

*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

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Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **REPUBLIC OF KOREA**

### **Responses submitted by:**

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### **1. Would your jurisdiction be described as a common law or civil code jurisdiction?**

A civil code jurisdiction. However, a form of non-binding jury trial for criminal cases was recently introduced (so called “Citizen Participation Trials”), adding a common-law component to the system.

### **2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?**

Adjudication method is basically adversarial. However the court has wide discretion to intervene in the process, for example, during the witness examination.

### **3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?**

Judges are appointed by the Chief Justice of the Korean Supreme Court. Qualification requirement is currently in state of flux; hitherto, those who passed the bar exam were all eligible, but from 2022, judges must have more than 10 years of legal experience.

### **4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?**

There are 3 kinds of specialized courts; patent court, family court and administrative court. The patent court deals with patent, utility model, design, or trademark disputes. The family court has exclusive jurisdiction over domestic relations and juvenile offense cases. The administrative court hears tax, eminent domain, labor, and other administrative cases.

### **5. Is arbitration an option and when? If so, what rules are typically used?**

Arbitration can be used when there is a valid arbitration agreement between the parties. The Korean Arbitration Act is closely modeled on UNCITRAL model law (1985). Practitioners generally choose International Chamber of Commerce (ICC) and Korean Commercial Arbitration Board (KCAB) arbitration rules when drafting arbitration agreements.

### **6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?**

Yes. Under the Arbitration Act article 9, the court must dismiss a case when the defendant pleads the existence of a valid

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arbitration agreement.

### **7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?**

Mediation is not mandatory, except for some family law cases, especially those concerning divorce, where mediation is mandatory before filing a claim.

### **8. What is the process for pre-hearing fact discovery (if any)?**

Pre-argument preparatory proceeding is available at the court's discretion (Civil Procedure Act, art. 279). During the pre-argument, the court has wide powers concerning fact-finding.

*(a) Are there provisions for mandatory document disclosures?*

No, but parties may request that the court order the opponent to submit documents (Civil Procedure Act, art. 344). If a party disobeys the order, the court may recognize that the requested documents exist (Civil Procedure Act, art. 349). Please note that these procedures are totally different from the common law disclosure system.

*(b) Is there provision for oral examinations of the parties or others?*

Oral examination is not allowed (Civil Procedure Act, art. 281.3) except in cases where witnesses are unable to attend court hearing (Civil Procedure Act, art. 313).

*(c) Are there limits on the length of oral examinations?*

If oral examination is allowed, there is no legally prescribed limit on its length. However, judges have the discretion to limit its length.

*(d) Are witness statements or summaries to be provided before the hearing?*

Courts may order parties to provide witness statements or summaries before the hearing (Civil Procedure Regulation, art. 79).

### **9. What is the process for pre-hearing expert disclosure (if any)?**

*(a) Are expert reports or written summaries required to be exchanged?*

Yes (Civil Procedure Regulation, art. 101.2). However, the court may decide otherwise, depending on contents of the expert report.

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(b) *Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?*

No, because oral examinations are not allowed as a rule (Civil Procedure Act, art. 281.3).

(c) *Are there provisions requiring experts to meet and narrow issues before the hearing?*

No.

### **10. Are there other notable discovery rules?**

During the pre-argument preparatory proceeding, the court may examine most evidences, including documents, expert opinions and 3<sup>rd</sup> party queries, but not testimonies.

### **11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?**

Yes, in the form of pre-argument preparatory proceeding sessions. The judge(s) will preside over the sessions. Pre-argument preparatory proceeding may last up to 6 months before hearings (Civil Procedure Act, art. 284).

### **12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?**

No, prehearing judgments are not allowed.

### **13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?**

Yes, during the pre-argument preparatory proceedings, the court may issue rulings on evidence admissibility (Civil Procedure Act, art. 281.1). However, expert testimony is excepted.

### **14. What is the standard for admissibility of expert evidence?**

There is no limitation on the admissibility of expert evidence. However, expert evidence may not be admitted if the expert does not take an oath.

### **15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?**

Yes, the court may appoint its own expert under its own discretion (Civil Procedure Act, art. 335). There is no explicit limitation on the court's power to appoint experts.

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**16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?**

Yes. Testimonies or documents that (a) may be disadvantageous to oneself or relatives, (b) concerning professional practice, such as those of attorneys, doctors, notaries, certified public accountants, etc., (c) contain technical or trade secrets are partially protected (Civil Procedure Act, art.314, 315, 355.2). However, professional privileges are not protected if their duty to secrecy is waived.

**17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?**

No.

**18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?**

Courts rule on whether refusal to testify may be justified on privileges (Civil Procedure Act, art. 317).

**19. Briefly describe the trial process?**

(a) *Are there opening submissions, in what form and of what length?*

No, there is no opening submission.

(b) *What is the order of presentation of witnesses?*

There is no rule on the order of presentation. The court has discretion on the order of presentation.

(c) *Who conducts examination and in what order?*

The party that called the witness will examine first, then the counterparty will conduct cross examination, and the party that called the witness will examine again (Civil Procedure Act, art. 327). As a rule, the court may examine the witness after the examinations by parties, but may ask questions during party examinations if needed.

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(d) *What is the process for closing submissions?*

The court has discretion on closing submissions. The court will verbally notify the parties during a hearing whether there will be closing submissions.

### **20. Please identify any other notable trial procedures.**

Arguments in Korean courts mainly take the form of written submissions; attorneys are likely to be asked to submit any significant and/or complex argument in a written form. Extended verbal arguments are rare.

### **21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?**

The plaintiff will generally bear the burden of proving liability, causation and damages (with broad exceptions). The standard of proof required in civil trials is generally described as “*high level of certainty*” or “*preponderance of evidence*”, which would be comparable to standard of “*clear and convincing evidence*”.

### **22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?**

Compensatory damages, pre-judgment and post-judgment interest are recoverable.

### **23. If punitive damages are available, what is the threshold for recovery, and range of awards?**

Punitive damages are not available.

### **24. Are there time limits for bringing claims? Responding to claims? Please describe.**

Claims can only be brought within the time limit prescribed by statute of limitations.

- ✓ 10 years for most civil claims (Civil Code art. 162)
- ✓ 3 years for professional service (doctors, attorneys, etc.) fees, et cetera (Civil Code art. 163)
- ✓ 1 year for lodgings, restaurant, entertainment service fees, et cetera (Civil Code art. 164)
- ✓ 5 years for commercial claims (Commercial Code art. 64)

Defendants must reply to claims within thirty (30) days of receiving the copy of the claim (Civil Procedure Act, art.

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256.1). If not, the court may consider that the respondent has admitted to the claim and render judgment without holding hearings (Civil Procedure Act, art. 257).

**25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?**

Jurisdiction is a matter to be investigated *ex officio*, but parties may make arguments on jurisdiction. Yes, a defendant may request that the court decline jurisdiction and transfer the claim to another court, to avoid “substantial loss or delay” (Civil Procedure Act, art. 35).

**26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.**

Other parties may join the proceedings, by participating only in arguments (supplementary participation, Civil Procedure Act, art. 71), or by participating fully as a defendant (joint participation in litigation, Civil Procedure Act, art. 83). However, other parties must willingly join the proceedings; it is not possible for a defendant to forcibly bring other parties into proceedings.

**27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).**

As a rule, the loser pays legal costs (Civil Procedure Act, art. 98). Legal cost includes court fees, document costs, attorney’s fees and expert’s fees. However, attorney’s fees are payable only within fixed limits (Civil Procedure Act, art. 109.1.).

**28. Are contingency fees allowed?**

Yes, attorneys’ contingency fees are allowed. However, courts may reduce the contingency fee if it is exceedingly large and is against good faith and equity (Korean Supreme Court Decision 2009Da21249 rendered on July 9<sup>th</sup>, 2009).

**29. Is third party funding of claims permitted? Under what circumstances?**

The practice of third party funding of claims is virtually unknown in Korea, and there is no explicit laws or regulation banning the practice. However, the Attorney-at-Law Act art. 109 allow only attorneys to be remunerated for legal

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practice, and third party funding may be in contravention to it.

### **30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?**

Not generally allowed yet. Class actions are allowed for stock-related cases (Securities-Related Class Action Act), consumer protection cases (Framework Act on Consumers) and personal information protection cases (Personal Information Protection Act). Stock-related class actions are allowed when there is disclosure-related wrongdoing (IPO, annual reports, insider trading, etc.). Consumer protection class actions are allowed when manufacturers infringe on consumer protection standards (transaction, labelling, advertisement, etc.). Personal information protection class actions are allowed when there is privacy infringement concerning personal information.

### **31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?**

Yes, only for consumer protection cases and personal information protection cases. Also, only organizations satisfying certain legal criteria (registered, certain size of membership) can commence claims (Framework Act on Consumers art. 70, Personal Information Protection Act art. 51).

### **32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?**

It usually takes around one and a half to two months from the filing of the claim to the first hearing. As of 2012, it took on average 138 days (from the date of filing) for a lower court case to be ruled upon, according to official court statistics. While a variety of factors may affect the duration of a trial, most significant factors would be the work load of the court in question. Also, personnel reshuffles and seasonal factors (summer and winter break) must be taken into consideration.

### **33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?**

Yes, both for final judgments and interlocutory/procedural orders.

For final judgment, a party may file an appeal to an appellate court (Civil Procedure Act, art. 390, on points of fact and law), then to the Supreme Court (Civil Procedure Act, art. 422, only on points of law). Appeals are heard by appointed judges. For interlocutory/procedural orders, a party may file a complaint (Civil Procedure Act, art. 439), which will then be considered both by the court which issued the order and the next higher level court. Complaints are heard by appointed judges.

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**34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?**

For documents and transcripts, yes. Both judges and attorneys are provided with computer monitors, by which documents registered on electronic trial system can be seen. However, in general, witnesses cannot testify by video conference.

**35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?**

Visual aids such as graphics, computer animation, Powerpoint can be used as a part of courtroom argument in trials and appeals. They are more actively used in large, complex cases.

**36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?**

Generally yes. Power of attorney conferred by parties are good for each level of litigation; a power of attorney for the trial in the lower court will not be valid for the trial in the appellate court. (Civil Procedure Act, art. 90).

No, there is no solicitor / barrister distinction.

**37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?**

In Korean law, the concept of "comparative negligence" (Civil Code art. 396, 763), where damages is reduced proportionate to the plaintiff's negligence, is comparable to contributory negligence. Tortfeasors are joint and severally liable to the plaintiff. A plaintiff's negligence reduces liability of defendants.

**38. Is service of a complaint issued outside your country permitted in your country by "informal" means, or must the Hague Convention be followed?**

For the Korean Court to serve a complaint in cooperation with a foreign court, either a treaty such as Hague Convention must be followed or there must be a mutual guaranty of cooperation, usually given in the form of ambassador's or minister's verbal note (Act on International Judicial Mutual Assistance in Civil Matters art. 12). Therefore, "informal" means of service is generally unaccepted.



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**39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)**

While Korean law generally allows export of relevant documents for purposes of foreign litigation, export of documents that contain personal information (information that enables identification of individuals, such as name, national ID number, etc.) requires consent from individuals in question (Personal Information Protection Act, art. 17.3.)

**40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.**

The “Court Practices Digest (*Bupwon Silmu Jeyo*)” published by the National Court Administration is the official and definitive Best Practices document used both by judges and attorneys.

**41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?**

No.

**42. Are there legislative efforts under way that address any of the litigation practices in your country?**

As of May 2014, the Civil Procedure Act is in the process of being revised, but there will be no material change to the litigation practice.