International Commercial Transactions, Franchising, and Distribution

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This article surveys important developments in the field of international commercial transactions, franchising, and distribution during late 2010 and 2011.[1]

I. U.N. Convention on the Use of Electronic Communications in International Contracts

The use of electronic commerce in international trade has grown exponentially in the last few years. To date, however, few legal instruments have harmonized the law in relation to electronic communications. In response to this gap, United Nations Commission on International Trade Law (UNCITRAL) initiated the Convention on the Use of Electronic Communications in International Contracts (ECC).[2] The Convention's purpose is to "facilitat[e] the use of electronic communications in international trade by assuring that

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1. For developments in 2010, *see* Arnold S. Rosenberg et al., *International Commercial Transactions, Franchising, and Distribution*, 45 INT'L LAW. 191 (2011). For developments in 2009, *see* Arnold S. Rosenberg et al., *International Commercial Transactions, Franchising, and Distribution*, 44 INT'L LAW. 229 (2010).

2. U.N. Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, U.N. Doc. A/RES/60/21 (Nov. 23, 2005) [hereinafter Convention] has been signed by eighteen nations as of January 16, 2008, according to the United Nations Commission on International Trade Law (UNCITRAL). *See Status 2005—United Nations Convention on the Use of Electronic Communications in International Contracts*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html [hereinafter *Status 2005*] (last visited Jan. 18, 2012).

contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents."[3] A simple goal, one would think, yet after several years of dormancy, only two nations have ratified the Convention.[4] Three nations are required to bring the Convention into force.

The Convention may be on the brink of coming into force as the Australian Parliament recently passed the Electronic Transactions Act 2011, which was explicitly drafted to comply with the ECC.[5] Within the next year the Australian process will likely be complete,[6] at which time the Convention will come into force. Upon this occurrence, this little-known Convention will begin to impact the enforceability of electronic communication in key regions and industries.

Of primary concern to the practitioner is what the Convention covers. The Convention applies to all electronic communications exchanged between parties whose places of business are in different states if at least one party has its place of business in a contracting state.[7] If only one party is from a contracting state, the Convention only applies if the law of a contracting state is the law applicable to the dealings between the parties.[8] Of course, if the parties have agreed that their relations are to be governed by the law of a contracting state, the Convention will apply.[9] While the Convention may apply by virtue of the parties' choice,[10] it is important to note also that the parties may exclude its application or vary its terms within the limits allowed by otherwise applicable legislative provisions.[11] In terms of party location, similar to other Conventions,[12] primacy is given to the declared location.[13] Should a party's location not be discernible from the communications, contract, or prior dealings of the parties, the Convention will not apply.[14] Moreover, the Convention does not apply to contracts concluded for personal, family, or household pur-

3. *Status 2005—United Nations Convention on the Use of Electronic Communications in International Contracts*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html. This also matches U.S. law and the prior Model Law E-Commerce Document of the United Nations. *See* Model Law on Electronic Commerce Adopted by the U.N. Comm'n on Int'l Trade Law, G.A. Res. 51/162, art. 5, U.N. Doc. A/RES/51/162 (Jan. 30, 1997), *available at* http://documents.un.org/mother.asp; Electronic Signatures in Global and National Commerce (E-SIGN) Act, 15 U.S.C. § 7001(a) (2000); Uniform Electronic Transaction Act (UETA) § 7(a), (b) (1999).

4. Honduras (June 15, 2010) and Singapore (July 7, 2010). *See Status 2005*, *supra* note 2.

5. Bruce Arnold, *ETA II*, BARNOLD L. BLOG, (Feb. 9, 2011), http://barnoldlaw.blogspot.com/2011/02/eta-ii.html.

6. The Australian government plans to "move to accede to the UN Convention" as soon as the "amendments have been enacted in all jurisdictions." *Updating the Electronic Transactions Act*, THE FINANCIAL, (Nov. 5, 2011, 3:09 AM), http://bank.finchannel.com/news_flash/World/86601_Updating_/.

7. *See* Convention, *supra* note 2, art. 1(1).

8. *See id.* Explanatory Note (II)(A)(6).

9. *See generally id.* art. 18.

10. *Id.* Explanatory Note (II)(A)(6).

11. *Id.* art. 3.

12. *See* United Nations Convention on Contracts for the International Sale of Goods (CISG), Austria, art. 1(2), U.N. Doc. A/CONF.97/18 (Vol. I), Annex I (April 11, 1980).

13. This does not place an affirmative duty on the party to disclose location. *See* Convention, *supra* note 2, art. 6(1), Explanatory Note (II)(B)(8).

14. *See id.* art. 1(2).

poses,[15] nor does it apply to certain financial transactions,[16] negotiable instruments,[17] and documents of title.[18]

The possibility that the Convention might become applicable to a contract, even if only one of the parties has its place of business in a contracting state, should give a business pause for careful planning. Businesses and practitioners also should keep a watchful eye on the domestic law pertaining to e-commerce in some key regions and industries. This is because countries that have indicated their intention to consider ratifying the Convention are prohibited from enacting legislation which conflicts with the Convention.[19] To date, a total of eighteen nations have made this declaration,[20] including important trading countries such as China,[21] the Russian Federation,[22] Singapore,[23] the Republic of Korea,[24] Iran,[25] Saudi Arabia,[26] and Panama.[27] Each of these nations is obligated to refrain from legislative measures that would conflict with provisions of the Convention.

Despite these concerns, one should note that for the most part, the Convention contains proscriptions that will not appear surprising to a U.S.- or Canada-based practitioner. First, as in the case of analogous Canadian[28] and U.S. statutes,[29] the purpose of the Convention is to "remove [existing legal] obstacles to the use of electronic communications in international contract" formation and performance.[30] To accomplish this goal, also like U.S. and Canadian law,[31] the Convention seeks to establish the functional equivalence between electronic communications and paper documents,[32] as well as between electronic authentication methods and handwritten signatures.[33]

Another similarity with U.S. and Canadian e-commerce laws is that the Convention defines the time of dispatch of electronic communications to be that in which the "communication . . . leaves an information system under the control of the originator."[34] Time

15. *See id.* art. 2(1)(a).
16. *See id.* art. 2(1)(b).
17. *See id.* art. 2.
18. *See id.* art. 2(2).
19. Those nations which have signed the Convention are "obliged to refrain from acts which would defeat the object and purpose when . . . it has signed the treaty . . . [and] until [a country has] made its intention clear not to become a party." Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).
20. *See* Convention, *supra* note 2, art. 16(1).
21. June 7, 2006. *See Status 2005*, *supra* note 2.
22. Apr. 25, 2007. *See id.*
23. July 6, 2006. *See id.*
24. Jan. 15, 2008. *See id.*
25. Sept. 26, 2007. *See id.*
26. Nov. 12, 2007. *See id.*
27. Sept. 25, 2007. *See id.*
28. *Uniform Electronic Commerce Act (UECA)*, UNIFORM LAW CONFERENCE OF CANADA, http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u1&print=1 (Aug. 1999).
29. The E-SIGN Act, 15 U.S.C. § 7001 and UETA §7, are in force in 47 states and the District of Columbia. *See* Convention, *supra* note 2, art. 23.
30. Convention, *supra* note 2, pmbl. In general, "when it leaves an information system under the control of the originator." Convention, *supra* note 2, art. 10(1).
31. In general, "when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee." *Id.* art. 10(2).
32. *Id.* arts. 9(1), (2).
33. *Id.* art. 9(3).
34. *Id.* art. 10(1).

of receipt of an electronic communication is "the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee."[35] It is important to note that a rebuttable presumption exists which specifies that "[a]n electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address."[36] However, the Convention leaves the time of formation to applicable domestic law.[37]

The Convention also establishes on an international level, as does E-SIGN in the United States, that communications are not to be denied legal validity solely on the grounds that they were made in electronic form.[38] Specifically, the Convention allows for the enforceability of contracts entered into by automated message systems, even when no natural person reviewed the individual actions carried out by those systems.[39] But one should note the Convention provides an opportunity to remedy input errors made by natural persons entering information into automated message systems.[40]

One of the highly regarded provisions of the Convention extends its application to other conventions already in force,[41] specifically the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[42] and the Convention on Contracts for the International Sale of Goods (CISG).[43] The application of the Convention to these two widely adopted conventions should be welcome to most international practitioners as neither the CISG nor the New York Convention contemplated electronic transactions. But the incongruity between the Convention and current domestic law on electronic commerce should be a further source of concern for the international practitioner. The differences between domestic and international law may become more significant as domestic harmonization efforts evolve.

Although at the point when it becomes effective, the Convention will be in force only in countries that account for a small percentage of international trade, four Convention signatories were among the top ten coal, oil, and natural gas producers in the world in 2010.[44] While energy is perhaps the largest and most important sector that could be affected by the Convention, finance, technology, defense, and shipping are also substan-

35. *Id.* art. 10(2).

36. *Id.*

37. *Id.* art. 10(1) cmt. 175.

38. *See id.* art. 8(1).

39. *See id.* art. 12 cmt. 209–10.

40. *See id.* art. 14(3) cmt. 231.

41. *See id.* art. 20(1) cmt. 288–89.

42. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3, 21 U.S.T. 2517, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

43. U.N. Convention on Contracts for the International Sale of Goods U.N. Doc. A/CONF. 97/18, Annex 1, S. Treaty Doc. 98-9, 1489 U.N.T.S. 3, 19 I.L.M. 668 (Apr. 11, 1980), http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

44. In 2010, Russia and China (two of the world's fastest growing economies) along with Saudi Arabia and Iran produced 38.6% of the world's main energy sources. *See* BP, BP STATISTICAL REVIEW OF WORLD ENERGY (2011), pp. 8, 22, 32, *available at* http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2011/STAGING/local_assets/pdf/statistical_review_of_world_energy_full_report_2011.pdf.

tially impacted by the Convention signatories.[45] In addition, the Association of Southeast Asian Nations (ASEAN) has chosen to use the Convention as a tool for harmonizing the electronic commerce laws in the ten ASEAN member nations. This means that though only two ASEAN member nations are Convention signatories,[46] the laws of an additional eight countries[47]—several of which routinely attract outsourcing from the United States—reflect, or will soon reflect, the provisions of the Convention.

It is safe to predict that the Convention will play an important role in the future of electronic commerce, whether officially or behind the scenes. A significant portion of the international commercial transactions that take place throughout the world every day could be affected by this little-known Convention, from the formation of a contract to shipping arrangements, choice of arbitration seat, and rules and financing arrangements, among others. Given the significant role this Convention is poised to play, the international practitioner needs to be aware of the ways in which it could affect her practice and her clients.

II. Adoption of UNIDROIT Principles 2010

In 1994, a Working Committee of the International Institute for the Unification of Private Law (UNIDROIT) authored the first UNIDROIT Principles of International Commercial Contracts.[48] After a 2004 revision, a third edition of the Principles was drafted in 2010. Called "UNIDROIT Principles 2010," the third edition was adopted by the UNIDROIT Governing Council at its meeting in Rome in May 2011.[49]

UNIDROIT Principles 2010 are not legally binding but constitute a soft law instrument for "harmonising" international business law.[50] The Secretary General of UNIDROIT and the Chairman of the working group of the 2010 edition have dubbed the Principles a "restatement" of the general part of international contract law.[51] The authors intend several uses for these non-binding rules, including serving as the governing law of a contract, a method of interpreting international conventions, and as an expression

45. *See generally Asia's share of global ICT exports at record high*, THIRD WORLD NETWORK (Feb. 22, 2011), http://www.twnside.org.sg/title2/wto.info/2011/twninfo110205.htm; SANG RIM CHOI ET AL., BANKS AND THE WORLD'S MAJOR BANKING CENTERS, 2000 (2002), *available at* http://fic.wharton.upenn.edu/fic/papers/02/0236.pdf; *"Russian arms exports exceed $8bln in 2008*, RIA NOVOSTI (Dec. 16, 2008, 6:58 PM) http://en.rian.ru/russia/20081216/118889555.html; UNCTAD, Review of Maritime Transport 2009, UNCTAD/RMT/2009, 1, 54–55, http://www.unctad.org/en/docs/rmt2009_en.pdf.

46. Singapore and the Philippines; *see Status 2005*, *supra* note 2.

47. Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Thailand, and Viet Nam; *see* ASEAN Member States, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, http://www.aseansec.org/18619.htm (last visited Jan. 22, 2012).

48. *See generally* Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281 (1994).

49. UNIDROIT, SUMMARY OF CONCLUSIONS (2011), 1, 2, *available at* http://www.unidroit.org/english/documents/2011/cd90-conclusions-e.pdf; *see* Michael J. Bonell, *The Unidroit Principles 2010: An International Restatement of Contract Law*, GEORGETOWN UNIVERSITY (Oct. 28, 2011), http://www.law.georgetown.edu/cle/materials/UNIDROIT/2011.pdf; *see also* Unidroit Principles of International Contracts, 1, 9, http://www.unidroit.org/english/principles/contracts/main.htm (last visited Jan. 22, 2012).

50. *See* José Angelo Estrella Faria, *From Scholar's Dream to Lawyer's Tool? Uniform Commercial Law and International Legal Practice – Brief Remarks on the Work of Unidroit*, GEORGETOWN UNIVERSITY 1, 9–10 (Oct. 28, 2011), http://www.law.georgetown.edu/cle/materials/UNIDROIT/2011.pdf.

51. *Id.* at 12; Bonell, *supra* note 49, at 1–2.

of common legal principles on international commercial contracts for arbitral panels or domestic courts.[52] Therefore, the Principles would be applicable in disputes similar to, but broader than, those covered by the UN CISG.[53] The 2010 Principles have been updated to include material on restitution on failed contracts, conditions, plurality of obligors and obligees, and illegality.[54]

Under the Principles, freedom of contract is of paramount importance, so parties will determine the content of their contract.[55] But mandatory rules of domestic law will prevail over the Principles.[56] The Principles may be modified by agreement of the parties unless otherwise provided as non-excludable, such as the duty to act in accordance with good faith and fair dealing.[57]

"A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement."[58] Contracts are valid by the agreement of the parties without further formal requirements.[59] They can be avoided because of a mistake, error, fraud, threat, or gross disparity.[60] "[E]ither party may claim restitution of whatever it has supplied under the contract, or the part of it avoided."[61] Restitution should be granted for an illegal contract when reasonable under the circumstances.[62]

Contractual obligations can be express or implied; they can be implied by the "nature and purpose of the contract, established practices, . . . good faith and fair dealing, [and] reasonableness."[63] Parties may be under a duty of best efforts or a duty of achieving a specific result, depending on the contractual terms, the risk, and the influence of the other party.[64] Parties may confer rights upon third parties,[65] as long as the beneficiaries are identifiable.[66] The 2010 Principles now recognize two types of conditions: suspensive conditions, conditions precedent to performance, and resolutive, conditions ending contractual obligations.[67]

"Where performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations" — except when there is a hard-

52. *See* Faria, *supra* note 50, at 12.

53. For a summary of how these two instruments interact, *see* Herbert Kronke, *The UN Sales Convention, the Unidroit Contract Principles and the Way Beyond*, 25 J. L. & COM. 451, 457 (2005).

54. *See* Bonell, *supra* note 49, at 1, 5–14; *see generally* Int'l Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts, [hereinafter UNIDROIT Principles 2010], *available at* http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf.

55. *See id.* art. 1.1.

56. *See id.* art. 1.4. A broad notion of "mandatory rules" means that restrictions on freedom of contract may also be derived from general principles of public policy.

57. *See id.* arts. 1.5, 1.7–1.10. Articles 1.8–1.10 set other standards for party behavior.

58. *See id.* art. 2.1.1. Agents can also create contractual obligations. *See id.* art. 2.2.1(1).

59. *See id.* art. 3.1.2.

60. *See id.* arts. 3.2.1–3.2.7.

61. *See id.* art. 3.2.15(1). Article 3.2.15 was amended in the 2010 Principles.

62. *See id.* art. 3.3.2.

63. *Id.* arts. 5.1.1–5.1.2.

64. *Id.* arts. 5.1.4–5.1.5.

65. *Id.* art. 5.2.1(1).

66. *Id.* art. 5.2.2.

67. *See id.* art. 5.3.1. But if a party causes a condition to occur or prevents one from occurring in conflict with the duty of good faith and fair dealing, the party cannot rely on the occurrence or non-occurrence of the condition. *See id.* art. 5.3.3.

ship.[68] Hardship is defined where the equilibrium of the contract is fundamentally altered either by the increased cost of a party's performance or because the value of performance of a party has diminished, allowing a court to amend or terminate the contract if reasonable.[69]

Non-performance is a party's failure to perform, and defective or late performance[70] entitles the aggrieved party to withhold performance.[71] A non-performing party may also have an opportunity to make a prompt and appropriate cure.[72] An impediment beyond a party's control and that the party could not reasonably anticipate at the time of the contract justifies non-performance, but the other party may terminate the contract.[73] Specific performance is required except when it is impossible in law or in fact, it is unreasonably burdensome or expensive, it is exclusively personal, or alternative performance is reasonably obtainable.[74] Termination is permitted when there has been fundamental non-performance.[75] Upon termination, if a party requests, the parties must make restitution in kind or in money, if in kind restitution is not possible.[76] Damages may also be given for non-pecuniary harms, including physical suffering and emotional distress, although that harm must be foreseeable at the time the contract was made and the damages may be reduced to the extent that the aggrieved party was responsible, bore the risk, or failed to mitigate.[77] Liquidated damages and penalty clauses are permissible, except when grossly excessive given the harm.[78]

Assignment of non-monetary performance is allowed provided that "the assignment does not render the obligation significantly more burdensome."[79] The party whose performance is assigned need not consent to the assignment nor be notified unless the performance is essentially personal.[80] Prohibitions on assignments only invalidate an assignment if performance is non-monetary.[81] Transferring an obligation or assigning a contract needs consent of the other party.[82]

"When several obligors are bound by the same obligation . . . they are presumed to be jointly and severally bound [in equal shares], unless the circumstances indicate other-

68. *Id.* art. 6.2.1.

69. *See id.* art. 6.2.2.

70. *See id.* art. 7.1.1 cmt. But non-performance due to another party's act or omission or due to a risk born by the first party does not qualify as non-performance for the Principles. *See id.* art. 7.1.2 cmts. 1–2.

71. *See id.* art. 7.1.3.

72. *See id.* art. 7.1.4.

73. *See id.* arts. 7.1.7(1), (4).

74. *See id.* art. 7.2.2.

75. *See id.* art. 7.3.1(1). Anticipatory termination is permitted, as is asking for assurance of due performance when the party reasonably believes that there will be fundamental non-performance. *See id.* arts. 7.3.3–7.3.4.

76. *See id.* art. 7.3.6 (paragraphs 3 and 4, allowing a failure to make monetary restitution if the failure to make in kind restitution is the fault of the other party and allowing recovery of costs for preservation or maintenance of performance, are new to the 2010 Principles).

77. *See id.* arts. 7.4.2, 7.4.4, 7.4.7–7.4.8. In addition to damages, failure to perform pursuant to a court order may be punished with a monetary penalty. *See id.* art. 7.2.4(1).

78. *See id.* art. 7.4.13.

79. *Id.* art. 9.1.3.

80. *See id.* art. 9.1.7.

81. *See id.* art. 9.1.9.

82. *See id.* art. 9.2.3.

wise."[83] "Performance or set-off by . . . or . . . against . . . [any single] joint and several obligor discharges the other obligors."[84] Similarly, performance to one of joint and several obligees discharges the obligation to the other obligees.[85] A joint and several obligor who has performed more than his or her share can claim against the other obligors and exercise the rights of the obligee to recover the excess from them.[86]

The 2010 Principles contain many provisions with which U.S. lawyers will be familiar, such as the duty to act with good faith and fair dealing or restitution. There are, however, at least four key differences between U.S. contract law and the 2010 Principles. First, there is no need for consideration for a contract to be valid under the 2010 Principles.[87] Second, specific performance is a more available remedy under the 2010 Principles.[88] Third, courts and arbitral panels can award emotional and physical suffering damages, unlike U.S. law which requires such actions to be brought in tort.[89] Finally, the 2010 Principles permit penalty provisions unless they are *grossly* excessive as opposed to being merely unreasonable.[90]

III. New Developments in Korean Commercial, Privacy and Competition Law

A. 2011 Amendments to the Korean Commercial Code

The Korean Commercial Code (KCC) was amended on April 14, 2011.[91] The amended KCC will go into effect on April 15, 2012.[92] The amendments are broad: there are new corporate forms (limited partnerships and limited liability companies), eased restrictions on dividends, elimination of a par value requirement, introduction of new share types, and lower capital reserve requirements, among many other new provisions.[93] Of great significance to many companies is the elimination of requirements to issue physical stock certificates. This means that, under the amended KCC, companies may use electronic registration for shares and bonds.

In total, these amendments are intended to modernize the KCC to create a more flexible investment environment. The amendments also, however, introduce the corporate

83. *Id.* art. 11.1.2; *see id.* art. 11.1.9; see also Bonell, *supra* note 49, at 9 n.16 (The chapter on plurality of obligors and obligees is new to the Principles).

84. UNIDROIT Principles 2010, *supra* note 54, art. 11.1.5.

85. *See id.* art. 11.2.2.

86. *See id.* arts. 11.1.10–11.1.11. "An obligee who has received more than . . . [his or her] share must transfer the excess to the other obliges . . . ." *Id.* art. 11.2.4.

87. *See id.* art. 3.1.2 cmt. 1.

88. *See id.* art. 7.2.2. cmt. 2 ("[U]nder the Principles specific performance is not a discretionary remedy, *i.e.* a court must order performance, unless one of the exceptions laid down in this Article applies.").

89. *Compare* UNIDROIT Principles 2010, *supra* note 54, art. 7.4.2, *with* Restatement (Second) of Contracts § 353 (1981).

90. *Compare* UNIDROIT Principles 2010, *supra* note 54, art. 7.4.13, *with* Restatement (Second) of Contracts § 356.

91. *See* Kim & Chang, *Recent Amendments to the Korean Commercial Code*, Law.com, http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202512579976&slreturn=1 (last visited Jan. 28, 2012).

92. *Id.*

93. *Id.*

opportunity doctrine, which may increase potential liability for officers, directors, and shareholders.

B. Personal Information Protection Law

On September 30, 2011, the Personal Information Protection Act (PIPA) came into effect in Korea.[94] The Act provides comprehensive mandatory guidelines regarding the collection, use, transfer, storage, and destruction of personal information.[95] This legislation applies to any person, corporation, organization, or public institution that collects and processes personal information or manages a database containing personal information for business purposes.

This legislation applies to both digitally processed personal information and non-digitally processed personal information (physical files).[96] It also specifies detailed guidelines that a personal information manager (data manager) should comply with at each stage of the personal information life cycle, from collection to destruction. Previously, personal information protection was enforced in Korea only in certain particular areas (such as public administration, telecommunications, financial credit, etc.) under individual sector-specific laws. Comprehensive personal information protection principles and guidelines did not exist.

The PIPA requires a data manager to inform the owner of personal information of certain facts relating to the data collection, such as the purpose, items collected, and the duration of data collection.[97] The Act also requires a data manager to obtain express consent before collecting, using, or transferring personal information.[98] Consent can be obtained by transmission of a document, email exchange, telephone call, input through an internet homepage, etc. A data manager is required to destroy the collected personal information when the purpose of collection has been achieved or the duration of data collection has expired.

The Act also prevents a data manager from collecting more personal information than is necessary, and, in principle, prohibits the collection of individual identification numbers, such as resident registration numbers (similar to a social security number), driver's license numbers, etc. For example, websites that requested the input of a resident registration number for membership registration must now provide an alternative method for registration. The Act also prevents other activities, such as the use of cameras to record visual information in public settings for purposes other than facility security, crime prevention, or traffic control.[99] The Act recognizes that the owner of personal information has rights of control over their own personal information, and provides that the owner can request review, correction, deletion, or suspension of processing of their personal information.

94. *See* Kwang Hyun Ryoo, *Comprehensive Personal Data Protection Law Enacted*, BKL LLC, http://www.bkl.co.kr/upload/data/20110423/sub-TELE.html (last visited Jan. 28, 2012).

95. *Id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

C. Competition Law

Article 29(1) of the Korean Monopoly Regulation and Fair Trade Act (MRFTA) states that minimum price restraints are illegal.[100] But a recent Korean court precedent established that an enterprise challenging minimum price restraints has the burden of showing that the restraints lack justification.[101]

Korean fair trade law is influenced heavily by U.S. antitrust law. An established principle of U.S. antitrust law under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, is that horizontal price-fixing is per se illegal.[102] Prior to 2007, vertical price-fixing was also regarded as per se illegal. Thus, if a manufacturer required its distributors to sell products at a fixed price, the price fixing was automatically deemed illegal, without further analysis. This changed when the U.S. Supreme Court ruled in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[103] that vertical price restraints are not illegal per se, but instead subject to the rule of reason. In other words, price fixing may be legal if the restraint promotes economic efficiency under the circumstances.

On November 25, 2010, the Korean Supreme Court—seemingly inspired by *Leegin Creative* and despite article 29(1) of the MRFTA—similarly ruled that vertical price restraints are not illegal per se, but must be examined on a case-by-case basis to determine whether they are justified.[104] The Court observed:

> [t]he judgment about whether there exist justifiable reasons should be based on the comprehensive review of (1) whether there is active competition among brands in a relevant market, (2) whether such act facilitates competition among distributors for services other than prices for consumers, (3) whether such act diversifies consumers' options on products, [and] (4) whether such act allows a new enterpriser to have easy access to the relevant product market by securing a distribution network, and the burden of proving the foregoing factors should lie with the enterpriser in light of the intent of the relevant provisions.[105]

More recently, in 2011 some legal scholars criticized this ruling as going against the long-established doctrine that price fixing is per se illegal and contravening the language of the MRFTA that prevents price fixing. But the Korean Supreme Court case shows that Korea, like the United States, is moving away from rigid per se rules. This will have a profound effect on structuring and maintaining commercial relationships going forward.

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100. *See* Monopoly Regulation and Fair Trade Act, Act No. 3320, art. 29(1), Dec. 31, 1980, *amended by* Act No. 7315, Dec. 31, 2004 (S. Kor.), translated by Japan Fair Trade Commission, *available at* http://www.jftc.go.jp/eacpf/01/Korea-monopoly.pdf.

101. *See* Supreme Court [S. Ct.], 2009Du9543, Nov. 25, 2010 (S. Kor.), *available at* http://www.shinkim.com/newsletter/65_2011/eng_202.html (last visited Jan. 28, 2012).

102. *See* Sherman Antitrust Act, 15 U.S.C. § 1 (2004).

103. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007).

104. *See* Supreme Court [S. Ct.], 2009Du9543, Nov. 25, 2010 (S. Kor.), *available at* http://www.shinkim.com/newsletter/65_2011/eng_202.html (last visited Jan. 28, 2012).

105. *Id.*

IV. Regulation of Quebec Money Services Businesses

In December 2010, the Money-Services Businesses Act[106] (MSBA) was enacted in Quebec, with an effective date tentatively scheduled by the provincial agency charged with its enforcement, the *Autorité des marchés financiers* (the AMF or Financial Markets Authority), for April 2012. The primary goal of the MSBA is to prevent, detect and combat money laundering and tax avoidance by imposing additional regulatory scrutiny, at the provincial level, of money services businesses that are considered to pose a heightened degree of risk.[107]

Businesses subjected to new regulation under the Act include currency exchanges, money transmitters, so-called "white label" (non-bank) automated teller machine (ATM) operators, check-cashing businesses, and the issuance and redemption of travelers checks, money orders and bank drafts.[108] The operation of non-bank ATMs that are subjected to regulation under the Act includes the leasing of a commercial space intended as a location for the machine if the lessor is responsible for keeping it supplied with cash.

The impact of the Act could be substantial for those businesses that will henceforth be subject to its new regulatory regime as, in addition to various compliance requirements, the Act mandates scrutiny of not only the entity's officers, but its employees, directors, controlling shareholders, partners, agents, and lenders as well.[109] The Act is noteworthy in that it is a new and unique provincial-level overlay on the existing Canadian anti-money-laundering legislative and regulatory scheme, it imposes requirements that are in some ways stricter than that scheme, and it applies to a broader spectrum of business entities.

Within six months of the effective date of the Act, regulated money services businesses will have to obtain an operating license from the AMF. These businesses must meet a significant number of criteria and provide a substantial amount of information in order to obtain a license. In particular, according to AMF's proposed regulations,[110] non-bank ATM operators could be subjected to a requirement of a $350 fee and a $10,000 bond for each ATM, a proposal vigorously opposed by the industry.[111]

The *Sûreté du Québec* (SQ), Quebec's provincial police force, will check various aspects of an individual's background using information provided by the AMF. Those aspects include financial criminality, tax fraud, and links to organized crime. The soundness of the individual's moral character will also be checked. Such background checks will be performed on the following persons involved in the money-services business: officers, di-

106. *See* Money-Services Businesses Act, S.Q. 2010, c. 40, sched. I (Can.), *available at* http://www.finances.gouv.qc.ca/documents/Ministere/En/MINEN_Money-Services-Businesses-Act.pdf.

107. *See id.*

108. *See id.* at c. 1, s. 1.

109. *See id.* at c. 2, s. 6.

110. See Money-Services Businesses Act, Regulation under Money-Services Businesses Act, S.Q. 2010, c. 40, Sched. I (Can.), *available at* http://www.lautorite.qc.ca/files/pdf/consultations/entreprises-services-monetaires/2011juin10-esm-reglappl-cons-en.pdf; Money-Services Business Act, Regulation Respecting Fees and Tariffs, S.Q. 2010, c. 40, Sched. I (Can.), *available at* http://www.lautorite.qc.ca/files//pdf/consultations/entreprises-services-monetaires/2011juin10-esm-regldroits-cons-en.pdf.

111. *See* Regulation Respecting Fees and Tariffs, *supra* note 110; Regulation Under the Money-Service Businesses Act, *supra* note 110; Kim Williams, *Quebec's Proposed Money-Services Industry Regulations Elicit Strong Reactions*, ATM MARKETPLACE (July 25, 2011), *available at* http://www.atmmarketplace.com/article/182784/Quebec-s-proposed-money-services-industry-regulations-elicit-strong-reactions.

rectors, partner, employees, lenders (other than financial institutions), controlling shareholders, and mandataries (agents).

The SQ will provide the AMF with a security clearance report for each of these persons and for the business, so that the AMF can decide whether a license should be issued. The report will indicate whether or not the individual has a criminal or penal record and is of good moral character. The background check will be focused on certain criminal offenses and offenses under ten or so other statutes. Depending on the individual's record, the business may be refused a license, or an already issued license may be suspended or revoked. A business could thus be obliged to sever ties with an individual who has an unfavorable record. This could have unanticipated and undesirable consequences, such as losing a director, a key employee or shareholder, or even a lender. Because of the wide-ranging application of the MSBA, entities not directly engaged in money services business could potentially be required to subject their employees to background checks, at considerable cost. For instance, a supermarket or gas station that leases space for an ATM and stocks it with cash might be compelled to pay a $112 fee per employee to have its employees undergo background checks.

Once a license is issued, the business must verify the identities of its customers and co-contractors. There are also specific requirements for keeping records and registers, and for filing reports with the AMF. While some businesses may already be subject to similar obligations under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act,[112] the nature, form, and extent of the new Quebec reporting requirements have not yet been defined by regulation. Nor is any exemption from the requirements currently provided. The Act provides that the AMF can inspect a business in order to verify compliance with its provisions.[113] The SQ can also enter a business establishment in order to verify whether the business holds a license and is respecting its conditions.[114]

V. Recent Developments in Distribution, Franchising and Direct Selling in Indonesia

A. Restrictions on Imports of Finished Goods for Trading by Indonesian-Owned Producing Companies

Two years after its issuance, MOT Regulation No. 45/M-DAG/PER/9/2009 Regarding API (September 16, 2009) (MOT Reg 45/2009) remains a problem for many Indonesian companies. In effect on January 1, 2010, this Regulation required any individual or business entity undertaking import activities to have either a General Importer Identification Number (*Angka Pengenal Importir Umum* or API-U), issued "to importers importing goods for [their] . . . business activities by trading or transferring the [imported] goods to other parties," such as trading companies; or a Producer Importer Identification Number (*Angka Pengenal Importir Produsen* or API-P), issued to importers conducting import of

112. *See* Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17, s. 5-7, June 29, 2000 (Can.), *available at* http://laws-lois.justice.gc.ca/eng/acts/P-24.501/.

113. *See* Money-Services Businesses Act, *supra* note 106, at c.1, s. 45.

114. *See id.* at s. 49.

goods for their own use, such as raw and supporting materials and/or to support their production, such as producing companies.[115]

MOT Reg 45/2009 effectively revoked the right of producing companies that also engaged in trading activities to both import capital goods and raw/supporting materials for their production activities and import finished goods for their trading activities under a single Limited Importer Identity Number (*Angka Pengenal Importir Terbatas* or API-T). The API-T was phased out.

Once MOT Reg 45/2009 was issued, all Indonesian companies, including foreign-owned investment companies (*Penanaman Modal Asing* or PMA Companies) engaging in production activities, had to change their API-T to become an API-P by December 31, 2010.[116] As a result, producing companies were limited to importing capital goods for production and could no longer import any finished goods for their trading activities.

This was particularly problematic for wholly Indonesian-owned companies, almost all of which are authorized in their articles of association to conduct virtually any type of business and a number of which actually engage in both production and trading activities. For PMA Companies, only those that had obtained a license from the Capital Investment Coordinating Board (*Badan Koordinasi Penanaman Modal* or BKPM) to produce one type of product and sell another were affected.

On this regulatory change, the BKPM and the Ministry of Trade received substantial feedback. In response to the controversy, the Ministry issued MOT Regulation No. 39/M-DAG/PER/10/2010 Regarding Provisions on the Import of Finished Goods by Producers (October 4, 2010) (MOT Reg 39/2010).[117] MOT Reg 39/2010 permits Indonesian producers to import certain finished goods that are not used in their production process.[118] They can use such finished goods in any business they are authorized to conduct as set out in a business permit issued by an authorized governmental authority.

For a producer to be able to import and sell finished goods for non-production purposes, the company must have an API-P and the producer needs to be included in a list established and maintained by the Director General of Foreign Trade.[119] A producer must file a notification with the MOT through the Director General of Foreign Trade to be placed on this list.[120]

But MOT Reg 39/2010 restricts the types of finished goods that can be imported by producing companies. A producer may import finished goods only if the finished goods are in the same line of business as the producer's industrial business licenses or other similar types of business licenses issued by the head of BKPM or other authorized technical agencies.[121] The Ministry of Trade interprets the phrase "other similar types of business licenses" as a business license for production only and that interpretation does not

115. Ministry of Trade, Regulation of Importer's Identity Number (API), No. 45/M-DAG/PER/9/2009, arts. 2-3(2), 3(3), Sept. 16, 2009 (Indon.).

116. Eurocham Regulatory Update, Eurocham, Minister of Trade Regulation 45/2009 as amended by Minister of Trade Regulation 17/2010 on Import Licenses, and the subsequent Producer Importer License, (Sept. 7, 2010).

117. *See generally* Ministry of Trade, Regulation Provision on the Import of Finished Goods by Producers, No. 39/M-DAG/PER/10/2010, arts. 2-3, Oct. 4, 2010 (Indon.).

118. *See id.* art. 2(3).

119. *See id.* arts. 3(1), (4).

120. *See id.* art. 2(4).

121. *See id.* art. 2(2).

include a business license in the field of trading. The Ministry of Trade's view is that finished goods can be imported by a producing company for non-production purposes only if such goods fall within the business sector(s) indicated in the business license granted for a production activity, and if the finished goods are similar to the products the producer manufactures or are at least related to the products the producer manufactures. MOT Reg 39/2010 is silent on the definition of or criteria for "related goods." Thus, to determine whether certain goods are included as "related goods," an importer usually lists the finished goods that it wants to import in its application to be further discussed with the Ministry of Trade.

Preventing a company that produces one type of product from importing and selling another type of product does not solve the problem faced by producing companies that also import finished goods. In order to continue importing such finished goods, the producing companies may cooperate with another company that has an API-U to import the finished goods on its behalf or establish a new company engaging in import and trading activities. But these measures increase business and administrative costs.

B. Restrictions on Foreign Investment in Minimarket Convenience Store and Restaurant Franchises and Multi-Level Marketing

PMA Companies in Indonesia that covet a minimarket franchise in Bali probably will find it impossible to buy it. Want a McDonald's franchise in the same location? They will need at least forty-nine percent Indonesian ownership, and depending on local law in that region, the figure might be fifty-one percent Indonesian ownership. How about investing in a Mary Kay or Tupperware multi-level marketing/direct selling operation? Under the MOT Direct Selling Regulations,[122] they will not only need to meet domestic ownership requirements and be a "large-scale business" (over about $1,124,000 US net assets or $5,618,000 US annual sales), but also do a presentation to persuade the Ministry of Trade of their ethical marketing and business practices and have at least one Indonesian director and commissioner.

Indonesia's franchise regulations are contained in Government Regulation No. 42 of 2007 Regarding Franchising (July 23, 2007) (GR 42) and Minister of Trade Regulation No. 31/M-DAG/PER/8/2008 Regarding the Organization of Franchise Businesses (August 21, 2008) (MOT Reg. 31).[123] In Presidential Regulation No. 36 of 2010 Regarding List of Business Fields that are Closed and Business Fields that are Open with Requirements in the Field of Capital Investment (May 25, 2010), the Negative Investment List identified minimarket convenience franchisees as closed to PMA Company investment.[124] Minimarket Stores are considered "modern markets" in accordance with Ministry of Trade Regulation No. 53/M-Dag/Per/12/2008 Regarding Guidelines on the Ordering

122. *See* Ministry of Trade, Regulation on Business Trade Organization System with Direct Sales, No. 32/M-DAG/PER/8/2008, arts. 7(2), 13(3), Aug. 21, 2008 (Indon.), *amended by* Ministry of Trade, Reg. No. 47/M-DAG/PER/9/2009, Sept. 16, 2009 (Indon.) (collectively the "MOT Direct Selling Regulations").

123. *See* Government Regulation on Franchise, No. 42/2007, Statute Book of the Republic of Indonesia Year 2007 No. 90, July 23, 2007 (Indon.); Ministry of Trade, Regulation About Implementation of Franchises, 31/M-DAG/PER/8/2008, Aug. 21, 2008 (Indon.).

124. *See* Presidential Regulation of the Republic of Indonesia, List of Business Fields Closed to Investment and Business Fields Open, with Conditions, to Investment, No. 36 of 2010, app. II, tit. 8, May 25, 2010 (Indon.).

and Guidance for Traditional Market, Shopping Center and Modern Market (December 12, 2008) (MOT Regulation No. 53).[125] A "modern market" is defined as a store with a floor area of less than 400m^2 and a self-service system that sells various goods at retail.[126]

The Negative Investment List allows a PMA Company to be a restaurant franchisee if the relevant regional government permits. But the Negative Investment List provides that in some cases fifty-one percent ownership is allowed while in other cases only forty-nine percent is permitted, without specifying how these rules are applied. It is clear that the central government has deferred to regional governments on this issue and it will be necessary to review the regional regulations of each region in which the franchisee wishes to operate. It is possible that a fifty-one percent foreign-owned PMA Company may be permitted to own and operate a restaurant franchise in some regions but not in others.

125. *See* Ministry of Trade, About Structuring Guidelines and Guidance Traditional Market, Department Stores and Modern, No. 53/M-DAG/PER/12/2008, art. 1(5), Dec. 12, 2008 (Indon.).
126. *See id.* arts. 1(5), 9(1)(a).