less than KRW 1 billion (hereinafter referred to as the "Small-Scale Corporation") and established with an Incorporation only by Promoters, the AOI shall come into effect after all promoters writes their names and affixes their seals, or sign thereon (§292). This exception will reduce the cost of incorporation for Small-Scale Corporations by removing the requirement for AOI to be notarized by a notary public. However, case law held that an amendment to the AOI after incorporation shall be effective at the time when the amendment is made with the Special Resolution in a meeting of shareholders, irrespective of whether the amendment to the AOI is registered with or authenticated by a notary public.[50]

[3] Keeping, Public Notice and Inspection of the AOI

The directors of the stock corporation shall keep the AOI at the head office and any branch office respectively, and any shareholder or creditor of the corporation may request, any time during business hours, to inspect or take copies from the AOI (§396).

When a shareholder or creditor of the corporation may request to inspect or take copies from the AOI, the corporation shall accept such request unless there are special circumstances, for example when such request could not be justified. In this case, the corporation shall bear the burden of proof that such request could not be justified.[51]

[B] Determination of Matters Concerning the Issuance of Shares

Unless otherwise provided in the AOI, the following matters concerning the shares to be issued at the incorporation of a stock corporation shall be determined by the unanimous consent of promoters (§291):

(1) Class and number of shares (subparagraph 1 of §291)[52];
(2) In cases where the corporation issues shares at a price exceeding the par value, the number and price of such shares (subparagraph 2 of §291)[53]; and
(3) In case a stock corporation issues shares without par value, the issuing price of such shares and the amount to be contributed to the paid-in capital out of the issuing price (subparagraph 3 of §291).[54]

50. Supreme Court 2006*Da*62362(28 June 2007).
51. Supreme Court 2008*Da*37193(22 July 2010) and Supreme Court 97*Geu*7(19 March 1997).
52. For example, promoters may determine that 200 common shares and 100 preferred shares are issued at the incorporation of a stock corporation where common shares, preferred shares, shares without voting rights, convertible shares and/or redeemable shares may be issued under its AOI.
53. For example, promoters may determine that 3,000 common shares are issued and the issuing price is KRW 20,000 per share at the incorporation of a stock corporation where the Authorized Capital Shares of common shares is 20,000 and a par value of each share is KRW 10,000 under its AOI.
54. For example, promoters may determine that KRW 10 million is contributed to the paid-in capital of a stock corporation where the issuing price of 200 shares without par value is KRW 20 million at its corporation.

The matters mentioned above when they refer to a new issuance of shares after the incorporation shall, in principle, be determined by the BOD. However, at the time of incorporation, unless otherwise prescribed in the AOI, such matters shall be determined by the unanimous consent of promoters considering that it is important for promoters to determine the initial paid-in capital as the first step of incorporation.

[C] Determination on the Incorporation Only by Promoters or the Incorporation by Subscription

Based on the reason mentioned right above, promoters shall determine with unanimous consent which procedure should be followed, namely the Incorporation only by Promoters or the Incorporation by Subscription.

[D] Subscription of Shares by Promoters

Promoters shall subscribe to their shares a number of which they decide to subscribe to at the time of incorporation, in writing (§293, §295 (1)).[55] This subscription of shares by promoters with a written document serves the purpose not only of specifying the number of shares for which each promoter is subscribed but also determining a capital as the basis of the stock corporation in which the unity of assets is considered more material than the unity of members.

Because each promoter shall write its name and affix its seal, or sign on a document for the subscription of shares, it is my view that the unanimous consent of promoters is required in order for them to subscribe for shares. With respect to the legal nature of share subscription by promoters, because there is no need for differentiation between the subscription by promoters or third parties in both the Incorporation only by Promoters and the Incorporation by Subscription, it is my view that the legal nature of both applies to the contract for entering into a stock corporation which is scheduled to be established for the purpose of establishing a relationship of members.[56]

Meanwhile, in cases where, after a stock corporation comes into existence, any shares issued at the time of incorporation of the corporation are found not to have been subscribed for or the subscription for certain shares has been revoked, promoters shall be deemed to have jointly subscribed for such shares (§321 (1)).[57]

55. Under subparagraph 2 of §129 of the Regulation of Commercial Registration of Korea, the information proving the subscription of shares shall be submitted with the application for registration of the incorporation of a stock corporation.
56. Supreme Court 2002*Du*7005(13 February 2004).
57. In this case, promoters might be liable for damages (§315).

subscription price to the corporation even after closing of payment of subscription price.[78]

3) Criminal Liability to be Assumed by Promoters

If a promoter has committed an act of disguising a payment for the subscription price or the fulfillment of the Investment in Kind, it shall be punished by imprisonment for not more than 5 years or fine not exceeding KRW 15 million (§628 (1), §622 (1)).[79] Such criminal penalty shall also apply to a person who has consented to or has mediated such act (§628 (2)).

[3] Inaugural Meeting

The Inaugural Meeting shall be the supreme decision-making organization of the Corporation in the Course of Incorporation which consists of subscribers of shares including promoters. The provisions on a meeting of shareholders shall apply mutatis mutandis to the Inaugural Meeting, in principle (§308 (2)). However, the resolutions of the Inaugural Meeting shall be adopted by an affirmative vote of at least two-thirds of the total number of voting rights of subscribers attending the Inaugural Meeting and a majority of the total number of shares subscribed for (§309), unlike a meeting of shareholders. In cases where the payment of the subscription price and the Investment in Kind have been completed,[80] promoters shall, without delay, convene the Inaugural Meeting (§308 (1)).

[a] Convocation

(1) When the Inaugural Meeting is convened, it shall give a written notice to each promoter and subscriber, or a notice in electronic form to each promoter and subscriber by obtaining the consent of each promoter and subscriber, at least 2 weeks prior to the date set for such Inaugural Meeting, and such notice shall state the agenda for the Inaugural Meeting (§308, §363 (1), (2)).

(2) Unless otherwise provided for in the AOI, the Inaugural Meeting shall be convened at the place of the head office or a place adjacent thereto (§308, §364).

78. Supreme Court 2002*Da*29138(26 March 2004).
79. Same provision shall apply to a managing member, a director, an officer, a member of the audit committee, an auditor or acting person (in cases where an action to nullify or revoke a resolution for electing a director or for dismissing a director is filed, a person appointed by the court to perform rights or duties of such director on its behalf until a final judgment is rendered; hereinafter referred to as the "Acting Person") under §386 (2), §407 (1), §415 or §567 of the Commercial Act, a manager or other employees commissioned to undertake a certain class of matters or specified matters related to the business affairs of a stock corporation.
80. A person who is to make the Investment in Kind shall, without delay, deliver all of the assets of the investment on the date designated for the payment of the subscription price, and if registration, records, or the creation or transfer of rights is required, he/she shall prepare the relevant documents completely and deliver them to the corporation (§305 (3), §295 (2)).

(3) A promoter or a subscriber shall be entitled to exercise their voting rights by a proxy, in which case, the proxy shall submit a document proving the right to exercise voting rights by itself to the Inaugural Meeting, and a person having a special relationship with a resolution of the Inaugural Meeting shall not exercise their voting rights (§308, §368 (2), (3)).

(4) If a promoter or subscriber has 2 or more voting rights, it may exercise them in disunity, in which case, it shall notify the corporation, in writing or by electronic document, of its intent to do so and the grounds therefor 3 days prior to the date set for the Inaugural Meeting, and the corporation may reject the exercise of vote in disunity by a promoter or subscriber, except when he/she has accepted a trust of shares or holds the shares on behalf of another person (§308, §368-2).

(5) Each promoter or subscriber shall have 1 vote for each share (§308, §369 (1)). A number of shares of which voting rights shall not be exercised because of having special relationships in respect of a resolution of the Inaugural Meeting (§308, §371 (2), §368 (4)), and a number of shares which is more than 3% of total number of shares issued and outstanding except for shares without voting rights at the election of auditors (§308, §371 (2), §409 (2), (3)),[81] or auditors or members of the audit committee of listed corporations shall not be exercised (§308, §371 (2), §542-12 (3), (4)),[82] and they shall not be included in the number of voting rights of shares owned by the promoters and subscribers present at the Inaugural Meeting (§308, §371 (2), §409 (2), (3), §542-12 (3), (4)).

(6) The Inaugural Meeting may adopt a resolution for adjournment or continuation of the meeting, in which case, the provision of §363 of the Commercial Act regarding a notice of convocation shall not apply (§308, §372).

(7) The minutes shall be prepared for the proceedings of the Inaugural Meeting, and shall record a summary of proceedings of the meeting and the outcomes thereof and the chairperson as well as the directors present at the meeting shall write their names and affix their seals or shall sign thereon (§308, §373).

81. No shareholder who holds more than 3% of the total number of shares issued and outstanding, other than the shares without voting rights, shall exercise his/her voting rights in respect of such excess shares beyond the above limit, in the election of auditors of a stock corporation. However, the AOI may provide for a lower ratio than 3%.
82. In cases where the total amount of voting shares of a listed stock corporation held by the largest shareholder, specially related persons, and other persons determined by §38 (1) of the Enforcement Decree of the Commercial Act exceeds 3% of the total number of shares issued and outstanding, excluding the shares without voting rights, such shareholder may not exercise his/her voting rights on the shares in excess when appointing or dismissing auditors or members of the audit committee who are not outside directors; provided that a lower ratio of holding shares may be determined in the AOI. Also, any shareholder who owns shares in excess of 3% of the total number of shares issued and outstanding, other than the shares without voting rights, of a listed stock corporation which owns the assets which are valued as more than KRW 2,000 Billion (§38 (2) of the Enforcement Decree of the Commercial Act; hereinafter referred to as the "Listed Large Corporation"), may not exercise its voting rights on the shares in excess when appointing members of the audit committee who are outside directors. However, a lower ratio of holding shares may be determined in the AOI.

been registered by making promoters burden strict liability, and protecting the credibility of interested party against a stock corporation.

(1) Liability for Security of Subscription

In cases where, after a stock corporation comes into existence, any shares issued at the time of incorporation of the corporation are found not to have been subscribed to or the subscription for certain shares has been revoked, promoters shall be deemed to have jointly subscribed for such shares (§321 (1)).

In cases where defects of share subscription based on other causes for nullification or revocation except for the grounds for nullification or revocation pursuant to §320 of the Commercial Act occurred,[88] promoters shall assume both a strict liability and a joint and several liability by owning the applicable shares jointly (§333).[89] The liability for security of subscription shall not affect any claim to indemnify against promoters (§321 (3), §315), and the provisions of the derivative suit shall apply mutatis mutandis to the promoters (§324, §403 through §406).[90] However, it is my view that §400 (1) of the Commercial Act absolving by the consent of all shareholders shall not apply mutatis mutandis to the liability of security for subscription, considering the principle that the paid-in capital of the corporation shall not be leaked out of the corporation without a reasonable cause.

88. This shall apply to the cases where (1) a subscriber asserts a reason for nullification or revocation before a registration of incorporation or exercising a voting right in the Inaugural Meeting, or (2) a subscriber with limited capacity asserts a reason for nullification or revocation even after a registration of incorporation or exercising a voting right in the Inaugural Meeting.
89. In cases where a share belongs jointly to 2 or more persons, they shall designate 1 person among themselves who is to exercise the rights of a shareholder, and where no one is designated to exercise the rights of a shareholder, a notice or peremptory notice required to be given to the co-owners may be given to any one of them.
90. Any shareholder who holds at least 1% of the total number of shares issued and outstanding may request in writing that the corporation file a suit against promoters to compel them to perform their obligations. If the corporation fails to file a suit within 30 days from the date of receiving the request, the shareholder may immediately file such suit on behalf of the corporation. If irreparable damage may be caused to the corporation upon the lapse of the period, the shareholder may immediately file such suit without such request. The effect of instituting a suit shall not be prejudiced even where the number of shares held by the shareholder who filed a suit falls below 1% of the total number of shares issued and outstanding after the institution of the suit(excluding where the shareholder no longer holds the shares issued and outstanding). In cases where a corporation files a suit pursuant to the request or the shareholder files a suit, the corporation or the shareholder shall not withdraw the suit, renunciate or admit the claim, or come to a compromise, without permission from the court. In such case, the court may, upon the request of the corporation which convincingly shows the fact that the suit was filed in a malicious intent, order such interested person to furnish adequate security (§176 (3), (4)). This suit shall be subject to the exclusive jurisdiction of the district court having jurisdiction over the place of the head office of the corporation (§186).

(2) Liability for Security of Payment

In cases where, after a stock corporation comes into existence, the payment of the subscription price for any shares has not been completed, promoters shall make such payment jointly and severally (§321 (2)), and this liability shall be a strict liability.

Where the payment of the Investment in Kind has not been completed, it is my view that (1) if the implementation is essential to the establishment of the corporation, the establishment of the corporation shall be null and void, and (2) if not, the defect shall be settled by the liability of security for payment to be assumed by promoters.[91] The liability to compensate for payment shall not affect any claim to compensate for damages against promoters (§321 (3), §315), and the provisions of the derivative suit shall apply mutatis mutandis to the promoters (§324, §403 through §406).[92] However, it is my view that the §400 (1) of the Commercial Act absolving by the consent of all shareholders shall not apply mutatis mutandis to the liability for security of payment, considering the principle that the paid-in capital of the corporation shall not be leaked out of the corporation without a reasonable cause.

(3) Liability to Indemnify

In cases where a promoter has neglected to perform its duty in connection with the establishment of the corporation, it shall be jointly and severally liable for damages to the corporation (§322 (1)).

This liability shall be a non-strict liability. It is my view that the negligence of a promoter's duty resulting in this liability includes the acts violating laws, regulations and/or the AOI. It is my view that, because an intent or negligence shall be presumed *de facto* with regard to acts violating laws, regulations and/or the AOI relating to the incorporation of a stock corporation, a promoter not willing to undertake the liability shall prove the fact that it had neither the intent nor negligence. However, in case of negligence of a promoter's duty, the corporation claiming the liability of a promoter shall prove the fact that the promoter had intent or negligence.

Because the liability to indemnify by a promoter is different from the liability for security of subscription or the liability for security of payment by the promoter, It is my view that in cases where there are damages not recovered by the liability for security of subscription or the liability for security of payment, a separate claim for indemnification by the promoter could be made.

In this regard, the provisions on a derivative suit shall apply mutatis mutandis to the claim for indemnification by a promoter (§324).[93] Also, because the §400 (1) of the Commercial Act applies mutatis mutandis, it is my view that the liability to indemnify

91. HK Kim, *supra* n.2, at 410; KS Lee et al., *supra* n.2, at 196; CS Lee, *supra* n.2, at 261; Lim(I), *supra* n.2, at 276; Korea Commercial Law Association, *Macro Structure of the Stock Corporation Law I* (2nd ed., Bubmunsa 2016), 422.
92. The further details applying mutatis mutandis to the liability of security for payment are the same as those of the liability of security for subscription.
93. The further details applying mutatis mutandis to the liability for indemnification are the same as those of the liability for security of subscription and payment.

[C] Shares with Par Value and Shares Without Par Value

[1] Shares with Par Value

A share with par value means the share where the nominal value of which shall be determined under the AOI and stated in the share certificate. The par value shall be at least KRW 100 (§329 (3)), and shall be equal (§329 (2)). The total amount of par value of shares issued and outstanding shall constitute the paid-in capital (§451), and the remaining amount of the issuing price exceeding par value shall be appropriated in the capital reserve (§459 of the Commercial Act, §18 & §15 of Enforcement Decree of the Commercial Act, §20 (2) of Accounting Standard of Medium Sized Corporation).

[2] Shares Without Par Value

A share without par value[108] is the share a par value of which is not stated in the AOI and only the number of shares to be issued shall be stated in the share certificate. In this regard, (1) a paid-in capital shall be the amount that promoters (at the incorporation)[109] or the BOD (at the issuance of new shares after the incorporation)[110] determine as the paid-in capital which shall be at least half of the total amount of shares issued and outstanding. (2) The remaining amount exceeding the amount appropriated in the paid-in capital shall be appropriated in the capital reserve (§451 (2)). (3) The stock corporation which has issued shares without par value shall not issue shares with par value (§329 (1)).

[3] Conversion Between a Share with Par Value and a Share Without Par Value

(1) The conversion between a share with par value and a share without par value is allowed in accordance with the AOI (§329 (4)), which means that only 1 of both shall be allowed in a stock corporation pursuant to the AOI. (2) No procedure for the protection of creditors is needed in this conversion because no alteration of paid-in capital is made (§451 (3)).

In connection with the procedure of conversion, the stock corporation shall determine a period of at least 1 month and shall give public notice that shares shall be converted and that share certificates must be submitted to the corporation within such period. It shall also give individually notice on such effect to the shareholders and the

108. Because a share with par value is difficult in issuing a watered share and performing a share split, it is expected that introducing a share without par value results in efficiency and autonomy in the issuance of shares (the Chairperson of the Legislation and Judiciary Committee in the National Assembly, *a draft of the Commercial Act proposed to be* revised (March 2011)).
109. This is one of the matters concerning an issuance of shares (subparagraph 3 of §291) which promoters shall determine by unanimous consents.
110. In cases where the AOI authorizes a meeting of shareholders to decide, the meeting of shareholders, not the BOD, shall decide thereon (§416 proviso).

pledgees registered in the register of shareholders, respectively (§329 (5), §440). The conversion shall take effect upon the expiration of such period of public notice (§329 (5), §441 main sentence). In this regard, if a shareholder cannot submit their old share certificates, the corporation may, upon the request by such person, determine a period of at least 3 months and give public notice to the effect that any interested person shall raise an objection, if any, on such certificates within such period and may deliver new share certificates to the requester after the lapse of such period, and expenses incurred in giving such public notice shall be borne by the requester (§329 (5), §442). It is my view that in cases where material defects exist in the procedure of the conversion, the provisions concerning a suit to nullify the issuance of new shares shall apply mutatis mutandis. This means that the judgment comes into effect against any other person who is not a party in the suit in order to be resolved pursuant to the organizational law, and the retroactive effect of the judgment shall not be allowed for the purpose of legal certainty.

[D] Classes of Shares

Under the Commercial Act, a stock corporation may issue any classes of shares which are different in particulars such as the dividend of profits, the distribution of residual assets, the exercise of voting rights at a meeting of shareholders, or redemption or conversion. In this case, the number and content of each class of shares shall be prescribed in the AOI (§344 (2)).[111] The reason why the different classes of shares appear much more often than before is for the purpose of procuring a capital more easily and thereby improving a financial structure, and enlarging the autonomy of financing the corporation, by allowing an exception to the principle of equal treatment of shares and allowing classes of shares different from common shares to be issued in the corporation.

Furthermore, (1) in cases where the corporation issues different classes of shares, the special provisions for not only each class of shares with respect to the subscription to new shares, reverse share split, share split, and/or retirement of shares, but also the allotment of shares in consequence of a merger or division of the corporation may be made, even if no provisions regarding such matters are provided in the AOI (§344 (3)). (2) Where the shareholders of a certain class of shares are to be prejudiced thereby, a resolution adopted by the meeting of the class of shareholders which is to be prejudiced is required (§436, §435).

111. The number and content of each class of shares shall be prescribed in a share subscription form (§347), a register of the corporation (§317), a register of shareholders (§352) and a share certificate (§356), and within the scope that the AOI provides, promoters shall determine a class and number of shares to be issued as one of the matters concerning issuance of shares at the time of incorporation, and the BOD shall, in principle, decide the content and number of a class of shares to be issued at the time of new issuance of shares after the incorporation.

[Case8] Supreme Court 2008*Da*37193(22 July 2010)
A stock corporation shall prove, with evidence, the fact that there is no justifiable cause against the request for inspection or copy, that is, there is a purpose of harassing the corporation and/or interrupting a business thereof, in order for the corporation to reject a request for inspection or copy of the register of shareholders, and so forth.

[C] Particulars to Be Prescribed in the Register of Shareholders

(1) In cases where shares are issued, the following matters shall be entered in the register of shareholders (§352 (1)):
  (1) Name and address of each shareholder (§352 (1) 1.);
  (2) Class and number of shares held by each shareholder (§352 (1) 2.);
  (3) In cases where the share certificates on shares held by each shareholder have been issued, serial number thereof (§352 (1) 2-2.); and
  (4) Date of acquisition of each share (§352 (1) 3.).

(2) In cases where a stock corporation prepares a register of shareholders in electronic form (hereinafter referred to as the "Electronic Register of Shareholders"), as determined by the AOI, the Electronic Register of Shareholders shall contain e-mail address[147], in addition to matters mentioned right above (§352-2 (2)).

(3) Also, in cases where a convertible share has been issued, the following matters shall be stated in the register of shareholders (§352 (2), §347):
  (1) A statement to the effect that shares may be converted into a different class of shares (subparagraph 1 of §347);
  (2) Conditions of conversion (subparagraph 2 of §347);
  (3) Particulars of the shares to be issued in consequence of the conversion (subparagraph 3 of §347); and
  (4) Period within which the conversion shall be requested or the period for conversion (subparagraph 4 of §347).

(4) In case of a pledge of shares registered in a register of shareholders, a stock corporation has, at the request of the pledgor, entered the name and address of the pledgee in the register of shareholders (§340 (1)), and (5) upon receipt of a declaration of non-bearing of a share certificate, the corporation shall without delay enter in the register of shareholders and part of a set thereof its intent not to issue the share certificates (§358-2 (2)). (6) In cases where shares belong jointly to 2 or more persons, they shall designate a specific person from among themselves who is to exercise the rights of shareholder (§333 (2)), in which case, the name of a person to execute the rights on their behalf shall be stated in the register of shareholders pursuant to a notice of the designation. (7) The indication that a property is the trust property may also

147. It is my view that this refers to an internet address under §2 (1) of the Internet Address Resources Act (CS Lee, *supra* n.2, at 335).

be made by stating such fact in the register of shareholders (§4 of the Trust Act, subparagraph 3 of §2 of the Enforcement Decree of the Trust Act).

Where a director including a representative director of a stock corporation fails to state any particulars in the register of shareholders or the part of a set thereof or makes misstatements therein, and thereby the corporation or a third party incurs any damages, such director or representative director shall be liable for such damages (§399 & §401), and subject to a fine for negligence not exceeding KRW 5 million. However, this fine shall not apply where a criminal penalty is imposed against such act (§635 (1) 9., 20.).

[D] Effect of a Register of Shareholders

[1] Effect Against the Corporation

A transfer of shares shall not be effective against the corporation, unless the name and address of the transferee have been entered in the register of shareholders (§337 (1)). In other words, a transferee of shares exclusive of an initial shareholder shall not execute a shareholder's rights against the corporation without the entry of a change in holders in the register of shareholders. [Case9] However, a transfer of shares shall be effective between the parties of the transfer. Also, in case of a comprehensive succession such as inheritance, testation and merge, the entry of a change in holders is needed to be effective against the corporation, in which case, the share certificate shall be presented to the corporation. However, a person who lost the share certificate may use a judgment of nullification in lieu of the share certificate, and in case of the comprehensive succession, other evidence thereon could be used to prove.

[Case9] Supreme Court 2009*Da*89665(14 October 2010)
Only a transferee is entitled to execute a right to demand the entry of a change in holders in the register of shareholders, and in cases where a share certificate has not been issued within 6 months after incorporation and thereby a transfer of a registered share shall be effective only by the agreement of transfer between a transferor and transferee without delivery of the certificate, only transferee is entitled to execute a right to demand of entry of a change in holders against the corporation.

In this regard, the issue of whether a stock corporation may allow a person who is not registered in the register of shareholders as a substantial shareholder arises. It is my view that the issue whether a shareholder who is registered in the register of shareholders is entitled to execute a right to demand of the entry of a change in holders shall be different from the issue whether a stock corporation shall allow a person who is registered in the register of shareholders as a substantial shareholder, and a right of the corporation which tries to find a substantial shareholder under the burden of indemnity for damages despite that it is not burdensome for it to admit a registered shareholder as a substantial shareholder, shall be guaranteed. Thus, the corporation is

the entry of a change in the register of shareholders for a specified period (§354 (1)).[157] In this case, such period shall not exceed 3 months (§354 (2)), and in cases where a corporation has determined the period, it shall give a public notice 2 weeks prior to such period. However, this shall not apply where such period has been designated by the AOI (§354 (4)).[158]

[b] Scope

A closure of a register of shareholders means the suspension of the entry of a change on all kinds of alteration on shareholders or pledgees including, but not limited to, the entry of a change in holders, a pledge of shares registered in a register of shareholders and the indication that a property is the trust property (§4 of the Trust Act, subparagraph 3 of §2 of the Enforcement Decree of the Trust Act).

In this regard, a right of conversion of a convertible share may be exercised during the period of closure of a register of shareholders. However, the holders of shares converted during such period shall not exercise their voting rights at a meeting of shareholders held during such period (§350 (2)).

However, it is my view that this provision shall not apply in cases where (1) a person can exercise a right at their discretion (for example, a right of minority shareholders or a right to sue),[159] or (2) it is not related to an exercise of shareholder rights (for example, a defensive measure against hostile M&A),[160] or (3) the exercise of a right is left at the discretion of the corporation.[161]

[c] Effect of the Closure of a Register of Shareholders

In case of closure of a register of shareholders, the shareholder registered in a register of shareholders at the beginning of the closure shall automatically become the eligible shareholder to exercise a specific shareholder right.[162] Thus, even though shareholder status might have changed by transfer of shares during the period of closure of a register of shareholders, a transferee shall not be entitled to exercise the rights of a

157. Whether this right would be exercised or not shall be at the discretion of the corporation, that is, the resolution of the BOD.
158. For example, in cases where the provision of "with regard to exercise of voting rights in a general meeting of shareholders, a register of shareholders shall be closed from the closing of the business year immediately before this business year to the closing of a general meeting of shareholders of this business year." is stated in the AOI of the corporation, a separate public notice is not be necessary.
159. KB Kwon, *supra* n.2, at 554; Commentary(II), *supra* n.155, at 554.
160. CS Lee, *supra* n.2, at 338.
161. KS Lee et al., *supra* n.2, at 258; Commentary(II), *supra* n.155, at 554.
162. For example, in cases where a stock corporation was going to convene a general meeting of shareholders on 25 March 2016, and a register of shareholders had been closed from 1 January 2016 to 25 March 2016 in order to determine the shareholders who could exercise rights of shareholders, shareholders registered in a register of shareholders at the beginning of 1 January 2016 should be entitled to exercise voting rights in the meeting on 25 March 2016.

shareholder. In other words, the prior shareholder, that is, transferor who was a shareholder at the beginning of the closure is entitled to exercise shareholder rights.[163]

If the change in holders, in cases where a stock corporation changed a shareholder or pledgee, is entered in the register of shareholders at the request of the shareholder in violation of a closure of a register of shareholders during the period of the closure, it is argued that such change shall be null and void.[164] However, even if the entry of a change in holders made by the corporation during the period of closure of a register of shareholders such as conversion of a convertible share exercised during such period shall not be allowed, it is my view that the entry of a change in holders shall be effective after the lapse of such period. This is because prohibition of entry of a change in holders during such period results in inadequacy of protection of persons to hold rights regarding shares such as shareholders or pledgees.[165]

[3] Record Date

In order to designate a person who may exercise the voting right or receive dividends or exercise other rights as a shareholder or pledgee, the corporation is entitled to deem any shareholder or pledgee whose name appears in the register of shareholders on a specified date to be the shareholder or pledgee who is entitled to exercise such rights (§354 (1)). Because a person who has a right is decided on the basis of a specific date, there is a merit where a suspension of the entry of a change in holders such as a closure of a register of shareholders would not happen. However, there is a demerit where it could be difficult in deciding who may become a shareholder at a specific date.[166]

The specific date mentioned right above shall be determined as a specific day within 3 months before the date on which the person may exercise the rights as a shareholder or pledgee (§354 (3)). If a stock corporation has determined the specific date, it shall give a public notice 2 weeks prior to such date. However, this shall not apply the case where such date has been designated by the AOI (§354 (4)).

163. Of course, it is my view that because a transfer of shares between a transferor and a transferee shall be effective in cases where requirements of a transfer are satisfied, it is highly probable that a transferor shall follow an instruction of a transferee with respect to the exercise of voting rights.
164. Ryu, *supra* n.25, at 149; KS Lee et al., *supra* n.2, at 261; DY Chung, *supra* n.2, at 475; KW Choi, *supra* n.2, at 394.
165. Kang, *supra* n.24, at 305; KB Kwon, *supra* n.2, at 489; KS Kim, *supra* n.2, at 201; DH Kim, *supra* n.24, at 220; Suh Ton et al., *supra* n.11, at 366; HJ Suh, *supra* n.25, at 644; OR Song, *supra* n.2, at 818; Lim(I), *supra* n.2, at 487; Jang, *supra* n.18, at 155; Jung, *supra* n.18, at 410; CH Chung, *supra* n.2, at 729; JS Choi, *supra* n.25, at 271.
166. For example, in cases where it was decided by a stock corporation that shareholders who were registered in the register of shareholders at 3:00 p.m. on 15 January 2016 should be given voting rights of a general meeting of shareholders, it would be highly possible that a huge chaos regarding who shall constitute the shareholders of the applicable corporation at 3:00 p.m. occurred due to the fact that a tremendous number of shareholders, at the same time, could rush to request the corporation to make the entry of a change in holders in a register of shareholders from 2:58 p.m. on 15 January 2016, and thereby legal disputes might arise.

Delivery by Agreement.[177] The court decision has provided for the Delivery by Agreement as an effective delivery of a share certificate.[178]

[Case16] Supreme Court 2012*Da*34764(23 August 2012)
In case a person who possesses a share certificate on the assignor's behalf, makes a third party possess the certificate, if the assignor transfers a possession of the certificate by the Delivery by Assignment of a Right to demand the Return of a Share Certificate, a notification against the person by the assignor or approval of the person shall be required (in other words, a notification against the third party by the assignor or the person, or an approval of the third party is not required).

[C] Limitation to a Transfer of Shares

[1] Limitation to the Transfer of Rights Based on Subscription for Shares

[a] In General

The rights based on subscription for shares are the rights held by subscribers of shares, before becoming shareholders, that is, before the establishment of the stock corporation or lapse of the period of payment of the subscription price of new shares. Where the transfer of the rights based on subscription for shares could be effective against the corporation, a burden where an agreement of a transfer of the rights based on subscription for shares shall be confirmed could happen in a situation which the corporation has not been established or new shares issued have not been effective, and the establishment of a stock corporation could be delayed due to a dispute on whether the transfer of rights based on subscription for shares is effective or not, and could be misused for speculation. This is the reason why the transfer of rights based on subscription for shares shall not be effective as against the corporation.

[b] Effect

A transfer of rights based on subscription for shares shall not be effective as against the corporation (§319).[179] In other words, the agreement of transfer of rights based on subscription for shares shall be effective only between the parties thereto. [Case17], [Case18]

177. It refers to a case where an assignor, not assignee, continues to possess a share certificate by an agreement between the assignor and the assignee even if the shares have been assigned, a delivery shall be deemed to take effect (§189 of the Civil Act).
178. Supreme Court 2014*Da*221258,221265(24 December 2014).
179. In case of issuance of new shares, a transfer of the rights based on subscription for shares shall not be effective as against the corporation (§425 & §319).

[Case17] Supreme Court 65*Da*2069(7 December 1965)
Even if a stock corporation would allow the transfer of rights based on subscription for shares, such transfer shall not be effective as against the corporation.

[Case18] Supreme Court 2011*Da*62076,62083(9 February 2012)
The transfer of shares after issuance of a share certificate shall be effective upon delivery of the share certificate. In other words, the delivery of the share certificate shall be requirement for the transfer of shares to come into effect together with the declaration of intention on the transfer of shares. However, even if there is no delivery, the agreement of transfer of shares between transferor and transferee shall be effective only by the declaration of intention on the transfer of shares.

Thus, with respect to the transfer of rights based on subscription for shares, a stock corporation shall not accept an assignee of the rights based on subscription for shares as a lawful subscriber, before the establishment of a stock corporation or the lapse of a period of payment for the subscription for new shares.

With respect to the transfer of rights based on subscription for shares, after establishment of a stock corporation or lapse of a period of payment for the subscription for new shares, the applicable corporation (1) shall issue a share certificate to an assignor, not an assignee, and (2) shall allow the assignor, not the assignee, to execute their rights against the corporation. (3) However, where the assignor receives a share certificate issued by the corporation, the assignee is entitled to demand a delivery of the certificate against the assignor, and after receipt of the certificate, the assignee is entitled to execute their rights by making the entry of a change in holders in the register of shareholders.

[2] Limitation to a Transfer of Shares Made Before the Issuance of a Share Certificate

[a] In General

A subscriber who paid the subscription price to the corporation shall be entitled to shareholder rights after the establishment of the corporation or lapse of the period for payment of new shares. In cases where a share certificate has not been issued after the establishment of the corporation or lapse of the period for payment of new shares, the transfer of shares shall, in principle, not be effective against the corporation. The rationale is to allow the corporation to operate its business in stability, because if the transfer of shares before issuance of share certificates was effective against the corporation, it would be difficult for the corporation to identify who should be a shareholder and it would be possible to be engaged in disputes relating thereto.

However, because the freedom of transfer of shares shall be violated if the corporation would delay the issuance of a share certificate without reasonable cause, a transfer of shares without delivery of the share certificate shall be effective against the

corporation if 6 months have passed since the establishment of the corporation or lapse of the period of payment of subscription for new shares.

[b] Effect of the Transfer of Shares Within 6 Months after Establishment of the Corporation or Lapse of the Period of Payment of Subscription for New Shares

(1) Principle: Nullification against the Corporation

Any transfer of shares made prior to the issuance of share certificates within 6 months after the establishment of the corporation or lapse of the period of payment of subscription for new shares shall not be effective against the corporation (§335 (3) main sentence).

In this regard, (1) case law held that a transferee of shares before the issuance of a share certificate should not be entitled to demand the issuance of the certificate directly against the corporation, and where the transferee would demand issuance of the certificate on behalf of a transferor, the transferee should not demand that the corporation issue the certificate directly to itself.[180]

Furthermore, (2) a transfer of shares made before the issuance of a share certificate shall not be effective against the corporation even though the corporation would approve it and register such transfer in the register of shareholders or issue the certificate after such transfer. [Case19]

[Case19] Supreme Court 86*Daka*982, 86*Daka*983(26 May 1987)
In cases where a party terminates an agreement under §548 of the Civil Act, each party shall comply with the duty of restoration. However, such restoration shall not infringe on the rights of any third person who acquired rights with respect to an object of the agreement and by whom the requirements against the parties would be satisfied in order to demand their rights against the parties. Thus, a transferee to whom shares were reassigned by a person to whom they had been assigned before the issuance of a share certificate should not be included in the "third person" mentioned in the provision stated right above unless the transferee possesses the certificate legally before the termination of a transfer of shares.

However, (3) case law held that even if a transfer of shares before the issuance of a share certificate was made within 6 months after the establishment of the corporation or lapse of the period of payment of subscription for new shares, if the certificate was not issued after 6 months, such defect should be cured and the transfer of shares would be effective against the corporation.[181]

180. Supreme Court 81*Da*141(8 September 1981).
181. Supreme Court 2000Du1850(15 March 2002).

(2) Exception: An Agreement of Transfer of Shares shall be Effective between a Transferor and a Transferee

Case law held that even if there would be no delivery of a share certificate, an agreement of transfer of shares between a transferor and a transferee should be effective only by the declaration of intention on the transfer of shares.[182]

[c] Effect of a Transfer of Shares after 6 Months from the Establishment of the Corporation or Lapse of the Period of Payment of Subscription for New Shares

Where 6 months have passed from the date of establishment of the corporation or the date of payment of the subscription price for new shares, the transfer of shares made before the issuance of a share certificate shall be effective against the corporation (§335 (3) proviso). Thus, the corporation shall issue the certificate to the transferee of shares. [Case20] In order to secure the freedom of transfer of shares, the purpose of this provision is for the transferee to be able to assert the effectiveness of the transfer of shares against the corporation without delivery of the share certificate in cases where the share certificate has not been issued until 6 months from the date of establishment of the corporation or the date of payment of the subscription price for new shares.

[Case20] Supréme Court 99*Da*67529(23 March 2000)
Even if the stock corporation which had been notified of a transfer of shares before the issuance of a share certificate after 6 months from the establishment of the corporation would allow a third party other than the transferee to make the entry of a change in holders in the register of shareholders and issue the registered certificate to the third party, the third party would not be a shareholder, and therefore, the rights of the transferee as a shareholder would not be forfeited.

Thus, after 6 months from the establishment of the corporation or lapse of the period of payment of subscription for new shares, a transfer of shares shall be effective only by an agreement of the transfer of shares between a transferor and a transferee.[183] In this case, (1) in order to be effective against the corporation, the transferee shall notify the corporation of the transfer of shares, or the corporation shall approve such transfer[184] by a mutatis mutandis application of the assignment of a nominative claim under the Civil Act.[185] In which case, the transferee is entitled to demand to make the entry of a change in holders in the register of shareholders by proving the transfer of

182. Supreme Court 2011*Da*62076,62083(9 February 2012). Thus, it is my view that in cases where a transferor receives a share certificate issued by the corporation afterwards, a transferee is entitled to demand the delivery of the certificate against the transferor.
183. Supreme Court 2006*Du*6604(22 February 2007).
184. Supreme Court 99Da67529(23 March 2000) & Supreme Court 94Da39598(20 August 1996).
185. §450 of the Civil Act.

allowed to be leaked out of the corporation lawfully, the corporation is entitled to acquire the shares it issued within the amount of the distributable profits (§341 (1) proviso).

(2) In this case, the corporation shall acquire the shares which it issued only in the name and account thereof (§341 (1) main sentence). [Case25] In order words, the corporation shall not be allowed to acquire the shares it issued in the name of any third party and in the account of the corporation.

[Case25] Supreme Court 2008*Da*37193(22 July 2010)
A stock corporation which acquired the shares which it issued shall, without hesitation, keep the statement including details on the acquisition of the shares it issued at its head office during a period of 6 months. In this case, any shareholders and/or creditors of the corporation are entitled to inspect the statement at any time and request the corporation to issue a certified transcript or copy of such statement after paying the fees determined by the corporation (§9 (2) of the Enforcement of Decree of the Commercial Act). The corporation shall prove that there is no justifiable cause in the request for inspection or copy, that is, there is a purpose of harassing the corporation and/or interrupting its business thereof, in order for the corporation to reject a request for inspection or copy of the statement.

(3) The corporation seeking to acquire the shares it issued shall determine the following matters in advance by a resolution of a meeting of shareholders (§341 (2)).[190]
  (1) The class and number of the shares that the corporation seeks to acquire (§341 (2) 1.).
  (2) Limit on the total acquisition price (§341 (2) 2.); and
  (3) The period which must not exceed 1 year for the corporation's acquisition of the shares it issued (§341 (2) 3.).

(4) In addition to the resolution of a meeting of shareholders, in cases where the corporation intends to acquire the shares it issued, the corporation shall determine the following matters by a resolution of the BOD, in which case, the conditions for the acquisition of shares shall be equally determined each time

accumulated until the pertinent period for the settlement of accounts of the corporation, (3) the amount of earned surplus reserve to be accumulated for the pertinent period for the settlement of accounts of the corporation, and (4) the net assets on the balance sheet, which have increased as a result of evaluation of assets and liabilities according to the accounting principles under §446-2 of the Commercial Act, but have not been offset against unrealized losses(§462 (1) of the Commercial Act, §19 (1) of the Enforcement Decree of the Commercial Act).

190. In cases where the AOI provides that the dividend of profits can be made by a resolution of the BOD, a resolution of the BOD may substitute for a resolution of the meeting of shareholders (§341 (2) proviso).

the BOD adopts a resolution (subparagraph 1 of §10 of the Enforcement of Decree of the Commercial Act):
  (1) Purpose of the corporation's acquisition of the shares it issued;
  (2) The class and number of the shares that the corporation seeks to acquire;
  (3) Details of the money or other assets to be delivered in exchange for each share (excluding its treasury stock; hereinafter referred to as the "money or other assets") and the method of calculation thereof;
  (4) Total amount of the money or other assets to be delivered in exchange for the treasury shares;
  (5) The period during which a share transfer application may be filed, which shall be at least 20 days and not more than 60 days (hereinafter referred to as the "filing period for a transfer application"); and
  (6) The date of delivery of the money or other assets in exchange for the transfer within 1 month from the end of the filing date of a transfer application, and other conditions for the acquisition of shares.

(5) With respect to the methods of the corporation's acquisition of the shares it issued, a stock corporation shall select one 1 of the following methods (§341 (1) of the Commercial Act, §9 (1) of the Enforcement Decree of the Commercial Act):
  (1) In case of shares traded in a stock exchange, the method by which the acquisition is made at the exchange; or
  (2) The method by which the corporation notifies all the shareholders of the corporation's acquisition of the shares it issued or makes a public notice thereon pursuant to §10 of the Enforcement of Decree of the Commercial Act, or the Method by which a tender offer is made pursuant to §133 through §146 of the Capital Market Act, all of which are subject to the methods of acquisition under equal conditions in proportion to the number of shares owned by each shareholder other than the redeemable shares.[191]

(6) No corporation shall acquire the shares it issued in case it is possible that the net assets value on the balance sheet for the period for the settlement of account in the relevant business year is less than the sum of the amounts prescribed in the subparagraphs of §462 (1) of the Commercial Act (§341 (3)). In other words, even if there had been distributable profits in the previous business year, where it is possible that there was a deficit in the relevant business year, the corporation should not acquire the shares it issued (§341 (3)).

(7) In cases where the corporation acquires the shares it issued despite the net assets value on the balance sheet for the period for the settlement of accounts in the relevant business year is less than the sum of the amount prescribed in the subparagraphs of §462 (1) of the Commercial Act, directors shall be,

191. Because the method of redemption shall be subject to the terms of issuance in case of a redeemable share (§345 (1)), this rule shall not apply to the redeemable share.

7) Corporation's Acquisition of the Shares It Issued Free of Charge

Case law held that it shall be permitted for a stock corporation to acquire the shares it issued free of charge because it is not possible for them to be used as means of infringing the interests of creditors of the corporation or means of unfair speculation.[194] However, it is my view that the corporation's acquisition of the shares it issued in a type of a donation subject to a charge shall not be permitted because such donation is not free of charge.

8) Corporation's Acquisition of the Shares It Issued in the Account of Any Third Party

The corporation's acquisition of the shares it issued is permitted in cases where the shares issued by a trustee e.g., the shares a trust corporation issued are trusted to it by a trustor, or a commission agent purchases the shares issued by it in the account of consignor, and so forth.

9) Corporation's Acquisition of the Shares It Issued under the Act on the Special Measures for the Promotion of Venture Business (Hereinafter referred to as the "Venture Act")

A venture stock corporation that is not a listed corporation is entitled to exchange its treasury shares with the shares of a principal shareholder[195] of another stock corporation or other venture stock corporation for the purpose of a strategic alliance pursuant to the AOI (§15 (1) of the Venture Act). in this case the venture corporation shall acquire the shares it issued by approving the share exchange agreement made in advance by the Special Resolution of a meeting of shareholders in the account of it up to the amount of distributable profits (§15 (2), (3) of the Venture Act).

[e] Corporation's Unlawful Acquisition of the Shares It Issued

With respect to the effect of the corporation's unlawful acquisition of the shares it issued, there is no specific provision under the Commercial Act. In this regard, there is a theory of nullification (where regardless of whether a transferor knows or did not know, a corporation's unlawful acquisition of the shares it issued shall be null and void in violation of the principle that the paid-in capital of the corporation shall not be leaked out of the corporation without a reasonable cause, unless exceptionally allowed. Case law supports this opinion),[196] a theory of non-invalidation (where a

194. Supreme Court 88*Nu*9268(28 November 1989).
195. This shareholder shall be a shareholder who owns at least 10% of shares with voting rights issued and outstanding of an applicable stock corporation.
196. KS Kim, *supra* n.2, at 655; JH Kim, *supra* n.24, at 227; OR Song, *supra* n.2, at 846; BC Lee et al., *supra* n.23, at 169; CH Chung, *supra* n.2, at 746; Supreme Court 2005*Da*75729(12 October 2006) & Supreme Court 2001*Da*44109(16 May 2003).

corporation's unlawful acquisition of the shares it issued shall be effective for the reason of safety of the transaction),[197] and a theory of comparative nullification (where regardless of whether a transferor knows, a corporation's unlawful acquisition of the shares it issued shall be null and void. However, it shall be effective against any third party who did not know the corporation's unlawful acquisition of the shares it issued such as a third transferee and a creditor whose foreclosure rights were executed).[198] In this regard, in my opinion, considering the material status the principle that the paid-in capital of the corporation shall not be leaked out of the corporation without a reasonable cause takes in the Stock Corporation Law, the corporation's unlawful acquisition of the shares it issued shall be null and void.[199] However, it is my view that it shall be effective against any third party who did not know the corporation's unlawful acquisition of the shares it issued without gross negligence.[200]

Meanwhile, with respect to the corporation's unlawful acquisition of the shares it issued, the directors in charge of the unlawful acquisition shall be liable for any damages incurred by the corporation under §341 (4) of the Commercial Act. In case additional damages not covered by such provision were incurred by the corporation, §399 of the Commercial Act may apply, and in case shareholders or any third party incurred damages thereby, §401 of the Commercial Act may apply. Regardless of whether whose name is used in the corporation's acquisition of the shares it issued, in case a director has improperly made the corporation acquire the shares it issued for the account of the corporation, or establish a pledge thereon, they shall be punished with imprisonment for not more than 5 years or fine not exceeding KRW 15 million (subparagraph 2 of §625).

[f] Exercise of Rights by a Stock Corporation Which Owns the Shares Issued by It

The issue which rights could be exercised by the corporation which owns the shares it issued lawfully arises.

(1) No corporation is entitled to the right to vote in respect of the treasury shares (§369 (2)). With respect to a resolution by a meeting of shareholders, the treasury shares under §369 (2) shall be excluded from the total number of

197. HJ Suh, *supra* n.25, at 676; Chai, *supra* n.76, at 639.
198. HK Kim, *supra* n.2, at 480; Son, *supra* n.25, at 460; Jung, *supra* n.18, at 425; DY Chung, *supra* n.2, at 496; HC Chung et al., *supra* n.2, at 400; Han, *supra* n.24, at 190.
199. In my view, it would be reasonable that where the money exceeding distributable profits was used in the corporation's acquisition of the shares it issued, only the excess amount shall be null and void.
200. It is my view that the burden of proof that a third party did not know that the corporation's acquisition of the shares it issued was unlawful shall not be with the third party who asserts that the corporation's acquisition of the shares it issued is effective. On the contrary, a person asserting that the corporation's acquisition of the shares it issued is null and void shall bear the burden of proof that the third party knew or did not know because of a gross negligence that the corporation's acquisition of the shares it issued was unlawful.

On the other hand, a shareholder or their agent having special interest shall not exercise voting rights only on the agenda related to the special interest, but they may exercise their voting rights on other agenda exclusive of such agenda.

(4) Effect

A shareholder having a special interest shall not exercise their voting rights on the agenda related to the special interest. In such case, the shares in relation to which the special interest exists shall not be included in the number of shares present in a meeting of shareholders. Also, it is my view that the shares having the special interest shall be excluded from the total number of shares issued and outstanding (a mutatis mutandis application of Supreme Court 2016*Da*222996(17 August 2016)).[309] [Case33] In the event that a shareholder having the special interest exercises voting rights in a meeting of shareholders, this is a cause for revocation of the resolution in the meeting.

[Case33] Supreme Court 2016*Da*222996(17 August 2016)
Despite §371 of the Commercial Act, shares exceeding 3% of the total number of shares issued and outstanding in case of election of auditors shall not be included in the "total number of shares" prescribed in §368 (1) of the Commercial Act. Also, such rule shall apply to a stock corporation which needs not necessarily elect an auditor because the amount of a paid-in capital thereof is below KWR 1 billion.

[e] Election of Auditors and Members of an Audit Committee

No shareholder who holds more than 3% of the total number of shares issued and outstanding other than shares without voting rights, shall exercise its voting rights in respect of such shares beyond the above limit, in the election of auditors of a stock corporation (§409 (2)).[310]

Also, where the total amount of voting shares of a listed stock corporation held by (1) the largest shareholder, (2) their specially related persons, and (3) persons who have delegated their voting rights (applicable only to the voting rights delegated) to the largest shareholder or persons specially related to the largest shareholder (including the power to instruct the exercise of a voting right) exceed 3% of the total number of shares issued and outstanding, excluding shares without voting rights, such shareholders shall not be entitled to exercise their voting rights in respect of the shares beyond

309. Unless the shares having a special interest are excluded from the total number of shares issued and outstanding, an inclusion in the total number of shares would result in an actual impossibility of adopting the resolution for which the shares having a special interest is voted (Kang, *supra* n.24, at 457; KB Kwon, *supra* n.2, at 609; OR Song, *supra* n.2, at 922; Yang, *supra* n.94, at 246; BC Lee et al., *supra* n.23, at 240; CS Lee, *supra* n.2, at 517). However, a director having a special interest in the BOD shall be included in calculating the quorum (in spite of this interpretation, such problem occurred in the meeting of shareholders does not arise, because a quorum means only a minimum ratio to hold the BOD), and such director shall be excluded from the number of directors present at the BOD ([Case33]).
310. The AOI may provide for a lower ratio than 3% (§409 (3)).

the above limit, when electing or dismissing auditors, or members of an audit committee who are not outside directors (§542-12 (3) main sentence of the Commercial Act, §38 (1) of the Enforcement Decree of the Commercial Act).[311]

Also, any shareholder who holds more than 3% of the total number of shares issued and outstanding, other than shares without voting rights, of a Listed Large Corporation, may not exercise their voting rights in respect of such shares beyond the above limit, when electing members of an audit committee who are outside directors (§542-12 (4) main sentence of the Commercial Act, §38 (2) of the Enforcement Decree of the Commercial Act).[312]

It is my view that where voting rights shall not be exercised at an election of auditors and members of an audit committee, the shares in excess of 3% of the total number of shares issued and outstanding other than shares without voting rights shall not be included only in the number of shares present, but also shall not be included in a number of shares issued and outstanding.[Case33] In the event that voting rights on the shares in excess of 3% of the total number of shares issued and outstanding other than shares are exercised, a cause for revocation of a resolution in a meeting of shareholders will arise.

[f] Limitation of Voting Rights under the Capital Market Act

Collective investment business entities shall be subject to a specific limitation of investment while investing the collective investment property in any securities or derivatives (§81 (1) & §84 (4) of the Capital Market Act). In this case, no collective investment business entity may exercise voting rights for the shares acquired in excess of such investment limit (§87 (4) of the Capital Market Act).[313]

[g] Limitation of Voting Rights under the Fair Trade Act

Neither a financial nor an insurance corporation which belongs to a conglomerate group subject to the limitations on mutual investment (having the total amount of assets of at least KRW 10,000 billion) under the Fair Trade Act shall, in principle, exercise its voting rights of the shares of domestic affiliated corporations it owned (§11 main sentence of the Fair Trade Act).

Also, any corporation belonging to the conglomerate group shall, in principle, not acquire or own stocks of an affiliated corporation which acquires or owns its stocks (§9 (1) of the Fair Trade Act), and make an affiliated investment that forms circular equity investment (§9-2 (2) of the Fair Trade Act). In this case, no corporation which has made cross-capital investment or circular equity investment shall exercise voting rights

311. The AOI may provide for a lower ratio than 3% (§542-12 (3) proviso).
312. The AOI may provide for a lower ratio than 3% (§542-12 (4) proviso).
313. No collective investment business entity shall act in a way so to avoid such limitation on voting rights, such as the cross-exercise of voting rights by a contract, etc. with a third party (§87 (5) of the Capital Market Act).

[4] Scope of a Proxy

In respect of whether a proxy can exercise voting rights on behalf of a shareholder in more than 1 meeting of shareholders, there is a dissenting opinion[329] based on the problems that a trust of voting rights[330] not recognized in the Commercial Act would actually be allowed, and only voting rights separate from a status of a shareholder would be transferred. However, there is also an assenting opinion.[331] In this regard, it is my view that there would be no reason to prohibit granting a proxy for the exercise of voting rights on the behalf of the shareholder in more than 1 meeting of shareholders at the discretion of it because the shareholder is entitled to exercise voting rights in person at any meeting of shareholders even if they had vested a proxy with the mandate to exercise voting rights on their behalf in more than 1 meeting of shareholders. Thus, I agree with the assenting opinion. [Case34], [Case35][332]

[Case34] Supreme Court 2002*Da*54691(24 December 2002) & Kwangju High Court 2002*Na*952(4 September 2002)
It is effective that a specific proxy has been vested with the right to exercise voting rights in a meeting of shareholders for 7 years.

[Case35] Supreme Court 69*Da*688 (8 July 1969) & Seoul High Court 67*Na*2070(3 April 1969)
It is effective that a specific proxy has been vested with the right to exercise voting rights in a meeting of shareholders for 12 years or more.

Furthermore, it is my view that there is no ground that the right of a proxy to exercise voting rights on behalf of a shareholder shall be limited only within a concrete and specific agenda in a single meeting of shareholders. Thus, the proxy could exercise voting rights on behalf of a shareholder comprehensively with respect to all the agenda in a specific meeting of shareholders.

[5] Method for Exercising a Proxy

The proxy shall submit a document proving their right as a proxy at the meeting of shareholders (§368 (2) latter sentence). The rationale of this provision is easily

329. KS Lee et al., *supra* n.2, at 499; BC Lee et al., *supra* n.23, at 247; CS Lee, *supra* n.2, at 527; Lim(II), *supra* n.297, at 69; Han, *supra* n.24, at 241.
330. This means a voting trust in the USA which is established by an agreement that makes a trustee exercise voting rights, and in principle, shall not exceed 10 years (§7.30. of the Model Business Corporation Act (hereinafter referred to as "MBCA")).
331. KB Kwon, *supra* n.2, at 619; KS Kim, *supra* n.2, at 295; DH Kim, *supra* n.24, at 245; JH Kim, *supra* n.24, at 307; HK Kim, *supra* n.2, at 525; TK Suh et al., *supra* n.11 at 405; HJ Suh, *supra* n 25, at 765; OR Song, *supra* n.2, at 909; Jung, *supra* n.18, at 471; DY Chung, *supra* n.2, at 555; CH Chung, *supra* n.2, at 857; KW Choi, *supra* n.2, at 478; JS Choi, *supra* n.25, at 366.
332. Supreme Court 2013*Da*56839(23 January 2014), [Case34] & [Case35].

adopting a resolution in a meeting of shareholders by clearly indicating the existence of the right as proxy,[333] and preventing a dispute on the resolution in the meeting from being raised in the future by deciding through the document whether or not a proxy who asserts it would be a lawful one.

In this regard, case law held that a document proving the right as a proxy meant a power of attorney, and because the reason why the corporation required a document certifying that a seal was registered or a letter of attendance together with the document be submitted thereto would be to confirm a qualification of a proxy more accurately, even if these auxiliary documents were not accompanied, in the event that the validity of the power of attorney could be proved through other methods, the corporation should not reject the right as a proxy.[334]

Also, a document proving the right as a proxy shall be an original that can be easily identified whether it has been forged or not, and unless there are special circumstances, the duplicate thereof shall not constitute such document. [Case36], [Case37]

[Case36] Supreme Court 94*Da*34579(28 July 1995)
The shareholders of the corporation was only 3 persons, B and C as a representative director respectively and A, and B and C already knew that D and E were mere nominees of A because they accepted A's request to become nominees for the interest of A, and A, B and C together had managed the corporation for a long period. In this case, in the event that A was notified of the convocation of the meeting of shareholders, and notified the corporation of an intention of exercising its voting rights by its attorney as a proxy before the meeting of shareholders, and the attorney participating the meeting submitted the original of a power of attorney made by A to the corporation, even though a power of attorney and a document certifying that a seal was registered, made by D and E and submitted by the attorney, was not an original, but a duplicate, the fact that A mandated the voting rights on all the shares it owned to the attorney was fully proved.

[Case37] Supreme Court 2003*Da*29616(27 April 2004)
A power of attorney printed by a facsimile could not be an original.

[6] Effect of an Exercise by a Proxy

In general, a proxy exercises voting rights in a meeting of shareholders in accordance with the intention of the shareholder as principal. However, even if the proxy exercised the voting rights against the intention of the shareholder, it is my view that the resolution shall, in principle, be effective, and the proxy shall be liable for any damages incurred by the shareholder due to the default.

333. Supreme Court 94*Da*34579(28 February 1995).
334. Supreme Court 2008*Da*85147(28 May 2009).

5) Procedure

a) Specification in a Notice of Convocation of a Meeting of Shareholders

In a notice of the convocation of a meeting of shareholders in relation to the matters to be resolved by the Special Resolution to which an appraisal right of dissenting shareholders is allowed, the content and method of exercise of such appraisal rights shall be specified (§374 (2), §374-2 (1), (2), §530 (2), §530-11, §360-3 (4), §360-16 (3)). It is my view that in cases where such content is not specified in the notice, even the dissenting shareholder who did not notify the corporation of the intention of a dissent thereon in writing before opening of the meeting shall be entitled to exercise an appraisal right of dissenting shareholders against the corporation.[378]

Meanwhile, in case of the short-form transfer or lease of business, the corporation shall notify or make a public notice the shareholders of the intention of proceeding of the short-form transfer or lease of business without approval of the meeting of shareholders within 2 weeks from the date of execution of an agreement thereof. However, if all the shareholders assent, such notice or public notice is not needed (§374-3 (2)).

b) Notification of the Intention of Dissent in Advance

A dissenting shareholder who opposes to the subject matter of a resolution shall notify in writing the corporation of its opposition before the opening of a meeting of shareholders (§374-2 (1), §522-3 (1), §530-11 (2), §360-5, §360-22).

Meanwhile, in the case of short-form transfer or lease of business, the dissenting shareholders shall notify the corporation of the intention of dissent on the short-form transfer or lease of business in writing within 2 weeks from such notification or public notice of a statement to the effect that the procedures thereon would be proceeded without approval of the meeting of shareholders (§374-3 (3)).

c) Exercise of an Appraisal Right in Writing

A dissenting shareholder who notified in writing the corporation of their intention of opposition before the meeting of shareholders shall be entitled to make a written demand which shall specify the classes and number of shares against the corporation for purchasing its shares, within 20 days from the date of the resolution at the meeting (§374-2 (1), §522-3 (1), §530-11 (2), §360-5, §360-22).

Shareholders who notified the corporation of the intention of opposition on the short-form transfer or lease of business in writing within 2 weeks from such notification or public notice under §374-3 (2) of the Commercial Act, shall be entitled to demand a purchase of shares owned by the shareholders against the corporation by a written document containing the class and number of shares within 20 days after the lapse of such period (§374-3 (3)).

378. Supreme Court 2012*Ma*11(30 March 2012) & Seoul High Court 2011*Ra*1303(9 December 2011).

Meanwhile, shareholders who dissented in advance by a written document need not dissent again by an exercise of voting right in a meeting of shareholders. It is my view that voting rights of dissenting shareholders who are not present shall be included in the number of voting rights of the shares being present, and as a dissent upon calculating a number of voting rights of the shares necessary to resolve a certain agenda.

d) Determination of Purchase Price

The purchase price of shares shall be determined through a negotiation between the shareholder and the corporation (§374-2 (3), §374-3 (3), §530 (2)). It is my view that such negotiation refers to an agreement.

If such negotiation has not been made within 30 days of the receipt of such demand, the corporation or the shareholder who has demanded the purchase of shares may request the court to determine the purchase price (§374-2 (4), §374-3 (3), §530 (2)).

Where a court makes a ruling on the purchase price of shares, it shall compute it by a fair price in view of the current status of assets of the corporation and other situations (§374-2 (5), §374-3 (3), §530 (2)). In this regard, case law held that if there existed a price of transaction reflecting the objective value of exchange properly, the price should be determined by regarding such price as the market value. However, if there was no price of transaction, the fair price should be determined, considering a variety of methods such as market value, net asset value, and/or earning value, generally accepted in evaluating shares of an unlisted corporation.[379] [Case40]

[Case40] Supreme Court 2008*Ma*264(13 October 2011)
In case of listed shares, a court shall, in principle, determine the price of purchase by referring to the market price. However, the court need not necessarily calculate by using only one method using average for prior two months, one month, or one week respectively, that is, a court may, at its discretion, reasonably determine whether the market value on a specific day prior to the date of the resolution of the BOD, or an average of market value during a certain period, or only one method among the methods using average for prior two months, one month, or one week respectively.

379. Supreme Court 2005*Ma*958,959,960,961,962,963,964,965,966(23 November 2006) & Supreme Court 2004*Ma*1022(24 November 2006); In case of listed shares under the Capital Market Act, this means the average of the prices calculated in each average of final quotations of the shares traded on the securities market and disclosed on a daily basis for 2 months, 1 month, and 1 week respectively before the day immediately preceding the date the resolution of the BOD is made, weighted by trading volume by real transactions (§165-5 (3) proviso of the Capital Market Act, §176-7 (3) 1. of the Enforcement Decree of the Commercial Act), and in case of unlisted shares, the average of the weighted average of the asset value and earnings value (§176-7 (3) 2. of the Capital Market Act, §176-7 (3) 2., §176-5 (1) 2. b. of the Enforcement Decree of the Commercial Act).

§10.05 AUTHORITY OF A REPRESENTATIVE DIRECTOR

[A] In General

A representative director shall be authorized to do all judicial or extrajudicial acts relating to the business of the corporation (§389 (3), §209 (1)).

[B] Right to Execute an Office

There is an opinion that a right to execute office of a representative director is originated from an authority of the BOD.[771] However, it is my view that a representative director is an institution having independent authority separated from the BOD.[772]

In respect of a right to execute an office generally, a representative director shall have an authority to execute the matters resolved in a meeting of shareholders and the BOD, and resolve and execute the business mandated from the BOD, and determine and execute at its discretion with respect to the matters related to other ordinary businesses of the corporation not included in the matters to be resolved a meeting of shareholders and the BOD. [Case104]

[Case104] Supreme Court 96*Da*48282(13 June 1997)
With respect to the material business not included in an ordinary business as the business not mandated to a representative director generally or concretely by the BOD among the businesses where the Acts, their subordinated statutes or the AOI do not prescribe that a resolution of a meeting of shareholders or the BOD is necessary, the BOD shall retain an authority to determine its intention.

The Commercial Act prescribes that an authority to write a name of a representative director and affix their seal or sign on a share certificate and a bond certificate (§356, §478 (2)) shall constitute the matters on an authority to execute businesses of a representative director. Despite that it would be prescribed as an authority of directors, the matters to be included in an authority of a representative director in nature are as follows: (1) Keeping of the AOI, a register of shareholders, a register of bondholders and minutes of a meeting of shareholders (§396); (2) A preparation of a share subscription form and a bond subscription form (§420, §474 (2)); (3) A request for appointment of an inspector upon the Investment in Kind (§422 (1)), and (4) A preparation, submission, keeping and making a public notice of the financial statements (§447, §447-3, §448).

771. KS Kim, *supra* n.2, at 365.
772. CS Lee, *supra* n.2, at 690; DY Chung, *supra* n.2, at 615; CH Chung, *supra* n.2, at 947.

[C] Right to Represent

[1] Scope

Generally, the scope of authority of a representative director of a stock corporation is identical to capacity for exercising rights of the corporation.[773] The capacity for exercising rights of the corporation shall be limited to the law based on its incorporation and the purpose of the AOI of the corporation. However, the act within the scope of the purpose is not be limited to the purpose itself designated under the AOI, but shall include all the acts necessary to perform it directly or indirectly. In this regard, case law held that whether or not it would be necessary for performing its purpose should not be judged by a subjective and concrete intention but rather by an objective nature of acts.[774]

Both a type of an active representation which expressed intentions against a counterparty and a type of a passive representation which receives the intentions of the counterparty shall be included in a right to represent, and both an act which is not related to a legal meaning and an illegal act shall be included in the right to represent,[775] and a provision of a proxy shall apply mutatis mutandis to a representative director unless in contradiction of the nature (§59 (2)).

Where the number of representative directors is more than one, each representative director could, in principle, represent the corporation.[776] However, the joint representative director who shall jointly represent the corporation could be adopted (§389 (2)). The purpose of this provision is securing a unity of execution of business, and exercising prudently through exercising a right to represent by more than 1 representative director jointly, and preventing a right to represent from being misused through checking among representative directors. [Case105]

[Case105] Supreme Court 89*Daka*3677(23 May 1989)
One of the joint representative directors could mandate the execution of a right to represent to other joint representative director with respect to a specific matter. However, a general or comprehensive mandate thereof should not be allowed.

Meanwhile, case law held that a formal act such as issuing a note or check should state a specific representative director thereon, and write their name and affix their seal, or signature thereon. [Case106]

773. Supreme Court 86*Daka*1858(9 August 1988).
774. Supreme Court 98*Da*2488(8 October 1999) & Supreme Court 91*Da*8821(22 November 1991).
775. In this point, a right to represent is different from a proxy, and both an act which is not related to a legal meaning and an illegal act shall be included in the extrajudicial acts with respect to the business of the corporation.
776. A representative director elected shall register its name, ID number and address in a register of corporation of a registry office (§317 (2) 9.). Of course, like a director, the registration of a representative director will not result in making election of it effective.

Delaware General Corporation Law,[823] and the California Corporations Code,[824] a corporation shall establish the officer pursuant to the bylaws or by the BOD. Especially, under the Principles of Corporate Governance[825] of ALI (American Law Institute),[826] the management of the business of a publicly held corporation[827] which had both 500 or more record holders of its equity securities for its most recent general shareholder's meeting as of the record date and USD 5 million or more of total assets, should be conducted by or under the supervision of such principal senior executives as are designated by the BOD.

§11.04 APPOINTMENT

[A] In General

A stock corporation may have officers (§408-2 (1) former sentence), and the BOD shall have the authority to appoint or dismiss the officers (§408-2 (3) 1.). In other words, even if there is no provision, the officers could be appointed or dismissed only by a resolution of the BOD. No stock corporation which has an officer shall have a representative director (§408-2 (1) latter sentence).

There is no provision on the qualification of officers in the Commercial Act. It is my view that a director may become concurrently an officer, and an employee of the corporation or any third person other than a director may also become an officer.[828] In my opinion, an officer shall not become concurrently an auditor. A stock corporation with officers shall have a chairperson of the BOD to chair a meeting of the BOD, in which case, the chairperson of the BOD shall be appointed by a resolution of BOD, unless otherwise provided for in the AOI (§408-2 (4)). In this case, it is my view that the officer may also become concurrently the chairperson.[829]

[B] Number

More than one officer may be appointed (§408-2 (3) 5.). In such case, even though there is no provision, it is my view that the corporation having officers is entitled to establish a meeting of officers.[830]

823. §142 (a) of Delaware General Corporation Law.
824. §312 (a) of California Corporations Code.
825. §3.01 of ALI Principles of Corporate Governance.
826. As the institute established in 1923, its mission is, as set out in its charter, to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work, and the representative accomplishments of the institute are the establishment of the Uniform Commercial Code and the Restatements of the Law (https://www.ali.org).
827. §1.31 of ALI Principles of Corporate Governance.
828. OR Song, *supra* n.2, at 1071; CS Lee, *supra* n.2, at 819; Lim(II), *supra* n.297, at 360.
829. Lim(II), *supra* n.297, at 363; Commentary(III), *supra* n.303, at 510; BK Hong et al., *supra* n.25, at 358.
830. CS Lee, *supra* n.2, at 827; Commentary(III), *supra* n.303, at 524; KW Choi, *supra* n.2, at 724.

Where 2 or more officers are appointed, a representative officer who is to represent the corporation shall be appointed by a resolution of the BOD. However, in case there exists only 1 officer, it shall become the representative officer (§408-5 (1)). The provisions concerning the representative director of a stock corporation shall apply mutatis mutandis to the representative officer, unless otherwise provided for in the Commercial Act (§408-5 (2)). The provision of the Apparent Representative Director shall mutatis mutandis to the corporation having officers (§408-5 (3), §395).

[C] Term

The term of office of an officer shall not exceed 2 years, unless otherwise provided for in the AOI (§408-3 (1)). The purpose of this provision is charging the liability of the officer appointed by the BOD.[831] The term of office of an officer may be extended by the AOI until the closing of a meeting of the BOD convened immediately after the closing of a meeting of shareholders convened in respect of the last period for the settlement of accounts within the such term of office (§408-3 (2)). In comparison with this officer, the term of office of a director may be extended by the AOI until the closing of a meeting of shareholders convened in respect of the last period for the settlement of accounts within the director's term of office (§383 (3)).

[D] Registration

The name and ID number of officers, and Name, ID number and address of a representative officer, and a joint representative officer shall be registered in a register of the corporation of a registry office (§317 (2) 8. through 10.).

§11.05 AUTHORITY

[A] Right to Execute Businesses and a Right to Determine an Intention

An officer shall have the right to execute businesses of the corporation and the right to decide on the execution of affairs delegated to them by the AOI or a resolution of the BOD (§408-4). The right of officers to execute business is the same as that of representative directors. Deciding on the execution of affairs delegated by the AOI or a resolution of the BOD means the authority to determine the intention of the corporation mandated by the BOD except for the matters designated as an authority of the BOD under the Commercial Act (§408-2 (3) 4.).

831. KB Kwon, *supra* n.2, at 725; OR Song, *supra* n.2, at 1071; Lim(II), *supra* n.297, at 364; Jang, *supra* n.18, at 392; CH Chung, *supra* n.2, at 973. In comparison with this officer, the term of office of a director shall, in principle, not exceed 3 years.

Also, an external auditor shall submit an audit report to the corporation 1 week prior to the date set for a general meeting of shareholders, and submit the audit report to the Securities and Futures Commission and the Korean Institute of Certified Public Accountants within 2 weeks after the closing of the general meeting of shareholders (§8 (1) of the External Audit Act, §7 (1) 1. of the of the Enforcement Decree of the External Audit Act).

[C] Keeping, Disclosure and a Public Notice of the Financial Statements

Directors shall keep the financial statements, the supplementary statements thereof and the business report as well as an audit report at the head office of the corporation for 5 years and shall keep the certified copies thereof at the branch offices for 3 years, from 1 week prior to the date set for an general meeting of shareholders (§448 (1), §447, §447-2). Meanwhile, any shareholder or creditor of the corporation may, any time during business hours, inspect such documents and request the copying of such documents or an abstract, with the payment of fees determined by the corporation (§447-2).

Also, in the event that directors have obtained approval from a meeting of shareholders in respect of the financial statements and supplementary statements thereof, they shall give, without delay, a public notice of the balance sheet (§449 (3), (1), §447).

[D] Approval of the Financial Statements

[1] In Principle: Approval of a Meeting of Shareholders

Directors shall submit the financial statements and the supplementary statements to an general meeting of shareholders and shall request an approval thereof (§449 (1), §447). In other words, the representative director shall request for approval of the financial statements and the supplementary statements thereof under the Common Resolution at the general meeting of shareholders. Meanwhile, directors shall submit a business report to the general meeting of shareholders and report its content thereof (§449 (2), §447-2).

In respect of whether the general meeting of shareholders could approve the financial statements and their supplementary statements submitted by the representative director after an amendment thereto, it is my view that there is no reason to disapprove it.[959] The reason is that the representative director shall prepare such document once again from the outset, which is inconvenient, unless the meeting would not hold the authority to approve after amendment, and amending at the general meeting would be helpful in making such documents trustworthy.

959. HJ Suh, *supra* n.25, at 1020; Son, *supra* n.25, at 665; BC Lee et al., *supra* n.23, at 469; WJ Choi, *supra* n.25, at 316; Han, *supra* n.24, at 394; BK Hong et al., *supra* n.25, at 569.

[2] Exception: Approval by the BOD

Notwithstanding such provision, as provided for in the AOI, the financial statements and their supplementary statements may be approved by a resolution of the BOD, provided that in such case, all the requirements mentioned below shall be satisfied (§449-2 (1), §447).

(1) An external auditor presents an opinion that each of the financial statements and the supplementary statements properly represent the corporation's financial conditions and performance of management in accordance with the Acts, subordinate statutes and the AOI (§449-2 (1) 1.); and
(2) All the auditors (in case of a stock corporation which has established the audit committee, referring to all the members of the audit committee) give consent thereto (§449-2 (1) 2.).

Also, in case a BOD approves, the directors shall report the content of the financial statements and their supplementary statements approved to the meeting of shareholders (§449-2 (2), §447).

[3] Effect of the Approval of the Financial Statements

[a] Final Determination of the Financial Statements

The financial statements shall be determined finally and effectively when approved by the meeting of shareholders (or the BOD; hereinafter the same shall apply in this section). In other words, the dividend of profits as stated therein shall be allowed, and the acts where the reserves as stated therein shall be accumulated could be allowed after this point.

[b] Occurrence of a Right to Demand Dividend of Profits

A shareholder is entitled to acquire a concrete right to demand the dividend of profits against the corporation pursuant to an approval of the financial statements at the meeting of shareholders. This is separate from the right of shareholder, and the disposition of such right including a transfer is allowed, and shall be subject to the extinctive prescription separately.

[c] Public Notice of the Balance Sheet

If directors have obtained an approval from an general meeting of shareholders in respect of the financial statements and the supplementary statements, they shall give, without delay, public notice of the balance sheet (§449 (3)).

distribution of profit by the corporation without accumulating such optional reserve shall not constitute an illegal distribution. However, the director in violation of the AOI or shareholders' resolution could be liable for damages incurred by the corporation (§399).

The unreal reserve (so to speak, a quasi-reserve) is nominally a reserve, but substantially an item for correcting the amount of assets stated as debt in order to reflect the real value of assets which includes a depreciation reserve or an allowance for bad debts (§2.43 of the business accounting standard for general corporation).

A secret reserve shall not be appropriated in the reserve in the balance sheet, but substantially constitutes a reserve. It is the difference calculated by over-valuing obligations and underestimating claims. Because there is a risk created by an illegal or improper accounting estimate, it is my view that it shall not be allowed.[975]

§18.04 EARNED SURPLUS RESERVE

An earned surplus reserve is the reserve accumulated from profits, which is for covering a deficit of capital (§460).

A stock corporation shall accumulate, as its earned surplus reserve, at least 10% of the cash dividend including dividend in kind in each period for the settlement of accounts until its reserve reaches half the amount of the paid-in capital. However, this shall not apply in case of a share dividend (§458). It is my view that the amount exceeding half of the paid-in capital shall be included in an optional reserve.[976]

Meanwhile, in respect of whether an accumulation of an earned surplus reserve could be allowed unless there is no distribution of profits, it is my view that the earned surplus reserve could be accumulated in the event that distributable profits exist even if there is no actual distribution of profits. The reason is that it shall be interpreted that a provision that at least 10% of the amount of distribution of profits shall be accumulated at the distribution of profits does not deny a possibility that the earned surplus reserve is accumulated in the event that distributable profits exist even if there is no distribution of profits.[977]

§18.05 CAPITAL RESERVE

[A] In General

A stock corporation shall accumulate as its capital reserve the surplus amount accrued from capital transactions in accordance with the accounting standards (§459 (1) of the

975. KB Kwon, *supra* n.2, at 1015; KS Kim, *supra* n.2, at 547; JH Kim, *supra* n.24, at 697; Ryu, *supra* n.25, at 372; CH Chung, *supra* n.2, at 1138; Commentary(IV), *supra* n.201, at 321.
976. HK Kim, *supra* n.2, at 681; Yang, *supra* n.94, at 480; KS Lee et al., *supra* n.2, at 680; CS Lee, *supra* n.2, at 949; Jung, *supra* n.18, at 620; KW Choi, *supra* n.2, at 916.
977. The Ministry of Finance and Economy, *Interpretation by the ministry of finance and economy* (Securities 22325-57), 4 February 1986. KS Kim, *supra* n.2, at 550; CS Lee, *supra* n.2, at 949; Lim(I), *supra* n.2, at 690; CH Chung, *supra* n.2, at 1139; Commentary(IV), *supra* n.201, at 324.

Commercial Act, §18, §15 of the Enforcement Decree of the Commercial Act). The capital surplus is a surplus accrued from a transaction with shareholders such as an increase or decrease of capital. This includes the amount exceeding par value at the issuance of shares, the gain accrued from a disposition of treasury shares and the gain accrued from a reduction of paid-in capital (§2.30 of the business accounting standard for general corporation).

Unlike the earned surplus reserve, all the amount of the capital surplus shall be accumulated into a capital reserve without limitation.

[B] Composition of the Capital Surplus

[1] Amount Exceeding a Par Value at the Issuance of Shares

In case of shares with par value, this is the issuing price exceeding the par value of the shares (§451 (1)). In case of shares without par value, this is the amount which is not appropriated in the paid-in capital among the amount of shares issued (§451 (2) latter sentence).

[2] Profit Accrued from a Disposition of Treasury Shares

This is the difference between the amount of disposition of treasury shares and the amount registered in a book, in case of disposition of treasury shares (§2.30 of the business accounting standard for general corporation).

[3] Gain Accrued from a Reduction of Paid-In Capital

This is the difference where the amount of reduction of paid-in capital is larger than the total amount used for retirement of shares, refund of the subscription price and covering the deficit.

[4] Gain Accrued from a Merger

The gain accrued from a merger is an amount calculated by subtracting the total amount which consists of the obligations succeeded from a merged corporation, the amount paid to the shareholders of the merged corporation and the amount of paid-in capital of a surviving corporation increased (or the paid-in capital of a corporation newly established) from the amount of assets succeeded from the merged corporation.

[5] Gain Accrued from a Division

The gain accrued from a division is an amount calculated by subtracting the total amount which consists of the obligations succeeded from a divided corporation, the amount paid to the shareholders of the divided corporation and the amount of

AOI may provide that the new shares shall be deemed to have been issued at the end of the business year immediately before the business year in which such issuance has been included. However, unless there is such provision in the AOI, it is my view that the dividend of profits against the new shares shall be subject to the Dividend in proportion to the Days (§423 (1), §461 (6), §462-2 (4), §350 (3) latter sentence).[986] Thus, with regard to new shares is issued pursuant to an ordinary issuance of shares, or a capitalization of reserves, or a share dividend, the corporation may decide at its discretion which methods to use among a distribution pursuant to the AOI and a Dividend in proportion to the Days.

However, with regard to the distribution of profits against new shares issued pursuant to a conversion of convertible shares, or an exercise of preemptive rights of convertible bonds or bonds with warrant, the AOI may provide that the new shares shall be deemed to have been issued at the end of the business year immediately before the business year in which such issuance has been included. However, unless there is such provision in the AOI, the new shares shall be deemed to have been issued at the end of the business year in which such issuance has been included (§350 (3), §516 (2), §516-10). In case of an interim dividend, the record date of the interim dividend shall be deemed as the end of the business year (§462-3 (5), §350 (3)). Thus, with regard to the distribution of profits against new shares issued pursuant to a conversion of convertible shares, or an exercise of preemptive rights of convertible bonds or bonds with warrant, or the interim dividend, the corporation shall be entitled to determine at its discretion whether there would be no dividend, or the distribution for an entire business year in which such issuance has been included pursuant to the AOI would be made.

[3] Unequal Dividend Against a Majority Shareholder

Where there is no dividend to a majority shareholder or it is disadvantageous comparing to a shareholder, if the shareholder agrees to that, there is no problem. However, unless there is an agreement, it is my view that this shall constitute a violation of the principle of equal treatment of shares.[987] Case law held that in the event that all majority shareholders agreed such unequal dividend which was disadvantageous to them in a meeting of shareholders, this would be deemed to constitute a waiver of the right to receive the dividend of profits or the transfer. Therefore, it would not violate §464 of the Commercial Act.[988]

986. KB Kwon, *supra* n.2, at 1034; DH Kim, *supra* n.24, at 440; Son, *supra* n.25, at 675; KS Lee et al., *supra* n.2, at 689; Jung, *supra* n.18, at 625; WJ Choi, *supra* n.25, at 329.
987. KB Kwon, *supra* n.2, at 1032; OR Song, *supra* n.2, at 1167; CS Lee, *supra* n.2, at 972; CH Chung, *supra* n.2, at 1144; KW Choi, *supra* n.2, at 929; JS Choi, *supra* n.25, at 721.
988. Supreme Court 80*Da*1263(26 August 1980).

[E] Illegal Dividend

[1] In General

An illegal dividend is a dividend in violation of the Act, subordinated statutes or the AOI. It includes the case of the dividend exceeding the distributable profits and other cases that there are defects on the procedure of dividend. It is my view that the former shall be null and void. The latter case that there are substantial illegal matters in defects such as a dividend in violation of the principle of the equal treatment of shares, or an interim dividend where there is no provision in the AOI shall be null and void. In such case, it is my view that this may be asserted by any methods including a suit to nullify.[989] However, where there exist only procedural defects on a resolution of dividend, a suit for revocation a resolution shall be filed.

[2] Request to Return the Amount of Illegal Dividend by the Corporation

It is my view that in the event that an illegal dividend is null and void, the corporation may request a return of the amount of illegal dividend pursuant to the theory of a return of unjust enrichment under the Civil Act (§741 of the Civil Act). In this case, all the amount shall be returned irrespective of the good or bad faith of the shareholder who received such dividend.[990]

In such case, it is interpreted by law that the derivative suit shall not be allowed. However, it is my view that it should be allowed by an amendment to the Commercial Act.

On the other hand, unless the illegal dividend is null and void, it is my view that after a final and conclusive judgment on the suit of revocation of a resolution on the illegal dividend, the amount of the illegal dividend shall be requested to be returned.

[3] Request to Return the Amount of Illegal Dividend by Any Creditor of the Corporation

Where the dividend including the interim dividend has been paid despite that there was no distributable dividend, any creditor of the corporation may claim that such dividend be returned to the corporation (§462 (3), (1), §462-3 (6)). This right is not a right to subrogate for the right of the corporation, but a right allowed specifically to creditors under the Commercial Act. In case of an illegal dividend other than the case where there are no distributable profits, the creditors of the corporation shall not be entitled to exercise this right. Regardless of whether the corporation has exercised this right or not, the creditors at the exercise as well as the creditor at the illegal dividend would be allowed to exercise it. This right needs not be exercised only by a suit to

989. Kang, *supra* n.24, at 795; KS Kim, *supra* n.2, at 572; HK Kim, *supra* n.2, at 694; KS Lee et al., *supra* n.2, at 692; CS Lee, *supra* n.2, at 980; Commentary(IV), *supra* n.201, at 354.
990. HK Kim, *supra* n.2, at 695; CS Lee, *supra* n.2, at 981; Lim(I), *supra* n.2, at 729; DY Chung, *supra* n.2, at 784; CH Chung, *supra* n.2, at 1147; KW Choi, *supra* n.2, at 934.

(1) The amount of paid-in capital in the immediately previous period for the settlement of accounts (§462-3 (2) 1.);
(2) The total amount of the capital reserve and earned surplus reserve accumulated until the immediately previous period for the settlement of accounts (§462-3 (2) 2.);
(3) The amount which is to be distributed as a profit or paid at a general meeting of shareholders with respect to the immediately previous period for the settlement of accounts (§462-3 (2) 3.); and
(4) The earned surplus reserve which is to be accumulated in the relevant period for the settlement of accounts pursuant to the interim dividends (§462-3 (2) 4.).

Meanwhile, the earned surplus reserve against the dividend of profits mentioned (3) above shall be included in (2), and it is my view that the share dividend shall be included in the (3), and by an amendment to the Commercial Act, the unrealized profits to be deducted in calculating the distributable profits shall be included in the items of deduction mentioned (1) through (4) right above.[993]

[D] Limitation to an Interim Dividend

If the amount of net assets on the balance sheet in the relevant period for the settlement of accounts is deemed unlikely to amount to the total amount of (1) the amount of paid-in capital, (2) the total amount of the capital reserve and the earned surplus reserve accumulated until the pertinent period for the settlement of accounts of the corporation (§462 (1) 2.), (3) the amount of the earned surplus reserve to be accumulated for the pertinent period for the settlement of accounts of the corporation (§462 (1) 3.), and (4) the unrealized profits which is a net asset on the balance sheet, which have increased as a result of evaluation of assets and liabilities according to the accounting principles but have not been offset against the unrealized losses (§462 (1) 1. through 4.), the corporation shall not pay the interim dividends (§462-3 (3), §462 (1)). In other words, in the event that it is likely that there would not exist distributable profits in the relevant period for the settlement of accounts, the interim dividend shall not be allowed.

[E] Effect of Illegal Interim Dividends

[1] Right to Demand the Return of the Interim Dividend

Where there is no provision on interim dividend in the AOI or its payments exceeded the limit, the interim dividend shall be null and void. In this case, the corporation may

993. KB Kwon, *supra* n.2, at 1040; Yang, *supra* n.94, at 496; BC Lee et al., *supra* n.23, at 490; JS Choi, *supra* n.25, at 734.

exercise a right to demand the return of the illegal dividend by virtue of the provisions on unjust enrichment. This shall be applied with regard to the regular dividend as mentioned above. If there are simply defects on the procedure of a resolution of a meeting of the BOD, a suit for revocation of a resolution shall be filed first.

[2] Liability of Indemnification for Damages by Directors

Where a payment of interim dividends is made, despite that the amount of net assets on the balance sheet in the relevant period for the settlement of accounts fails to amount to the total amount of (1) the amount of paid-in capital, (2) the total amount of the capital reserve and the earned surplus reserve accumulated until the pertinent period for the settlement of accounts of the corporation (§462 (1) 2.), (3) the amount of the earned surplus reserve to be accumulated for the pertinent period for the settlement of accounts of the corporation (§462 (1) 3.), and (4) the unrealized profits which are the net assets on the balance sheet, which have increased as a result of evaluation of assets and liabilities according to the accounting principles but have not been offset against the unrealized losses (§462 (1) 1. through 4.), directors shall be jointly and severally liable to indemnify for the difference (where the amount of dividend is less than such difference, the amount of dividend) the corporation (§462-3 (4), main sentence, §462 (1)). Also, the directors who have assented to such resolution of the BOD shall bear the same joint and several liability (§462-3 (6), §399 (2)), and directors who have participated in such resolution and whose dissenting opinion has not been entered in the minutes of the BOD shall be presumed to have assented to such resolution (§462-3 (6), §399 (3)). Such liability of directors may be absolved by the consent of all shareholders, and the maximum amount to be liable may be designated pursuant to the AOI (§462-3 (6), §400).

The purpose of this provision is to hold liable for damages incurred by the corporation directors who resolved such interim dividend despite that it is likely that there would be no distributable profits in the relevant period for an applicable settlement of accounts. However, unlike the burden of proof on the liability of indemnification for damage against the corporation, the directors could be exonerated from the liability only if they prove that they have not been negligent in rendering judgment that the deficit is not likely to occur (§462-3 (4) proviso), which is to make the liability of director more strictly.

[3] Request of Return by Creditors of the Corporation

Where the interim dividend is made despite that it is likely that there would be no distributable profits, the creditors of the corporation may claim that such dividends be returned to the corporation. This suit shall be subject to the exclusive jurisdiction over the district court where the head office is located (§462-3 (6), (3), §462 (3), (4)).