Will-be Amendments of Korean Corporate Laws in 2009: Mystic Mix

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I. Introduction

On January 8, 2009, the Korea National Assembly (“National Assembly”) finally passed bill No. 180342¹ revising the Korean Commercial Code (“KCC”).² The bill entered into effect as Law No. 9362 on February 4, 2009. Along with the Law, Presidential Decree No. 21288, which was prepared by the Korean Ministry

¹ The first two digits mean the 18th National Assembly.
² www.assembly.go.kr/renew07/info/int/tra_read.jsp
of Justice ("KMOJ"), became effective on the same date. The Korean government initially proposed bill No. 1801556 to the National Assembly on October 21, 2008.\(^3\) It was a much more comprehensive package purported to achieve several goals: i) increase the transparency and efficiency of the corporate management by reorganizing the sections on finance and accounting, ii) introduce information technology by adopting e-voting and e-registration of stocks and bonds, iii) provide diverse entrepreneurial legal forms, such as the limited partnership and limited liability company; and iv) ameliorate legal formalities for small joint stock companies\(^4\) in accordance with international standards. In addition, as the Securities Transaction Law ("STL") was to be integrated into part of the Capital Market and Finance Investment Law ("Capital Market Law") on February 4, 2009,\(^5\) special sections on listed companies under the STL had to be relocated into part of the KCC and some into the Capital Market Law.\(^6\) On November 28, 2008, the Judiciary Comm. decided to carve out the latter part of the bill No. 1801556 as an independent Comm. bill No. 1803424, with the reservation that the core of the initial amendment proposals in bill No. 1801556 would be reviewed with more time upon further public hearings.\(^7\) In the end, only the technical part of the bill No. 1801566 became effective, but the major part remains at the National Assembly. The future of the major changes in bill No. 1801556 ("Will-be" or "Bill") is not clear. It is likely that it would pass the National Assembly by the end of 2009.

The KCC chapter on companies had undergone six changes in the past four decades since it first went into effect in 1963 as Law No. 1000. The first change was in 1984. It covered minimum paid-in capital, the supervisory authority of the statutory auditor, stock dividend, transfer of shares by handover and other similar subjects. Japanese company laws were reference points partly due to the similar structure of the two economic systems.\(^8\) In 1995, another amendment bill was adopted to catch up with the discussions in Japan,\(^9\) which was more comprehensive than that in 1984. They include the minimum dividend ratio for preferred shares, different stock dividends for different kinds

\(^3\) [http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=ARC_J0E8G1I0T2J1U1B8C1X0N1F3H7R9G4](http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=ARC_J0E8G1I0T2J1U1B8C1X0N1F3H7R9G4)

\(^4\) Chushikhoesa is translated into joint stock company, which is similar to a general corporation under US corporate laws.

\(^5\) [http://www.law.go.kr/LSW](http://www.law.go.kr/LSW)


\(^7\) See Staff Report and Minutes of the Judiciary Comm. Meeting on Jan. 12, 2009, *Supra* Note 2

\(^8\) Law No. 3724 dated Apr. 10, 1984, See full text and the reason for amendment, *Supra* Note 3

\(^9\) See *id.* Law No. 5053 dated Dec. 29, 1995, See full text and the reason for amendment
of shares, appraisal rights, short form merger, enhancement of statutory auditor’s authority, among other issues. Immediately after the 1997 financial crisis hit the Korean economy, the KCC transformed itself into a completely different animal through four draconian changes in 1998, 1999, and twice in 2001.10 The goal was to ensure a more transparent and responsible management structure. Through the post-1997 changes, the KCC is now far apart from the Japanese and European company laws. Rather, the KCC is dominated by the US corporate law concepts. The Bill is a continuation of a series of such radical attempts to change the KCC modeled on US corporate laws. The Bill was largely based on the 2006 proposal prepared by the special comm. under the KMOJ and subsequently proposed to the National Assembly in 2007.11 The 2006 bill was aborted due to a lack of attention by the National Assembly and the lukewarm drive by the previous administration. Despite the power shift in 2008, the basic tenure of the amendments in 2009 was not very different from that of the 2007 bill. Contrary to the previous six amendments, the 2009 bill was the outcome of relatively enduring dialogues among scholars, business leaders and bureaucrats. Thus, the Bill is more orderly and focused compared to the previous ad hoc discussions for amendments. Ironically, that was the reason that the National Assembly halted the review of the changes in the Bill at the last minute in 2008.

The purpose of this article is to make critical comments on the Bill and anticipate the future of Korean corporate laws beyond the Bill. I argue the Bill is a mystic mix of conflicting perspectives and philosophies about the substance of a corporation in the sense that a corporation is conceptualized as an independent entity while shareholders have more room for tailoring the structure of the company by drafting the articles of incorporation with care. The Bill tries to distance itself from the concept of the statutory capital, while it has two different corporate governance requirements depending on the amount of the capital. The Bill gives more leeway for the creditors and the company to negotiate the financing contracts while it puts more restrictions on the company’s financing capability. The Bill still wanders around between the non-standing auditor and the audit committee composed of board members. It has failed to provide clear, satisfactory answers to some of the basic corporate questions, but has posed more questions. If we assume that the amendment will be adopted in 2009, how would and should such legal vacuum be filled in? I believe the judiciary branch


can and should play a more active role in rendering solutions to these legal uncertainties. However, the Korean judiciary has built-in drawbacks in answering legal questions. Such problems could be resolved only if the judiciary takes a more open approach to the issues.

Sections II and III are a summary of Will-be and its history. Unanswered questions are expounded in Section IV. In Section V, as a way to find answers to such questions, I support judicial activism in light of the past judicial precedents. In Section VI, however, I will examine the restraining forces to that direction and some guideposts desirable for such a strategy.

II. Overview of Will-be Amendments

A. More Diverse, Liberal Forms of Enterprises

1. Limited Partnership Contract and Limited Liability Company

The KCC and the Korean Civil Code ("Civil Code") provide for a garden variety of contract and corporate forms for enterprises. They include: partnership contract,\textsuperscript{12} silent partnership contract,\textsuperscript{13} general member corporation,\textsuperscript{14} limited member corporation,\textsuperscript{15} joint stock corporation\textsuperscript{16} and limited corporation.\textsuperscript{17} The former two are contractual arrangements, while the latter four are corporate entities. The CC and the KCC provisions about contractual arrangements and internal relationship among equity holders in corporate entities are not mandatory.\textsuperscript{18} Nonetheless, the liability of partners in a partnership contract and general partners in a silent partnership contract is not limited\textsuperscript{19} in the sense that they are responsible for the other partners' debts or corporate debts. The liability of general members in general member corporations is not limited in the sense that they are responsible for the other partners' debts or corporate debts.

\textsuperscript{12} Civil Code Arts. 703-724, et seq.
\textsuperscript{13} KCC Arts. 78-86
\textsuperscript{14} KCC Arts. 178-267 Hapmyong hoesa is translated into general member corporation.
\textsuperscript{15} KCC Arts. 268-287 Hapja hoesa is translated into limited member corporation.
\textsuperscript{16} KCC Arts. 288-542 Also, see Supra, note 4.
\textsuperscript{17} KCC Arts. 543-613 Youhan hoesa is translated into limited corporation.
\textsuperscript{18} KCC Arts. 195 and 269
\textsuperscript{19} CC Arts. 712, 713 and KCC Art. 82
corporations or limited member of corporations is also not limited. The liability of limited members is limited to the amount of contribution promised to the company. The fundamental principle that cannot be changed by contracts or articles of incorporation is that limited liability cannot go with management authority.

The Bill will introduce the concept of management with limited liability. The more diverse legal forms offered by the KCC, the more convenience the entrepreneurs can enjoy in organizing a legal entity balancing ownership, management interests and risks involved in investment. Will-be thus will provide for one additional contractual and one additional corporate forms of enterprises: limited partnership contract and limited liability company. Under these forms, limited partner or limited member can exercise management authorities depending on the provisions of the partnership agreement or the articles of incorporation. In a limited partnership contract, general partners and limited partners can be management partners. In a limited liability company, any member including limited members or any third party can be designated as managers in the articles of incorporation.

2. Special Rules for Small Joint Stock Company

The KCC provides for universal rules on all joint stock companies. However, joint stock companies range from giants like Samsung Electronics with the paid-in capital of more than KRW 800 billion, 130,000 shareholders, KRW 65 trillion in assets, and KRW 63 trillion in annual sales revenue to small companies with the minimum capital of KRW 50 million and only one shareholder. Special rules on listed companies used to be regulated by the STL, which now became Chapter 13 of the KCC. As to the financial matters of joint stock companies with assets exceeding KRW 10 billion based on the previous

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20 KCC Arts. 212 and 269
21 KCC Art. 279
22 Bill 1801566 Arts. 86-2 through 86-10 hapja chokap is translated into limited partnership contract.
23 Bill Arts. 287-2 through 287-45 yuhan chaekim hoesa is translated into limited liability company.
24 Bill Arts. 86-5 and 287-12
25 As for tax, see Special Tax Treatment Limits Law, Cl. 10-3, Arts. 100-14 – 100-26 on Special Tax Treatment on Joint Ventures (translatin of dongup kiup)
26 Minor exceptions such as Art. 383, Para. 1
28 KCC Arts. 542-2 through 542-12. As to the special rules under the Capital Market Law, see Supra, note 6
year-end balance sheet, outside auditing is required by the Outside Audits of Joint Stock Companies Law (“OAL”).

Will-be will have wider special rules for small joint stock companies (“SJSC”) with paid-in capitals of less than KRW 1 billion. At the time of incorporation by its promoters, the articles of incorporation do not have to be notarized and thus costs and efforts for notarization can be saved. For the recordation of a SJSC on the company register, a certificate of the balance from financial institutions will suffice and thus the costs and efforts for securing a certificate of deposit from financial institutions can be saved. In terms of corporate governance, SJSCs do not have to notify its shareholders of the shareholders meeting two weeks prior to the meeting, but a one-week notification is required. Furthermore, by unanimous written consent, such notification requirements can be waived. Again, costs and efforts for two week prior written notice and physical meetings can be saved. For SJSCs, they do not have to maintain three directors, but instead only one director or a two member board. The articles of incorporation of SJSCs can also waive the requirement for a statutory auditor, in which case the shareholders meeting will carry out the function of the statutory auditor. Less formality can save costs and time.

3. Wider Availability of Limited Corporation

The corporate form of limited corporation covers closely-held corporations. Contrary to such legislative purpose, however, closely-held corporations usually take the form of joint stock companies. Accepting such reality, Will-be provides for special rules for SJSCs. If special rules are provided for SJSCs, the KCC provisions on limited corporation, which were initially designed for small closely-held companies, do not appropriately reflect their prototype of its own. Rather, limited corporation should be free from special rules for small companies. Will-be abolishes the restrictions on the number of limited unit holders in a limited corporation. It also provides the free transferability of units in a limited corporation unless the articles of incorporation provide otherwise. Unit holders meeting can be notified by

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29 OAL Art. 2, Enforcement Decree under the OAL (“OAL-ED”) Art. 2
30 Bill, Arts. 292, 318, 363, 383 and 409
31 KCC Art. 545
32 Bill Art. 556
emails as long as they consent to this mode of notification and thus the written notice in writing can be waived.33

B. More Efficient, Responsible Management

1. More Power to Majority Shareholders and Management for Efficiency

The KCC is based on the same basic principles on corporate governance as those of US corporate laws: the majority shareholders elect the management,34 the board has the supreme authority to run the company,35 certain fundamental corporate actions are subject to the consent of shareholders36 while the minority shareholders have appraisal right.37

In terms of details, however, the KCC still seems to adhere to the unanimity principle. Will-be will shift the balance in favor of the majority shareholders. In the case of a merger, for example, the KCC requires special resolutions of the merging and merged company.38 The shareholders of the merged company, however, must be issued at least one share of the merging company. They cannot be cashed out. Will-be provides for the possibility of a cash-out merger.39 The minority shareholders of a merged company can receive cash or even debt instruments as the only consideration of a merger. Appraisal rights can be exercised, except for in the instances of small mergers.40

In a similar vein, Will-be provides for the possibility of unilateral buy-out by majority shareholders.41 If majority shareholders own 95% or more of shares, they can buy out the minority shares at a fair price. Likewise, the minority

33 Bill Art. 571
34 KCC Art. 382. US corporate laws differ on the meaning of the majority: simple majority or absolute majority and whether a super-majority voting requirement can be included in the articles. See, MBCA Secs. 7.25 and 7.26, pre-1999 MBCA Secs. 11.03 & 12.02 & DGCL Secs. 216 & 242
35 KCC Art. 393
36 KCC Arts. 374 (business transfer), 522 (merger), 343-2 (capital reduction) & 434 (amendment of articles)
37 KCC Art. 374-2 Shareholders of a merged company cannot be cashed out.
38 KCC Arts. 526 and 527. In the case of short form mergers and small mergers, board of directors approval is sufficient. KCC Arts. 527-2 and 527-3. Prior to the amendment of Art. 343-2 of the KCC, there were discussions about the possibility of stock redemption by amendment of the articles. Most commented negative.
39 Bill Art. 523, Item 4. The possibility of cash-outs of the merging company is not clear from the Bill.
40 KCC Arts. 522-3 & 527-3, Para. 5
41 Bill Arts. 360-24 through 360-26
shareholders can exercise appraisal rights\textsuperscript{42} to the controlling shareholders at a fair price.

The KCC provides for the director’s liability to the company or third parties if the fiduciary duty is breached.\textsuperscript{43} Such liability can be waived on unanimous consent of shareholders.\textsuperscript{44} Will-be, while sticking to this principle, will allow the articles of incorporation to adopt the limitation of the director’s liability up to six times his/her annual compensation.\textsuperscript{45} Such limitation, however, shall be invalid if the breach is intentional or out of gross negligence.\textsuperscript{46} This change seems to imply that a company can provide for the scope of fiduciary duty, the limitation or even exemption of liability for a breach of fiduciary duty in its articles of incorporation, which requires two-thirds of the shareholders present where a majority of the shares outstanding is attending.

2. Responsible Management

Since the fiduciary duty of directors was incorporated into the KCC,\textsuperscript{47} it has adopted many provisions to increase the transparency of management by introducing an audit committee system\textsuperscript{48} and lowering the threshold for minority shareholder rights.\textsuperscript{49} As a continuation of this policy, Will-be expands the scope of protective mechanisms.

Self-dealing is prohibited unless approved by the board.\textsuperscript{50} Will-be broadens the definition of self-dealing to transactions between the company and the director’s spouse, lineal ascendants or lineal descendants of the director or director’s spouse (“Director’s Family”), companies controlled by Director’s

\textsuperscript{42} Put option as opposed to appraisal rights may be a better name.
\textsuperscript{43} KCC Art. 399
\textsuperscript{44} KCC Art. 400
\textsuperscript{45} Bill Art. 400
\textsuperscript{46} Bill Art. 399, Para. 1 clearly states breach of fiduciary duty is not based on moral precept, but on traditional liability for willful or negligent misconduct. This change, however, is desirable, I am not sure.
\textsuperscript{47} KCC Art. 382-3
\textsuperscript{48} KCC Arts. 393-2 and 415-2
\textsuperscript{49} KCC Art. 403
\textsuperscript{50} KCC Art. 398
Family (“Director’s Family Company”), or companies controlled by the Director’s Family or Director’s Family Company.\(^{51}\) With respect to self-dealing transactions, fair terms as well as approval of the board are required.

Misappropriation of corporate opportunities is prohibited.\(^{52}\) Corporate opportunities are defined as business opportunities that the director has become aware of in the process of performing their job as directors, that utilize corporate information, or that are closely related to the company’s current or future business. If the director wishes the company enters into contracts with a third party who appropriates corporate opportunities that can benefit the company at present or in the future, such transaction must be approved by the board.

The KCC imposes the fiduciary duty on directors and quasi-directors.\(^{53}\) Will-be will officially introduce the concept of officers.\(^{54}\) It, however, is not mandatory. A company may adopt an officer system, under which the board of directors can elect officers for two year terms and no representative director will be elected. Instead, representative officer is designated by the board. Under the officer system, they have the same fiduciary duty as directors.

As a way to ensure a pro-active shareholders meeting, Will-be will introduce the electronic vote system.\(^{55}\) The board of directors may adopt a resolution that permits shareholders to exercise voting rights by an e-voting system. In the written notice or public announcement of a shareholders meeting, shareholders must be notified that they may exercise their voting rights by e-voting system. Electronic records for e-votes must be retained by the company for five years from the end of the shareholders meeting.

C. Orderly Reorganization of Capital/Accounting/Finance Rules

1. No Minimum Capital/No Par Shares

The KCC still maintains the minimum paid-in capital of KRW50million at all times.\(^{56}\) Furthermore, only par shares are allowed.\(^{57}\) Statutory capital is

\(^{51}\) Bill Art. 398, Para. 1
\(^{52}\) Bill Art. 398, Para. 3
\(^{53}\) KCC Art. 401-2
\(^{54}\) Bill Arts. 408-2 through 408-9
\(^{55}\) Bill Art. 368-4
\(^{56}\) KCC Art. 329
defined as the product of the number of shares outstanding multiplied by par value. Will-be will abolish the minimum capital requirements while a joint stock company may issue either par shares or no par shares. At the time when no par shares are issued, the board of directors also must decide the amount to be accounted for as paid-in capital. A joint stock company cannot issue both par and no par shares.

2. Accounting Standards

The KCC has one chapter on accounting matters that provides for such issues as evaluation of assets and establishment of deferred accounts. In practice, however, the OAL that governs accounting matters of joint stock companies with assets over KRW10 billion has more detailed rules and standards, which are not always consistent with those under the KCC. Thus, it is necessary to coordinate the discrepancies between the KCC and the OAL.

Will-be simply provides for generally accepted accounting practices that are fair and reasonable as the guidelines. Instead, the detailed provisions on evaluation of assets and establishment of deferred accounts are completely deleted. As to the scope of financial statements to be prepared by the board, Will-be foresees the details to be prescribed by the presidential decree under the KCC. As to the approval procedure of financial statements, Will-be permits the articles of incorporation to delegate the approval authority of the shareholders to the board.

3. Liberalization of Legal Reserve

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57 KCC Art. 289, Para. 1, Item 4
58 KCC Art. 451
59 Bill Arts. 291 and 329
60 Bill Art. 451
61 KCC Book III Company, Chapter 4 Joint Stock Company, Clause 7 Accounting Arts. 447 through 468
62 OAL Art. 13, OAL-ED Art. 7-2. Korea Accounting Standards Board has established extensive authorities such as Preface to Statements of Korea Accounting Standard, Korea Financial Accounting Standards, Supplementary Standards, Concepts, Interpretations and Korea Accounting Institute Opinions. See www.kasb.or.kr
63 Bill Art. 446-2
64 Bill Art. 447
65 Bill Art. 449-2
The KCC has rather strict regulations on legal reserve, i.e., profit and capital reserve, for the protection of creditors. Ten percent or more of the distributable income must be reserved until the profit reserve reaches one-half of paid-in capital. Capital reserves are required in the case of premium issuance of new shares, surplus from share exchange or transfer, merger, capital reduction, scission or other capital transactions. Legal reserve is to be used to compensate capital deficits in the order of capital and profit. Legal reserve can be transferred to capital accounts upon a resolution by the board.

Will-be will expect the scope of legal reserve will be narrowed by the presidential decree. Under Will-be, any reserve over 1.5 times the amount of paid-in capital may be reduced by a resolution at a shareholders meeting and thereby excessive reserve can be part of the distributable income. This possibility obviates the two step distribution of reserve – transfer to the capital account and reduction of the capital.

4. Lenient Distribution of Profits

The KCC requires that the financial statements to be approved at a shareholders meeting, which creates a time gap between the end of a fiscal year and the shareholders meeting. The KCC also requires that the distribution of dividends be in the form of cash or newly issued shares. The KCC, however, provides for the board supremacy over shareholders in the governance part of the KCC.

To make the board supremacy consistent in the financial matters, Will-be will permit the board to decide on the dividends when the financial statements are approved by the board pursuant to the provisions of the articles of incorporation. A joint stock company may distribute its distributable income in

66 KCC Art. 458
67 KCC Art. 459
68 KCC Arts. 460 and 461
69 Bill Art. 459
70 Bill Art. 461-2
71 KCC Art. 449
72 KCC Arts. 462 and 462-2
73 KCC Arts. 361 and 393
74 Bill Art. 462, Para. 2
the form of any assets, and thus dividend is not limited to cash or shares. As to the amount of distributable income, Will-be still maintains the balance sheet test while unrealized profits also must be deducted from net assets.

5. Diverse Kinds of Shares

The KCC provides for two kinds of shares: common and preferred. Preference features are permitted in terms of dividends and liquidation. The KCC also still adhere to the principle of free transferability. As the capital market has been developed, the STL, now Capital Market Law, used to provide exceptions for listed companies of the general rules under the KCC, such as the increase of the cap of non-voting shares from one-fourth to one-half of the shares outstanding.

Will-be will provide for the possibility of more diverse kinds of shares in terms of voting rights, transferability, conversion and redemption in the articles. The number of non-voting shares or restricted voting right shares can be as much as one-half of the total number of shares outstanding.

6. Improvement of Bond Market Structure and E-Register

The KCC has plenty of sections on bond sales from its inception in 1963. As the bond market develops, the STL, now Capital Market Law, had special sections on bond sales by listed companies. Nonetheless, many archaic provisions in the KCC operate as the source of uncertainties and hindrances in the bond market.

Will-be will abolish the sections of the KCC regarding the maximum amount of the bond and limits on face value and premium issuance.
also will provide for the possibility of more diverse bonds such as bonds with dividends, exchange bonds, redeemable bonds, and bonds with derivative features. Will-be also will introduce the concept of a bond management company which must be separate from the trustee. While trustees are soliciting sales, the bond management company shall engage only in the supervisory activities for the protection of bond holders’ interest as an independent entity. As a technical matter, bond does not have to be registered on paper, but electronic registration and management is a possibility. The same system is to be introduced for shares under Will-be.

III. Procedures

A. 2006 Proposal

Subsequent to the extensive discussions and report of the Korea Commercial Law Association about the amendments of the company law since November 2004, the KMOJ organized Corporate Law Amendment Special Committee (“Special Committee”) composed of 15 professors and trade group representatives on July 28, 2005. The Special Committee was divided into two groups: one group for corporate governance matters; and the other group for corporate finance matters. After year-long discussions within the groups, the Special Committee produced a proposal to the KMOJ on June 6, 2006. As usual, the KMOJ had a public hearing on July 4, 2006. On October 4, the 2006 proposal (“2006 Proposal”) was finally announced to the public by KMOJ Public Notice.

85 Bill Art. 469
86 Bill Arts. 480-2, 480-3, 481, 482, 483, 484, 484-2 and 485
87 Bill Art. 478, Para. 3
88 Bill Art. 356-2
No. 2006-106. It had four bullet points: i) advancement of corporate governance by introducing officer and double derivative suits system; ii) introduction of information technology into corporate management by adopting e-voting system; iii) more autonomous management of financial matters by abolishing minimum capital and revising legal reserve system; and iv) new forms of enterprises. The 2006 Proposal has no big difference from the Korea Commercial Law Association proposal as the members of the Special Committee overlap with the reporter of the said Association. One interesting idea in the Korea Commercial Law Association proposal is a re-definition of a corporation, which denies the nature of the association. On October 12, 2006, the Korean Legal Center organized a symposium about the 2006 Proposal with the drafters. In the public notice, the KMOJ clearly indicated that the 2006 Proposal would pass through the technical review of the Ministry of Legislation, the official adoption at the Cabinet meeting, and the National Assembly by the end of 2006. On December 12, 2006, however, the Justice Minister ordered the organization of a Special Issue Debate Committee composed of five professors to reconcile the 2006 Proposal with the demands of the business world. The three major issues were: officer liability; double derivative suit; and usurpation of corporate opportunity. On February 5, 2007 the Special Issue Debate Comm. , after several discussions, decided to stick to the initial proposal with some minor changes. The 2006 regular session of the National Assembly, however, had long sine concluded.

B. 2007 Proposal

On August 27, 2007, the KMOJ again publicly announced the amendment proposal (“2007 Proposal”) in its public notice No. 2007-97. The focus of the 2007 Proposal, however, was to shift the STL provisions for listed companies to part of the KCC. Most provisions of the 2006 Proposal on corporate governance and finance disappeared except for minor portions about incorporation.

93 Bok-Ki Hong, Draft Amendment on Corporate Governance, 94 The Korean Legal Center 5-30 (Oct. 2006); Jong-June Song, Draft Amendment on Corporate Finance, 94 The Korean Legal Center 31-59 (Oct. 2006); Seung-Kyu Yang, Chang Hyun Koh & Tae-Jong Lee, Comments and Discussions, 94 The Korean Legal Center 60-83 (Oct. 2006)
conveniences. On September 5, 2007, the KMOJ had a public hearing.\(^{97}\) On September 20, 2007,\(^{98}\) the 2007 Proposal was submitted to the National Assembly as Bill No.177463. As the term of the 17\(^{th}\) National Assembly concluded on May 29, 2008, Bill No. 177463 was abolished on the same date.

C. 2008 Proposal

Under the new administration, on May 7, 2008, the KMOJ publicly announced the 2008 proposal (“2008 Proposal, i.e., Will-be/Bill”) in its public notice No. 2008-47.\(^ {99}\) The 2008 Proposal was, as described above, a combination of the 2006 Proposal and 2007 Proposal. Some important sections in the 2006 Proposal such as double derivative suits and managerial needs for purchase of treasury shares were deleted. However, substantial parts on corporate governance and finance from the 2006 Proposal were returned. The 2008 Proposal passed through the legislative procedure up to the floor of the National Assembly as Bill No. 1801556 on October 21, 2008. On November 28, 2008, the Judiciary Comm. decided to carve out the STL part of the bill as an independent bill, Bill No. 1803424 to have it passed only. However, Bill 1801556 is technically still pending with the 18\(^{th}\) National Assembly for further consideration.

IV. Unanswered Questions

A. To what extent can the authority of shareholders and board of directors under the KCC be prescribed in the articles of incorporation? To whom should the fiduciary duty be addressed? Corporation as Institution v. Corporation as Property of Shareholders v. Nexus of Contracts


Under the KCC, a corporation is a legal entity independent of its shareholders. As a corporation is incorporated by equity interest holders, it can be depicted as the property of its shareholders. However, as the law grants the privilege of limited liability to a corporation, it has become an institution that functions as a legal means to amass capital. Korean courts espouse the traditional view about the substance of a corporation: an independent entity with its own interest. For example, in a company where there exists only one shareholder, if the shareholder uses the corporate funds for personal purposes and immediately pays back the funds, such conducts constitute a breach of fiduciary duty, which constitutes a criminal conduct under the Korean Penal Code. In determining whether a director of a bank breached fiduciary duty, the Korean Supreme Court clearly indicated that directors of financial institutions should consider their quasi-public nature as well as the interest of the shareholder such as terms of the loan, payment plan, security interest, and so forth. In a recent decision, one district court also permitted the board of directors to consider the interest of the society as well as that of the shareholders in taking a corporate action to deter any hostile takeover attempts. According to this line of cases, Korean courts seem to conceptualize a corporation as an independent entity having its own interest apart from the shareholders’.

Nonetheless, more and more commentators in Korea tend to take the view that a corporation is a property to be managed by the shareholders by contracts among themselves. Some are even sympathetic with the view that a corporation is just a nexus of contracts without any substance, which is to be free from any mandatory corporate rules. Probably as a reflection of such views, the KCC profusely and broadly permits the shareholders to plan corporate governance and finance structure in the articles of incorporation. They include: board

100 KCC, Art. 171, Para. 1
101 Berle, Corporate Powers as Powers in Trust, 44 Harv. L. Rev. 1049 (1931)
approval for share transfer,\textsuperscript{107} issuance of new shares to third parties,\textsuperscript{108} interim dividend,\textsuperscript{109} terms of convertible bond\textsuperscript{110} and bond with warrant,\textsuperscript{111} issuance of convertible bond and bond with warrant to third parties,\textsuperscript{112} ground for dissolution,\textsuperscript{113} designation of liquidator,\textsuperscript{114} designation of transfer agent,\textsuperscript{115} grant of stock option,\textsuperscript{116} redemption of shares with retained earnings,\textsuperscript{117} different kinds of shares,\textsuperscript{118} minimum dividend ratio for preferred shares,\textsuperscript{119} terms of redemption for preferred shares,\textsuperscript{120} terms of conversion for convertible shares,\textsuperscript{121} record date or shareholder register closing period,\textsuperscript{122} issuance of bearer form share certificate,\textsuperscript{123} authority of shareholders meeting,\textsuperscript{124} venue of shareholders meeting,\textsuperscript{125} chair at shareholders meeting,\textsuperscript{126} quorum for regular shareholders meeting,\textsuperscript{127} exercise of voting rights in writing,\textsuperscript{128} non-voting right of preferred shares,\textsuperscript{129} exclusion of cumulative voting,\textsuperscript{130} fiduciary duty,\textsuperscript{131} extension of

\textsuperscript{107} KCC Art. 335, Para. 1
\textsuperscript{108} KCC Art. 418, Para. 2
\textsuperscript{109} KCC Art. 462-3, Para. 1
\textsuperscript{110} KCC Art. 513, Para. 2
\textsuperscript{111} KCC Art. 516-2, Para. 2
\textsuperscript{112} KCC Arts. 513, Para. 3 & 516-2, Para. 4
\textsuperscript{113} KCC Arts. 517, Item 1 & 227, Item 1
\textsuperscript{114} KCC Art. 531, Para. 1
\textsuperscript{115} KCC Art. 337, Para. 2
\textsuperscript{116} KCC Art. 340-2, Para. 1
\textsuperscript{117} KCC Art. 343, Para. 1
\textsuperscript{118} KCC Art. 344, Para. 2
\textsuperscript{119} KCC Art. 344, Para. 2
\textsuperscript{120} KCC Art. 345, Para. 2
\textsuperscript{121} KCC Art. 346, Para. 1
\textsuperscript{122} KCC Art. 354
\textsuperscript{123} KCC Art. 357
\textsuperscript{124} KCC Art. 361
\textsuperscript{125} KCC Art. 364
\textsuperscript{126} KCC Art. 366-2, Para. 1
\textsuperscript{127} KCC Art. 368, Para. 1
\textsuperscript{128} KCC Art. 368-3
\textsuperscript{129} KCC Art. 370, Para. 1
\textsuperscript{130} KCC Art. 382-2, Para. 1
\textsuperscript{131} KCC Art. 382-3. The meaning of reference to the articles in defining the scope of fiduciary duty is a big question. I guess it is the outcome of complete confusion about the substance of a corporation. While it is defined as an independent entity, the shareholders are rather heedlessly allowed to change it. As to the fiduciary in a close corporation, see, Lawrence E. Mitchell, The Death of Fiduciary Duty in Close Corporations, 138 U. Penn. L. Rev. 1675 (Jun. 1990)
director’s term,\textsuperscript{132} number of directors,\textsuperscript{133} share retention requirement of
directors,\textsuperscript{134} director’s compensation,\textsuperscript{135} selection of representative director,\textsuperscript{136}
shortening of prior notice period for board meeting,\textsuperscript{137} supermajority
requirement for board resolution,\textsuperscript{138} exclusion of no face-to-face meeting
resolution,\textsuperscript{139} establishment of committees within the board,\textsuperscript{140} board authority
that cannot be delegated to the committees,\textsuperscript{141} lower share ownership ratio for
excluding voting rights in selecting statutory director,\textsuperscript{142} establishment of audit
committee,\textsuperscript{143} terms of new shares,\textsuperscript{144} shareholders’ resolution for a transfer of
reserves to capital accounts,\textsuperscript{145} and so forth.

While Will-be will introduce aforementioned concepts and tools to the
corporate governance and finance matters, they are largely optional, not
mandatory. They include: no par shares,\textsuperscript{146} approval of financial statements by
the board,\textsuperscript{147} payment of dividend or disposal of treasury shares by the board,\textsuperscript{148}
diverse kinds of shares,\textsuperscript{149} e-shareholder register,\textsuperscript{150} cap on director’s liability,\textsuperscript{151}
establishment of executive officers,\textsuperscript{152} in-kind dividend,\textsuperscript{153} delegation of bond
issuance authority from the board to the representative director for one year,

\begin{footnotes}
\item KCC Art. 383, Para. 3
\item KCC Art. 383, Para. 1
\item KCC Art. 387
\item KCC Art. 388
\item KCC Art. 389, Para. 1
\item KCC Art. 390, Para. 3
\item KCC Art. 391, Para. 1
\item KCC Art. 391, Para. 2
\item KCC Art. 393-2, Para. 1
\item KCC Art. 393-2, Para. 2 Item 4
\item KCC Art. 393-2, Para. 2 Item 4
\item KCC Art. 393-2, Para. 1
\item KCC Art. 393-2, Para. 1
\item KCC Art. 409, Para. 3
\item KCC Art. 415-2, Para. 1
\item KCC Art. 416
\item KCC Art. 461, Para. 1
\item Bill Art. 329, Para. 1
\item Bill Art. 449-2, Para. 1
\item Bill Arts. 341, Para. 2 & 462, Para. 2
\item Bill Art. 344, Para. 2
\item Bill Art. 356-2, Art. 1
\item Bill Art. 400, Para. 2
\item Bill Art. 408-2
\item Bill Art. 462-4, Para. 1
\end{footnotes}
among others. Some are in reality a political settlement between the business world who wants broader board authority over the shareholders and those against such trend. For example, the establishment of executive officers will be introduced to impose the fiduciary duty concept over the officers who are not board members. As the business world is against it, it became optional, not mandatory. Executive officer system thus will be possible only if the articles of incorporation are revised by a special resolution at a shareholders meeting. Such a settlement is possible only when one can assume that the coverage of fiduciary duties does not have to be addressed by corporate laws, but rather belongs to contractual domains.

However, this does not always hold true that everything is contractual. Except for certain extreme views about the substance of a corporation, the fiduciary relationship between the shareholders and the directors is the basic tenet of corporate laws that cannot be negotiated between them, but should be imposed by law. Technical matters such as one-shareholder register can be managed by the articles. So can reallocation of authorities between the shareholders and the board to a certain extent. Who should be the fiduciaries and what should be the details of the fiduciary obligations, however, cannot be optional matters. It is true that the KCC is a mixture of two different perspectives. To define the subject matters that can be delegated to the articles with clarity, thus, it seems desirable and necessary that a consensus about the substance of a corporation should be formulated. Any amendment of the KCC without such consensus will end up as a mystic mix that may bring about more confusion and uncertainty.

Such consensus would also help to clarify the meaning of KCC sections about the possibility of different provisions in the articles. Where there is no reference to the articles that may provide differently from that under the KCC, one can always raise the question whether such delegation is prohibited. One example is super-majority requirements for a shareholders’ meeting. KCC provides for the possibility of supermajority for board meetings while it is silent about it with respect to shareholders meetings. The issue is whether the articles of incorporation may require a supermajority at certain shareholder resolutions. If one conceptualizes a corporation as social institution granted by special legislation, all rules governing a corporation are what corporate laws say

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154 Bill Art. 469, Para. 4
155 KCC Art. 391, Para. 1
156 KCC Art. 368, Para. 1
about it. If, on the other hand, a corporation is basically a contractual precept that can be filled in by the KCC, even without specific authorization in corporate laws, liberal placements of authorities in the articles would not be prohibited. Korean courts are rendering conflicting decisions about the validity of super-majority clauses in the articles.\footnote{Inchon D. Ct., Boochon Br. Decision 2007 KAHAP 335 dated Apr. 13, 2007 confirmed amendment of the articles requiring 95% of the shares present and 90% of the shares outstanding for resolutions for terminating directors be null and void as it violates the substance of a joint stock company and infringes on shareholder’s innate rights. Caledonian Trust Cayman Limited et al v. In-Chang Whang et al, 2008 KAHAP 1167 Seoul C. C. Ct. Decision dated June 2, 2008 rendered the same view.}

Where the articles can provide otherwise under the KCC, next question is whether that is the only possibility. One example is what kind of restrictions on share transfer are possible under the KCC as it only provides for the possibility of board consent requirements in the articles. Whether the articles can provide for the consent of all the other shareholders, it is not clear. As Will-be introduces restricted shares on transfer as one of the diverse kinds of shares, this question will then be partly resolved. Will-be, however, will cause similar questions to be raised when it provides for the possibility of special deviation in the articles. Will-be provides that the articles can limit the liability of directors to six times annual compensation. One could ask whether and to what extent insurance at company’s costs would be permitted in addition to or in lieu of the limits on the articles without any understanding about the substance of a corporation.

\textbf{B. To what extent should corporate laws be different for different companies? What should be the criteria for different rules?}

The KCC provides for different corporate governance structure, depending on the amount of the paid-in capital, listing of shares, and the amount of assets. If the amount of capital is less than KRW10 million, certain provisions on trade name and commercial registration are not applicable.\footnote{Enforcement Decree under the KCC ("KCC-ED"), Art. 2} The minimum paid-in capital of a joint stock company must be KRW 50 million.\footnote{KCC Art. 329, Para. 1. Bill Art. 329 will abolish the minimum capital requirement with the introduction of no par shares.} If the amount of capital is less than KRW 500 million, there may be fewer than three directors.\footnote{KCC Art. 383, Para. 1. Bill Art. 383 will increase the amount from paid-in capital of KRW500M to KRW1B.} As a general rule, a board must be composed of three or more directors who do not have to be outside directors. A joint stock company must
have a statutory auditor.\textsuperscript{161} Alternatively, an audit committee within the board may be established.\textsuperscript{162} Such committee must be composed of at least three directors who are not related to directors, largest shareholders, or other parties to the incumbent directors.\textsuperscript{163}

In the case of listed companies,\textsuperscript{164} they must have outside directors who account for at least one-fourth of the board.\textsuperscript{165} If the assets are KRW 2 trillion or more, the number of outside directors must be at least three who accounts for a majority of the board.\textsuperscript{166} They are also required to have an outside director recommendation committee where at least one-half must be outside directors.\textsuperscript{167} Such listed companies are also required to organize three or more member audit committee where two thirds or more must be outside directors.\textsuperscript{168} Thus, the minimum size of the board is five - two are inside and three outside directors - and one outside director must sit on the nomination committee and the two remaining outside directors on the audit committee. If the assets are KRW100 billion or more, the listed company must have one standing statutory auditor,\textsuperscript{169} unless an audit committee has been established, who must meet, among other things, the requirements for outside director.

As described above, Will-be will introduce another category of joint stock company – those with an amount of capital less than KRW 1 billion. In this case, the paper work for incorporation will become less burdensome and a statutory auditor is not mandatory.\textsuperscript{170} Different governance rules for listed companies can be justified as there the management is at least conceptually separated from the shareholders due to the large number of shareholders. Among listed companies, depending on the amount of assets on the balance sheet, the KCC imposes different supervision mechanism on the management, which also makes sense considering the sheer size of the assets in the hands of

\begin{itemize}
\item[\textsuperscript{161}] KCC Art. 409, Para.
\item[\textsuperscript{162}] KCC Art. 415-2, Para. 1
\item[\textsuperscript{163}] KCC Art. 382, Para. 3
\item[\textsuperscript{164}] KCC-ED, Art. 13, Para. 1 lists up the exceptions such as venture companies, corporate reorganization companies, etc.
\item[\textsuperscript{165}] KCC Art. 542-8, Para. 1
\item[\textsuperscript{166}] KCC-ED, Art. 13, Para. 2
\item[\textsuperscript{167}] KCC Art. 542-8, Para. 4
\item[\textsuperscript{168}] KCC Arts. 542-11 & 542-12
\item[\textsuperscript{169}] KCC Art. 542-10, KCC-ED Art. 15, Para. 1
\item[\textsuperscript{170}] Bill Arts. 292, 318, 363 & 409
\end{itemize}
the management. However, among non-listed companies, Will-be will introduce
different legal requirements depending on the amount of legal capital.

This could make things more complicated than simplified. Furthermore,
it is not clear why the amount of paid-in capital should be the criteria for
different governance rules. Will-be will introduce no par shares and thus limit
the legal significance of statutory capital to a certain extent. A company can
list shares on the Korea Exchange (“KRX”) in either of its two markets: KOSDAQ
and KSE. Although the listing requirements are different for KOSDAQ and
KSE, the KRX rules on KOSDAQ provide for, among other things, the minimum
amount of shareholders equity as KRW3 billion for ventures and 10 billion for
general companies. Considering the insignificant gap between KRW1 billion and
the minimum equity for listing shares on KRW, it is not clear whether the Will-be
should introduce a new category of rules.

Rather, if there should be different rules among non-listed companies, the
criteria for such different treatment should be not the amount of paid-in capital,
but the separation of directors and shareholders or the total number of
shareholders. Despite the definition of a company as an association for profits
under the KCC, a joint stock company does not have to have two or more
shareholders at the time of incorporation and thereafter. The Korean Supreme
Court also has developed exceptions for one-person joint stock companies in
terms of valid shareholders meeting. The KCC, however, is still silent about
the validity of shareholders agreement in closely held companies on the
management and corporate governance. Thus, instead of the paid-in capital
standard, the total number of shareholders or the degree of the separation of the
directors from the shareholders can be adopted as the criteria to permit more
flexible planning of the corporate management structure by the shareholders.

C. Should the KCC be more autonomous or more paternalistic
on Finance Matters? Should it be a guardian? Umpire?

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171 As to the history of legal capital, see Manning & Hanks, Legal Capital (3d ed. 1990)
172 Capital Market Law Art. 390, KRX Listing Regulations most recently revised on Jan. 28, 2009 Art. 32, Para. 1, Item 2,
KOSDAQ Listing Regulations most recently revised on Jan. 28, 2009 Art. 6, Para. 1, Item 2
173 Prof. Lawrence E. Mitchell even argues close corporations should be treated as partnerships instead of trying to
develop varied rules. See Lawrence E. Mitchell, Close Corporations Reconsidered, 63 Tulane L. Rev. 1143 (May 1989).
174 KCC Art. 169. Hyung-Gyu Lee, supra note 83, 150 proposes revision of Art. 169 because a joint stock company and a
limited company do not require two or more shareholders or quota holders.
The KCC has many provisions on accounting and financial matters based on the perception that the KCC, as mandatory norms, should protect the interest of creditors and shareholders. While the economic reality unfolds, the KCC provisions on accounting and financial matters have not been changed for decades. Instead, the STL and subsequently the Capital Market Law have produced a great deal of exceptions based on the mixture of two conflicting policies – convenience of corporate financing and protection of investor interests. As the STL was merged into part of the Capital Market Law and the KCC, Will-be expects to provide more diverse means for corporate financing, less vigorous restrictions on issuance shares or bonds, and more authority to the board. In addition to the KCC, the OAL and the Korean Accounting Standards of the Korea Accounting Standards Board are still basic rules for most of the joint stock companies including listed companies. As a matter of fact, Korea Accounting Standards Board has adopted the Korean International Financial Reporting Standards, which shall be applicable to all listed companies beginning in 2012.

Nonetheless, as the reliance on the self-regulatory power of the market decreases, it is not clear that Will-be adequate for the protection of investors’ rights and thereby continuous prosperity and expansion of Korean enterprises and their financial markets. Although it is the basic principle that creditors are to be protected by contracts, greater authorities to the board and market forces might not be sufficient for the protection of shareholders’ interest. One interesting development under Will-be is easier restructuring as Will-be will substantially liberalize the rules on mergers and acquisitions as the typical means of restructuring financial matters of joint stock companies. Under Will-be, shareholders of the merged company can be cashed out. Even without financial restructuring, 95 percent or more shareholders can buy out the minority shareholders. Although fair price is the standard for appraisal and involuntary sell-out, it is an open issue whether the Korean courts can decide on the fair price of minority shares based on the modern finance theory as they tend to apply the Delaware block approach almost without exception like the status of Delaware court before the 1983 UOP decision. In the case of Daewoo Electronics, the Seoul

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176 If the KCC articles from Clause 4 (Issuance of New Shares) to Clause 8 (bond) are roughly about financial matters, total number of articles exceeds 100.
177 Capital Market Law Art. 1 (purpose)
178 Law 9408 dated Feb. 3, 2009 revising OAL
179 Bill Arts. 360-24-360-26
High Court\textsuperscript{180} decided the appraisal value by applying 50% weight to market value and 50% to net asset value, which was confirmed by the Korean Supreme Court. In the case of Dreamcity Eunpyong Broadcasting, the Korean Supreme Court, revoking the Seoul High Court decision\textsuperscript{181} averaging the market price, net asset value and earnings value, ruled that earnings value should have been given more weight in applying the block method.\textsuperscript{182} In re Korea MBS Company\textsuperscript{183} and re Minong Company,\textsuperscript{184} the Seoul High Court even rejected the earnings value completely by deciding the appraisal value on net assets. This seems to be a worrisome trend as courts become a bureaucratic organization rendering quick decisions based on their convenience.

D. How can the KCC ensure compliance? Insiders? Outsiders? Litigation?

The KCC, like all other corporate laws, has been struggling to find the right way to ensure that the board comply with the fiduciary duty.\textsuperscript{185} It started with the statutory auditor, which originated from European company laws. Statutory auditors cannot be directors,\textsuperscript{186} but function as independent supervisory individuals. The reality is they have frequently been perfunctory. In 1980s and 90s, their authorities were expanded with the hope that they would work as real auditors.\textsuperscript{187} Implementation of the OAL in 1981 was the recognition of the reality that statutory auditors did not work and that there had to be outside auditors for at least financial matters.

Immediately after the 1997 financial crisis, however, the KCC completely changed its direction: introduction of the outside director and ultimately audit the committee concept. This may be viewed as an official surrender of the auditor system. The current status is a mixture of everything: statutory auditor, full time statutory auditor (“standing auditor”), outside director and audit committee. As described above, depending on whether the joint stock company

\textsuperscript{180} Decision 2005 RA 37 dated Aug. 11, 2005
\textsuperscript{182} 2004 MA 1022 Decision dated Nov. 24, 2006
\textsuperscript{183} Seoul High Ct. Decision 2005RA192 dated Apr. 2, 2008
\textsuperscript{184} Seoul High Ct. Decision 2006RA990 dated Mar. 6, 2008
\textsuperscript{186} KCC Art. 411
\textsuperscript{187} KCC Arts. 409-2, 410, 411, 412, 412-2, 412-3, 412-4, 413 & 413-2 are the outcome of such amendments.
is listed or not and how much the amount of assets or paid-in capital is, the KCC provides for different supervisory structure on the management of the board. However, there always has been a difference of views on the independence and effectiveness of outside directors and audit committees.188

Will-be will not touch the outside director concept. It instead will expand the coverage of fiduciary duty to executive officers.189 Such expansion is one great step forward for the protection of shareholders although majority shareholders are still not covered by the fiduciary. Nonetheless, Will-be does not address the issue of how to ensure outside directors work independently except for some disqualifications for outside directors. In this connection, there are concerns about the legal mechanism for lessening influence of majority shareholders on the election of the outside directors. Rather, some argue a more realistic approach would be sanctions by the company or possibility of disputes in the form of derivative suits by shareholders as the effective deterrence to ensure compliance of the management with the fiduciary duty.190 It is true that the KCC permits a minority shareholder to file a derivative suit. However, due to the 1% for companies in general191 and 0.01% for listed companies shareholding requirements and insufficient cost reimbursement mechanism, derivative suits are largely on paper only. In this context, complete abolition of the shareholding requirement and compensation of litigation costs could be considered as a more effective way to ensure fiduciary duties are carried out. This should accompany the means to ensure outside directors be independent.

E. Who should be the Final Arbiter? National Assembly? FSS/KMOJ? Court?

The KCC did not have any substantial presidential decrees for the details. Due to the recent amendment, the KCC now has Presidential Decree with more substance.193 They include: qualification for transfer agent,194 excluded items for

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191 KCC Art. 403, Para. 1
192 KCC Art. 542-6, Para. 6. Para. 7 provides for the possibility of lower percentage ownership requirement for minority shareholder rights in the articles of incorporation.
193 Compare old Presidential Decree No. 11485 with the current Presidential Decree No. 21288
194 KCC-ED Art. 4
shareholder proposal, special rules for stock options of listed companies, special rules for public notice of shareholders meeting of listed companies, lower share ownership requirement for minority shareholder rights of certain large listed companies, lower share ownership requirement for cumulative voting request for certain large listed companies, outside director requirements for listed companies, scope of related party transactions for listed companies, and standing auditor and audit committee requirements for certain listed companies. This is due to the relocation of the STL provisions on listed companies to the KCC, which used to be administered by the Financial Supervisory Commission. From now on, the KMOJ will have the responsibility as well as the authority to address the details of corporate governance of listed companies.

Will-be expects many more items to be prescribed by Presidential Decree. They include: the scope of financial statements, waiver of court-appointed inspector report on in-kind contribution, share repurchase rules, details of e-shareholder register, details of e-voting, scope of related joint stock companies for combined financial statement, details of capital reserve, and so forth. Thus, Will-be authorizes KMOJ to promulgate the rules on financial as well as managerial matters expeditiously and in a timely fashion. However, it is not clear whether the KMOJ is the right institution to address these issues considering the political twist it made on the 2006 Proposal. Furthermore, it is questionable that the KMOJ can develop the expertise and attain promptness on

195 KCC-ED Art. 5
196 KCC-ED Art. 6
197 KCC-ED Art. 9
198 KCC-ED Art. 10
199 KCC-ED Art. 11
200 KCC-ED Art. 12
201 KCC-ED Art. 13
202 KCC-ED Art. 14
203 KCC-ED Arts. 15 & 16
204 Bill Art. 447, Para. 1, Item 3
205 Bill Art. 299, Para. 2, Items 1, 2 & 3
206 Bill Art. 341, Para. 1, Item 2
207 Bill Art. 352-2, Para. 3
208 Bill Art. 368-4, Para. 3
209 Bill Art. 447, Para. 2
210 Bill Art. 459, Para. 1
financial matters. If not, the courts would have to step in with more liberal views about the spirit of the law as opposed to the letter of the statutes. This is a feasible option to address the legal uncertainties with some drawbacks accompanied.

V. Answers to Unanswered Questions: Judicial Activism in Korea

How to address the legal issues arising from the wide gap between the rules in the KCC and the reality of the corporate world is a big question. As mentioned above, Will-be is a combination of diverse perspectives and philosophies about the legal nature of a corporation and the role of the management with a lot of loopholes and uneasy compromises. Thus, even under the Will-be that intends to address corporate legal issues with the statute and presidential decrees from the KMOJ, there remain plenty of uncertainties in answering corporate governance and finance issues. In this context, a legitimate question is who and how such uncertainties are to be resolved. I argue and predict the court will continue to play an active role even under Will-be.

As Korea is a civil law jurisdiction with an extensive statutory system of laws, the role of the judiciary is to interpret such statutory laws promulgated by the National Assembly and the executive branch. Courts are not bound by the judicial precedents of other parallel or higher court decisions. Under this model, the judiciary is not to make new laws, but to simply interpret the current statutes. This general observation is not always true of corporate matters for several reasons. Some exemplary pro-active decisions of Korean courts on corporate matters are reviewed below first.

A. Examples of Judicial Activism

1. Piercing the Corporate Veil

The KCC clearly defines a corporation as a legal person for business purposes.\(^\text{211}\) It further states that a shareholder of a joint stock company shall be responsible to the company only to the extent that it subscribes for the shares.\(^\text{212}\) Thus, a shareholder cannot be held responsible for the debt of a corporation.

\(^{211}\) KCC Art. 171
\(^{212}\) KCC Art. 331
In Young-Il Cha v. Bong-Gil Kim, the Seoul High Court held the defendant, the shareholder of Taewon Corporation, was responsible to the plaintiff who extended credit to Taewon Corporation based on its promissory notes. Seoul High Court listed up the reality of Taewon Corporation’s operation by the plaintiff: all or almost all capital contribution was from the plaintiff; the paid-in capital and assets were meager compared to the size of the business; corporate formalities such as board or shareholders meeting were completely disregarded; corporate assets and those of the plaintiff were intermingled; basic assets of the company were disposed of at the discretion of the plaintiff, among other things. The Seoul High Court then reiterated the principle that a corporation is a separate legal person from the shareholders. Based on the good faith principle, however, it then held the plaintiff, the shareholder of Taewon Corporation, abused the legal formality of a corporation and thus should be responsible for the company debts.

Although the Korean Supreme Court reversed the Seoul High Court decision on the ground that the corporate entity was not a mere formality in the case of Taewon Corporation, piercing the corporate veil theory has been repeatedly applied in several cases at the lower court level. In the 2001 Byuong-Il Park v. Jung-soo Lee (Samjin Company) case, the Korean Supreme Court ultimately adopted the piercing the corporate veil theory. As the cases have been built up, the Korean Supreme Court started to refine the requirements for the application of the theory in later decisions such as Kiwoo Engineering v. Total Media Angun Co., and Hantong Engineering v. KT. Although the Korean Supreme Court requires the subjective intent as well as objective abusive conducts, piercing the corporate veil theory is clearly judicial creation of new laws where the statutes are silent.

2. Double Derivative Suit

213 Decision 72NA2583 dated May 8, 1974
214 Civil Code Art. 2, Para. 1
215 Decision 74DA954 dated Sept. 13, 1977
216 Decision 97DA21604 dated Jan. 19, 2001
217 Decision 2002DA66892 dated Nov. 12, 2004
219 Korea Supreme Court still takes a more conservative approach on piercing the corporate veil. In Decision 2007DA90982 dated September 11, 2008, it also revoked Daegoo High Court Decision on the ground that the corporate entity was not a skeleton.
The KCC, although adopting the concept of derivative suits, provides for strict procedural and substantive requirements for a derivative suit.\textsuperscript{220} For a listed company, while the threshold shareholding ratio is lower, six month retention period is required. As a matter of practice, largely due to these requirements, few suits have been filed except for shareholder disputes on management control.

In \textit{Eun-Sup Jung v. Pyung-Sup Jung, et al.},\textsuperscript{221} the Seoul High Court ruled a shareholder of a holding company that owned 80\% shares of a subsidiary can file a derivative suit against the directors of the subsidiary. The Seoul High Court narrowed the issue to the literal interpretation of the phrase “a shareholder of the company” in Article 403, Para. 1 of the KCC whether it includes a shareholder of a shareholder of the company. Then, it weighed on the pros and cons of double derivative suits. Arguments against the double derivative suits point out the fact that a shareholder of a shareholder of the company can ask the board of the parent company to file a derivative suit against the directors of the subsidiary. They also argue that if double derivative suits are possible, the principle that a shareholder who files a derivative suit must own the shares at the time of misconduct of the directors can be avoided. The Seoul High Court indicated three concerns only if the parent, not the shareholder of the parent, can file a derivative suit against the management of the subsidiary: the damage of the parent is not easy to measure; multiple parent companies can file multiple derivative suits; and practical difficulties of a derivative suit if the management of the parent company also controls the management of the subsidiary. In conclusion, the Seoul High Court ruled a shareholder of the company includes a shareholder of a shareholder of the company. The Korean Supreme Court,\textsuperscript{222} however, reversed the ruling on the ground that a parent company is a separate legal entity from the subsidiary and the KCC provides for a shareholder of “the company.”

The 2006 Proposal had one section\textsuperscript{223} about double derivative suits although there had been heated debates about the scope of the parent company and procedural requirements. At the last minute, the KMOJ deleted it

\begin{flushleft}
\textsuperscript{220} KCC Arts. 403 & 542-6
\textsuperscript{221} Decision 2002NA13746 dated Aug. 22, 2003
\textsuperscript{222} Decision 2003DA49221 dated Sep. 23, 2004
\textsuperscript{223} 2006 Proposal Art. 406-2. Chan-Hyung Chung, Supra Note 85, 13. The 2006 Proposal also provides for the right to inspect books and records of minority shareholders of the parent company over its subsidiaries.
\end{flushleft}
completely in the 2007 Proposal without clear reasons. Almost all the scholars made comments on this issue and surprisingly most of the commentators lauded the Seoul High Court decision. This is still an active topic, but temporarily dormant. All the debates were arisen by the audacious move of Seoul High Court.

3. Fiduciary Duty and Defensive Measures of Board

The KCC used to apply the rules on mandate to the relationship between a company and its directors. Through a 1998 amendment, the concept of fiduciary duty was added. The KCC has had specific sections on self-dealing and non-compete obligations. It has yet to be determined whether and to what extent the general concept of fiduciary duty can be extended beyond the specific sections of the KCC.

In the Eu-Song Park v. Hanwha Merchant Banking case, the Seoul High Court ruled that an issuance of convertible bonds to a third party friendly to the existing controlling shareholder group in a situation where two shareholders were vying for management control was null and void as it is patently unfair. The dispute arose when the two biggest shareholders were fighting for management control. As Eu-Song Park, after amassing shares from the market, asked for a special shareholders meeting of Hanwha Merchant to replace the incumbent board members, they decided to issue convertible bond to third parties who were friendly to the management. Convertible bonds were immediately converted into shares prior to the scheduled shareholders meeting. The first procedural hurdle was whether a shareholder can file a suit to invalidate an issuance of convertible bonds because the KCC did not cross-reference the cause of action to invalidate an issuance of new shares. The second issue was whether such issuance was null and void because it violated the pre-emptive right of the existing shareholders. The Seoul High Court answered affirmatively to this question. Furthermore, it pointed out that such

225 KCC Art. 382, Para. 2
227 KCC Arts. 397 & 398
228 Decision 97 RA 36 dated May 13, 1997
229 KCC Art. 516 does not list Art. 429
issuance is egregiously unfair. Although the Seoul High Court did not specifically use the term fiduciary duty, this ruling was in effect a clear extension of the coverage of the fiduciary duty beyond the statutory ones.

Largely due to this incident, the KCC was amended in 2001 to provide for the possibility of issuance of new shares or convertible bonds to third parties for business purposes. Even after the amendment, however, many courts repeatedly held that issuance of new shares or convertible bonds to third parties in a situation where shareholders are fighting for management control fails to meet the business purpose standards and thereby narrowly defines the business purpose required by the fiduciary duty in a hostile takeover situation. This view was extrapolated to the disposal of treasury shares in a recent case.

In *Hae-Young Lee, et al. v. Jae-Woo Lee, et al.* (Daelim Trading case), the Seoul W. D. Ct. decided that disposal of treasury shares to a friendly party by the management in a situation where shareholders were contesting for management control was null and void as it violates the rules on issuance of new shares to third parties assuming disposal of treasury shares is the functional inverse of pre-emptive rights. This decision is also an outcome of the court’s aggressive interpretation of fiduciary duties. Despite differences of views, the 2006 Proposal adopted the logic of this ruling, which silently disappeared in the 2007 KMOJ proposal. Will-be also has no section about disposal of treasury shares and business purpose. It is true that at the district court level, there still remain confusions on this issue.

Another troublesome section on fiduciary duty was whether the misappropriation of corporate opportunities should be statutorized in the 2007 Proposal. The KMOJ, despite the Special Committee’s recommendation to adopt

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230 Law No. 6488 Amending the KCC effective Jul. 24, 2001


232 Decision 2006 KAHAP393 dated Mar. 24, 2006

233 2006 Proposal Art. 342, Para. 2

234 2007 Proposal Art. 342, Para. 2 deletes Art. 418 to be applied by analogy to the disposal of treasury share

235 Bill Art. 342


32
the idea, deleted the same in its 2007 Proposal without any explanation.\textsuperscript{237} In light of the pro-active approach of Korean courts, however, the theory would probably appear in letters at any court’s decision at any time.

4. Fair Value in Appraisal Proceedings

The KCC recognizes appraisal rights of minority shareholders in many situations including merger, business transfer, share exchange and transfer, scission, and so forth. Although the KCC provides for exceptions in small-scale mergers and short form mergers, shareholders of a merging company as well as those of a merged company have appraisal remedies. The KCC requires minority shareholders be compensated for the fair value. No more guidelines about fair value have been offered. In the case of listed companies, however, STL used to provide a specific formula based on the market price. Under the revised KCC, it is not clear whether such a formula will be continued or not. The legal significance of the formula is not clear.

In the \textit{Doosan Development case},\textsuperscript{238} the Seoul C. D. Ct., at the request of the minority shareholders of the merging company to decide the fair value of minority shares, completely dismissed the valuation formula based on the two month/one month/one week weighted average market price prior to the board’s merger decision under the then-STL\textsuperscript{239} for several reasons: the merger plan was disclosed to the market one month prior to the board decision; the controlling shareholders were affiliates of the merging company; the merging company was under court protection immediately prior to the board’s merger decision, among others. In the end, the court gave 25\% weight to the market price while asset value received 50\% and earnings value 25\%. It does not appear to be desirable that Korean courts still adhere to the Delaware block method. However, the court’s dismissal of the statutory formula was too audacious to be looked over. This decision is another good example of Korean courts’ aggressive approach to corporate issues. It is uncertain whether such interpretation can be maintained even if the formula is prescribed in the enforcement decree under the Capital Market Law.

\begin{small}
\textsuperscript{237} Compare 2006 Proposal Art. 382-5 with 207 Proposal
\textsuperscript{238} Decision 2004 BEHAP151 dated Nov. 3, 2005
\textsuperscript{239} STL Art. 191, Para. 3; STL-ED, Art. 84-9, Para. 2
\end{small}
B. Reasons for Judicial Activism

Reviewing the decisions explained above, Korean courts have taken a proactive approach in tackling many corporate legal issues. I believe this tradition should and could continue for some time because the court thinks it is a better organization than any other authority including the KMOJ to make neutral and professional judgments on corporate issues. It is true that the KMOJ has been trying to take the initiative in drafting many statutory amendment bills on commercial matters. The KMOJ, however, is composed of public prosecutors who work on corporate matters on a rotation basis. Furthermore, the KMOJ tends to become a more politically sensitive organization that is under the influence of several ideology-imbued presidencies. Thus, I believe the major reason for this tradition is the institutional belief and confidence of courts in its expertise and self-denial of bureaucracy and politics, which have been supported by the public.

Another reason for the more active role of the judiciary branch in corporate matters is the KCC provision on fiduciary duty is extremely general in nature like other corporate laws. Although the KCC has some specifics of the fiduciary duty such as approval of self-dealings, the concept of the fiduciary duty is not easily stipulated in more details to some extent. Rather, the fiduciary duty can be made concrete in a given fact situation. Thus, the basic corporate issues are not easily statutorized and such statutorization might not be desirable. This is another reason why the court could be an active player in corporate matters.

As the KCC has incorporated the board supremacy over shareholders under the influence of US corporate laws after the 1997 IMF financial crisis, Korean courts are becoming more familiar with US corporate laws. To the same extent, the influence of US jurisprudence based on judicial precedents has become dominant in Korea. As such, Korean judiciary tends to claim more authority in interpreting and making new laws. This might be one of the reasons for judicial activism on corporate matters in Korea.

240 KCC Arts. 382, Para. 2 & 382-3
241 KCC Art. 398
242 As to the potential risks involving the application of fiduciary principle to close corporations, see Lawrence E. Mitchell, Supra Note 122, 1677 “...from a broad prophylactic measure to a tool to remedy substantial misconduct.”
VI. Limits of Responses from Judicial Branch

The general drawbacks of the court in resolving corporate issues are passivity, individuality, uncertainty and speed. Courts make judgments only after legal disputes are arisen. A courts’ decision for a specific case is not binding to other courts. As court’s judgments are always post facto, they might not be of great help in planning a course of action beforehand. The judicial process will take time until the final decision. Corporate disputes usually arise from diverse and complicated facts that are peculiar to each case. Even if Korean courts try to induce general rules that can govern the relevant legal issues, decisions are not easily generalized, depending on the fact patterns. Thus, an attempt to seek answers to corporate issues from the judicial branch may end up as a chaos with too diverse, too ambiguous, and too individualistic answers. Such risk is more realistic in Korea as court decisions tend to propose general rules, but list up multiple factors. They legitimize their conclusions by parading all the relevant factors without giving much guidance or explanation on the significance of each factors and how such factors are to be weighed in a given case. As judicial precedents have no legal binding effect, court decisions do not compare the pending case with similar decisions in the past from the same or other courts, or distinguish the case from previous ones, but render rather cryptic conclusions in a terse manner. Thus, the traditional format of judgments, even with the good inteniont of the judiciary, is debilitating the court’s creative power to make law.

Korea, like other civil law jurisdiction countries, has a career judiciary. After a brief practical training at the Judicial Research and Training Institute, judges start their career in their mid-20s or early 30s. Although most judges wish to reach the top of their career as next Korean Chief Justice, most or all of them end up as private practitioners. Even Korean Justices open a law office or join a law firm after their terms expire. If they are overly sensitive to their long term economic well-being, their philosophy might be skewed in favor of big businesses without regard to the merits of each case. They may wish to enjoy the visibility of sensationalism by jumping to conclusions without sound legal reasoning. Although the judiciary branch has maintained its reputation of the highest integrity, there always exists risk of falling apart at any time. This is especially true if the Korean Supreme Court is being politicized as guardians of

243 As to the risk of bureaucracy, see J.G. Deutsch, The Teaching of Corporate Law: a Socratic Investigation of Law and Bureaucracy, 97 Yale L. J. 96 (Nov. 1987)
the incumbent administration by abandoning its responsibility as last protector of the rule of law principle, pursuit of post-judgeship interests combined with the pro-active approach might damage the clear grasp of the corporate law issues with neutrality.

Despite all these pitfalls involving the resolution of issues by the judiciary branch, balancing them against the possibly politically skewed and inexperienced personnel in the National Assembly and KMOJ, I believe the judiciary is better prepared to play the leading role in solving the gap between the reality and the corporate laws at least for the time being. The National Assembly is trying to reposition itself in the Korean political process, however, it will take more time for it to take center stage in providing the legal remedies to corporate legal issues. The National Assembly will ultimately float new policy ideas and directions on corporate matters. Even as the general rules are being established with more time for political consensus, finer tuning and fair conclusions in specific cases would and should continue to be developed by the judiciary. To fill the vacuum that required time to be filled in, the least dangerous branch would continue to play the role given.

VI. Conclusion

The KCC started in 1961 as a twin of the Japanese Commercial Code with certain minor twists. As the Korean mainstream economy has expanded along with the development of the capital market, it had still remained static except for miniscule moves in 1984 and 1994 until the big wave of Asian financial crisis hit the country in 1997. The amendments in 1998, 1999, and 2001 were under the strong influence of board supremacy in US company laws. The 2009 enactment of the Capital Market Law and relocation of the STL rules on listed companies into part of the Capital Market Law are a continuation of the trend leaning towards more reliance on market forces and autonomy of the business management. After almost four years of discussions among legal scholars, extensive proposals were made in 2006, 2007 and 2008 despite some distortions by KMOJ politics. At the last minute, however, the National Assembly abruptly blocked the flow, calling for more time for discussion and consideration. It is difficult to predict the future of Will-be in 2009.

I speculate that the National Assembly pass Will-be with some minor modifications. Will-be was the outcome of joint efforts among legal scholars and
practitioners with some ideological influence from the KMOJ. I hope that the political distortion should be restored first to the scholarly proposal. I also hope the National Assembly will take the center stage to give answers to unanswered questions in Will-be. My suggestion is - stakeholder provision in exceptional circumstances balancing the board supremacy, more rigorous regulations on corporate governance with less strict corporate regulations on financial matters; abolition of multi-tier rules depending on the amount of paid-in capital, but clearer rules on close corporations; less reliance on audit committee or statutory auditor for compliance, but no restrictions on share ownership for derivative suits. Such changes are desirable, but not always feasible at the National Assembly. However, the Will-be Amendment is better than no action.

Even if the current Will-be becomes part of the KCC without any changes, I am optimistic about the future of the KCC in light of its past performances I believe the Korean judiciary will continue to play an active role in formulating new rules on fiduciary duty. Korean courts will find details of the fiduciary duty in specific cases as most Korean companies still lack independent management and controlling shareholders tend to have complete control over the management. Such a pro-active judicial branch might entail potential drawbacks of excessive politicization and hasty decisions, which can be overcome by open criticism and professionalism.

Korea will start a new legal educational system in March 2009. Instead of the four-year law college education, extremely competitive bar exams, career judiciary from the mid-20s and private practice as ex-court officials, three-year graduate law school education, open bar exams, experienced judiciary officials and professional lifetime practice development will be gradually introduced. It remains to be seen how the Korean judiciary can transform itself from the civil law jurisprudence under the common law education system. One of the reasons for such changes may be the general perception that legislative statutes fall short of giving clear answers to legal issues, but court decisions in specific cases might be the source of finding the right laws. Considering such changes, it may be the time for Korean courts to re-think the way to draft persuasive decisions. They could supply much more explanations about facts, precedents and factors to be taken into account before rendering conclusions. It seems true that Korean court decisions become longer. However, they are still conclusions without much in the way of explanations. In this connection, the Korean judiciary ought to have its decisions disclosed to the public. As of now, one can ask for a copy of the court decision with a specific case number, which cannot be obtained without reading that decision. This is a clear indication of indifference to the needs of the
public and lack of confidence in its authority. By making its decisions publicly available and thereby receiving comments from the public, the Korean judiciary can become an institution with more authority and integrity.