2020 Outlook on Cyber Security and Force Majeure in the Age of Cyberattacks and COVID-19

On 26 March 2020, European Chamber of Commerce in Korea (ECCK) and Yoon & Yang have jointly provided a Webinar on the practical considerations regarding cyber security and the force majeure clause in the age of cyberattacks and COVID-19. The following outlines the key points discussed.

1. Practical Considerations on Cyber-Security

On December 5, 2019, Korea Internet and Security Agency, in collaboration with 6 major cyber security companies in Korea (collectively, "KISA"), announced its outlook on cyber security for 2020. Among other things, KISA warned of cyberattacks launched in the form of an advanced persistent threat ("APT").

APT is an attack where an unauthorized user gains access to a system or network and remains there for an extended period of time without being detected. Common techniques to launch an APT attack include sending phishing e-mails containing malicious codes. However, a more discreet and sophisticated APT technique such as Living off the Land is being observed where reliable utility software (compromised by the threat actor) is used to perform malicious acts.

Given the potentially devastating consequences of cyberattacks, it is important for companies to understand their obligations pertaining to data protection, as well as the measures that can be implemented to reduce their exposure to cyber security risks.

A. Comply with the minimum standards and obligations mandated by the laws

Info-communications service providers are statutorily obligated to (i) implement measures to protect the users' personal information, and (ii) notify KISA and the affected users when personal information is leaked. Korean law also establishes minimum standards a company must consider in order to protect the users' personal information.

B. Implement adequate security systems

Companies must implement protective measures that are socially acceptable and reasonably foreseeable. Companies should use reliable security solution products and keep them properly updated.

C. Implement company-wide measures & Continuously monitor electronic messages

Companies should continuously invest in security. Moreover, companies should implement a company-wide administrative approach towards their employees, so that engineers are not the only ones handling security issues.

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When an employee receives instructions to take a different action for a known task, the employee should double check with the source of the instruction to verify the authenticity of the requested change in action, and such verification should be made through analog devices (e.g., verification via phone calls or faxes).

2. Practical Considerations regarding Force Majeure Clause in the context of COVID-19 and/or Cyberattack

The concept of force majeure is recognized in both civil law (e.g. Korea) and common law jurisdictions. In Korea, the concept of force majeure is embodied in various statutes including the Civil Act, which is further defined through court precedents. For example, the Korean Supreme Court defines force majeure event as an event occurring outside the control of the obligor which could not have been foreseen or prevented even if the obligor had taken all reasonable measures available. [Supreme Court Supreme Court 2005Da59475 (23 Aug 2007)]

To the contrary, common law jurisdictions do not avail a generalized doctrine or customary definition of force majeure. Accordingly, parties must engage in contractual interpretations in each case to determine whether an event constitutes force majeure. There are, however, some general principles that apply to force majeure clauses in a contract. For example, (i) burden of proof lies upon the party asserting force majeure event, (ii) canons of construction (e.g., ejusdem generis) may apply when interpreting the force majeure clause, (iii) force majeure clauses are narrowly interpreted, and (iv) force majeure protections are available to parties who have taken reasonable measures to mitigate the impact of the force majeure event at issue.

In light of the foregoing, parties to a contract should carefully draft force majeure clauses to address disputes that may arise out of events such as COVID-19 outbreak or cyberattacks. Among other things, the parties should determine (i) the scope or definition of force majeure events, (ii) the degree of event that constitutes force majeure event (e.g., impossibility vs. commercial impracticability), (iii) the procedures to trigger force majeure clause, and (iv) allocation of risks between parties.

If a party wishes to engage in an ex post evaluation of whether force majeure clause applies to a breach of contract, he or she should examine whether (i) the event itself constitutes a force majeure, (ii) the breach is actually caused by the force majeure event, (iii) measures to mitigate the impact of force majeure event have been taken, and (iv) there have been any alternative measures available to the party to avoid breaching the contract.

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