

UNFAIR CONTRACT TERMS: THE CASE OF JYJ v SME

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Abstract

This is one of the most popular legal battle cases for problematic contract terms. This paper will look into the unfair contract terms between JYJ and SME which were the main hiatus and the effects on Korean entertainers whom largely tied up with entertainment agency's contract.

Key words: *slave contract, unfair contract terms, contract law*

INTRODUCTION

In late July 2009, three members of Korean male group singers called JYJ submitted an application to the Seoul Central District Court to determine the validity of their contract with their agency, SME. JYJ claimed that the 13-year contract was excessively long, unfair and that the members were left out of proper profit distribution. Early termination penalty of their contract will cost them 2 times the profit that the group is estimated to earn for the rest of the contract period (over ₩11 billion, or around US\$9.2 million). The news was enough to cause SME's stock price to drop over 10% on the KOSPI (Korea Composite Stock Price Index). The Seoul Central District Court decided with heavy concentration on protecting weak celebrities who were powerless to request their affiliated large agencies for protection rights that they deserved.

SME (S.M. Entertainment) is an independent Korean record label, talent agency, producer and publisher of K-pop. It is founded by Lee Soo-man in South Korea. SM Entertainment co-publishes Avex Trax releases for Japanese artists such as Ayumi Hamasaki, Namie Amuro, and Kumi Koda, as well as Johnny's Entertainment acts like Arashi and KAT-TUN. Initially, "SM" was an abbreviation of the agency founder's name, but now stands for "Star Museum". Once the home to top-selling groups such as H.O.T., S.E.S., and Shinhwa, its current roster of recording artists include BoA, f(x), Kara, Girls' Generation, The Grace, Kangta, Shinee, Super Junior, TRAX, TVXQ and Zhang Liyin.

JYJ consists of 3 male singers. JYJ stands for Jaejoong, Yuchun and Junsu is a three member boyband, formed by three members of South Korean boyband TVXQ: Hero Jaejoong, Micky Yuchun and Xiah Junsu. Their debut Japanese language EP reached No. 1 on the Japanese Oricon albums chart. The band's global debut album, *The Beginning*, was released in October 2010. The group formed following the hiatus of TVXQ. *JYJ v. SME* is one of the cases that involved unethical contract terms.

JYJ v SME

On February 17, 2011, the Seoul District Courts dismissed all of SM Entertainment's lawsuits against JYJ including two injunctions. This allows JYJ to legally continue their activities as a trio and SME is not allowed to block or interfere with their activities. However, this is not the final ruling on JYJ's lawsuit against SME which deals with their contracts. JYJ won another case when a Seoul Court dismissed the two injunctions filed by SME aimed at preventing the three from releasing their albums and continuing with their activities. In a decision, the Seoul Central District Court dismissed two petitions by SME that sought to overturn a court ruling allowing the three singers to continue with their activities without the interference of the Korean entertainment agency. The two suits were dismissed. In dismissing the cases, the court said the exclusive contract between SME and JYJ are invalid since it doesn't give JYJ the freedom of choice and instead forces the trio to follow the orders of the agency.

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UNFAIR CONTRACT TERMS BETWEEN JYJ AND SME

On July 31, 2009, three of the members, Hero, Micky, and Xiah submitted an application to the Seoul Central District Court to determine the validity of their contract with SM Entertainment.³ The members stated that the 13-year contract was excessively long, schedules were held out without the confirmation or permission of the members, contract terms have been extended and changed without their knowledge or consent and that the group's earnings were not fairly distributed to the members.⁴ Early termination penalty of their contract will cost them twice the profit that the group is estimated to earn for SM Entertainment the rest of the contract period (over ₩1 billion, or around US\$9.2 million).

SME entered into unethical contract terms and put burden on JYJ. The unethical contract terms on issues are as listed below:

The Distribution Of Their Earning Percentages Were Unfair

In the case of their album *Miroctic*, SME's treasurer named Mr. Yoon said that it sold 480,000 copies. Their contract said that they would be given 5 million KRW if album sales exceed 500,000 copies which it seems it didn't. The lawyer of JYJ then countered it with evidence that album sales were actually 540,000 which exceeded 500,000 copies. Mr. Yoon then replied that they actually only going to pay them on condition that another album were released.

On top of that, the group was obligated to pay for expenses that were not supposed paid by them which are; rent for their dorm, salary of their housekeeper, salary of security guard, electric bill, snack and foods and last but not least is the expense for parking and gas of SM officials.

There was an issue to SM regarding income distribution and their tax adjustments. When calculations and checking of the revenues are made, SME's representative mentioned that all the details/breakdown are cross-checked in 6 month periods and SME is supposed to show the documents and get the artist's signature. However, SME admitted that they only show all revenue-related documents such as the contents of the bank account, receipts, album contract, commercial contract, overall contract and so forth to JYJ members only if they request for it. But the 3 of them has never requested it. It raised the issue whether this mean that JYJ has *never* seen such documents before? Under these circumstances, SME's representative confirmed that there are NO ways that JYJ will be able to check and rectify the contents.

As regards to overseas activities income, after SME deducted all the promotion activities expenses & fees, the remain money will be divided among the members.

The Length Of The Contract Period

Both sides agreed to the length of the contract period for financial motives. However, the period of the exclusive contract is 13 years, which is too long. The first contract was signed when all the members were still under age.

Deprivation Of Freedom

The terms of the contract somehow allowed SME to deprive JYJ of their freedom. This can be accounted for by staff members who have worked with JYJ. In the contract between SME and JYJ, there are many unfair and unlawful clauses such as; 13-year long-term contract. There have been previous instances of an unlawful contract between an agency and a celebrity. Even if the

³ "TVXQ Feuds With SM Entertainment". The Korea Times. August 2, 2009.
http://www.koreatimes.co.kr/www/news/special/2009/08/178_49459.html.

⁴ "TVXQ to Stick Together Despite Legal Dispute". The Korea Times. August 3, 2009.
http://www.koreatimes.co.kr/www/news/special/2009/08/178_49540.html.

contract is not nullified, JYJ cannot be charged for non-fulfillment of their obligations. They have always carried out the schedules given to them.

The members' rights and responsibilities that stated in the contract are more to "a slave contract", where the members have to follow and attend all schedules and functions that SME gave them, have to follow all SME's orders and instructions unconditionally but they do not have the right to request the contract to be revised.

Signing unfair contract terms with its employees is far from only SME's problem. From April to May 2011, Korea's Fair Trade Commission investigation revealed that YG Entertainment and Star Entertainment were also investigated along with 20 other entertainment companies. 19 companies with 230 celebrities were found with contracts made up of various unfair conditions. These conditions were not about appearance limits but rather about the celebrity's individual affairs such as telling agencies their current location and not being able to apply for leave. period, all **Deprivation Of Composition's Rights**

During the contract copyright of albums and songs will belong to SME. Although the members wrote, composed, and arranged the songs, they can be used by SME without the members' permission but the members could not use them without SME's permission.

The Seoul Central District Court ruled in favor of the three members. The Court decided that the contract was unfair and the members were left out of proper profit distribution. The unfair terms/slave contract has nothing to do with anything sexual. The contract had provisions in SME's favour; the 13-year contract length was unlawful, it would take an unfair sum of money to end the contract, the members weren't allowed to request to revise their contract, they were forced to do things against their will, they were fined if they disobeyed the company, missed any events or was late, and there was unfair profit distribution. Thus, the unfair terms/slave contract was about overworking the members and unfair wages.

LAW REGARDING UNFAIR CONTRACT TERMS

A contract may be void through illegality or other reasons such as the lack of consideration or operative mistake. English law makes a distinction between contracts that are merely void and those that are void through illegality either at common law or by statute. Void contracts through illegality are treated more strictly by the law and general rule is that the court will refuse its aid to a person who founds his or her cause of action upon an immoral or illegal act; the policy is encapsulated in the maxim *ex dolo malo non oritur actio*. In the case of JYJ v. SME, the contract is immoral under section 24(e). Immoral which also known as unethical is the actions that violate the legal standard. Section 2(g) stresses that 'an agreement not enforceable by law is said to be void'. Other relevant provisions are section 10(1) which states that a contract must be made by the free consent of competent parties, 'for a lawful consideration and with a lawful object', and section 24 which provides the consideration or object of an agreement is lawful unless; it is forbidden by law, it is of such a nature that, if permitted, it would defeat any law, it is fraudulent, it involves or implies injury to the person or property of another or the court regards it as immoral or opposed to public policy.

Article 63 (Prohibition of Employment) ⁵

Female workers and those who are under 18 shall not be employed for any work detrimental to morality or health. The Presidential Decree shall determine the prohibited type of work.

This is also the same with s.11 of the Malaysian Contracts Act ⁶ where "every person is competent to contract who is of the age of majority..., and who is of sound mind,...". The age of majority in Malaysia is eighteen years old.⁷

⁵ Labour Standards Act 1997, Republic of Korea

⁶ Contracts Act 1950, Laws of Malaysia

⁷ Age of Majority Act 1971, Laws of Malaysia

Article 3 (Determination of Conditions of Employment)⁸

The conditions of employment shall be determined based upon the mutual agreement between employers and workers, on an equal footing.

This is the same as s.12(1) of the Malaysian Contracts Act ⁹ where “a person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interest.”

Article 4 (Observance of Conditions of Employment)¹⁰

Both employers and workers shall comply with collective agreements, rules of employment, and terms of labour contracts, and each of them shall be obliged to do so in good faith. However, in this case, the terms of the contract were not in good faith where by following the terms made by the employer, the employees were suffering.

KOREA'S FAIR TRADE COMMISSION'S INVESTIGATIONS AND REVISIONS

The “slave” contracts were uncovered when the Korea Fair Trade Commission ran a check on the contracts of 354 artistes belonging to 10 major entertainment companies (see list below). Apart from a few elite artistes, most of the artistes had signed contracts that weren't beneficial to them.¹¹

The entertainment companies have since made changes or abolished the 46 terms and conditions classified under ten categories with 204 artistes affected by this change. This has created an uproar in Korea after the unfair contract terms was made known to the public and the “slave” contract between companies and their artistes has once again come under the spotlight.

The 10 biggest entertainment companies named by the Korea Fair Trade Commission to change their artistes contracts include iHQ, JYP Entertainment, SM Entertainment, Yedang Entertainment, BOF, Olive9, Wellmade Star, Namoo Actors, Fantom Stars and M.net. The spotlight is on the contract terms that mainly interferes with the personal life of their artistes. For example, an artiste has to first seek approval from their company before being able to go overseas (iHQ). An artiste must notify their company their present location at anytime of asking (Olive9, Fantom). An artiste lifestyle including companionship, schooling, citizenship, military enlistment, making friends, economic activities, socializing events, transportation will have to be consulted with the company in advance which means interfering with their personal life (JYP Entertainment).¹²

Below are the lists of celebrities either solo or group entertainers that brought their case on grounds of unfair contract terms:

- 1- On March 7, 2009, 26-year-old South Korean actress *Jang Ja-yeon* 장자연 was found hanged to death at her home, leaving a note describing how she was beaten and forced to entertain and have sex with a string of VIPs, including program directors, CEOs and media executives.
- 2- On July 31, 2009, three members of Korean boy band *TVXQ* 동방신기 (aka DBSK), Micky, Xiah and Hero, submitted an application to the Seoul Central District Court to determine the validity of their contract with *SM Entertainment* (SM). The members stated that the 13-year contract was excessively long and that the group's earnings were not fairly distributed to each member.
- 3- On August 20, 2010, Taiwanese artist *Estrella Lin* 林韦伶, a former member of the girl group 3EP Beauties, claimed that she was asked to “sexually” entertain investors in exchange of her debut in Korea.

⁸ Labour Standards Act 1997, Republic of Korea

⁹ Contracts Act 1950, Laws of Malaysia

¹⁰ Labour Standards Act 1997, Republic of Korea

¹¹ (<http://www.showbiztime.com/south-korea-high-court-nixes-slave-contracts>).

¹² (<http://coolsmurf.wordpress.com/2008/11/21/korea-fair-trade-commission-orders-10-entertainment-companies-to-modify-slavery-contract-terms>).

- 4- The first Korean model *Lee Pani* 이파니 has also admitted that she was once asked to have sex with an influential figure for money and fame. All of these situations have supported the words of famous actor and filmmaker *Na Woon-gyu* 나운규, who claimed in 1937 that "movie directors should become like pimps to treat actresses as if they are prostitutes."
- 5- Popular Korean girl group *Girls Generation* 소녀시대, also formed by SM Entertainment, will attend the Fair Trade Commission early next month and testify upon the case regarding the heated "slave contract" accusations. The statement of the girl group is expected to make quite an influence over how the issue would end.
- 6- "Despite KARA receiving much love from their activities in both Korea and Japan, the members have experienced inexplicable pain that brought them to this decision. They've held it in for a long time, but in order to protect their rights and their future, the members have decided to part ways from their music company."¹³

EFFECTS ON KOREAN ENTERTAINERS

SME has always been under fire for their slave contracts that last 13 years. Contracts by law are not supposed to last over 10, but they have gotten around it by making the length "10 years after debut." However, after many lawsuits and criticisms, SME has decided to fix their contract to make it more fair. The "10 years after debut" has been shortened to "7 years after debut."

Also, the fine for breaking the contract was "three time the amount of the money invested and two times the amount of profits." That has been changed to say "the amount of profit per month times the amount of months."

Additionally, the contract used to say that SME had the final say in everything, but that has now been changed to say that celebrities are encouraged to put in their opinion and refuse any schedules that were almost impossible.

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Entertainment companies should not have the right to interfere with their artistes' personal life. Under the request of the Korea Fair Trade Commission, the 10 entertainment companies have either modified or abolished the unfair terms and conditions stated.

Before this, M.net Entertainment had a ruling whereby if it's artistes terminates their contract before it ends, they would not be able to sign on with other companies. This continues even after the contract has lapse, otherwise the artiste is liable to be sued. Artistes belonging to SM Entertainment have to appear on internet broadcasting belonging to the company for free. But these rulings will now be modified by the Korea Fair Trade Commission, thanks to the highlights of these problems brought by in the legal suits of JYJ and SME.

Other notable terms which include companies being able to ask artistes to perform for free as and when they like, using their artistes song compositions in anyway they want to, etc have since been modified or abolished.

The representative expressed they will maintain even more stringent checks on companies in order to prevent "slave" contracts from appearing again. For companies that do not or refuse to exercise fair contracts, they would be hauled up to court for a hearing and also slapped with a hefty fine.

¹³ (www.redflava.com/2010/gossip/korean-gossip/slave-contract).

CONCLUSION

Everything that has occurred between JYJ and SM is because of an unlawful 13-year contract, SME's unfair exploitation of their authority by putting all responsibility of compensation on JYJ if the contract is terminated, and an unfair income distribution.

This contract is provided as a secure agreement which defines in specific terms the relationship and interaction between two parties, ie TVXQ and SME. TVXQ agrees to submit completely to SME in all ways. There are no boundaries of place, time, or situation in which TVXQ may willfully refuse to obey the directive of SME without risking punishment. Their body belongs to SME, to be used as seen fit. All of TVXQ's possessions likewise belong to SME including all assets, finances, and material goods, to do with as SME sees fit. The "slaves" agree to please the "Master" to the best of their abilities, in that they now exist solely for the pleasure of the said "Master".

Due to this unfair contract terms, an aspiring group of TVXQ has been divided into two; where three of its' members formed another group known as JYJ. JYJ later proceeded with legal suits to acclaimed their freedom and rights. The decision of the Seoul District Courts confirmed that the contracts between them indeed, an unfair contract terms.

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