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COMMERCIAL LITIGATION IN KOREA

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Republic of Korea

INTRODUCTION

The Korean civil procedure system is based on the continental civil law system. In 1910, with the Japanese occupation of Korea, Japan's laws became applicable in Korea in accordance with a Japanese government decree. As a result of that decree, Japanese civil procedure was applied until the end of the Second World War. Historically, the Japanese Civil Procedure Code itself was modeled in part on the German Civil Procedure Code promulgated in 1877, which, in turn, had been derived from the Code Napoleon. After the Second World War, the Republic of Korea was founded. The Constitution of the Republic of Korea, which was promulgated on July 17, 1948, provided that the then current laws and regulations would remain valid unless found to be contrary to the Constitution. As a result, the Japanese Civil Procedure Code, which was based on the European civil law system, was translated word for word into Korean and was applied to all civil litigation until the new Civil Procedure Act was adopted in 1960. The new Civil Procedure Act was basically modeled on the Japanese Civil Procedure Code. Although the Civil Procedure Act has been amended ten times, the last of which occurred on December 6, 1995, mostly for the purpose of expediting the litigation procedures, the Act remains basically the same. Current Korean civil procedure, therefore, remains mainly based on the continental civil law system. Korean court proceedings exhibit features prevalent in other civil law jurisdictions: professional judges control much of the conduct of case proceedings, private attorneys play a less active role in the discovery and presentation of evidence than do their counterparts in common law jurisdictions, and juries are not used.

The Civil Procedure Act of Korea, however, does not provide specific procedures applicable to any particular type of commercial litigation, except that, with respect to enforcement or preservation of a claim, the procedures are differentiated to a certain extent, depending upon the nature of the particular claim. Also, there are no separate courts in which any particular type of commercial litigation is to be initiated. In principle, any commercial litigation, classified as a civil case, is initiated and conducted in accordance with the general civil procedures. These procedures are discussed in Part A. In Part B, we discuss those procedures and theories which are peculiar to certain types of commercial litigation, particularly those which involve foreign parties such as arrest of ships, enforcement of foreign judgments as well as domestic and foreign arbitration awards.

PART A - GENERAL SECTION

(1) STRUCTURE OF THE COURTS

(a) Basic Structure

A1.1 Under the Court Organization Act of Korea, the court at the highest level is the Supreme Court. Immediately under the Supreme Court are the High Courts, which are intermediate appellate courts. Under the High Courts are the District Courts which are the courts of general original jurisdiction. Currently, there are 5 High Courts and 13 District Courts, divided into geographical districts. The District Courts set up their own Branch Courts in order to share their work loads and try their cases in a more conveniently located place to the parties concerned. The Branch Courts, however, are neither independent nor separate from the District Courts of which they are a part. They exercise the same judicial power and perform the same judicial function as the District Courts.

A1.2 Under the Court Organization Act of Korea, the jurisdiction over the matters relating to family law resides with the Family Court commensurate to the level of District Courts. Under the Court Organization Act, beginning March 1, 1998, the Patent Court commensurate to the level of High Courts will be in operation to handle intellectual property cases appealed from the decision of the Korean Industrial Property Office. (However, the original jurisdiction over the intellectual property infringement cases will reside with the District Courts.) Also operational from March 1, 1998, will be the Administrative Court commensurate to the level of District Courts for the handling of administrative lawsuit cases.

A1.3 Briefly then, under the Korean Court Systems, there are three types of courts, i.e., the Supreme, High and District Courts, with two levels of appeal, and one type of special court, i.e., the Family Court at the level of District Courts. However, beginning March 1, 1998, there will be two additional special courts, i.e., the Patent Court at the level of High Courts and the Administrative Court at the level of District Courts.

A1.4 In Korea, there are no separate courts in which any commercial litigation is to be initiated. Commercial litigation, classified as civil cases, should be originally brought within the jurisdiction of the District Courts, which try all civil and criminal cases in the first instance.

(b) Supreme Court

A1.5 The Supreme Court is Korea's highest judicial tribunal and the court of last resort. Its decisions are beyond challenge. The Supreme Court receives appeals from judgments of High Courts or Patent Court or appeals from judgments of three-judge courts of District Courts or Family Courts in cases originally reviewed by single-judge courts. A three-judge court of a District Court or a Family Court

can be a court of the first instance, but a judgment of a single-judge court of a District Court or a Family Court is appealed to a three-judge court of the same District Court or Family Court as a court of the second instance. A judgment of such a three-judge court is then appealed to the Supreme Court as the court of last resort.

A1.6 The Supreme Court is composed of fourteen Justices including the Chief Justice. Hearings and adjudications at the Supreme Court are conducted either by a Petty Bench or by a Grand Bench. The Petty Bench is a collegiate body of three or more Associate Justices, and the Grand Bench is a collegiate body composed of not less than two-thirds of all Justices of the Supreme Court. A case is generally assigned to a Petty Bench first, which may consider and decide the case only upon the unanimous agreement of the Justices. If the Justices fail to unanimously agree, the case cannot be handled by the Petty Bench but must be transferred to a Grand Bench. A case must also be transferred to a Grand Bench if the Petty Bench decides that a decree or a regulation is in violation of the Constitution or statutes or there is a need to change the former opinion of the Supreme Court regarding the application or interpretation of the Constitution, statutes, decrees or regulations.

A1.7 Following civil law tradition, a decision of the Supreme Court does not have a binding force of a precedent in later cases of a similar nature. However, the interpretation of law rendered in a particular case by the Supreme Court has a binding effect on an inferior court when a judgment of the inferior court is reversed upon appeal and the case is remanded to it. Also, it is generally accepted that the established opinions of the superior courts exert a significant influence upon subsequent court decisions.

(c) High Court

A1.8 The High Courts in Korea are located in Seoul and four other major cities. Each High Court has territorial jurisdiction over one-fifths of Korea. The High Court is an intermediate appellate court with jurisdiction over appeals from judgments rendered by three-judge courts of a District Court or a Family Court of original jurisdiction or appeals from judgments of Administrative Court.

A1.9 The High Courts hear and adjudicate cases in divisions, each of which is composed of a collegiate body of three judges. Proceedings accomplished at the trial in the first instance maintain their substance, but additional impetus is given during proceedings in the High Court. Former opinions plus new findings form the basis of judgment in the High Court, and new evidence and material may be introduced to the High Court.

(d) Patent Court

A1.10 Beginning March 1, 1998, the Patent Court will be in operation at the level of High Courts. This special court is established to meet the challenges of the industrial property matters which are becoming more sophisticated and ever increasing in numbers. Specifically, the Patent Court will function as an intermediate appellate court with jurisdiction over intellectual property cases appealed from the decision of the Korean Industrial Property Office.

A1.11 The Patent Court will hear and adjudicate cases in divisions, each of which is composed of a collegiate body of three judges. Proceedings accomplished at the trial in the first instance maintain their substance, but additional impetus is given during proceedings in the High Court. Former opinions plus new findings form the basis of judgment in the High Court, and new evidence and material may be introduced to the High Court.

(e) District Court

A1.12 District Courts in Korea are located in Seoul and twelve other major cities. Each District Court has its own territorial jurisdiction, which generally coincides with that of an administrative province. The District Courts are the courts of general and original jurisdiction. They try *all* civil and criminal cases in the first instance.

A1.13 Cases at the District Court are heard either by a single judge court or a three-judge court, a collegiate body of three judges. A single judge-court adjudicates claims of up to 50,000,000 Korean Won (equivalent to the approximate amount of US$41,666.00 at the foreign currency exchange rate of 1,200 Korean Won to US$1.00), or those claiming payments under promissory notes, bills of exchange or checks. The three-judge court has jurisdiction over more important cases such as those involving claims in excess of 50,000,000 Korean Won.

A1.14 The appeal process differs depending on whether the single or three-judge court exercises original jurisdiction. The judgment of a single-judge court is first appealed to a three- judge court in the appellate division of same District Court. The subsequent appeal is heard by the Supreme Court, skipping the High Court intermediate appellate level. The judgment of a three-judge court of original jurisdiction is first appealed to the High Court and may be further appealed to the Supreme Court.

A1.15 For the small cities and counties where an access to a District Court is not feasible due to the relatively small amount in controversy, since September 1, 1995, the City and County Court system was installed to replace the circuit court system previously administered by a district court judge in the applicable region. Under the City and County Court system, a city and county court judge resides in the applicable city or county and handles small claim cases there.

A1.16 Beginning March 1, 1998, the Administrative Court will be in operation to handle the administrative lawsuit cases at the District Court level, thereby affording two levels of appeal to the administrative lawsuit cases for which only one level of appeal is previously allowed.

(2) JUDICIARY

A2.1 Since judges are vested with great authority and assume heavy responsibilities to safeguard fundamental rights of people, the Court Organization Act provides for strict qualifications for the appointment of judges. The tradition of the Civil Law system, in which judges control much of the conduct of a case, also requires an educated and professional judiciary.

A2.2 The qualifications for judges set out in the Act are (i) completion of two years of training at the Judicial Research and Training Institute after passing the national judicial examination (bar examination), or (ii) possession of qualifications for an attorney at law (qualifications for becoming an attorney at law are currently the same as those for becoming a judge).

A2.3 Beginning March 1, 1998, the Apprentice Judge system will be in operation under which those who have just completed the training program at the Judicial Research and Training Institute and desire to become judges must first be appointed as the apprentice judges who may be selected as the judges depending upon the evaluation result after two years of the apprenticeship during which they will be responsible for conducting case research, drafting opinion, etc. For those who have the qualification as an attorney at law and whose combined years of law practice are two years or more by serving as judges or prosecutors, or by working as attorneys at law, or by working in government-related positions, or by teaching law as assistant law professors at accredited law colleges, the apprentice judgeship requirement is waived and, therefore, they can be appointed to the judge positions without having to go through the Apprentice Judge system. In fact, these experienced law practitioners have been appointed to the judge positions from time to time.

A2.4 To be admitted to the Judicial Research and Training Institute, one must pass the national judicial examination. Although no specific educational background is required to apply for the examination, most of the applicants are graduates from four-year colleges of law.

A2.5 Unlike the legal education system of the United States, where any person who has completed three-year legal study at an accredited law school and who has passed the bar examination of a State may practice as a licensed lawyer without an official training for practice, the purpose of legal education at law colleges in Korea does not lie solely in training professional lawyers. This is apparent from the fact that for all graduates from regular law colleges each year, the judicial examination passage is available only for less than 10% thereof. The legal education at law colleges in Korea is mainly aimed at teaching legal principles, consisting of one year of liberal arts and three years of legal studies. During the three-year period, Korean law colleges teach primarily constitutional law, criminal law, commercial law, public administrative law, civil procedure and international law. Other various special laws, including international transaction law, and foreign laws are also offered as electives.

A2.6 Those who pass the national judicial examination must complete a two-year program designed for training for practice as a judge, prosecutor or attorney, at the Judicial Training and Research Institute of the Supreme Court. The training courses are divided into preliminary education, actual training and advanced education. The preliminary education is conducted at the Institute for eight months, and is a preparatory process of actual training in civil and criminal trials, prosecution and lawyer's practice. Also, professional education in various subjects is provided. The subjects consist of research on general and special law, such as labor laws, conflict of laws, industrial property rights, tax, compulsory execution, preservative measures, foreign laws, international commercial transactions, and research into new areas such as public nuisance, variations in domestic and international economy. The faculty members at the Judicial Training and Research Institute consist of experienced judges, prosecutors, attorneys and college professors with doctorate degrees in special areas such as intellectual property laws, tax laws, etc. Actual training is conducted for two months at a District Court, two

months in public prosecution at a prosecutor's office, two months in advocacy at an attorney's office and two months, according to the trainee's choice, in a related area such as at an administrative office, a bank, a newspaper company, the Korea Trade Association or the Korean Commercial Arbitration Board. The advanced education is conducted at the Institute and lasts for three months. At the end of the two-year program, the trainees must pass the final examination in order to be licensed to practice law as a judge, prosecutor or attorney, and decide whether to be a judge, public prosecutor or attorney, according to their choice.

A2.7 Since, until recently, most of the trainees started their career in the legal profession either as a judge or a public prosecutor, the chance for one who has experience as an attorney or a public prosecutor to be appointed as a judge has been very rare. Most of the judges are appointed from those who have just finished the training course at the Judicial Research and Training Institute, although, beginning March 1, 1998, those who are fresh out of the training course should qualify for the judgeship after serving the apprentice judge positions for 2 years. The judges thus appointed start their career as associate judges in three-judge courts of a District Court. Thereafter, 5 years or longer is needed to qualify for the position of a judge of a High Court or a senior judge of a District Court; 10 years or longer for chief judge of a District Court or the chief judge or senior judge of a High Court; and 15 years for the Chief Justice or Justice of the Supreme Court. Such formal requirements are provided in order to protect judicial appointments from improper political influence. As of May 1, 1999, the number of judges(i.e., regular judges) is 1,409 and the number of apprentice judges is 210.

A2.8 In addition to the two-year training at the Judicial Research and Training Institute and the two years of apprenticeship experience afterwards, the judges will gain their experience in actual litigation by handling all kinds of cases, whether criminal, civil or commercial, through their career as judges. Since, as mentioned earlier, there exists no separate court for commercial litigation in Korea, almost all of the judges will have chances to handle various kinds of commercial litigation. Because of the increase in commercial litigation involving foreign parties resulting from the rapid exposure of Korean economy to global economy, the judges of Korean courts have gained considerable experience in adjudicating international commercial litigations. Beginning March 1, 1994, the Seoul District Court has been operating the Special Trial Divisions on International Transaction and Commercial Litigation in order to reasonably and effectively handle the international transaction and commercial litigation matters that are ever increasing and getting more complex.

(3) LEGAL PROFESSION

A3.1 The qualifications for becoming an attorney at law in Korea are the same as those for judges or public prosecutors, i.e., (i) completion of two years of training at the Judicial Research and Training Institute after passing the national judicial examination (bar examination), or (ii) possession of qualifications for a judge or a public prosecutor. In the past, most of the attorneys started their practice after serving for some period of time as either a judge or a public prosecutor. Therefore, most of the attorneys in practice have more experience in actual litigation than the judges. Recently, however, an increasing number of attorneys start practicing immediately after finishing the training course at the Judicial Research and Training Institute.

A3.2 Since there is no barrister-solicitor distinction in the Korean legal system, any qualified attorney at law may appear in court as counsel for a litigating party. Although most of the attorneys are practicing as litigators, an increasing number of attorneys in a number of sizable law firms located in Seoul practice mainly as commercial lawyers. The attorney must be registered with both the Korea Bar Association and a District Bar Association located where he wishes to practice. At the end of May 1998, the number of attorneys registered with the Korea Bar Association was close to 4,668, out of which about 2,900 attorneys were members of the Seoul District Bar Association.

A3.3 The practice takes the form of either a sole practitioner, a law firm or a joint law office. More than a score of law firms located in Seoul have considerable experience in dealing with international commercial litigation as well as experience in other areas involving international interests including, *inter alia*, international financing and banking, foreign investment and trade, international technology transfer, maritime and insurance, aviation, intellectual property, and international commercial arbitration. However, there is no law firm which specializes only in any particular type of international commercial litigation. The number of attorneys at leading law firms range from about 10 to 100. The system and function of the leading law firms are similar to those of their counterparts in the United States or England.

A3.4 Joint law offices consist of five or more attorneys (three or more attorneys in districts other than Seoul), and mainly engage in domestic litigation. A joint law office is not much different from a sole practitioner' practice except that the members of a joint law office share a same office and that a joint law office is allowed to render notary services.

A3.5 Most attorneys practice as sole practitioners. However, the increasing demands for more specialized and efficient legal services in ever-diversifying legal areas such as international legal disputes which are accompanying the rapid growth and internationalization of the Korean economy have resulted in an increase in both the number and the size of law firms. As of July 1999, there were 151 law firm nationwide.

A3.6 Korean law firms will usually charge their foreign clients fees for their services rendered in connection with international commercial litigation either on an hourly basis or on a lump-sum basis. If charged on an hourly basis, the hourly rate for the fees would vary from law firm to law firm and would also vary depending on the experience of the attorneys involved. If charged on a lump-sum basis, the fees will be divided into a retainer fee and a success fee. The success fee will be calculated based on the retainer fee, in proportion to the percentage of the success of the case. Disbursements incurred in connection with handling the case, including the court fees, will be separately charged.

(4) JURISDICTION

(a) Bases of Jurisdiction

A4.1 Korea has no statute providing rules of jurisdiction in the international sense, nor has it entered any convention with other countries to that effect. The Korean Civil Procedure Act contains provisions for territorial jurisdiction, rather than international jurisdiction. However, most Korean commentators believe that since jurisdiction in the international sense and territorial jurisdiction in the domestic situation have the same goal of establishing a forum where adjudication over the subject matter and parties can be conducted most properly, fairly and efficiently, the provisions of territorial jurisdiction in the Civil Procedure Act can be applied by analogy to international civil and commercial litigation.

A4.2 Korean courts, in most cases, tend to acknowledge and exercise jurisdiction over international claims by applying, by analogy, the Civil Procedure Act provisions of general and special forums and venues within the territory. It has been said, however, that analogical application of the provisions in the Act alone would not be sufficient to determine fairly and properly the complicated jurisdictional questions arising out of international civil litigation, and that it would be desirable to find a basis of jurisdiction by logical reasoning, even in the absence of applicable provisions in the Act. In this regard, the Supreme Court has recently rendered a noteworthy decision which first introduced logical reasoning as a basis for jurisdiction in a case where a Korean company filed a suit against a foreign company. It is expected that, following this decision, logical reasoning will be often resorted to by Korean courts to take, or refuse to take, jurisdiction over international civil litigation.

A4.3 In deciding the jurisdiction of a Korean court attaches to the connection of the parties or of the subject matter with the territory through various points of contact, comparable to the criteria used by the modern American long-arm statutes, is of primary importance. It should also be noted that the doctrines of in rem and quasi in rem jurisdiction have not gained a foothold in civil law countries. In Korea, the presence of the defendant's assets forms a basis for jurisdiction, but this basis authorizes the court to render an in personam, not in rem, judgment.

A4.4 Of course, consent is recognized as a well established basis for jurisdiction in Korea. Korean courts will assume jurisdiction if the parties have agreed in writing to submit to the court a dispute which is either existing or will arise from a specified transaction. If the parties have agreed in writing to submit to the exclusive jurisdiction of a foreign court, Korean courts would recognize the legal effect of such an agreement and consequently dismiss the case, provided that (i) the case is not subject to the exclusive jurisdiction of Korean courts, and (ii) such a foreign court is able to exercise jurisdiction on the case based on the jurisdictional agreement.

A4.5 Discussed below is how Korean courts have applied or modified the territorial jurisdiction provisions of the Civil Procedure Act in the international context. The court may, without waiting for jurisdictional plea from the defendant, examine at its own discretion whether it can exercise jurisdiction over the case. If the court finds that the jurisdiction is not constituted, it will dismiss the case by a judgment.

(b) Defendant's Domicile

A4.6 The defendant's domicile, regardless of the party's nationality, is a generally recognized basis for the exercise of international jurisdiction in Korea. The defendant's domicile is the affiliating

circumstance that can most appropriately provide general jurisdiction to adjudicate. Plaintiffs should generally be required to come to defendants rather than defendants to plaintiffs, since plaintiffs enjoy the initial advantage of having taken the initiative and having selected the forum for its procedural and choice-of-law advantages. It is, therefore, a fundamental principle in Korea that a suit should be brought before the court sitting in the district of the defendant's domicile.

A4.7 Article 1-2 of the Korean Civil Procedure Act provides that an action is subject to the jurisdiction of the court situated at the place where the defendant has his general forum. General forum means the common or ordinary place where a person may be sued. The place is the focus of contacts between the country and the defendant or the legal relationship therein. In addition to this general forum, there are a series of so-called special forums. The difference between a general forum and a special forum is that the former may be relied on for any kind of action while the latter can be relied upon only in particular circumstances, and is in any case applicable only in actions concerning property. A Korean court, sitting in the defendants domicile, can exercise jurisdiction over any action against him, because his domicile is his general forum.

A4.8 According to Article 2 of the Korean Civil Procedure Act, the general forum of a person shall be determined by his domicile. However, if a person has no domicile in Korea, or his or her domicile is unknown, the general forum shall be determined by the place of his or her residence, or if he or she has no place of residence or the place of his or her residence is unknown, then by his or her last domicile. It is said that the concepts of domicile or residence as a basis of international jurisdiction need not necessarily correspond to the meanings ascribed to them in the Korean Civil code, and that their meanings should be determined from the international point of view. In this regard, a mere transient who is staying in a hotel room or at a house of his acquaintance for a week or so may not be considered as having thereby acquired 'residence'. Since his mere presence will not be sufficient to establish a basis for civil jurisdiction, such a traveler cannot be sued in Korea, unless there is some other jurisdictional basis for doing so.

A4.9 Article 5-2 of the Act provides for a forum with respect to a person who is for the time being working at an office or a place of business in Korea. A court sitting at the place where the office or place of business is located is allowed to exercise jurisdiction over him.

(c) Place of Business

A4.10 Article 4 of the Civil Procedure Act provides that the general forum of a juridical person or any other association or foundation shall be determined by its principal place of business, or if there is no office or place of business, by the domicile of the principal person in charge of its affairs. With regard to the general forum of a foreign juridical person or other association or foundation, the general forum of such entity shall be the place of its offices, place of business, or the domicile of persons in charge of its affairs in Korea.

A4.11 Article 10 of the Korean Civil Procedure Act, however, provides that the court which has jurisdiction over a place where an office or a place of business of an entity is located can exercise its jurisdiction over the entity, only if the particular cause of action is connected with the operation of such

an office or place of business. Therefore, if a foreign corporation establishes a branch office or place of business in Korea, it will be subject to Korean jurisdiction for any cause of action connected with the branch office or place of business. However, it is generally believed that Korean courts cannot take jurisdiction over a foreign corporation on the mere ground that the domicile of the principal person in charge of its affairs is located in Korea.

(d) Place of Performance

A4.12 Article 6 of the Korean Civil Procedure Act provides for a special forum at the place of residence or at the place where a liability is to be performed, stating that an action with regard to property rights may be brought in the court of the residence of the defendant or place where the liability is to be performed. An action concerning property rights indicates a pecuniary suit, as distinguished from a family or status action. Such actions may include those claiming payment of borrowed monies, contract price for goods, etc. The above provision does not apply to actions claiming monetary damages, whether based on tort or contract, even though the damages have to be paid at the place where the plaintiff is located. In cases involving foreign parties, there is no reasonable ground to subject the defendant to the jurisdiction of the place where the damages have to be paid.

A4.13 The Korean Civil Procedure Act contains no specific provision as to a forum based on the place of contract or contract-making. Thus, the above provision has been invoked almost exclusively as a basis of international jurisdiction over contractual disputes. The place of performance shall be determined in a reasonable international sense for the purpose of determining a fair and efficient venue for the international litigation, and does not necessarily have to correspond to that prescribed by foreign or Korean substantive laws.

(e) Place of Property

A4.14 Article 18 of the Korean Civil Procedure Act provides that an action relating to real property may be brought in the court of the place where such real property is located. Article 9 of the Korean Civil Procedure Act also provides that an action involving a property right against a person who has no domicile in Korea, or whose domicile is unknown, may be brought in the court at the location of such person's property which is the subject matter of the claim or the security for it, or which can be subject to an attachment. A suit concerning a property right includes any non-family case or non-status suit, and the concept of property includes anything which can be the object of a pecuniary right, tangible or intangible, real or personal.

A4.15 It is a generally recognized principle in Korea that international jurisdiction can be based on the location of real property or immovable belonging to the defendant within Korea. This principle also seems to be a generally accepted international customary law. Real property is the very core of the territorial sovereignty of one country, and most other countries, by way of comity, pay due respect to that country's judicial power over its property. It cannot be denied that as to a suit directly related to immovable property, many countries have long recognized the exclusive jurisdiction of the country within whose territory the property is located. In light of the importance of actual enjoyment, the

concreteness of the place of physical location, political and social attitudes of long standing, and deep historical roots, our instinct is to consider location decisive for problems involving land, both as to jurisdiction and the regulating substantive rule.

A4.16 However, as to personal or movable property, it is unclear whether Korean courts would take jurisdiction over its owner based on the mere presence of the property within Korea. It seems to be a general view of the Korean commentators that the mere presence of personal or movable property within Korea would not be sufficient to subject the property's owner to the jurisdiction of Korean courts, unless the property is the direct object of the claim. They explain that, in light of the purpose of international jurisdiction, it is too harsh to force a foreign defendant to respond to a suit instituted in Korea on the mere ground that he happened to have attachable personal property in Korea. Real or immovable property has sufficient contact with the country where it is located. Personal or movable property lacks such sufficient contact. Thus, the presence of personal or movable property within Korea will not be recognized as a basis for Korean jurisdiction, unless the property is the direct object of the claim, or its value amounts to the claim and has been located in Korea for a considerable period to establish a sufficient contact with Korea. Therefore, even if a vessel or an aircraft owned by a foreigner makes a transitory call at a Korean port or airport, Korean courts would not take jurisdiction over its owner for that reason alone.

A4.17 According to Article 698 of the Civil Procedure Act, the court of the place where property is located can take jurisdiction in a provisional attachment procedure against the property. However, it is generally believed that this provision will not apply to personal or movable property owned by a foreigner. The court of the place where personal or movable property belonging to a foreigner is located will not have jurisdiction in a provisional attachment procedure against the property, unless it can otherwise exercise international jurisdiction over the underlying suit against the owner.

A4.18 As has already been pointed out, even though the above Korean concepts of jurisdiction appear to be like the American concepts of in rem or quasi in rem jurisdiction, the concepts of in rem and quasi in rem jurisdiction are unknown in Korea, where litigation is structured between persons over a certain thing and not between a person and a thing. Jurisdiction in Korea is always and necessarily in personam.

(f) Place of Tort

A4.19 Article 16, Paragraph 1 of the Korean Civil Procedure Act provides for a special forum at the place where a tortious act was committed, stating that an action arising out of a tortious act may be brought in the court of the place where the act was committed. Korean courts have often expressed their belief that the place of tort rule is generally recognized as a basis of jurisdiction in the international sense. They have also recognized that the concept of the place of the tort covers not only the place where the tortious act originally took place, but also the place where the consequence of the act occurred.

A4.20 The place where the tortious act took place will normally be the same place where its consequence occurred, and if a tortious act was entirely committed in Korea there would be no room for

controversy over Korean jurisdiction. However, where the tortious act occurred in one place and the consequence of it occurred in another, each of them may give a basis for jurisdiction over the same tort case. The easiest case in which jurisdiction may be supported under this place of tort rule is that in which the defendant has acted tortiously within the forum and caused harm to the plaintiff who is in the forum. The next circumstance in which jurisdiction should be available on a single act tort theory is that in which a manufacturer produces a defective product outside the forum, and the defective product then causes harm to the plaintiff within the forum. There appears to be no reported case which applied this rule in international products liability. Korean products liability law is not well settled, and it is uncertain whether a Korean court will be able to exercise jurisdiction over a foreign manufacturer whose products caused injuries in Korea. On the other hand, the government of Korea made an announcement to enact the law on product liability on July 13, 1999, and it is expected that this new law will be enforced in the near future.

A4.21 Paragraph 2 of Article 16 of the Korean Civil Procedure Act also provides that an action for damages due to a collision, or any accident, of ships or aircraft may be brought in the court of the place where the ship or aircraft first touched after such collision or accident. Korean commentators, however, generally believe that, in principle, this paragraph shall not apply in determining international jurisdiction. They explain that, since the place of the first call will not coincide with the place of the final destination in most cases, the defendant could not usually have foreseen that he would be subject to the jurisdiction of such a place, which will not necessarily be a convenient forum to prove the factual circumstances of the accident.

(g) Appearance

A4.22 Even though a person is not subject to the international jurisdiction of a Korean court, if he appears before the court and answers to the merits, the court may exercise jurisdiction over him, since he can be deemed to have consented to the Korean jurisdiction. Article 27 of the Civil Procedure Code provides for appearance as a basis of jurisdiction, stating that, if the defendant has appeared at the hearing or has made statements in preparatory proceedings in the court of first instance without filing any jurisdictional defense, he shall be estopped from challenging the jurisdiction of the court involved. The defendant's appearance, lacking expression of a limiting intent, generally implies consent. Therefore, a general appearance may provide Korean jurisdiction in the international sense. But where the defendant has manifested his intention to protest the jurisdiction of the court, he is not subject to its jurisdiction even if he interposes at the same time an answer as to the merits of the plaintiff's claim. And it is not always required that jurisdictional defense be presented at the first hearing. It is sufficient to raise the jurisdictional defense during the initial phase of the litigation.

(5) INSTITUTION OF LITIGATION

(a) Filing a Complaint

A5.1 An action (other than an action subject to a small claims proceeding involving a claim of up to 20,000,000 Korean Won, in which case oral institution is allowed) is instituted by a plaintiff filing a written complaint with a District Court.

A5.2 The complaint must state clearly the names and other identifiable matters regarding the parties, their legal representative or counsel (if any), and the gist of the claim, together with its grounds. The complaint is required to be signed and sealed by the plaintiff or his counsel. The complaint is also required to be attached with (i) copies of the complaint in the number corresponding to the number of defendants, (ii) power of attorney (if issued outside Korea in a foreign language, this should be notarized, consularized by a Korean consul, and accompanied by its Korean translation), and (iii) commercial registry extracts regarding the plaintiff and/or the defendant (if the plaintiff and/or the defendant is a corporation, and if the plaintiff is a foreign corporation, this can be substituted with a "certificate as to corporate nationality", which should also be notarized, consularized by a Korean consul and accompanied by its Korean translation). The Plaintiff must pay court fees, which will usually be about 0.5% of the claim amount. Payment of court fees is made by affixing revenue stamps in a required amount to the complaint.

A5.3 The complaint shall be reviewed by the court. If the complaint fails to state any of the matters required to be stated therein, or if it is not affixed with the required amount of revenue stamps, the court must order the plaintiff to remedy the defect within a reasonable period of time (usually 5-7 days). If the plaintiff fails to comply with the order, the complaint shall be dismissed.

A5.4 The plaintiff may change the gist or cause of his claim up to the close of the hearings, provided that the legal interests or factual grounds on which his claim was originally based are not affected. Whereas an expansion in the amount of the claim is acknowledged as a change in the claim, a reduction in the amount of the claim will be regarded as a partial withdrawal of the claim. Therefore, the plaintiff must obtain consent from the defendant to reduce the amount of his claim, as he would for withdrawal of a claim in general. An application for change in the gist of the claim should be made in writing. However, the plaintiff may apply for change in the cause of the claim either orally or in writing.

(b) Service of Process

A5.5 Upon institution of a suit, the court must, without delay, set the date for the first hearing and serve a copy of the complaint and summons for the first hearing upon the defendant. The court must also serve the summons upon the plaintiff. Unlike in common law system where service of process is up to the litigating parties, service of process is made by the court. The service shall be effected either by registered mail, ordinary mail, public notice on the bulletin board of the court or by personal delivery by a designated court official. If a party has appointed his counsel in Korea, the service may be served on the counsel. The methods by which the Korean courts effect service of process outside Korea are discussed below.

A5.6 With regard to the service of process, the Korean National Assembly has enacted a law called the International Judicial Cooperation on Civil Cases Act on March 8, 1991, to provide for the procedures regarding the judicial cooperation between the Korean courts and foreign courts on reciprocal basis in

civil litigation cases. Under the International Judicial Cooperation on Civil Cases Act, the judicial cooperation is defined as the cooperation by court or other government agencies in carrying out domestic procedures on the service of process or the domestic procedures on serving discovery related documents in foreign country or carrying out foreign procedures on those in Korea. The International Judicial Cooperation on Civil Cases Act is basically concerned with the Transmission Request to Foreign Country and the Transmission Request from Foreign Country, where the Transmission Request to Foreign Country is defined as the request for judicial cooperation made by Korean courts to foreign courts or other government agencies or Korean diplomats stationed in that foreign country and the Transmission Request from Foreign Country is defined as the request for judicial cooperation from the foreign courts to Korean courts.

A5.7 Under Article 5 of the International Judicial Cooperation on Civil Cases Act, a transmission request to foreign country shall be made to a foreign court having a jurisdiction or the government agencies by the presiding judge of a Korean court with a pending lawsuit. Such presiding judge is required to make the transmission request to foreign country under either of the following methods: (i) if the person who is to be served with the document or is subject to discovery as a witness is a Korean national residing in a country which is a signatory to the "Vienna Convention on Diplomatic Relations" (Korea entered into the Convention in 1963), the court may request a transmission of service document to a Korean diplomat stationed in that country, unless such transmission request is in violation of the laws and regulations and the declaration of intention of that country, or (ii) in the event that foreign country has approved with obvious declaration of intention, such transmission request shall be made to the administering agency under that declaration of intention.

A5.8 Under Article 6 of the International Judicial Cooperation on Civil Cases Act, the Chief Judge of the Court to which the presiding judge who intends to make a transmission request to foreign country belongs must make a transmission request to the Director of the Office of Court Administration to send the Transmission Request document and other related documents. In turn, the Director of the Office of Court Administration must make a transmission request to the Minister of Foreign Affairs to send the Transmission Request document and other related documents to either the diplomats or the administering agencies through the diplomatic channels. Under Article 8, if the service is to be made by a Korean diplomat, the service should be made either by certified mail or by personal delivery. If none of the above methods is available, the court may resort to a publication. Under Article 10, a public notice shall be put on the bulletin board of the court, and the Korean diplomats stationed in the country where the service was intended to be effected should be notified.

A5.9 In case of Transmission Request from foreign country, under Article 11 of the International Judicial Cooperation on Civil Cases Act, the jurisdiction over the request for transmission of service documents belongs to the District Court having jurisdiction over the place to be served, and the jurisdiction over the discovery related service of process belongs to the District Court having jurisdiction over the address of the witness, the place of evidence, or the place of other examination or appraisal objects. Under Article 12 of the International Judicial Cooperation on Civil Cases Act, such District Court may render the judicial cooperation regarding the transmission request from foreign country only if all of the following requirements are met: (i) either there is a judicial cooperation treaty between Korea and the foreign country or the foreign country to which the foreign country belongs has guaranteed to abide by the judicial cooperation request of Korean courts regarding the same or similar

matters; (ii) it shall not pose any danger to the good morals and social order of Korea; (iii) the transmission request shall be made by the diplomatic channel; (iv) the request for transmission of service documents shall be made by a document on which the name, nationality and address or residence of the person to be served are subscribed; (v) the request for transmission of discovery related documents shall be made by a document on which the parties to the lawsuit, summary of the case, the type of discovery device, and the name, nationality, address or residence of the person to be questioned as a witness and the content of the interrogatory are subscribed; (vi) there shall be a translation of document in the Korean language; and (vii) the foreign country to which that requesting court belongs shall guarantee to bear the costs incurred during the execution of the requested matters. Under Article 13, when the proper transmission request from foreign country is received by the Director of the Office of Court Administration, the Director will then forward the transmission request to the District Court with the appropriate jurisdiction. The method of service of process shall follow the established method under the laws of Korea, although, when a specific method is requested, such method shall be followed unless it is not in contravention of Korean law.

A5.10 Service of process in a foreign country takes a considerable period of time. The period will usually range from three to six months, depending on the method of the service and the country in which the service is to be made.

A5.11 Korea will broaden the scope of cooperation with other countries in the civil service of process as Korea has acceded to the Hague Conference on Private International Law on August 20, 1997, and the statute of the Hague Conference on Private International Law has become effective in Korea as Treaty No. 1420. In addition, the recent plan of the Korean government is to accede to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in civil or Commercial Matters(1965).

(c) Security for Litigation Costs

A5.12 If the plaintiff has no address, office, or other place of business in Korea, the court must order him to provide security for litigation costs, upon an application from the defendant. The purpose of this security is to secure the defendant's claim for reimbursement of the litigation costs to be obtained by him should the non-resident plaintiff lose the case. If there is no dispute between the parties over a portion of the claim and the amount of such a portion is sufficient to secure the defendant's claim for reimbursement, the plaintiff does not have to provide such security. The defendant may refuse to respond to the case until the plaintiff provides the security.

A5.13 When rendering an order to provide security, the court must specify the security amount and the period within which the security should be posted. The amount shall be determined by the court based on the estimates of the costs to be incurred by the defendant at each level of the suit. The security shall be provided by depositing with the court either cash or negotiable instruments acceptable to the court, by submitting to the court a document evidencing that the applicant has obtained a payment guarantee, or in any other manner agreed upon between the plaintiff and the defendant. The court may from time to time permit the security to be substituted with another type of security, if the plaintiff so requests. If the plaintiff fails to provide the security within the period specified by the court, the court may dismiss

the suit by a judgment without holding any hearings.

A5.14 The defendant shall be deemed, in respect of the litigation costs to be incurred by him, to have a pledge over the security provided by the plaintiff. The court must order the security to be canceled upon an application from the plaintiff, who, at the time of his application, is required to prove that there exists no further necessity for the security, or that the defendant has agreed to the cancellation of the security. After the litigation proceedings have been concluded, the court may, upon an application from the plaintiff, order the defendant to exercise his rights over the security within a certain period of time. If the defendant fails to exercise his rights pursuant to the order, he will be deemed to have agreed to the cancellation of the security.

(6) PRE-TRIAL PROCEDURE

A6.1 Formal pre-trial evidence-gathering rarely takes place. Because evidence is mostly gathered at trial, the Korean system does not use pre-trial discovery devices such as depositions and interrogatories. Before the first hearing, parties can begin to compile evidence from their own sources, but do so without the benefit of formal discovery rules. The Civil Procedure Act, however, provides for a procedure (called a "preparatory procedure") to promote the efficient and prompt administration of the hearing by narrowing the facts to be reviewed and clarifying the points at issue in advance. Although similar in some respects to a pre-trial conference, a preparatory procedure may also take place after the first hearing. This procedure is frequently used by the courts.

A6.2 The preparatory procedure is allowed only in cases reviewed by a three judge court of a District Court. Cases reviewed by a single judge court are not eligible for this procedure. The court may, in its own discretion, order one of its member judges to conduct a preparatory procedure on all or only a part of the matters to be reviewed at the hearings. The judge so ordered shall set the date for the procedure and summon the parties. The preparatory procedure is conducted in the same manner as the hearings. The judge in charge may order the parties to submit written briefs.

A6.3 The procedure shall be concluded if the judge in charge determines that necessary preparation for the hearing has been completed. Also, the judge in charge may terminate the procedure if any party fails to appear on the date fixed for the procedure, or fails to submit a brief requested by the judge. Upon completion of the preparatory procedure, the court will determine the evidence to be examined at the hearing immediately following the preparatory procedure, and will make all necessary arrangements, such as summoning a witness, in preparation for the examination. At subsequent hearings, the parties will be prohibited from presenting matters which are not contained in the records of the preparatory procedure, except such matters as have already been stated in the complaint or in briefs submitted before commencement of the preparatory procedure.

A6.4 In certain extraordinary circumstances, where for example, a witness is planning a long overseas trip or suffering a serious illness, or a damaged vessel has to leave a Korean port, investigation of evidence would be rendered impossible or difficult if it had to be postponed. In such circumstances, a party to a pending suit, or anyone who anticipates being a party to a suit to be instituted, may file an

application to adduce the evidence in advance, and preserve the results in preparation for a future hearing.

(7) HEARINGS

(a) In General

A7.1 A typical Korean trial consists of a number of hearings over a relatively lengthy period of time with most of the evidence-gathering taking place between hearings. Thus, where a case in the United States might be in the pre-trial stage for one year in preparation for a two-day trial, the same case in Korea would simply be at trial stage over the course of a similar period of time.

A7.2 The trial proceedings have to be conducted, in principle, at oral hearings. Korean courts use what is called the "direct examination system" in which judges play an active role in the hearings. While the parties are responsible for collecting and submitting facts and evidence, the court must question a party or request him to present evidence on issues of fact or law if it feels that such party's statement is unclear or inadequate. The exercise of this authority is compulsory.

A7.3 A litigating party or his legal representative, e.g. a custodian for a minor or a representative director of a company, may carry out the proceedings by himself. However, no one except a qualified attorney at law is allowed to act as a counsel for a litigating party. Only in cases reviewed by a single-judge court, may a person who has a special relation with a litigating party, e.g. a relative or an employee, carry out the proceedings with permission from the court.

A7.4 The parties are allowed to present an argument (by stating facts or legal points or by presenting evidence) at any time up to the close of the hearing. If any party fails to present an argument at a proper stage of the hearing either by his willful misconduct or by gross negligence, the court may at its own discretion, or upon application of the opposing party, decide not to accept the argument. If the gist of the argument is unclear, or if the party fails to comply with the court's inquiry into factual or legal points, the court may also decide not to accept the argument.

A7.5 If any party does not expressly contest a fact asserted by the other party, he will be deemed to have admitted the fact, except where the court finds that he has contested the fact considering the overall circumstances and development of the hearing. Also, if any party fails to appear at a hearing after having been served with the summons other than by publication, he will be deemed to have admitted the facts asserted by the other party at the hearing. In the meantime, if a party states that he is ignorant of a fact asserted by the other party, he will be deemed to have contested the fact.

A7.6 Any document to be submitted to the court which is in a foreign language, must be accompanied by its Korean translation.
If any party participating in the hearing, including a witness, is incapable of communicating in Korean, the court shall be obligated to appoint an interpreter.

(b) Hearing Dates and Appearance

A7.7 The dates for hearings are set by the presiding judge at his own discretion or upon application from the parties. The interval between each hearing date is usually two to four weeks. A summons for each hearing must be served on each party. However, if the court advises any party present at a hearing of the date, time and place of the next hearing, it would have the same effect as the service of summons. Also, if any party to the litigation, including a witness, notifies the court in writing its intention to appear at the hearing, the service of summons would not be necessary. The set hearing dates may be changed by the presiding judge at his own discretion or upon application from the parties, if there exists an express reason to do so.

A7.8 If one of the parties fails to appear at the hearing, or does not present his case after appearance, he will be deemed to have stated the matters contained in the complaint or briefs which he previously filed with the court. In such a case, the court may order the other party present at the hearing to proceed with presenting his argument. Moreover, if the party who fails to appear (having been served with the summons other than by publication) has not submitted any brief in preparation for the hearing, he will be deemed to have admitted the facts asserted at the hearing by the other party.

A7.9 If both of the parties fail to appear at the hearing, or, if present, do not present their cases at all, the court must re-set the hearing date and summon the parties again. If this happens twice in a same level of hearing procedures, e.g., twice in the hearing procedures at the court of first instance, the plaintiff will be deemed to have withdrawn his suit, resulting in the conclusion of the litigation, unless an application for the hearing date is filed by either party to the suit within one month from the then-applicable, last hearing date.

(c) Briefs

A7.10 The litigating parties must submit written briefs in preparation for the hearings, except in small claim cases or in cases reviewed by a single judge court. This requirement may seem contrary to the principle that the court should render a judgment based on the parties' oral presentment of their case. The matters contained in the briefs, however, cannot be used as bases for the judgment unless they are orally stated, or deemed to have been stated, at the hearing. Therefore, the commentators generally believe that this requirement does not contradict the principle of oral presentment. Rather, this requirement is aimed at expediting the procedures by allowing the other party and the court a chance to review in advance the matters to be asserted at the hearing. The initial brief to be submitted by the defendant in response to the plaintiff's complaint is called an "answer".

A7.11 A brief must contain arguments with respect to legal or factual matters. A brief must be accompanied by copies of any documents referred to in it if the documents are in the hands of the party submitting the brief. That party must, upon request, allow the opposing party to inspect the original of those documents. A copy of the brief must be served on the opposing party in the same manner as required for service of the summons.

A7.12 A brief must be submitted well in advance of the hearing to allow a reasonable period of time for the opposing party to review the matters contained in it. In practice, however, the courts accept a brief submitted even on the hearing date, in which case the brief is served on the party in the courtroom. The court may also fix the period within which the brief must be submitted.

A7.13 At a hearing at which an opposing party fails to appear, the parties are prohibited from presenting any argument which is not stated in their briefs. The main purpose of this restriction is to protect the interest of the opposing party. Therefore, even if the court permits a party to present arguments which are not contained in his brief at a hearing at which the opposing party is absent, the argument will be deemed to have been duly made, unless the opposing party contests its validity as soon as the violation of this restriction comes to his knowledge.

A7.14 The arguments which are stated in a brief may be presented at a hearing at which the opposing party is absent. The absent party will be deemed to have admitted such arguments, unless the court finds that he has contested them, considering the overall circumstances and development of the hearing. Also, arguments contained in a brief shall be deemed to have been orally presented at the hearing, even in the absence of the party who has submitted the brief in preparation for the hearing.

(d) Recording of Procedure

A7.15 The course of each hearing must be recorded in the trial records. Any and all matters concerning the hearing, including any argument made by the parties, testimony of a witness, opinion of an expert, settlement and the announcement of the judgment, are required to be recorded in the trial records. In cases reviewed by a single judge court, however, certain matters may be omitted from the trial records with the permission of the judge, provided that there is no objection to the omission from the parties.

A7.16 Upon application, the trial records must be made available for inspection by the parties. Any party may raise an objection to the matters recorded in the trial records. The trial records, unless destroyed, mutilated or lost, shall be the conclusive evidence with respect to the matters concerning the conduct of the trial proceeding.

A7.17 The court may, at its own discretion or upon application from the parties, order all or any part of the course of the hearing to be stenographed or mechanically recorded. The stenographed records or the tapes are made a part of the trial records.

A7.18 The parties or any person who proves himself to be interested in the litigation may inspect or request certified copies or extracts of, the trial records or any document relating to the litigation which is kept at the court. They may also request the court to issue certificates certifying any matter concerning the litigation.

(e) Intervention

A7.19 In certain circumstances, third parties may intervene in a pending suit.

A7.20 Any person who alleges that all or part of the subject matter of the claim in a pending suit belongs to himself or that his interests would be adversely affected by the results of a pending suit, e.g., where the suit has been instituted by a conspiracy between the parties to affect his rights, may intervene in the pending suit as an independent party. He has to assert his claim both against the plaintiff and against the defendant. If, as a result of the intervention, it becomes unnecessary for any of the existing parties to proceed with the suit, that existing party may retire from the suit with the consent of the opposing party. However, judgment on the suit has a binding effect on the retiring party.

A7.21 Any person whose legal interest might be affected, adversely or otherwise, by the results of a pending suit may intervene in the suit to assist one of the parties, but not as an independent party. If any of the parties to the pending suit raise an objection to the intervention, the intervening party must show the reasons for his intervention and the court must decide whether to accept the application for the intervention or not. The intervening party will be allowed to take any step in connection with the pending suit, except for actions which are contrary to those taken by the party assisted by him, steps which would adversely affect the interests of the assisted party, or steps which the assisted party himself is not allowed to take. The judgment rendered will have a binding effect on the intervening party. This effect, however, is not the same as the res judicata effect of a judgment in general. With respect to the intervening party, the judgment shall take effect only as between him and the party assisted by him. Therefore, if the intervening party has taken any step which he is not allowed to take, or if the assisted party has hindered the intervening party from taking any step, or failed to take any action step is allowed to be taken only by the assisted party, the judgment will not have any binding effect on the intervening party.

(f) Counterclaim, Cross-Claim and Third-Party Claim

A7.22 A defendant may institute a counterclaim utilizing the same procedure as the pending suit instituted by the plaintiff. A provisional counterclaim, conditioning the effect of its institution on the results of the pending suit, is also allowed. The cause of action for a counterclaim should have a legal or factual connection with either the plaintiff's cause of action or matters asserted in the pending suit. A counterclaim is instituted by filing a written complaint with the court. The counter claim and the pending suit are usually heard in the same hearings and the court will render its judgment on both of them simultaneously. As in the withdrawal of a main suit, the withdrawal of a counterclaim requires the consent of the plaintiff. If the plaintiff's claim is withdrawn, however, the defendant may withdraw his counterclaim without obtaining consent of the plaintiff.

A7.23 In Korea, there is no separate procedure specifically provided for a cross-claim which, as in the United States, is litigated by co-parties on the same side of the main suit. A co-party may, however, accomplish similar results by instituting a separate action against other co-parties, and then filing an application with the court to hear the cross-claim in the same trial proceedings as the main suit.

A7.24 Also, a third-party claim asserted by the defendant against a thirty-party is not used in Korea.

Any litigating party may, however, apply to the court to give notice of the suit to a third-party who is entitled to intervene in the suit. The purpose of this notice is to allow such a third-party a chance to intervene in the suit by giving notice of the fact that the suit is pending. Failure of the notified third-party to intervene in the suit would subject him to the binding effect of the judgment rendered without his intervention. However, the judgment shall have its binding effect only as between the notifying party and the third-party so notified, in which case the third-party shall be deemed to have intervened in the suit at the time he was able to do so.

(8) EVIDENCE

(a) In General

A8.1 As mentioned earlier, Korean courts use what is called the 'direct examination system' in which judges play an active role in the hearings. While the parties are responsible for collecting and submitting facts and evidence, the court must question a party or request him to present evidence on issues of fact or law if it feels that such party's statement is unclear or inadequate. Since juries are not used, the facts are found by the court. All the facts which are asserted by each party are required to be proved by evidence. However, facts which are evident to the court or facts which the opposing party has admitted at the hearing need not be proved.

A8.2 Since the court will be deemed to have knowledge of the existence and contents of domestic laws or government regulations, they need not be proved by the parties. As to foreign laws or government regulations, a number of recent Supreme Court decisions have expressly addressed whether they will be equally treated with domestic laws or government regulations. In those decisions, the Supreme Court has held that the existence and contents of foreign laws or government regulations should be found by the courts, and need not be proved by the litigating parties. The Supreme Court further observed that, in such findings, the courts may resort to whatever method they deem reasonable, and that they do not necessarily have to obtain opinions or testimony from experts or enquire of government or public offices (domestic or foreign) or educational institutions. In practice, the courts usually recognize the existence and contents of foreign laws based on documentary evidence submitted by the parties, such as foreign commentaries, affidavits of a foreign counsel, or official reports issued by foreign courts or public offices.

A8.3 If any fact asserted by a party has been admitted by the opposing party at the hearing, the asserting party will be exempted from proving that fact. The admission will bind both the court and the parties. Even if the court believes that the admitted fact is untrue, it will be prohibited from finding facts contrary to the fact already admitted. Admission of a fact made by the opposing party during his testimony as a witness will not have binding effect as an admission. Also, the existence, contents or interpretation of laws, which must be enquired of by the court, cannot be admitted by any party. Once an admission has been made by a party, he cannot revoke the admission, unless he proves that the admitted facts are contrary to the truth and the admission was made as a result of his misapprehension, or unless the opposing party consents to the revocation. Any party who does not expressly contest a

fact asserted by the opposing party will be deemed to have admitted the fact. The admission thus deemed will have its binding effect only on the court, not on the parties. Therefore, the parties may contest a fact which has been deemed admitted without any restriction, up to the close of the hearings.

A8.4 Application to present evidence may be made, either orally or in writing, on or before the date set for a hearing or preparatory procedure. The applicant should identify the evidence and the facts to be proved thereby. The court may decide, at its own discretion, whether to accept the application. Although it is up to each party to collect and present evidence, if the court is unable to find a fact to its satisfaction after examination of the evidence presented by the parties, it may at its own discretion decide to examine whatever evidence it deems necessary to find the fact.

A8.5 In principle, the examination of evidence will be conducted at the court. Examination of evidence such as on-the-spot surveys may be made outside the court. In case of an examination outside the court, the court may order one of its member judges to conduct the examination, or entrust the examination to a judge of another court. Also, the court may entrust the examination to governmental or public offices, educational or other institutions or foreign governmental or public offices. If the examination is to be made in a foreign country, the court must entrust the examination to the Korean diplomats stationed in that country, or to the relevant governmental or public offices of that country. In such a case, the examination does not necessarily have to be conducted in accordance with the relevant laws of that foreign country, as long as it is conducted pursuant to the Korean Civil Procedure Act.

A8.6 If the date set for the examination of evidence coincides with that set for a hearing, the court need not serve separate summonses for the examination upon the parties. If the examination is to be made separately from a hearing, however, the court must serve a summons on each party. Once the summonses for the examination have been served on the parties, the examination may be made without the presence of either or all of the parties, except that, if the examination date coincides with the hearing date and none of the parties appear at the hearing, the court cannot examine the evidence.

A8.7 The course of the examination must be recorded in the trial records. The results of any examination which has been made outside the court, or in a foreign country, or which has been entrusted to other courts or institutions must be presented at a hearing if they are to be used as bases for the judgment. The court must also make and keep a list of all evidence presented by the parties.

A8.8 Discussed below are procedures peculiar to each type of evidence: examinations of witnesses, expert opinions, documents, surveys by the court (including on-the-spot surveys).

(b) Examination of Witnesses

A8.9 Anyone except the litigating parties themselves is eligible to be examined as a witness in a civil litigation, and, with certain exceptions, anyone subject to the jurisdiction of Korean courts can be called as a witness.

A8.10 If the court decides to accept an application for examination of a witness, the applying party must submit copies of interrogatories to be enquired of the witness to the court, in principal, ten days

prior to the date set for the examination. Copies of the interrogatories must be served on the opposing party to allow him a chance to prepare for the cross-examination. In practice, counsels for the litigating parties exchange their interrogatories in advance, without waiting for service from the court. Examination of a witness in a foreign country shall be conducted in the same manner as in the case of service of process to be made in a foreign country. The party who applies for such an examination must submit to the court interrogatories, both in Korean and in the language of that foreign country, at the time of application.

A8.11 The court must serve a summons upon the witness at least twenty four hours before the date and time set for the examination. If the court accepts an application for examination of a person present at the hearing, the service of the summons is not necessary.

A8.12 In certain circumstances, written testimony is sufficient to accomplish the purpose of the examination. In such a case, the court may have the witness submit written and notarized answers to the interrogatories instead of having him personally appear and testify at the court, unless the opposing party objects. Also, the court may have one of its member judges take testimony from a witness outside the court, if it is impossible or impracticable for him to appear at the court.

A8.13 If the summoned witness fails to appear at the date set for the examination without reasonable cause, the court must impose a fine on him, and order him to bear any increased litigation cost incurred in connection with his non-appearance. The court may also issue a subpoena to such a witness.

A8.14 The court must take an oath of the witness before examination, unless his age is under sixteen or he is incapable of comprehending the oath. A witness may refuse to be sworn if his testimony would materially affect his own interests. If a sworn witness commits perjury he will be subject to a criminal punishment.

A8.15 The witness is examined first by the party who has applied for the examination. If the applying party fails to appear in court, the chief judge may examine the witness in his place. After the applying party's examination, the opposing party may cross-examine the witness. The cross-examination must be limited to matters relating to those examined by the applying party or the credibility of the testimony. If the opposing party wishes to examine matters which are not so allowed, he must file a separate application for such an examination. The applying party may, of course, re-examine the witness in response to the cross-examination. The presiding judge, or a member judge after notifying the presiding judge, may examine the witness after the examinations by the parties have been completed. Since, as mentioned earlier, Korean courts use what is called the 'direct examination system' in which judges play an active role in the hearings, the judges are also allowed to examine the witness at any time before the completion of the examination by the parties.

A8.16 The testimony of the witness must be recorded in the trial records, in most cases, based on the interrogatories submitted by the parties. The court may, at its own discretion or upon application from the parties, order all or any part of the testimony to be stenographed or mechanically recorded. In such a case, the stenographed records or the tapes are made a part of the trial records.

A8.17 If the court is unable to satisfactorily find a fact after investigation of other available evidence, it

may, at its own discretion or upon application from the parties, examine the litigating parties themselves. Examination of a litigating party is only a supplementary means to find a fact. Therefore, the court cannot find any fact solely based on this examination. Procedures for examination of a witness will apply mutatis mutandis to examination of a litigating party. If the party to be examined fails to comply with the summons, or if he refuses to be take an oath or answer the matters inquired about, then the court may regard as true the assertion of the opposing party relating to the matters to be examined.

(c) Expert Opinion

A8.18 Expert opinion is obtained in a similar manner as explained in the examination of witnesses. An expert must be appointed, in principle, by the court. In practice, however, the court usually appoints the expert designated in the parties' application for the expert opinion. The court may also seek expert opinions from a governmental or public office, an educational or other institution, or a foreign governmental or public office. There is no restriction as to the nationality of an expert. However, Korean courts would be reluctant to appoint a foreign expert, unless the court is unable to find in Korea any appropriate person who has sufficient experience or knowledge to give opinions as an expert surveyor. Therefore, a party who wishes to present an opinion of a foreign expert but who fails to have the foreign expert appointed as an expert should submit a written opinion, together with its Korean language translation, of such a person as documentary evidence.

A8.19 The expert may state his opinion either orally, or in writing. The courts usually have experts submit written opinions. Any party who is discontented with the expert opinion may, of course, apply for an additional expert opinion by the same or another expert.

(d) Documents

A8.20 Any document may be used as evidence. The party who wishes to present a document as evidence may do so, if it is in his possession, by submitting the document to the court or, if it is in the possession of others, by applying to request its holder to submit the document to the court, or by applying to inspect the document outside the court at the place where it is located. If any of the parties keeps commercial books, however, the court may at its own discretion order him to submit his commercial books, even in the absence of an application from the opposing party.

A8.21 Any document to be submitted by the parties as evidence must, in principle, be its original. However, the original document may be substituted with its certified copy. Also, any uncertified copy of an original document may be submitted as evidence, provided that such an uncertified copy cannot be used as evidence, unless the existence of the original is established. The original document will be returned to the submitting party after inspection by the court.

A8.22 The court must enquire of the opposing party whether he admits or contests the authenticity (that the document has been made by the person who is alleged to have made the document) of the submitted document. Once the opposing party admits the authenticity of the document, he will be bound by his admission, as if an admission of a fact has been made. If the opposing party contests the authenticity,

the submitting party bears the burden of proving it. The authenticity of documents made by a governmental or public office (domestic or foreign) will be presumed. The authenticity of a private document may be proved by the testimony of the person who actually made the document, or any person who has witnessed the making of the document or who received the document in the course of business. The authenticity of a private document may also be established by comparing the handwriting or seal appearing on it with those appearing on other documents whose authenticity has previously been proved or acknowledged by the opposing party, or with the actual handwriting or seal. If the document is alleged to have been made by the opposing party, and if no handwriting of the opposing party is available to be compared, the court may order the opposing party to personally write down certain words for the purpose of comparison. If the opposing party refuses to comply with the order, or if he intentionally varies his handwriting, then the court may deem the document to have been made by the opposing party.

A8.23 A party may apply for an order to have the opposing party submit a document in his possession to the court. If the opposing party so ordered refuses to submit, or intentionally defaces or mutilates, the document, the court may deem true the assertion made by the applying party with respect to the document.

A8.24 A party may also apply for an order to have a third-party submit to the court a document in his possession, if the applying party is entitled to inspect, or request the delivery of, the document (for example, by a shareholder's right to inspect the accounting books of the company), or if the document has been made for the benefit of the applying party, or the document relates to the legal relationship between the applying party and its holder. If any third-party who has been served with such an order fails to submit the document, the court may impose a fine on him.

A8.25 The parties may apply to the court to ask a governmental or public office, a corporation, a hospital, or an educational institution to forward the original or certified copy of documents in their possession to the court. If the third party so asked forwards the document to the court, the applying party may inspect and make copies of the document, then submit the copies at the hearing as documentary evidence.

A8.26 If the documents in the possession of the applying party are too voluminous to be submitted to the court, or if the documents are not in the possession of the applying party, he may also apply with the court to inspect the documents outside the court at the place where they are located.

(e) Survey by the Court

A8.27 The parties may apply for a survey of certain objects in, or outside, the court (a survey to be made outside the court is called an 'on-the-spot survey'). The applying party must specify the objects of the survey and the matters to be proved thereby. A summons for the survey should be served on the parties. If the survey is to be made by inspecting the objects of the survey in the court, the applying party must submit the objects to the court, if they are in his possession, or may apply for an order against the opposing party or any third party to submit the objects. The detailed course and results of the survey will be recorded in the trial records.

(9) CONCLUSION OF LITIGATION

(a) In General

A9.1 A case may come to an end by various ways. The most typical conclusion of a trial proceeding is, of course, a judgment on the merits of a case. A proceeding may also come to an end by a judgment on procedural matters, such as wrongful jurisdiction, without a further review on the merits. The parties may also dispose of the proceedings by conciliation, by settlement or by withdrawing the claim.

(b) Judgment

A9.2 A court judgment must be made by the judges who have participated in the oral hearings. Although one of the three judges in a three judge court is appointed as the presiding judge and is given charge of the maintenance of order and of controlling the proceedings, all three judges are vested with independent power, as far as the judicial decision of the court is concerned. Therefore, they have one vote each in making a judgment upon the case. Where there are varying opinions in a three judge court, the decision of the court is made by a majority vote of the judges. In civil cases, the number of votes cast in favor of the largest award are added to the number of votes cast to the next largest award, until a majority number of votes is reached. The conference of the judges is never open to the public.

A9.3 A judgment is required to be rendered, in principle, within two weeks, or if the nature of the case is complicated or if there exist extraordinary circumstances, within four weeks, after closing of the hearing. Also, the court of first instance is required to render its judgment within five months after the suit has been instituted. The court of second instance is required to render its judgment within four months after it has received the documents concerning the litigation from the court of first instance. The court of third instance is required to render its judgment within three months after it has received the documents from the court of second instance. Such time requirements, however, are interpreted to have only recommendatory effect, and do not legally bind the courts. In practice, there are usually two to four week intervals between the pronouncement of a judgment and the closing of the hearing. In complicated cases involving foreign parties, it usually takes about one year from the institution of the suit to obtain judgment from the court of first instance alone.

A9.4 A judgment of the court will take effect by the presiding judge's pronouncement of the conclusion of the adjudication contained in the original of the written judgment. The presiding judge may, if necessary, explain the gist of the reasons for the adjudication. The court must serve upon the parties a summons for the date set for the pronouncement. However, the court may pronounce the judgment without the presence of the parties.

A9.5 Unlike in common law jurisdictions where the written judgments of the courts can take rather liberal forms, the judgments of the Korean courts are written in compliance with strict formalities. The

written judgments must contain the conclusion of the adjudication, the gist of the claim (or, in case of a judgment by an appellate court, the gist of the appeal) and specified reasons for the adjudication, and must be signed and sealed by the judges who participated in the hearing.

A9.6 In principal, the default interest rate for a monetary obligation is the higher of (i) the rate prescribed in the Civil Code (5 per cent) or in the Commercial Code (6 per cent, applicable if the monetary obligation has been incurred in connection with commercial acts), or (ii) the rate previously agreed upon between the parties. In the event that the rate previously agreed upon between the parties exists and that such rate is higher than the statutory rates mentioned in the Civil Code or the Commercial Code, but is less than the statutory rate specified by the Special Act on the Expedition of Court Proceedings, the court will impose the statutory rate specified by the Special Act upon the defendant. That is, in a judgment ordering performance of a monetary obligation, the court must declare that default interest on the monetary award shall accrue at 25 per cent from the date immediately following the date on which the written complaint has been served on the defendant. This 25 per cent rate, however, will not apply for the period and to the extent the court finds that the defendant has reasonable grounds for contesting its obligation, up to the close of hearings at the court of first instance or, if appealed, at the court of second instance. In practice, the court will usually recognize the existence of such grounds, and declare the 25 per cent rate applicable from the date immediately following the date on which the pronouncement of the judgment is made.

A9.7 A judgment in respect of property rights must be pronounced with a provisional enforcement decree. The court may require the plaintiff to provide security for the provisional enforcement. However, the court cannot require security in respect of judgments on claims for payment under promissory notes, bills of exchange or checks. The court may also pronounce, at its own discretion or upon application from the parties, that the defendant may be exempt from provisional enforcement upon providing security covering the entire amount of the claim. The provisions for security for litigation costs apply mutatis mutandis to security to be provided in connection with the provisional enforcement decree. The provisional enforcement decree loses effect to the extent such decree itself or the judgment on the merits is repealed by the judgment of the appellate court. If the appellate court repeals the judgment on the merits, it must, upon application from the defendant, order the plaintiff to return the properties, which he obtained through such provisional enforcement, to the defendant, and to reimburse to the defendant for any loss or damage incurred in connection with the provisional enforcement.

A9.8 The court must also determine who shall, and to what extent, bear the costs of the litigation. The judgment on the litigation costs must be included in the conclusion of the adjudication. In most cases, this judgment only determines who shall, and to what percentage, bear the litigation costs, and does not determine the specific amount of the costs. Therefore, the parties may apply with the court of first instance to determine the specific amount of the costs, after the judgment on the litigation costs has become final. Upon application, the court must determine the specific amount of the costs. The applying party may then recover the costs by enforcement of the court decision on the amount of the costs. In principle, the losing party has to bear the costs of litigation. If the court renders a judgment in favor of only a part of the claim, the court may determine the percentage of the costs to be borne by each party; provided that, in certain circumstances, the court may have any one party bear all of the litigation costs. The litigation costs include the court fees, expenses for service of process, travel and other expenses paid to witnesses, fees for surveys, etc. Attorneys' fees may, within limits prescribed by

regulations of the Supreme Court, or within the actual fee paid to the attorney, whichever is less, be included in the calculation of the litigation costs. A party disputing the amount awarded by the court of first instance may request an appellate court to review the award, provided that such request is made within 7 days from the date such award was rendered.

A9.9 Immediately after pronouncement of the judgment, the original of the written judgment must be delivered to a court official. The court official must then affix on the original judgment his seal, the date of the pronouncement of the judgment and the date on which he received the original judgment. Within two weeks after he receives the original judgment, the court official must serve formal copies of the original judgment upon each party.

(c) Conciliation

A9.10 In order to facilitate the expedited dispute resolution, the Judicial Conciliation of Civil Disputes Act was enacted on January 13, 1990. Under the Judicial Conciliation of Civil Disputes Act, the conciliation may occur by parties' request or by the court with pending lawsuit on its own initiation. The conciliation is conducted by the court with pending lawsuit or by the conciliation committee. When the parties request the conciliation to be conducted by the conciliation committee, the conciliation must be conducted by the conciliation committee. When the conciliation judge finds that the pending case is improper for conciliation or that the either party sought the conciliation for unfair benefit, the conciliation judge may end the conciliation proceeding, and there can be no objection against such decision. When the conciliation judge finds that the settlement is not reached between the parties or the content of the settlement is not proper, the conciliation judge must end the conciliation proceeding as failure to reach conciliation unless the conciliation judge renders the decision replacing conciliation to fairly resolve the case within the boundary not contravening the parties' intent for conciliation request by considering the parties' interests and other circumstances. Unless any of the parties objects to the decision replacing the conciliation and such objection stands, the decision replacing conciliation has the effect of the compromise by court. However, if the decision not to conciliate is rendered or if the conciliation is ended as failure to reach conciliation or if the objection to the decision replacing conciliation stands, the time of filing request for conciliation shall be deemed as the time of filing a lawsuit. For further information, please refer to Part C (Conciliation).

(d) Settlement

A9.11 The court may, at any stage of the trial proceedings, advise the parties to settle the case amicably. If the parties reach a settlement, either following the court's advice or voluntarily, and state the results before the court, the results will be recorded in the trial records and the litigation will come to an end. The trial records recording the results of the settlement will be treated as having the same effect as a judgment which has been rendered final and the formal copies setting out its terms must be served on each party within seven days from the date of the settlement. The litigation will not be concluded by a settlement agreement which has been reached outside the court between the parties and not presented before the court.

(e) Withdrawal of a Suit

A9.12 The plaintiff may withdraw all or any part of his suit at any stage of the trial proceeding until the judgment becomes final. Withdrawal of a suit, therefore, may be made at proceedings before the court of second or third instance. Withdrawal of a suit must be differentiated from withdrawal of an appeal. As a result of withdrawal of an appeal, the appealed judgment will become final, while a withdrawal of a suit will invalidate the judgment already rendered. Also, an appellant may withdraw his appeal without obtaining the other party's consent, even if the other party has already responded to the appeal.

A9.13 After the defendant has filed a brief with respect to the merits of the claim, or after he has responded to the case at oral hearings, the plaintiff cannot withdraw his suit without obtaining the defendant's consent. In such cases, the withdrawal shall take effect from the time the defendant consents to the withdrawal.

A9.14 If the withdrawal takes effect, the withdrawn portion of the suit shall be deemed not to have been instituted from the beginning, and the litigation will come to an end to that extent. As mentioned above, the plaintiff may withdraw his suit even after judgment has been rendered on the merits of the claim. In such a case, however, the plaintiff will be prohibited from instituting another suit which is identical to that previously withdrawn.

(10) APPEAL

(a) Appeal to the Court of Second Instance

(i) Institution of Appeal

A10.1 Appeal from a judgment of a three-judge court of a district court of original jurisdiction is made to a high court. A judgment of a single-judge court of a district court must be appealed to a three-judge court of the same district. An appeal is required to be instituted within two weeks after the date of service of the original judgment. If a party fails to institute an appeal within the required period, he will be deprived of his right to appeal, and the original judgment will be rendered final. If such failure was due to any cause beyond his control, however, he will be allowed to institute the appeal within two weeks, or, if he was not in Korea, within thirty days, after such cause ceased. The parties may agree not to appeal the case; provided, that such an agreement is made in writing with reservation of appeal to the Supreme Court.

A10.2 An appeal must be made by filing a written motion of appeal to the court of original jurisdiction. The written motion must contain the identifiable matters regarding the original judgment and gist of the appeal. The court fees for institution of an appeal are one and a half times that for institution of a suit. It should also be noted that a power of attorney must be given to a counsel for each level of the litigation. Therefore, even if an appellant or an appellee decides to retain the same counsel he

previously retained for the proceedings in the court of the original jurisdiction, he must give to the counsel a new power of attorney for the proceedings in the appellate court.

A10.3 The appellate court is allowed to change the original judgment only to the extent requested by the appellant. Therefore, an respondent cannot assume that the appellate court will render a judgment more favorable to him than the original judgment, unless he institutes his own appeal. If he has been deprived of his right to appeal by failing to institute his own appeal within the prescribed limit of time or otherwise, however, he is allowed to institute an appeal incidental to the existing appeal of the appellant. This incidental appeal may be instituted at any time before the close of the hearings in the appellate court. Since the incidental appeal is granted based on the existence of the previous appeal, it will cease to have effect if the previous appeal is withdrawn by the appellant or dismissed on procedural grounds.

(ii) Hearings and Adjudication

A10.4 The hearings in the appellate court are conducted in the same manner as in the court of original jurisdiction. The hearings are confined to consideration of such changes in the original judgment as may be requested by the parties. The proceedings in the court of second instance are treated as an ongoing trial in which a continuous trial is interrupted by a judgment of the court of original jurisdiction. Therefore, the parties have to present the results of the hearings in the court of original jurisdiction to the appellate court. Former opinions plus new findings form the basis of judgment of the appellate court. A counterclaim is also allowed to be instituted at the appellate court, but only with the consent of the opposing party.

A10.5 If an appeal is not instituted in compliance with the provisions of law, and the illegality is not remediable, the appellate court may dismiss the appeal without opening hearings. Even though the grounds for appeal are established, the court must also dismiss the appeal when the original judgment is justifiable for other reasons.

A10.6 When alleged grounds for appeal are properly and clearly established, the court must set aside the original judgment by means of another judgment. If the court finds that the proceedings at the court of first instance have been conducted in violation of law, it must also set aside the judgment.

A10.7 If the basis for setting aside the judgment is an erroneous dismissal of the original judgment on procedural grounds, the court must remand the case to the original court for retrial. However, this is only because no trial on the merits of the case would have been properly conducted in the first instance. Therefore, if the court finds that the court of original jurisdiction has sufficiently reviewed the merits of the case before dismissing the action on procedural grounds, or if the parties consent, it may render its own judgment on the merits of the case.

A10.8 If the basis for setting aside the judgment is an erroneous determination of jurisdiction, the court must transfer the case to a lower court which has jurisdiction. It should be noted that the parties cannot raise an issue of erroneous determination of jurisdiction in the appellate court, unless a matter of exclusive jurisdiction is involved.

A10.9 The court may render its own independent judgment based on the trial records or evidence examined during the first and second instance. Judgments of the appellate court will be rendered with the same formalities as those of the court of original jurisdiction. With respect to the reasons for the adjudication, however, the appellate court is allowed to only quote those contained in the original judgment.

(b) Appeal to the Supreme Court

(i) Institution of Appeal

A10.10 A subsequent appeal from a judgment of the court of second instance (a high court, or a three judge court of a district court as an intermediate appellate court) can be made to the Supreme Court, as the court of last resort. In civil cases, the grounds for appeal to the Supreme Court are limited to constitutional and legal questions material to the judgment appealed from. Grounds for appeal to the Supreme Court exist if (i) the court rendering a judgment has not been constituted in compliance with law, (ii) a judge who is precluded by law from participating in the judgment has participated in rendering the judgment, (iii) provisions relating to exclusive jurisdiction have been violated, (iv) a person who has not been duly authorized conducted the proceedings as a legal representative or a counsel, (v) provisions relating to open hearings have been violated, or (vi) the judgment contains no specified reasoning or contains inconsistent reasoning.

A10.11 Formerly, the grounds for appeal were further restricted by the Special Act for Speedy Proceedings, which limited the grounds for appeal to (i) a violation or improper interpretation of the Constitution, (ii) an improper decision as to whether administrative decrees, regulations or dispositions are in violation of statutes, or (iii) conflict with prior Supreme Court decisions as to interpretation of statutes, administrative decrees, regulations or dispositions. Appeal on the grounds of legal questions other than the above were allowed only upon prior approval from the Supreme Court. The Special Act, however, was amended with effect from September 1, 1990 to abolish such restrictions. Then, on September 1, 1994, the Special Act on Appellate Procedure was enacted which adopted the system of discretionary appellate review to reduce the amount of caseloads burdening the Supreme Court with unnecessary and frivolous appellate cases and to allow the Supreme Court to review important cases. Under this system, unless the Supreme Court finds any violation in interpretation of law, it may dismiss the appeal by issuing a decision of no review.

A10.12 The provisions for the appeal to the court of second instance apply mutatis mutandis to the appeal to the Supreme Court. Therefore, a written motion of appeal must be filed with the court of second instance within two weeks after the date of service of the original judgment. The court fees for institution of an appeal to the Supreme court are twice that for institution of a suit. Immediately upon receiving the trial records, together with the written motion of appeal, from the court of second instance, the Supreme Court must notify the receipt to each party and serve a copy of the written motion on the respondent. If the written motion does not state the grounds for the appeal, the appellant must file a written statement of grounds for appeal within twenty days after he has been so notified. If the appellant fails to file the written statement of grounds for appeal, the Supreme Court must dismiss the appeal. A copy of the written statement of grounds for appeal must be served on the respondent, who

may file a written reply to the statement within ten days after he received it. The written reply from the respondent must also be served on the appellant.

(ii) Hearings and Adjudication

A10.13 The Supreme Court can inquire into matters only within the limits of dissatisfaction expressed in the written motion of appeal or statement of grounds for appeal. The facts lawfully found by the original judgment are binding upon the Supreme Court. Therefore, the Supreme Court may, and in most cases does, render a judgment without holding any hearing, based on the written motion of appeal or statements of grounds for appeal, the written reply of the opposing party, and the trial records received from the lower court.

A10.14 When the grounds for appeal presented by the appellant are found to be unreasonable, the appeal must be dismissed. If the grounds for appeal are found to be well supported, the original judgment of the lower court must be set aside. When the original judgment is set aside, the case is either remanded to the original court or transferred to another court of the same level. The court to which the case has been remanded, or to which it has been transferred, must adjudicate the case by opening new hearings, in which case the lower courts will be bound by the interpretation of laws or facts found by the Supreme Court. Also, the judges who formerly participated in the original judgment are not allowed to participate in the new hearings. If the Supreme Court finds it appropriate to render its own independent judgment based on the facts already found by the lower courts, it may render its own judgment rather than remanding or transferring it to the lower courts.

(11) ENFORCEMENT

A11.1 Even if a person obtains a favorable judgment, he can only obtain actual satisfaction of his claim by enforcement of the judgment. Judgments eligible for enforcement are (i) a judgment which has become final (a judgment will become final when there is no possibility for further appeal), (ii) a judgment which has been pronounced with a provisional enforcement decree, (iii) an enforcement judgment of a foreign judgment which has become final or which has been pronounced with a provisional enforcement decree, or (iv) an enforcement judgment of a domestic/foreign arbitration award which has become final or which has been pronounced with a provisional enforcement decree.

A11.2 Prior to applying for enforcement of any of the foregoing judgments, the applicant must first obtain an enforcement clause at the end of the formal copy of the judgment. The purpose of this enforcement clause is to officially verify the enforceability of the judgment and the parties to the enforcement procedure. The enforcement clause may be obtained from court officials of the court of the original jurisdiction, or, if the trial records of the case are kept at a higher level of court, from court officials of such court.

A11.3 After obtaining the enforcement clause, the applicant must file a written application for enforcement to a court marshal, a district court which has jurisdiction over the place where the enforcement is to be effected, or the court which reviewed the merits of the case in the first instance, as

the case may be. The specific procedures for the enforcement vary depending upon the nature of the claim sought to be enforced (whether it is a monetary claim or a claim for delivery of certain property), and also upon the nature of the object of the enforcement (whether it is personal property, real property, a vessel, an aircraft, heavy machinery or a claim of the debtor against a third party). For example, enforcement of a monetary claim against the personal property of the debtor is effected by a court marshal by taking possession of the property and subsequently selling it at a public auction. Enforcement of a monetary claim against real property or a vessel of the debtor is effected by a district court by rendering a decision to seize the property and subsequently selling it at a public auction. Enforcement of a judgment ordering delivery of personal property, real property or a vessel is effected by a court marshal by taking possession of the property from the debtor and subsequently delivering it to the creditor. Costs of the enforcement must be borne by the debtor. The applicant must deposit the costs of enforcement in advance. The costs will be reimbursed to the applicant out of the proceeds of the enforcement.

A11.4 If the enforcement is to be made in a foreign country, the applicant may apply with the court which reviewed the merits of the case in the first instance to entrust the enforcement to a governmental or public office of that foreign country. If the enforcement can be made by a Korean consul stationed in the foreign country, the court must entrust the enforcement to the Korean consul.

(12) PROVISIONAL ATTACHMENT AND PROVISIONAL DISPOSITION

(a) Provisional Attachment

A12.1 For the purpose of securing execution against movables or immovables, arrest may be effected by sequestering the properties belonging to the debtor, even if the suit on the merits of the case is still pending or yet to be instituted. Such an arrest, or provisional attachment, will be allowed for a monetary claim or a claim which can be converted into money. Also, provisional attachment will be allowed only where the future execution would be impossible or considerably difficult without it, especially where the future execution has to be effected in a foreign country.

A12.2 Provisional attachment is accomplished under the jurisdiction of a district court which exercises jurisdiction over the place where the object of the attachment is located, or of a court which exercises jurisdiction over the principal case.

A12.3 A written application, stating the gist and grounds of the application, must be filed with the court. The court fees for the application is nominal. The applicant must provide security by depositing with the court either cash or negotiable instruments acceptable to the court, by submitting to the court a document evidencing that the applicant has obtained a payment guarantee, or by any other method agreed upon between the applicant and the debtor. The required amount of the security differs from court to court. If the property to be arrested is real property or a vessel, the amount of security usually ranges from one eighth to one tenth of the applicant's claim to be secured. In the case of personal property, the security amount usually ranges from one third to one fifth of the claim. In the case of a debtor's claim against a third party, the security amount usually ranges from one fifth to one tenth of the

claim.

A12.4 The decision on an application for arrest may be rendered ex parte. In light of the need for promptness in the arrest procedure, it does not require conclusive evidence, and the applicant has only to show minimally the grounds for his application. Even if the applicant fails to show grounds to support his application, the court may render an arrest order upon the applicant's depositing certain security. (The nature of this security is different from the one mentioned in the preceding paragraph).

A12.5 An arrest order should specify the amount of security to be deposited by the debtor in order to suspend the execution of an arrest order, or, if the execution has already been effected, to cancel the effected arrest. The amount is determined by the court, taking into account the principal amount and interest of the claim sought to be secured, and the costs incurred, or to be incurred, by the applicant in connection with the arrest.

A12.6 An arrest order takes effect when it is rendered, and must be executed within fourteen days from the date the order is rendered. The specific procedures for execution of an arrest order are differentiated among real property, personal property, automobiles, aircraft, heavy machinery, vessels, claims and industrial properties, in accordance with the characteristics of the properties.

A12.7 If the main suit concerning the claim sought to be secured by the arrest is not pending, upon an application from the debtor, the court which rendered the arrest order shall also order the applicant to institute the main suit within a reasonable period of time. If the creditor fails to institute the main suit within such period, upon an application from the debtor, the court must cancel the arrest order by a final judgment. If, after issuance of the arrest order, any change in circumstances occurs which renders the arrest unnecessary, or the debtor deposits the security (release money) specified in the arrest order, the debtor may also apply for the cancellation of the arrest order. Furthermore, if the applicant does not institute the main suit until ten years after the arrest has been executed, the debtor or any one whose interest is affected by the continuance of the arrest may likewise apply for the cancellation of the arrest order.

(b) Provisional Disposition

A12.8 As mentioned above, provisional attachment may be effected for the purpose of securing execution of a monetary claim, or a claim which can be converted into money, if the future execution would be impossible or considerably difficult without it. For similar purposes, a person who has a claim other than monetary claim, e.g., a claim for delivery of movables or immovables, may apply for provisional disposition with respect to his claim, even if the suit on the merits of the case is still pending or yet to be instituted. Provisional disposition is granted to maintain a present status of the subject matter of the claim, or to confer temporary authority upon a person who is a party to a legal dispute. Therefore, provisional disposition will take various forms, depending upon the nature of the claim sought to be secured. The most typical form of provisional disposition is an injunction, which prohibits an owner or holder of a personal or real property from delivering possession of the property to any third party, or from disposing of the property by assignment, creating any security interest in it, or otherwise.

A12.9 Provisional disposition is accomplished under the jurisdiction of a district court which exercises jurisdiction over the principal case. Most of the procedures explained in 1 above, with respect to provisional attachment will also apply to provisional disposition.

PART B - PARTICULAR CLAIMS

NOTE

With the exception of the special procedures set out below in relation to the arrest of ships, the enforcement of foreign judgments, and the enforcement of arbitration awards, the procedural steps applicable to the litigation of the following claims is identical to that outlined in Part A, namely claims for:

breach of contract for the sale of goods;
for rights in a mineral concession;
for title to or damage to goods;
for moneys due under insurance or reinsurance contracts;
to enforce corporate share transactions;
to enforce a copyright or trademark;
to an interest in a bank account; and
for recovery of charter hire or damages under a charter party.

(1) ARREST OF SHIPS

(a) In General

B1.1 An arrest (provisional attachment) may be effected for the purpose of securing execution against movables or immovables by sequestering the properties belonging to the debtor, based on a monetary claim or a claim which can be converted into money. Since Korean companies are widely engaged in foreign trade involving maritime transportation, vessels with Korean as well as foreign flags often become subject to arrest in Korea to secure various claims arising out of bill of lading contracts, charter contracts, shipbuilding contracts, collisions of ships, etc. Discussed below are procedures peculiar to the arrest of ships. On 31 December, 1991, the Act Regarding Procedures for Limitation of Shipowners' Liability was promulgated with effect from 1 January, 1993. This Act establishes the procedures by which a shipowner can limit its liability for various claims resulting directly from operation of its vessel to a certain amount prescribed in the Commercial Code in a single forum. Briefly, a shipowner may file an application with a competent court to initiate the limitation procedure and then must deposit with the court an amount corresponding to the limitation amount prescribed in the Commercial Code. The Court may stay all procedures against the shipowner's property, including the vessel, which are pending for enforcement or provisional enforcement of, or auctions based on, claims subject to limitation, which may further be cancelled after the court decides to initiate the limitation procedure. Creditors are thus allowed to satisfy their claims only out of the monies deposited with the court. Shipowners may take advantage of this procedure in respect of claims arising on or after 1 January, 1993.

(b) Ships Subjects to Arrest

B1.2 Any vessel which is used for navigation at sea for the purpose of commercial transactions or any other profit-making transactions can be subject to arrest. However, arrest of small boats (with a gross tonnage of less than 20 metric tons), or any vessel propelled only or mainly by oars, are effected through procedures applicable to arrest of personal property, not through procedures applicable to arrest of ships.

B1.3 Arrest of a ship which has completed preparations for commencing a voyage is prohibited, except where the arrest is based on claims arising out of transactions in connection with the preparation for the voyage.

B1.4 It should be noted that a holder of a maritime lien cannot arrest a ship subject to his maritime lien based on the claim secured by such a maritime lien. Because his maritime lien would entitle him to obtain satisfaction of his claim in preference to other creditors of the shipowner by applying for an auction of the ship, he is not at the same time allowed to apply for an arrest of the ship.

(c) Jurisdiction, Application, and Procedure for Arrest Order

(i) Jurisdiction

B1.5 Arrest of a ship must be under the jurisdiction of a district court which exercises jurisdiction over the place where the ship is located (the place where the ship is anchored), or of a court which exercises jurisdiction over the principal case.

B1.6 If the ship to be arrested has not yet entered a port, a creditor may apply for an arrest order with a court which exercises jurisdiction over the principal case, and then apply for the execution of the arrest order with the district court which exercises jurisdiction over the place where the ship anchors.

(ii) Application

B1.7 For an arrest order of a ship, a written application should be filed with the court. In addition to the documents which are required for applications for arrests (provisional attachments) in general, the application should be attached with (i) a certified copy of the registry of the ship (in case of a foreign vessel, this can be substituted with a document evidencing its ownership, such as a certificate of ship's nationality), (ii) a certificate evidencing that the preparation for voyage has not been completed, and (iii) a certificate evidencing that the ship is at anchor.

B1.8 The written application should also request an order to anchor the ship (for actual execution of the arrest order), and describe the name and address (or the place where he can be located) of the ship's master, and the details of the ship.

B1.9 The applicant must provide security by depositing with the court security either in cash or in negotiable instruments acceptable to the court, by submitting to the court a document evidencing that the applicant has obtained a payment guarantee, or in any manner agreed upon between the applicant and the shipowner. The required amount of the security differs from court to court, but generally ranges from one eighth to one tenth of the applicant's claim to be secured.

B1.10 In certain cases, future execution of the arrest order would be considerably difficult if documents such as the certificate of ship's nationality were kept on board the vessel. In such circumstances, the applicant, before filing the application for arrest, may apply with the court to order such documents delivered to court officials. After such documents have been delivered to the court officials, the applicant must submit to the court officials written proofs evidencing that he has actually applied for the arrest, within five days from the date the documents were delivered to the court officials. If the applicant fails to submit such written proofs, the court officials must return the documents to the vessel.

(iii) Procedure

B1.11 The decision in respect of an application for arrest may be rendered ex parte. In light of the need for promptness in the arrest procedure, it does not require conclusive evidence, and the applicant has only to show minimally the grounds for his application. Even if the applicant fails to show the grounds for his application, the court may render an arrest order upon the applicant's depositing certain security. (The nature of this security is different from the one mentioned above).

B1.12 An arrest order should specify the amount of security to be deposited by the shipowner in order to suspend the execution of an arrest order or, if the execution has already been effected, to cancel the effected arrest. The amount is determined by the court taking into account the principal amount and interest of the claim sought to be secured, and the costs incurred, or to be incurred, by the applicant in connection with the arrest.

(d) Execution of Arrest Order

B1.13 An arrest order of a ship takes effect when it is rendered, and is executed by the district court having jurisdiction over the place where the ship is anchored at the time the arrest order takes effect. The arrest must be executed within fourteen days from the date the order is rendered.

B1.14 Execution of arrest against a ship is effected by anchoring the vessel at the port where she is lying at the time the arrest order takes effect. The execution takes the form of either (i) execution of an order to anchor the ship, (ii) registration of the arrest with the ship's registry, or (iii) execution of an order for supervision and preservation of the ship.

B1.15 An order for anchorage is effected by serving an authentic copy of the arrest order (if the order for anchorage has been included in the arrest order at the request of the creditor) upon the owner of the ship, if the ship is at the port of her registry, or upon the master of the ship, if the ship is at a port other than the port of registry. If the arrest order has been rendered without an order for anchorage, the creditor may apply for an order for anchorage to the court having jurisdiction over the place where the ship is lying, within fourteen days from the issuance of the arrest order. The court may permit the ship to leave the port, even after execution of an order for anchorage, upon application from the shipowner and with consents of the parties concerned, if the court finds it reasonable to permit the navigation in

light of the commercial interests.

B1.16 After rendering an arrest order, the court must entrust the registration of the arrest to the registration office at the port of registry within fourteen days after the arrest order. Such registration, however, would not apply to a ship with a foreign flag.

B1.17 The court may also render an order necessary for taking custody of and conserving the ship, upon application from the creditor. Such an order is called an "order for supervision and preservation". The creditor must pay to the court the costs and expenses for the supervision and preservation in advance, and, if he fails to pay the costs, the court may cancel the supervision and preservation order. There is no provision as to the method of effecting the order. The usual practice, however, is to have a court official take custody of the ship.

(2) ENFORCEMENT OF FOREIGN JUDGMENTS

(a) In General

B2.1 Korea has not formally pronounced its intention to offer its full assistance in the enforcement of judgments rendered by a foreign court, nor has it entered into any international convention for that purpose. However, the practice of the Korean courts is to recognize any foreign judgment as having a binding effect on the Korean courts, automatically, upon fulfillment of certain requirements provided for in the Civil Procedure Act. But, even though a foreign judgment which meets such requirements will be recognized without any procedural steps being taken, the judgment shall not be enforceable unless an enforcement judgment declaring its lawfulness is obtained. This differential treatment in the stage of recognition and in the stage of enforcement comes from the consideration that enforcement, if unjustified, may infringe upon a debtor's property rights, thus causing considerable damage to Korean nationals. The Civil Procedure Act expressly provides for requirements for the recognition of foreign judgments in Article 203, and for their enforcement in Articles 476 and 477.

(b) Recognition of Foreign Judgments

B2.2 Any judgment obtained in any jurisdiction outside Korea will be recognized in the Korean courts if (i) such judgment was finally given by a court having valid jurisdiction, (ii) the party against whom such judgment was awarded received service of process in conformity with the laws of the jurisdiction of the court rendering judgment otherwise than by publication, or responded to the action without being served with process, (iii) such judgment was not obtained by fraud, is not contrary to public policy of Korea and was not obtained in proceedings which were contrary to natural justice, and (iv) judgments of the Korean courts are accorded similar treatment under the laws of the jurisdiction where the judgment was rendered.

B2.3 When the above requirements are met, any foreign judgment will be treated as having binding effect on the Korean courts. Accordingly, another lawsuit in respect of the same claim will be

dismissed without a further review on its merits due to the res judicata effect of the existing foreign judgment.

B2.4 It is unclear, however, whether a compromise (or settlement) before a foreign court would also be recognized as in the case of a judgment rendered by a foreign court. Even if the compromise is treated as having the same binding effect as that of a final judgment in the jurisdiction of the foreign court before which it has been reached, it may still be viewed as a mere agreement between the parties, rather than a judgment rendered by the court.

B2.5 Below is a detailed examination of the above-mentioned requirements for recognition of foreign judgments.

(i) Finality and Conclusiveness

B2.6 A foreign judgment will be considered final and conclusive only if there exists no possibility of a future appeal in the normal course. The party invoking the benefit of a foreign judgment thus has the burden of proving that, under the applicable law, an appeal or further appeal of that judgment is not possible or that the period for appeal has lapsed.

B2.7 The judgment should have been rendered by a court or judicial organ (including a specialized court), as those concepts are defined by applicable laws. This requirement is meant to exclude both extrajudicial arbitration or administrative decisions which are not adjudicatory in nature.

B2.8 A foreign judgment which is in the form of a court order, and as such would be directly enforceable in the rendering country, could be recognized as a judgment subject to the recognition. Recognition of such an order, however, would extend only to the legal rights and obligations it determined. As mentioned earlier, a separate enforcement judgment would be required to actually enforce the order in Korea. Conclusive injunctions would similarly be recognized if they address the legal rights and obligations of the parties involved. Temporary dispositions, however, would not be recognizable because of their nature as provisional remedies.

B2.9 While the res judicata effect of a recognized foreign judgment will bar any subsequent relitigation in Korea between the same parties, a judgment or order dismissing the subject claim on procedural grounds would not be viewed as final or conclusive. Such a judgment or order will, therefore, have no binding effect in another lawsuit instituted before a Korean court in respect of the same claim.

(ii) Valid Jurisdiction

B2.10 A Korean court will exercise its discretion in determining whether the foreign court had valid jurisdiction over the case. Since the Civil Procedure Act does not provide any guidelines for such a determination, the Supreme Court holds the position that this issue should be determined on reasonable grounds to adjudicate international disputes fairly, properly and efficiently, taking into account the purpose of the recognition of foreign judgments.

B2.11 Korean courts will recognize as valid the jurisdiction of foreign courts assumed by either a prior

agreement to submit to such jurisdiction or by the defendant's voluntary appearance in court without any objection to the jurisdiction. Even if the jurisdictional defense were thus waived by the defendant, however, the validity of the jurisdiction will be denied if the dispute were subject to the exclusive jurisdiction of Korean courts, e.g., a dispute concerning real property located in Korea, or the courts of any other country.

B2.12 A sufficient or reasonable contact, between the country where the judgment has been rendered and the parties, the dispute or the subject claim, will also be required to be established. Since the validity of the jurisdiction of foreign courts will be judged from the viewpoint of Korean procedural law, rather than the laws of that foreign country, a foreign court's jurisdiction will not be recognized if it is based solely on contacts which are not recognized as sufficient for taking jurisdiction under the Korean Civil Procedure Act.

B2.13 A foreign court need not necessarily have jurisdiction over the case at the time it renders the judgment. The existence of the foreign court's jurisdiction at the time when the Korean court recognizes the judgment would be sufficient to determine the validity of the jurisdiction.

(iii) Proper Service of Process

B2.14 Since it is a fundamental right of the defendant to receive the service of process in advance, this requirement is indispensable for the protection of a Korean national who has lost his case before a foreign tribunal. This requirement would not apply to foreign nationals. No enquiry may be made into the adequacy of the methods of the service, provided that it was effected in accordance with the laws of the country in which the judgment was rendered, and that it was not effected by publication alone.

B2.15 Even if the service was effected in accordance with the applicable laws of the foreign country, it should also have been timely and actually received by the Korean defendant. Notice received, but which allows no time to make the required appearance, might be invalid as well. Since the meaning of the service here should be broadly read, it will not be limited to the formal service provided for in the Korean Civil Procedure Act. However, service to a Korean defendant would best be effected through diplomatic channels, via the Korean Ministry of Foreign Affairs.

B2.16 The rationale behind this requirement is that the Korean court must protect its citizens from suffering the effects of litigation of which they may be ignorant. Therefore, any impropriety in the service of process will be deemed to have been cured by the Korean defendant's appearance in court. The requirement for voluntary appearance is based on the simple reasoning that a party who has voluntarily submitted himself to the jurisdiction of a court should not be permitted to raise a jurisdictional defense at a later stage. The same conclusion would result, if the defendant had filed an unqualified appearance or if he has employed a lawyer to enter an appearance in his absence. Special or qualified appearance for the purpose of raising a jurisdictional defense, however, would not amount to submission to the jurisdiction.

(iv) Public Policy

B2.17 The public policy requirement represents the only substantive limitation to the recognition of a foreign judgment. Foreign judgments are as a rule recognized without reviewing their merits. However, recognition has to give way to the basic demand of public policy or natural justice. Public policy or natural justice will be judged by Korean standards, and not by foreign standards. The procedure by which the judgment was obtained, as well as the substance of the judgment, will be subject to the test of this requirement. The reasoning leading to the conclusion, as well as the conclusion itself of the judgment, is examined in deciding whether or not its substance is contrary to public policy or natural justice.

B2.18 If there is a final and conclusive foreign judgment satisfying the requirements for recognition, as mentioned above, the res judicata effect of that judgment will result in dismissal of another lawsuit in respect of the same claim which may be instituted before a Korean court. However, if the defendant in the newly instituted lawsuit fails to present the existence of the foreign judgment to the court, the court will give its own judgment on the merits without dismissing the claim. In such a case, two judgments on the same claim come to existence. If the two are contradictory, the foreign judgment first rendered would be deemed contrary to the public policy of Korea and will not be recognized in Korean courts.

(v) Reciprocity

B2.19 The reciprocity requirement demands that the judgments of Korean courts must be accorded similar treatment in the courts of the jurisdiction rendering the judgment sought to be recognized. This does not mean that a foreign claimant must first prove the existence of some actual precedent in which the courts of the foreign jurisdiction have recognized a Korean judgment. Rather, he must only show that Korean judgments "Will" be similarly recognized by the courts of the foreign jurisdiction, if such an occasion were ever to arise. Reciprocity, therefore, need not be based on a treaty between Korea and the country of the foreign jurisdiction. The possibility of recognition based on laws or customs in each country will be sufficient to meet this requirement.

B2.20 The requirements for recognition of the country of the foreign jurisdiction do not have to be "identical" to those of Korea. A substantial similarity in material respects will be considered sufficient. The Supreme Court has interpreted the necessity for reciprocity to mean that the requirements for recognition of a foreign country should be "either the same or more lenient" than Korean requirements.

B2.21 Until 1985, the Korean courts tended to deny the existence of reciprocity. In cases where the judgments of the courts of the State of Nevada or Japan were sought to be enforced, the

reciprocity was denied. Recent Korean court decisions, however, have recognized the reciprocity between Korea and the states of U.S., Japan and West Germany.

B2.22 It is expected that, in the future, Korean courts will generally recognize the existence of reciprocity between Korea and foreign countries, except countries where examination into the merits of claim or existence of a treaty is required for recognition of foreign judgments, e.g., Belgium, Italy or The Netherlands.

(c) Enforcement Judgment

B2.23 As stated earlier, even though a foreign judgment satisfies all of the above-mentioned requirements, it will be enforceable only upon an enforcement judgment declaring its lawfulness being obtained from a Korean court.

(i) Jurisdiction

B2.24 An action requesting an enforcement judgment must be instituted with a district court which exercises jurisdiction over the general forum (place of domicile or place of business, see IV.2. and 3. of Part A) of the defendant, or, in the absence of the general forum, over the place where the property of the defendant is located (See IV. 5. of Part A).

(ii) Procedure

B2.25 The general procedure for civil litigations discussed in Part A also applies to obtaining an enforcement judgment. Therefore, the written complaint must be filed, attached with the foreign judgment sought to be enforcement and its translation.

B2.26 The court will not look into the merits of the claim, but the plaintiff must prove that the foreign judgment meets all requirements for recognition set out above. The enforcement judgment may permit provisional enforcement, if the plaintiff so requests. The plaintiff may execute the enforcement judgment which has become final or which has been rendered with a provisional enforcement decree, after obtaining an enforcement clause upon the face of the exemplification of the judgment from court officials.

(3) ENFORCEMENT OF DOMESTIC/FOREIGN ARBITRATION AWARDS

(a) In General

B3.1 The procedures for enforcing arbitration awards obtained in Korea are governed by the Korean Arbitration Act. As to the enforcement of foreign arbitration awards, Korea became a participant in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention") in 1973, but with two reservations recognized by the Convention itself. Korea recognizes and enforces foreign only arbitration awards made in the territory of another contracting state. Also, Korea limits the application of the convention to arbitration awards in those disputes that are considered commercial in nature under Korean laws. Discussed below are the procedures for domestic arbitration awards provided for in the Korean Arbitration Act and how the Korean courts have treated foreign arbitration awards under the New York Convention.

(b) Enforcement of Domestic Arbitration Awards

B3.2 Under the Korean Arbitration Act, arbitration awards will be treated as having the same effect as final court judgments. An arbitration award, however, would be enforceable only upon an enforcement judgment declaring its lawfulness being obtained, as in the case of foreign judgments. The procedures for obtaining an enforcement judgment are the same as those for an enforcement judgment of a foreign judgment. In rendering an enforcement judgment, the court must pronounce the judgment to be provisionally enforceable, either upon depositing security, or without depositing any security.

B3.3 However, the Arbitration Act provides the courts with certain grounds for vacating a domestic arbitral award, and that, in the presence of any of those grounds, an enforcement judgment would not be obtainable. In addition to a number of procedural grounds, the Act contains some substantive and quasi-substantive bases for vacating arbitral awards. First, Korean courts may vacate an arbitral award which orders the performance of acts prohibited by law. Also, an award may be vacated if the arbitration tribunal does not state the reasons for the award. Furthermore, an award may be vacated if the arbitral tribunal has failed to resolve factual or legal issues which might have affected the resolution of the dispute. These grounds have caused controversy among the commentators as to how broadly the statutory grounds for vacating an award should be interpreted by the courts.

B3.4 However, the Supreme Court's position on the statutory grounds for vacating an arbitral award which orders the performance of statutorily prohibited acts, for example, has gradually moved towards stricter construction. A case in point is the Supreme Court's position on the violation of the Foreign Exchange Control Act (FECA), whose prohibitions have most frequently been cited in an attempt to vacate arbitral awards. Until 1975, the Supreme Court had vacated awards ordering foreign currency payments in violation of the FECA, indicating the Supreme

Court's willingness to interpret the statutory grounds for vacating the award very broadly. In 1975, however, the Supreme court reversed its position in a case involving a contractual debt to be paid by a Korean resident to a non-resident. In that case, the Supreme Court observed that the restrictions imposed on foreign exchange transactions by the FECA should be limited to the minimum necessary to achieve the policy goals of the FECA, namely, the stability of the balance of payments and of the domestic currency value. By emphasizing the administrative regulatory nature of the FECA, the Supreme Court held that the validity of an underlying private transaction and the arbitral awards based on it should not be affected by that regulatory nature, which might authorize only administrative sanctions for any violation.

B3.5 The significance of this decision is that it indicates the Supreme Court's willingness to honor arbitral awards as much as possible, in the absence of legislative action, by reducing statutory grounds for vacating the awards to procedural ones. Thus, Korea, as an arbitral forum, does not present as many disadvantages as a literal reading of relevant statutes would indicate. In combination with the strict interpretation of grounds for refusing the enforcement of a foreign award under the New York Convention, as will be discussed below, it is expected that the Korean courts will enforce both domestic and foreign arbitration awards unless urgent public policy concerns demanding the refusal of such enforcement exist.

(c) Enforcement of Foreign Arbitration Awards

B3.6 As is required for enforcement of a domestic arbitral award, a foreign arbitral award will only be enforceable if an enforcement judgment declaring its lawfulness has first been obtained. The same rules of jurisdiction and procedure apply as for enforcement of a foreign judgment.

B3.7 At the time of application for an enforcement judgment the applicant must supply the court with the documents required under Article 4 of the New York Convention, i.e., the duly authenticated original award or a duly certified copy of it, the original agreement to submit to arbitration, or a duly certified copy of it, and Korean translations of such documents certified by an official or sworn translator, or by a diplomatic or consular agent.

B3.8 In determining whether to enforce a foreign arbitral award, the Korean courts will not examine the contents of the award, except as permitted under the New York Convention. However, Korea recognizes and enforces only foreign arbitration awards made in the territory of another contracting state, i.e., reciprocity is required. In this regard, a decision of the Seoul High Court, rendered in 1988, rejected the defendant's argument that enforcement should be denied on grounds of lack of reciprocity. The arbitration forum was England, a signatory of the New York convention, but the plaintiff hailed from a jurisdiction which was not a signatory to the Convention. The court was firm in upholding the rule that reciprocity should be decided on the

basis of whether or not the jurisdiction wherein the arbitration award was issued is a signatory to the Convention, and not on the basis of whether the parties to the arbitration are signatories to the Convention. The court subsequently upheld the existence of the reciprocity between Korea and England.

B3.9 The New York Convention, in Article 5, provides grounds upon which an arbitral award may be vacated. Paragraph 2 of the same Article specifies formal and procedural grounds for vacating an arbitral award, such as procedural irregularities and excessive arbitral authority. In Paragraph 2, public policy reasons are recognized as grounds for vacating an award. The most important issue to foreigners would be how the Korean courts interpret the public policy grounds of Paragraph 2 in a suit asking for an enforcement of a foreign arbitral award within Korea.

B3.10 In a case involving the enforcement of an arbitral award rendered in England, the Seoul Civil District Court refused enforcement on public policy grounds, because the arbitration agreement clause was printed in fine print on the reverse side of a purchase order. A recent Supreme Court decision rendered in April 1990, however, expressly addressed the concept of the 'public policy' under the New York Convention. The Supreme Court ruled that, considering the spirit and purpose of the Convention, the term 'public policy' should be interpreted narrowly and strictly, not only taking into account domestic demands but also from a viewpoint of establishing good order in international transactions. The Supreme Court consequently found that an arbitration clause submitting to arbitration in England printed on the reverse side of a purchase agreement falls into the definition of 'an agreement in writing which the parties undertake to submit to arbitration' in Paragraph 1 of Article 2 of the Convention.

B3.11 In the same case, the defendant also contended that the purchase agreement was not executed by his duly authorized attorney. The Supreme Court ruled that the authority of the person who executed the agreement on behalf of the defendant should be determined in accordance with the law of England, where he actually executed the agreement, for the purpose of protecting the interests of the other party to the agreement who should have examined the existence of the authority of the person in terms of English laws.

B3.12 A judgment rendered by the Seoul Civil District Court in 1983 also addressed the 'public policy' issue. This case involved an arbitration award based on a dispute under a charter party agreement, in accordance with which the arbitration proceeding had taken place in England. In rejecting the defendant's argument that the lack of oral hearings violated public policy, the court observed that the underlying spirit of the New York convention demands that the courts construe very narrowly the public policy grounds for vacating an arbitral award. The court also declared that the public grounds should be confined to violations of the domestic constitutional order or fundamental economic regulations.

B3.13 As noted above, the Korean courts are likely to recognize the enforcement of foreign arbitral awards in strict compliance with the provisions of the New York Convention, taking a cautious stance in declining to enforce foreign arbitral awards only in extreme cases. Therefore, foreigners will probably not have to concern themselves too much with the enforceability of a foreign arbitral award, not to mention a domestic award, in Korea.

PART C - CONCIILIATION

(1) OVERVIEW

C1.1 Conciliation is a dispute resolution process in which the court or the conciliation committee established in the court recommends a conciliation decision in consideration of the totality of the circumstances in order to help the disputing parties to reach an agreement in a speedy, simple and amicable way. Unlike the litigation process where the court makes binding decision in an adversarial setting based on the facts and arguments presented by the disputing parties, conciliation is to resolve a dispute in an amicable manner based on compromise and concession. Matters involving conciliation are governed by the Judicial Conciliation of Civil Disputes Act enacted on January 13, 1990.

C1.2 It is reported that the ratio of the number of conciliation cases filed with the court to the litigation cases pending is approximately 10%. To advance the conciliation system, the Korean judiciary has been making many efforts. Today, the Korean courts recommend conciliation in many cases (which are considered to be suitable for resolution by conciliation) and the rate of success to resolve the disputes pursuant to such resolution recommendation is on a steady rise. For instance, for disputes arising from construction and medical accident, the courts refer such cases to the conciliation committee comprised of experts in the field and the conciliation committee renders a reasonable conciliation decision pursuant to which the disputing parties come to an agreement in many cases. Disputes relating to insurance, the sale and purchase of securities are also the areas in which the rate of resolution by means of conciliation is increasing.

(2) MERITS OF CONCILIATION

C2.1 First, conciliation proceedings allow disputing parties to express their opinions without being subject to strict procedural requirements as in the case of litigation. Second, more speedy resolution is available in conciliation proceedings than in litigation. Once a request for conciliation is filed, hearing is scheduled within a relatively short period of time and the number of hearings required is no more than 1 in most cases. Conciliation cases requested by a party itself is concluded usually within 3 months. Third, conciliation proceedings are less costly. Although stamp tax is required for both litigation and conciliation proceedings, the amount of

stamp tax required for conciliation proceedings is 1/1000 of the claim amount, which is 1/5 of the litigation proceedings. Furthermore, as resolution by conciliation is a product of compromise and concession, no emotional antagonism remains unlike the case of in litigation. Finally, conciliation is a private proceeding and therefore, the result of conciliation is kept in secret.

(3) REQUEST FOR CONCILIATION PROCEEDINGS

(a) Commencement of Conciliation Proceedings

C3.1 Conciliation proceedings commence on request by the disputing party(ies) or by referral from the presiding judge at his/her discretion. Conciliation is available for a pending lawsuit until the decision by the High Court is rendered. The Judicial Conciliation of Civil Disputes Act are applicable to all civil matters except for limited areas such as marriage, divorce and such other families law disputes which are governed by the Matrimonial and Family Procedure Act.

(b) Jurisdiction

C3.2 Conciliation can be commenced in court, the city, or the county court which has jurisdiction over the respondent's place of residence or business, or the place in which the disputed object is located. Jurisdiction for conciliation can also be determined by the parties' agreement.

(c) Procedures of Making Request for Conciliation

C3.3 While request for conciliation can be made with the court both in writing or verbally, it is more common to file the request for conciliation in writing.

(d) Preliminary Disposition

C3.4 As in litigation process, the presiding judge in conciliation proceedings may, to the extent necessary, give an order to any party not to sell, alter or otherwise dispose of his property. This type of preliminary remedy is different from "preliminary attachment" or "preliminary injunction." Such preliminary remedies in conciliation proceeding are not as powerful as that under the litigation process because a failure to comply with such order requires a fine only.

(e) Expenses for Conciliation

C3.5 When conciliation is requested with the court, payment of stamp tax is required. Once a dispute is resolved by conciliation, each party shall bear its own conciliation costs unless agreed otherwise. On the other hand, if the parties fail to reach an agreement pursuant to the conciliation

decision as recommended by the court, the party who requested conciliation shall bear the entire conciliation costs. Also, if a dispute in litigation is referred to conciliation by the court and the conciliation is concluded as a result, the litigations costs incurred shall be deemed as a part of the conciliation costs.

(4) CONCILIATION PROCEDURES

(a) Handlings of Conciliation

C3.6 A request for conciliation is reviewed by the judges in charge of conciliation, provided, however, that the request for conciliation may be referred to the conciliation committee by the discretion of the judges in charge of conciliation or upon request by the parties. The conciliation committee is comprised of 1 conciliation chairperson selected among the judges and 2 others selected among the reputable person in the subject field. Nevertheless, the parties may, by an agreement, appointed such 2 other members of the conciliation committee.

(b) Hearing of Conciliation

C3.7 Once the request for conciliation is filed, hearing is scheduled and the parties are served with notice of place and time for such hearing. Unlike the litigation process in which hearings are held in a courtroom, hearing of conciliation is held in a separate place (i.e., Conciliation Room), which is not open to the public.

(c) Appearance of the Parties and Interested Parties in Court

C3.8 The parties or their attorneys must appear at the court as ordered by the court. Persons or entities who have interest in the outcome of the conciliation may participate in the conciliation process upon the permission by the court. If the petitioner of the conciliation fails to appear in court for 2 hearings, the request for conciliation shall be deemed to have been withdrawn. If, on the other hand, the respondent fails to appear in court for a hearing, the court may, at its discretion, render an *ex parte* "Conciliation Decision" in the absence of reasonable justification. Such a Conciliation Decision may be challenged within 2 weeks from the date on which a copy of the written Conciliation Decision is served.

(d) Investigation of Evidence

C3.9 At conciliation hearings, the petitioner presents its arguments under the court's instructions and the respondent's replies follow. Once the arguments and evidence are put forth by both parties, the court reviews the evidentiary materials and conducts its own factual investigation (if necessary), and based on such evidence, recommends a settlement at a level which it deems

reasonable to both parties. Although the factual investigation process is undertaken as it is in the litigation process, examination of witness is not a common practice seen in the conciliation process.

(5) CONCLUSION OF CONCILIATION

(a) Conciliation Decision

C3.10 If the parties reach an agreement at hearing, the terms of the agreement are indicated in the conciliation agreement and thereby conciliation is concluded. However, if the respondent fails to appear at the hearing or the parties fail to reach an agreement, the court may, at its discretion, render a Conciliation Decision in consideration of the totality of the circumstances. Such a Conciliation Decision may be challenged within 2 weeks from the date on which a copy of the written Conciliation Decision is served and if so challenged, the Conciliation Decision becomes ineffective and the case will be transferred (or returned) to litigation. If, on the other hand, neither party challenges the Conciliation Decision, it will be deemed as if the parties have reached an agreement upon the terms of the Conciliation Decision.

C3.11 If the court determines (i) that conciliation would not be an appropriate way of resolving the dispute or (ii) that the petitioner has requested for conciliation for illegitimate purposes, the court may render a decision not to proceed with conciliation. Also, if the parties fail to reach an agreement or the court determines that the case is not suitable for conciliation, the court may conclude the case by finding that the parties have failed to reach an agreement.

(b) Transfer to Litigation

C3.12 In the event (i) the court renders a decision not to proceed with conciliation, (ii) the parties have failed to reach an agreement or (iii) the Conciliation Decision is challenged, the case is automatically transferred to litigation. In such event, the lawsuit is deemed to have been initiated on the date on which the conciliation is requested for the purpose of meeting the statute of limitation. Similarly, if conciliation is proceeded subsequent to the institution of a lawsuit, the failure of conciliation would automatically transfer the case back to litigation.

(c) Effect and Enforcement of Conciliation

C3.13 If conciliation becomes successful, the result of conciliation will have the same effect as settlement in litigation. Stating differently, the successful result of conciliation is final and conclusive to the parties involved as in the case of a final judgment in litigation. If a party fails to

perform any terms of the concluded conciliation, the other party may enforce it against the failing party in accordance with the Civil Execution Act.

(d) Other Conciliation Procedures

C3.14 Other than conciliation procedures recognized under the Judicial Conciliation of Civil Disputes Act as described above, there are a number of *ad hoc* conciliation procedures to certain areas of law of which representative cases are the Matrimonial and Family Procedure Act, the Computer Program Protection Act, Environmental Dispute Adjustment Act, the Financial Supervisory Service, etc. Under these cases, conciliations are undertaken by the respective conciliation committees in accordance with the conciliation regulations provided under such laws.