Establishment of investor-owned medical institutions in South Korea

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The Medical Service Act (MSA) of South Korea (Korea) prescribes that a medical institution can be established only by (Article 33(2), MSA):

- A medical doctor.
- The state or local government.
- A non-profit organisation (medical corporation).

The Enforcement Decree of the MSA expressly stipulates that a medical corporation will not pursue profits (Article 20, Enforcement Decree of the MSA). As such, a medical corporation cannot be established in Korea for the purpose of pursuing profits.

However, as an exception to the MSA, the government permits establishment of "medical institutions with open-ended investment," that is, for-profit hospitals, which allow free equity participation and distribution of dividends, under the following, to promote new growth engines and deregulation in the healthcare and medical service sector:

- Act on Designation and Management of Free Economic Zones.
- Special Act on the Establishment of Jeju Special Self-governing Province and the Development of Free International City.

This article reviews:

- The for-profit hospitals that can be established in Korea.
- The legal grounds for establishment of them and related regulations.

FOR-PROFIT MEDICAL CORPORATIONS UNDER THE ACT ON DESIGNATION AND MANAGEMENT OF FREE ECONOMIC ZONES

The Act on Designation and Management of Free Economic Zones (FEZ Act) is a special act established to facilitate foreign investments, bolster national competitiveness and seek balanced development among regions, by improving the managerial environment for foreign-invested enterprises and living conditions for foreigners through the designation and management of free economic zones (FEZ) (Article 1, FEZ Act).

An FEZ is designated and publicly notified by the Minister of Trade, Industry and Energy in accordance with statutory procedures (Articles 2(0) and 2(2), FEZ Act). Korea has designated eight FEZs so far (Incheon, Busan-Jinhae, Gwangyang bay area, Yellow Sea, Daegu-Gyeongbuk, Saemangeun-Gunsan, East coast, and Chungbuk).

Persons that can establish for-profit hospitals in FEZs

Only "foreigners" or "corporations under the Commercial Code of Korea (KCC) which have been established by foreigners for the purpose of engaging in the medical service business" (medical institution enterprisers) can establish medical institutions in FEZs:

- The term "foreigner" refers to an individual with a foreign nationality, a corporation established under a foreign law and certain international co-operative organisations (foreign corporation) (Article 2(iii), FEZ Act; Article 2(1)(f), Foreign Investment Promotion Act).
- The term "medical institution enterpriser" refers to a corporation established under the KCC, which is an unlimited partnership, limited partnership, limited liability company, stock company or limited company (Article 170, KCC).

Kinds of for-profit hospitals in FEZs

For-profit hospitals that can be established under the FEZ Act are limited to general hospitals, hospitals, dental hospitals and convalescent hospitals under the MSA.

Requirements for establishing for-profit hospitals in FEZs

Despite Article 33(2) of the MSA, a foreigner or a medical institution enterpriser that satisfies the following requirements can establish a for-profit hospital in an FEZ with the permission of the Minister of Health and Welfare (Article 23(1), FEZ Act; Article 30(1), Enforcement Decree of the FEZ Act):

- The for-profit hospital must be located in a FEZ.
- 50% or more of its capital must be invested by foreigners.
- Its capital must be KRW5 billion or more.
- It must have a co-operative system with a medical institution established and operated under a foreign law, such as a co-operation agreement for operation. In particular, in case of a medical institution enterpriser, its articles of incorporation must prescribe the “matters regarding the decision making body related to medical services of the medical institution”. The decision making body must have seven or more members including foreign doctors or dentists belonging to a medical institution established and operated under a foreign law (Article 4, Rule on Establishment Permission Procedures, etc. for Foreign Medical Institutions in Free Economic Zones (FEZ Medical Institution Enforcement Rule)).
- It must have more than a specified number of foreign medical doctor licence holders. A for-profit hospital that provides medical services in the departments of internal medicine, neurosurgery, surgery, orthopedic surgery, thoracic surgery, plastic surgery, obstetrics and gynecology, pediatrics, ophthalmology, otolaryngology, dermatology, urology, rehabilitation medicine, tuberculosis and family medicine must have one or more foreign medical doctor licence holders in each department (Article 5, FEZ Medical Institution Enforcement Rule).

Procedures for establishing a medical institution under the FEZ Act

Application for pre-examination. A person who intends to apply for permission to establish a for-profit hospital in a FEZ can apply for pre-examination prior to the application by submitting an “application for pre-examination” together with a “business plan” which contains the following matters (Articles 3(1) and 3(2), FEZ Act).
Medical Institution Enforcement Rule: Article 19(1), Civil Petitions Treatment Act, provided that the Minister of the Health and Welfare can change the following matters upon feasibility review every two years from 1 January 2015 (Article 6, FEZ Medical Institution Enforcement Rule):

- Name, representative, size, location and time of establishment of the for-profit hospital to be established.
- Detailed operation plan of the for-profit hospital to be established including manpower, facilities and medical equipment, and so on.
- Investment amount, financing method and investment feasibility.
- Materials that prove the international reputation of the medical institution with which the co-operation agreement for operation has been executed.
- Business plan for auxiliary businesses if any.
- Other matters requested by the Minister of Health and Welfare.

The Minister of Health and Welfare will perform the pre-examination and notify the result of it within 60 days (this period can be extended up to 30 days if necessary for fact-findings, and so on) from the date of the above application for pre-examination (Article 3(3), FEZ Medical Institution Enforcement Rule).

**Application for permission for establishment.** A person who intends to establish a for-profit hospital in an FEZ must submit an application in the designated form, together with the following documents to the Minister of Health and Welfare (Article 23(1), FEZ Act; Article 2(1), FEZ Medical Institution Enforcement Rule):

- In case of a medical institution enterprise: copy of the certificate of incorporation, articles of incorporation and business plan.
- In case of a foreigner: copy of his licence (limited to a medical doctor or a dentist) and business plan.
- In case of a corporation: certificate of all registered matters.
- Building ground plan and explanation of its structure.
- Explanation of medical departments and facilities and capacity of each department.
- Documents proving the satisfaction of the location, foreign investment ratio and capital requirements.

**Permission from the Minister of Health and Welfare.** The Minister of Health and Welfare, upon receiving an application for permission for establishment of a for-profit hospital, will comprehensively review whether it satisfies the criteria for permission under the MSA and the FEZ Act and determine whether to grant permission. The Minister of Health and Welfare’s permission will pass the deliberation and resolution of the Free Economic Zone Commission and the Minister of Health and Welfare will issue a certificate of permission for establishment without delay (Articles 2(2) and 2(3), FEZ Medical Institution Enforcement Rule).

**Effects of establishment of medical institutions under the FEZ Act**

Standing and so on of a for-profit hospital. The following applies:

- **Standing as a medical institution.** A for-profit hospital established under the FEZ Act is deemed as a medical institution established under the MSA (Articles 23(4) and 23(9), FEZ Act). Therefore, it is subject to the MSA, such as prohibition of improper economic gains, and so on (so called “rebates”; Article 23(2), MSA) and prohibition of medical advertisements in certain forms or with certain contents (Article 56(2), MSA).
- **Employment of foreign doctors.** A for-profit hospital can employ foreign medical doctor licence holders, but the MSA will apply to the scope of medical services of such licence holders.
- **Patients.** A for-profit hospital can provide medical services to both Koran and foreign patients (Article 23(7), FEZ Act).
- **Non-application of health insurance.** Since a for-profit hospital is not included in the healthcare institutions under the National Health Insurance Act, health insurance is not applicable to for-profit hospitals, and for-profit hospitals can autonomously determine medical expenses (Article 23(5), FEZ Act).

**Special exceptions for auxiliary businesses.** Article 49 of the MSA limits the auxiliary businesses that can be carried out by a medical institution to a certain extent, such as:

- Education and refresher training for healthcare professionals.
- Research and development.
- Establishment and operation of medical and welfare facilities for senior citizens.
- Establishment and operation of funeral halls.
- Establishment and operation of annexed parking lots.

However, a medical corporation that has established a medical institution in an FEZ and a medical institution enterprise can engage in the following businesses in addition to the foregoing (Article 23-2, FEZ Act; Article 20-3, Enforcement Decree of the FEZ Act):

- Establishment and operation of rest hot springs (Article 9, Hot Spring Act).
- Tourist lodging (Article 3(1)(ii), Tourism Promotion Act), tourist facilities (Article 3(1)(iii), Tourism Promotion Act) and international conferences (Article 3(1)(iv), Tourism Promotion Act).

**Investment incentives under the FEZ Act.** The following incentives can be granted for promoting investments if certain requirements are met:

- Exemption or reduction of taxes and charges under the FEZ Act and other tax laws (Article 16, FEZ Act).
- Mitigated application of various labour regulations under the Labour Standard Act, and so on, and development related regulations (Article 17, FEZ Act).
- Foreign language services, such as issuance of official documents in foreign languages (Article 20, FEZ Act).
- Permission for direct foreign currency transactions in case of ordinary transactions in an amount of US$10,000 or less (Article 21, FEZ Act).

**FOR-PROFIT MEDICAL CORPORATIONS UNDER THE SPECIAL ACT ON THE ESTABLISHMENT OF JEJU SPECIAL SELF-GOVERNING PROVINCE AND THE DEVELOPMENT OF FREE INTERNATIONAL CITY**

The Special Act on the Establishment of Jeju Special Self-governing Province and the Development of Free International City (Jeju Special Act) was enacted to establish the Jeju Special Self-governing Province, and ensure actual decentralisation of power by providing high level autonomy to Jeju-do, and to develop a free international city by broadly reducing administrative regulation and applying international standards and so on (Article 1, Jeju Special Act).

In line with this legislation purpose, the Jeju Special Act delegates a substantial part of the requirements regarding establishment of
medical institutions to the ordinances of Jeju-do (Article 192, Jeju Special Act). Accordingly, Jeju-do has established the Ordinance on Special Cases of Healthcare and Medical Services in Jeju Special Self-governing Province (Jeju Healthcare Ordinance) to determine the matters regarding establishment and operation of medical institutions in detail.

For reference, Greenland Group of China has established Greenland Korea Investment and Development Limited Company, and is now developing the Jeju Healthcare Town in accordance with the Jeju Special Act.

Persons that can establish for-profit hospitals in Jeju-do

Only "stock companies or limited companies established by foreigners" (medical institution enterprisers) can establish for-profit hospitals in Jeju-do (Article 14, Jeju Healthcare Ordinance).

Unlike FEZs where a foreigner can directly establish a for-profit hospital, for a foreigner to establish a for-profit hospital in Jeju-do, the foreigner must establish a stock company or limited company (medical institution enterpriser) in Jeju-do and have such a company establish a for-profit hospital.

Kinds of for-profit hospitals in Jeju-do

For-profit hospitals that can be established in Jeju-do are limited to general hospitals, hospitals, dental hospitals and convalescent hospitals under the MSA (Article 192(1), Jeju Special Act).

Requirements for establishing for-profit hospitals in Jeju-do

A for-profit hospital in Jeju-do must satisfy the following requirements (Article 17, Jeju Healthcare Ordinance):

- It must be located in Jeju-do.
- 50% or more of its capital must be invested by foreigners.
- The capital of the medical institution enterpriser must be US$5 million or more.
- The amount of investment in the for-profit hospital must be US$5 million or more.
- It must satisfy the criteria under Articles 34 (Facility Criteria and Specifications of Medical Institutions) and 35 (Safety Management Facilities of Medical Institutions) of the Enforcement Rule of the MSA and, in case of a general hospital, must satisfy the facility criteria under Article 20 of the Jeju Healthcare Ordinance.
- It must meet the conditions requested by the governor at the pre-examination.

Procedures for establishing a for-profit hospital in Jeju-do

Application for pre-examination. A person who intends to apply for permission to establish a for-profit hospital in Jeju-do can apply for pre-examination by submitting an "application for pre-examination" together with a "business plan" which contains the following matters (Article 16, Jeju Healthcare Ordinance; Article 190), Act on the Civil Petitions Treatment Act:

- Name, representative, size, location, time of establishment and implementation period of the for-profit hospital to be established.
- Description of the medical service business, manpower and operation plan and department to be opened.
- Materials that can prove the enterpriser's experience in similar businesses, investment amount, financing method and investment feasibility.
- Land use plan and related key business plan.
- Economic analysis, including job-creating effects in Jeju-do and effects on the healthcare and medical service system.
- Other materials requested by the governor.

The governor will examine the feasibility of the business plan submitted and determine whether the establishment of the for-profit hospital is appropriate with permission of the Minister of Health and Welfare, and notify the result to the applicant. If the establishment of the for-profit hospital is deemed appropriate, the governor can add other conditions if necessary (Articles 16(2) and 16(3), Jeju Healthcare Ordinance).

If the enterpriser that was approved at the pre-examination fails to satisfy the original approval criteria, the governor will order the medical institution enterpriser to satisfy such criteria within a certain period up to six months. If the enterpriser fails to comply, the governor will not permit the establishment. If a medical institution enterpriser intends to change the business plan already approved, it must pass a separate pre-examination (Articles 16(4) through 16(6), Jeju Healthcare Ordinance).

Application for permission for establishment. A person who intends to establish a for-profit hospital in Jeju-do must submit a pre-examined business plan and an application for permission for establishment together with the following documents, provided that the business plan can be omitted if it has not been changed after the pre-examination (Article 18, Jeju Healthcare Ordinance):

- Certificate of all registered matters and articles of incorporation.
- Building ground plan and explanation of its structure.
- Explanation of medical departments and facilities and capacity of each department.
- Medical expense table.
- Operation plan for healthcare personnel and administrative personnel.

Permission from the governor. A governor who has received an application for permission to establish a for-profit hospital can grant permission if all requirements are met, with the approval of the Minister of Health and Welfare and after the deliberation of the Jeju Special Self-governing Province Healthcare Policy Deliberation Commission (deliberation), provided that if the application for permission is submitted after approval was granted at the pre-examination phase, the approval of the Minister of Health and Welfare can be omitted (Article 18(2), Jeju Healthcare Ordinance).

The governor will consider the following matters by comprehensively reviewing the manpower operation plan and the financing method of the for-profit hospital (Article 15, Jeju Healthcare Ordinance):

- Whether the for-profit hospital can provide high quality medical services.
- Whether it can cause a misunderstanding that a domestic profit-making corporation is allowed to participate as a domestic corporation, or a domestic medical institution is involved through detour investment by a Korean national or a domestic company.

If the governor permits establishment, he will issue a certificate of permission for establishment and have the permission for change to the permitted matters and the contents of administrative dispositions and so on be recorded and managed by preparing and keeping a management card for each for-profit hospital (Article 8(3), Jeju Healthcare Ordinance).

In addition, if any of the permitted matters regarding establishment is to be changed, each of the changes must be reported or obtain permission for change from the governor. In particular, if the location of the establishment of a medical institution is changed or if the medical institution enterpriser is changed through assignment of the medical institution, it must
pass the above deliberation and obtain permission for change from the governor (Article 8(4), Jeju Healthcare Ordinance).

Governors revocation of permission. If a for-profit hospital established under the Jeju Special Act fails to meet relevant requirements, the governor can revoke the permission for establishment after the deliberation. The medical institution enterpriser which receives the revocation of permission must not establish and operate a for-profit hospital for six months from the date of such revocation (Article 192(5), Jeju Special Act; Article 19, Jeju Healthcare Ordinance).

Effects of establishment of for-profit hospitals in Jeju-do

Standing and so on of for-profit hospitals. The following applies:

- **Standing of the for-profit hospitals.** The MSA will apply, *mutatis mutandis*, to for-profit hospitals established under the Jeju Special Act (Article 194, Jeju Special Act). However, as to the installation and operation of some special medical equipment, some of the criteria under the MSA are excluded (Article 195-2, Jeju Special Act), and for-profit activities to introduce, broker and attract Korean nationals residing abroad and foreigners as patients are allowed (Article 23, Jeju Healthcare Ordinance).

- **Employment of foreign doctors.** A for-profit hospital can employ foreign medical doctor licence holders, but the MSA will apply to the scope of medical services of such licence holders (Article 195, Jeju Special Act). Meanwhile, although Article 33(1) of the MSA prohibits healthcare professionals from providing medical services without establishing medical institutions or from providing medical services at multiple medical institutions, the Jeju Special Act allows healthcare professionals with foreign licences to provide medical services at medical institutions in Jeju-do without establishing medical institutions, and permits healthcare professionals with foreign licences who belong to certain medical institutions to provide medical services at other medical institutions in Jeju-do (Article 198, Jeju Special Act). A doctor who works at a for-profit hospital in Jeju-do can prepare medical certificates, death certificates, certificates and prescriptions under the MSA in English, but must provide Korean translations of them on request by patients, and so on (Articles 192(7) and 192(8), Jeju Special Act; Articles 20-4 and 20-5, Jeju Healthcare Ordinance). Further, a foreign doctor’s licence holder working at a for-profit hospital in Jeju-do can engage in telemedicine under which he provides, or is provided with, medical knowledge or technics, to or from a healthcare professional at a remote place through information and communication technologies such as computers and video communications, and so on (Article 197, Jeju Special Act).

- **Patients.** A for-profit hospital can provide medical services to both Korean and foreign patients (Article 193, Jeju Special Act).

- **Non-application of health insurance.** Since a for-profit hospital is not included in the healthcare institutions under the National Health Insurance Act, health insurance is not applicable to for-profit hospitals, and for-profit hospitals can autonomously determine medical expenses (Article 192(4), Jeju Special Act).

Special exceptions for auxiliary businesses

Despite Article 49 of the MSA, a medical institution enterpriser in Jeju-do can additionally engage in the following auxiliary businesses (Article 200-2, Jeju Special Act; Article 25, Jeju Healthcare Ordinance):

- Travel services (Article 3(1)(i), Tourism Promotion Act).
- Tourist lodging (Article 3(1)(ii), Tourism Promotion Act).
- Public baths (Article 2(1)(iii), Public Health Control Act).
- Laundry (Article 2(1)(vi), Public Health Control Act).
- Tourist facilities (Article 3(1)(iii), Tourism Promotion Act).
- International conference (Article 3(1)(iv), Tourism Promotion Act).
- Private teaching institutions (Article 2, Act on the Establishment and Operation of Private Teaching Institutions and Extracurricular Lesson).

Investment incentives

The following incentives can be granted for promoting investment if certain requirements are met:

- Exemption or reduction of taxes and charges under the Jeju Special Act and other tax laws (Articles 237 and 238, Jeju Special Act).
- Mitigated application of various regulations on development and facility management (Articles 243 through 259, Jeju Special Act).
- Foreign language services, such as issuance of official documents in foreign languages, and so on (Article 163, Jeju Special Act).
- Permission for direct foreign currency transactions in case of ordinary transactions in an amount of US$10,000 or less (Article 165, Jeju Special Act).

We have briefly reviewed the for-profit hospitals permitted under the Korean law. We expect positive activities to attract for-profit hospitals in the future, since the Korean government desires to promote the healthcare industry as a new growth engine.
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• Advised Yuju Co., Ltd. in its acquisition of Ray Co., Ltd., a medical image diagnosis machine manufacturer.
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• Advised CHA Bio & Diostech Inc., a subsidiary of CHA Healthcare Group in its spin-off.
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Publications
• Practical Issues concerning Regulations on Financial Institutions (co-authored, 2013).
• Study on U.S. Class Actions on Securities and Their Implications I and II (co-authored, 2005).
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• Advised Korea Kolmar Co., Ltd. in its acquisition of BRN Science Co., Ltd.
• Advised Olympus Korea Co., Ltd. in formulating a standard deal contract.
• Advised Taepooy Pharm Co., Ltd. and Hanmi Pharm Co., Ltd. on various legal issues regarding transactions and disputes.
• Advised Lutronic Co., Ltd., a medical device company on various legal issues regarding transactions and disputes.

Languages. Korean, English