A. INTRODUCTION

Several legal reforms and initiatives designed to make Korea a more attractive market for foreign investors have been instituted in the past decade, and the financial crisis that began in late 1997 (ushering in what is popularly referred to in Korea as the “IMF Era”).¹ has clearly accelerated the process.

As a result, within a relatively short time frame, a series of new laws, amendments to existing laws and new government initiatives have been adopted with the express purpose of eliminating or reducing barriers to foreign investment in Korea. More investment-friendly changes are expected to be implemented in the near future.²

B. SCOPE OF BUSINESS ACTIVITIES

In first deciding whether to invest in Korea, the foreign investor should be aware that Korea employs a negative list system that classifies types of enterprises into three basic categories for foreign investment purposes. These are the open, restricted, and excluded categories. Enterprises in the open category, as the name suggests, are subject to the fewest limitations, while enterprises in the restricted category are generally subject to special governmental approval requirements and other restrictions, including limits on equity ownership ratios. No foreign investment is allowed with respect to enterprises in the excluded category.

Currently, approximately 98.8 per cent of all enterprises are classified as open for foreign investment. The range of permissible foreign-invested enterprises includes the lease (for periods of up to 50 years) and/or operation of profit-generating enterprises in connection with government-owned properties. Restricted enterprises include newspaper and other publishing businesses, trust companies, and power utilities. Excluded enterprises include agriculture, fishing in Korean territorial waters, and medical insurance.

C. AVAILABLE FORMS OF BUSINESS ORGANIZATION

¹ The reference is to the International Monetary Fund.

² The following discussion of the basic framework of rules affecting foreign joint venture partners in Korea is in no way an exhaustive treatment of every legal aspect of participating in a joint venture in Korea. It is hoped, however, that this discussion will give potential investors a useful guide to the key laws and considerations that shape and influence the establishment and operation of joint ventures with Korean counterparts.
Under the Korean Commercial Code, there are four types of business organization, namely:

(1) The unlimited commercial partnership company (*Hapmyung Hoesa*);

(2) The limited commercial partnership company (*Hapja Hoesa*);

(3) The limited-liability company (*Yuhan Hoesa*); and

(4) The stock company (*Chusik Hoesa*).

The stock company is by far the most commonly used form of business organization. Ownership in the stock company is represented by shares of stock, and the liability of stockholders is generally limited to the extent of their holdings. The limited-liability company is also utilized, but it is less attractive due to restrictions that require the number of equity holders to be no less than two and no more than 50 persons.

D. MAJOR ISSUES ADDRESSED IN JOINT VENTURE AGREEMENTS

1. Corporate Legal Issues

   a. Executive Management of the Joint Venture Company

      The chief executive in a Korean corporation is called the representative director, and the nature of this position is very similar to that of a president or chief executive officer in corporations formed in other jurisdictions. The representative director is, however, always a director of the company. Korean law allows for a corporation to appoint more than one concurrently serving representative director.

      In the case of a joint venture company, the joint venture partners may agree that each will be represented by a representative director and that these representative directors can only exercise authority in concert. The partners may go further and designate one of the representative directors as president and the other(s) as vice-president. However, their actual authority in respect of binding the company will be based on their positions as representative directors.

   b. Authority of the Board of Directors

      The joint venture partners will have to incorporate into their joint venture agreement and articles of incorporation for the joint venture company provisions that set forth the actions that require approval of the board of directors and those that can be taken by the representative director(s) without such approval.

      As there is considerable flexibility in this area, this is an issue that can be the subject of extensive negotiation between the parties.

   c. Operation of the Board of Directors
The joint venture partners should also specify in their joint venture agreement how many directors will be appointed to the board of directors. Under Korean law, resolutions of a board of directors must be passed by the majority of directors in attendance, and attendance by proxy at board meetings is not allowed.

Accordingly, the parties to a joint venture agreement should carefully consider the composition of the board of directors that best ensures adequate and proportional representation.

d. Deadlocks

In some circumstances, the representative director(s) and the director(s) of a joint venture company, acting in the interest of the respective joint venture partners, may become deadlocked on important decisions that must be resolved to prevent substantial loss to the company.

Often, the parties choose to put a clause in the joint venture agreement to set forth rules on the handling of deadlock situations. Such provisions may include mandatory negotiations and negotiating time and other prerequisites that must be met before a party can move to terminate the joint venture agreement and trigger neutral buy-sell provisions.

e. Share Transfer Restrictions

Under the Korean Commercial Code, share transfers are generally allowed. However, a company may choose to place restrictions on share transfers in the company's articles of incorporation.

In the event that the parties want to have complete control over transferability, they would have to consider organizing the joint venture company as a limited-liability company which does not allow for transfers of equity interest without the consent of other equity holders.

2. Antitrust Issues

a. In General

In structuring the joint venture, the parties must keep in mind the restraints imposed by Korea's antitrust laws in respect of certain business activities and combinations.

b. Competition Laws

The basic law governing antitrust and fair competition issues in Korea is the Monopoly Regulation and Fair Trade Act. The purpose of the Monopoly Regulation and Fair Trade Act is to prevent unfair competition or dominance in a given market sector and its provisions are predominantly administered by the Korean Fair Trade Commission.

c. Activities Prohibited Under the Monopoly Regulation and Fair Trade Act

The Monopoly Regulation and Fair Trade Act generally prohibits collusion. However, some collaborative activities may be exempted, such as cooperation in corporate restructuring and research and development programs.
The Monopoly Regulation and Fair Trade Act does not seek to eliminate monopolies from the market. Instead, it seeks to control the actions of dominant companies by a set of rules designed to prevent abuse of dominant market positions. Dominance of a market segment is generally defined by the Monopoly Regulation and Fair Trade Act as occurring when:

1. A company has a market share of 50% or more; or
2. The two or three largest companies in a given market (excluding companies having less than 10 per cent market share) have an aggregate market share exceeding 75 per cent.

The Fair Trade Commission annually publishes a list identifying companies that have dominant market positions. The list is subject to revision as circumstances change and, where appropriate, at the initiative of the Fair Trade Commission or pursuant to a request from a listed company. Companies in the financial or insurance sector are exempted from the listing.

The Monopoly Regulation and Fair Trade Act generally prohibits resale price maintenance. However, this prohibition does not apply to:

1. Copyrighted works; or
2. Goods for which the Fair Trade Commission has granted an exemption pursuant to certain specified standards, i.e., a category of goods having uniformity of quality, being a daily purchase item for ordinary consumers, and for which free competition exists.

The Monopoly Regulation and Fair Trade Act prohibits various activities which in a given context can be deemed as impairments to fair competition. Such activities include, but are not limited to:

1. Unreasonable discrimination against or in favor of trade partners;
2. Abuse of superior bargaining position; and
3. False, deceptive, or misleading advertising.

The Monopoly Regulation and Fair Trade Act prohibits entrepreneurs or associations of entrepreneurs from entering into international agreements that may constitute collusion, unfair trade practice, or resale price maintenance. The Monopoly Regulation and Fair Trade Act also prohibits business combinations such as mergers and acquisitions that substantially restrict competition in affected market segments. As part of this regulatory scheme, a company having total assets (or an annual turnover) of KW 100 billion (approximately US$ 83 million) or more is required to file a report to the Fair Trade Commission for any one or more of a list of specified types of transactions or events.

d. Enforcement of the Monopoly Regulation and Fair Trade Act
In finding violations of the Monopoly Regulation and Fair Trade Act, the Fair Trade Commission is authorized to issue corrective orders and/or to impose administrative penalties. Possible corrective orders include:

1. Ordering violators to cease unlawful activities or transactions;
2. Ordering violators to use major media to inform the public of the violation; and
3. Ordering any other actions deemed necessary to correct the violation.

Corrective orders can only be issued by the Fair Trade Commission pursuant to administrative hearings and the alleged violators in such cases have the right to appeal Fair Trade Commission decisions to the Appellate Court of Seoul.

Violations of the Monopoly Regulation and Fair Trade Act can also be subject to civil suits and criminal sanctions. Once an action by the Fair Trade Commission has become final and conclusive, affected parties may bring civil suits against the violator to recover damages caused by the violation. Criminal charges based on alleged violations of the Monopoly Regulation and Fair Trade Act may be brought only when the Fair Trade Commission refers the case to the prosecutor for criminal investigation.

Possible criminal sanctions include both imprisonment and fines. In practice, however, the Fair Trade Commission is usually content to issue corrective orders. If the violator complies with the corrective order, the Fair Trade Commission rarely seeks to impose criminal sanctions.

3. Financing the Joint Venture

a. In General

Once the foreign investment funding originally approved in conjunction with establishing the joint venture has been depleted, obtaining additional funding is, in many cases, the most difficult problem faced in operating a joint venture company. Acquiring funds through borrowing and additional equity investment are discussed below.

b. Commercial Borrowing

In the past, numerous restrictions were imposed against borrowing from overseas sources. One example was the classification of such commercial loans as either long-term or short-term loans, based on whether or not the term of a loan exceeded three years. Approval from the Ministry of Finance and Economy was required for any long-term loan of US$1 million or more. In the case of short-term loans, reports had to be filed to and approved by designated transaction banks and the proceeds from such loans could only be used for a limited range of purposes.

In June of 1998, many restrictions on commercial borrowing were reduced or eliminated. For example, foreign-invested companies such as those engaged in general manufacturing, advanced technology-based manufacturing, or the provision of advanced technology-related services are eligible to obtain short-term loans, i.e., loans for periods of less than one year, from foreign sources, and are now only required to file a report to a designated
foreign exchange bank in connection with such loans. Loans received from foreign sources for periods of one year or more (which, in contrast to short-term loans, are not restricted to certain category of business such as the manufacturing and advanced technology sectors) also only require a report to a designated foreign exchange bank. However, for any loan obtained from a foreign source in an amount greater than US$30 million, a report must be filed to the Ministry of Finance and Economy, through a designated foreign exchange bank.

c. Corporate Debentures

Only stock companies are permitted to issue corporate debentures. A joint venture organized as a stock company may offer corporate debentures through private placement or public offering.

The maximum amount allowed for such bond issues is the amount equivalent to four times the net asset value of the company according to the latest balance sheet.

d. Additional Equity Investment

If the above methods of financing are unavailable or undesirable, additional equity investment by the joint venture partners is generally the only other means of securing additional funding. Although additional equity investment by foreign partners was significantly restricted in the recent past, the recently enacted Foreign Investment Promotion Act (see text, below) has, for the most part, eliminated such restrictions. The unwillingness or inability of a Korean partner to invest the amounts necessary to maintain agreed on voting share ratios is now simply a contractual matter to be resolved between the Korean partner and the foreign investor.

The foreign investor may choose to make additional investment by way of acquiring redeemable preferred shares. Technically, such a transaction is strictly another form of equity investment. By offering preferred dividend rates and fixed redemption periods, however, this form of investment has considerable flexibility and can be structured by the parties to provide many of the desirable attributes of a straight loan.

E. RELATED AGREEMENTS

1. In general

Some of the more common ancillary agreements entered into in connection with the establishment of joint ventures in Korea are discussed below. It is important to note that such agreements are subject to the Monopoly Regulation and Fair Trade Act, as administered by the Fair Trade Commission.

The Monopoly Regulation and Fair Trade Act authorizes the Fair Trade Commission to determine and publish guidelines ("Guidelines") for determining, among other things, what constitutes unfair collaborative acts, unfair trade practices or resale price maintenance under the Monopoly Regulation and Fair Trade Act in relation to private international agreements. In the past, such agreements had to be reported to and approved by the Fair Trade Commission prior to implementation. Due to recent reforms, prior reporting and approval are no longer mandatory.
However, either party to the international agreement may request the Fair Trade Commission’s review prior to or after the execution of the agreement. Upon the Fair Trade Commission’s review, if an agreement is found to be in violation of the Monopoly Regulation and Fair Trade Act and/or Fair Trade Commission Guidelines, the typical response of the Fair Trade Commission is to order the parties to modify the terms of the agreement to bring it into compliance with the regulations.

In addition, the Fair Trade Commission may, in theory, commence an investigation on its own initiative to find out the regulation violations in the international agreements. However, in practice, such investigations have not been implemented due to their impracticality. In any event, if the regulation violation is later found by the Fair Trade Commission, the Fair Trade Commission may order the modification of the terms of the agreement and/or impose fines up to the amount equivalent to two percent of the company's annual turnover, as determined by the Presidential Decree, although such penalties have not been imposed on any foreign investors to date.

2. Import Distribution Agreement

Import distribution agreements having a duration of one year or more, even if they continue to be subject to renewal, are subject to the Fair Trade Commission Guidelines, which include prohibitions against:

(1) Restrictions on parts sourcing (e.g., where a foreign investor requires a Korean company to purchase only from a designated company);

(2) Restrictions on sales area or customer base;

(3) Restrictions on transaction quantity;

(4) Restrictions on transaction method or sale-price;

(5) Restrictions against dealing in competitor's goods;

(6) Restrictions against parallel imports; and

(7) Imposition of mandatory advertising expenses.

3. Technology Inducement Agreement

If the duration of a technology inducement agreement is one year or more, and the subject technology to be induced is related to aerospace, defense, or advanced technology deemed essential for strengthening the economic competitiveness of Korean industry (and application for a related tax exemption has been filed with the Ministry of Finance and Economy), filing a report on such agreement with the Ministry of Financial and Economy and other concerned ministries is all that is required.

Prior Fair Trade Commission approval is not required for technology inducement agreements. However, international technology license agreements continue to be subject to
the Fair Trade Commission Guidelines, which include the same prohibitions as apply to import
distribution agreements.

In addition to the Fair Trade Commission restrictions, royalties under technology
transfer agreements may be paid only in regard to products which are manufactured by the
Korean licensee applying the licensed technology. This precludes the imposition of royalties
in regard to any products which are imported to the licensee from the licensor.

4. Raw Material Supply Agreements

Raw material supply agreements are subject to the prohibitions in the Fair Trade
Commission Guidelines described above for the other agreements, as may be applicable in
context of raw material transactions. Such prohibitions in this area would most commonly
relate, for example, to raw material supply agreements that unreasonably require the joint
venture company to purchase raw materials, components, equipment, and related products
exclusively from the foreign investor or from a person designated by the foreign investor.

According to the Fair Trade Commission Guidelines, a supply agreement, under which
the foreign investor, its affiliate or other designee is to be the exclusive supplier of raw
materials or components to produce the products of the joint venture company, may be
prohibited, unless such raw materials or components are requested at the initiative of the joint
venture company or such purchase is necessary in order to guarantee the quality or functions of
the products.

F. FORMAL ESTABLISHMENT OF THE JOINT VENTURE

1. In General

The Foreign Investment Promotion Act, enacted in 1998, has greatly reduced the
previous restrictions and barriers imposed on foreign investment activities in Korea. The
approval system imposed in many transactions has largely been replaced under the Foreign
Investment Promotion Act by a simpler reporting system and other past requirements such as
reports on foreign capital remittances and the mandatory appointment of agents in Korea have
been abolished in the interest of making investments into Korea more convenient for foreigners.
The establishment of a joint venture company is accomplished in two basic steps, namely:

(1) Meeting threshold requirements, i.e., determining whether the contemplated
investment is legally permitted; and

(2) Taking the formal steps necessary to complete the incorporation process.

2. Meeting Threshold Requirements

a. In General

After the foreign investor(s) and their Korean counterpart(s) have decided on the
appropriate form of business organization, they must ensure that the threshold requirements
can be met. The most important of these are:
(1) Determining whether the contemplated enterprise falls into the open or restricted investment category;

(2) Obtaining any necessary approvals from the Korean government; and

(3) Ensuring that the minimum capitalization requirement can be met. When there is only one foreign investor, the foreign investor should invest no less than KW 50 million (approximately US$41,700). When there are two or more foreign investors, each of the investors should invest no less than KW 25 million Korean Won (approximately US$20,800).

b. Investment Categories

The investment category in Korea can be classified into the positive category and the negative category.

In the positive category, there are two investment categories: open and restricted. The investment areas included in the open category are unconditionally open to foreign investment, whereas the restricted category means the investment areas that will be gradually open to foreign investment. In the case of the restricted category, the Korean government establishes the allowance criteria in the restricted category for the gradual openness to foreign investment and, thus far, those investment areas in the restricted category with the allowance criteria have been opened up to foreign investment.

In contrast, those investment areas that are included in the negative category are those that are prohibited to foreign investment and those that are included in the restricted category without any allowance criteria.

For businesses coming under the positive category, a foreign investor need only make a report of foreign investment to any foreign exchange bank (Korean banks or Korean branches of foreign banks) or the Korea Trade-Investment Promotion Agency, except when the investment areas fall into the designated defense industries, in which case the foreign investment approval must be obtained from the Ministry of Finance and Economy. Generally, the bank chosen will be a bank with which the joint venture will maintain its business account(s).

c. Foreign Investment Report

Prior to a foreign party’s participation in the establishment of a joint venture company, a foreign investment report must be filed with the government agencies in accordance with the Foreign Investment Promotion Act. The documentation required in the foreign investment report must include general information about the project and investor(s), such as:

(1) The full trade name(s) of the foreign investor(s);

(2) The jurisdiction(s) of incorporation of the foreign investor(s);

(3) The address(es) of the foreign investor(s);

(4) The trade name of the joint venture company (both in English and Korean);
(5) The location of the main office of the joint venture company; and

(6) The amount of proposed foreign investment into the joint-venture company. ³

A power of attorney in favor of local counsel is often needed in connection with the preparation and filing of the report and for carrying out many of the subsequent details related to establishing and registering the joint venture. After the above information and documents have been prepared, the report can be submitted to the relevant authority. Acceptance of the report should be granted within one or two days.

3. Incorporation Process

a. In General

Once it has been determined that the threshold requirements have been met, including the acceptance of the required report(s), the joint venture company may be established, and the foreign investment funds may be paid into the joint venture as part of the establishment procedure.

b. Minimum Initial Paid-in Capital

As mentioned above, the stock company is the most common form adopted for foreign invested company. Under the Commercial Code, the minimum required initial paid-in capital amount is 50 million Won. Under the Foreign Investment Promotion Act, the full amount of foreign investment may be paid in at once or incrementally over a reasonable period of time.

c. Basic Procedure for Establishing the Company

The articles of incorporation of the joint venture company must be prepared in Korean. The Korean version of the articles of incorporation will be submitted to the court as part of the registration process, and the Korean version will be controlling as to the legal content of the articles of incorporation.

Under the Commercial Code, a total of three promoters are required for incorporation of a stock company. If a foreign investor does not have access to such promoters, it is often the practice to utilize local counsel as promoters who will each subscribe to one share of stock. Immediately after the incorporation procedure is completed, the promoters will transfer their respective shares of stock to the foreign investor. This procedure is routine, and it does not involve any risk to the foreign investor.

Funds will have to be wired to a foreign exchange bank in preparation of the subscription payment needed for the establishment of the joint venture company. One of the documents required for the registration of a foreign-invested company is the certificate of the purchase of foreign currency to be issued by the bank and used for the share subscription. Such certificate is obtained at the time the foreign currency funds are converted into Korean Won.

³ This amount should be stated in Korean Won.
The inaugural meeting of shareholders must be held, at which directors and statutory auditor(s) must be appointed. In the case of a stock company, there must be at least three directors and one statutory auditor. One or more of the directors must be appointed as a "representative director" by the board of directors. A representative director is the person who is authorized by law and the articles of incorporation to represent the company.

Each director, representative director and auditor must submit a letter of acceptance that should be signed and notarized. In the case of foreign directors and statutory auditors, copies of their passports and other identifications are required. There is no restriction regarding the nationality of directors or auditor(s).

A corporate seal must be prepared and registered. These are usually prepared locally. The representative director must file an application in order to register the seal.

After completion of the foregoing, the joint venture company and its officers (i.e., the directors, auditor, and representative director) can be registered with the local district court in the jurisdiction where the company's head office is located. The joint venture company must register with the local tax office. A tax identification number for the company is usually issued within ten days from the application filing date.

4. Licenses and Filings Required for Relevant Business Operations

a. In General

After its formal establishment, the joint venture company needs to obtain governmental approval for operation of the business in which it will be engaged. There are numerous licenses, approvals, and filings that may be required, depending on the type of business activity involved.

b. Approval under the Industrial Placement and Factory Construction Act

If the company will operate a factory in its own name, it must obtain an approval for factory establishment from the local authorities where the factory is located, pursuant to the Industrial Placement and Factory Construction Act. Approval for factory establishment is usually issued within 45 days, and this period can sometimes be shortened.

Thereafter, the company must register the factory with the registry office. When leasing the existing factory facilities, an application for registration may be filed for “change of registration of factory” by attaching a document showing that the lessee has leased the existing factory facilities from the person who has registered the factory. The application process for “change of registration of factory” takes seven days.

c. Filing of Report under the Foreign Trade Act

A joint venture company must file a report to the Korea International Trade Association in order to engage in trading (export and import) activities. The report will be processed within five days after filing.
G. TAX INCENTIVES

1. General Tax Structure

a. Corporate Income

Theoretically, the entire global income of a Korean resident is subject to Korean taxation. Non-residents, on the other hand, can only be taxed on income generated in Korea. Such income is subject to withholding tax required under the Income Tax Act and the Corporation Tax Act.

In Korean tax law, all legal entities (both natural and legal persons) are treated independently. Accordingly, taxation of an entity does not take into account or provide relief for income taxed through several tiers of corporate ownership. Regardless of subsidiary-parent company relationships, dividends paid by each corporation will be taxed independently and without reference to taxes imposed throughout an affiliated group of companies. Corporate income is presently taxed as follows:

(1) Annual taxable income up to and including 100 million Won is taxed at the rate of 16 per cent; and

(2) Annual taxable income exceeding 100 million Won is taxed at the rate of 28 per cent.\(^4\)

b. Capital Gains: Capital gains earned from the sale of real property and/or stock are subject to a Special Added Tax at the rate of 20 per cent of the realized gain. This is imposed on top of the ordinary corporate tax.

c. Taxation of Foreign Joint Venture Partners

The above-mentioned taxes are subject to the provisions of double-taxation treaties that may be applicable to foreign partners in a joint venture. Korea is currently signatory to 50 bilateral treaties entered into for the prevention of double taxation, including treaties with Australia, Austria, Brazil, Canada, China, Egypt, France, Germany, Great Britain, India, Italy, Japan, Mexico, Russia, South Africa, and the United States.

Unless there is a superseding double-taxation treaty, foreign companies that do not have a permanent establishment in Korea are subject to Korean withholding taxes under the Corporation Tax Act at the different withholding rates depending on the source of income. The categories and applicable rates are broken down as follows:

(1) Two per cent of business income or income earned from the leasing of ships, airplanes, automobiles or heavy construction machinery;

(2) Twenty per cent of income derived from providing personal services;

\(^4\) Note that the first 100 million Won of income is still only taxed at the 16% rate and only the amounts above 100 million Won are subject to the higher rate.
(3) Twenty-five per cent of income derived from interest, dividends or royalties; and

(4) Ten per cent of the selling price of securities or 25 per cent of the capital gain realized from the sale of securities, whichever is less.

If a foreign corporation has a permanent establishment in Korea, any income reasonably connected with such permanent establishment is taxed as if the foreign corporation were a Korean corporation.

2. Special Tax Incentives Provided by Foreign Investment Promotion Act

The Foreign Investment Promotion Act seeks to encourage selected categories of investment by providing certain tax benefits. Eligible investments at present include:

(1) Investments involving advanced technology;

(2) Investments carried out in relation to foreign investment zones; and

(3) Other investments designated by Presidential Decree.

The most significant of these qualifying categories is the area of advanced technology investment, which is defined as investments related to advanced technology support services or investments accompanied by the introduction of highly advanced technology deemed essential to enhancing the competitiveness of Korean industries.

Foreign-invested companies making eligible investments can claim an exemption from corporate or income taxes in proportion to the foreign investor's equity ratio in the investing company (usually a joint venture company) for the first seven years of such investment and can thereafter claim a 50 per cent exemption from the corporate tax (again in proportion to the foreign investor's equity ratio) for the next three years.

Another attractive feature of the Foreign Investment Promotion Act includes the guarantee that dividends accruing from stocks or quotas acquired by a foreign investor; the proceeds from the sale of such stocks or quotas, and payments of principal, interest and fees to be paid under loan agreements can be fully repatriated as long as such accrued amounts conform with the content of the report (and approvals, where applicable) initially required in connection with the underlying agreement(s) that created the direct or indirect rights to such amounts.

H. SPECIAL INITIATIVES TO PROMOTE FOREIGN INVESTMENT

1. Foreign Investment Zones

Provincial and metropolitan governments can designate certain areas as foreign investment zones after obtaining prior approval from the Foreign Investment Committee established by the Ministry of Finance and Economy.
If such approval is granted, investors in the foreign investment zone can become eligible for tax benefits and in some cases receive infrastructure support in the zone from national and local governments.

2. Foreign Investment Support Centers

The Foreign Investment Support Center is a unit established under the auspices of the Korea Trade-Investment Promotion Agency and has been set up to provide "one-stop service" in assisting foreign investors with various government approvals and reports required in connection with foreign investment activities in Korea.

I. FOREIGN EXCHANGE REGULATIONS

1. Foreign Exchange Management Act

Foreign exchange matters are regulated in accordance with the Foreign Exchange Transaction Act which took effect on April 1, 1999. In 1991, foreign exchange transactions in Korea came to be regulated under a negative list system. Hence, virtually all international transactions in foreign currency are allowed unless they fall into a limited number of prohibited categories.

Presently, the Ministry of Finance and Economy and the Bank of Korea are the major institutions charged with administering foreign exchange controls. Regulatory methods include the requirement of reports, report acceptances and, in some instances, transaction approvals. Typically, reports must be filed and accepted in connection with any significant financial transactions in foreign currency. Occasionally, however, transaction approvals are required, as well.

The nature of the transaction determines whether the Ministry of Finance and Economy, the Bank of Korea, or both are involved in the reporting/approval process. A report and approval are usually required at the outset when a foreign investment transaction to be concluded creates obligations that may require one, or a series of, subsequent foreign exchange transactions. The subsequent transactions then need only be reported as they take place. The purpose of such subsequent reporting is to provide a means of confirming whether:

1. The foreign exchange transaction in question is actually related and within the scope of the obligations that were previously approved; and

2. Required taxes have been paid.

2. Foreign Exchange Transaction Act

As mentioned above, the Foreign Exchange Transaction Act took effect beginning April 1, 1999. The overriding purpose of the Foreign Exchange Transaction Act is to allow greater practical flexibility and convenience to foreign investors in terms of carrying out foreign exchange transactions.
J. RELAXATION OF RESTRICTIONS AGAINST FOREIGN LAND OWNERSHIP

The acquisition of land by foreigners was one of the most closely regulated areas of activity in Korea. To acquire or lease land or buildings or to obtain other real estate rights, foreigners were required to obtain approval from the Minister of Construction and Transportation.

However, in an effort to attract foreign investment, many restrictions have been eliminated. This is largely the result of the promulgation of a new law called the Alien Land Act in 1998. This Act has opened many areas to foreign investment, including the acquisition of land, commercial leasing of buildings and land, and land development and marketing. Foreign investment in the area of real estate investment trusts is still not allowed.

In conjunction with generally opening the real estate market to foreigners, many governmental reporting and approval requirements have been abolished or lessened to some degree under the Act. If, for example, a foreigner acquires real estate, he is only required to give notice to the relevant mayor or district official within 60 days after the conclusion of the purchase contract or within 6 months after the effective date of an inheritance or auction.5

K. LABOR LAWS

1. In General

In general employment agreements in Korea are subject to the Civil Code which contains provisions governing basic contract law in Korea. Wide latitude is granted to parties to freely negotiate wages and working conditions so long as the employer and employee come to mutual agreement.

Of special concern to larger-scale foreign investors, however, is the Labor Standards Act, which sets forth the basic rights of employees and obligations of employers.

2. Statutory Working Conditions Under Labor Standards Act

a. In General

The Labor Standards Act applies to companies having five or more employees. Among the basic rights guaranteed to employees under the Labor Standards Act are the following.

b. Payment of Wages

Employees are entitled to be paid monthly in cash. Employers are not allowed to offer employees in-kind payments in lieu of cash, or to deduct from employee wages debts owed by the employee to the employer.

c. Working Hours

5 The six-month period applies to all land acquisitions that occur by means other than by contract.
Under the Labor Standard Act, an employee's working hours may not exceed 44 hours per week nor exceed eight hours per day. However, under conditions specified in the employment rules prepared by an employer, an employee may be required to work in excess of the legal limits for a particular week or day as long as the average number of hours worked in any given period of up to two weeks does not exceed the maximum 44 hours per week and the number of hours worked within any particular week does not exceed 48 hours.

In addition, an employer may enter into a written agreement with an employee representative whereby the employer may require employees to work in excess of the legal work-hour limits. In such cases, the agreement is required to specify:

(1) The affected employees;
(2) The affected period (i.e., a specified period not exceeding 1 month);
(3) The number of affected working days and the working hours per such day within the unit period; and
(4) Other items specified under the Presidential Decree promulgated in connection with the Labor Standard Act.

However, the number of hours worked in any given week within the specified period may not exceed 56 hours, and the number of hours worked on any particular day may not exceed 12 hours. Furthermore, the average weekly work hours for any given month under such an agreement may not exceed 44 hours. For hours worked in excess of the basic maximum hours (i.e., 44 hours per week and eight hours per day), employers are required to compensate employees at an hourly rate equal to at least 150 per cent of an employee's regular hourly wage.

\[d. \quad \textit{Holidays and Leave}\]

Employees covered by the Labor Standards Act are guaranteed at least one day off per week, as well as days off for national holidays. Such employees also earn one day of paid vacation leave per month, and full-time employees who have been with a company for at least one year, and have no unexcused absences, become entitled to an additional 10 days of paid vacation per year.

Female workers may claim one day of paid menstrual leave per month. The Labor Standards Act also requires employers to grant paid maternity leave of up to 60 days to pregnant female employees.

3. **Statutory Benefits under Korean Labor Law**

\[a. \quad \textit{In General}\]

The Labor Standards Act and related laws and regulations mandate that certain minimum benefits be provided to each employee. Such benefits include severance payment, universal pension plan, universal access to health insurance, and worker's compensation insurance.
b. **Severance Payment**

Employees who have completed one year or more of service to a company are entitled to receive severance payment on termination of employment, whether such termination is voluntary or involuntary. The statutory minimum severance payment is calculated at one month's salary for each year of service with the employer, with the applicable monthly amount being the average monthly salary for the three months immediately preceding termination.

The Labor Standards Act permits employees to demand receipt of severance payment during the period of employment. If such severance payment is paid, however, the employee must work another year or more to be eligible for any subsequent severance payment and the number of years of employment used in calculating the severance payment will only be counted from the date of the previous severance payment.

c. **Pension Plans**

The National Pension Act requires employers to provide a pension plan for all workers, including managerial employees, who are between the ages of 18 and 60.

The plan is a matching-fund scheme, with employer and employee each required to contribute an amount equal to 4.5 per cent of the employee's monthly base salary into the employee's pension plan account. The National Pension Act pension benefit is entirely separate from the severance payment benefit.

d. **Medical Insurance**

All employees in Korea are covered by health insurance under the Medical Insurance Act. Like the pension plan under the National Pension Act, the Medical Insurance Act’s insurance scheme employs equal contributions from employer and employee. The total insurance premium is fixed by law within a range of two to eight per cent of monthly base salary.

e. **Worker's Compensation Insurance**

Employers are required to join a government-managed worker's compensation program under the Industrial Accident Insurance Act. The insurance is used to cover job-related accidents and illnesses.

Premiums are fixed according to actuarial tables based on the hazards normally associated with a given business.

4. **Termination under Labor Standards Act**

The Labor Standards Acts prohibits the termination of an employee without just cause and allows layoff based upon managerial necessity as a form of termination with cause when certain requirements are met.

The Labor Standards Act provides that, when an employer intends to layoff employees based upon managerial necessity, the necessity must be imminent. Imminent managerial
necessity is deemed to exist when a business transfer, acquisition or merger is made to prevent the deterioration of business.

Prior to carrying out such layoffs, however, the employer is required to use its best efforts to avoid the layoff and, for those layoffs that prove to be unavoidable, the employer must institute a reasonable and fair standard by which the affected employees are selected. Such standards must avoid any form of unreasonable discrimination in general, and gender-based discrimination is specifically prohibited.

In implementing layoffs, an employer is required to provide at least 60 days advance notice to the appropriate labor union, if a majority of the employees belong to a given union. If there is no applicable union, notice must be given to a designated employee who represents a majority of the employees.

The employer is also required to engage in good faith negotiations with such labor union or employee representative. Furthermore, in the event that layoffs based on managerial necessity exceed a number specified by the applicable regulations issued in connection with the Labor Standards Act, the employer must file a report to the Minister of Labor using the prescribed form.

L. DISPUTE RESOLUTION

1. Courts
   a. In General

      The parties are free to resort to any court of competent jurisdiction within or outside Korea to settle the disputes arising under a joint venture or related agreement. In relation to dispute resolution involving the Korean courts, foreign investors should be aware of the following basic aspects

   b. The Legal System and Civil Trial Procedure

      All trials are to the court, which generally consists of a panel of three judges. There is no formal, sanctioned, pretrial discovery procedure. Korea does not have jury system. Once the suit is commenced by the plaintiff's filing of a complaint with the court, the court will proceed to set a date for the first hearing and notify the defendant by registered mail.

      The trial will then consist of a series of hearings, normally scheduled approximately three weeks apart, until all the evidence is presented. Each hearing usually deals, for example, with a specific issue concerning the case, or with the examination of witnesses or documentary evidence.

   c. Personal Jurisdiction

      It should be noted that Korea is not a member of the Hague Convention or any other international convention providing for international service of process to confer personal jurisdiction. Therefore, jurisdiction over foreign parties is subject to service from the Korean court to a foreign court carried out through diplomatic channels.
d. Remedies

Possible legal remedies include monetary compensation for harm or loss, related provisional attachments, and equitable remedies of specific performance, and temporary and permanent injunction.

e. Appeals

Appeals of trial court judgments may occur at two successive levels. The first court of appeal is the High Court, where the court not only is the arbiter of claimed trial errors, but also may engage in fact-finding, which constitutes to some extent a second trial of the case. The same system of hearings will be utilized for this procedure.

The final court of appeal is the Supreme Court, which is the ultimate arbiter of claimed errors in the lower courts, and the Supreme Court gives its decision only on legal issues.

f. Enforcement of Foreign Judgments

Korea is not a member of any international convention governing the enforcement of foreign judgments. In the event that it becomes necessary or prudent to attempt to enforce a judgment of a foreign court in the courts of Korea, the foreign judgment will be given effect only if the requirements of the Civil Code of Korea are satisfied. The requirements are as follows:

(1) The jurisdiction of the foreign court is not denied by laws, regulations, or treaties;

(2) The defeated defendant, being a citizen of Korea, received service of summons or any other orders necessary for the commencement of suit other than by public notice, or responded to the suit without being served;

(3) The judgment of the foreign court does not violate good morals and the social order of the Republic of Korea; and

(4) There is a mutual guarantee of enforcement of Korean judgments on a similar basis in the foreign court where judgment was rendered.

In regard to the last item, it should be noted that Korean courts have found the required mutual guarantee or "reciprocity" to exist with very few foreign jurisdictions including the United States and Australia.

2. Arbitration

a. In General

There are no Korean legal restrictions against the use of arbitration as a method of dispute resolution. Nearly all joint venture agreements between foreign and Korean parties contain an arbitration clause.
In the majority of cases, the forum specified for arbitration will not be the home country (country of nationality) of any of the joint venture partners. However, parties occasionally agree that if the arbitration is requested by one party, the forum for arbitration will be the country of the other party. Korea has entered into a few bilateral agreements with foreign arbitration associations, including associations in the United States and Japan, to facilitate the resolution of disputes by arbitration, but these are not commonly utilized.

b. The Korea Commercial Arbitration Board

International commercial arbitration in Korea is sanctioned by the Arbitration Act. Pursuant thereto, the Supreme Court has adopted the Commercial Arbitration Rules (the "Arbitration Rules"). The agency authorized to administer arbitration pursuant to the Arbitration Rules is the Korea Commercial Arbitration Board.

Arbitration in Korea also may be conducted pursuant to other rules such as the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

The Korea Commercial Arbitration Board will recognize an arbitration agreement between the parties as to the number, identity and method of appointment of arbitrators. If the parties have not so agreed to such terms, the Korea Commercial Arbitration Board is authorized to appoint either one arbitrator or a panel of three arbitrators.

The Korea Commercial Arbitration Board will prepare a short list of candidate arbitrators from among a standing panel list of more than four hundred arbitrators drawn from the business and academic communities (including foreign nationals) in Korea. The parties may then use the short list to select the arbitrator(s) who will preside over their arbitration hearings.

When the arbitrators are selected according to the Korea Commercial Arbitration Board procedure, if one of the parties is a national of a country other than Korea, the sole arbitrator or chief arbitrator, as the case may be, at the request of either of the parties, shall be appointed from among the nationals of a country other than that of any of the parties.

Rules for hearings and other procedures are otherwise similar to rules promulgated by other internationally-recognized arbitration bodies and offer a fair and efficient method of dispute resolution. Prescribed arbitration fees are generally significantly lower than in other international arbitration fora.

c. Enforcement of Foreign Arbitral Awards

Korea is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958. As such, enforcement of foreign arbitral awards has been recognized between member nations pursuant to the Convention.

In the most recent recorded case of a request for enforcement of an arbitral award in Korea based on the Convention, the Korean trial court granted a judgment fully recognizing and enforcing an arbitral award against a Korean party.

M. OUTLOOK FOR JOINT VENTURES IN KOREA
As can be seen from the above, Korean government policy is definitely focused on the task of increasing the level of foreign investment in Korea. Joint ventures will continue to be a much-used investment vehicle, particularly in light of the greater scope of opportunity and activity possible for foreign investors (and by extension, foreign-invested joint ventures) resulting from very recently enacted changes in the relevant legal framework.

New laws and other initiatives are expected to further advance current trends. Much of the new legal structure is still in its infancy, however, and careful attention should be paid to the manner in which the new rules are actually implemented.

Until recently, as a result of Korea's need for foreign investment to stimulate economic development and the desire of foreign investors for access to Korea's inexpensive labor costs, a pattern of foreign investment developed in which foreign investors typically chose to set up new companies on their own or new joint venture companies with Korean partners.

Since the advent of the so-called “IMF Era”, however, a new investment pattern has emerged, in which foreign investors are demonstrating a preference for either purchasing existing Korean companies outright (through the purchase of all or a controlling block of shares) or purchasing a large enough block of shares to entitle them to meaningful participation as equal partners. As a result of this new trend, Korea is certain to face many new and challenging legal issues in the not so distant future.