role, if any, of the company secretary

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In South Korea, there is no statutory office or concept of a company secretary.

How the shareholders' resolutions should be recorded and amended

The minutes of the meeting must be recorded. Under the Commercial Code, the agenda, proceedings and the resolutions of the meeting must be recorded in the minutes (which must be affixed with the names and seals of, or signed by, the chair and the directors present at the meeting). In practice, the specificity of the minutes varies from company to company, depending on whether the company is listed or not and whether the minutes must be disclosed or registered.

There is no statutory provision on the amendment of shareholders' resolutions. Once a shareholders' resolution has been approved at the meeting, that resolution cannot generally be revoked or amended, especially if the resolution is related to an act or transaction of the company with a third party. However, if the resolution is yet to affect a third party, a separate resolution amending the original resolution can be considered.

The structure of *Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border* differs from the typical AOI for a private South Korean company. So it is difficult to amend *Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border: bye-law 38 to bye-law 47* in isolation. Some matters under these bye-laws are generally covered by internal regulations dealing with shareholders' meetings rather than by the AOI. Note that:

- It is rare to find bye-laws *38*, *39*, *40*, *43* and *45* in the AOI and some of the sections would be irrelevant or inapplicable in South Korea.
- In South Korea, the quorum requirement (in *bye-law 41*) for the shareholders' meeting was abolished in 1995.
- Bye-laws *44* and *47* would generally be inapplicable or irrelevant in South Korea.
- For an example of replacement article for *bye-law 42*, see below:

  Article [X] (Chairman of the General Meeting of Shareholders)

  (1)The Representative Director shall be the Chairman of the General Meetings of Shareholders.

  (2)In the absence of the Representative Director, Article [NUMBER] shall apply mutatis mutandis.

25. Are company seals required?

On incorporation, a company must register its corporate seal with the Commercial Registry Office. The corporate seal can only be used by the representative director of the company (see *Question 17*).

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The representative director is not required to exclusively use the corporate seal when representing the company. Signatures are also commonly used. However, any official document of the company that is registered with the Commercial Registry Office (for example, the minutes of a shareholders' meeting approving amendment of the AOI) must be affixed with the corporate seal and be submitted with a Certificate of Registered Corporate Seal Impression issued by the Commercial Registry Office.

It is rare to find a provision on corporate seals in the AOI and much of *Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border: bye-law 48* is irrelevant or inapplicable in South Korea.

26.Are there any restrictions under the law of your jurisdiction to include indemnity provisions for the benefit of the directors or officers of the company in the company's constitutional documents?

If so provided in the AOI, a director can be exempted from liability to the company resulting from a breach of the director's fiduciary duties for amounts in excess of six times (three times for an independent director) their remuneration (including bonuses and gains from the exercise of stock options) for the year immediately preceding the date of the acts leading to such liability. This exemption does not apply to any liability resulting from the following:

- Wilful misconduct or gross negligence.
- Breach of the duty not to compete with the company (see *Question 19*).
- Breach of the duty not to usurp corporate opportunity (see *Question 19*).
- Breach of the duty not to engage in self-dealing (see *Question 19*).

Regardless of being provided for in the AOI, a director can also be exempted from liability to the company resulting from their breach of fiduciary duty if they are exempted by unanimous shareholder consent. Exemption by unanimous shareholder consent is effective only for liability that has already arisen and does not extend to future liability.

The above exemptions can also apply to executive officers if the AOI provide for this (see *Question 17*).

There are no statutory restrictions on indemnity for other officers (non-director and non-executive officers), and it is rare to find provisions dealing with liabilities of these officers in the AOI.

Unless the company adopts the above "excess of six times" exemption in its AOI (in which case, the AOI would generally repeat the same provision of the Commercial Code), it is rare to find AOI that deal separately with directors' liabilities. Much of *Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border: bye-law 49* is irrelevant or inapplicable in South Korea.

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27. In relation to cross-border joint ventures that present a connection to the UK, have you noticed the introduction of any "Brexit" wording in the shareholders' agreement or other joint venture document?

Based on our experience (which is not exhaustive in terms of UK-related joint ventures in South Korea), we have not yet noticed the introduction of Brexit-related wording in the shareholders’ agreement or other joint venture document. We have also not noticed any aversion to choosing English law as the governing law or English courts as the jurisdiction of dispute resolution as the parties will typically choose the law and jurisdiction of the country in which the company in question is incorporated.

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