WHITE & CASE

South Korea: Building for the future

An Asian powerhouse, South Korea offers a wide variety of inbound and outbound opportunities for domestic and international investors.

Rising to the challenge

South Korea is one of Asia's powerhouses, and its strong exports sector and willingness to adapt its economy make it highly attractive to investors.

South Korea's economic development has been remarkable. It became the first nation to transition from being a recipient of the Organisation for Economic Co-operation and Development aid to becoming a donor itself. With a GDP of US$1.410 trillion in 2014, South Korea is the fourth-largest economy in Asia and the twelfth in the world, as well as being one of Asia's largest outbound investors. It is a success story in a fast-changing world—a country that is ready to carry on creating opportunities for domestic and international investors alike.

Although situated close to China and Japan, South Korea has been able to forge its own economic identity. Its biggest companies are global leaders in the construction, shipbuilding, steelmaking, infrastructure, energy, electronics, automobile and semiconductor industries. Many of its conglomerates have established international reputations and well recognized brand names, with Samsung, Hyundai Motors and LG among the most prominent.

Along with South Korea's state-owned enterprises, its conglomerates are active international investors seeking opportunities to enter new markets, as well as to deepen their presence in existing ones. Its export credit agencies correspondingly play a key role as lenders for some of the largest oil and gas, power and infrastructure projects globally.

Proactive expansion

South Korea is an export-driven economy, with exports making up about half of its GDP. "South Korean companies are some of the most industrious and proactive in the world when it comes to expanding into new markets" says James K. Lee, head of White & Case's Korea practice. As a result, the nation has been focused on achieving economic integration with other countries. Its first free-trade agreement (FTA) went into effect in 2004 with Chile, followed by Singapore, the United States, India, the European Union, ASEAN, the European Free Trade Association, Peru and Turkey. The country has also entered into FTAs with countries including Colombia, Australia, Canada and China, while agreements with others, such as Indonesia, are under negotiation. The many FTAs that South Korea has entered into will significantly increase the volume of trade, not just between South Korea and the United States and European Union, but also with many developing countries. South Korea is going truly global.

South Korea dominates the shipbuilding sector today, with most of the country's ship sales concentrated on higher-value ships that incorporate cutting-edge technology. While Japan and China are competitors, companies such as Hyundai Heavy Industries, Samsung Heavy Industries and Daewoo Shipbuilding & Marine Engineering lead the international shipbuilding industry.

Construction is also one of the main sources of foreign currency, and many South Korean firms have been responsible for successfully executing international construction projects around the world. In 2014 alone, South Korea secured

> "South Korean companies are some of the most industrious and proactive in the world when it comes to expanding into new markets.

A panoramic view of Seoul's skyline

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The government has promised to implement a 'paradigm shift'... fostering creativity and innovation.

overseas construction contracts worth US$66 billion, according to the Korea Trade Investment Promotion Agency (KOTRA).

Low on natural resources, South Korea has invested heavily in global energy and natural resource-related projects and businesses. Many state-run energy companies such as the Korea Gas Corporation and the Korea National Oil Corporation are involved in such investments, as are private firms.

Growth measures

South Korea's economic trajectory does face some potential bumps, however. China's economic slowdown is a concern, as it is South Korea's largest bilateral trade partner, while the yuan's devaluation could hamper the ability of South Korean companies to compete against Chinese rivals in areas such as shipbuilding and carmaking.

But measures are being taken to ensure continued growth. The government has promised to implement a "paradigm shift" in the country, fostering creativity and innovation, in a quest to build a knowledge-based economy. South Korea's skilled and highly educated workforce is a valuable advantage in making this shift. And a new program of reforms is being pushed forward by the government. South Korea, rather than resting on the laurels of its past success, is actively looking for ways to keep its economy vibrant and attractive to both domestic and international businesses.

This report explains how South Korea has turned itself into an attractive investment destination for foreign investors, and examines the evolution that South Korean firms have undergone to become significant global players in key sectors such as infrastructure finance. It also highlights the legal challenges that a growing international presence poses for South Korean companies in areas such as antitrust and US class action litigations, and how South Korea is making greater use of international arbitration as a means of resolving the increasing number of cross-border business disputes it faces.

Global infrastructure: South Korea's vision

South Korea is taking big strides globally with infrastructure financing, as both state-owned agencies and private banks fuel new investment in major ventures.

With projects under way in countries as far flung as Mexico, Australia, China and India, South Korean companies today rank among the top players in large infrastructure investments globally. They have been able to carve out this prominent position largely because of a high level of technical expertise acquired through decades of domestic infrastructure investments promoted by the South Korean government. More recently, however, the expansion has had much to do with the flexing of international muscles by South Korean financial institutions.

This is the case with KEXIM and K-Sure, state-owned export credit agencies (ECAs), that have evolved into two of the most active sources of global infrastructure financing. Since the start of the global financial crisis, they have stepped in to fill the gap in infrastructure funding left behind by retreating commercial banks.

Both KEXIM and K-Sure were created with the primary mission of providing credit insurance and other guarantees for South Korea's manufacturing exporters. But they later extended their activities to other sectors, as the country's investments abroad also began to encompass areas such as construction, oil and gas, and power. K-Sure still sticks reasonably close to its original mission, as it mostly sets up loan guarantees for political and credit risks, while KEXIM provides direct loans to companies. Last year, KEXIM even made its first direct equity investment in a power plant project awarded to a syndicate led by Korea Midland Power.

"Our activities range from direct loans to financial guarantees and, more recently, to equity-related products," say sources within KEXIM. "We can take private equity participations, and have also launched several private equity funds. Our equity investments are aimed to create some catalytic impact on a transaction."

KEXIM and K-Sure are both helping to finance the construction of a US$20 billion chemical complex in Jubail, Saudi Arabia (White & Case represents the Saudi Arabian Oil Company in the joint venture with the Dow Chemical Company) and the Eurasia Tunnel project, which will link the European and Asian sides of Istanbul. To provide their much-coveted support for projects, KEXIM and K-Sure require sufficient "South Korean content". The involvement of South Korean contractors or vendors in the construction and/or supply chain of the project, sufficient equity investment in the project or the supply of natural resources produced by the project directly to South Korea is necessary. Experts have noted that, as a result, many bidders have approached South Korean groups in a quest to have access to the loans and guarantees provided by the two ECAs—which works as another boost to the growing internationalization of South Korea's infrastructure players.

Resourceful strategy

In 2015, both KEXIM and K-Sure agreed to provide more than US$2 billion in loans and guarantees

Above
S-Oil Corporation's refinery facility in Ulsan

> **"Financing institutions have moved away a bit from commodities-based assets and toward power and infrastructure assets.**

for the construction of a steel plant in Brazil. The project is owned in part by South Korean steelmakers Donguk Steel and POSCO, and it illustrates how the support provided by the two ECAs helps South Korea's corporations deploy the full extent of their financial muscle and enables South Korean banks to participate in infrastructure projects.

South Korean financial firms have also stepped up their presence in international infrastructure funding. According to reports, five Korean banks are setting up a joint fund, worth US$2 billion, to help finance contractors involved in construction project abroad. State-owned Korea Development Bank is also a relevant global player. It is, for example, a member of a group of lenders, advised by White & Case, which has provided €550 million for an integrated healthcare campus public-private partnership in Adana, Turkey.

As a country lacking in natural resources, South Korea for a time emphasized projects in areas such as oil and gas, and steel production. But with the fall of commodity prices, South Korean infrastructure businesses have shifted their attention to other kinds of infrastructure investments. Consequently, their funding providers are moving in the same direction, according to Art Scavone, a partner at White & Case in New York and the global head of the firm's 200-plus team of project Finance lawyers.

"Financing institutions have moved away a bit from commodities-based assets and toward power and infrastructure assets," he says. "A good example is the power sector. South Korean entities are actively supporting contractors in power projects in countries such as Mexico, Chile and Indonesia. Another example is transportation infrastructure." The main draw of such projects is the stable long-term cash flow that they generate—a significant bonus in a volatile world, especially compared to the rollercoaster nature of the commodities markets.

"Traditionally, South Korea has played a big role in power, natural resources, petrochemicals and oil refineries," KEXIM sources state. "These four sectors take the lion's share of our financing portfolio. Now we are following companies that are doing business in areas such as transportation infrastructure. Roads, railways, metros, airports and seaports are the subsectors where we plan to increase our support to South Korean firms."

Niche expertise

But opportunities can still be found in commodities sectors that investors have shied away from of late. One of the biggest oil importers in the world, South Korea has developed a sophisticated petrochemical sector, and both contractors and financial providers are eager to take their know-how in the area to other parts of the world.

"When South Korean companies look now at oil and gas projects, they are aiming at cheap feeds for petrochemicals," says David Gartside, a project finance partner at White & Case in Singapore. Firms like LG Chem and LOTTE CHEMICAL, for instance, are taking advantage of the shale gas revolution in the United States to produce refined petrochemical products there. South Korean groups are also making petrochemical investments in Kazakhstan and Uzbekistan, and KEXIM has just signed an agreement to evaluate opportunities to fund

> “Today, South Korean infrastructure investors are strongly positioned in Asia, the Middle East, the United States and Latin America.

projects in oil-rich Turkmenistan.

Today, South Korean infrastructure investors are strongly positioned in Asia, the Middle East, the United States and Latin America. Next on the list, according to Gartside, is Africa, where they are looking at sectors such as petrochemicals in Uganda and liquefied natural gas in Mozambique.

It is a relatively new frontier, where South Korean companies will have to compete with their old regional rivals from Japan, traditionally a heavyweight in infrastructure investments, and their new regional rivals from China, who are gaining ever more clout in this field. "Today, the main concern for South Korean contractors is competition from Chinese competitors, and the Japanese are coming back into the market too," Scavone says.

"For South Korea, this means playing to the strengths of its contractors and consolidating its efforts in traditionally strong markets, such as the Middle East, as well as advancing on newer markets with the benefit of government-to-government support for economic integration, as has been seen in Kazakhstan following the 2008 Memorandum of Understanding between the two nations, and as consolidated by President Park Geun-hye's state visit to Astana last year," according to Gartside. Focusing on these political ties can provide a competitive advantage to South Korean exporters and their financiers, taking advantage of the cultural, economic and geopolitical synergies in strategic markets.

The lure of South Korea

South Korea's "can-do" business attitude and healthy regard for innovation make it a top destination for foreign investment.

South Korea is a dynamic, export-led economy that is actively sending a signal to global corporations that foreign direct investments are welcome there. A series of regulatory reforms implemented in recent years and investments in infrastructure have convinced many corporations to accept the invitation. South Korea has a target of closing 2015 with a record US$20 billion inflow of direct investments. By July, this had already reached US$10.5 billion. It is succeeding in generating interest not only from global groups based in developed economies but also from less traditional investors.
For instance, according to Invest KOREA, a government body, investments from Middle Eastern countries reached US$5.53 billion in the first half of 2015, 40 times more than in the same period last year.

Ease of doing business

Investors are drawn to South Korea by a welcoming business environment and competitive advantages that are well adapted to global economic trends. According to a 2015 World Bank report, South Korea is today the fifth-easiest country in the world for companies to do business. Among G20 countries, South Korea's ranking rose from sixth to second and then to first in 2010, 2013 and 2014, respectively. During the same period, its ranking among OECD member countries rose from twelfth to fourth and then to third.

South Korea's high business-friendly rankings are based on a number of factors, including the country's top digital infrastructure and a skilled workforce honed by decades of investment in a world-class education system. Reforms enacted by the government have created favorable entry and exit conditions for foreign capital, and its capital markets rank among the most developed in the emerging world.

Freedom to invest

"Equity markets are very dynamic in South Korea," says Kyungseok Kim, a White & Case partner in Seoul. "South Korea is also an investment-friendly environment for private equity, and several global funds are investing here."
He notes that there are no significant restrictions to foreign ownership of companies, with the exception of a few regulated sectors such as banking and insurance.
And once foreigners acquire a stake in a South Korean company, they have few worries about reaping the fruits of their investments. "If the South Korean unit is profitable and the dividends are clearly declared, sending money back home should not be an issue for international companies," Kim adds.

The South Korean government is engaged in a charm offensive around the world to attract ever more investments, and the country's stellar performance in world competition rankings only strengthens the case. Free trade agreements (FTAs) with many countries, including the United States, China, the European Union and India, have helped South Korea's quest to become an Asian business hub. The country has 52 FTAs in place, accounting for 73 percent of the world's GDP, and more are under negotiation with key markets such as Indonesia. As a result of the favorable conditions, some 16,000 foreign investors are already present in the country, according to Invest KOREA.

"Once foreigners acquire a stake in a South Korean company, they have few worries about reaping the fruits of their investments.

Times Square luxury shopping mall in Seoul

Innovation and technology

One of the main draws is the remarkable ability shown by South Korean companies to foster innovation in areas such as electronics, superconductors and carmaking. According to the OECD, in 2014 the country ranked first in the world in R&D intensity, at 4.36 percent of its GDP. It also boasted the fifth-highest level of expenditure in R&D. South Korea topped the Bloomberg Global Innovation Index ranking in 2014, scoring particularly highly in patent activity and manufacturing capability.

The World Economic Forum (WEF) reserved particular praise for South Korea's transportation and digital infrastructures in its latest "Enabling Trade" report. Furthermore, South Korea hosts one of the better connected societies in the world, ranking second in the International Telecommunications Union's latest index of Internet access, and its e-government facilities are seen as a model for other countries.

South Korea based companies are among the most active in the world in terms of registering patents, and multinational groups have benefited from the country's culture of innovation and its many FTAs to spread technologies developed in the country to other key markets. One significant example is China, South Korea's main trading partner today.

Remaining competitive

South Korean authorities are aware, however, that more can be done to make the country even more attractive for investors. According to the WEF, access to finance continues to be an issue for companies, even though the banking system has gone through reforms after it was badly hit by the Asian crisis of the late 1990s. The political and economic clout of the family-run all-ranging corporations that drove South Korea's export-led development still bothers rivals trying to get into sectors dominated by them. The government has tried to curb their influence, but this is seen by analysts as a particularly tough task. Also, even though South Korea as an exporter is a major winner in the free trade game, it still imposes restrictions on imports in sectors such as agriculture.

All things considered, the key for South Korea to carry on attracting investments is to maintain favorable conditions for companies to pursue innovation and break into new markets—not least because the competitive pressure tends to get fiercer as rivals from up-and-coming economies target their markets. "Countries like China and Taiwan are catching up pretty quickly in terms of manufacturing similar products at lower prices," Kim says. "South Korean companies need to acquire new technology and expand their product range in order to remain competitive."

Progress with risk in the United States

South Korean companies have made great strides in the US consumer product market, yet they must be more proactive in preventing US class action lawsuits.

South Korean companies have progressively exposed themselves to one particular threat that is characteristic to the US market, as they make inroads into the country: the risk of being targeted by consumer class action lawsuits. These lawsuits abound and illustrate the need for South Korean legal departments to be prepared to face litigation that can cost millions of dollars in legal fees and damages.

Large South Korean companies have been targets of numerous US class action lawsuits. For instance, a leading Korean manufacturer had to deal with a lawsuit where a putative class of owners of certain refrigerator models were sued for alleged defects. Television sets have also been the subject of class action lawsuits in the United States, as well as front-load washing machines and car engines.

"The types of Korean industries being targeted for class actions are expanding, including Korean ramen makers for alleged price fixing," says James K. Lee, head of White & Case's Korea practice. In 2013, for example, class action lawyers targeted noodle makers Nongshim, Ottogi, Samyang Foods and Korea Yakult after they were accused of fixing the prices of some varieties of ramen.

The class action procedural rules, combined with the consumer protection laws of many states, have created a difficult environment for companies that sell consumer products, and plaintiffs' lawyers specializing in class actions are always monitoring consumer products companies for opportunities to file a class action.

Risky business

There have, however, been positive developments for South Korean companies in the United States. In recent years, the US Supreme Court confirmed that companies may agree in advance to arbitrate disputes on an individual basis

Above
People walk through the shopping district in Seoul's Gangnam District

Right
Night dawns at Cheonggyecheon stream in Seoul

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Even less-known South Korean companies are on the radar of the plaintiffs' consumer class action attorneys.

with consumers rather than as a class. However, significant risks remain for companies that are not proactive and do not institute a strategy to prevent class actions before they are filed.

According to Bryan Merryman a partner at White & Case in Los Angeles, South Korean firms that are sued in the United States typically operate in the consumer electronics market. Their products are pushed to market quickly and consumers pay a lot of money for them and expect them to work perfectly, which is often not the case with new technology. "Technologies change quickly, and the expectations for such products are high. If the product does not meet expectations, even in a minor way, there is often a consumer class action filed," Merryman says. "These lawsuits often challenge the accuracy of the advertising and marketing that was used to sell the product."

The problem is compounded by the use of social media platforms by plaintiffs' firms and consumer activists. Today, unhappy consumers, who used to call a company and ask for a refund, can go online, read reviews or exchange information—whether or not accurate—on blogs and other platforms, and create the appearance of a more serious issue, or easily locate a lawyer to file a case. "The mere threat of a class action is often enough to cause companies to modify products or change advertising or a marketing strategy, even if the companies do not believe they have done anything wrong," notes partner James K. Lee, head of White & Case's Korea practice.

States of complexity

A major Korean company recently had this experience concerning new technology introduced into some of its smart TV sets. A privacy group filed a complaint with the US Federal Trade Commission claiming that the company's TV sets were intercepting and recording private communications of consumers in their homes. The company responded that users could disable the feature if they did not want to use it. But the complaints continued, and class actions became a threat. As a result, the company changed how the feature worked.

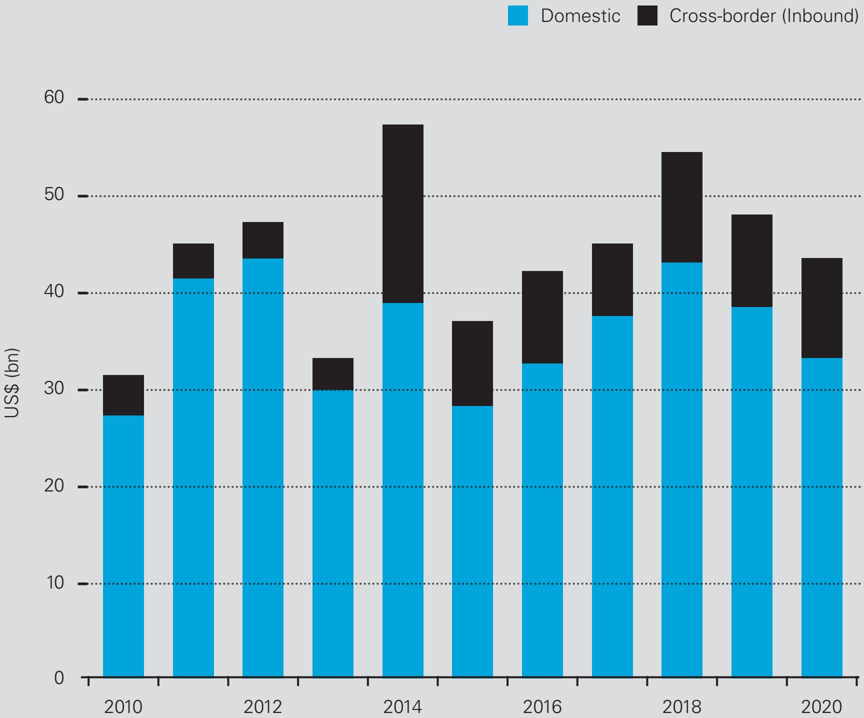
What steps do South Korean companies need to take to lessen the risks of class action lawsuits in the United States? "Understanding US consumer protection laws is essential," according to Lee, "because the rules that apply to advertising and marketing are very complicated and may differ from state to state.

"The key is to be proactive and to consider what the company can do to minimize the likelihood that a case will be filed," Merryman observes. "For example, many companies are able to place an arbitration and class waiver agreement in their consumer agreements, warranties, or other documents given to purchasers that may enable the companies to avoid class actions altogether. In addition, a company should always consider potential class action liability when it comes to developing marketing plans, packaging, advertising and the use of social media."

"The problem is compounded by the use of social media platforms by plaintiffs' firms and consumer activists.

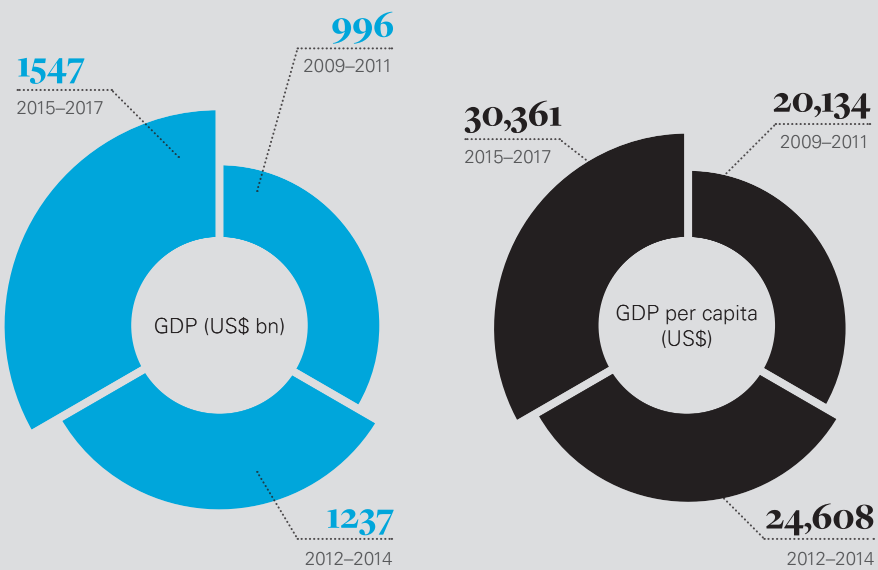
Mapping South Korea's business landscape

Value of M&A transactions (2010–2020)



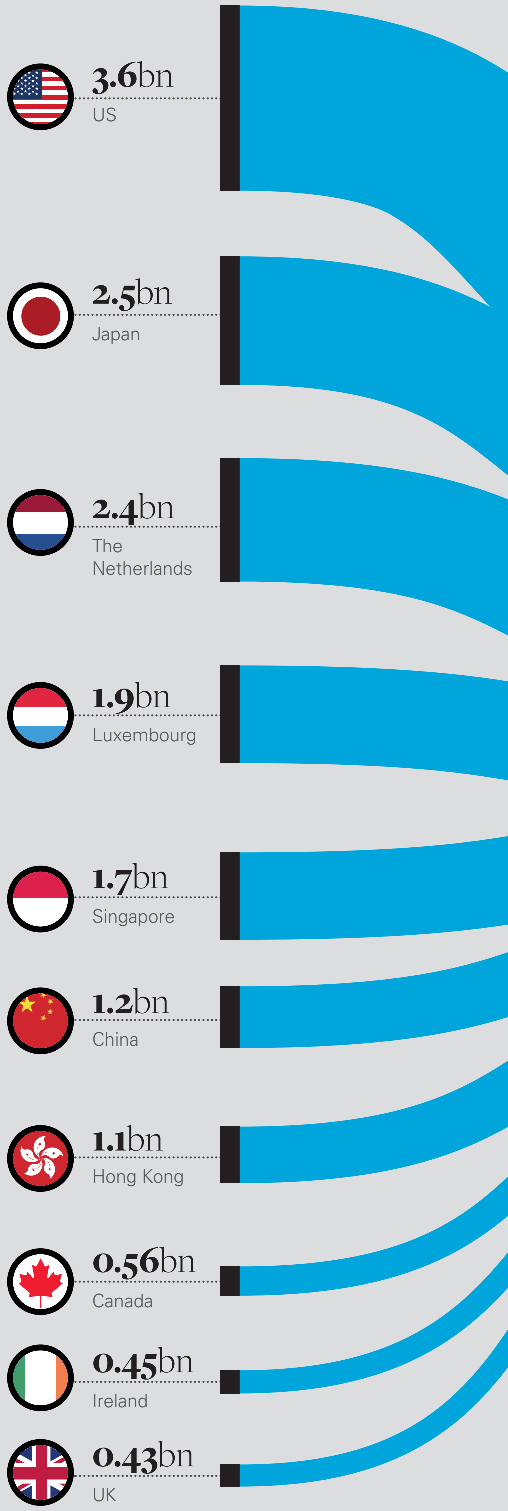
Source: *Oxford Economics*

Long term GDP growth (2009–2017)



Source: *FocusEconomics*

2014 ten biggest inbound investors (US$)



Source: *Korea.net*

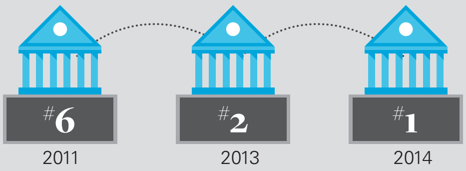
Ease of doing business in South Korea

Global ranking

DB 2015 rank
#5

DB 2014 rank
#5

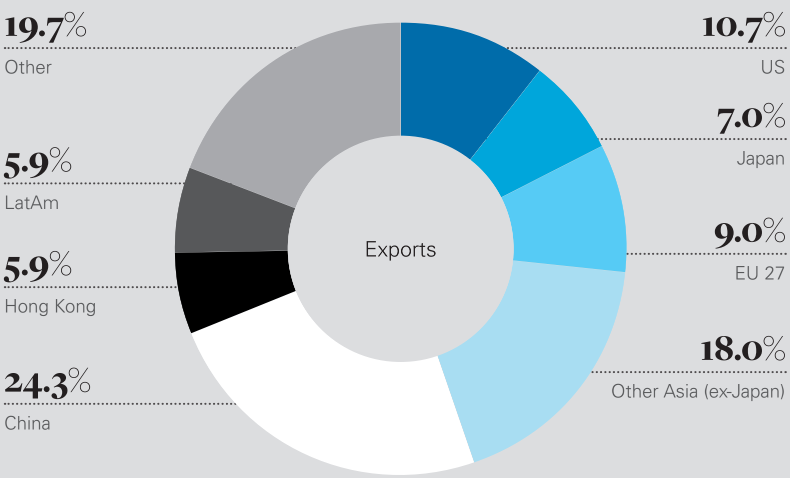
G20 country ranking

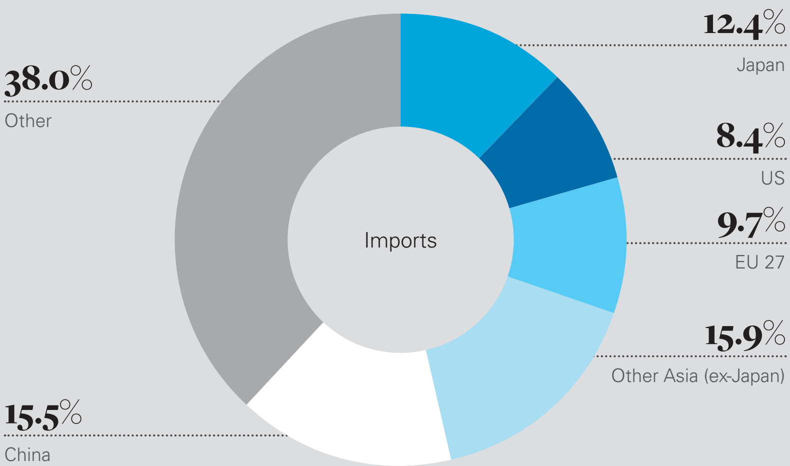


South Korea's World Bank ranking improved from number 6 in 2011 to number 2 in 2013 and number 1 in 2014 among G20 countries

Source: *World Bank*

2014 exports/imports primary markets



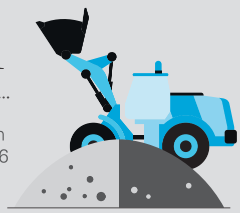


Source: *South Korea Ministry of Trade, Industry and Energy (MOTIE)*

Overseas construction contracts

US$66bn

South Korean construction companies secured US$66 billion worth of overseas contracts in 2014



Source: *Ministry of Strategy and Finance, South Korea*

Playing by the new global competition rules

With international antitrust enforcements on the rise, how can South Korean companies ensure they don't violate global competition laws?

Antitrust regulators around the world are becoming more aggressive and sophisticated in their investigation and enforcement activities, working in coordination across borders and imposing increasingly higher fines. South Korean companies are not exempt from this regulatory crackdown, and they need to be ready if faced with an investigation or enforcement.

"Fines imposed on companies can be particularly high in the European Union, and South Korean companies are no exception," says White & Case partner Jacquelyn MacLennan. For instance, in 2014, two South Korean companies were found to be part of a cartel of 11 producers of underground and submarine high-voltage power cables that was fined a total of €302 million.

Widening the net

While traditional cartel behavior remains the primary focus of investigation and enforcement, the scope of activities subject to scrutiny has expanded. "Alongside the growing number of successful leniency programs, antitrust enforcement itself is getting more sophisticated, and the specific business practices being targeted are expanding," says White & Case partner John Chung. "As a result, more and more companies are finding themselves in the crosshairs of antitrust enforcement agencies and civil plaintiffs, even when their conduct falls short of traditional cartel activity."

For example, many companies are walking a thin line of legality when exchanging information, as important and sensitive data regarding pricing, contracts, negotiations and customer requests and support go back and forth between them. While the mere exchange of information may not be considered an offense in the United States, in Europe it can be treated as collusion.

Given this expanded enforcement scope, what types of South Korean companies are most at risk? As the EC Commissioner Margrethe Vestager said at the end of 2014: "It should be clear that no industry, markets or company is immune from our scrutiny." But South Korean companies involved in consumer goods, including component makers, shipping and financial services, are at particular risk, according to Chung. In addition to bilateral and multilateral exchanges of information, trade association activity, standard-setting organizations and rate-setting conduct can trigger scrutiny.

Defense strategies

Antitrust enforcement has become more sophisticated, South Korean companies need to be prepared.

Subway in
Seoul, Korea

“As antitrust enforcement has become more sophisticated, South Korean companies need to be prepared.

To forestall investigation and enforcement, “the first line of defense is compliance control on the ground”, Chung notes, “discussing it with and training those in the company who are most at risk of creating an antitrust violation. Effective compliance requires cultural awareness and acceptance of antitrust rules,” he adds.

For South Korean companies, “as antitrust enforcement has become more sophisticated, South Korean companies need to be prepared”, says Han Bok-yeun, an international trade professor at Korea National Open University. “The concept and overall outcome may seem very obvious, but there are so many possibilities where things can get worse very fast.”

Once a company thinks it may be the subject of an antitrust investigation—or already is—the most important thing is to mobilize quickly to ascertain what happened and then to coordinate a global strategy in light of the multiple jurisdictions where the alleged conduct may trigger liability, advises Chung.

Fast fact-finding—gathering records and finding knowledgeable individuals—is key to creating an effective strategy. Whether an antitrust violation occurred is not always clear-cut—many activities fall within a grey area—and the activities in question may have occurred years ago. After fact-finding, a company can then consider all the options open to it, according to Song Eun-ji, a researcher at the Korea Development Institute on cartels and international trade. A sound global strategy must take into account different legal standards for certain kinds of conduct, different punitive measures (possible prison sentences for executives in the United States and high fines in the EU) and the ripple effects of taking certain positions on other jurisdictions.

One option may be to mount a vigorous defense tailored to the jurisdiction or jurisdictions involved. Another is to participate in a leniency program, which typically involves amnesty or immunity to the first informant of cartel activity, says Eun-ji.

Antitrust investigations and enforcements will not go away for South Korean companies. As the EC Commissioner signaled, there will be no immediate end to the EU’s “war against cartels”. And as Bill Baer, Assistant Attorney General in the US Department of Justice’s Antitrust Division, said in a speech at the Global Antitrust Enforcement Symposium in 2014: “The Supreme Court puts it succinctly, calling cartels ‘the supreme evil of antitrust.’ There is no more important work we do.”

Given this enforcement environment, it is imperative for South Korean companies to be ready: to take proactive measures to lessen the risk that they will violate antitrust laws and to act quickly if they become the target of an antitrust investigation or enforcement action.

The case for arbitration

Arbitration for dispute resolution has many potential benefits over litigation for South Korean companies involved in complex, cross-border projects.

South Korean companies have been actively involved in international arbitration for some time, particularly in the construction sector, as they invest in and develop major infrastructure, oil and gas, and power projects across the Middle East, South East Asia and Latin America. There is no sign of this trend abating. If anything, practitioners and commentators predict a continued increase in the use of arbitration as the preferred method of resolving disputes where amicable settlement during a project proves difficult.

"The growth in the use of arbitration by South Korean

companies is in many ways unsurprising," says Aloke Ray, a White & Case partner in Singapore, who leads the Firm's arbitration practice in Asia. "It reflects both the heightened levels of outbound economic activity that we have seen from major Korean contractors and the fact that this activity has been in sectors and emerging markets for which international arbitration has been consistently chosen ahead of litigation," he says.

"The reality is that, on high-stakes, technically complex, international projects, it is commonplace for disputes to arise, with the only question being how best to resolve them. Given the greater enforceability of arbitral awards as compared to court judgments, and the greater input that parties have over the arbitral process, it follows that where, as in South Korea, companies are increasingly active in cross-border infrastructure work, so too will be their potential involvement in cross-border disputes, for which international arbitration remains the principal forum for redress," Ray adds.

Use by South Korean firms

South Korean companies are far from unfamiliar with arbitration. According to a study by Joongi Kim, a professor at the Yonsei Law

Above
People passing through an illuminated tunnel, walking towards a metro station in Seoul

School in Seoul, among East Asian countries, South Korean companies only lag their Indian peers in the use of arbitration at the Paris-based International Chamber of Commerce's International Court of Arbitration.

Advantage arbitration

South Korean companies have turned to arbitration for several reasons. The key one, perhaps, is the advantage it offers in terms of enforceability, especially where a counterparty is based in a country with a national court system unlikely to enforce a foreign court judgment. By contrast, arbitral awards are enforceable in the 155 contracting states of the New York Convention 1958, which includes most emerging economies. Other reasons include the higher degree of party involvement in determining the process and the fact that the arbitration is private (and in most cases confidential). Going to court in a foreign jurisdiction can be risky because companies might be unfamiliar with the court system and face the risk of their disputes being litigated in the public eye, with the associated reputational damage that can follow.

In the past, South Korean companies viewed arbitration as foreign-run and controlled. But that perception has faded as the fairness and effectiveness of international arbitration has been demonstrated in matters involving South Korean companies. And, as in-house departments in South Korean companies have grown in size and sophistication, so too have companies' experience and understanding of the benefits of resolving cross-border disputes through arbitration.

Documentation is key

As a result, many South Korean companies nowadays insist on incorporating arbitration clauses into their commercial contracts, especially those that involve cross-border work. Ray explains that "in addition to the more routine considerations about which arbitration seat and which arbitral institution to choose when drafting arbitration clauses, South Korean companies are now increasingly aware of the need to get advice on the overarching legal structure of their investments, particularly into emerging markets, to avail themselves of protections under international law available under treaties, and to supplement the contractual protections they have been more used to negotiating for years."

> **"The use of international arbitration by South Korean companies will continue to grow, particularly with the ratification by the EU and United States of free trade agreements.**

Once an arbitration begins, key witnesses may not be fluent in English and the evidence may be in a language other than Korean. Cultural differences and miscommunication may arise but, according to experts, differing culture and languages are not the single biggest factors in arbitration. What is important is documentation.

"South Korean companies tend to be extremely well organized. Ultimately, most commercial disputes turn on who said what to whom, when and why. Accurate and comprehensive record-keeping is often the decisive factor," Ray notes.

Close communication with counsel is also essential. As arbitration hearings may use unfamiliar procedures and be conducted in a foreign language, South Korean companies need to support and communicate with their lawyers more so than in a domestic South Korean dispute involving familiar protocols and language.

Future growth

"The use of international arbitration by South Korean companies will continue to grow," according to White & Case partner Mark Goodrich, "particularly with the ratification of free trade agreements." Goodrich adds, "Many South Korean–financed projects are now in the construction phase in Africa and Southeast Asia. It seems likely that these will give rise to disputes in due course that will be resolved through arbitration."

South Korean companies are approaching international arbitrations with greater confidence and, while a successful outcome may not be guaranteed, these companies have proven that, with the right approach and focus, successful outcomes can indeed be achieved.

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