

## <Note>

# Control of a Korean Stock Corporation

Donald R. Meyer\*

Foreign attorneys particularly Americans are increasingly being called upon to advise clients about doing business in Korea. Unfortunately, the dearth of materials written in any language but Korean prevents any sort of accurate and complete counseling. This gap is increasingly being filled by Korean attorneys with foreign training and command of a foreign language such as English. However, the demand upon these local attorneys is so great that no time is left for them to prepare and publish the usual sort of note that one finds available in law reviews outside of Korea.

The author of these notes had the rare opportunity of spending two years in Korea as a Peace Corps Volunteer assigned to the Graduate School of Law (Judicial Training Academy) and College of Law of Seoul National University. During his service in Korea he was fortunate enough to spend a considerable amount of time voluntarily assisting local attorneys working in the foreign investment field. It became apparent to him that some of the knowledge he had gained by merely working with the Korean statutes in practical day to day situations should be passed along.

These notes are an attempt to set forth Korean statutory material in English with the

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\* A Peace Corps Volunteer, assigned to the Graduate School of Law and College of Law, Seoul National University.

\* The author served as a Peace Corps Volunteer and lecturer in law at the School of Law and Graduate School of Law, Seoul National University from February 1969 to December 1970. He is a graduate of the University of California at Berkeley with an A.B. in Political Science and a J.D. in Law. He did additional graduate work at the Graduate School of Business Administration of Harvard University. After his service in Korea he plans to enter the private practice of law in San Francisco, California with an emphasis on international business transactions.

American style of organization--the goal being to enable a businessman or other client to know what his rights and duties are in Korea.

At no time should this analysis be considered complete, or truly representative of the prevailing reality in Korea. It is common knowledge that Korean law and practice are two entirely different things. However, the formal codified law is usually the starting point and without a minimal comprehension of it the foreigner involved in Korea will be truly adrift. One should always apply the statute to the prevailing administrative and political climate with due emphasis on the crucial role that human relations play in Korean affairs. One should never use the blackletter law as a basis for assuming anything.

## I. Introduction

This note sets forth in outline form the types and extent of control which the shareholders and board of directors are required to exercise over the operations of a stock corporation ("*Chusik Hoesa*") organized under the Korean Commercial Code (Law No. 1000, Jan. 1962). Amended by (Law No. 1212 Dec. 1962, hereinafter referred to as the "Commercial Code"). This note is based upon provisions of the Commercial Code and incorporates reference to judicial precedents and comments upon certain provisions made by Korean scholars and other commentators. It does not deal with the other statutory corporate entities.

This note is intended to provide a general orientation to the pertinent provisions of statutory law. The body of case law relevant to provisions of statutory law has not been included herein, since cases are not of any substantive importance in this area. Unless otherwise indicated, all citations herein are to provisions of the Korean Commercial Code as found in *Laws of the Republic of Korea*, translated, edited and published by the Korean Legal Center, 1969. It should be noted that references to "shareholders" in respect of voting requirements indicates the number of shares, not the number of individual shareholders.

Analytically, the relevant statutory materials can be divided into three categories; first, matters which according to the Commercial Code, are to be resolved by the shareholders; second, matters which the Commercial Code does not require the shareholders to resolve, but which can be determined by the shareholders, if so specified in the articles of incorporation; and, third, matters which are exclusively within the prerogative of the board of directors.

The items in the first category--matters which the Commercial Code specifies that the shareholders must determine--can be subdivided into three categories corresponding to the

number of votes by which the Commercial Code requires items to be resolved. Those items requiring consent of all of the shareholders are discussed in Paragraph A of Part II; those items requiring action by more than two-thirds of the votes of the shareholders present who hold shares representing more than one-half of the total number of issued shares entitled to vote at such a meeting are discussed in Paragraph B of Part II.

## **II. Matters which must be determined by shareholders**

### **A. Resolutions requiring unanimous approval**

In certain situations directors, auditors, liquidators, promoters or shareholders (who took action on behalf of the corporation) cannot be released from liability to the corporation without the consent of all the shareholders (Art. 400). Scholarly comment indicates that this means all shareholders without exclusion. Those situations are:

(a) Resolutions to release directors or liquidators from liability for damage to the corporation resulting from the performance by such directors or liquidators of any act in contravention of any law or decree or in contravention of the Article of Incorporation or in neglect of duty. If any of these acts have been done in accordance with a resolution of the board, the directors who have assented are deemed to have done such act and such directors who have not expressed their dissent in the minutes shall be presumed to have assented (Art. 399, para. 1~3; Art. 542, para. 2).

(b) Resolutions to release auditors from any liability for damage to the corporation resulting from the neglect of any of their duties (Art. 415).

(c) Resolutions to release promoters from liability to the corporation for damages arising from failure to perform their duties in connection with the incorporation of the company or the taking of shares at the time of formation (Arts. 324, 322 & 323).

(d) Resolutions to release shareholder who take action on the part of the company from liability to the Company (Art. 324).

### **B. Resolutions requiring the votes of more than two-thirds of the shareholders present who hold shares representing more than one-half of the total number of issued shares.**

The commercial Code explicitly requires that resolutions concerning certain enumerated

matters can be adopted only by the affirmative vote of shareholders holding more than two-thirds of the shares represented (in person or by proxy) at a general meeting of shareholders at which the holders of more than one-half of the total issued and outstanding shares are present or represented by proxy (Art. 434).

Thus, in order to adopt resolutions concerning matters for which such "special" voting requirements are stipulated by the Commercial Code shareholders holding more than one-third of the total issued and outstanding shares must cast affirmative votes therefor. However, with regard to this requirement the computation of the number of total issued shares does not include non-voting shares. The Code provides in respect of all resolutions of a general meeting, the number of shares owned by shareholders who are not entitled to vote shall not be computed in the total number of issued shares (Art. 370, para.1).

The following are subject to an affirmative vote of more than two-thirds of the shares at a meeting attended by more than one-half of the total issued shares entitled to vote, except for the special instance of resolutions adopted at the inaugural general meeting (Art. 309). This is a straight two-thirds majority not a more than two-thirds vote. Directors and auditors are appointed at this meeting (Art. 312).

(1) Resolutions concerning the terms of conversion, the particulars of the shares to be issued in consequence of conversion and the period within which a demand for conversion may be made, in connection with the issuance of convertible debentures, unless such matters are provided for in the articles of incorporation (Art. 513, para. 2).

(2) Resolution to make, within two years after incorporation, a contract to acquire, for continuous use in the business of the corporation, property inexistence prior to incorporation and having a value not less than one-twentieth of the corporation's capital (Art. 375).

(3) Resolution to remove, with or without cause, a director or auditor from office prior to expiration of his term of office (Art. 385, para. 1; Art. 415). Note that if the term of office is fixed and he is dismissed without cause during said term, the company may be liable for damages incurred due to said dismissal.

(4) Resolution to transfer the entire business of the corporation or an important part thereof (Art. 374, para. 1).

(5) Resolution to make, alter, or rescind a contract to release the entire business, to give a mandate to manage, or for sharing the entire profits and losses of the business with another person, or any contract similar thereto (Art. 374, para. 2).

(6) Resolution to take over the entire business of another corporation (Art. 374, para. 3).

(7) Resolution to prepare and approve a written agreement to merge with another company (Art. 522, para. 3).

(8) Resolution to consolidate shares by reason of merger of companies (Art. 530, para. 3).

(9) Resolution appointing member to an organizing committee to effect a merger (Art 175, para. 5).

(10) Resolution to reduce stated capital (Art. 438, para. 1).

(11) Resolution to dissolve the corporation (Art. 518).

(12) Resolution to continue the existence of the corporation after dissolution due to expiration of the stated duration of the corporate or due to the occurrence of any other circumstance specified in the articles of incorporation or due to a resolution of a general meeting of shareholders (Art. 519).

(13) Resolution to issue shares at a price less than par value and the minimum issue price there of when such shares are issued two years after the date of incorporation (Art. 417, para. 1 & 2).

(14) Resolutions concerning any alteration of the articles of incorporation (Art. 433 & 434).

Further discussion is called for at this point since by implication all items in the articles of incorporation are subject to change or additions only by a resolution adopted by an affirmative vote of shareholders holding more than two-thirds of the shares represented at a general meeting of shareholders at which the holders of more than one-half of the total issued shares are present. The Commercial Code appears to admit three categories of items which are subject to this requirement:

1. items which must be contained in the articles of incorporation.

2. items which may be contained in the articles of incorporation.

3. the residual category of items which might be placed in the articles of incorporation, if the shareholders so elect, *except* for those items which the Code specifies are the prerogative of the Board of Directors. The first two categories of items are set forth in a. and b. below. The third category is discussed in Part III.

#### **a. Items which must be contained in the articles of incorporation**

The following matters, among others, must be provided in the articles of incorporation (Art. 289):

- i. the object.
- ii. the trade name.
- iii. the total number of shares authorized for issue.
- iv. the amount of each share. (par value)
- v. the total number of shares authorized to be issued at the time of incorporation.
- vi. site of principal office and each branch.
- vii. the manner in which the company is to give its public notices.

**b. Items which may be included in the articles of incorporation**

If they are so included, any changes therein or addition thereto would require the affirmative vote of more than two-thirds of the shares represented at a general meeting of shareholders, at which the holders of more than one-half of the total issued shares are present. Of course other item not mentioned herein may be included.

i. Venue of shareholders meetings. Unless otherwise provided in the articles of incorporation general meetings shall be convened at the site of the principal office or at some place adjacent thereto (Art. 364).

ii. Remuneration of directors and auditors. If the amount of remuneration to be received by a director (auditor, Art. 415) has not been fixed by the articles of incorporation, it shall be fixed by a resolution of the general meeting of shareholders (Art. 388). We note that the normal practice of Korean Corporation is for the shareholders to pass a resolution setting the amount of remuneration for each director subject to subsequent revision. It would be most uncommon to provide for such matters in the articles of incorporation.

iii. Conditions of conversion, particulars as to the share to be issued by the conversion and the period within which a demand for conversion may be made (Art. 513, para. 2). Unless the articles provide for these matters they must be made by a vote of more than two-thirds of the shareholders present at a meeting attended by shareholders representing more than one-half of the issued shares.

iv. Issuance of new shares (Art. 416). The Commercial Code provided that resolutions concerning issuance of new shares will be made by the board of directors, in the absence of provisions in the articles of incorporation or the Commercial Code reserving such authority to the general meeting of shareholders.

v. Pre-emptive rights to new shares. The Code provides that each shareholder has the right to have new shares according to the number of shares which he owns unless the

articles of incorporation provide otherwise(Art. 419).

vi. Appointment of the representative director or director. The Code provides that a representative director shall be appointed by a resolution of the board of directors unless the articles of incorporation provide for appointment by a general meeting of shareholders(Art. 388, para. 1).

vii. Resolutions by general meetings of shareholders(Art. 368). Except as otherwise provided in the Commercial Code (discussed above), and in the absence of any provision in the articles of incorporation to the contrary, all resolutions of a general meeting of shareholders shall be adopted by a majority vote of the shareholders present who hold shares representing more than one-half of the total number of issued shares. Proxies are recognized (Art. 368, para 3).

### **C. Matters which must be determined by the shareholders**

The Commercial Code specifies that the following matters must be determined by the shareholders. As noted in Paragraph B, 14, b,v, above, in the absence of a provision in the Code or articles of incorporation the following matters can be resolved by a majority vote of the shareholders present who hold shares representing more than one-half of the total number of the issued shares. However it should be noted that shareholders present at a general meeting are not obligated to exercise their right to vote, though the number of their votes will be counted in determining whether or not a quorum is present at the meeting. Furthermore if a company issues two or more classes of shares, it may be provided by the articles of incorporation that with respect to shares of preferred class, regarding the distribution of profits, a shareholder shall not be entitled to vote. However, such shareholder shall be entitled to vote from the time of the general meeting subsequent to the general meeting where the resolution to the effect that he shall not receive the preferred distribution provided for in the articles of incorporation has been adopted to the time of termination of the general meeting where the resolution to the effect that he shall receive such distribution has been adopted(Art. 370, para 1). Such non-voting shares shall not exceed one-fourth of the total number of issued shares(Art. 370, para 2).

1. Appointment of directors(Art. 382, para. 1).
2. Appointment of audit of auditors(Art. 409, para. 1).

3. Appointment of liquidators and removal of liquidators other than those appointed by the court(Art. 531, para. 1 & Art. 539). Normally the directors of a company become its liquidators unless the articles of incorporation provide otherwise or the shareholders appoint them.

4. Remuneration of directors, auditors and liquidators if not fixed by the articles of incorporation(Arts. 388, 415, 542, para. 2).

5. Resolutions approving accounting documents. The directors shall submit to each ordinary general meeting; an inventory, a balance sheet, a business report, a profit and loss account and proposals relating to the reserve fund and the distribution of profits or interest and shall demand approval thereof(Arts. 447, 449, para. 1).

6. Resolutions appointing inspectors to investigate the affairs of the company, the status of its property, or documents submitted by the directors or auditors. Such inspectors may be appointed at a general meeting convened by minority shareholders or the ordinary general meeting(Arts. 366, para. 3, 367).

7. Appointment of a representative of the company to act in a suit between the corporation and a director or liquidator(Art. 394, para. 2 & 542, para. 2). This appointment can be made notwithstanding the provisions providing for appointment of such a person by the directors.

8. Resolution to declare a transaction concluded by a director on his own behalf of a third person as one effected on behalf of the corporation, if the transaction falls within the business of the corporation and the director concerned has failed to secure the requisite approval therefor at a general meeting of shareholders(Art. 397, para 2). Similarly a director cannot become a member with unlimited liability or a director of any other company having for its object the same kind of business without the consent of a general meeting of shareholders (Art. 397, para. 1).

9. Resolution of approval of the inventory statement and balance sheet submitted by liquidators(Art. 533, para. 1).

10. Resolution of approval of the final statement of accounts prepared by the liquidators (Art. 540, para. 1).

11. Resolutions to release directors, auditors, liquidators or shareholders (who acted on behalf of the company) from liability to the corporation(Art.400). See: Part II. A. a-d, herein.



### III. Matters which may be resolved by the shareholders

As a general principle, the general meeting of shareholders will be authorized to pass resolutions only concerning matters specifically provided by the Commercial Code or by the articles of incorporation. Part II sets forth the matters which, according to the Commercial Code, the shareholders must determine, or which the Commercial Code states are matters which the articles of incorporation may provide as requiring shareholder determination. The latter list is not considered exclusive: unless expressly or implicitly prohibited by the Commercial Code or other relevant laws, all matters relating to the conduct of the business of a corporation can be entrusted to the decision of the shareholders, provided that the subject matter there of its specified in the articles of incorporation.

The Commercial Code lists a number of items which remain the prerogative of the Board of Directors: a provision in the articles of incorporation providing that shareholders may act upon such matters by resolution would be invalid under the Commercial Code. The Commercial Code also enumerates several matters which remain the prerogative of the Board of Directors, unless the articles of incorporation specifically provide that the shareholders may act upon such matters.

We note that specification of any matters in the articles of incorporation and changes there of as discussed in Part II. B, 14, b. v. require a more than two-thirds vote of the shares representing a majority of the voting shares. However, resolutions concerning the delegated matters can be adopted by a majority of votes represented at a shareholders meeting attended by shareholders having majority of all voting shares issued and outstanding unless provisions of the articles of incorporation alter the voting requirements by making them more severe. It is doubtful that they could be made less severe.

#### A. Matters which are exclusively within the prerogative of the Board of Directors

The following matters cannot be delegated to the shareholders:

1. Convocation of a general meeting of shareholders(Art. 362). Such convocation remains the exclusive prerogative of the board of directors, although the Code does state that an ordinary general meeting shall be convened at least once a year at a fixed time(Art. 365,

para. 1). Furthermore, if the company has two periods for the settlement of accounts in a year, the Code calls for a general meeting at each period end(Art. 365, para. 2). Shareholders who hold shares representing not less than five hundredths of the total number of issued shares may demand the convening of an extraordinary general meeting, by filing with the board a written application. If the board does not comply the shareholders may convene such a meeting by themselves with approval of the court(Art. 366, paras. 1 & 2).

2. Resolutions approving a transaction with the company by a director for his own account or for the account of a third person(Art. 398).

3. Resolutions relating to the administration of the affairs of the company. The general opinion of scholars is that the conduct of the general business of the company remains the prerogative of the board of directors although it can be provided in the articles of incorporation that certain matters are subject to the resolutions of a general meeting of shareholders(Art. 393).

4. Resolutions for the appointment or removal of a manager (Art. 393).

5. Resolutions inviting subscriptions for debentures(Art. 469).

6. Application to the court for appointment of an inspector to inquire about the process of incorporation(Art. 298).

7. Applications to the court for appointment of an inspector to make an investigations concerning the particulars of contributions in the form of property other than money for new shares(Art. 422, para. 1).

### **B. Matters to be determined by the Board of Directors in the absence of a provision to the contrary in the articles of a incorporation**

The Commercial Code provides that the following items shall be determined by the board of directors unless the articles of incorporation provide contra:

1. Issuance of new shares. Normally matters relating to the issuance of new shares are determined by the board of directors unless the articles of incorporation provide otherwise. In certain situations the Code or the articles of incorporation may provide that certain matters are to be decided by a general meeting of shareholders(Art. 416, para. 1).

2. Appointment of the representative director or directors(Art. 389, paras. 1 & 2).

Generally, the board of directors are entrusted with broad and comprehensive authority under the Commercial Code to determine and adopt corporate policies and to act upon major matters concerning corporate business except when such authority is expressly reserved for action by the shareholders either by the Commercial Code or by the articles of incorporation. Decisions on matters concerning day to day routine corporate business are usually left to the corporate executives with authority to bind the corporation resting with the representative director.