

## Recent Preparatory Work for the Amendment of the Korean Civil Code

*Chang Soo Yang\**

### Abstract

*The Korean Civil Code (“KCC”) was promulgated on February 22, 1958 and became effective as of January 1, 1960. More than 40 years have now passed since the enactment of KCC. During that time, revisions were mainly made to Book 4 (“Family”) and Book 5 (“Succession”) of KCC on several occasions, including material and far-reaching amendments in 1977, 1991 and, most recently, in January of this year. But with respect to the first three Books, i.e., General Provisions (Allgemeiner Teil), Law of Property (Sachenrecht) and Law of Obligations (Schuldrecht), revisions of KCC itself have been infrequent and relatively minor. The preparatory work for the amendment to the first three Books of KCC began on February 1, 1999, when the Special Committee for the Civil Code Amendment (“Civil Code Amendment Committee” or “Committee”) was established as a subcommittee of the Legal Advisory Commission within the Ministry of Justice. After the Committee presented the tentative results of its discussions and findings by announcing the Draft Amendment in November 2001, and after holding public hearings and reviewing opinions from experts in various fields, it recently wrapped up its discussions, the contents of which were promulgated as a “Preliminary Announcement of Legislation” on June 14, 2004.*

*The author participated in the preparatory work as a member and chief secretary of the Committee. In this article, he presents an overview of the foregoing discussions and process to date and to present one possible point of view with respect to the significance of such amendment process. First, he briefly tracks the process of the work (Section II), provides an overview of the issues discussed during the work (Section III), and focuses on certain points in greater detail that he believes reveal the material characteristics of this preparatory work (Section IV). Lastly, he expresses some of my impressions and thoughts on the work (Section V).*

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\* Professor of Law, Seoul National University.



## I. Introduction

1. The Korean Civil Code (“KCC”)<sup>1)</sup> was promulgated on February 22, 1958 and became effective as of January 1, 1960. More than 40 years have now passed since the enactment of KCC. During that time, revisions were mainly made to Book 4 (“Family”) and Book 5 (“Succession”) of KCC on several occasions, including material and far-reaching amendments in 1977, 1991 and, most recently, in January of this year. Through these amendments, certain outdated provisions of the family and succession laws that are now regarded as incompatible with general principles of gender equality and human rights have been abolished or modified. With respect to the first three Books, i.e., General Provisions (*Allgemeiner Teil*), Law of Property (*Sachenrecht*) and Law of Obligations (*Schuldrecht*), various new legislation and/or their amendments<sup>2)</sup> have been enacted, while revisions of KCC itself have been infrequent and relatively minor.<sup>3)</sup>

2. The preparatory work for the amendment to the first three Books of KCC began on February 1, 1999, when the Special Committee for the Civil Code Amendment (“Civil Code Amendment Committee” or “Committee”) was established as a subcommittee of the Legal Advisory Commission<sup>4)</sup> within the Ministry of Justice. After the Committee presented the tentative results of its discussions and findings by announcing the Draft Amendment in November 2001, and after holding public hearings and reviewing opinions from experts in various fields, it recently wrapped up its discussions, the contents of which were promulgated as a “Preliminary

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1) Hereinafter, I will quote the acts or codes of Korea or its provisions without any affixation of “Korean,” unless otherwise required due to the context.

2) Notable examples include: Act on Establishment and Operation of Non-profit Corporations (1975), Housing Lease Protection Act (1981), Provisional Registration Security Act (1983), Act on Ownership and Management of Aggregate Buildings (1984), Act on Regulation of Standardized Contract (1986), Installment Sales Act (1991), Door-to-door Sales Act (1994), E-commerce Basic Act (1999), Product Liability Act (2000), Commercial Building Lease Protection Act (2002). And in February 2004, Korea made an accession to the United Nations Convention on Contracts for the International Sale of Goods, and it will take effect in Korea on March 1, 2005.

3) In 1984, the right of layer superficies was newly introduced and certain provisions relating to *Chonse*-rights (which is a unique right in rem under the Civil Code) such as its duration and statutory renewal were amended.

4) This is an advisory organ, set up in order to assist the Ministry of Justice in preparing for major new legislation.

Announcement of Legislation”<sup>5)</sup> on June 14, 2004.

3. I participated in the preparatory work as a member and chief secretary of the Committee. With this short speech, I would like to present an overview of the foregoing discussions and process to date and to present one possible point of view with respect to the significance of such amendment process. First, I will briefly track the process of the work (Section II), provide an overview of the issues discussed during the work (Section III), and focus on certain points in greater detail that I believe reveal the material characteristics of this preparatory work (Section IV). Lastly, I want to express some of my impressions and thoughts on the work (Section V).

I want to make it clear that what I say today is based solely on my personal understanding, observation and opinion, and is not an official opinion of the Committee, or the Subcommittee that is discussed and defined later. Further, I would like to note that I have personally objected to some of the amendment proposals finally prepared by the Committee.

## II. Procedure of the Preparatory Work for Amending KCC

1. The Committee consisted of 11 members, when it was first formed in February 1999. The membership increased to 13 in September 1999. Out of the 13 members, 11 members are professors of universities and the remaining two are judges.<sup>6)</sup> You may find it noteworthy that five of the 11 university professors received Dr. jur. degrees in Germany.<sup>7)</sup> And five of the remaining six members have received Ph.D. in Law degrees in Korea, but these five have also studied law in Germany.<sup>8) 9)</sup> The eminent presence in the Committee of the German touch may explain various influences from

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5) This is an equivalent of *Regierungsentwurf* in German.

6) Of the 11 professors, 4 had previous experience as judges (all of them acquired Ph.D. degrees from Korean universities). And 3 of them had more than 15 years of practicing experience as judges, and recently held positions in their respective universities as professors. As such, the members of the Committee can be categorized as 6 members with practicing experience as a judge and 7 members without such experience.

7) One member received a degree of *docteur en droit* in France.

8) One of the members who is a judge also studied law in Germany.

9) Three of the members also have studied law in the U.S.

German law in the results of preparatory work, which will be depicted later. And as of January 1999, 10 out of the 13 members were in their late forties or early fifties.<sup>10)</sup>

Such composition of the Committee is in contrast to the demographics of those who were in charge of the procedure regarding the first enactment of KCC that began in 1947 and was mainly done during and in the aftermath of the Korean War. The enactment of KCC was driven in great part by the belief that Korea, as a new independent country, must overcome as soon as possible the “humiliation” of using foreign laws, and in particular, the laws of Japan, which once colonized Korea.<sup>11)</sup> The actual drafting involved with the enactment was conducted by rather old practitioners rather than scholars due to the scarce number of legal scholars who taught at universities (or their equivalents) during the Japanese colonial period.<sup>12)</sup> In addition, the systems for universities in Korea were not well organized around 1947 when the procedure for the enactment of KCC started.

2. The Committee, at the initial stage of its activity, set its basic directions for the amendment procedure as follows.

(1) The Committee summarized the purposes of the amendment of KCC, with reservations for further changes, as follows.

First, to secure and enhance the comprehensiveness and unity of KCC. In other words, above all, the amendment is intended to incorporate into KCC the established legal practices and theories that developed in our daily life and civil practices after the enactment of KCC. And it is intended to identify and revise certain provisions that

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10) More specifically, 8 members were between 43 and 49 years old at that time.

11) Article 100 of the First Constitution of Korea (July of 1948) states that “the current laws are effective so long as such laws are not contradictory to this Constitution.” The “current laws” referred to therein include those Japanese laws that were effective as of August 1945, including most provisions of the Japanese Civil Code, with rare exceptions.

12) A “Code Compilation Committee” was formed immediately after the birth of Korea, pursuant to the “Rules for Composition of Code Compilation Committee” promulgated on September 15, 1948 as Presidential Decree No.4. The purpose of this committee was “preparing and reviewing drafts of codes and acts, after collecting and researching various codes of civil, commercial, criminal laws and other regulations on litigation and criminal penalties” (Article 2 of the foregoing Rules). 52 original member of the committee were renowned persons that deserved to represent Korean legal profession at that time, and only 3 of them were fulltime university professors. Further, among 11 members of “Special Committee on the Civil Code,” which was actually in charge of the initial works for the preparation of KCC, only 1 member was a university professor.

have lost their normative power and no longer function as directives of everyday life.

Second, to better conform KCC to reality. In other words, in response to the issues that have arisen and will arise in the course of implementing KCC, it is intended to provide legal frameworks in which individual citizens, with freedom and responsibility, can fulfill and realize their will and ability and also provide flexible directives in response to the reasonable needs of the adjudication practice. This means to identify legal issues that have been found or are expected to arise in the future and to prepare legal directives that may address such issues.

Third, to make KCC more understandable and tighten its logical composition. The amendment is intended to re-consider difficult terminologies and re-think whether it is possible to improve readability.<sup>13)</sup> It is not necessary to change the basic composition of KCC, but the amendment is intended to re-consider whether each provision and system is appropriately located in KCC considering each provision's function and ramification.

(2) Based on these purposes, as a more technical matter, the following issues were determined.

(a) With respect to the scope of the amendment, it was determined that the current order and basic system of KCC be maintained. Instead of identifying specific issues for review from the beginning, it was determined that the Committee review the provisions of KCC as a whole from a critical point of view and identify points for amendment on a step-by-step basis in the course of overall review. This means that the amendment procedure start from the comprehensive and overall reconsideration of the current Civil Code in its entirety. However, it is needless to say that this starting point does not necessarily lead to a conclusion that all of the provisions required amendments.

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13) However, it was clearly determined from the beginning that technical terminologies that are essential for developing legal thinking in a logical and systematic manner cannot be abandoned.

(b) With respect to procedural matters, it was determined that:

(i) two subcommittees should be set up, namely the First Subcommittee in charge of the General Provisions and the Law of Property, and the Second Subcommittee in charge of the Law of Obligations, with each commissioner belonging to either of these Subcommittees;

(ii) each Subcommittee reviews amendment proposals submitted by each commissioner and experts in various fields (these selected items were generally called “Starting Points”), provided that very important issues and issues overlapping the respective work scopes of both Subcommittees shall be discussed at the general session;

(iii) further, each Subcommittee selects items from the Starting Points to be actively discussed to determine whether amendment is required (these selected items were generally called “Review Points”), and thereafter, the Subcommittee discusses whether an amendment is required and what the amendment should be, and finally provides the appropriate language for the amendment;

(iv) the Committee inquires about comments on the amendment of KCC from various fields of Korean society to obtain broader opinions, and the Committee collects and organizes all the amendment proposals presented in various documents and articles; and

(v) the Committee also considers whether or not to incorporate special legislation into KCC, and if so, the scope of such incorporation.

3. The preparatory work has been done pursuant to the foregoing directives. Each Subcommittee prepared a Preliminary Draft Amendment in May 2001, which summarized the results of the work up to that point. Then a “Working Committee” composed of three members was introduced (I was one of the members), to review and revise the expression, contents and structure of this Preliminary Draft Amendment in its entirety. After the general session of the Committee reviewed the Preliminary Draft Amendment and the revised version of the Work Committee, the Draft Amendment was completed in November 2001.

Public hearings were held with respect to the Draft Amendment, and various opinions and comments have been presented in many seminars, symposiums, etc. The Committee recently wrapped up its discussions, the contents of which were

promulgated as a “Preliminary Announcement of Legislation” on June 14, 2004. The number of the provisions for which any kind of revision are proposed there is more than 130.

### **III. Issues discussed and examined during the Preparatory Work**

In the working process, a wide array of issues have been discussed and examined as Starting Points. In order to highlight the diversity of issues, I list below a few of the issues that were discussed during the general meeting of the Committee but *not* selected as Review Points.

(i) To move the general provisions regarding contracts from the “General Provisions” Section in the Book of Law of Obligations to the Book of General Provisions;

(ii) To create newly a provision on declaration of intention (*Willenserklärung*) by electronic means;

(iii) To combine the three provisions on apparent representation<sup>14)</sup> into a single provision;

(iv) To move the provisions on the things from the Book of General Provisions to that of the Law of Property;

(v) To amend the provision on the definition of property to include information;

(vi) To provide more comprehensive language regarding restriction on land ownership;

(vii) With respect to the registration for real estate, ① to adopt a notary system for certificate of immovables transactions; ② to acknowledge public credibility of registry (*Grundsatz des öffentlichen Glaubens*); ③ to introduce a substantive examination process by the registration officials in the registration process; ④ to unify land cadaster and registry;

(viii) To acknowledge the transferee’s (not only the transferor’s) notice to the debtor as a requirement for transfer of claims;

(ix) To delete the provision on debt payable to order;

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14) This can be said to be an equivalent of *Anscheinsvollmacht*.

- (x) To delete Article 535 which is an equivalent of the former § 307 BGB;
- (xi) To acknowledge the lessee's leasehold in spite of the change in ownership of the leased property, only by the transfer of the leased premise to the lessee (cf. § 566 BGB);<sup>15)</sup> and
- (xii) To provide for punitive damages, etc.

#### IV. Several noticeable issues

The following issues are a few of the important ones that were in fact chosen to be proposed for amendment, after being discussed and examined mainly in the general meetings of the Committee.

##### 1. Private Autonomy and Right to Personality

Article 1-2 [Human Dignity and Autonomy] (1) All persons shall shape their legal relationships according to their own free will, based on their dignity and value as human beings.

(2) Rights to personality shall be protected.

(1) Book 1 of KCC contains two provisions in its section 1 (Common Provisions). Article 2 provides for the principle of good faith and the principle of prohibition of abuse of right.<sup>16)</sup> Korean courts use the principle of good faith every time they feel there is any trivial reason to intervene in any kinds of transactions between private persons. In the name of good faith, contracts are not interpreted necessarily according to what the parties really intended, and the positive rules of KCC are not applied in a constant manner. Many of these stances were, I must say, necessary to fill the gap between the imported legal rules and the social reality. In some sense, the people of

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15) The Housing Lease Protection Act of Korea (see *supra* note 2), which purports to protect the lessees of the housing, acknowledges the lessee's right in spite of the change in ownership, when the lessee satisfied two requirements: transfer of the leased premise to the lessee *and* lessee's resident registration (see Article 3 of the Act). Otherwise KCC generally requires the registration of the lessee's right in the building registry.

16) Article 1 provides for the doctrine of statute priority over other sources of law, especially over customary law.

Korea needed to be placed under the guardianship of the state. But if people depend on this principle too much, they might be “idle” while they prepare and conclude a contract. When something goes wrong with the contract, then they beg the court for its mercy like whimpering babies, and in many cases the court does not betray their hopes. Yes, the principle of good faith is really a crown paragraph of KCC. And the view that supports the significance of Article 2 has been extremely influential in Korean civil law theories, as Article 2 has been construed as declaring the fundamental, most precious principle of civil law.<sup>17)</sup> However, there have recently been increasing questions regarding such understanding. Taking also the economic growth of Korea since the 1960’s and its democratization since the late 1980’s into consideration, some scholars think that this kind of excessive stress on the paternalistic applications of the principles cannot be compatible with the constitutional demand of human dignity. During the preparatory work for the revision of KCC, it was accepted that, not as its substitute, but as a counter-balancing value for it, the principle of private autonomy should be clearly stipulated ahead of the principle of good faith.

(2) While Articles 751 and 764<sup>18)</sup> mention the plaintiff’s reputation in the context of torts, there is no general provision on “rights to personality” (*Persönlichkeitsrecht*) in KCC.<sup>19)</sup> However, the relevant court precedents and the prevalent view among scholars support rights to personality such as right to portraits, sexual integrity, credibility,<sup>20)</sup> not

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17) For example, one of the most famous textbooks, Yoon-jik Kwak, *General Provisions of the Korean Civil Code* (newly revised edition, 1989), p.78 ff., says, “The principle of good faith and the principle of prohibition of abuse of right, which operates as restriction or modification of the so-called ‘three basic principles’ [*i.e.*, guarantee of private ownership, freedom of contract and principle of culpability], are provided for in the beginning of KCC. . . . The principles of good faith, prohibition of abuse of right, security of transaction, public order, etc. are *higher principles than the ‘three basic principles’* and actively restrict the ‘three basic principles’. They are *the embodiment of the highest principle of public welfare.*” (Emphasis added).

18) Article 17 of the Constitution of Korea provides that the secrecy and freedom of the private life of citizen shall not be infringed.

19) In addition, Articles 11 through 15 of the Copyright Act provides for the author’s moral right.

20) For example, the Supreme Court decision of 2.13.1998, *96da7854* (Official Case Collection 46-1, 59), which was a damage suit raised by a patient infected by HIV virus during blood transfusion, mentioned the infringement of “right to personality” of the patient in self-determining whether to receive blood transfusion in finding against the hospital on the grounds that it failed to sufficiently explain about the risk of infection. In addition, the Supreme Court decision of 2.10.1998, *95da39533* (Official Case Collection 46-1, 1), which states the standards of unlawfulness regarding sexual harassment, construes sexual harassment as an infringement of one’s “right to personality.”

only by giving the right-holder to claim tort damages but also by acknowledging the right to request prohibition of infringing acts, which reflects the characteristics of dinglicher Anspruch, when there is an infringement upon such rights.<sup>21)</sup>

There has been much discussion during the work as to whether there should be a new provision on the protection of the right to personality and, if it shall be so provided, what the structure and contents of such provision should be. It was finally decided to expressly provide that rights to personality shall be protected as a legal right, while the specific contents or protective means of the right were delegated to the courts and legal scholars.

What is important is, I think, that such provision was deliberately provided for in the Chapter of Common Provisions and that it was combined with the provision on the principle of private autonomy. This implies reconsideration on the current overemphasis on the economic and materialistic aspects of KCC that were deemed necessary in order to support the operation of free market.

## 2. Mistake

(1) Paragraph 2 of Article 109 is to be newly created as follows.

(2) Paragraph 1 shall be applied, even when the mistake is as to the party, character of goods or any other motive of declaration of intention, if such mistake is concerned with an essential matter of the transaction.

Paragraph 1 of Article 109 provides that declaration of intention (*Willenserklärung*) may be revoked when there is a mistake as to a material part of “the contents of the juristic act (*Rechtsgeschäft*),” unless the mistake was due to gross negligence of the party expressing his intention.

Various issues are being discussed with regard to the mistake of a juristic act, such as whether mistake of act (*Geschäftsirrtum*) and mistake of motive (*Motiveirrtum*)

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21) Supreme Court decision of 4.12.1996, *93da40614* (Official Case Collection 44-1, 323) (“Since the right to personality cannot be fully recovered by *ex post* remedies (such as monetary damages) once it has been infringed upon, preventive *ex ante* measures such as right to request prohibition of the infringing acts shall be acknowledged.”); Supreme Court decision of 10.24.1997, *96da17851* (Official Case Report 1997 ha, 3574); etc.

should be distinguished, how both categories of mistakes should be treated, and whether the cases of common mistake, the other party's knowledge of the mistake, and gratuitous act should be treated separately and differently. Although the revocation should be allowed only when the mistake is about the content of the juristic act in light of words of the current provision, the view that a mistake of motive, i.e. when the mistake is not about the content of the juristic act, may also be revoked under certain circumstances was adopted.<sup>22)</sup> Consequently, mistake of act and mistake of motive are to remain distinguished in KCC. While there have been discussions as to the circumstances under which revocation should be allowed in case of mistake of motive, the majority adopted the position, which was admittedly influenced by § 119 II of the German BGB and Art. 24 of the Swiss OR.

(2) A new provision was proposed on the liability of reliance damages of the party who revokes the declaration of intention due to mistake.

Article 109-2 [Liability of the party who revokes the declaration due to his mistake] (1) The party who revokes his<sup>23)</sup> declaration of intention according to Article 109 shall be liable for the damages incurred upon the other party due to the latter party's reliance on the validity of such declaration. However, the damages shall not exceed the proceeds that could have been obtained if such declaration had been valid.

(2) Paragraph 1 shall not be applied when the other party knew or should have known the mistake.

Even without this kind of provision, some scholars had argued that the general liability of *culpa in contrahendo* must be imported into Korea, and as its concrete

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22) I could not agree with the majority in this respect. I think the solution suggested by the majority is too German. In addition, the view was strongly raised by a few members of the Committee including me that, disregarding the distinction between mistake of act and mistake of motive, revocation should be allowed only when (i) the mistake was shared by the other party (so called "common mistake"), (ii) the other party knew or should have known of the mistake, or (iii) the other party caused the mistake, unless the contract is gratuitous. I personally prefer this solution. However, this could not be a majority opinion.

23) In the following, the nomination of only "he, his, him", not of "he/she, his/her, him/her," is only a matter of convenience, and has nothing to do with my attitude to sexes.

application, contractual liability of reliance damages should be imposed on the party in mistake when the declaration of intention is revoked. But the Supreme Court of Korea<sup>24)</sup> denied tort liability of the party who legitimately revoked his juristic act due to mistake by stating as follows: Tort liability should be established only when the act of the tortfeasor is illegal in addition to the willfulness or the negligence of the tortfeasor. Even if the defendant was negligent, since Article 109 of KCC allows the party in mistake to revoke his declaration on condition his negligence was not gross, the defendant's act in issuing the letter of guarantee due to mistake by negligence or in revoking the guarantee contract on the basis of mistake shall not be deemed illegal.

The view that KCC should expressly provide for the liability of the party who revokes the declaration of intention due to mistake was adopted in the preparatory work. The above-mentioned revision was proposed with reference to § 122 BGB. This is a good example of how German legal theories influenced the work.

(3) The following are a few of other examples of influences from German law.

(a) A new provision on the construction of a juristic act (*Rechtsgeschäft*) was added. This provision provides the standards as to the construction of a juristic act by providing as follows: “(1) In construing a juristic act, one should not adhere to the wording of the expression and should examine the genuine will of the party. (2) A juristic act shall be construed in accordance with the principle of good faith considering the purpose of the party, trade usage, and other circumstances.” (Article 106) There was much debate in drafting the provision. Eventually, the above-mentioned provision was drafted with reference to the court precedents,<sup>25)</sup> §§ 133, 157 BGB, Articles 8 and 9 of CISG, and Articles 5:101 and 5:102 of the Principles of European Contract Law.

(b) A new provision on the disposition by a non-titleholder (*Verfügung eines*

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24) Supreme Court decision of 8.22.1997, *97daka13023* (Official Case Report 1997 ha, 2800).

25) Supreme Court decision of 11.24.1992, *92da31514* (Official Case Report 1993, 239); Supreme Court decision of 10.26.1993, *93da2629* (Official Case Report 1993, 3165), etc. adopted the principle of *falsa demonstratio non nocet* by holding that “In construing a contract, one should not adhere to the formalities of the wording but should examine the genuine intention of each party.”

*Nichtberechtigten*) was added (Article 139-2). The current KCC provides for the disposition by a person without the requisite rights only indirectly with regard to provisions on bona fide acquisition of movables (Article 249) and performance of obligation with another person's goods (Article 463). This proposal of the new provision is basically a codification of the court precedents providing that the disposition by a non-titleholder be valid in case there is prior consent of the right-bearer and also when there is ex post confirmation (with retroactive effect unless it infringes upon the right of a third party). It might be said that this is an importation of § 185 BGB.

(c) A new provision on the substantive effect of provisional registration (*Vormerkung*) was added. Paragraph 2 of Article 6 of the Real Estate Registration Act provides that when provisional registration is established, the priority of principal registration based thereon shall be determined according to the order of provisional registration. With respect to this provision, there is discussion on what the stipulated effect of preservation of the order implies in terms of substantive law beyond its procedural aspect. It was determined that a new provision on the substantive effect of provisional registration be added to KCC, to the effect that disposition of the property occurring after the provisional registration shall have no effect so long as it infringes upon the rights to be preserved by such provisional registration. In adopting this position we felt supported by the presence of § 883 II BGB.

After the debate concerning the location of such new provision, the new provision was to be located in Article 187-2, immediately following Articles 186 and 187, which state the principles with regard to transfer of rights in rem. *One may* raise doubts about this provision since it only provides for the effect of provisional registration while it does not mention the circumstances under which the provisional registration can be established. However, the Committee accepted the view that such provision would not raise serious issues since Article 3 of the Real Estate Registration Act already provides for such circumstances.

(d) A new provision on construction that invaded boundaries (*Überbau*) was added (Article 242-2). This provision provides that in case of construction that invaded the boundaries without willfulness or negligence, the owner of the land suffering from such invasion may not claim restitution (i.e., demolition) if he/she fails to raise an

objection within 10 years from the invasion or within three years of having knowledge of such invasion. The owner of the land suffering from such invasion, however, may still claim for the monetary compensation equivalent to rent or may request the invader to purchase the invaded portion of the land. This proposal was in part inspired by §§ 912 ff. BGB, but you will notice that they were significantly modified.

### 3. Guaranty

Article 428-2 [Formality of Guaranty] ① Guaranty shall become effective only if the intention of a guarantor is declared in writing with the guarantor's name and seal affixed thereon or with the guarantor's manual signature thereon.

② The provision of Paragraph 1 shall apply to any adverse alteration of the guarantor's obligations.

③ To the extent that the guarantor has performed the guarantee obligations, he may not assert invalidity of guaranty on account of any defect in formality as prescribed in Paragraph 1 and Paragraph 2.

Article 436-2 [Creditor's Obligation to Notify] ① The creditor shall promptly notify the guarantor if the obligor fails to pay principal or interest or perform any other obligations for three months or more, or if the creditor becomes aware in advance that the obligor is unable to pay or perform its obligations on the due date.

② Upon the guarantor's request, the creditor shall notify the guarantor of the details of the guaranteed obligations and the results of performance thereof.

③ Upon the creditor's failure to notify as prescribed in Paragraph 1 and Paragraph 2, the guarantor shall be discharged from its obligations to the extent of the damages attributable to such failure.

Article 448-2 [*keun*-Guaranty] ① Guaranty may be made with respect to unspecified multiple obligations. In this case, the maximum amount of guaranteed obligation shall be set and included in writing as prescribed in Article 428-2, Paragraph 1.

② The obligations of the *keun*-guarantor shall be limited to the obligations arising out of a specified continuous contract or a specified type of transaction

between the creditor and the obligor or arising continuously from a specified cause.

Article 448-3 [Duration of *keun*-Guaranty] ① The duration of *keun*-guaranty shall not exceed three years. If the duration agreed upon by the parties exceeds three years, it shall be reduced to three years.

② If there is no duration of *keun*-guaranty agreed upon by the parties, the duration shall be three years.

③ The *keun*-guaranty may be renewed. The duration of renewed *keun*-guaranty may not exceed three years from the date of renewal.

Article 448-4 [Termination of *keun*-guaranty] The *keun*-guarantor may terminate the *keun*-guaranty upon occurrence of a material adverse change in circumstances at the time of entering into the *keun*-guaranty or for other important reasons.

A guaranty (*Bürgschaft*) is the crown of personal surety, serving a distinguished role in financial practices. If you look into the reality of guaranty transactions in Korea, however, in many cases the guarantor signs the guaranty out of personal relationship, gratuitously and without due deliberation of the legal consequences thereof. In practice, guaranties for the benefit of financial institutions have been made in the form of a comprehensive *keun*-guaranty,<sup>26)</sup> which covers any of the obligor's obligations arising during the considerable duration, without specifying the scope of guaranteed obligations. In various cases, the guarantors were held liable as such type of comprehensive *keun*-guaranty was basically found valid by courts. In particular, the financial crisis since the end of 1997 has awakened the need to mitigate the overly strict guarantee liabilities.

The proposed amendment of KCC<sup>27)</sup> at this time introduces a formality of

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26) *Keun* means "root" in Korean. So *Keun*-guarantor guarantees various unspecified obligations arising from one "root," for example, from a sole distributor contract between a creditor and an obligor which normally lasts more than one year. There is another form of *keun*-surety in KCC, *keun*-hypothec, which is an equivalent of *Hochsthypotheken*.

27) In preparing these proposals, the applicable provisions of Obligation Law of Swiss (Article 492 and its

guaranty<sup>28)</sup> and stipulates creditors' notification to the guarantor.<sup>29)</sup> In addition, as to *keun*-guaranty, the proposal purports to prohibit an excessively comprehensive *keun*-guaranty, to limit the duration of *keun*-guaranty, and to stipulate newly a provision for termination upon material adverse change.<sup>30)</sup> I believe this provision is probably one of the most significant revisions in terms of actual, practical influence.<sup>31)</sup>

I doubt these drastic changes in guaranty laws would have been suggested without the financial crisis referred to above. In this regard, this amendment proposal on guaranty is one good example of reflecting society's needs into legislation.

#### 4. Rescission (*Rücktritt*) or Termination (*Kündigung*) of Contract<sup>32)</sup>

The following language for the amendment of the Rescission or Termination

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subsequent Articles) were useful references. These provisions of Swiss law were enacted on July 1, 1942 as a substantial amendment to the previous provisions, with reflections on the pains suffered by many people who carelessly guaranteed others' debts during the recession period of the 1930s. Please refer to Ch.M. Pestalozzi, in: Honsell/Vogt/Wiegand(Hrsg), *Kommentar zum Schweizerischen Privatrecht. Obligationenrecht I: Art. 1-529 OR*(1992), Vorb. zu Art. 492-512, Rn.1(S.2345). In addition, Article 7:850 and its subsequent Articles of the New Civil Code of the Netherlands were used as references in drafting these provisions.

28) Hence, there will be two juristic acts in KCC requiring certain formalities: the testament and the guaranty. However, I think that the tendency of minimizing formality requirements as shown in the current KCC should be reconsidered.

29) It is an interesting issue whether the creditor may be obligated to take certain actions towards the guarantor, pursuant to general principle of good faith provided for in KCC. For instance, the Supreme Court held in the decision of 1.20.1987, *86daka1262* (Official Case Report 1987, 305) as follows: "A bank's essential business is lending and earning interest income thereon; a commercial bank may reasonably expand loan amounts to increase interest income as long as there is sufficient security; and personal security is a protection for the bank itself against any default on loans. As such, the bank cannot be obligated to refrain from lending nor to prevent default for the benefit of the guarantor pursuant to general principles of good faith provided for in KCC." At the first stage of the current preparatory work, a provision discharging the guarantor's liability to the extent attributable to the creditor's negligence in its enforcing claims against the main obligor was considered. However, concerns have been raised that imposing such general obligations on creditors would make it difficult for creditors to provide financing. Eventually, it was agreed to provide for limited obligations to give notice.

30) With respect to the right of termination due to change of circumstances in general, please see Article 544-4 discussed in Section 4 below.

31) In addition, Article 448-5 declares Articles 436-2, 448-2 through 448-4 as unilateral mandatory provisions. Any agreement in violation of these provisions, which has an adverse effect on the guarantor, shall be invalidated.

32) The following discussions refer to statutory right of rescission and statutory right of termination.

section was drafted with existing doctrines and laws of foreign jurisdictions in mind, with the intention of making up for certain defects in KCC.

Article 544-2 [Non-performance of Obligation and Rescission] ① In case the obligor fails to perform its obligation as due, the obligee may give a notice of demand for performance within a reasonable period of time, and if the obligor fails to perform in the given period of time, the obligee may rescind the contract unless the obligor acted without willfulness or negligence in its original non-performance.

② The obligee may rescind the contract without giving notice of demand as set forth in Paragraph 1 above, in any of the following cases:

1. If performance of the obligation has become impossible;
2. If non-performance is clearly foreseeable;
3. If the obligor has failed to perform its obligation within a certain specified period of time, in case the contract cannot fulfill its purpose if not performed within such period of time due to the nature of the contract or declared intent of the parties.

Article 544-3 [Non-performance and Termination] ① In a continuing contractual relationship, if an obligor's future performance of its obligation is doubtful due to its non-performance, the obligee may give notice of demand for performance within a reasonable period of time, and if the obligor fails to perform in the given period of time, the obligee may terminate the contract notwithstanding the agreed duration of the contract unless the obligor acted without willfulness or negligence in its original non-performance.

② Notwithstanding Paragraph 1, if it becomes inevitable to break off a contractual relationship due to a grave non-performance by the obligor, the obligee may terminate the contract without giving notice of demand for performance.

Article 544-4 [Change in Circumstances and Rescission/Termination] When there has been a significant change in circumstances that was unforeseeable at the time of agreement and it is clearly unjust to maintain the contract as originally concluded, the relevant party may request a modification of the

contract to reflect the changed circumstances. If the parties fail to reach an agreement for modification in a significant period of time, they may rescind or terminate the contract.

(1) With regard to the rescission of contracts, it was debated whether to require fault (*Verschulden*) of the obligor as a condition for the right of rescission to arise.<sup>33)</sup> This was one of the most fiercely debated issues in this process of preparatory work. One group strongly argued, relying on recent legislation of other countries and international trends, that fault of the obligor should not be a requirement because rescission of contract should be regarded not as a sanction on the obligor who failed to perform, but as a mechanism to free the obligee from a binding contract when smooth performance of the contract has been hindered.<sup>34)</sup> On the other hand, some argued that a drastic change in this respect is not desirable so far, while keeping an eye open for progress being made in other countries regarding rescission of contracts. It may be too harsh on the obligor to allow the obligee to rescind a contract without finding any fault on the part of the obligor and extinguishing the obligor's counter obligation. Even under the current regime where the obligor's fault is required, in reality, it hardly ever determines whether a right of rescission arises. Restricting the argument in connection to impossibility of performance where there is no fault on the part of the obligor, the outcome is identical to an automatic rescission of contract due to the rules of burden of risk (*Gegenleistungsgefahr*).<sup>35)</sup> In the end, the latter opinion was adopted in drafting Paragraph 1 of Article 544-2, after the issue was considered in relation to whether KCC should follow the examples of recent foreign legislation in adopting 'material non-performance' as a requirement for giving rise to right of rescission.

If it is clear that the obligor will not perform its obligation in spite of a notice of demand by the obligee, there is no need to require a notice before giving rise to right of rescission, and such instances are not limited to where the obligor has manifested its

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33) The same issue comes up regarding right of termination due to non-performance in continuous contractual relationships. Please refer to the following Sub-section (2).

34) This group argued that the following argument from the other side is legislative retrogression considering the fact that the current KCC does not explicitly require obligor's fault to trigger right of rescission except for cases where performance is impossible.

35) Some raised the concern that not requiring fault on the part of the obligor may raise needs to revise the current rules of burden of risk (Article 537 of KCC), which is thought to be indispensable.

intent not to perform as stated in Article 544 of the current KCC. In order to clarify this point, No. 2, Paragraph 2 of Article 544-2 states that a contract may be rescinded without notification if non-performance is clearly foreseeable.

(2) The current KCC states instances where termination (voiding a contract going forward) is permitted according to particular types of contractual relationships. The Committee has adopted the view that there should be general rules on conditions giving rise to right of termination due to non-performance in connection with continuous contractual relationships over a certain period of time.<sup>36)</sup> As for the conditions that give rise to right of termination, in addition to being a one-time non-performance, the non-performance must be of a nature such that future non-performance of all or a significant part of the contract is anticipated. Even under such conditions, notice of demand is required in principle. However, when the non-performance is so grave that it is no longer reasonable to expect the contract to be complied with by the other party, no notice of demand is required.

(3) Aside from rescission and termination of contract due to non-performance, it has also been an issue of debate as to under which conditions a contract may be terminated due to change in circumstances. It was also discussed from the perspective of embodiment of the principle of good faith. Such conditions are drafted pursuant to existing doctrines, Article 6.2.2 of the UNIDROIT Principles of International Commercial Contracts, Article 6:111 of the Principles of European Contract Law and § 313 BGB as amended. On the other hand, there have been considerable debates as to the effects of such termination. Key issues were whether to acknowledge *modification* of contracts apart from termination, and as a related matter, whether and in what extent the involvement of courts should be acknowledged. In the end, it was the dominant view that it would not be desirable for courts to unilaterally modify the terms of a contract.<sup>37)</sup> Therefore, the Committee decided to acknowledge a right of termination after the terminating party's request for modification of the contract has failed.

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<sup>36)</sup> A party can terminate at any time a contract that does not specify the term of the contract (see Paragraph 2 of Article 603 regarding loan for consumption (*Darlehen*), Article 660 regarding employment and Article 699 regarding bail (*Verwahrung*) etc.), and this is understood to be a declaration of general legal principles.

<sup>37)</sup> Committee members working as judges shared this view.

## V. Conclusion

1. As discussed above, the process of amending KCC entails drafting language from court precedents and doctrines; solving certain issues regarding legislative meaning that were called to attention after the enactment; and supplementing and amending the initial legislative resolution to keep in line with changed social circumstances and the legislative trends of other countries.

On the other hand, the following tasks were not substantially accomplished: disposing of certain provisions that have effectively ceased to be actually effective law; incorporating certain special legislation into KCC; making legal terms and sentences easy to read; and reconsidering the structural position of certain regulations and systems.

2. I would like to express some of my thoughts on the current amendment process.

(1) I would like to say more bluntly: the significance of the current amendment process is that it showed how extensively KCC could be modified. In other words, we confirmed and delivered a clear message that the provisions of KCC are not golden rules or *ratio scripta*, but that they could be modified when the need arises.

What made us so hesitant to amend KCC in the past? There may be numerous reasons, but I guess the following ideas played a part: as Korea was highly influenced by (in effect, adopting through *Rezeption*) the laws of other countries, we had to focus more on understanding them first and were not in a position to rashly discuss the suitability of such laws; rather than saying that some laws are not desirable, should we not ask initially whether the problem was due to the backwardness of Korean people or society? A different view, but similarly indifferent towards legislation, might exist as follows: instead of relying on the written law of the Code, it is better to absorb living law into the system through precedents, and further, through the accumulated precedents, the problems of written law could be addressed little by little rather than by amending the Code. Was there not also apprehension about amending the basic Codes when the normative landscape was unstable (meaning that it was difficult to predict how the courts would rule)? Figuratively speaking, despite the problems shown in a completed building, did not many people worry that fixing the problematic section

would have an adverse impact, in some cases a destructive impact, on other sections or the rest of the building?

I personally feel that it is somewhat masochistic to hesitate amending the basic codes such as KCC and to try to solve any problem of such codes through case precedents and doctrines only. Although KCC was consciously structured loosely to adapt to the future, this is only true relative to other laws. KCC comprises over 760 provisions (which is a relatively small number compared to that of the German BGB) in the first three Books. Not all provisions are fundamental principles that are true forever and many are fortuitous and incomplete laws that could only be explained in the context of a particular time in history. KCC is based on laws of Germany, France, Switzerland and England in the late 19<sup>th</sup> and early 20<sup>th</sup> century. No one could say that the selection of certain items from these laws was entirely reasonable and proper at that time, much less feel confident about the propriety of such selection as of today.

I believe we should recognize the importance of legislation, especially since we have accepted our laws from other countries through the process of legislation. Hence, should not an extensive amendment be carried out independently from our own initiative rather than through pressure from other countries?

(2) Furthermore, it is crucial to officially fix and legitimize legal concepts, legal propositions and legal institutions through the actual provisions of KCC. This is especially true when we consider that KCC is the source of various legal tools and legal apparatus. KCC provides a lawyer with plenty of detailed techniques to perform legal analysis and think in legal terms about any event in the world including basic aspects of people's lives such as property rights, contracts and marriage.

Notwithstanding the acknowledgment that the law is not a complete system and that deficiency in law is inevitable, being granted citizenship by actual provisions of positive law is totally different, in terms of stability, clarity and systematicness, from case law that depends on individual events, or from general principles of good faith and public order and good morals.

(3) We cannot overlook costs involved in an extensive amendment of KCC. The various aspects of costs involved include increased work for professors and students of law due to the need for new textbooks and commentaries for new provisions; and, more importantly, instability in everyday life and transactions due to ambiguity on how

the courts will interpret and apply the new provisions. There is a law in effect at the present, and it is advisable to be prudent in legislating amendments. Even considering the costs involved, however, I cannot help but think that there are many provisions in the current KCC that need amending despite the costs.

3. The Korean Civil Code is still undergoing the process of amendment. Sometimes it is frightening to think that I am taking part in this process when I realize that legislative work exhibits the quality of a country's law and legal culture. I would like to take this opportunity to hear the candid opinions of all of you who have an interest in this matter and to move one step forward in an effort to improve the Korean Civil Code.