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SUMMARY:
... This Note reviews the background of the current economic situation in South Korea and explains how the 1997 International Monetary Fund ("IMF") relief program affected the Korean legal market. ... REFORMS AFFECT THE LEGAL MARKET ... Local lawyers echoed this sentiment, using terms such as "crisis" and "urgency" to describe the approach Korean firms should take towards the impending opening of the legal market. ... The Ministry of Commerce, Industry and Energy's warning that lawyers should circle their wagons seems blithely at odds with the Justice Ministry's exhortation that South Korea open its legal market. ... Looking at the fate of the over-expansive chaebols, Korea's law firms might be better advised to create partnerships with larger international law firms, rather than to band together in mega-law firms in order to protect themselves from the international legal market. ... The Korean legal market should therefore be entering a period of phased-in liberalization, similar to the step-by-step opening of the financial services sector and the gradual rise in the ceiling on allowable foreign investment in Korean companies. ...

TEXT:
[*571] I. INTRODUCTION

In September 1999, nearly six months after the Korean government announced the relaxation of barriers to the legal services market, Stephen Brown, the British ambassador to South Korea, aimed pointed criticism at the market's slow pace of change. "Foreign
law firms are effectively unable to open offices in Korea, even to provide advice on non-
Korean law, meaning that Korea has one of the most restrictive sectors in Asia, more so
than China or Vietnam," Brown said. n2 Though he may have overstated the situation,
Ambassador Brown's impatience is understandable. In the three years following the
currency crash of 1997, the Korean economy has made a comeback worthy of Lazarus,
but its fledging strength needs to be supplanted by continued structural reforms.

As one of Asia's largest economies, South Korea plays an important role in the global
market. The events of 1997, during which a fall in the Thai baht precipitated steep market
decrees in South Korea, Malaysia, Indonesia, Singapore, and Japan, underscored how
quickly a shift in one segment of the international market can affect other markets in the
region and the world economy. Unprecedented political events focused global attention
on Korea again in 2000, for more positive reasons--a historic summit between North and
South Korea orchestrated by South Korean President Kim Dae-jung, who was awarded
the [*572] Nobel Peace Prize for his efforts n3 --but international views on the South
Korean economy remain more cautious than confident. To maintain global financial
stability and reduce the chances of a "repeat crash," South Korea needs the support of the
international business and legal communities as it works to improve transparency in its
legal, financial, and business systems.

This Note reviews the background of the current economic situation in South Korea
and explains how the 1997 International Monetary Fund ("IMF") relief program affected
the Korean legal market. It then focuses on the challenges that international legal
practitioners are likely to face regarding transactions in South Korea, points out the
importance of recognizing the different points of view regarding the role of law in
Korean business transactions, and outlines some of the substantive growth areas for
practitioners interested in the Korean market. Finally, this Note argues that allowing
international legal firms to offer a full range of services in the Korean market will help
forge the kinds of long-term relationships--and draw the long-term capital investment--
the country needs.

II. BACKGROUND

A. From Tiger to Octopus: South Korea's Economic Backslide

Between 1961 and 1991, state control of industrial development and a fierce
determination to modernize South Korea brought about unprecedented economic growth,
but at a very high price: nearly every aspect of the South Korean market was under the
tight control of distinctly authoritarian regimes. n4 After its first truly democratic
election in 1992, South Korea continued to be counted among the strongest of the "Asian
tigers," ahead of Singapore, Malaysia, Hong Kong, and Thailand. The winner of the 1992
election, former political dissident Kim Young-sam, built a winning platform on a policy
of globalization, or segyewha. President Kim's push to internationalize Korea was a
welcome change from the growth-at-all-costs policies of the past thirty years under the
administrations of Park Chung-hee, Chun Doo-hwan, Syungmun Rhee, and Noh Tae-woo.

Under the Kim administration, family-owned corporations, or chaebol, [*573]
continued to dominate the Korean economy as they had throughout the decades
immediately following the Korean War. As the country's economic backbone, the
chaebol had been carefully monitored by the Park and Chun governments. Companies
were told where, when, and how to operate, and disobedience was not tolerated. In turn, the government protected the chaebols' markets through high tariffs and cheap loans until Korean industry became competitive internationally. In only three decades, the chaebols made Korea one of the world's top three steel-producing countries, the world's largest producer of semiconductor chips, and the world's second-largest shipbuilding country, statistics about which the country was justifiably proud.

But the chaebols remained too closely linked to the government for too long, and consequently developed unrealistic expectations about how markets perform. This lack of autonomy proved seriously damaging. In the early 1990s, despite already distressed credit ratings and overextended financial capabilities, many of South Korea's chaebol continued to expand into often ill-advised new business areas. Samsung, the country's third-largest corporation, went ahead with its plans to open a car division despite a state of oversupply in national and international markets. Haitai, a smaller-scale chaebol that had previously manufactured only sweets and ice cream, expanded into electronics and construction before going bankrupt in 1997. Pundits termed this type of corporate excess mooneobal-shik management ("octopus management"), a term that described with fatalistic accuracy how many chaebol had become oversized heads surrounded by affiliate tentacles, co-opting Kim Young-sam's segyewha globalization policies to serve their own ends and reaching in too many directions at once.

State planning can serve as a temporary (and, in the case of transitional economies like South Korea's, a necessary) surrogate for market forces, but only to a degree that the market can support. The economy, which successive administrations crafted so carefully, and often relentlessly, took a steep plunge in 1997. The value of the Korean won plummeted and Korea's chaebol-fueled economic miracle came to an abrupt halt.

B. Relief Did Not Come Cheaply

In obtaining relief assistance from the IMF, South Korea agreed to a number of conditions, most of which involved stepped-up compliance with World Trade Organization ("WTO") and Uruguay Round requirements: (1) increased transparency in corporate accounting methods; (2) higher ceilings on foreign ownership of Korean companies; and (3) stricter lending requirements for Korean banks. Additionally, the South Korean government agreed to open its professional service sector to foreign competition. Following the IMF's bailout, which cost the institution $ 58.35 billion, thousands of small companies were dissolved or declared bankrupt between 1997 and 1999. Many of the chaebols were drastically reorganized, and nearly all had to tighten their belts to accomodate the demands of new financing arrangements that were part of the IMF's restructuring program, though smaller businesses were even harder hit.

The resultant large-scale layoffs of managerial-level staff, as well as line workers, underscored the degree of economic distress for South Korea's middle class, which, after thirty years of hyper-speed industrial growth, was shocked by the suddenness and severity of the downturn. Laid-off workers and university students vented their frustration at the IMF for "forcing" the country's industries to make such drastic cuts, and they viewed the government's kinder treatment of the largest chaebols as distinctly unfair.
compared with the sink-or-swim attitude [*575] taken towards smaller firms. n18 Many Koreans, perhaps understandably, viewed the IMF's conditional loans as bitter medicine that had ultimately been forced down the wrong throats.

III. REFORMS AFFECT THE LEGAL MARKET

A. The IMF Calls and the Market Responds . . .

Despite economic hardship and negative public sentiment, the cure appeared to work. In 1998, the Korean economy began regaining strength. n19 President Kim Dae-jung, elected in late 1997, pledged to keep economic reform--including compliance with IMF and WTO policies--at the top of his administration's agenda. n20 This bolstered the efforts of the IMF and its shareholders, particularly the United States and the European Union, to keep reform pressures high through conditional loan guarantees, import tariffs on Korean products, and traditional diplomatic channels. One of the most firmly pressed points was the opening of the professional services sector, including financial, accounting, and legal services. n21 Though anti-IMF street demonstrations had largely subsided by the close of 1998, residual hostility towards IMF-imposed economic reforms continued, and the atmosphere was still a defensive one in January 1999, when the Korean Ministry of Commerce, Industry and Energy announced that, in line with IMF and WTO mandates, South Korea would allow foreign law firms to open offices inside the country. n22

B. . . . in Contradictory Ways

South Korea's Ministry of Commerce, Industry and Energy oversees all foreign trade under the Korean Foreign Trade Act of 1986. n23 Originally, in 1986, the Act called for "the encouragement of export and the regulation of import." n24 However, the Act was amended in 1996 to emphasize then-President Kim Young-sam's globalization policy. [*576] The new language seeks "[t]he enlargement of international transactions." n25 With this change, the Ministry's role was redefined from that of an import-export gatekeeper to one of an active promoter of international trade. The Act allows the Ministry to "sustain [] the growth of trade by indirectly supporting international trade consultants," n26 meaning it can encourage businesses to follow its recommendations vis-a-vis forming international partnerships. It also has the power to order them to do so through formal directives. n27 Thus, the Ministry has, through the Korean Foreign Trade Act, the power to force internationalization, a prospect that has caused some alarm in the Korean legal arena, and prompted contradictory messages from Korean governmental agencies.

In its reportage of the Ministry's announcement, the Korea Herald, South Korea's largest English-language daily news publication, characterized the government's decision as a response to external pressure rather than a voluntary action, calling U.S. trade policies a protectionist threat to the recovery of the Korean economy. n28 Local lawyers echoed this sentiment, using terms such as "crisis" and "urgency" to describe the approach Korean firms should take towards the impending opening of the legal market. n29 However, other agencies advised exactly the opposite. In May 1999, South Korea's Justice Ministry encouraged local lawyers to improve their competitiveness in the face of impending foreign competition by forming more law firms, rather than sole practitioner offices. n30 As it now stands, Korean firms have approximately twenty-five percent of the nation's legal business; the rest is handled by individual attorneys. n31
The Ministry of Commerce, Industry and Energy's warning that lawyers should circle their wagons seems blithely at odds with the Justice Ministry's exhortation that South Korea open its legal market. Which Ministry's advice should be heeded? A supremacy clause in the Korean Foreign Trade Act suggests that the Ministry of Commerce, Industry and Energy might take primary authority over the Justice Ministry. It will be unfortunate if the Commerce Ministry's view does in fact trump the Justice Ministry's, as the latter's advice seems more sound. Looking at the fate of the over-expansive chaebols, Korea's law firms might be better advised to create partnerships with larger international law firms, rather than to band together in mega-law firms in order to protect themselves from the international legal market. But regardless of the outcome of the "independents versus firms" question, the issue illustrates the often contradictory governmental pulls that international practitioners must learn to navigate in order to practice responsively in South Korea.

IV. LOOKING AHEAD

A. What Does the Korean Market Hold in Store for Foreign Lawyers?

Regulatory changes enabling international concerns to set up full-service law firms were to be completed by 2001. The Korean legal market should therefore be entering a period of phased-in liberalization, similar to the step-by-step opening of the financial services sector and the gradual rise in the ceiling on allowable foreign investment in Korean companies. At present, informal partnerships and consulting relationships are currently underway that paint a challenging but optimistic picture for international legal practitioners interested in the South Korean market.

1. Major Challenges

Conducting transactions in the Korean market poses a three-fold challenge for international practitioners. The first and biggest challenge is the attitude in South Korea towards the law itself, which--although it has undergone a sea of change over the past decade--may pose significant difficulties for U.S. practitioners, especially those with little Asian experience. Because South Korea is a civil law country, its technical approach more closely resembles the civil law approach of many EU countries than the common-law approach of the United States. The difference, however, is more multi-faceted than the civil-law versus common-law dichotomy. Two points of view are useful in this respect.

The first is the traditional liberal democratic Western norm, which assumes that the rule of law comes first and that laws must be prescribed by the majority (as opposed to an elite ruling class); as long as those laws are in line with economic principles, an ordered business society will follow. This view is perhaps best exemplified by Alan Wolff, a seasoned practitioner who, after years of experience with clients in Asia, continues to describe East Asian business and legal communities as necessarily inferior to those of the West: "There are laws of economics that inexorably govern economic behavior with rewards and penalties, whether in East or West. In a broad sense, there is no equally valid alternative Asian model. No model is acceptable that promotes unsound loans or equity investments." Economics and law offer predictable results, and are thus the preferred route.
A second perspective, and probably a more useful one for the forward-looking practitioner, is set forth by Philip McConnaughay. In his view, Asian business traditions value predictability just as highly as western business law, but in terms of "the fact of resolution, not in terms of result." n36 For the parties involved in a transaction, the relationship is paramount, and resolutions are to be carried out privately: "Public adjudicated dispute resolution can be deeply embarrassing; not because, as Western commentators often assume, of the risk that public adjudication will expose improper conduct, but because public adjudication communicates to the world that their opponents lack sufficient respect for them to settle their differences privately." n37 In Western economies, the rule of law and public adjudication have been, at least theoretically, supported by the majority. This has not been the case in South Korea, a country that only emerged from a succession of foreign occupations and military dictatorships a half-generation ago, where the majority's relationship to government was more likely to be one of enmity rather than mutualism.

Law generally is viewed in East Asia as little more than commands by those who possess political authority. In the West, in contrast, notions of law and morality often coincide as a result of the religious or deistic origins of law . . . [thus,] In [*579] the West, avoiding law has moral consequences; in East Asia it does not. n38

The second major challenge is linked closely to the first. International practitioners in South Korea may find that smaller local law firms are not experienced in "cultural and procedural translation," n39 meaning that while local lawyers may be very adept at negotiating a particular aspect of Korean law or have extensive contacts in a certain jurisdiction, they may have had little, if any, experience in explaining this information to foreign professionals. The barrier for attorneys from smaller Korean firms who deal with issues that large firms do not (bankruptcy, for example) is not necessarily linguistic but pedagogical: they may not anticipate what the foreign attorney will need to know at different stages of the transaction in order to get the job done. The burden falls equally on the foreign practitioner, who must know which questions to ask, and perhaps more importantly, when and of whom to ask them.

Third is the challenge of flexibility and responsiveness. The Korean financial system remains in flux, as the laws underpinning the way transactions must be structured have changed drastically during the past two administrations and will likely continue to shift. "The laws will, quite literally, change while you are drafting the term sheet and while you are negotiating the deal," says a New York practitioner about conducting pass-through corporation transactions in South Korea. n40 "I have sat at the table and had to create new schedules for loan agreements while the newspapers are reporting that certain companies are being designated as nonviable and will receive no more lending. Quite literally, this happens while you are in your conference calls." n41

2. Perhaps an Ideal Environment for Mediation and Arbitration

A rapidly shifting regulatory environment combined with a business culture that values private relationships and the independent, non-judicial resolution of disputes may make South Korea an ideal atmosphere for mediation and arbitration, in terms of both
judicial [*580] and commercial disputes. n42 However, this area is a delicate one, because in this context the expectations of the Korean and the Western parties may be quite different. The purpose of dispute resolution in Korea is first to preserve the business relationship, and second to resolve the dispute. Thus any permanent, "final" attribution of blame, or breach, or liability—which is often the reason arbitration is pursued at all by a Western party—is viewed as counter-productive. n43

It is beyond the scope of this Note to reconcile the differences between the East and West in terms of cultural expectations and dispute resolution; however, any attorney involved in arbitration or mediation with a Korean firm must at least be aware of the differences in Western and Korean traditions of dispute resolution in order to reach an optimal outcome. Philip McConnaughay and Will Kymlicka have both written extensively on the subject. n44

3. Tax, Telecoms, and Fewer Sharks in the Water

Following the currency crisis of 1997, many South Koreans feared an onslaught of mergers and acquisitions by raiders who were looking to buy Korean companies while the currency was weak and bargaining power tilted distinctly towards the prospective purchaser. n45 Merger and acquisition business has not turned out to be as brisk as the market feared, boding well for firms looking to build integrated, long-term relationships with Korean clients. With the economy now on firmer ground, prospects for legal advice by foreign practitioners in South Korea have expanded considerably. International firms are serving in traditional, policy-based advisory roles with government agencies such as the Financial Supervisory Commission. n46 International firms are also active in the restructuring of South Korea's bankruptcy laws and corporate governance guidelines, as well as in the privatization of various industrial sectors, [*581] including electricity and power. n47

In addition to these broad-based advisory roles, international lawyers with specialty expertise are also in demand. In terms of investment, South Korea is liberalizing the rules for foreign ownership not only of companies, but also of mutual funds and insurance firms. This liberalization opens up opportunities for creating offshore tax pass-through entities for the foreign investor. n48 These special-purpose corporations pose advisory challenges for international lawyers, not only because the transactions themselves are complex but because they are entirely new.

Clients . . . in the States will need to rely on [American lawyers] to ask the right questions . . . and also to assist [Korean] lawyers, who can navigate local law but who probably have no experience with [these] complicated international [tax] structures . . . [and] no foreign investor has ever invested using the structures that we are using now. As a result, nobody knows what will be the ultimate tax treatment of the vehicles that we're choosing to use. n49

The Korean telecommunications industry, an $ 8.7 billion annual market, n50 is another major growth area for international lawyers. Foreign concerns are now allowed to own up to forty-nine percent of the equity in facilities-based telecom carriers, as a result of the liberalization measures discussed in the first part of this Note. South Korea also has
a booming wireless telephone market, due in large part to its young and primarily urban population, presenting increased investment opportunities for foreign capital.

One of the signs that Korea's economy was squarely on the recovery path was the 1999 public offering of shares in Korea Telecom, the country's largest local and long-distance carrier. The Korean government sold a relatively large chunk of its shares in Korea Telecom to international firms in 1999. n51 The overall issue of 90 million American depositary receipts (equivalent to 45 million shares) for Korea Telecom on the New York Stock Exchange raised $2.49 billion for the company. n52 [*582] The strength of Korea Telecom has sparked an upsurge in competition; there are currently three up-and-coming telecom service providers now vying with Korea Telecom for South Korean customers. Though the government has been shaping competition by enforcing price controls on telecom service providers, this practice is unlikely to continue indefinitely. The resulting enhanced competition will eventually mean better opportunities for telecom practitioners and better prices for consumers.

In addition to investment opportunities, the growth in the Korean telecom market also presents increased opportunities for international lawyers experienced in technology transfer agreements. Historically, because Korean telecom companies have limited budgets for research and development, the industry tends to draw on imported high-tech expertise for its products. n53 If this trend continues, the demand for foreign attorneys who can negotiate and draft complex technology transfer agreements between Korean and non-Korean high-tech firms will continue to grow.

V. CONCLUSION

In 1998, when the full implications of East Asia's financial turmoil were still unfolding, Alan Greenspan stated that the "Asian financial crisis" may not be a one-off occurrence, in fact not a "crisis" as we commonly define it, but rather a crisis cycle that may be unavoidable in current high-tech financial systems. n54 George Soros shared this view, stating that the present system is "inherently unstable" and predicting that, as long as current regulatory mechanisms remain, future regional financial collapses having hair-trigger global consequences are possible and even likely. n55

The accuracy of these predictions remains, for the moment, unproven. Yet the events of South Korea's past three years must not be viewed as a mere blip in the Asian economic progress chart. As the world economy becomes more interdependent, businesses strengthen [*583] efforts to internationalize, and cross-border flows of goods and services continue to rise, transparency, predictability, and a commitment to long-term growth will continue to be key to future international stability and market growth. Perhaps the most important lesson of the Asian financial crisis is that these are not one-way commitments—they are not "lessons" that South Korea and other East Asian countries must "learn" from the economies of the West. Nor should they be viewed as penance for unsound practices that, once performed, can be forgotten. These are goals that the international business and legal communities must continue to seek together.

FOOTNOTES:
n1 Because many of the authors cited are Korean, their full names are used in "supra" and "id." cites. Some of the writers have used slightly different capitalization and hyphenation in their bylines than the ones used herein. The format has been standardized--for example, Choi Gang Pil becomes Choi Gang-pil. This generally makes differentiating the family name (Choi) easier.


n4 For a thorough if somewhat terse overview of South Korea's economic and political history, see MARK L. CLIFFORD, TROUBLED TIGER: BUSINESSMEN, BUREAUCRATS, AND GENERALS IN SOUTH KOREA 3-10, 329-36 (1994).

n5 See id. at 6-7.

n6 See id. at 9.


n9 See id.


n11 See Sachs, supra note 7, at 11.


n13 See CLIFFORD, supra note 4, at 330 (describing recent prohibitions against using aliases in banking transactions as an example of increased transparency); Rachelle B. Chong & Wendy Chow, *Financing Telecommunications Projects in Asia: A Promising Regulatory Perspective*, 52 FED. COMM. L.J. 1, 3 (1999) (a higher ceiling on foreign ownership); *South Korea's Bail-out Bonanza*, ECONOMIST, June 27, 1998, at 72.

n14 See Chon Shi-yong, supra note 10.

n16 See Chaebol, supra note 8, at 67; see also Thinking Small, ECONOMIST, Nov. 14, 1998, at 67.


n18 See Chaebol, supra note 8, at 67 (stating unions blame IMF policies for layoffs).

n19 See id. at 68.

n20 See South Korea's Bail-out Bonanza, supra note 13, at 72.


n23 Lee Eun-sup, Foreign Trade Regulation of Korea in the WTO World, 8 J. TRANSNAT'L L. & POL'Y 231, 244 (1999).

n24 Id. at 243.

n25 Id. at 243.

n26 Id. at 244.

n27 See id. at 244.

n28 See Sohn Tae-soo, supra note 22.

n29 See Kim Kyung-ho, supra note 21.
n30 See Lawyers to be Encouraged to Establish Law Firms, KOREA TIMES, May 5, 1999, 1999 WL 5593005 [hereinafter Lawyers to be Encouraged].

n31 Id.

n32 See Lee Eun-sup, supra note 23, at 244-46.

n33 See Lawyers to be Encouraged, supra note 30.


n37 Id. at 458-59.

n38 Id. at 504.


n40 Id. at 67.

n41 Id. at 67.

n42 See McConnaughay, supra note 36, at 509-12.

n43 See id. at 512-13.

n44 See generally id. (discussing cultural expectations and dispute resolution); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP (1995) (discussing cultural expectations and multicultural diversity).


n48 See Dixon, supra note 39, at 66.

n49 Id.

n50 See Chong & Chow, supra note 13, at 18.

n51 See id. at 18-19.

n52 See Korea Telecom Issue, supra note 15, at A18.

n53 See 3A STEVEN Z. SZCZEPANSKI, ECKSTROM'S LICENSING IN FOREIGN AND DOMESTIC OPERATIONS § 32.02 (2000).
