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South Korea: Trends & Developments

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Trends and Developments

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Introduction and Summary

As in other countries, the global COVID-19 pandemic has brought many changes to the trends and developments in the recent litigation landscape in Korea. Specifically, remote hearings have been increasingly used, laws have been amended or enacted in response to COVID-19, and significant court decisions referencing COVID-19 were rendered.

In addition, there were several notable court decisions in the fields of labour and employment as well as ICT, and we expect to see follow-on lawsuits. Also, with the introduction of the Serious Accident Punishment Act (SAPA) and the Framework Act on Carbon Neutrality and Green Growth (the "Carbon Neutrality Framework Act"), we expect to see more lawsuits against companies and the government based thereunder. We will explain in more detail below.

Impact of COVID-19 Pandemic on Litigation Trends and Developments in South Korea

Expanded use of virtual hearings

Prolonged COVID-19 has brought about many changes to Korea's trial and case-handling procedures. The most representative example would be increased virtual hearings. As of 2021, the number of virtual hearings conducted by Korean courts nationwide was 697, which is 2.7 times (171.2%) higher than the number of virtual hearings conducted in 2020 (257). Virtual hearings were adopted, most commonly in preparatory (pre-trial) hearings (424 hearings), followed by main hearings (169 hearings), witness examinations for civil cases (58 examinations), and witness examinations for criminal cases (46 examinations).

Every time there was a resurgence in COVID-19 cases, hearings were frequently delayed, and some courts were even temporarily closed. The pandemic highlighted the need to shift to virtual hearings as courtrooms are often filled with visitors in addition to judges, parties and counsel. In response, Korean courts have implemented a new system and procedures to fully utilise virtual hearings.

In the past, in the case of civil litigation, virtual hearings used to be allowed only in exceptional cases and for the examination of witnesses and appraisers. On top of that, witnesses used to be only allowed to participate in virtual hearings at designated places, such as nearby courts or government offices. However, under the amended Civil Procedure Act (effective on 18 November 2021), even without a particular reason, upon receiving applications or consent from parties to a lawsuit, virtual hearings can be conducted at any place using attendees' own videoconferencing devices. In civil cases, virtual hearings can be used in all types of hearings, including but not limited to main hearings, preparatory hearings and mediation hearings.

As for criminal cases, in accordance with the constitutional principle of public trials, hearings cannot be conducted virtually. But the Criminal Procedure Act was amended (effective on 18 November 2021) so that preparatory hearings, hearings informing people of reasons for arrest,

and witness examination could be conducted remotely.

In addition, courts have adopted systems that could help the actual implementation of virtual hearings. To alleviate the impact of COVID-19 on delays in court proceedings, courts have recently adopted and implemented an electronic court system that allows all courts across the country to access the electronic court through a link. Courts also plan to promote a system using live-streaming hearings for public viewing. Some courts also established courtrooms dedicated to virtual hearings in the court, rather than installing computers and digital equipment in the courtroom to conduct virtual hearings.

Amendment of laws related to COVID-19

The outbreak of COVID-19 has caused various laws to be amended. First, the Infectious Disease Prevention and Management Act was amended to further refine the quarantine requirements and classifications. More specifically, the Act redefined the definition of probable pandemic patients, established grounds for self- or facility quarantine, and allowed people to check whether they have symptoms using communication devices so that necessary measures can be taken at the "probable pandemic patient" stage. Furthermore, the Quarantine Act was amended to reorganise the overall quarantine system by further subdividing the individuals subject to COVID-19 testing, and the Medical Act was amended to establish a new definition of medical-related infection and to provide the basis for monitoring systems such as the occurrence and cause of medical-related infection.

In addition, the Act on Support for Disaster Medical Expenses was amended to expand the benefits of medical expenses to support those who are economically and socially affected by COVID-19. The Act on the Protection of and Support for Micro Enterprises was also amended, stipulating the grounds for payment of compensation to business owners due to the government's ban on gatherings and restrictions on business hours. The amendments to regulations on tax cuts and tax-related laws were implemented as well.

Is COVID-19 a force majeure event?

The spread of COVID-19 gave rise to issues and disputes concerning whether COVID-19 constitutes a force majeure event.

The Korean Supreme Court's position has been to interpret the scope of force majeure in a very limited manner. In a case involving liquidated damages for delay under a construction agreement, the Supreme Court ruled that "the IMF crisis and the resulting disruption in the supply of materials cannot be considered a force majeure event. Unless such an event is caused by an unusual situation equivalent to a natural disaster, it does not suffice as grounds for exempting from liquidated damages for delay" (Supreme Court Decision No 2001Da1386, 4 September 2002).

Against this background, in the first lawsuit filed in Korea where the parties invoked a force majeure clause based on COVID-19, the Seoul Central District Court rejected a narrow interpretation of force majeure and found that a sharp drop in sales resulting from the COVID-19 pandemic is a force majeure event that warrants the termination of a commercial lease agreement (Seoul Central District Court No 2020Gadan5261441, 25 May 2021; both sides did not appeal and therefore the decision became final). In this case, even though the lease agreement did not include explicit reference to business closure or orders to ban business etc due to COVID-19 as

grounds for termination of the agreement, the court found that COVID-19 constitutes a "case where [the business owner] is prevented from continuing its operation of the business due to a force majeure event" provided in the agreement based on the following reasons: (i) foreign tourists were the major source of the plaintiff's sales; (ii) continued losses would be inevitable if the plaintiff maintained the business despite a 90% sales drop; (iii) neither party could have anticipated the outbreak of COVID-19 or the government's extended quarantine restrictions against COVID-19; and (iv) the foregoing was not attributable to either party.

Recently, the court also found that a building owner should reduce the rent in part when a movie theatre incurred losses due to a force majeure event, such as COVID-19 (Seoul Central District Court Decision No 2022Gahap500289, 15 July 2022, appeal is ongoing). Based on the fact that "the COVID-19 pandemic could not be predicted", the court said: "If maintaining agreement terms goes against justice and equity, the principle allowing modification of such terms should be applied."

Is COVID-19 an accident covered by insurance?

Terms and conditions of non-life insurance contracts generally stipulate "insurance accidents" covered by the insurance as "violent and accidental external events". In 2020, there was a decision on whether infection and death caused by COVID-19 constitute an insurance accident (Daegu District Court Decision No 2020Gahap753, 22 October 2020; both sides did not appeal and therefore affirmed).

In the above decision, the court denied the bereaved family's right to claim insurance proceeds, finding that (i) death due to COVID-19 is not "external" because it was a death arising from infection in daily life; (ii) it is possible that the underlying disease, which is an intrinsic factor, worsened because of COVID-19; and (iii) since COVID-19 constitutes a disease under the relevant laws, sepsis caused by COVID-19 was not an "injury caused by a violent external event". In Korea, up to this decision, there was no court precedent on whether an infection caused by a virus or bacterial infiltration could be considered an insurance accident. As a result, this decision, which distinguished injury from disease, drew considerable public attention as well as criticism. Separately, in the case of life insurance, in accordance with the standard terms and conditions, death resulting from COVID-19 is commonly interpreted as an insurance accident.

Notable Decisions

Requirements of wage peak system: labour and employment litigation

Most employees in Korea receive wages under the seniority-based "pay step system". Since 2014, the Act on the Prohibition of Age Discrimination in Employment and Aged Employment Promotion has required all employers to set the retirement age to 60 or older. To alleviate the rigidity of the labour market resulting from the foregoing, the Korean government recommended the "wage peak system" to all business operators as part of the wage system reform. To further explain, the wage peak system is a system under which a company gradually reduces the salary of its employees once employees reach a certain age (generally, around the age of 55) until the employees retire at the set retirement age.

Despite this government recommendation, as there were no specific regulations governing the system, the system was introduced in various forms and details by companies depending on

what was agreed with their employees. In certain cases, employees were negatively affected by their company's wage peak system, and lower courts have been reviewing the substance of each company's wage peak system to determine whether there were reasonable grounds for discrimination that arose from the wage peak system.

In the midst of this, on 26 May 2022, the Korean Supreme Court found that the wage peak system, which is based solely on age without rational grounds, is not valid (Supreme Court Decision No 2017Da292343, 26 May 2022). The Supreme Court presented substantive requirements for the wage peak system to be valid, reasoning that, even if the wage peak system was introduced with the consent of a majority of employees (procedural requirements), the validity of the wage peak system should be determined based on the following factors: (i) legitimacy behind the introduction of the wage peak system; (ii) degree of disadvantage to the affected employees; (iii) whether any measures were introduced to compensate the wage reduction; (iv) whether such measures were appropriate; and (v) whether resources saved through the system were used for the original purpose behind the adoption of the system.

Although some media outlets reported that the Supreme Court had ruled that the entire wage peak system is null and void, the decision was more of the Supreme Court clarifying the criteria for the wage peak system to be valid. This Supreme Court decision is expected to invite a slew of lawsuits filed by individual employees/retirees who were affected by the wage peak system.

Global content providers' obligation to pay network usage fees to Korean internet service providers: ICT litigation

In 2020, a global content provider (CP), Netflix, filed a lawsuit seeking confirmation that Netflix does not have an obligation to pay any network usage fees to the Korean internet service provider (ISP) SK Broadband (SKB). The Seoul Central District Court found in favour of SKB in 2021 (Seoul Central District Court Decision No 2020Gahap533643, 25 June 2021). This decision is noteworthy in that it is the first court decision concerning the network usage fee between a Korean ISP and a global CP.

Due to a recent surge in the number of Netflix users in Korea, Netflix generated excessive traffic on the internet network. SKB charged Netflix network usage fees, alleging that Netflix was responsible for heavy traffic. In response, Netflix filed a lawsuit against SKB alleging that it has no obligation to pay network usage fees as ISPs are responsible for managing their networks.

In determining whether the network usage fee should be paid by CPs, the court found that "CP is either accessing internet network through the ISP or at least is being provided with a paid service from the ISP to connect to the internet and maintain the state of connection" and ruled that the CP is obliged to pay the ISP for receiving paid services. Moreover, as for the scope of the payment, the court emphasised that the "CP is in the process of negotiating the method, size, criteria and timing of the payment to be made in exchange for being connected to the ISP's network, and the scope of the payment obligation borne by the CP will be determined in accordance with such negotiation". Accordingly, the court did not set the scope of payment to be made by the CP.

This case is currently under appeal. However, if the lower court's decision is affirmed by the appeals court, it is expected to somewhat reduce "unfairness" claims or criticism stemming from the fact that Korean CPs are paying for network use whereas foreign CPs are not. In addition, as the court stated that the decision on the details of network usage fees should be negotiated between the parties, more active negotiations of the network usage fee between the ISPs and the CPs are expected.

Notable Enactments and Amendments of Laws

Introduction of the Serious Accidents Punishment Act: criminal, labour and employment litigation

Recently, an increase in fatalities due to industrial and civil accidents has been recognised as a major issue in Korea. The need to prevent serious accidents caused by the lack of a safety management system has emerged as a consequence. Accordingly, the Serious Accidents Punishment Act (SAPA) was enacted on 26 January 2021 to secure the safety of employees and general citizens, and has been in effect since 27 January 2022. The existing Occupational Safety and Health Act is different from the SAPA in that the former focuses on measures to be taken after an accident, whereas the SAPA focuses on preventing accidents in advance. The SAPA targets businesses or workplaces with five or more full-time workers (Article 3) and imposes an obligation on business managers, etc, to ensure the safety and health of all people working in the business or at the workplace. Here, the employer or responsible managing officers' duty to secure the safety and health of employees means: (i) to establish and implement a safety and health management system, such as human resources and budget, necessary to prevent accidents; (ii) if an accident occurs, to establish and implement contingency plans to prevent recurrence of accidents; (iii) to comply with an order issued by a governmental authority to improve and correct the system in accordance with the relevant laws; and (iv) to implement managerial measures necessary to perform duties under safety and health-related statutes or regulations (Articles 4 and 9 of the SAPA).

In particular, there are rising concerns that corporate activities will decrease in that the SAPA strongly holds business owners or responsible managing officers accountable. If a serious industrial accident occurs because employers or the managing officers failed to fulfil the duty to secure the safety and health of employees, they would be subject to imprisonment or fine (Articles 6, 7, 10, 11 of the SAPA) or liable for damages to the person who sustained the damage within a limit not exceeding five times the amount of such damage (Article 15 of the SAPA).

Nonetheless, the SAPA has been criticised for a potential violation of the Constitution for reasons such as violating the principle of clarity (conduct subject to punishment and constituent requirements are unclear), the principle of proportionality (excessive statutory punishment), and the principle of accountability (ambiguous responsibility). In fact, in the case where the SAPA was first applied (a case in which employees were diagnosed with toxic hepatitis at a workplace where hazardous substances were used and safety measures were not fully established or implemented), the defence counsel applied for adjudication on the constitutionality of the SAPA, highlighting the abstract nature of the SAPA.

Introduction of the Framework Act on Carbon Neutrality and Green Growth for Coping With the Climate Crisis: environmental litigation

According to the "Paris Agreement" adopted in 2015 to respond to the global climate crisis, all countries that have signed up for the agreement became obliged to set and implement an initiative to reduce greenhouse gas. In line with this international trend, Korea has also become the 14th country to legislate for "2050 carbon neutrality" by enacting the Framework Act on Carbon Neutrality and Green Growth for Coping With the Climate Crisis (the "Carbon Neutrality Framework Act") on 24 September 2021.

To achieve zero net carbon emissions by 2050, the Carbon Neutrality Framework Act specifies the Nationally Determined Contribution (NDC) target in 2030 to be a 40% reduction from the 2018 level (Article 8, Paragraph 1 of the Carbon Neutrality Framework Act, Article 3, Paragraph 1 of the Enforcement Decree of the Carbon Neutrality Framework Act). To this end, the central government must establish and implement a carbon-neutral green growth basic plan every five years, with a planning period of 20 years for the central government and ten years for local governments.

Under the Carbon Neutrality Framework Act, the government has the obligation and responsibility to do its best to achieve 2050 carbon neutrality. If the government neglects to do so or intends to ease the already established reduction targets, lawsuits for violating the Carbon Neutrality Framework Act or the Constitution may be filed. As the government and government agencies establish and implement policies for carbon neutrality, it is expected to have a significant impact on corporate activities. In particular, companies would be required to prepare for how they would properly and legally disclose greenhouse gas-related information and reduction plans, and how they would protect related trade secrets.

With the implementation of the Carbon Neutrality Framework Act, interested parties are expected to put stronger pressure on the government and businesses to achieve the target reduction. As such, as in foreign countries, there is a possibility that environmental groups may file lawsuits against the government or companies, seeking more ambitious greenhouse gas reduction targets.

Possibility of expanded class action lawsuit and punitive damages system: civil litigation

Currently, the only class action system introduced in Korea is the one under the Securities-Related Class Action Act, which has a limited application to the securities sector, such as stock price manipulation and false disclosure. However, the 2022 Government Legislative Plan includes the Bill on Class Action Act as well as the proposed amendments to the Korean Commercial Act, which is related to the expansion of the punitive damages system. The Ministry of Justice prepared these to expand the class action and punitive damages system to promote effective relief and prevent collective damage.

The Bill on Class Action Act will apply to all damages claims from 50 or more victims without any sector restrictions. The binding effect of decisions applies to all victims except those who opted out. Moreover, for prompt and efficient dispute resolution, the Bill aims to reduce the victim's burden of proof, strictly manage non-compliance with document production orders and introduce a discovery system.

The amendment to the Korean Commercial Act is an amendment that introduces a punitive damages system directly into the Korean

Commercial Act. The amendment stipulates the responsibility to compensate victims within a limit not exceeding five times the amount of damage if a merchant intentionally or by gross negligence causes damage to others. If the merchant proves that the damage is not caused by commercial activities, the punitive damages system does not apply. Also, any special agreement that excludes or restricts the liability for punitive damages is considered invalid under the amendment.

Due to the limitations of the existing civil litigation system, it has been difficult for consumers to receive adequate relief even when they suffered damage. However, if the above bills are introduced, consumers will likely actively file damages lawsuits in various fields seeking adequate relief permitted under those bills.

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Shin & Kim LLC is a leading law firm in Korea with over 700 professionals, including Korean and foreign attorneys, patent attorneys, tax attorneys, certified public accountants, customs specialists and other advisers. The firm advises companies of all sizes across a broad variety of industries. The professionals work in close-knit teams to deliver client-focused results through its offices in South Korea as well as satellite offices in Beijing, Shanghai, Ho Chi Minh City, Hanoi and Jakarta while leveraging its unrivalled network of leading international firms and consultants to collaborate on matters. The professionals have demonstrated outstanding litigation capabilities and maintain a high success rate in significant domestic and international cases. Some specific specialisms include assisting with administrative appeals and disputes relating to sanction dispositions as well as damages lawsuits filed against both Korean and foreign companies, including multinational auto makers and semiconductor companies.

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