CHAPTER 12

# South Korea


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## COUNTRY OVERVIEW

South Korea has been considered "the premier development success story of the last half-century."[1] In 1960, hunger was pervasive in Korea and life expectancy was just 52 years of age. Today, South Koreans enjoy one of the most advanced information technology infrastructures and a life expectancy exceeding that of the United States. With an average of more than 8 percent growth from 1960 to 1998, the "Miracle of the Han" helped lay the economic, legal, and human capital foundation for Korea's current global economic dominance.[2] Cultural factors played a key role in this transformation. Reverence for education, strong work ethic, and frugality continue to play a role in Korea's success as it extends trade regionally to capture markets in emerging economies.

### *Geography and Demographics*

Following an armistice to end the Korean War in 1953, the Korean peninsula was split at the 38th parallel: The northern part of the peninsula became a communist-style regime (North Korea, or the People's Democratic Republic of Korea) and the southern part a government modeled on liberal-democracy (the Republic of Korea, or Korea). A little larger than the U.S. state of Indiana, Korea comprises nine provinces and seven autonomous metropolitan zones. About one-fifth of Korea's 48.9 million people live in Seoul, the capital and the world's fifth largest city. A highly mountainous country with relatively few mineral resources, commerce has historically revolved around the Han River running through Seoul near its confluence with the Yellow Sea on the west and the major port of Pusan on the East Sea in the southeast coast. Throughout its 4,000-year history, Korea's political and economic conditions have been profoundly shaped by Korea's location as a maritime country sandwiched between Japan and China. Korea has been insulated from large land-based emigrations. There are no significant ethnic minorities (the small Chinese populations in Seoul and Busan constitute the largest single group). Korean is the official language, and English is used increasingly in many academic and business contexts.

### *Economic Indicators*

Following an export-oriented growth strategy since the late 1960s, Korea succeeded in compressing industrialization into just three decades. Thanks to advance planning, Korea entered the information age on technological par with the world's most advanced economies in the new millennium. Korea has emerged as a global leader in telecommunications, semiconductors, shipbuilding, steel, consumer electronics, automobiles, construction, and biotechnology. A decade after South Korea entered the Organisation for Economic Co-operation and Development (OECD) in 1996, its per capita gross domestic product reached the equivalent of USD 17,690. During the first decade of the new millennium, Korea has sustained close to a 5.0 percent growth rate. Korea's largest trading partners are China, the United States, and Japan, respectively, with exports to those countries accounting for 44 percent of Korea's USD 284 billion in exports in 2005.

Korea received an International Monetary Fund rescue package in December 1997 during the Asian financial crisis that was the largest to date, totaling USD 57 billion. However, Korea rapidly recovered from the crisis, which compelled Korea to reevaluate its government-led growth models, ultimately leading to the establishment of corporate and financial regulations guided by international norms. Immediately after the crisis, foreign direct investment accelerated for a time but retreated in 2007. In the last decade, foreign investors have entered into successful joint ventures in finance, semiconductors, display technology, chemicals, auto parts, machinery, and research and development centers, including those for bio technology. The Korean government also expects to accelerate the induction of investment in clean energy and environmental technology through public-private partnerships in research and development.

Still technically at war and despite occasional confrontations, relations between the two Koreas have improved since the first Inter-Korean Summit in 2000. Economic exchange dramatically increased to USD 1.05 billion in 2006, mainly in the form of aid to the North from the South and direct investment by South Korea in the Kaesong Industrial Complex economic zone in North Korea. Plans for expansion of economic cooperation, until now promoted by both sides, have suffered some interruptions due to setbacks in North Korean denuclearization under the Six-Party Talks. However, the government of the South continues to support ambitious long-term plans for a globally competitive "inter-Korean economic community" to evolve from the current economic cooperation projects in Kaesong and Mt. Kumkang, and planned investment in Haeju and Nadul Island.

## Government and Legal System

The structure of South Korea's civil law system, which was inherited from the Japanese colonial era, is based on the German-continental model with a Civil Code and Code of Civil Procedure at its core. Under the Republic of Korea, the content of individual statutes, including the Constitution, have been strongly influenced by U.S. laws. Economic regulations tend also to reflect OECD guidelines and Korea's World Trade Organization participation.

South Korea completed its transition from military rule to democracy in the late 1980s, thus ending the period of constitutional turmoil and authoritarian rule imposed in the early climate of security urgency and economic competition with the North. The executive branch is headed by a President, elected directly by the people for a single term of five years. A cabinet of ministerial advisors called the State Council supports the President, including the Prime Minister as Vice Chairman, who is personally appointed by the President subject to legislative approval. The President has significant law-making powers, including the authority to propose fundamental acts (matters pertaining to fundamental rights and the structure of government that are enacted by the National Assembly), the authority to make emergency executive orders, and the power to veto legislation. The President also prescribes the specifics of each act through a Presidential Decree, at least in theory. In practice, the relevant Ministry drafts the Presidential Decree along with the Act's enforcement ordinance as a precondition for the Act to become law.

The legislative branch, the National Assembly, is a unicameral legislature composed of approximately 300 members elected mostly from single-member constituencies and some through proportional representation. Two main political parties have continuously dominated seats in the National Assembly: the Democratic Party (liberal) and the Grand National Party (conservative).

The judicial branch consists of a three-tiered national court system and a Constitutional Court. The Supreme Court is the court of final resort and controls the Ministry of Court Administration as well as the Judicial Research Training Institute where all lawyers are required to study for two years after passing the bar exam. Judges serve a 10-year term, which is almost always renewed. Although Korea has a very low proportion of judges and lawyers in relation to its income and population, an increase in the availability of legal services is expected in the coming years with the graduated opening of its legal services market to foreign law firms in 2009, the introduction of U.S.-style law schools, and the gradual replacement of the judicial examination system with a U.S.-style bar exam.

## BUSINESS PRESENCE IN SOUTH KOREA

### *Business Structures*

In planning their operations in Korea, investors may choose from the different corporate forms under the Company Chapter of the Korean Commercial Code (KCC). Except for a few industries where foreign investment is prohibited (e.g., postal services, economic R&D, and educational institutions) or restricted, as published annually by the Ministry of Knowledge Economy, foreigners may pursue opportunities in virtually all of Korea's economic sectors.

#### Representative Offices

To establish a representative office, investors may choose either a liaison office or a branch office. A liaison office is prohibited from engaging in any profit-generating activity and is not required to pay taxes. The most common authorized activities of liaison offices are research and market studies and repair services. A branch office, as a profit-generating entity, must pay corporate taxes. The foreign parent is principal to the rights and obligations of its branch office.

#### Subsidiaries

The two most common forms of subsidiaries in Korea are the *chusik hoesa* (a joint stock company) and the *yuhan hoesa* (a local version of a private company limited by shares). The *chusik hoesa* has been the preferred corporate form to date because it is very similar to a joint stock corporation as understood in the United States. Shareholders are limited in their liability to the amount they invested. The *chusik hoesa* must have one shareholder, but there is no minimum paid-in capital requirement. The board of directors of a *chusik hoesa*, led by a representative director who has the power to bind the firm legally, is elected by the shareholders. There are no nationality requirements for directors. A *chusik hoesa* with paid-in-capital of Korean won (KRW) 1 billion or more requires three directors and an auditor to oversee the directors. A *chusik hoesa* may offer securities in addition to common stock (e.g., preferred shares, bonds, warrants, debentures) and may be publicly listed on the Korea Stock Exchange (KSE).

Like a *chusik hoesa*, a *yuhan hoesa* limits liability of the shareholder (or in this case, "member") up to its invested amount (represented by "units"). However, a *yuhan hoesa* issues only one class of units and issues all units at incorporation. Resembling a closely held company, its membership is restricted to 50 members and it cannot be publicly listed. Members have one vote per unit. A *yuhan hoesa* has no board of directors unless expressly provided for in its articles of incorporation. Furthermore, a transfer or pledge of units is subject to the approval of more than 50 percent of members holding at least 75 percent of the shares. Dividends for both types of companies, if authorized in the articles of incorporation, are paid midterm and annually.

### Partnerships

Local forms of general partnership (*hapmyong hoesa*) and limited partnership companies (*hapja hoesa*) have traditionally offered no tax advantages, thus they have rarely been used. In a *hapmyong hoesa*, all partners have unlimited liability. In a *hapja hoesa*, composed of partners with unlimited liability and partners with limited liability, the unlimited partners make a capital contribution but may not be involved in partnership affairs.

### Joint Ventures

Foreign investors are generally advised to capitalize on the experience or local know-how of a Korean business through a joint-venture company rather than independent incorporation, particularly if the foreign parent lacks bilingual personnel. The joint-venture agreement can be tailored to incorporate most corporate principles on share transfers common in the United States, although some options may require regulatory approvals. The joint-venture partners may also stipulate management principles to supplement but not override the KCC.

## *Incorporation Procedure*

Incorporation of a new business generally requires two steps: (1) notification of a foreign investment under the Foreign Investment Promotion Act (FIPA)[3]; and (2) incorporation under the KCC and securities laws.[4] The foreign investor must first submit a notification of the project to a branch of a foreign or local bank that has registered as a "foreign exchange bank" under the Foreign Exchange Transaction Act (FETA) or to the Korea Trade and Investment Promotion Agency, Invest Korea. If a local law firm or representative files the application on behalf of the foreign investor, a signed and notarized power of attorney should be attached to the report along with the certificate of incorporation of the foreign investor.

Incorporation of a *chusik hoesa* may occur either by promotion or subscription. In the case of promotion, promoters either subscribe to all the shares at incorporation or subscribe to at least one share, and the remaining shares are issued to other parties. The promoters prepare the articles of incorporation specifying, among other things, the number of authorized shares, the par value, and the number of shares issued at incorporation. Any in-kind contribution must be recorded in the articles of incorporation and undergo an asset valuation through the court. Once the shares have been fully paid in, the promoters must call a general promoters meeting or general incorporation meeting to appoint auditors and directors. The incorporation must be registered with the commercial registry at the court with jurisdiction over the head office within two weeks after the closing of the general promoters meeting or general incorporation meeting. Within 20 days of the business commencement date, the company will need to register with the tax office and obtain a tax identification number.

### *Merger, Consolidation, or Business Transfer*

A foreign company (locally defined as a corporation established under a foreign law) may desire to purchase a Korean company and operate the Korean company's business under its own name (merger), or to enter into an agreement to form a new business with a Korean company under a new name (consolidation). In this regard, foreign ownership limits may apply in media and communications, energy generation, power and distribution, nuclear processing, local banks, and certain agricultural and fishing industries.[5] Permission from the Financial Supervisory Commission (FSC) is also required to acquire an ownership stake of greater than 10 percent in a bank or greater than 4 percent in any other financial institution.

An acquisition of shares by a foreigner pursuant to a merger or consolidation agreement that qualifies as a foreign investment requires prior notification under FIPA in addition to adhering to the procedures in the Commercial Code and securities laws on mergers and share purchases. A merger must be approved by a supermajority vote through a special resolution at a general shareholders meeting of the target. A special resolution can be adopted by the affirmative vote of at least two-thirds of shares represented at the meeting, provided the shares present constitute at least one-third of the outstanding voting shares of the company. A target may restrict a transfer of shares only if provided for in its articles of incorporation and only by decision of the board of directors. Within two weeks after the shareholders meeting, public notice must be served to creditors. Creditors may object or apply for security within a month-long period. If the target is listed on one of Korea's two stock exchanges, KSE or KOSDAQ, the foreigner must also file pre- and post-merger reports with the FSC. The merger or consolidation takes effect after registration of the merger with the commercial registry.

Mergers of companies above a certain asset size or entailing interlocking directors may require a business combination report to the Korea Fair Trade Commission, as discussed below. Similar requirements apply to a transfer of the whole or a substantial part of the assets of a company.

## FOREIGN INVESTMENTS: OPPORTUNITIES AND INCENTIVES

FIPA protects foreign investments (including but not limited to subsidiaries of foreign companies) and guarantees advantages to foreign-invested companies that comply with its procedures. Under FIPA, a protected "foreign investment" is mainly one of two types. The first type are investments of KRW 50 million or more to own shares or equity for the purpose of establishing a continuous economic relationship with the company (provided the ultimate ratio of foreign shareholding is at least 10 percent) or in order to participate in the management of the company by other means such as through directorships. The second type are loans to the company of over one year's maturity.

Other activities such as a research and development agreement with a Korean nonprofit can also qualify as a protected foreign investment, as can certain assets contributed in kind to a foreign-invested company. In particular, when a foreigner properly registers such qualified investment, FIPA guarantees remittance to foreign countries of income, dividends, loan principal, interest, and other consideration paid by foreign investors, and the investment will qualify for all the available incentives under the law. There is also a civil petitioning process for disputes concerning foreign investment.

In addition to protections under domestic law, Korea has entered into more than 80 multilateral investment agreements with foreign countries. All but three allow an aggrieved investor to initiate investor-state dispute arbitration with the International Center for the Settlement of Investment Disputes.

## OPERATIONAL ISSUES

### *Contracts*

Under the Korean Civil Code, a contract is formed in one of three ways: (1) an offer and an acceptance; (2) realization of an intent; or (3) simultaneous counteroffers.[6] If the law governing the contract is Korean law, the relevant sections of the Civil Code and the Commercial Code on sales will fill in the missing terms of a contract. Agreements between parties may be overridden by mandatory rules. One of the most important mandatory rules is the Regulation of Adhesion Contract Act, which covers all contracts that have been prepared for use by multiple parties.[7] The law prohibits terms that violate the good-faith principle by unfairly favoring the party that prepared the terms. Applying also to shrink-wrap and on-line contracts, this very comprehensive statute includes unfair limitations of liability, unfair liquidated damages, and dispute resolution designating foreign courts. There is no Statute of Frauds in Korea. However, for written documents, signatures and impression of seals are necessary for authentification.

### *Labor and Employment*

#### Overview

The Labor Standard Act (LSA) prescribes minimum standards of working conditions for employees. Neither employers nor employees may contract out of the requirements of the LSA, but may agree on terms more favorable than the statute.

#### Termination and Layoffs

Termination of employment may arise due to (1) dismissal by an employer; (2) resignation by an employee; (3) expiration of a fixed-term contract; (4) retirement of an employee; (5) death of the employee; or (6) termination of employer's operations.

The LSA prohibits an employer from dismissing an employee without just cause. The Korean Supreme Court held that "just cause" may exist if the reason for dismissal is attributable to the employee, such as the employee being found guilty of theft, fraud, or misconduct. An employer may dismiss an employee on account of restructuring if (1) there is an urgent business necessity for such dismissal; (2) the employer has made every effort to avoid dismissal; (3) the employer established and followed reasonable and fair criteria for the selection of those employees subject to dismissal; and (4) the employer, at least 50 days before the intended date of dismissal, informed and consulted in good faith with the union or a person who represents more than half of the employees.

### Mandatory Insurance and Severance Pay

Employers must maintain mandatory social insurances, such as Industrial Accident Compensation Insurance, National Health Insurance, Unemployment Insurance, and National Pension. One-half is paid by the employer and the other half is paid by the employee through salary withholding. The employer is responsible to pay the relevant state body the total contribution due. Once an employee has been employed for one complete year, an employer with five or more employees must pay a lump-sum severance payment equal to 30 days of the employee's average wage for each consecutive year of service at termination.

### Prohibition Against Discrimination

Under the Korean Constitution and the LSA, employers are subject to general principles of equal treatment and may not discriminate. Prohibited grounds for discrimination include sex, religion, social status, race, disability, and age. The legal test is whether discrimination is without reasonable cause.

### Restrictions on Fixed-Term Employment

The Fixed-Term and Part-Time Worker Protection Act limits to two years the term of fixed-term employment. After two years of employment, employees are deemed employed for an indefinite term. Under the Dispatched Worker Protection Act, if an employer continues to use dispatched workers for a period exceeding two years, the employer must hire such dispatched workers.

### Labor Unions

Membership in a labor union is voluntary and, thus, the general rule is that employers are not able to exclude unions. All companies that recognize a labor union execute a collective agreement with the union. The Trade Union and Labor Relations Adjustment Act states that when a collective agreement applies to a majority of the employees "of the same category" employed in a business or workplace, it shall also apply to the other employees "of the same category" employed in the same workplace. Labor unions have the right in certain circumstances to engage in strikes, sabotage, boycotts, picketing, work-to-rule, and overtime bans.

## *Immigration and Work Visas*

Foreign employees are required to obtain the relevant work visas within two months of the expiration of any temporary visa. A work visa may be obtained through the consul of an overseas embassy or by applying for a change of status of sojourn at the Immigration Office. A work visa is valid only for a specific work place. Aliens wishing to stay longer than 90 days must register and obtain a foreign registration identification number with the Immigration Office within 90 days of entering Korea.

Under FIPA, a business investment (D-8) visa will be issued to essential specialists in foreign-invested companies engaged in business management, production, or technology. Companies may employ foreign workers upon government approval for up to three years on an H-2 visa, provided that they attest that they could not hire local workers to fill the position. Such workers will have the same rights as Korean workers. Permanent Residence (F-5) visas may be granted to foreign investors depending on the amount invested and the time they have resided in Korea.

The Nationality Act prescribes several routes to naturalization. Broadly speaking they include general naturalization for those residing at least five years; simplified naturalization for those residing at least three years and married to a Korean; and naturalization for spouses of overseas Koreans and special naturalization. However, in order to obtain Korean citizenship aliens must renounce their citizenship from their original country.[8]

## *Financial Regulations on Foreign Exchange*

The majority of foreign exchange controls have been eliminated with the enactment of the Financial Investment Services and Capital Market Act (FSCMA), effective February 2009. In the meantime, most international capital transactions such as borrowing in foreign currencies are already liberalized, but they usually require advance notification to a foreign exchange bank under FETA. Failure to report a capital remittance can result in up to one year of imprisonment or a fine up to 10 times the amount of the capital remitted abroad. Reporting requirements are relaxed in specific ways for foreign-invested manufacturers and high tech companies. Under FETA a force majeure clause may prevent the remittance of foreign exchange in a national emergency. However, the clause does not apply to transactions on FIPA-registered investments.

## *Securities and Capital Markets*

### Financial Investment Services and Capital Market Act

Effective February 4, 2009, the Financial Investment Services and Capital Market Act (FSCMA) implements a comprehensive regulatory system based on financial function of an activity and degree of consumer risk. The FSCMA governs conditions for entry, soundness, and disclosure for six "financial investment services" conducted by "financial investment companies" with respect to "financial investment products." Financial investment products are categorized as securities, over-the-counter derivatives, and exchange-traded derivatives. Under the open-ended definitions of financial investment products, a "security" is a product on which the investor's risk may include losing the principal while a "derivative" is one on which the risk may involve losing more than the principal.

### Primary Market Regulation

#### *The Korea Exchange (KRX)*

The KRX allows customers to use a single trading account for transactions in each of its three divisions, the KOSPI Market, the KOSDAQ Market, and the Korea Futures Market. The KOSDAQ Market is an exchange for the securities of small and medium-sized companies and venture-type companies with high potential for growth but that may not meet all the conditions for listing with the KOSPI Market. The FSCMA governs public offerings, tender offers, disclosure, and sanctions of insider trading and market price manipulation. Within the framework of the FSCMA, the KRX establishes listing requirements and other rules on trading for publicly traded securities.

#### *Share Issuance: Public Offerings and Private Placements*

A public offering of securities in Korea is subject to the requirement of filing a securities registration statement with the FSC unless deemed exempt as a private placement.

A private placement is an offer of securities to fewer than 50 nonaccredited investors and an unlimited number of accredited investors including institutional investors. Any offers undertaken within six months of each other will be aggregated for the purposes of the private placement exemption.

The contents of the securities registration statement are generally similar to those in a typical disclosure document used in international offerings pursuant to Rule 144A and Regulation S under the U.S. Securities Act of 1933. Listed companies must file quarterly and annual statements, which can be accomplished electronically. In this regard, Korea is expected to adopt the International Financial Reporting Standards by 2011. Listed corporations must disclose material facts that may affect the investment decisions of a reasonable investor on the same day the event occurs or on the following day.

#### *Share Purchase: Reports on Substantial Holdings*

Even when a share purchase does not result in a merger or consolidation, share purchases are subject to the following requirements when they involve a significant fraction of a company's ownership interest. Any "person" (together with the "specially related persons" as defined in the FSCMA) who holds 5 percent or more of "equity interest" (including options) of a company listed on the KRX is required to report the details of such holdings to both the FSC and the KRX within five business days after acquiring such holdings (This is called the "5 percent rule.")

Any person who, together with any specially related persons, intends to purchase 5 percent or more of the total issued and outstanding shares of a company listed on the KRX from 10 or more persons outside the KRX during any six-month period is required to make a public tender offer. This "5 percent mandatory tender offer rule" also applies to additional purchase from 10 or more persons outside the KRX during a six-month period of any number of shares by a person who already holds 5 percent or more of the total shares. Such reports can be made electronically through the Data Analysis and Retrieval System, where they are disclosed to the public.

### Secondary Market Regulation

A foreign investor desiring to purchase Korean listed securities for portfolio investment purposes must follow the following procedures: first, the investor must obtain a foreign investment registration number from the Financial Supervisory Service; second, the investor must establish foreign currency and Korean won accounts with a foreign exchange bank in Korea; third, the investor must open a securities trading account with a licensed securities company in Korea; and finally, the investor must effect the purchase of the securities through a licensed securities company in Korea. In addition, the foreign investor must appoint a standing proxy and local custodian (which can be the foreign exchange bank at which the bank accounts are opened).

A foreign investor who files a foreign direct investment report to and obtains acceptance from a foreign exchange bank in Korea, and obtains acceptance from the Bank of Korea with respect to the acquisition of securities issued by a Korean company, is exempt from the second and third requirement set forth above.

## *Securitization*

Asset-backed securitization is regulated by the Asset-Backed Securitization Act (ABS Act). Compliance with requirements under the ABS Act is a prerequisite to tax exemptions available under relevant tax laws; however, the ABS Act does not require that all securitization transactions meet its requirements.

## *Export and Import Regulations*

### Customs Procedures

#### *Valuation and Licensing*

Korea is a party to the International Convention on the Harmonized Commodity Description and Coding System and observes the Harmonized Tariff Schedule.[9] Some goods are partially or wholly exempted from customs duties, such as raw materials for manufacturing vessels and semiconductors, goods related to academic research, environmental protection, and those subject to reexport. The Ministry of

Knowledge Economy publishes an Export and Import Notice defining prohibited import items or restricted import items requiring a license or subject to special procedures required by another agency.[10]

Imported goods are normally valued after the import license is received. The primary method of valuation under the Customs Act is the transaction value method based on the price actually paid or payable for the goods when sold to Korea for export. Freight charges, insurance, and other transportation costs are included in the customs value, as well as certain intangibles.

For related-entity-transactions, customs duties follow the WTO Customs Valuation Agreement and Customs Act, while internal taxes follow Organisation for Economic Co-operation and Development Transfer Pricing Guidelines under the Adjustment of International Taxes Act. To reduce uncertainty, importers may enter into an advance customs valuation agreement based on a one-time ruling valid for up to a three-year period as well as an Advanced Pricing Arrangement with the National Tax Service (NTS).

If a foreign investor establishes a foreign-invested company by making an in-kind investment, in order to benefit from value-added-tax deduction, the business registration must be acquired while the materials are clearing import customs prior to setting up the corporation.

#### *Declaration and Clearance*

The Import Declaration should include an import license, an invoice, a price declaration, the bill of lading, proof of satisfaction of Article 226 of the Customs Act, a packing list, a certificate of origin, and any application for duty exemption. After declaration is accepted, the cargo will be released when customs duties or a sufficient deposit has been paid. The full amount of customs duties is due 15 days after clearance.

### Appeals

Appeals on country of origin decisions should be filed with the Fair Trade Division of the Korea Customs Service within 60 days of the decision, while those concerning classification and valuation should be filed with the Customs Valuation and Classification Institute within 90 days of the decision. Subsequent appeals can be directed to the Customs Office or the National Tax Tribunal administered by the Minister of Finance and Economy before independent judicial review of the High Court.

## *Intellectual Property Law*

### Overview of IP Protection

Korea has continued to broaden and strengthen protection of intellectual property (IP) rights since 1908, when the first patent system was established. Table 1 shows the major relevant laws and scope of coverage. Korea's IP regulation reflects the international standards embodied in the many IP treaties it has entered.[11]

**Table 1**

| | Protected Subject Matter | Protection Period |
|---|---|---|
| Patent Act | • Traditional inventions categorized into a product, a process (method), and a product-by-process (if clear and necessary)<br>• Microorganisms, genes, and proteins defined by DNA or amino acid sequences (provided at least one utility be disclosed); bio-engineered plant and bio-engineered animal (except for human beings)<br>• Software-related inventions if claimed as a process, apparatus/system, or recording medium<br>• Business methods if implemented by a computer and have industrial applicability | • 20 years from the effective filing date<br>• Term extended for pharmaceutical or agrochemical inventions unable to be exercised due to required approval or registration procedures |
| Utility Model Act | • Device having a definite shape or structure of an article, or a combination of articles<br>• Methods claims cannot be patented | • 10 years from the effective filing date |
| Design Protection Act | • Industrial designs including typeface | • 15 years from the registration date |
| Trademark Act | • Visually recognizable trademarks including marks in motion, hologram marks, and color marks | • 10 years from the registration date<br>• Renewable every 10 years |
| Copyright Act | • Creative works that express the ideas or emotions of human beings | • Originates from the moment a work of authorship is completed<br>• In principle, 50 years after the author's death |
| Computer Programs Protection Act (as a supplement to Copyright Act) | • Computer programs: "a set of instructions and orders to be used directly or indirectly in computers or similar equipment which possess the function of processing information in order to bring about a certain result" | • Same as Copyright Act |

## Process for Procuring IP Protection

### *Patents, Utility Models, Designs, and Trademarks*

These IP rights arise upon registration through a series of formal and substantive examination processes at the Korean Intellectual Property Office (KIPO). Filing patents and utility models as well as designs can be done directly before the KIPO or via the Patent Cooperation Treaty (for patents and utility models) and the Madrid Protocol (for trademarks). Well-known marks, including domain-names, can be protected under the Unfair Competition Prevention and Trade Secret Protection Act, regardless of registration status.

### *Copyrights and Well-Known Marks*

A copyright is created from the moment a work of authorship is completed. Although registration is not a precondition for copyright protection, registration does provide the advantage that any person whose name is registered is presumed to be the author of the registered work. In the case of a work whose date of first publication or release is registered, the first publication or release of the work is presumed to have taken place on the registered date.

## Enforcement and Licensing of IP Rights

### *Enforcement*

One notable characteristic of IP litigation in Korea is its bifurcated system. Enforcement issues such as injunctive relief are handled by general civil and criminal courts. A civil or criminal infringement action may be initiated at the district court level, and the prevailing plaintiff may obtain injunctive relief and/or monetary compensation. The Seoul Central District Court and a few other district courts have panels specializing in IP cases.

Validity issues are separately dealt with in the first instance by the Intellectual Property Tribunal (IPT) within KIPO. The IPT hears IP invalidation, cancellation, and scope confirmation actions, in addition to final rejection appeals. Courts cannot invalidate or cancel IP rights. IPT decisions can be appealed to the Patent Court, while infringement decisions issued by the District Courts are reviewed by the High Court.

### *Multiple Registrants of IP Rights*

If there are multiple patents, designs, or trademark rights surrounding the same subject that conflict with each other, an IP registrant of the earliest filing date would have priority over other IP registrants in accordance with the first-to-file rule. A later-filed IP registrant generally cannot exercise its right without the earlier-filed IP registrant's consent. This applies equally to a case where a later-filed patent application utilizes and improves an earlier-filed patent application and is granted a patent right. In this situation, a junior patent holder must obtain a senior patent holder's consent to exercise its patent right, while having the right to request a compulsory license before the Intellectual Property Tribunal if the senior patent holder does not grant a license without a justifiable reason. When the above conflicting issues arise between copyrights, designs, or trademarks, the priority is given to whichever is earlier between the filing date (for the designs and trademarks) and the creation date (for the copyrights).

### *Licensing*

License registration is mainly to protect licensees. The recordation process is relatively straightforward and once all the required documents are available, it only takes one or two weeks to complete the recordation of the license. A registered exclusive licensee is entitled to seek preliminary and permanent injunctive relief, to seek compensation for damages, and otherwise fully enforce a patent, utility model, design, or trademark where the licensed rights therein are infringed by a third party. When a nonexclusive license has been registered, it becomes effective against any person who subsequently acquires the IP right or an exclusive license.

### *Sanctions*

Korean intellectual property laws provide for both criminal sanctions and civil liability as stipulated in Korea's agreement with the World Intellectual Property Organization. Special protections apply to software and online digital content. Software piracy is punishable by up to KRW 50 million in fines and up to three years' imprisonment.

## *Real Estate and Real Property*

### Distinction Between Structure and Underlying Land

In Korea, a building and its underlying land are in principle treated as separate properties. As a result, land and buildings are generally registered separately in the real property registry. However, strata title ownership is also recognized in Korea in reference to a specific location within a building or structure. In a case of a strata title building, the underlying land is treated as a part of the strata title building and the owners of a strata title building jointly own, and have the right to use, the underlying land in proportion to their respective ownership interest of the building. Real estate is owned in a form of "complete ownership," similar to the fee simple absolute under U.S. law. Real estate may also be jointly owned in a form of a tenancy in common (*kongyu*), expressed as a percentage of ownership in the undivided entirety of the real estate.

### Title Registration System

Under Korea's real property title recording system, a certificate of registration (*deungki-piljeung*, similar to a U.S. title deed) issued by a court of competent jurisdiction generally creates a presumption of ownership. In order to acquire conclusive ownership, the buyer must obtain the land cadastre certificate and the building management certificate from the seller with a power of attorney issued by the seller; these certificates must be registered at the commercial registry of the court along with other sales-related documentation. Transfer of ownership is finalized when registration is complete, absent fraud. If the ownership of a portion of the strata title building is transferred to a third party, the corresponding portion of the underlying land is also automatically transferred to the transferee. In transfers through inheritance, appropriation, court judgment, or court auction, ownership rights may be granted without the court registration, provided that the grantee of ownership registered at the time of disposition of real estate to a third party for effecting valid title transfer.

### Foreigner's Acquisition of Real Estate

Foreigners are free to acquire land in most areas, except in protected areas where approval is required (mainly, military facilities, cultural assets, land for ecological preservation, and land on islands used for military purposes). The right extends to leases and mortgages. If required, permission must be obtained prior to contract conclusion. The Foreigner's Land Acquisition Act (FLAA) regulates foreign ownership of land in Korea, where a foreigner is defined as a foreign-national individual or a foreign corporation or a domestic corporation with more than 50 percent shares held by foreign investors. The FLAA restrictions apply only to the acquisition of title to land and not to the acquisition of security interest in land. Foreign investors are required to report the acquisition to the mayor's office, regional office, and local district office within 60 days of the signing of the sale and purchase agreement.

Under FETA, a foreign investor who is not residing in Korea and who desires to acquire ownership of a real estate or security interest associated with real estate in Korea with funds physically brought or electronically transferred into Korea from abroad must report his or her planned acquisition to a designated foreign exchange bank in Korea.

## *Environmental Laws and Regulations*

The Basic Environmental Policy Act (BEPA) sets forth the administrative framework for enactment and enforcement of environmental laws. Separate statutes specify duties to comply with standards, obtain licenses, and remediate damage according to the medium in which pollution is released, including the Clean Air Preservation Act, the Water Quality Preservation Act, and the Soil Environment Preservation Act. The Waste Control Act and the Toxic Chemicals Control Act regulate the disposition of waste in industrial and commercial contexts.

The Ministry of Environment (MOE) and local agencies may carry out investigations and enforcement through telemetering systems, information requests, and on-site inspections. Agencies have the power to suspend businesses but normally will issue warnings before fines or suspension of activities. Businesses may appeal an agency decision to the administrative tribunal on the ground of illegal or unfair application of the laws. For particularly severe sanctions, the party has a right to a formal hearing. If the appeal is denied, the party may initiate an appeal in the High Court.

### Principles of Liability

The BEPA adopts a strict standard of liability for bodily injury and property damage. If more than one party is proven to be involved, the parties will be jointly and severally liable. A corporate officer can be found to be liable for crimes and wrongful conduct under the environmental laws if the conduct was taken as a result of a business decision and the person by his position has the responsibility to prevent it.

### Obligations of Owners, Manufacturers, and Importers

Under the Act on Resources Recycling of Electrical Products and Vehicles, producers and importers of cars and electronic products must design a recyclable structure for the products and will be responsible for recycling according to mandatory rates. Initially, 10 categories of electronic products and passenger cars, vans, and trucks under 3.5 tons are covered, but the scope is expected to expand. Producers must comply with concentration limits for four heavy metals, and in the case of electronic products, for polybrominated biphenyl (PBB) and polybrominated diphenyl ether (PBDE). Companies that sell noncompliant products face fines, and a person who makes a fraudulent report or hinders inspection will face imprisonment of up to one year.

The Harmful Chemical Substances Control Law requires anyone who manufactures, imports, sells, or otherwise handles harmful chemical substances (such as drugs, fertilizers, explosives, or radioactive chemicals) to maintain certain operating procedures and report on the generation, storage, and transactions of such chemicals.

### Environmental Impact

The Environmental Impact Assessment Law requires a prior environmental impact assessment to be approved by the MOE for any project that can affect environmental quality in certain categories of projects.

### Emissions

National standards limit carbon monoxide, nitrogen dioxide, dust, ozone, hydrocarbons, and sulfuric acid gas emissions from stationary sources. Within the metropolitan area of Seoul, an installation that emits 80 tons or more of nitrogen oxides, sulfur oxides, or dust particles is subject to an allotment, but may offset the costs by trading permits. Emission standards on newly manufactured gasoline vehicles have been set to the level of ULEV (ultra-low-emission vehicle) and on diesel vehicles to the level of EURO-4 since 2006.

### Special Issues in Business Succession

In a merger and acquisitions (M&A) transaction, the successor entity will acquire the rights and obligations under the environmental laws of the target company whenever the M&A results in a change of business entity. This includes the duty to comply with administrative orders or sanctions and to fulfill conditions for licenses. Where the target company faces civil claims from third parties based on environmental noncompliance, such liability passes to the successor business. However, the successor does not assume criminal liability under environmental laws unless the successor has somehow participated in the conduct.

In the special case of contaminated soil, if an ordinary purchaser can prove that the purchase was made in good faith and without negligence, he will not be liable for civil damage claims or the costs of remediation to third parties. Otherwise, the principle of owner liability prevails. If the land purchase agreement contained a representation and warranty that the land was not contaminated, the new owner is entitled to indemnification for any remediation costs from the previous owner.

## *Taxation*

### Tax Implications of Doing Business in Korea

National taxes include personal income tax, corporation tax, value-added tax, inheritance and gift tax, customs duty, and other taxes. Local taxes include inhabitant tax, property tax, acquisition tax, and registration tax. A person who starts a business in Korea must register each of its business places within 20 days after the business commencement date. As of September 2007, Korea has entered into tax treaties with 70 countries,[12] under which favorable tax rates are provided for dividend, capital gains, interest, and royalties.

### *Personal Income Tax*

For residents, taxable personal income includes sources both within Korea and outside of Korea, while a nonresident is taxed only on sources within Korea. In principle, business income, real estate rental income, labor income, property income, and other income are aggregated and taxed progressively. Interest and dividends are subject to withholding tax. The tax rates for personal income tax range from 8 percent to 35 percent. Inhabitant tax is imposed as a surcharge of 10 percent of the income tax.

### *Corporation Tax*

A Korean company is liable for tax on its worldwide income whereas a foreign corporation is liable for tax only on its Korean source income. Currently set at 22 percent, the corporate income tax rate for companies with annual incomes exceeding

200 million won is expected to decrease to 20 percent in 2012, while the rate for smaller companies is 10 percent. If a Korean company pays corporation tax abroad, the foreign tax amount will, as a general rule, be deducted from its corporation tax liability in Korea, up to an amount equivalent to the ratio of foreign income over total taxable income.

Subject to any applicable tax treaty, a foreign corporation without a permanent establishment in Korea is subject to withholding tax. For example, the following are withheld: 20 percent of dividends and interest, 14 percent of interest on bonds, and 20 percent of capital gains derived from share transfer. Inhabitant tax is imposed as a surcharge on the 10 percent of corporation tax.

### *Value-Added Tax (VAT)*

A person who engages in the supply of goods or services independently in the course of business, whether or not for profit, pays VAT at 10 percent of the supply price.

### *Local Taxes*

Local taxes include registration tax and real estate acquisition tax. In general, registration tax is payable at 0.48 percent (including a resident surtax) of a Korean company's paid-in capital. A taxpayer who acquires real property is subject to acquisition tax generally at 2.2 percent (including resident surtax) and registration tax generally at 2.4 percent (including resident surtax) of the purchase price. Such registration tax may be tripled under certain conditions where the head office of the company in Korea is located in the Seoul Metropolitan Area.

## Tax Issues for Nonresidents with Domestic Source Income

### *Beneficial Ownership*

Korea has entered into tax treaties with 70 countries as of September 2007, under which favorable tax rates are provided for dividend, capital gains, interest, and royalty, among other things. The NTS considers true beneficial ownership in determining the applicable tax treaty for foreign investments from tax-haven countries using pass-through entities (such as partnerships).

### *Permanent Establishment*

If a foreign corporation with no fixed business place in Korea operates a business by having a person in Korea authorized to enter into contracts on its behalf and habitually exercises that authority, it is deemed to have a permanent establishment in Korea.

## Tax Audit and Appeal Process

Given that the general statute of limitations is five years, a taxpayer in Korea is likely to face periodic tax audits every five years or less. Additionally, special tax audits may occur. A taxpayer has a right to obtain the assistance of tax attorneys to help in dealing with the NTS.

Following the tax audit, a preassessment notice is delivered to the taxpayer, which includes tax audit findings and potential income adjustment amounts. Then, the taxpayer may file a request for a Review of Adequacy of Tax Imposition (RATI) with the tax authority. Until the RATI decision is made, the issuance of the official tax payment notice is suspended.

Once the official tax payment notice is issued, the taxpayer may appeal to the National Tax Tribunal under the Ministry of Finance and Economy and/or to the Board of Audit and Inspection. Administrative appeals to either body must be filed within 90 days after the taxpayer receives the tax payment notice. The taxpayer (but not the NTS) may appeal. An appeal of the decision of the administrative bodies to the High Court must be filed within 90 days.

## Special Issues

### E-Commerce and Protection of Personal Information in Electronic Form

With one of the highest Internet penetration rates in the world, Korea's adoption of Internet-protocol television through hand-held devices is expected to increase the significance of digital information for the economy as a whole. E-commerce is particularly developed in the financial sector, with all banks offering on-line and mobile banking services. Laws protecting e-commerce consumers and laws regulating the use of private information by network-based businesses apply to any entity targeting Korean consumers regardless of location. The Korea Communications Commission has the general authority over e-commerce merchants and enforces privacy and certain fair trade laws applying to network-based businesses and digital signature requirements under the Electronic Signatures Law. The Korea Fair Trade Commission (KFTC) has general enforcement authority for fair trade laws and consumer protection.

#### *Protection of Private Information*

The Act on Promotion of Use of Information and Communication Network and Protection of Information requires businesses to obtain consumer consent to gather and store private information and prohibits the use of the information beyond the scope of the consent. It also imposes an obligation on users of private digital information to implement measures to prevent the information from being stolen, lost, or revealed while requiring indemnification to consumers in such cases. The Korea Communications Commission has also issued privacy guidelines for the collection, use, storage, transfer, and deletion of personal information, which provide detailed operational standards to prevent security breaches.

#### *Consumer Protection*

The Law on Consumer Protection in Electronic Commerce gives the KFTC the authority to impose fines on or suspend a business that has violated fair trade laws.

### *Electronic Signatures*

The Electronic Signatures Act stipulates the legal effects and certification requirements for electronic signatures in order to secure electronic commerce and protect personal property. Businesses may apply for certification of digital signatures with the Korea Information Security Agency.

### *Financial Transactions*

In the financial sector, the Credit Information Use and Protection Act pertains to privacy while the Basic Act on Electronic Financial Transactions sets out security and indemnification requirements imposed on businesses in employing Internet banking, virtual cash, and smart cards, as well as ATM transactions. Under the latter, financial service providers must indemnify consumers against financial damage caused during the electronic transfer or processing of contracts or transactions, unless consumers are found to be seriously negligent.

## Product Liability

### *Product Liability Claims*

A person who is injured by a defective product may bring a statutory claim for damages under the Product Liability Act (PLA) or a tort claim under the Civil Code. Under the PLA, a manufacturer is held strictly liable for damages that are caused by the defective products. Under the Civil Code, however, a claimant must prove negligence or wrongful conduct on the part of the manufacturer. Under the PLA, anyone in the chain of manufacture of a defective product may be liable. This includes the manufacturer and importer and, in certain limited cases, the distributor, wholesaler, or retail store owner.

### *Manufacturers' Duties*

A manufacturer has a duty to take affirmative steps to protect the public from harm after the distribution of its product. Under the Consumer Basic Act, a manufacturer, supplier, or importer of a product is required to notify the customers of a product that has the potential to cause property damage or injury and to implement appropriate remedial measures including recalls. With respect to particular products, different laws may govern. For example, automobile recalls are regulated under the Automobile Management Act. A manufacturer must also submit a report to the head of the central administrative agency (for example, in the Seoul area, the Consumer Protection Division of the Seoul Metropolitan Government) in charge of the voluntary recall procedure within five days after its discovery of a gross defect in the construction, design, or labeling of a product or service that causes or threatens to cause unreasonable harm to health or property.

### *Defenses*

A manufacture that has met the duty of "vigilant guard of the product" (which includes the duty of recall) may avail itself of the following defenses against product liability claims: (1) it did not supply the product; (2) it was not possible to discover the defect given the state of scientific or technical knowledge at the time the defective product was delivered; (3) the defect existed due to compliance with standards designated by applicable law; and (4) a product was used as a part or base material in another product and the alleged defect was necessary to comply with the specifications relating to the design and manufacture of such other product. Generally, courts have been liberal in terms of reducing the plaintiffs' burden of proof in product liability claims.

#### *Damages*

A claimant is entitled to full compensatory damages under the PLA, although the damages need to be directly or proximately caused by the defective products. Though there is no recovery of punitive damages in product liability claims in Korea, compensatory damages can be significant since they are not capped.

#### *Collective Remedies*

Although there is no general class action system, the Consumer Basic Act set up a collective dispute resolution system for product liability disputes. Consumers having a common interest who incurred damages due to the same or similar defective products, or a consumer group on behalf of the consumers, may file a claim with the Korea Consumer Agency in order to resolve their claims in a collective mediation. In addition, a consumer group may file a suit on behalf of the consumers for injunctive relief to prohibit sales and imports of defective products. A court decision favorable to plaintiffs for an injunction may lead to successive damage claims brought by individual consumers.

### Competition Law

The Monopoly Regulation and Fair Trade Act (MRFTA) is the principal competition law in Korea and the KFTC is responsible for its enforcement. The policy goals of MRFTA and KFTC are to promote competition and enhance consumer welfare. KFTC has the authority to (1) establish the standards necessary for implementation of the MRFTA; (2) conduct the necessary investigation on violations of the MRFTA; (3) issue corrective orders; and (4) impose penalties.

#### *Business Combination Reports*

The MRFTA prohibits a business combination that is likely to produce competition-restraining effects in the relevant market. A business combination report must be filed with the KFTC if a domestic company that has total assets or annual turnover of at least KRW 100 billion acquires a company with total assets or annual turnover of KRW 10 billion; or if, in an overseas combination, both companies had an annual of turnover of KRW 10 billion in Korea. If the acquiring company's total assets or total sales are KRW 100 billion or more, it must file within 30 days after the merger registration. If the company's total sales or assets are KRW 2 trillion or more, the company must file within 30 days of the conclusion of the merger agreement and wait for the expiration of the 30 day period before registering the merger.[13]

### *Review of Business Combinations*

If the business combination will result in the acquisition of at least 50 percent of the market share, or is, at the time of the report, one of the three leading companies whose aggregate market share constitutes at least 70 percent of the relevant market, KFTC will presume that the combination will have a competition-restraining effect. In that case, the KFTC may impose a corrective measure, and if the corrective measure is not followed, a fine may be imposed.[14]

### *Cartels*

MRFTA prohibits enterprises from agreeing by any means to jointly engage in an act that unfairly restricts competition. Collaborative activities that clearly have the effect of restraining competition such as price fixing or market or customer allocation are in principle unlawful. If a particular collaborative activity has an efficiency benefit, such as in a joint R&D agreement, a balancing method will be used to determine the lawfulness of the activity whenever the collective market share of the participants is 20 percent or more. If a business enterprise is found to have engaged in an unreasonable concerted act, KFTC may order a corrective measure and an administrative fine not exceeding 10 percent of the total annual sales turnover of the relevant company.[15]

### *Abuse of Dominance*

MRFTA prohibits a market-dominating enterprise from abusing its market power. A market-dominating enterprise is an enterprise with a market share of 50 percent or more in the relevant market, or has a market share of at least 10 percent and is one of the three leading enterprises with a combined market share of not less than 75 percent. Abuse of dominance includes setting high prices unfairly, unreasonably restricting sales, unreasonably interfering with the business activities of others, unreasonably impeding new entrants, and unreasonably excluding competitors. If the KFTC concludes that a market-dominating enterprise abused its market power, it may impose corrective measures such as a price reduction order or an administrative fine not exceeding 3 percent of the total sales turnover, or order the publication of the imposed corrective measure against violators.[16]

### *Unfair Trade Practices*

MRFTA restricts an enterprise from committing unfair business practices, such as refusal to deal, discriminatory treatment, exclusive dealings, or unreasonable support. If a business enterprise is found to be engaging in unfair trade practices, KFTC may impose a corrective measure, an administrative fine not exceeding 2 percent of the enterprise's total annual sales turnover, or an order to publish the corrective measures.[17]

*Enforcement of KFTC*

KFTC investigation may include on-site "voluntary" inspections, document requests, and interviews. The Commission will render a decision after holding adversarial proceedings to hear arguments from the investigator and the defendant. The defendant may request redeliberation to the Commission or appeal directly to the High Court.

## LITIGATION AND DISPUTE RESOLUTION

### *Overview of the Korean Judiciary System*

Judicial authority in Korea rests in 20 district (trial) courts of either one- or three-judge panels; five high (appellate) courts of three-judge panels; and the Supreme Court, composed of one chief justice and 13 associate justices. A separate constitutional court is empowered to determine the constitutionality of legislation. Two courts of limited jurisdiction exist at the trial level, the Seoul Administrative Court and the Seoul Family Court. The patent court considers the validity appeals from the district courts.

As in most civil law countries, the judge plays a greater role in discovery and examination of the witnesses. The judge is both the finder of fact and the interpreter of the law. Until recently, all judicial proceedings took the form of bench trials. Evidential effect was statutorily granted to prosecutorial records. However, a hybrid system between a jury and an assessor system with citizen observers has recently been introduced for criminal matters, and defendants are now allowed to challenge to the evidentiary value of prosecutors' records.

### *Civil Litigation Process*

Civil litigation is initiated by the filing of a written complaint with a district court. In civil litigation, the plaintiff has the burden of proof in proving the facts necessary to sustain its allegations against the opposing party. The court then determines whether the facts supporting the allegation are true based on available evidence, judicial experience, and the principles of equity, justice, and public policy.

### *Administrative Action*

Complaints may be filed with administrative courts by individuals with a legal interest to challenge a decision issued by an administrative agency. Judgments of administrative court decisions may be appealed to the High Court.

### *Constitutional Action*

The Constitutional Court has jurisdiction over issues regarding the constitutionality of laws, impeachment, the dissolution of political parties, disputes between government agencies, and constitutional challenges filed by individuals. Anyone individual filing a constitutional claim must first exhaust remedies under lower courts.

## *Arbitration, Mediation, and Conciliation*

### Arbitration and Mediation

In existence for over 50 years, the Korean Arbitration Act allows parties to choose to resolve a dispute through the decision of an mutually selected arbitrator or arbitrators and specify the procedure governing the arbitration, while mandating the role of the court system in supporting the administration of the arbitration and recognizing private arbitral awards. Arbitrations concerning criminal law or public law matters is not permitted.

Arbitration is commonly practiced in preference to litigation for both commercial and noncommercial disputes. The Korean Commercial Arbitration Board (KCAB) maintains a list of arbitrators and assists parties seeking reconciliation through mediation. In the 1990s the Korean Arbitration Act was revised to reflect the UNCITRAL Model Law, and in 2007 the KCAB adopted separate rules for international arbitration to further harmonize its arbitration practices with international norms.

In the absence of specific terms in a contract's dispute resolution clause, Korea's Arbitration Act governs arbitral proceedings. The arbitration tribunal has wide discretion including the authority to determine the admissibility, relevance, and weight of any evidence. The arbitral awards have the same effect as a final judgment of a court. However, since the prevailing party must apply for an enforcement judgment through the court system, the losing party at that time may challenge the award on the following bases: (1) the arbitrator's appointment or the arbitration procedures were not in accordance with the provisions of the Arbitration Act or the arbitration agreement; (2) a party is incompetent or his representative has not been lawfully selected; (3) an arbitral award provides for the performance of an act that is prohibited by law; (4) in the arbitration, the parties have been examined without due cause, or the grounds for the arbitral award have not been given; or (5) grounds for review prescribed under the Civil Code exist. Korea has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, thus awards rendered in other contracting countries are enforceable in Korea.

Mediation terminates a dispute through mutual concession by negotiation through a third party. Unlike arbitration, it will not have legal effect unless the parties agree to the mediation protocol draft. As a private provider of mediation services, KCAB mediates approximately 520 commercial disputes per year in nonbinding mediation hearings. Many of Korea's administrative agencies may require mediation as part of administrative adjudication procedures, such as the Financial Disputes Mediation Commission, the Electronic Commerce Mediation Commission, or the Environmental Dispute Mediation Commission. Mediation may also be ordered by a court of first instance as part of a civil proceeding. In this case, the court will constitute an ad hoc mediation commission or the judge will mediate the dispute. Family courts also may order mediation.

### Conciliation

Under the Korean Civil Code, parties may terminate a dispute through mutual concessions in a voluntary agreement. In a private conciliation, the parties record their compromise in a contract. The parties may also request a judicial compromise, by which they declare before a judge the terms of their agreement to terminate the dispute. A judicial compromise is possible before or after a lawsuit has been filed, and will have the same effect as a final judgment.

### Enforcement of Foreign Judgments

Enforcement is carried out by a court-appointed marshal. A final judgment of a civil matter by a foreign court is presumed to be valid and enforceable only upon fulfillment of all of the following: (1) a judgment must be made by a competent jurisdiction; (2) the losing defendant must have been duly served with actual notice of process (i.e., notice by publication is insufficient); (3) the foreign judgment must be consistent with public policy; and (4) there must exist reciprocal enforcement of judgments with the foreign jurisdiction. Punitive damages are not recognized in Korea and are not enforced as a matter of public policy.

## MARKET EXIT STRATEGY

Market exit is usually accomplished by sale of shares, sale of assets, or dissolution, although the Civil Code also provides procedures for capital reductions. A sale of shares must take place pursuant to a share purchase agreement and take into account any applicable restrictions in the articles of incorporation. If the sale of shares effectuates a merger, execution of a merger agreement is necessary, and all regulations and provisions of the Commercial Code and securities laws pertaining to mergers apply. For a valid transfer, physical delivery of share certificates is required unless the company is KRX-listed or KOSDAQ-registered. If a foreign investor transfers the business through the sale of all or substantially all of its assets of a publicly listed company, he or she must file a business transfer report to the FSC, KSE, or KOSDAQ in addition to following the corporate governance process in the articles of incorporation and the Commercial Code outlined above.

When a company is in financial distress, investors may consider dissolution, reorganization, or composition. A company reorganization proceeding is analogous to a restructuring under Chapter 11 of the U.S. Bankruptcy Code, and a bankruptcy proceeding is analogous to liquidation under Chapter 7 of the U.S. Bankruptcy Code. In a reorganization proceeding or a bankruptcy proceeding, management loses its power to make ordinary decisions for the company. Secured creditors may exercise their rights against the company unless the court decides to impose a stay at the petition of an interested party. No unified system for registration of secured interests exists, except with regard to real property.[18] A petition for a reorganization proceeding can be filed by the debtor company, by creditors who hold 10 percent or more of the company's assets, or by shareholders who hold 10 percent or more of the company's outstanding shares. A petition for bankruptcy can be filed by the company or its creditors. If the investor pursues dissolution in the absence of a court order, he or she must obtain approval through special resolution at a shareholders' general meeting. At the general meeting, a liquidator must be appointed to satisfy the company's liabilities with its assets and distribute the remaining property to the shareholders. The FIPA guarantees that the proceeds of the share sale, the sale of assets, or the liquidation may be remitted freely.

## CONCLUSION

The Korean legal system bears most of the characteristics of a modern legal system. It is based on the civil law system of continental Europe and its commercial and business laws have been profoundly influenced by U.S. laws, particularly in the areas of corporate governance, insurance, securities, antitrust and competition, and intellectual property. However, the legal culture in Korea remains traditional in many aspects. Korean society is relatively nonlitigious and attorneys are not as widely used in business transactions. Nevertheless, the value of legal services is well recognized within the international business community in Korea, and Korean law firms that cater to Western clients—often staffed with U.S.-trained attorneys and legal interns—are set up to address the needs of their clientele as Korea's globalization continues.

## NOTES

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6. See the Immigration Guide on www.hikorea.org, the Korean government's multiagency cooperative website to support foreign residents with official legal applications.

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12. Albania, Algeria, Australia, Austria, Bangladesh, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Czech Republic, Denmark, Egypt, Fiji, Finland, France, Germany, Greece, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kuwait, Laos, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Mongolia, Morocco, Myanmar, Nepal, Netherlands, New Zealand, Norway, Oman, Pakistan, Papua New Guinea, Philippines, Poland, Portugal, Romania, Russian Federation, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Arab Emirates, Ukraine, United Kingdom, United States, Uzbekistan, Venezuela, and Vietnam.

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