International Business Acquisitions: Major Legal Issues and Due Diligence

Third Edition

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19. SOUTH KOREA

Yong Suk Oh Bae, Kim & Lee

19.1 Introductory Comments

In the past, foreign investors faced numerous legal barriers when attempting the acquisition of Korean companies and business assets. However, the legal and business climate relating to foreign investment in Korea has in recent years undergone a transformation, and Korea embarked several years ago upon a sweeping liberalization plan of laws and administrative practices relating to foreign investment. Having received added impetus as a result of the ongoing financial recovery package that the IMF brokered with the Korean Government in December 1997, the Government has adopted measures designed to stimulate merger and acquisition activities of domestic companies by foreigners. Indeed, the Korean National Assembly passed a number of new laws relating to foreign investment, such as the Foreign Investment Promotion Act (FIPA), which replaced the Foreign Investment and Foreign Capital Inducement Act effective as of November 1998, and the Foreign Exchange Transaction Act (FETA), which replaced the Foreign Exchange Management Act (FEMA) effective as of April 1999, and amended other laws governing foreign investment, such as the Securities & Exchange Act (SEA) and the Monopoly Regulation and Fair Trade Act (MRFTA), for the purpose of dramatically liberalising the government restrictions.

While it is true that Korea has a central government system and that all laws passed by the central legislature are uniformly applied throughout the country, there are several individual local government entities situated in Korea's provinces and major cities. Foreign investors are therefore also advised to review local laws when contemplating a corporate acquisition.

As foreign investment and international corporate transactions increase, the regulatory infrastructure in Korea is rapidly becoming more sophisticated and complex, and, in given circumstances, sometimes provides for stiff penalties for violations of applicable law. Accordingly, it is essential for any foreign investor to seek legal advice early on before attempting to acquire either an individual Korean company or a group which includes Korean subsidiaries or Korean assets.

19.2 Corporate Structures

The Korean Commercial Code (KCC), FIPA and SEA, among others, comprise the principal sources of law in Korea pertaining to international corporate acquisitions.

Korean law provides for four types of corporations, comprising two classes of limited liability companies and two classes of unlimited liability companies. Most Korean limited liability companies take the form of joint stock companies, which are the most common target of acquisitions in Korea. Joint stock companies can be listed

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on the Korea Exchange (KRX)[1] provided that they meet certain criteria set forth in the SEA.

It is possible to acquire shares or assets from anyone having legal personality and capacity, including private individuals, companies, statutory corporations, local government entities or even central government. While partnerships do not have a separate legal personality, a buyer may contract with a partnership so as to bind each of the partners jointly and severally.

19.3 Letters of Intent and Heads of Agreement

An agreement, whether oral or written, is binding if it appears from the document itself or from the surrounding circumstances that the parties intended to create a legal relationship. Consideration is not necessary to show a binding and fully enforceable agreement. If the parties do not wish to be bound by a letter of intent until the exchange of formal contracts (if any), clear language unambiguously expressing this intention should be used. There is, however, no set formula, so long as the parties' intention in this regard is evident. Note, however, that expressions such as 'subject to contract' are generally insufficient for this purpose.

19.4 Taxes Affecting the Structure and Calculation of the Price

For real properties and certain kinds of assets (e.g. automobiles) that require registration, the local government imposes acquisition and registration taxes. If title to certain real properties or registered assets are transferred to the buyer in a bulk business transfer or asset transfer deal, acquisition and registration taxes are imposed on the buyer. If 51 per cent or more of the shares of the targeted Korean company are acquired, deemed acquisition taxes (in proportion to the shareholding in the acquired company) are imposed on the buyer as if such assets of the targeted company had been acquired.

An acquisition tax of 2 per cent (plus a 10 per cent surtax on the acquisition tax amount) is levied on transferred real estate. Such acquisition tax is increased three times if the real estate is located in certain metropolitan areas, such as Seoul. The mayor or governor having jurisdiction over the metropolitan area may adjust the tax rate within a 50 per cent range. In addition, a registration tax of 2 per cent (plus a 20 per cent surtax on the registration tax amount) is levied on transferred real estate. Such registration tax is increased three times if the real estate is located in above-mentioned metropolitan areas.

The tax base on which the acquisition and registration taxes are levied is the price reported by the taxpayer to the tax office as the acquisition price agreed between the parties. If such reported acquisition price is less than the 'current base value' (as defined under the pertinent tax regulations), then the current base value is the tax base.

1. The Korea Stock Exchange, the KOSDAQ (Korea OTC market) and the Korea Futures Exchange were merged and the new official name of the merged exchange is the Korea Exchange, which now consists of the Securities Market, the KOSDAQ and the Futures Market.

In the case of the acquisition of shares in the targeted Korean company, there are no carry-over tax liabilities, other than the payment of the target company's corporate tax. In the case of a bulk business transfer, however, the buyer may have carry-over tax liabilities if:

- the seller is unable to pay national taxes (such as corporate tax, VAT etc) assessed on the seller's business prior to the transfer date; and
- the value of the assets remaining with the seller after the transfer is insufficient to cover such taxes.

The buyer's liability is limited to the amount of the assets acquired from the seller.

19.5 Extent of Seller's Warranties and Indemnities

The nature and extent of warranties and indemnities largely depend on the size of the acquisition and the parties' relative bargaining power. However, it is not unusual for sellers to give full warranties and indemnities covering the accounts of the business or company to be acquired, title to the assets, taxation, litigation, employee issues, etc.

It is always advisable to consider whether warranties and indemnities from a seller should be supported by a parent company guarantee, or by a partial retention of the purchase price.

19.6 Liability for Pre-contractual Representations

Negligent and fraudulent misrepresentations may give rise to both criminal and civil liability. In certain cases they can furnish grounds for rescission of the contract, as well as an action for damages, matters covered by relevant provisions of the Korean Civil Code. Furthermore, various criminal statutes establish penalties (fines, imprisonment) for sellers who engage in fraudulent conduct. Acquisition agreements often attempt to preclude actions for negligent misstatement or misrepresentation, leaving the buyer with a remedy only in damages for breach of warranty.

However, such protective clauses are deemed null and void where it is established that the seller intentionally defrauded the buyer or intentionally withheld material information from the buyer.

Since sellers frequently use contractual provisions shielding them from liability for representations made during pre-contractual negotiations, and restricting rights of rescission to the period between the exchange of contracts and completion, buyers are well advised to rely only upon representations specifically repeated in the agreement, or facts and matters specifically warranted or related to indemnities that have been given.

19.7 Liability for Pre-acquisition Trading and Contracts

If the purchase agreement contains a retrospective effective date the buyer, for accounting purposes, bears the loss or is entitled to the business profits from the effective date.

After completion, the seller remains liable for contracts to which it was a party unless they are novated and a release is given to the seller. Occasionally large contracts are novated (where the buyer fully steps into the seller's place, the seller being released from all further liability); however, more often contracts are assigned with the buyer promising to the seller to perform the contract from completion and indemnify the seller.

In a share acquisition, pre-acquisition profits are generally retained in the company and hence ultimately received by the buyer. Therefore, such profits should be taken into consideration when calculating the purchase price.

19.8 Pre-completion Risks

No legislation in Korea specifically addresses the question of who bears the risk between a seller and a buyer of assets or shares. However, an acquisition agreement typically contains a provision identifying which party will bear the risk of loss of, or damage to, the assets occurring between signing and completion.

In a share acquisition, the matter is usually addressed by a warranty to the effect that there has been no material adverse change to the business since a warranted accounts date and declaring that if indeed there has been any such material adverse change, the buyer has a right to terminate.

Occasionally, provisions allowing for a price adjustment in proportion to any loss or damage to assets are included.

19.9 Required Governmental Approvals

In general, all foreign investment into Korea (whether subscribing for new shares or acquiring existing shares in an existing company or establishing a new company) is governed by the FIPA and FETA.

The first issue is whether the FIPA and its related regulations restrict or prohibit foreign investment in the target's business activities. As part of the restructuring of the Korean foreign investment system, almost all activities have become fully open to foreign investment, although certain business areas (classified according to the Korean Standard Industry Classification System) are still partially or completely closed to foreign investment. If foreign investment in a given business activity is restricted, then such restrictions may require that the potential foreign buyer obtain additional governmental approvals and may affect the investment amount, among other factors. In this regard, the Korean Government has significantly reduced the number of business areas that are partially or completely closed to foreign investment and has accelerated its schedule for further liberalization of foreign investment, including investment in the capital market.

For acquisitions of existing shares by foreigners, a buyer is only required to report its acquisition to a foreign exchange bank pursuant to the FIPA or FETA unless the targeted Korean company falls into the category of the defence industry, in which case the acquisition of shares in such industry requires the approval of the Ministry of Commerce, Industry and Energy (MOCIE).

For acquisitions of newly issued shares by foreigners, a buyer is only required to report its acquisition to a foreign exchange bank pursuant to the FIPA or FETA.

Since 25 May 1998, general foreign portfolio investment ceilings under the SEA on the acquisition of beneficial ownership of any class of shares in a company listed on the KRX have been wholly lifted for both single foreign investors and foreign investors in the aggregate.

A foreign buyer may also consider establishing or using an existing subsidiary in Korea to acquire the targeted Korean company. The FIPA regulates only direct equity or quasi-equity investment by foreign entities in Korean companies. The acquisition of assets is subject to a number of specific laws, such as the Alien Land Acquisition Act (ALAA) and FETA.

Under the ALAA, foreigners wishing to acquire land in Korea are required to report to the local government authorities within 60 days after the execution of the relevant contract, unless the land falls into certain categories which are specially designated for national purposes such as defence, environment or cultural preservation.

19.10 Anti-trust and Competition Laws

The MRFTA and the regulations promulgated thereunder are the Korean version of anti-trust and competition laws. The MRFTA governs anti-competitive and unfair trade practices, including mergers and acquisitions.

Certain business combinations, including both stock deals and asset deals, are required to be reported to the Fair Trade Commission (FTC), the governmental authority charged with overseeing the implementation of the MRFTA, either prior to and/or immediately after the closing, depending on the total assets or gross annual revenues of the buyer and the target company.

Under Article 12 of the MRFTA, if the total assets or gross revenues of either the buyer or the target company (in each case including its worldwide affiliates on a consolidated basis before and after the transaction) are KRW 100 billion or more and the total assets or gross revenues of the other company (including its worldwide affiliates on a consolidated basis before and after the transaction) are KRW 3 billion or more, the buyer must file a business combination report with the FTC within 30 days after any of the following events:

a. If it acquires at least 20 per cent (15 per cent in the case of outstanding listed shares) of the voting shares or outstanding equity (including units of contribution) of another company;

b. If it acquires more of the voting shares or outstanding equity in another company after the filing of a business combination report pursuant to paragraph a. above, and becomes the largest holder of such shares or equity in such company;

c. If it subscribes for at least 20 per cent of the total issued shares or equity (including units of contribution) of a newly established company;

d. If it merges with another company or acquires all, or a principal portion, of the business of another company (in case of business acquisitions, the total assets or gross revenues of worldwide affiliates are not included in assessing the amount of total assets or gross revenues of the seller); or

e. If any of its officers or employees concurrently become an officer of another company (excluding its affiliated companies worldwide).

Notwithstanding the foregoing and also pursuant to the MRFTA, if the total assets or gross revenues of either the buyer or the target company (in each case including its worldwide affiliates on a consolidated basis before and after the transaction; provided, however, that in case of business acquisitions, the total assets or gross revenues of worldwide affiliates are not included in assessing the amount of total assets or gross revenues of the seller) are KRW 2 trillion or more, the buyer must file a business combination report with the FTC within 30 days from the execution date of the share transfer or acquisition agreement in the case of paragraph a. or b. above, within 30 days from the date of the decision (e.g. date of approval by the board of directors or shareholders) to subscribe for shares in the case of paragraph c. above or within 30 days from the execution date of the merger or business transfer agreement in the case of paragraph d. above. Such a pre-closing notification generally requires a standstill period of up to 30 days (which may be extended for another 90 days by the FTC), during which time no merger, transfer of business or acquisition of shares may be conducted. The reporting company may, however, request that the FTC conduct a prior examination of the contemplated transaction in advance, in which case the 30 day period of no activity after the submission of the business combination report may be reduced. The reporting company must also notify the FTC within 30 days after the completion of the pertinent transaction.

In the past, the FTC has rarely investigated mergers and acquisitions of domestic companies by foreigners. The FTC's current policy, however, is that mergers and acquisitions of domestic companies by foreigners are subject to the requirements of the MRFTA. The MRFTA prohibits any business combination that will have an anti-competitive effect on the relevant market.

19.11 Required Offer Procedures

Under the Financial Supervisory Commission (FSC) rules, any foreign investor who seeks to invest in the Korean securities market is required to register with the Securities Supervisory Services to receive investment registration certificates which must be presented each time the foreign investor opens an account with a securities company or other financial institution in Korea. The application to register can be made either directly or through a standing proxy.

Although foreigners are not required by Korean law to designate a standing proxy, non-resident foreigners are recommended to have a standing proxy to ensure that their investment-related activities are carried out in a timely manner. Korean securities companies, banks and the Korean Securities Depository are eligible to be a standing proxy for foreign investors. The major services of standing proxies are investment registration, account opening, order placing, settlement and collection of dividends or interest.

Under the SEA, any shareholder who acquires in excess of 5 per cent of the shares of a listed company must file a report with the KRX and the FSC. Thereafter, any change involving 1 per cent or more of shares in the company must be reported.

The above 5 per cent reporting requirement is calculated by aggregating the listed shares (including convertible securities, such as convertible bonds and bonds with warrants) held by all affiliated groups (which include parties holding special interest and any group 'acting in concert', as defined in the SEA).

The above procedures and requirements only apply to foreign investors who seek to make an equity investment in companies that are listed on the KRX.

Under the FETA, other than in case of direct investments, such a foreign investor would normally designate a single foreign exchange bank where it would open a foreign currency account and a KRW account that is to be exclusively used for securities investments. No governmental authorization is required for inward remittance into Korea and deposits of foreign currency funds into such foreign currency account. No restrictions exist on outward remittances to a foreign country of any principal or interest in connection with securities investments.

Upon confirmation from a designated foreign exchange bank, such foreign currency funds may be transferred from the foreign currency bank account to a KRW account at a securities company or other financial institution for purposes of placing a deposit for, or setting the purchase price of, a securities transaction.

19.12 Continuation of Government Licences

With respect to certain industries, the business operator is required to hold a licence, a requirement which may be imposed under either central or local government law, or both. Examples of businesses requiring licences are banking, insurance, gaming and broadcasting. Various conditions may be attached to a licence and in any acquisition these require close scrutiny; for example, the licence may be revocable upon a change of control of the licence holder. Licences are in fact normally non-transferable so that a buyer of a business (as opposed to e.g., a buyer acquiring the shares of a corporation) must obtain a licence in its own name. In Korea, the waiting period for the review of licence applications and the granting thereof can be relatively lengthy, and thus may become an important factor to consider in an acquisition.

19.13 Requirements for Transferring Shares

Restrictions on transfers of shares may be located in shareholders' agreements. Hence, all shareholders' agreements should be closely reviewed. Note, however, that the only share transfer restriction permitted under the KCC is to require the approval by the board of directors of the company if the articles of incorporation so provide and further that a share transfer restriction for an extended period of time which does not allow for any practical possibility of exit by a shareholder and therefore blocks the fundamental right of the shareholder to freely transfer its shares is likely to be invalid.

Shares are normally transferable by mere written share transfer form or by simply conveying the share certificates in question. If a form is used, the form must be submitted to the company's board of directors and the buyer's name must be inserted in the register of company shareholders.

Under the KCC, the board of directors of the target Korean company has authority to issue new shares up to the authorized share capital amount, as stipulated in its articles of incorporation. If the authorized share capital amount needs to be increased, the articles must be amended by special resolution of the shareholders. In order to do so, under the KCC, such amendment must be adopted by affirmative votes representing at least two-thirds of the shares present and at least one third of the total issued and outstanding shares, unless a higher voting requirement is provided for in the articles.

Under the KCC, the existing shareholders of a Korean company have pre-emptive rights to newly issued shares, subject to any special provisions in its articles of incorporation. Therefore, if newly issued shares are to be allocated to the foreign buyer, the existing shareholders of the target company must waive their pre-emptive rights to such shares, unless the articles provide the new shares may, by a board resolution, be issued to parties other than shareholders.

19.14 Requirements for Transferring Land and Property Leases

Korea maintains a comprehensive registration system of title to land (including leasehold interests). The purchase of any interest in real property requires the execution of a prescribed transfer form, and is subject to payment of stamp duty and registration with the Court Registry Office of the locality in which the land is situated. It is also advisable to register leasehold interests in land and buildings since unregistered leasehold rights are unenforceable in the event such land or building is transferred to a third party.

Title to land can be specifically encumbered by mortgages or charges and other interests of third parties in the land (such as easements and rights of way). However, the buyer may rely on the recording system and assume that all encumbrances pertaining to the land have already been registered with the Real Estate Registry. Therefore, in principle, good title to the land may still pass to the buyer and be registered in favour of the buyer.

19.15 Requirements for Transferring Intellectual Property

Title to all forms of intellectual property can be transferred by assignment.

Patents, designs, utility models, service marks and trade marks must be registered with the Korean Industry Property Office (the KIPO) in order to benefit from protection. Thus all transfers involving such intellectual property rights must be registered with the KIPO, failing which the assignment is not enforceable by an assignee. In the case of copyrights, registration with the KIPO is not always necessary.

A licence to use the intellectual property of a third party as well as an assignment of the benefit of a licence must be registered with the KIPO in order to benefit from protection. Furthermore, the assignment of the benefit of a licence almost always requires the licensor's consent.

19.16 Requirements for Transferring Business Contracts, Licences and Leases

A business contract governed by the laws of Korea is only transferable or assignable in accordance with its terms. An assignment of the benefit of a contract does not release the transferor from the burden of the contract without a specific release from the other party. As a result, some business acquisitions involve a formal novation of contracts rather than a simple assignment. Licences and business leases (finance leases, operating leases or hire purchase agreements) are governed by the same rules.

In most cases, the consent of the other party to the contract (e.g., a lessor) is required before the contract can be assigned. Leaving aside registration with the KIPO (see **14.15**), it is not normally necessary to register or record an assignment of a business contract, although stamp duty on the assignment document may be required in some instances. Furthermore, notice must be given to the other party to the effect that the contract has been assigned.

19.17 Requirements for Transferring Other Assets

Personal property can usually be transferred by delivery. However, real estate, intellectual property, or substantial personal property (e.g. aircraft, automobiles, boats, etc) which is subject to registration requirements under local law, may be transferred by registration with the appropriate government agency or office.

19.18 Encumbrances and Third Party Interests

Assets can be subject to several types of third party interests. Interests can arise under contract (e.g. a charge or a mortgage) or by operation of law (e.g. a property right or a lien in favour of a statutorily protected interest).

A buyer for full value of an asset generally takes good title to it, unless the buyer has actual notice of an encumbrance. However, if the asset involved is real estate (land or building) or an item of personal property that may be registered (aircraft, boat, automobile, etc), a buyer for full value obtains good title provided that it has not received actual or constructive notice of an encumbrance. Furthermore, the buyer for full value of any asset cannot acquire good title if the seller does not, in fact, have clear title to such asset.

Certain title registers (particularly in the case of land) can constitute prima facie evidence of the title of the registered proprietor, on which the buyer can rely. However, other assets may be subject to unregistered or unascertainable interests which a buyer will not be able to identify. In such cases, warranties from the seller as to clear title are essential.

19.19 Minimum Shareholder and Officer Requirements

Joint stock corporations must have a minimum of three directors, one representative director (i.e. a director authorized to represent or act on behalf of the corporation) and one statutory auditor, provided that in case of a company the total capital of which is less than KRW 500 million, the number of directors may be less than three. Certain companies are required to have outside directors and/or an audit committee in place of the statutory auditor. A limited liability company must have at least one director. None of the above is required to be a Korean citizen or even a resident of Korea.

A joint stock corporation requires a minimum of one promoter at the time of incorporation. There is no maximum number of shareholders for a joint stock corporation.

19.20 Non-competition Clauses

Restraint of trade clauses and non-competition covenants given by a seller in the context of a sale of a business will generally be enforceable, provided that they are reasonable in scope and content. What is reasonable will depend upon the facts and circumstances, including the nature of the business in question and the effect that competition might have on the buyer.

Covenants furnished by an employee in employment agreements can likewise be enforceable, provided they are reasonable. However, the test of reasonableness is likely to be stricter in the case of an employee than in the case of a seller. A blanket prohibition on an employee engaging in his actual occupation or exercising his skills is likely to be considered unreasonable, as is a restraint of excessive duration following termination of the employment relationship.

Agreements involving restraint of trade may also fall under the sweep of the MRFTA, which prohibits any agreement or understanding the purpose or effect of which is to lessen substantially competition or which is an exclusionary provision (essentially, a collective boycott). The provisions of the MRFTA are comprehensive and far-reaching and can potentially surface in virtually any acquisition.

19.21 Environmental Considerations

Korea has enacted several laws aimed at protecting the environment, which are administered and enforced by both local governments and the Ministry of the Environment. Substantial penalties can be imposed on businesses that cause environmental damage. A purchaser of a business or property can inherit responsibility for rectifying environmental damage caused by the previous owner.

Korea is a signatory to two international environmental treaties: the Vienna Treaty for the Protection of the Ozone Layer and the Treaty on the Prevention of Ocean Pollution in Relation to Waste Material and Disposal of Dye Materials. In the case of mining, manufacturing and chemical industries, notably, appropriate environmental due diligence investigations are always advisable in the context of an acquisition of either shares or assets.

Warranties covering environmental damage and liability should always be obtained from a seller, unless the buyer's due diligence investigation has extended to a full environmental audit.

19.22 Employee Superannuation/Pension Plans

Pursuant to the Korean Employee's Retirement Payment Guarantee Act, employers are required by law to pay their employees a retirement allowance, which may be paid directly by employers in lump-sum or indirectly through retirement pension plans.

In addition to receiving a retirement allowance, employees receive other benefits from the National Pension Fund. The National Pension Act requires all employers and all employees to pay 4.5 per cent of their monthly wages into the national fund. The Fund is supervised and managed (independently from the company) by the National Pension Management Organization, which is operated under government control.

19.23 Employee Rights

The Labour Standards Act (LSA) prescribes the minimum terms and conditions of employee agreements such as working hours, holidays and the method of paying salaries, and also prohibits unfair dismissal. If an individual agreement violates the prescribed minimum terms and conditions set forth in the LSA, the offending provisions of such agreement are deemed null and void and the statutory minimum terms and conditions of the LSA replace such provisions.

The government periodically revises the minimum salary for employees, and any employer violating such minimum is, in theory, subject to criminal sanctions. The minimum salary is, nonetheless, relatively low compared to the prevailing salary levels in the Korean labour market. Employees in Korea have the right to organize labour unions as well as collective bargaining organizations and procedures.

19.24 Compulsory Transfer of Employees

In the case of an acquisition through share purchase, the buyer may not demand the dismissal of employees as a condition for completing such transaction.

In the case of a bulk transfer, the buyer usually acquires the labour force in addition to the seller's business assets. The parties may decide to enter into an agreement to transfer only a portion of the labour force to the buyer. Such agreement, however, would result in the dismissal of certain employees, in which case the seller is subject to the applicable laws, namely the LSA, that restrict the dismissal of employees. The buyer is subject to such restrictions under the LSA if it chooses to reduce the labour force.

Under the LSA, an employer may not terminate an employee's employment without valid cause. Further under the LSA, an employer may downsize its labour force only under the following conditions:

- the company must prove that management is in a state of crisis (which includes mergers and acquisitions);
- the company must exert its best efforts to avoid the dismissal of its employees;
- the company must select employees for dismissal using fair and reasonable criteria; and
- with regard to the possible methods for avoiding dismissal and the criteria for dismissal referred to above, the employer must, in good faith, consult with the employees or their representative (although no precise method for nominating such representative is mentioned by the court, leaving aside unionized companies)

60 days in advance. Note, however, that in practice 'consult' does not as such require the employees' actual permission or agreement.

With respect to the labour force acquired by the buyer from the seller through the bulk transfer, the existing employment agreements (and the rules of employment that are deemed to be part of such agreements) which set forth the working conditions of such labour force are transferred unless otherwise agreed with the employees. In this respect, the buyer is obligated to pay wages, to set the working hours, etc according to such agreements as the employer of the acquired labour force.

In the case of a simple transfer of certain assets of a company, the buyer may selectively acquire the seller's employees.

19.25 Tax Deductibility of Acquisition Expenses

Where a buyer is a company or individual neither residing nor otherwise taxable in Korea, the laws of its home country govern the deductibility of its acquisition expenses.

Pursuant to the Korean Corporate Tax Act, expenses incurred in the acquisition of shares or assets are generally deductible, provided that such expenses are incurred in making a new business investment (i.e. an investment which expands the industrial scope of the acquiring entity's business).

19.26 Levies on Acquisition Agreements and Collateral Documents

No stamp duties are payable in the case of a share transfer, but a securities transaction tax is applicable.

On the other hand, stamp duties are applied in the case of a business transfer involving a transfer of real property, intellectual property or other property subject to registration requirements under Korean law.

Any transfer of property requiring registration under Korean law is subject to registration tax and education tax.

19.27 Financing Rules and Restrictions

In general, expenses incurred in the normal course of business operations of the corporation are deductible, provided, however, that they are adequately supported by documentary evidence; expenses not supported by documentation may be disallowed. Depreciation, rentals, selling expenses, etc are the principal allowable expenses, with additional depreciation and provision for reserves deductible under certain conditions. Depreciation expenses, interest expenses and maintenance expenses relating to land not used for business purposes are not tax deductible.

Any common general administrative expenses incurred by an enterprise as a whole or its related office controlling the Korean branch and which are reasonably connected with the generation of domestic source income of the Korean branch are allocated on a reasonable basis for the computation of domestic source taxable income of the Korean branch.

Loans between related companies (e.g. a loan between a parent company and its subsidiary) for tax purposes may incur a statutorily prescribed interest rate.

Effective as of 1 January 2006, businesses are free to borrow foreign currency under loans regardless of the maturity thereof. In order to expedite the compilation of statistics on foreign borrowings, however, borrowers must report to the Ministry of Finance and Economy (MOFE) if the amount is USD30 million or more or to their correspondent foreign exchange banks when the amount is less than USD30 million.

Under the International Tax Coordination Act of Korea, if the amount of a loan extended to a Korean company by, or under the guarantee of, its foreign controlling shareholder (owning directly or indirectly 50 per cent or more of the total voting shares of, or otherwise having a substantial control over, the Korean company) exceeds 300 per cent (600 per cent, in case of financial institutions) of the amount of the equity capital contributed by such foreign controlling shareholder, then interest payments made on such excess portion of the loan will not be treated as deductible expenses of the Korean company for tax purposes.

19.28 Exchange Controls and Repatriation of Profits

The Korean Government unveiled a foreign exchange liberalization plan in June 1998 which introduced a comprehensive deregulation of foreign exchange transactions starting in April 1999. As a first stage liberalization measure, the FETA was enacted in September 1998 to replace the existing FEMA. The existing Act was aimed at regulating and managing foreign exchange transactions. However, the purpose of the new Act is to liberalize foreign exchange or other transactions with foreigners and minimize any regulations or restrictions on such transactions. As part of the government's reform of corporate borrowing, trading and foreign investment, the FETA is also intended to induce more foreign capital by improving the environment for investment in Korea by foreigners. The FETA came into effect on 1 April 1999.

Pursuant to the FIPA, the repatriation of profits earned from investment under the FIPA can be effected without restriction, with the exception of a withholding tax levied on dividends. Such withholding tax on dividends for a foreigner who does not have a 'permanent establishment' in Korea is 27.5 per cent. However, bilateral double taxation treaties in force between Korea and various countries can generally lower this to 5–15 per cent.

19.29 Groups of Companies

A company incorporated under the KCC is required to prepare financial statements (profit and loss account and balance sheet) for the company.

Joint stock companies with total assets exceeding KRW 7 billion (KRW 1 billion in case of listed companies) must be audited annually by independent certified public accountants, and an annual auditor's report must be prepared.

A company incorporated under the KCC is required to synchronize its financial year with that of each company or entity which it controls. Namely, a parent company with controlling interests in other companies should prepare consolidated financial statements which bring together the accounts of its own and its subsidiaries. In addition, business groups the total assets of which exceed KRW 2 trillion should prepare combined financial statements to bring together the accounts of companies that belong to the group.

19.30 Responsibility for Liabilities of an Acquired Subsidiary

In principle, shareholders in Korea are shielded from liability for the debts of a company in which they hold shares, except where a specific guarantee, indemnity or other undertaking has been given in favour of a creditor. Note, however, that if 51 per cent or more shares of a Korean company (which is not listed) are owned by a shareholder and its related parties, such controlling shareholders would have a secondary liability for payment of the national taxes assessed on the company. Such secondary tax liability arises only if the tax authorities are unable to collect on the primary tax liability.

19.31 Governing Law of the Contract

Korean courts honour a choice of law freely entered into between parties to a contract. They do not insist on applying Korean law to a contract for the acquisition of shares or business assets in Korea. However, a choice of law that has no commercial or reasonable connection with the parties and even the agreement itself runs the risk of being disregarded on grounds of public policy, in certain situations.

While the law of a foreign jurisdiction may govern the agreement and the relationship between the parties, Korean law usually governs collateral issues such as the effect of a transfer of title to shares or other assets, or the rights of creditors and others.

19.32 Dispute Resolution Options

Korean law acknowledges that parties to commercial contracts may wish to settle any disputes that occur by means other than litigation, and a range of arbitration and mediation options are available to them.

Korea is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, commonly referred to as the New York Convention. Korean courts will thus in general recognize and enforce international arbitration awards, although it should be noted that Korea opted under the Convention to apply its terms only to awards rendered in another signatory state, and to differences arising out of legal relationships which are considered commercial under Korean law.

The Korean Commercial Arbitration Board maintains a list of potential arbitrators (including foreigners' resident in Korea) available to hear commercial disputes between parties, and oversees arbitrations conducted pursuant to its rules of arbitration.

Mediation has also been a successful dispute resolution process for commercial disputes in Korea, and is increasing in popularity due to its relative effectiveness in resolving disputes while at the same time avoiding lengthy and expensive litigation. In the course of litigation of a commercial dispute, a Korean court has the power in certain circumstances to halt proceedings so as to conduct a mediation session.

Parties are free to incorporate into their contracts the arbitration or mediation rules of any Korean or international body, and Korean courts will honour such choice. Further, pursuant to the Korean Arbitration Act, if the parties have agreed to resolve their dispute through arbitration, the courts will refuse to intervene unless the court deems the arbitration agreement to be null and void.

With respect to the enforcement in Korea of judgments rendered by a foreign court, the Korean Code of Civil Procedure enumerates the conditions that must be satisfied before a Korean court will enforce such a judgment:

- the jurisdiction of the foreign court is not disputed in any Korean laws and ordinances or in a treaty;
- proper service of a summons or other process necessary for the commencement of the suit was effected upon the defendant, other than by public notice, or else the defendant voluntary responded to the suit without having been served;
- the judgment of the foreign court is compatible with the 'public morals and social order' of Korea; and
- there is reciprocity for enforcement between Korea and the foreign jurisdiction in question.

It is therefore wise to investigate whether the courts of a given jurisdiction have previously enforced any Korean judgments, when one is faced with the possibility of seeking enforcement, in Korea, of a judgment rendered in such foreign jurisdiction.

If the duty to exercise due diligence is fulfilled, you will have a better hand in court proceedings. But who sets the standards for due diligence? The ISO sets the standards for diligence and compliance in many fields, but still has yet to define what is due diligence absent a subject field.Â With issues such as sanctions, FCPA, UK Anti Bribery Act, and the strict liability many face for lack of internal control in a host of product liability matters â€“ operation up to and or beyond IOS Standards is an excellent standard both for a competitive advantage but also as a legal defense should such an unfortunate event occur that many raise the issue of.Â As the legal requirements of duty of care and diligence is further codified by law Due diligence is a vital activity in M&A transactions and conducting M&A due diligence in todayâ€™s global marketplace is a demanding, high-pressure undertaking that requires considerable skill and expertise.Â So, to provide protection to the dealers and brokers, the Act included a legal defense which they called the â€œdue diligenceâ€ defense.Â Each of these four areas can be further sub-divided into business, legal, and functional areasâ€“including ITâ€“each receiving the appropriate level of attention and analysis based upon the category and nature of the deal. Conducting M&A due diligence in todayâ€™s global marketplace is a demanding, high-pressure undertaking that requires considerable skill and expertise. International Business Acquisitions has proven its great value over the ten years since the first edition as a clear guide to the major legal issues and to the allimportant process of informed due diligence in each jurisdiction. The Third Edition retains the bookâ€™s invaluable country-by-country presentation, with each country contribution in a common format to make comparison as straightforward as possible. And as in previous editions, the subject of due diligence is treated in a separate chapter, with individual country annotations. In addition to updating and substantial expansion of content PDF | This study analyses due diligence as a key success factor of M&A. Previous research has shown that more than half of M&A transactions fail to | Find, read and cite all the research you need on ResearchGate.Â Due diligence is a process which identifies, approves or denies business reasons for proposed M&A transactions. After general presentation of the process of due diligence, its phases and different areas of research, the study analyses the role of due diligence in alleviating risks associated with takeover process.Â relates to determining cultural compatibilities of international acquisitions. Implementing cultural due diligence prior to the acquisition can help the acquiring. company to assess whether combination of different cultures at the postî€acquisition. Learn about the most significant legal and business due diligence activities the buyer will undertake in a typical M&A transaction involving a privately held company.Â Mergers and acquisitions typically involve a significant amount of due diligence by the buyer. Before committing to the transaction, the buyer will want to ensure that it knows what it is buying, what obligations it is assuming, the nature and extent of the sellerâ€™s contingent liabilities, problematic contracts, litigation risks, intellectual property issues, and much more.