



LITIGATION IN KOREA

Edited by Kuk Cho



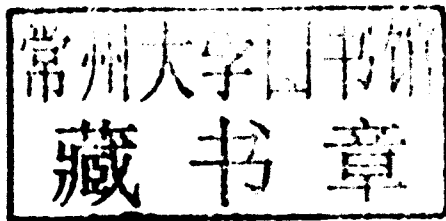
ELGAR KOREAN LAW

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Edited by

Kuk Cho

School of Law, Seoul National University, Korea



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Edward Elgar

Cheltenham, UK • Northampton, MA, USA

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Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book is available from the British Library

Library of Congress Control Number: 2009938400



Mixed Sources

Product group from well-managed
forests and other controlled sources
www.fsc.org Cert no. SA-COC-1565
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ISBN 978 1 84844 339 6

Typeset by Cambrian Typesetters, Camberley, Surrey
Printed and bound by MPG Books Group, UK

Litigation in Korea

ELGAR KOREAN LAW

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In the dramatic transformation Korean society has experienced for the past 40 years, law has played a pivotal role. However, not much information about Korean law and legal system is readily available in English. The *Elgar Korean Law* series fills this gap by providing authoritative and in-depth knowledge on trade law and regulation, litigation, and law and society in Korea. The series will be an indispensable source of legal information and insight on Korean law for academics, students and practitioners.

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Preface

The nationwide 'June Struggle' of 1987 led to the collapse of Korea's authoritarian-military regime and opened a road toward democratization. Korea has achieved political democracy following rapid economic growth. These changes were accompanied by the change of law and legal system.

Since 1987, the rule of law has rapidly replaced the rule of man and the procedural democracy has been taken seriously in Korea. Throughout the democratization process of the nation, litigation has played a crucial role as an instrument to solve most challenging civic and social conflicts with much greater and multifaceted ramifications in the nation's political, constitutional, societal and cultural domains.

The legal structure and the adjudicatory institutions surrounding litigation have been also reconstructed. For example, Korea's Code of Civil Procedure has been revised and its focus has shifted from the written dossiers to the oral elements of the litigation including oral testimony in a concentrated, continuous and uninterrupted trial that is open to the public as a matter of principle, for further openness and transparency. The Code of Criminal Procedure has been substantially reshuffled particularly in the field of procedural rights and evidence law. A jury system was recently introduced for the first time in the nation's legal history in serious felony cases in 2008. The Constitutional Court, which was established by the 1987 Constitution, has vigorously reviewed the constitutionality of legislation by the nation's legislative body, the National Assembly. The Administrative Court, which was newly established in 1994, has actively checked administrative discretions for possible abuses thereof.

There has been a longstanding demand both domestically and overseas for a publication on this subject in the English language, from scholars and students, governments and lawyers. This book is the first publication in the English language that provides a comprehensive picture of litigation in Korea and the relevant laws, institutional designs, judicial institutions and some of the important court decisions. The authors of this book are selected from among promising legal scholars and judges in Korea who have gained their legal education in the Anglo-American traditions. I am grateful to them for their unfailing cooperation. I should like to express my particular thanks to Professor In Seop Chung of the School of Law, Seoul National University. When he was a director of the Law Research Institute, Seoul National

University, he first suggested the publication of this book and has been supportive and encouraging. The *Journal of Korean Law*, which is published by the School of Law, Seoul National University, has kindly allowed me to include the authors' articles in this book.

Kuk Cho
July 2009

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1. Litigating in Korea: a general overview of Korean civil procedure

Youngjoon Kwon

I. INTRODUCTION

In the aftermath of the Korean War that literally devastated the whole nation a half century ago, the Republic of Korea miraculously grew up from one of the poorest nations into the 13th economy in GDP as of 2007. Along with an established industrial economy, Korea has also changed dramatically during the last few decades in the political environment, broadening and deepening its democracy. These political and economic infrastructures laid a solid cornerstone for the rule of law. Drawing on the experiences of other nations and creatively adapting these lessons in its own context, the Korean legal system has also been developing into a firm and sound one. Consequently, the Korean judiciary is gradually increasing its scope of influence in response to the enhanced demand of the people calling for a more reasonable and fair society.

With regard to dispute resolution, the rule of law seems to play an even more significant role. In the past, based on the Confucian heritage,¹ a great number of disputes were settled by *de facto*, informal mediators like elder members of the community or family without making their way to the court.² Yet, with western cultures and thoughts gradually gaining ground in Korean society and a modern legal system standing firm as a central mechanism of dispute resolution, more and more disputes are resolved by law, instead of informal reconciliation. Individuals are showing more willingness to bring their civil disputes to the court. This, in turn results in a tremendous increase in caseload.³ Accordingly, the body of law governing civil dispute resolution

¹ Nam Hyeon Kim, Jaes A. Wall, Jr, Dong-Won Sohn and Jay. S. Kim (1993), *Community and Industrial Mediation in South Korea*, 37 J. Conflict Resol. 361.

² Lisa Blomgren Bingham, Sun Woo Lee and Won Kyung Chang (2007), *Participatory Governance in South Korea: Legal Infrastructure, Economic Development, and Dispute Resolution*, 19 Pac. McGeorge Global Bus. and Dev. L.J. 375, 381–2.

³ The total number of civil cases filed in 2002 was 1,015,894. It increased to 1,288,987 in 2006. See www.scourt.go.kr/scourt_en/jdc_info for more information.

is becoming even more significant. Arguably, the Korean Civil Procedure Act is the most fundamental and essential field of law in the realm of dispute resolution.

However, it is quite shocking to realize the rarity of the relevant legal literatures in English that offer a general explanation on how Korean civil procedure functions.⁴ Therefore, it is pertinent that Korean civil procedure be introduced and analyzed in the language people outside the nation can understand. As one might predict at this point, this chapter intends to be an initial point of reference for foreigners embarking on study or research of Korean civil procedure law, by providing a general overview. Therefore, this chapter will rather focus on giving readers a general picture of civil litigation based on Korean civil procedure, rather than delving into specific and sophisticated legal issues. Besides outlining the general proceedings of litigation and clarifying their theoretical basis, this chapter also provides some observations as to the practical aspects of civil procedure in order to give readers some sense of how litigations in Korea are performed in practice.

With this in mind, this chapter is structured as follows. Part II describes the basic features of the Korean Civil Procedure Act, including its history, guiding principles, and structure. Part III explains the critical concepts and relevant issues regarding the initial stage of litigation, such as a complaint, parties, jurisdictions and legal costs. Parts IV and V deal with pre-trial and trial proceedings. Important issues concerning pleading and evidence will be elaborated on. Part VI outlines the final stage of litigation as well as other issues to be followed afterwards. It illustrates how judgments are rendered, what effects they take, and how one can challenge them. Part VII deals with issues of settlement, enforcement and the recognition of a foreign judgment. Finally, Part VIII concludes the chapter with a summary, and adds a short prediction on how Korean civil procedure will in the near future serve the ideals it declares.

⁴ *Korean Law in the Global Economy* (1996), edited by Song, Sanghyun, a former professor at the college of law, Seoul National University, and currently judge of International Criminal Court, is by far the most comprehensive literature to feature Korean law for English readers. In this book, several articles are devoted to civil procedure related subjects, such as a small claims act, or a commercial arbitration. However, it is not easy to find out an English text that provides a comprehensive, bird's-eye view of Korean civil procedure.

II. BASIC FEATURES OF THE KOREAN CIVIL PROCEDURE ACT

1. History

A. Pre-modern era

Korean history dates back to B.C. 2333, when the first state, Kojoseon, was established. The judicial tradition of Korea is as old as this, for Kojoseon had its own statutory law.⁵ Ever since, Korea has developed its own judicial system. During the Chosun dynasty that lasted until 1910, it was governmental officials who were in charge of adjudicating civil law suits. The distinction between civil and criminal procedure was not clear-cut. Appeals were allowed, and the case could go as high as to the King. There were no full-time judges, not to mention a separate judicial branch. It was not until 1894 that the first modern system separating the judiciary from other branches of the state was initially introduced, when King Kojong introduced the 14 Articles of Hongbum. Based on this, the first court in a modern context was established in Seoul in 1895.

B. Japanese colonization period

In the wake of imperialism's grip over the world, Japan forcefully annexed Korea in 1910. This colonization period lasted until 1945, the year the Second World War was put to an end. During this period, Japanese laws were in force according to a Japanese government decree. Since the Japanese legal system was strongly rooted in the continental civil law system, Korea was also influenced by this tradition. Thus, the Korean civil procedure is said to be based on the continental law system as well.

Civil procedure law was no exception to this. From the perspective of comparative law, the Japanese civil procedure code was influenced by the German civil procedure Act of 1877. This inevitably left indelible footprints on the Korean civil procedure law. It is no wonder that a substantial portion of legal academia on civil procedure still consults German literature when handling domestic issues.

C. The enactment of the Korean Civil Procedure Act

After regaining independence from Japan in 1945, the law of the former occupying country needed to be replaced with a new one. The Constitution of the

⁵ This law consists of eight articles. Only three articles are available at present. They are about capital punishment for murder, compensation with grains for personal injury, and the enslavement of thieves.

Republic of Korea was promulgated on 17 July 1948. Shortly after, a newly formed commission began to work on drafting various Acts including a civil procedure Act. After many twists and turns, the Korean Civil Procedure Act (hereinafter 'the KCPA') was first enacted as of 1 July 1960. Japanese civil procedure law had to remain tentatively in force until the enactment of the new code. Since the enactment of the KCPA, it has been amended 14 times. The most dramatic reform in the civil procedure was made in the year 2002, emphasizing the pre-trial phase and the concentration of the trial for the sake of efficiency as well as separating the civil execution part from the code.

The KCPA is the most significant body of law that primarily governs the civil procedure in Korea.⁶ The Rules of Civil Procedure (hereinafter 'the RCP') has been promulgated by the Supreme Court of Korea, and serves as supplemental rules to the KCPA. As mentioned above, the Civil Execution Act has been enacted as of 2002 to govern the area of enforcement. Procedures regarding family litigation are regulated by the Family Litigation Act. Likewise, bankruptcy and restructuring proceedings are governed by the Bankruptcy and Rehabilitation Act.

2. Guiding Principles

As Article 1 of the KCPA puts it, the court should strive to enhance fairness, swiftness and efficiency in civil proceedings. This summarizes the guiding principles that permeate the whole process.

A. Fairness

Fairness is the essence of civil procedure. To find out the truth in a just way is the ultimate purpose of the procedure. It is no exaggeration to say that nearly every provision incorporated in the KCPA is directed at attaining fairness.

Substantive fairness – finding out the truth and drawing a just conclusion – is the first type of fairness to be achieved in the civil procedure. To make this goal feasible, parties are allowed to submit every possible argument and evidence to clarify the facts. Moreover, the law obliges the court to acquire information from parties firsthand (Article 204).⁷ Whenever it is necessary to clarify facts or the point of pleading, a presiding judge may take suitable measures such as asking questions or urging parties to clarify obscure things (Article 136). Appeals are another means by which true fact-finding and a just conclusion can be secured.

⁶ The full text of the KCPA in English can be found on the official website of the Korea Legislation Research Institute at www.klri.re.kr.

⁷ Unless otherwise stated, the article numbers refer to those in the KCPA.

Procedural fairness – observing neutrality and treating parties equally – is another type of fairness to be considered. The principal objective of procedure law is to give parties an equal and fair opportunity to present their cases to a non-prejudiced tribunal. In this context, Korean civil procedure is based on an adversarial model, as opposed to an inquisitorial model. The parties play a primary role in the process, while the judge plays only a passive role. The court should stay neutral and is not allowed to step in and side with one of the parties. It is also a procedural reflection of self-determination. It is the party who determines the beginning, subject-matter, and the termination of the proceedings. It is also the party who presents facts and submits relevant evidence. Parties should be given the same degree of protection and access to the process.

There is delicacy between these two notions of fairness. Tipping toward procedural fairness might harm the goal of finding out truth, especially when a party is not capable enough to perform procedural acts properly by himself. Tipping toward substantial fairness might be helpful in drawing a right conclusion, but might endanger procedural fairness when the court aggressively intervenes in the proceedings to reach what it considers a right conclusion. The KCPA Article 136, the clause that provides a basis for the intervention of the court to clarify pleadings by parties as well as setting forth its limitation, is a sort of an equilibrium balancing these two values.

B. Swiftmess and efficiency

Justice delayed is justice denied. Article 27 of the Constitution of Korea clearly declares that citizens shall have the right to a speedy trial. This idea is implemented throughout civil procedure. Parties bear responsibility of timely presentation of pleadings (Article 146). Failure to make pleadings or appear on the date of pleadings may result in disadvantageous treatments (Articles 146, 150, 268). The KCPA also prescribes a certain period for the rendering of the judgment (Article 199).⁸

Efficiency is another value to be pursued. Although efficiency sometimes needs to be balanced against fairness, reducing the administrative cost of adjudication is arguably one of the most significant ideals to be pursued. The most notable feature of Korean civil procedure in the context of efficiency is the Small Claims Trial Act, which features an expeditious and convenient process.⁹ This process was first introduced in 1973, mainly to remove the

⁸ It provides that judgment shall be rendered within five months from the date of the file. However, this is construed as a recommendatory provision.

⁹ Small claims cases are cases in which the plaintiff claims payment of money, fungibles, or securities not exceeding 20 million Korean won (equivalent to approximately 19,800 U.S. dollars, as of 15 July 2008).

delays, complexities and costliness of regular trials by providing people with an accessible, simple, speedy and inexpensive mechanism for minor dispute resolutions.¹⁰ In a small claims trial, the plaintiff can institute an action by making an oral statement to the court clerk instead of filing a written petition to the court. Once it is filed, the court may first render a decision recommending the defendant to perform her obligation based on the complaint, without waiting for the response of the defendant. If the defendant does not want to accept the recommendation as it is, she may raise an objection to the decision. Practically speaking, a great portion of small claims cases are resolved at the stage of recommendation. A restriction on the legal representative is eased, allowing persons in certain family relations with the party to represent her without the permission of the court. Evidence rules are less stringent. Although the judge must give a written judgment at the end of a hearing, she is not required to state the reasons in writing. The grounds for final appeal are strictly limited. Also worth noting are the amendments of the KCPA in 2002, focusing on streamlining the whole process. The new case management model which has been introduced by the amendment focuses on enhancing efficiency by requiring timely measures by the party at each phase of the proceedings and minimizing the number of hearing dates supported by substantial pre-trial pleadings.

3. Judicial System

Indispensable to an understanding of a civil procedure is familiarity with the judicial system in which the civil procedure fits. Below are the basic features of the Korean judicial system, focusing on a court system and judges.¹¹

A. Court system

According to Article 101 of the Constitution of Korea, courts are endowed with power to adjudicate all legal disputes.¹² To perform this mission, the

¹⁰ See Ogon Kwon (1996), Small Claims Courts in Korea and the U.S.; A Comparative Analysis, in Sanghyun Song (ed.), *Korean Law in the Global Economy*, p. 451.

¹¹ Comprehensive information on the Korean judicial system can be found at www.scourt.go.kr, the official website of the Supreme Court of Korea, as well as www.court.go.kr, the official website of the Constitutional Court of Korea. Also see Young-Hee Kim (2002), Introduction to Korean Legal Materials, 2 *Journal of Korean Law* 1, 125, for more information on research sources of Korean law in English.

¹² However, there are some exceptions as well. The power and authority to adjudicate on the constitutional issues lie with the Constitutional Court. The Constitutional Court deals with cases concerning the constitutionality of a law, impeachment, dissolution of a political party, competence disputes between state agencies, between state

Court Organization Act of Korea sets forth the basic structure of the court system. According to this Act, the courts operate in a three-tier system.

At the root level is the district court. Currently, there are 13 district courts nationwide, each of which represents their respective geographical area. Branch courts, family branch courts, and municipal courts are established under the district courts upon necessity. Family courts and administrative courts are also on the level of District Courts. District courts are the courts of first instance, exercising general original jurisdiction. In principle, a single judge presides over a case. However, a panel of three judges is in charge of cases when the sums in dispute exceed 100 million Korean won¹³ or if the money involved is incalculable.

At the appellate level is the High Court. The high court serves as the court of appeal. Five high courts are located in major cities of Korea – Seoul, Busan, Daegu, Gwangju and Daejeon.¹⁴ However, it should be noted that high courts are not the only appellate courts in the Korean system. The High Courts hear all the appeals from judgments by a panel of three judges, and the appeals from judgments by a single judge when the amount in dispute exceeds 50 million Korean won. Yet appeals from other judgments that have been rendered by a single judge will be heard by an appellate panel in district courts. In this sense, appellate jurisdiction in civil cases is divided among high courts and district courts.

At the highest level is the Supreme Court. It serves as the court of last resort. The Supreme Court is comprised of 13 Justices, including the Chief Justice. This court hears appeals from the High Courts and the Patent Court. It also hears appeals from District Courts or Family Courts when they adjudicate as courts of appeals. The grounds for appeal to the Supreme Court are limited by the law.¹⁵ If the appeal does not contain the cause enumerated by law, the

agencies and local governments, and between local governments; and constitutional complaints. For details, refer to the official constitutional court website at www.ccourt.go.kr. Another exception can be found in article 64, which vests the power to examine the qualification and/or to take disciplinary measures against lawmakers in the national assembly.

¹³ This equals approximately 99,010 U.S. dollars as of 15 July 2008. There is an exception to this rule as well. Cases involving claims for payment of checks or bills, or the claim for repayment of loans by financial institutions will be presided over by a single judge regardless of the amount in dispute.

¹⁴ The Patent Court was newly established on 1 March 1998. The major function of this court is to deal with appeals against the decision of Korean Intellectual Property Office (KIPO) with regard to the intellectual property related cases (patent, utility model, design or trademark. Copyright is not handled by KIPO). It's position is on the level of a high court. Currently, it is located in Daejeon.

¹⁵ According to the KCPA Article 423, violation of the Constitution, Acts, administrative decrees, or regulations are grounds for appeal to the Supreme Court.