

Labor Law's Challenge to Business Change

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Abstract

This article examines the legal issues that may arise in a business transfer, the most representative form of business change. Any business change, regardless of its purpose or legal form, presents a variety of labor law questions regarding labor relations. The most basic question is whether the employment will be succeeded. If a transfer of employment is recognized, a number of legal questions arise.

In terms of the individual employment relations, a question first arises whether the working conditions provided in the work rules will be succeeded. If the work rules are succeeded, two or more working conditions would exist in one worksite. This circumstance raises a question as to whether it contradicts the equal-treatment principle. If an employer attempts to unify the multiple working conditions, unilateral adverse changes in the work rules would occur. Then, a question arises as to whether the changes would meet the "reasonableness" accepted in a society, which the case law requires as a condition to unilateral changes in the work rules. Also, a question may arise as to whether dismissal of employees may be legitimate.

In terms of the collective labor relations law, issues such as whether the status of labor unions would maintain after the business change and whether collective agreements will succeed would arise. These questions may arise in every kind of business changes, compelling one to consider every aspect - 'the alpha and omega'- of the labor law. Unfortunately, however, Korea has no codified rules with regard to these questions, leaving their solutions to interpretation of court decisions by courts and legal theories by scholars.

This article has discussed basic labor law issues that might arise from business change.

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I. Introduction

Business as a going concern may go through various changes in its legal or factual status during its life. Business changes, usually in the form of a merger, business transfer, division of a company and so forth, occur according to the changes in the form of a firm in business organization laws, including the Commercial Code (hereinafter the “Code”).¹⁾ This article discusses business changes only when a transfer of employment following a change of business ownership involves a change in the identity of an employer. Thus, the business changes discussed in this article do not include takeovers by acquisition of equity shares that do not involve significant ownership relations.²⁾

Any business change, regardless of its purpose or legal form, presents a variety of labor law questions regarding labor relations. The most basic question is whether the employment will be succeeded. If a transfer of employment is recognized, a number of legal questions arise.

In terms of the individual employment relations, a question first arises whether the working conditions provided in the work rules will be succeeded. If the work rules are succeeded, two or more working conditions would exist in one worksite. This circumstance raises a question as to whether it contradicts the equal-treatment principle. If an employer attempts to unify the multiple working conditions, unilateral adverse changes in the work rules would occur. Then, a question arises as to whether the changes would meet the “reasonableness” accepted in a society. Also, a question may arise as to whether dismissal of employees may be legitimate. In terms of the collective labor relations law, issues such as whether the status of labor unions would

1) Important types include a merger under the Commercial Code (hereinafter the “Code”) (Code Articles 174, 175, 230 through 240, 522 through 529, 530(2), and 598 through 603), business transfer (Code Articles 41 through 45, 204, 269, 374 Items 1 and 3, and 576(1)), division of a firm (Code Articles 530-2 and thereafter), succession of business by a death of a sole proprietor, business lease (Code Article 374 Item 2), change of the organization of a firm (Code Articles 242, 269, 604, and 607), conversion of a sole proprietorship into a corporation, commencement of succession of business by a death of a business owner, commencement of a company reorganization procedure under the Company Reorganization Act, commencement of a bankruptcy procedure under the Bankruptcy Act and commencement of a composition procedure under the Composition Act.

2) In this case, the “employer in a legal sense” remains the same because there is no change in the identity of the employer in a legal sense. Therefore, regulations in general labor laws are applicable.

maintain after the business change and whether collective agreements will succeed would arise.

These questions may arise in every kind of business changes, compelling one to consider every aspect—"the alpha and omega"—of the labor law. Unfortunately, however, Korea has no codified rules with regard to these questions, leaving their solutions to interpretation of court decisions by courts and legal theories by scholars. This article examines the legal issues that may arise in a business transfer, the most representative form of business change. Issues specifically related to merger and division of a company will be discussed in relevant parts.

II. Business Change and Succession of Employment

A. Business Transfer

1. Theories and Case Law

Without any codified rules on the succession of employment in business transfer in Korea, jurists have presented various theories, including tripartite-agreement theory,³⁾ *ipso-jure*-succession theory⁴⁾ and succession-in-principle theory. Courts have consistently recognized the succession-in-principle theory.

Courts have recognized succession of employment when parties to business transfer have so agreed. If there is no explicit such agreement in a business transfer agreement, courts have even presumed that such an agreement has been reached implicitly.⁵⁾ Furthermore, the Supreme Court held that: "If the parties to a business transfer agree on succession of employment in part, the agreement may be valid. However, such agreement is tantamount to a dismissal, it must be based on a "reasonable ground" pursuant to Article 27, Paragraph 1 (Article 30, Paragraph 1 of

3) Under this theory, employment contracts will not be assigned in business transfer unless special provisions to that effect are included in the business transfer agreement, which in turn must be approved by the employees in question as well.

4) This theory makes little distinction between merger and business transfer; it argues that, just as in merger, all rights and obligations of a transferor company, including the employment relations with its employees, must be succeeded "comprehensively and automatically" (*ipso jure*) to a transferee company.

5) Supreme Court Judgment, 91Da15225, dated August 9, 1991.

the current Act) of the Labor Standard Act. Any dismissal relying solely on reasons of business transfer itself lacks a reasonable ground,” affirming its adherence to the succession-in-principle theory.⁶⁾

Most jurists also share a common understanding that, absent any special circumstances, employment may be succeeded in its entirety by the parties’ reasonable interpretation of intention or the interpretation of the provision regarding restriction on dismissal in the Labor Standard Act. Therefore, the issue of employment succession in business transfer seems to be settled.

2. Relations between Succession of Employment and Restriction on Dismissals

However, courts have not yet explained why employment may be succeeded in its entirety when there is no such written rule. The explanation, in my opinion, must draw on the normative demand for curbing any unlawful deviation from the restriction on dismissals prescribed in the Labor Standard Act. Employers are generally tempted to adjust the number of employees during a business transfer, regardless of whether the transfer is conducted to enhance the company’s competitiveness or reorganize the company’s business. If succession of employment is not guaranteed, then employers will use the business transfer as an opportunity to freely remove employees and yet be exempt from the stringent restrictions on managerial dismissal (lay-offs) under the Labor Standard Act. This, certainly, is neither fair nor reasonable.

The purpose of recognizing employment succession in business transfer, by way of restricting dismissal, would be to prevent unlawful evasion from the Labor Standard Act. Thus, the rules regarding employment succession in business transfer are not new restrictions on dismissal, but are merely supplementary to the existing rules. Courts had similarly allowed so-called lay-offs by case law when there was no written rule regarding lay-offs.⁷⁾

6) Supreme Court Judgment, 93Da33173, dated June 28, 1994; Supreme Court Judgment, 91Da15225, dated July 14, 1992; Supreme Court Judgment, 91Da12806, dated November 12.

7) The rule regarding lay-offs at that time was not amended to add lay-off as a reason for dismissal, but was simply a production of specifying then-existing principles. For a detailed explanation, see Lee, Heung-Jae & Lee, Sung-Wook, *Business Transfer and Dismissal Restrictions*, Seoul National University Law Review, vol. 40 no. 3 (1999), 263 pages 263 onwards.

This line of logic will inevitably trigger a question as to whether every employment should always be kept in a business transfer and that whether any dismissal is disallowed in a business transfer. Affirmative answers to these questions will definitely constrain free economic activities of companies. However, succession of employment, ensured by regulating unlawful deviation of dismissals law, simply means that employment relations must not be unilaterally terminated by employers for arbitrary reasons. Employment relations should be succeeded after business transfer because the firm still exists and that the employment is related to the firm. If there is a justifiable reason, for example, circumstances meeting the requirements for a lay-off, exists, employer may refuse the succession of employment and dismiss employees.

B. Merger

In case of a merger, there is no doubt that all employment relations of disappearing company will succeed to the newly established or surviving company. In contrast to the case of a business transfer where there is no written rule provided for, in case of a merger Code Article 235 states: “A company either newly established or surviving after a merger shall succeed the rights and obligations of a company extinguished by the merger.” (also see Articles 530 and 603 of the Code). Jurists and courts mostly agree that rights and obligations regarding employment may succeed to a newly established or surviving company pursuant to this provision.

III. Business Transfer Allowing Succession of Employment

The question of whether employment relations are succeeded in a business transfer is almost settled. Yet, the so-called Sammi Alloyed Steel (hereinafter “Sammi”) case posed a new question regarding a business transfer and employment succession.⁸⁾

8) Judgments on the Sammi Alloyed Steel case are: Seoul High Court Judgment, 97Ku53801, dated January 22, 1999; and Supreme Court Judgment on appeal, 99Du2680, dated July 27, 2001. For commentaries on the Seoul High Court judgment, see Lee, Heung-Jae & Lee, Sung-Wook, *supra* note 7, at pages 254 onwards; Kim, Hyung-Bae & Kim, Young-Mun, *Business Transfer and Succession of Employment*, Court Cases Monthly, vol. 338 (1999), at pages 9 onwards. For commentaries on the Supreme Court judgment, see Lee, Sung-Wook, *Evasion of Dismissal Restrictions by Business Transfer in Labor Law* (Sep. 2001).

The question Sammi case posed is which criteria should be used to determine a business transfer that is subject to the employment succession requirement. In Sammi case, parties to the agreement have explicitly stated that they do not enter into a business transfer agreement but, merely an asset sales agreement and agreed that they rule out any kind of employment succession. But, in reality most assets with few exceptions were transferred and most of the employment was succeeded. The question brought before the court was whether this kind of agreement could be construed as a business transfer allowing succession of employment.

Courts have consistently stated that a “business transfer is a transfer as a whole, for a certain business purpose, of an entity organized in both material and persons while maintaining an identity.”⁹⁾ Material and personal identity must be maintained for employment to be succeeded.

The material and personal identity is determined on the basis of the generally accepted social perceptions and practices and not of the subjective intentions of the employer.¹⁰⁾ Hence, if the identity of business is maintained from the objective point of view, it will be regarded as a case of business transfer with succession of employment. Contracting parties’ intentions to opt out of the employment succession, in this case, will be subject to the restrictions on dismissal under the Labor Standard Act. From the standpoint of labor law, then, the legal requisite of “business transfer” and its legal effect of “succession of employment” must be examined objectively, without any regard to the contracting parties’ subjective intention.

Seoul High Court in Sammi case took a similar position on this issue. As to the general criteria for determining a business transfer, the court stated that “the context of the agreement, the parties’ intention, circumstances before and after the conclusion of the contract, the extent of material and personnel transferred, and all other relevant factors must be taken into consideration comprehensively; the appearance and formality of the agreement should not be the sole determining factor.” Subsequently, the court ruled that, despite the explicit statement in the agreement, the generally accepted social perceptions and practices dictated a finding of business transfer and, therefore, the denial of employment succession was unjustifiable. The Supreme Court,

9) Supreme Court Judgment, 91Da15225, dated August 9, 1991; Supreme Court Judgment, 93Da33173, dated June 28, 1994.; Supreme Court Judgment, 93Da18938, dated November 18, 1994.

10) Supreme Court Judgment, 88DaCa10128, dated December 26, 1989.

however, differed in its finding of fact from the Seoul High Court,¹¹⁾ and consequently refused to characterize the disputed agreement as business transfer. The Supreme Court hence denied succession of employment in Sammi case. But, the judgment should not be interpreted as modification of the comprehensive-succession-of-employment principle in general. The decision does not deny the principle, but rather, deny the existence of a business transfer based on the principle and in consideration of the special circumstances in the case.

IV. The Scope of Succession of Employment

A. Problems Presented

In case of “overall” business transfer, employees rarely refuse succession of their employment. If they refuse, they will eventually be dismissed by their employer who

11) The Supreme Court presented the following ten reasons for its findings. ① Sammi Alloyed Steel (hereinafter “Sammi”) wished to dispose of those unprofitable businesses, and decided to transfer only the assets, because succession of employment would drive away any prospective buyer. ② Sammi notified the union during collective negotiation of the rationale for the selling of assets and of the exclusion of succession of employment, and promised to do their best to guarantee continued employment. ③ POSCO estimated that undertaking of Sammi employees would prove to be an impediment to the rehabilitation of the under-performing businesses; POSCO made it clear during the negotiation that employment would not be succeeded, and that Sammi employees should be informed so. ④ Sammi provided Changwon Alloyed Steel with its employee profiles and information necessary for recruitment, and bore the obligation to terminate then-existing employment relations with those employees to be newly employed by Changwon Alloyed Steel. As for the other employees, Sammi promised their continued employment in Sammi . ⑤ Changwon Alloyed Steel recruited 60.6% of Sammi employees, and after a three-month period of training, relocated them according to Changwon Alloyed Steel’s own system of position, salary and work hours. The personal composition of Sammi was thus dissolved and then reorganized in accordance with the standards and staffing policies of POSCO affiliates. ⑥ The knowledge and technology required in producing alloyed steel were already standardized, and technical personnel available in the parent company, POSCO, were of sufficient number; Changwon Alloyed Steel did not need to newly recruit Sammi employees, but did so nonetheless out of comity. ⑦ Even though Changwon Alloyed Steel continues its production of alloyed steel, it has established long-term plans to close down its rod-steel sector and to concentrate on different items; it decreased the total production of rod-steel from 59.8% in 1996 to 11.3% in September, 1998 and improved the quality. ⑧ Changwon Alloyed Steel has not been assigned any claims or debts of Sammi. ⑨ Changwon Alloyed Steel has not undertaken any contractual responsibility of Sammi Alloyed Steel towards its trading partners and maintained only 29% of the raw material suppliers and 10% of the buyers, Changwon Alloyed Steel opened up new trade relationships with new partners. ⑩ Changwon Alloyed Steel has not purchased intangible assets of Sammi such as its trademark, business orders, and business secrets.

has discontinued all of his or her business. The scope of succession of employment in case of overall business transfer includes all employees, which poses few legal problems.

However, a different scope may be applicable in case of a partial business transfer or division of a company (Code Articles 530-2 and thereafter). First, this article examines the question of whether employment in this case should be succeeded. Employment will be succeeded comprehensively in a partial business transfer¹²⁾ I think a partial business transfer poses little difference from overall business measured by quality, although it is different from overall business transfer measured by quantity. There are neither codified rules nor court decisions on the question of succession of employment regarding a division of a company. Because division of a company is essentially similar in nature to a merger or business transfer, employment succession in a division of a company would be handled comparable to the cases in a merger or business transfer. Thus, employment is believed to be comprehensively succeeded.

Although comprehensive employment succession may be allowed in a partial business transfer or division of a company, the scope of employment to be succeeded will still be restricted because, unlike merger or overall business transfer, only a certain segment of business is transferred in a partial business transfer. This “partial” comprehensive succession presents two further questions: one is about the scope of the succession and the other regards those employees who do not want their employment to be succeeded.

B. The Scope of Succession of Employment

In case of partial business transfer or division of a company, the succession of employment is restricted to those employees engaged in the specified business segments subject to the transfer or division. If a business transfer agreement, division plan or division-consolidation agreement (hereinafter “Division Plans”) states the scope of employment to be succeeded, the scope of employment is in principle determined according to the Division Plans. If the Division Plans include those

12) Supreme Court Judgment, 93Da18938, dated November 18, 1994; Supreme Court Judgment, 90Da16801, dated May 28, 1991; Supreme Court Judgment 91Da12806, dated November 12, 1991; Supreme Court Judgment, 91Da40276, dated July 14, 1992, etc.

employees who are not mainly engaged in the business segments to be transferred as those subject to the employment succession, a question arises as to whether the employment should be succeeded accordingly.

An affirmative answer to this question will result in unilateral modification of the employment agreement. Inclusion in a business transfer of those employees who are not mainly engaged in the separating business segment is equivalent to issuing moving-out orders¹³⁾ to employees. In this case consent of the concerned employees is required pursuant to the general moving-out order principle.

On the other hand, absence of the scope of employment succession provision in the Division Plans poses a question of how to determine the scope. Contracting parties need not include in the Division Plans a reference to the transfer of employment because the Code does not require that the Division Plans include a reference to the transfer of employment (see Code Articles 530-5 and 530-6). Thus, when contracting parties fail to make a reference to the transfer of employment in the Division Plans, only those employees who are mainly engaged in the separating business segments are supposed to be subject to the succession of employment. As examined before, rules regarding employment succession in a business change are supplementary to the rules restricting dismissal and this logic of law should be applied in case of division of a company.

What still remains unclear is the issue regarding the employment transfer of those employees who work for different departments at different times as needed and those employees working in the general administrative, personnel or data-processing departments because it is not clear whether or not these people belong to the department subject to the transfer. There can be a number of opinions regarding this issue that: the employers can freely choose: succession of employment should be presumed when unclear; or employment succession will be established where the basic employment relations after business transfer are created. In light of the comprehensive succession principle which would ensure continued employment, it is the employer and not the employee who is obligated to continue the employment relations.

13) A "moving-out" means that an employee moves his or her employment from one company to another and that he or she is newly employed by the latter. Following a successful "moving-out" order, the employment agreement with the first company will be terminated and a new employment agreement with the latter company will take effect. But, two factors of moving-out required for a successful moving-out, termination of the existing employment agreement and execution of a new one, require valid and voluntary consent of the employee. Thus, if an employee is ordered to move-

Consequently, I think the employees must be allowed to choose their place of work.

C. Employees Wishing to Opt out of the Succession

In case of an overall business transfer or a merger where one of the firms disappears completely, employees refusing succession of their employment may hardly be found. But, certain employees may refuse succession of their employment in a partial business transfer or division of a company. Employees may refuse succession of their employment or object to the division of a company or partial business transfer in cases where the division of a company or partial business transfer is used to divide a strong labor union of a large company; to enter into a new business with uncertain prospect; or to liquidate under-performing business segments.

In cases of partial business transfer, courts have found the employment relations of such disagreeing employees still effective with the transferor company.¹⁴⁾ There will then be a surplus of employees on the part of the transferor. If reduction of employees and lay-off are justified under the Labor Standard Act, the transferor company may lay off those employees who have refused succession of their employment and remained in the company.¹⁵⁾

V. Contents of Succeeded Employment

A. Basic Position

The principle of comprehensive employment succession ensures the transfer to transferee of the employee's status based on the Labor Standard Act. However, we need to further examine whether the content of the employment relations will be transferred in its entirety.

Recognition of comprehensive employment succession by courts and jurists in business transfer, when other rights and obligations of a transferor company are succeeded only on a specific succession basis pursuant to the relevant provisions under

out, he or she may decide whether or not to consent.

14) Supreme Court Judgment, 98Da11437, dated October 13, 2000.

15) Supreme Court Judgment, 98Da11437, dated October 13, 2000.

the Code, has a significant bearing on this issue. If specific transfer is interpreted to take effect regarding employment relations like other regulations regarding business transfer pursuant to the Code, the status based on the employment agreement in a business transfer may be comprehensively transferred. However, the content of the employment agreement would be transferred by individual agreement.

This will allow employers to unilaterally modify working conditions, resulting in the destruction of existing labor law orders. That is why in determining the content of an employment agreement to be succeeded, an overall evaluation of the relevant legal systems, not merely the principle of specific succession, is required. Effect of business transfer upon employment relations should be judged in connection with rules regarding working condition restrictions as well as the rules regarding restriction on dismissals. Succession of employment in business transfer, then, should be understood as ensuring specific content of the employment agreement as well as the continuance of the employment relations.

B. Succession of Work Rules

With respect to succession of work rules, the following questions may be posed. First, will succession of work rules be recognized in a business transfer? If so, this would result in multiple sets of work rules within a transferee company, and working conditions for previous employees and newly succeeded employees of the transferee company would be different. Such disparity in working conditions among employees presents possible violations of Article 5 of the Labor Standard Act, which ensures equal treatment of employees and Article 34, Paragraph 2 of the Labor Standard Act, which prohibits establishing different standards for severance payments. Finally, if the transferee company unilaterally attempts to modify specific work rules in an adverse manner, evaluation of whether it is “reasonably accepted by society” should be conducted.

1. Content of Succeeded Work Rules

Courts and jurists generally recognized that in the event of merger or business transfer the work rules are transferred to a transferee company or a surviving company in the merger.¹⁶⁾ A transferee company is obliged to apply succeeded work rules to succeeded employees. Comprehensive succession of employment protects previous

status of the succeeded employees. Thus, if succeeded severance payment standard is more advantageous for employees than the existing standard of the transferee company, then the company may not, unless it has obtained collective consent of the group of the employees pursuant to Article 93, Paragraph 1 of the Labor Standard Act, apply its existing severance payment standard to the newly succeeded employees. This is the position affirmed by the court¹⁷⁾ and seems proper.

2. Equal Treatment and Succession of Work Rules

The equal treatment principle does not prohibit every form of discrimination in working conditions, but prohibits only those that are unreasonable and unfair. Existence of multiple sets of work rules as a consequence of business transfer or merger is rarely premeditated by the transferee company and, thus, it does not seem to violate the principle of equal treatment (Article 5 of the Labor Standard Act) or the principle of prohibition in discriminating severance payment standards (Article 34, Paragraph 2 of the Labor Standard Act).¹⁸⁾ Maintaining separate work rules long after a business transfer or a merger, however, might violate the equal treatment principle, if the substance and nature of the work among employees are the same.

3. Modification of Work Rules to Unify Working Conditions

Finally, the question of whether an employer may unilaterally modify work rules to avoid existence of different sets of work rules may arise. Hearing employees' opinion pursuant to Article 97, Paragraph 1 of the Labor Standard Act will suffice in the case of modification favorable to employees. But, for adverse modification, the employer must obtain consent of employees' group (Article 97, Paragraph 1, Note). The courts, however, will allow work rules to be adversely modified without consent, provided it

16) For business transfer, *see* Supreme Court Judgment, 97Da17575, dated December 26, 1997 and Supreme Court Judgment, 95Da41659, dated December 26, 1995. For merger, *see* Supreme Court Judgment, 93Da1589, dated March 8, 1994.

17) *See* Supreme Court Judgment, 97Da17575, dated December 26, 1997; Supreme Court Judgment, 95Da41659, dated December 26, 1995; Supreme Court Judgment, 93Da1589, dated March 8, 1994.

18) Supreme Court Judgment, 97Da17575, dated December 26, 1997.

is reasonably accepted by society.¹⁹⁾

The notion of “acceptable reasonableness,” according to courts’ interpretation, takes into account all circumstances relevant to the matter, for example, the degree of disadvantage incurred by employees, necessity of such modification, specific details of the modification and other improvements in working conditions. Therefore, unilateral adverse changes against employees in the work rules by the employer can be effective only when it is fair and reasonable in view of the economic necessity of changes for employer and the extent and nature of disadvantages for employees.²⁰⁾ In light of this general criterion for reasonableness, mere difficulty in personnel management may not justify unilateral and adverse modification of work rules. Consent of the employee group is required in such cases.

As for the consent of employee group, opinions differ on this matter. One interpretation is that it would be the group of only succeeded employees. The other interpretation would be that it would be the entire employees, including the employees of the transferee company. There has been no court decision directly relevant to this issue. The Ministry of Labor in its practice manual, however, has defined it as the group of only the succeeded employees, that is, the group of employees who may be adversely affected by the modification. If the employees’ union of the transferee company represents the majority of the entire employees, then the Ministry of Labor requires the employer to hear the opinion of the union, pursuant to Article 97, Paragraph 1 of the Labor Standard Act, although the employees of the transferee company may not be adversely affected.

19) Supreme Court Judgment, 99Da70846, dated January 15, 2001; Supreme Court Judgment, 93Da14493, dated May 24, 1994; Supreme Court Judgment, 92Da39778, dated January 15, 1993, etc.

20) If certain working conditions become unfavorable while the general level of working conditions are improved and the content, procedure and method of modification are reasonable, the modification could be regarded as “acceptably reasonable by society.”(See Supreme Court Judgment, 99Da70846, dated January 15, 2001).

VI. Issues in Collective Labor Relations

A. *Status of Labor Union*

A question arises as to whether a labor union may be succeeded following a business transfer or merger. In contrast to the unions in the western countries, the dominant form of labor union in Korea is an enterprise union, which normally shares its fate with the company. For this reason, this question is posed when employment relations are comprehensively succeeded. However, establishing multiple unions within a single enterprise will be prohibited until December 31, 2006 (Article 5 of Appendix under the Labor Union and Settlement of Labor Relations Act (hereinafter, the “Labor Union Act”). If succession of union in a transferee company is allowed and the transferee company already has a union, then, a potential problem of multiple unions might arise.

1. Recognition of the Status of Union

The Supreme Court has not yet dealt with this issue. But, lower courts have found: “In a business transfer, in principle employment relations are transferred to the transferee company. Just as in merger, business transfer means a change of the business operator. In light of that the employment relations are merely the objectives of a business transfer and that employees may not be involved in the business transfer, employment relations succeeded to the transferee company should include not only the individual relations between each employee and the employer, but also the collective relations between employees and the employer; an existing labor union should not be affected by a business transfer and continue to exist in a transferee company.”²¹⁾ Jurists generally agree that a labor union itself will not be affected.

Enterprise unions, the most prevalent form of union in Korea, are usually composed of employees only and they are inevitably related to the company itself. Yet, union is an entity legally separate from business enterprise and is not a business component; unless Article 28 of the Labor Union Act (Requirements for Dissolution

21) Judgment of Seoul District Court, South Region Office, 98KaDan28156, dated November 24, 1998.

of Union) provides business change or termination of business as permissible causes of dissolution of union, business transfer may not have any influence on the organization of the union. This view makes more sense when compared with the case of an industrial union. Survival of a labor union relies on a transferee company after a merger or a business transfer.

2. Prohibition of Multiple Unions

The type of multiple unions prohibited under Article 5 of Appendix to the Labor Union Act is limited to those who may “potentially share members.” If transferor company’s union is assumed to be succeeded to a transferee company and a union already exists in the transferee company, then it might conflict with the Article. Before examining this issue, one must be aware that after the transfer the transferee company may run the company in two manners. That is, (1) even though company A has bought company B, company B may be run independently and (2) company A buys company B and incorporates it into company A.

In case of (1), there is not, in the first place, any problem of “overlapping union members.” It is simply a case where there are two business segments running within a single company. In this case, there are two separate unions who have their own members without overlapping from the other. Thus, if existing business were operated independently after merger or business transfer, there would be no violation under Article 5.

In case of (2), human and material resources of the two organizations are combined and the two organizations lose their independence. Therefore, the issue as to whether it violates Article 5 arises.

There have been no court decisions on this issue. However, the general view is that there is no violation of Article 5 in this case.

Current Labor Union Act, unlike its predecessor, has repealed its restriction on establishment of unions that have the same potential members as the existing union, although establishment of such unions is “exceptionally and tentatively” prohibited until December 31, 2006, as provided as an exception in the Appendix. Article 5 restricts the constitutional right of association and, therefore, should be interpreted rigorously. Furthermore, it may be appropriate to believe that the Article prohibits multiple unions caused by establishing a new union and do not prohibit multiple

unions caused by the continuance of an existing union. Therefore, multiple unions following a business change is always permitted without exception.

B. Succession of Collective Agreement

In case of a merger, it is generally agreed that collective agreements are succeeded to a surviving company. In case of business transfer, collective agreements would be succeeded according to the majority opinion in legal academia.

Previously the Supreme Court had not directly addressed this issue. Only in its obiter dictum has the Court once expressed its view on the issue: "In case of business transfer where employees are succeeded in their entirety, collective agreements would be provisionally succeeded and maintained."²²⁾ But recently the Court has manifestly recognized succession of collective agreements in business transfer.²³⁾

Individual and collective labor relations should be examined in conjunction with each other. In practice, work rules and collective agreements often operate together. If only contracting relationship regarding employment, including employment agreements and work rules, are allowed to be transferred, and that individual employment agreements use certain provision contained in collective agreements which have not been succeeded, then the work rules would be defective and cause confusion in labor relations. Thus, the issue of collective and individual employment relations succession should be handled together and in connection with the issue of employment relations succession and labor union status maintenance. In conclusion, I think collective agreements in a merger or business transfer should be transferred.

VII. Conclusion

This article has discussed basic labor law issues that might arise from business change. Business changes known in Korea as M&A which began to take place following the financial crisis in late 1997 present a number of questions in the areas of labor law as well as tax and securities transactions law. These issues arise from the area where commercial law intersects labor law. These issues also arise from factual causes

22) Supreme Court Judgment, 88Nu4508, dated May 23, 1989.

23) Supreme Court Judgment, 2000Da3347, dated March 26, 2002.1

because there may be: multiple parties involved; overlapping employers; and conflict of interest among employees. The most desirable solution to these problems is enacting new laws to regulate employment relations in business change.

Enactment, of course, may not resolve every issue. Conflicts may still remain concerning interpretation of law as in Europe where there is written law regarding business change. However, if there is written law, problems concerning interpretation of law would reduce to some extent. Until then, interpretation based on a framework retained by existing principles of labor law and supplemented where necessary, should be relied. Development in interpretation may be of assistance in enactment.

The ultimate solution to the legal issues involving business change and employment relations is to enact a special act. In this case, enacting the Employment Transfer Act, rather than amending the Labor Standard Act which regulates individual employment relations because business changes involve issues collective employment relations as well as individual employment relations.