A COMPARATIVE STUDY ON LEGISLATION OF HYPOTHECATION IN KOREA AND MONGOLIA

한국과 몽골의 저당권 법제에 관한 비교연구

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2008. 11

한국법제연구원
KOREA LEGISLATION RESEARCH INSTITUTE

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Acknowledgement

This work would not have been possible without the support of the Korean Legislation Research Institute. I am especially indebted to Mr. Kipyo Kim, the President of the of the Korean Legislation Research Institute, Dr. Heedoo Son, director of the Legal Cooperation Center of of the Korean Legislation Research Institute and Ms.Kyunghee Lee, researcher of the of the Korean Legislation Research Institute who have been supportive of my career goals and who worked actively to provide me with the protected academic time to pursue those goals.

I am grateful to all of those with whom I have had the pleasure to work during the completion of this work. Each of the colleagues of the Institute has provided me extensive personal and professional guidance and taught me a great deal about both scientific research and life in general. I would especially like to thank Dr. Heedoo Son, he has shown me, by his example, what a good scientist (and person) should be. I'm deeply indebted to the KLRI for allowing and recommending this Research paper. I am also grateful to the Library staff of Institute for providing materials.

Introduction

This paper briefly reviews the hypothecation law through improved legal and institutional support. The paper examines the weaknesses of substantive law in Mongolia relates to immovable property financing. The paper outlines concrete policies that would improve the legal climate for real estate law. The paper contains a draft proposal that might be used to develop a legislative expression necessary to bring Mongolian law to 21st century commercial

realities. There is no effort here to pretend that deficient law is the only obstacle to enjoy economic rights in all ways. Quality performance by courts is necessary for enforcement of property rights. In fact, creditors often assert that enforcement is the problem, not the law.

This paper disagrees with that assertion. Substantive law is a problem. It is true that the best law will be of little use to creditors if it is not enforced or if it is improperly enforced. But it is equally true that perfect enforcement machinery would be useless to creditors if policy toward hypothecation remains opposed to the needs of modern commerce, expressed in anachronistic rules interpreted by those whose hands are tied by misguided and inconsistent rulings of the past. To overcome this problem legislation of Korea which is advanced in new market society will be helpful guide and therefore concerned legislation of Korea will be considered in this paper.

CHAPTER I

Hypothec Is As a Subject To Civil Law

1. Concept of Hypothecation

Hypothection is originated from "hypotheke" which is Greece word expressing pledge property shall be remained under debtor's possession.

Under hypothecation debtor still can use the plegde property since that property is under pledge to creditor. Firtsly, it was used only for land but later on it is used for all kinds of real estate.

Hypothecation shall be understood in broad manner. It is not just a voluntary lien which is one type of the secured transaction but also it is one of terminology of investment. The "investment" means every kind of assets invested by an Investor of either Contracting Party in the territory of the other Contracting Party, in accordance with the laws and regulations of the latter, and includes, in particular, though not exclusive;

- "Movable and immovable property as well as any other property rights such as mortgages and pledges" (see Annex 1)[1]

Then what the immovable property consists of? It is clarified as below:

- Land
- Land subsoil mineral resources
- River and object on the water
- Building
- Housing and non housing building
- Forests, plants

[1] See annex 1 agreement on the promotion and protection of investments between the government of republic of Korea and the government of Mongolia. Article 1, 1991.

- Complex of industry
- Building under construction
- Condominium
- Some equipment attached to land

Even in some countries the ship, shares shall be considered as real estate. Because the share can be the real estate on the following basis:

1/ High cost

2/ Importance to economy

3/ It can be secured pledge for loan

4/ Term of period is longer;[2]

Assets which refer to real estate has a connection to land on basis of legal character except physical character. Such as it is impossible to use in accordingly without right to possess, use and ownership.

In modern commerce, access to credit often requires the effective use of movable property to secure payment of obligations. Creditors generally desire some form of security beyond a mere promise to pay, in exchange for business credit.

Creditors often prefer land and buildings (immovable property) as security, even though other property (manufactured goods, stock in trade, or accounts receivable) may be more valuable. In developing countries, this is often because the law on movable property as security is weaker than the law on mortgage of land and buildings.

Unfortunately, large and small businesses in rich and poor countries generally have insufficient land and buildings to secure business loans. If a business has immovable property, the property is often mortgaged to creditors whose funds have made the purchase possible.

Over the past forty years in the U.S and over the past decade or so in

[2] A. Batsaikhan "Mongolian real estate regulation", UB 2000, at 7.

Canada, the law on movable property as collateral has developed markedly from 19th century law and tradition. The result has been an explosion of credit for everyone – consumers, and businesses of all sizes. The focus of the reformed law has been:

- To simplify, unify, & codify the rules by which movable property is claimed as collateral,
- To guarantee prospective creditors access to quick, inexpensive, and reliable information about the status of encumbrances upon a prospective debtor's movable assets,
- To assure creditors of their respective priority in the debtor's assets, in the event that the debtor disposes of the collateral, or in the event that competing creditors stake claims to it,
- To assure creditors, upon the debtor's default, speedy and inexpensive access to the collateral to help satisfy the debt.

1.1 Pledge

The pledge is perhaps the oldest transaction by which movable property is taken to secure an obligation, having been codified as early as in Roman times.

In short, a debtor (the pledgor, or pawner) may give a pledge to a creditor (the pledgee, or pawnee) in movable property for the purpose of securing on obligation. The creditor is obligated to take possession of the pledged property while claiming it as security. Upon default, the creditor may dispose of the property and the proceeds will be applied to the secured debt. The debtor is liable for any deficiency. The creditor must provide the debtor with reasonable advance notice of the disposition of collateral.

Creditors find use for the pledge. For example, creditors may require importers to pledge imported goods in exchange for credit to purchase the goods. The arrangement is not ideal. It is inflexible for the importer – the pay-as-you-go restriction prevents the importer from selling the goods on credit. And the creditor, of course, is saddled with the burden of maintaining control

of the goods, the cost of which is passed, of course, to the debtor.

The pledge is unsuitable for most common commercial transactions. Suppose a producer desires a loan to purchase equipment, and would like to pledge the equipment as collateral but the producer needs possession of the equipment to produce goods for sale that enable payment of the obligation. The possession requirement is an anti-commercial obstacle. Suppose a dealer of goods desires cash flow financing to purchase inventory (sometimes called "stock in trade"). The dealer must have possession of the goods to sell them. The formal requirements of the pledge are unforgiving. Upon the debtor's default, the creditor has the right to sell the pledged property after reasonable notice to the debtor.

1.2 Hypothecation

Hypothecation is the creative lawyer's attempt to avoid the anti-commercial restrictions of the pledge. Eventually, debtors and creditors had become painfully aware of the inadequacy of the pledge. They persuaded some judges that possession did not necessarily mean actual, physical possession. Possession could be "symbolic," or "constructive." A pledge without possession by the creditor, however, requires a new term. The term "hypothecation" came to be applied to pledges where the creditor's possession is constructive.

Hypothecation is essentially an attempt to create a non-possessory pledge. In the hypothecation agreement, the debtor grants the creditor a "charge" on movable property, and the creditor grants the debtor the right to hold and use the charged property.

The law of hypothecation is not found in any act of parliament of Mongolia. In Mongolia, it exists in the either created by court decisions and legal commentators dating at least to the early decades of the 20th century.

According to local practice, however, the creditor's right to the property does not arise until the creditor obtains an execution order to enforce the charge.

If the creditor's property right does not vest until enforcement action is taken, one wonders if Mongolian law really recognizes an *in rem* right under hypothecation agreements. Without an *in rem* right, the hypothecation agreement gives the creditor no meaningful security. If another creditor should obtain a lien on the property prior to the debtor's default, presumably, the creditor's rights would be subordinate to the lien.

If it is doubtful that hypothecation actually creates an *in rem* right in collateral, the doubt is even stronger to the extent hypothecation agreements are used in inventory financing.

Inventory financing arrangements contemplate that most of the charged property will be acquired in the future. Scholarly commentary is clear that an agreement to sell goods in the future does not create any *in rem* rights because there is nothing in which to create an *in rem* right. Logically, this unfortunate principle should be equally applicable to credit sales, suggesting strongly that hypothecating debtors give precious little of value to the creditor.

Whatever the creditor's right is, it is weak, and it is no wonder that creditors report that hypothecation is general taken only if immovable property is mortgaged first.

In the event that the hypothecation agreement is "registered", the creditor's rights may be safer and it is recognized that a registered hypothecation over subsequently created liens. Upon default, the creditor has no right to take possession and dispose of the hypothecated property. The creditor must resort to dismal judicial sale procedures.

The another name for hypothecation is mortgage. A mortgage is a loan secured by the collateral of some specified real estate property, which obliges the borrower to make a predetermined series of payments. The mortgage gives the lender (the mortgagee) the rights of foreclosure on the loan if the borrower (the mortgagor) defaults. That is, if the borrower fails to make the contract payments, the lender can seize the property in order to ensure that the debt is paid off.

The types of real properties can be mortgaged are divided into two broad categories residential properties and nonresidential properties. The former category includes houses, condominiums, cooperatives, and apartments. Residential real estate can be subdivided into single family structures and multi family structures. Non residential property includes commercial and farm properties.

The market where these funds are borrowed is called the mortgage market. This sector of the debt market is by far the largest in the world. The mortgage market has undergone significant structural changes since the 1980s. Innovations have occurred in terms of the design of new mortgage instruments and the development of product that uses pools of mortgages as collateral for the issuance of a security. Such securities are called mortgage –backed security.

2. Comparative Study on Legislation

Before I consider the legal regulation on hypothecation of Korea and Mongolia I'm obliged to mention the specialty of legal system and legal tradition of both countries.

2.1 Introduction to Legislation of Mongolia

The development of Mongolian law has been rapidly started from a period of massive empire, and it is divided into three main historical stages.

First stage is the period of formation of the legal system. The Great Zasag Law of Chinggis Khaan, the first integrated written code, was the main regulation of the Great Mongol State, which was formed on vast territory.

Second stage covers the period of the second integration of such laws as the Mongolian-Oirat Laws, Khalkh Juram Law, the Mongolian law paper, the Ministry of Statehood Affairs legal documents related to Outer Mongolia adopted by the Order, and the Mongolian legal document adopted by the Order.

Third stage is the period of the formation and development of the modern legal system. The most important feature was the attempt to establish a national and socialist legal system with the aim of making the transition to industrial capitalism. Despite this, the fundamental character of the continental legal system remained intact.

Seeing from historical sources which have come down to us from ancient time, Mongolians established their own State for the first time in 209 B.C., in the period of Khunnu State. It was the first State which built State rules and its traditions, not only for Mongolians, but also for Central Asian nomadic tribes.[3] After that, States such as Sumbe (A.D. II-IV century), Great Nirun (A.D. III-VI century), Tureg (552-745), Uigar (745-840), Kidan (907-1125) and Great Mongol Empire (1206-1755) existed in current Mongolian territory. During this time the mildness of Mongol law and the customs of steppe culture showed up in some odd ways. Chinese authorities frequently tattooed a criminals crimes on his forehead so that he was permanently marked by his crime. Because Mongols considered the forehead the abode of the soul, they maintained that even a criminal's head could not be thus abused. The Mongol authorities allowed the tattooing to continue, where it was already in practice, but specified that the tattoos be placed on the upper arms for the first two offences and on the neck for the third, but never on the forehead. The Mongols did not allow the punishment to be extended into new areas or to ethnic minorities who did not already have the practice.

Rather than writing the crime on the body, Mongol authorities preferred to write the offence on a wall erected front of a criminal's home so that the entire community could watch him carefully. They also used system of parole in which freed prisoners had to report twice a month to local officials to have their behaviour reviewed. In keeping with the Mongol principle of group culpability and responsibility, the freedom of a prisoner depended, in part, on his

[3] J. BOLDBAATAR & D. LUNDEEJANTSAN, HISTORICAL OVERVIEW OF MONGOLIA'S STATE AND LEGAL TRADITION 14 *(Mongol Ulsin Tor, Erh Zuin Tuuhen Ulmajlal)* (1997).

willingness to join an auxiliary law enforcement agency in order to apply his knowledge or crime to the apprehensive of other prisoners.

Criminals, and often their entire families, had to sign documents acknowledging receipt of their sentence and to register their disagreement or complaint with the process.

Whenever practical, Mongol administrators preferred to have as many issues as possible settled at the lowest level without the intervention of officials. Crimes within family could be settled by the family, or disputes within a group of monks of the same religion could be settled by monks within that religion, and crimes within a profession could be settled by councils of those professionals.

Related to dispute settlement, Mongol authorities encouraged the printing of books on criminology so that individual citizens and these small councils had the benefit of proper guidance. The Mongol procedures not only improved the quality of law enforcement, but corresponded with the overarching Mongol policy that all people, not just an educated elite, should know and be able to act through the law. For the Mongols, the law was more a way of handling problems, creating unity, and preserving peace rather than just a tool fro deciding guilt or administering punishment. [4] As the peace advocate Jawaharlal Nehru, the father of Indian Independence says "It would be foolish not to recognize the greatness of Europe. But it would be equally foolish to forget the greatness of Asia." The Mongol Khan believed in "the unchangeable law for ever and ever, and no one could disobey it. Even then emperor was subject to it."

As a consequence of occupation by Manchurian Empire in West Mongol in 1755, Mongolia has been under Manchurian governance until 1911 Revolution for Independence. Even whereas Mongolia declared its independence in 1911, its neighboring countries, Russia and China, had not recognized it and made an agreement providing that Mongolia is an

[4] Jack Weatherford, "Genghis Khan and the making of the Modern World" at 203(2004)

autonomous entity of China in 1913. Due to this Mongolians had fought for their Independence until Mongolia had gained its Independence with the help of military of Russian Soviet in 1921 and adopted its first Constitution three years after its Independence. We can not evaluate it as real Independence.

During the period of 1921-1990, Mongolia was under direct influence of the communist regime of Soviet Union and was de facto under its rule.

In the 1990 the Mongolian democratic movement overthrew the old communist leadership in way of peaceful revolution.[5] Recognizing democracy in 1990, the first Mongolian democratic Parliament was established and the first democratic Constitution of Mongolia was adopted in 1992.[6]

Following popular democratic reform demonstrations in winter of 1989, existing Soviet - style Constitution of 1960 was renewed in May of 1990 to provide for multiparty elections. After victory of democratic coalition in election of July 29, 1990, reformist Prime Minister Byambasuren appointed draft commission to prepare entirely new constitution based upon principles of democracy, human rights and rule of law. Draft committee worked closely with American and European advisors and proposed constitution based on European parliamentary model. Draft constitution was submitted to State Great Hural June 1, 1991, and was adopted with some modification on Jan. 13, 1992.

Mongolian law is based on codified laws. Codes such as the Civil Code, Commercial Code, Criminal Code and Procedural Codes form the basis of the system. Principle of respect for statute became the supreme principle of the

[5] Alan J.K. sanders, historical dictionary of Mongolia, Asian historical dictionaries, No. 19. page. 1.

[6] As the supreme sources of law, the Constitution states the leading principles of the state, its organization, and the basic rights of the individual. The Mongolian Constitution in 1992 reflects the reforms of the 1980s and early 1990s. it abolished the system in which different members of the population were distinguished by class; eliminated Marxist-Leninist ideology and the objective of creating a socialist or communist system; and established a system for private ownership and freedom for entrepreneurship. In addition, it accepted human rights and freedoms in accordance with universally accepted principles and norms of international law, and set up the separation of powers and the new structure of the state, while strengthening the principle of local self-governance. According to Article 40(1) of the Constitution, laws, decrees and other decisions of state bodies, as well as the activities of all other organizations and citizens should fully conform to the Constitution.

activities of the State. Statutes or codified laws are the main sources of law in Mongolia. As of 2008, more than 305 laws exist[7]. Mongolian legal system is originated from the Romano-Germanic continental legal system. The source of law is written law and the courts apply laws only in settling cases or disputes.. The State Great Hural only reserves the right to adopt law. Only members of the State Great Hural, the Government and the President of Mongolia may initiate a draft of a law.

Legal acts in a broad sense, are parliamentary resolutions, presidential decrees, cabinet ministry resolutions and ministry rules and orders.

Only laws and Parliamentary resolutions, as well as Cabinet Ministry resolutions may be implemented nationwide. All other normative acts are restricted to the sector for which a given ministry is responsible. According to the Constitution, international law stands for one main source, with provision that "the international treaties to which Mongolia is a party, shall become effective as domestic legislation upon the entry into the force of the laws or on their ratification or accession. Mongolia shall not abide by any international treaty or other instruments incompatible with its Constitution"[8].

As precedent and legal doctrines is not considered to be a source of law, the courts in the Mongolian legal system play no formal role as a source of law. But legal customs are considered to be a limited, not principal, source of law, while interpretation of laws are to be considered a part of the laws.

In history of mongolia civil code was adopted in year of 1926, 1952, 1963, 1994, 2002. Even though first four codes had some deficiencies performed their own role to regulate relations in mongolian economy. And it was legalized that there should be only one type of property but also divided property into movable and immovable propety.

- In code of 1926 Art 89 " any property shall be categorized into two types which are immovable or movable" and it was defined in Art 90

[7] http://www.legalinfo.mn
[8] The Constitution of Mongolia, Article 10

"any kind of immovable property shall be land, buildings, industrial entity which are closely connected with land." Also in Art 7 of this code on pledge of property says "provide a pledge in for of immovable and movable property for satisfaction of obligation, pledge agreement shall be done in writing and contract on pledge of immovable property shall be registered, building can be built whereas it is under pledge of third party, re-pledge, to arrange a bid to satisfy the obligation from pledged property.[9]

- The code of 1952 consists of three parts:
  - General provision
  - Asset right
  - Obligation right.

Part II of Asset right is divided into 3 chapters which are property right, construction right, last one is pledge of asset. Even though according to this code property was no categorized into movable and immovable but it divided into main and subordinate.

- In the code of 1963 concept on real estate was not defined was due to prohibition of private property. And it categorized as follows state property, cooperative property, trade union property, property of public institutes and state property includes land, mineral resources, forests, water resources, state owned industries, railway, auto, air and other transportation, roads, electric stations, post, banks, agriculture and trade, apartment fund, state industrial raw materials, science and cultural institutes and other institution's property shall be under state only."
- In year of 1994 the new Civil Code was adopted and even though recognized all forms and kinds of private properties and provided legal guarantee to protect the rights of owner and equal opportunities but also still some unequal regulations which state shall play leading role remain.

[9] D.Naranchimeg. "Mongolian civil legislation." UB 2003, at 182.

> In Art 77 of this code asset as property is divided into forms of immovable and movable and real estate includes land, other items which are inseparable from land.

But this code did not have regulations on construction right, servitude, usufruct, hypothecation registration, rule of secured hypothecation which are most important to the subjects of civil relations.[10] "Law of Mongolia on real estate registration" was adopted on 9th January of 1997 in first time in history of Mongolia and this code is the first law reulates real estate and its registration relation.

State registration on real estate shall have the lists of owner's data of such property and what rights such person has in connection with the property and state registration on asset's right shall be used by Government for the following purpose[11]:

- To regulate relations of land possession, use and ownership right which is the core part of real estate.
- To collect lease fees and use for budget income.
- To set up condition to transfer certain power to private sector by state.
- To consider for city plan.
- To establish basis of real estate taxation.
- To collect statistical datas of state.

2.2 Introduction to Legislation of Korea

The Korean Civil Code was enacted on February 22, 1958 as Act No. 471 and entered into force on January 1, 1960. Until today it had been amended sixteen times in total. [12]

[10] D.Naranchimeg "Mongolian civil legislation-Legal reform" Copilation of reports, UB 2003, at 188.
[11] A. Batsaikhan "Mongolian real estate legislation", UB 2000, at 7 .
[12] http://elaw.klri.re.kr/index.jsp

The Korean legal system is a civil law system, and the modern Korean legal system originally followed the European civil law system. The Korean Civil Code follows the Pandects system in form and is compiled into five parts in total. Property law and family law are prescribed together within one civil code. At the time when the Korean Civil Code was being enacted, the legislators were strongly conscious of a desire to compile a civil code, that is different from the Japanese Civil Code, which had been in effect as the Civil Code of Korea from 1912. One reason for such a sentiment was that the Japanese Civil Code was extremely individualistic in its contents, because it was enacted with the French Civil Code and the first draft of the German Civil Code as its basis. Another reason was national wish to have own civil code, which is different from that of Japan. Thus, the legislators wished to enact a civil code, which, although based on liberalism and individualism, could still embody the traditional spirit of community and achieve an aspect of originality for the Korean legal culture. The results were codification of customary law to a considerable extent, for example, legislating the Chonsegwon, that is, the right to registered lease on key money deposit basis, regulating the relationships of mutual land use between neighboring land occupants under customary law, and, for conveyance of real rights, adopting the doctrine of two conditions of juristic act (Rechtshandlungen) and registration or transfer of possession rather than the doctrine of one condition of juristic act, which has been prevalent in Japan.

The legislators compiled the current Civil Code with use of the civil codes of Germany and France as reference.

After the Civil Code was enacted, its amendment proceeded separately for property law and for family law.

Such a separate management of the property law and family law was due to the fact that the family law, at the time when the Civil Code was enacted, had many contents that were especially patriarchal and was thus contrary to the constitutional spirit of gender equality. Moreover, there had been strong

demands from women's organizations for amending the family law. Therefore, although the family law, under the Civil Code, was subject to extensive amendment, amendment of the property law proceeded only to a very limited extent.

At the time when the Korean Civil Code was enacted, the Korean society had an agriculture centered economic structure and maintained a traditional, patriarchal family system.

However, as a result of the implementation of the plans for economic development, which began in the mid 1960's, the Korean society rapidly transformed itself from a society of agricultural economy into an industrialized, urbanized society, and the patriarchal family system was converted to a nuclear family system.

At present, the industrialized society is rapidly transforming into an information-oriented society.

Furthermore, the economic structure, which was under strong, government-initiated regulations, has changed into a private-initiated, self-regulating economic system, and the internationalization of the economy, the promotion of globalization, and the joining into the OECD have secured freedom in economic activities and led to an amazing growth of the economic scale. Liberalization of foreign trade has especially increased to a large degree.

In political aspects, the authoritarian military dictatorship has changed into a democratic civilian government, which improved the guarantee of human rights and allowed the citizens to freely engage themselves in activities in various spheres.

The rivalry between the North and South Koreas has eased, and there has been an amazing increase in the movement of personnel and the exchange of goods and materials between the two Koreas.

The Korean Government has dealt with such rapid changes to the Korean society, since the enactment and enforcement of the Civil Code, by legislating special laws.

Thus it can be said that there was a failure to accommodate these changes under the Civil Code through amendments of the Civil Code. Special laws enacted to cope with these changes include: the Act on the Ownership and the Management of Aggregate Buildings in order to deal with the increased construction of apartments resulting from the process of urbanization, the Act on Provisional Registration Security in order to deal with the frequent practices of offering a security of an irregular form, such as security by transfer of ownership, provisional registration (Vormerkung) and redemption etc., the Housing Lease Protection Act in order to protect lessees of residential house against lessors, and the Act on Special Measures for Registration of Real Estates as well as the Act on the Registration of the Names of Real Title Holders in Respect of Real Estates in order to deal with the social problems, which arise from the increasing practices of speculative investment in real estates following industrialization and urbanization of communities.

Furthermore, the repeal of the Interest Limitation Act and the enactment of the Assets-backed Security Circulation Act and the Housing Mortgage Bonds Trading Company Act occurred in an attempt to overcome the foreign currency crisis of 1997. The details contained within these important special legislations could actually be included in the Civil Code, but the path of enacting special legislations was chosen over that of amending the Civil Code.

Where the Civil Code should be the living law existing amongst the people and providing the basis for the legal lives of the people, instances, the Korean Civil Code was updated to respond to the social changes in a timely fashion, were not few.

Overcoming the problems of an adopted law, which have become clear in the process of enforcing the Civil Code until now, and allowing its development into a law, that preserves the individuality of the nation, are other reasons for the current efforts to bring about amendment of the Civil Code.

However the Korean Civil Code had some deficiencies. Deficiencies of provisions, that can respond accordingly to the society changes, are found to be

especially numerous. For example, because there is only a single provision that concerns floating sum mortgage (Hohsthypothek) (Art. 357 Civil Code), the reality of the use of floating sum mortgage is not sufficiently prescribed. It is another deficiency in the Civil Code, that there are no provisions concerning the claim on a real right (dinglicher Anspruch), that arises from the right of pledge. Because such deficiencies of the Civil Code are discovered everywhere, supplementation of these deficiencies through amendment of the Civil Code is another important reason for amending the Civil Code. In addition, since the provisions of the old Civil Code, which are from an intent-oriented foundation, are left intact in the formalistic new Civil Code, amendment of these provisions, which do not fit the formalistic frame, is becoming another major reason for amending the Civil Code. Examples include the Civil Code provisions, that prescribe a pledge contract as a contract for delivery (Art. 330 and 347 Civil Code), although a pledge contract is not a deliverable contract, and a provision, that preserves an old Civil Code term "derivative possession" (Art. 332 Civil Code), which refers to "agreement on possession".[13]

In the process of amending the Civil Code, civil codes of Germany, Japan, France and Switzerland were mainly used for reference. Additionally, United Nations Convention on Contracts for the International Sale of Goods, Unidroit Principles of International Commercial Contracts, Principles of European Contract Law, and the Dutch Civil Code were used as reference materials. For certain parts, the Civil Code of the Republic of China and the Spanish Civil Code were also used for reference as the need arose. Thus, Japanese, German, and French civil codes, which belong to the continental law, in which the Korean Civil Code is rooted, were principally referred to, and the Anglo-American law was indirectly used through reference to the contents thereof appearing as international agreements.

It is necessary to amend provisions relating to mortgage of the Civil Code, which would allow liquidity of mortgage notes to accommodate this trend of

[13] *Sang Yong Kim – Amendment Works of the Korean Civil Code (Property Law), at 14.*

internationalization in the Korean Civil Code. Furthermore, a need to newly establish provisions concerning foreigner's capacity to enjoy their rights, and a need to have general provisions in the Civil Code regarding foreign corporations has increased.

Floating sum mortgage right will be subordinate to the base contract, under which the secured claim arises. Therefore, a blanket floating sum mortgage right will be denied. Accordingly, continuous transactional relationships, out of which a secured claim of a floating sum mortgage right arises, will be limited to specified continuous contracts, continuous contracts belonging to a uniform category, and uniform grounds for development of continuous obligation.

Provisions concerning changes in the scope of claim secured by a floating sum mortgage, provision concerning the change of the maximum amount of claim secured, provisions on complete transfers, partial transfers and installment transfers of floating sum mortgage, provisions concerning whether a floating sum mortgage shall be settled or continued in case of the merger or the inheritance, and provisions concerning claims for settlement of a floating sum mortgage and the grounds for settlement could be included in the amendment. In case individual claims secured by a floating sum mortgage are transferred or individual obligations are assumed, a provision that stipulates that those individual claims or individual obligations are not secured by a floating sum mortgage would be included in the amendment.

CHAPTER II

Some Issues on Elaboration of Legal Regulation of Hypothec

1. The Current Legal Regulation of Hypothecation in Mongolia

The new civil code adopted in year of 2002 was made on the basis of concepts on the national development approach in compliance of world economy and legal relations development and future trend. In order to eradicate the some defects from the code of 1994 the new regulations were included in the new code to provide equal opportunity for subjects in civil relations, to prescribe regulations protecting property and other property rights of citizens. Such as it is precisely prescribed in sub-chapter of Chapter 13 "Rights of Pledge", in sub-chapter 3 regulations of pledge of real estate right /hypothecation/.in Article 165.1 of Civil Code defines that "Creditor's mortgage of certain immovable property in order to have his demand satisfied first before all the other creditors shall be hypothec." But there still some immature regulations on it. Such as in article 171.3 "Transaction about agreeing that right to ownership of immovable property shall be transferred to creditor unless the latter demand is satisfied completely or partially, shall be invalid" is considered that it restricts the right of dispose of real estates under pledge of bank and other non banking institutions. Details will be in following sub-part.

1.1. Constitution of Mongolia

The constitutional provisions concerning land are generally adequate, but do contain several potential problems or ambiguities which are listed and discussed at the end of this section. The Constitution recognizes all forms of

both public and private property.[14] The state retains ownership of all pastureland, forests, subsoil, and water resources. The Constitution authorizes the State to allocate private ownership of other types of land to Mongolian citizens only. It does not allow foreign ownership of land. Foreign nationals, legal persons, and stateless persons may receive land leases from the State.[15] Mongolian citizens may also transfer possession (but not ownership) rights to foreign nationals and stateless persons, but only with State permission.[16]The State retains the right to take land from landowners for special public needs and with the provision of either other land or due compensation. The State also reserves the right to confiscate land if it is "used in a manner adverse to the health of the population, the interests of environmental protection and national security."[17] The Constitution also guarantees Mongolian citizens the right to "fair acquisition, possession, and inheritance of movable and immovable property."[18]

Potential Problems and Ambiguities

1. State's broad rights to confiscate land. Although law in a few other transition economies allows for confiscation of land, no developed market economies allow for such confiscation. The threat of confiscation, especially for such a broad range of circumstances, can substantially threaten land tenure security which will lower land values, act as an impediment to investments in land, and become an obstacle to land market development. These problems could be mitigated without changing the constitution if the constitutional provisions concerning confiscation were not followed by enacting legislative language. The Law on Land, however, as discussed below, does contain such provisions.

[14] The Constitution of Mongolia (1992), art. 5(2).
[15] *Id*., art. 6(3).
[16] *Id*., art. 6(4), 16(3).
[17] *Id*., art. 6(4).
[18] *Id*., art. 6(4).

2. Legal persons cannot own land. While this is not explicitly prohibited, Article 6(3) states that private ownership can be given only to citizens. The Civil Code does allow for legal persons to hold indefinite use rights to land. While this makes the non allowance of land ownership by legal persons less problematic, indefinite use rights are an imperfect substitute. The purpose for not allowing legal persons to own land is not clear. In some other transition economies in Central and Eastern Europe, policy concerns that both foreign and domestic enterprises would buy up all the newly privatized land in the early stages of privatization led to a similar prohibition (which was sometimes applied only to agricultural land). Such prohibitions, especially when they apply to non-agricultural land, present substantial constraints to private sector enterprises that need both land and credit (which is often accessed using mortgages) to conduct business.

3. Prohibition on foreign ownership of land. This provision, while potentially problematic, is much less of a problem than the two discussed above. Many if not most countries discriminate against foreign ownership of land through various restrictions and regulations, although few have outright prohibitions such as Mongolia's.[19] Mongolia's outright prohibition of foreign ownership is unlikely to become a significant impediment, however, so long as foreigners can obtain long-term and transferable non ownership rights to land.

1.2 Civil Code of Mongolia

As in most civil law systems, Mongolia's Civil Code provides a comprehensive foundation of the country's private law. The Civil Code provides that other civil laws must be consistent with the Code. The Code is divided into seven parts, two of which (property law and contractual liability) contain articles directly relevant to land rights.

These land-related provisions are generally adequate. In at least two cases,

[19] *See* Hodgson et al., *supra* note 21

they help to resolve part of a potentially problematic constitutional provision. The land-related Civil Code provisions do, however, contain a few potential problems and ambiguities which are noted throughout this section.

The Code repeats the constitutional provisions concerning state ownership of pastureland, forests, water, and all subsoil.[20] It further provides that areas under "public and special use" must be owned by the State. Importantly, it appears to allow state-owned land to be allocated into the ownership of provinces or districts (aimags, the capital city, sums, and duuregs). Other types of land may be owned "only by the citizens of Mongolia," but only after the establishment of procedures for private ownership of land.[21]

Importantly, the Code provides that owners are entitled to possess, use, and dispose of their property at their discretion according to law. It also provides that owners are entitled to transfer their rights to others who are entitled to possess, use or dispose of the things within the definite authority given by the owner according to law or contract. Owners may not violate the rights or legitimate interests of other owners and holders by the exercise of their own rights of ownership.[22]

The Code states that the competent State authorities located at the place where immovable property (land and things attached to land) is situated shall register it in accordance with the procedures prescribed by law. It appears that the State authorities are to register the immovable property regardless of whether it is under state, local, or private ownership.

The Civil Code also recognizes a variety of non-ownership rights to land. These non ownership rights include possession rights, use rights, lease rights, and limited use rights (servitudes). Non-owners are entitled to possess, use, and dispose of property within the definite authority given by the owner according to law or contract. The Code places no limits on the duration of any of the non-ownership rights, although it clearly envisions that limits on duration may be

[20] Civil Code of Mongolia (1994), art. 87.
[21] art. 100(4); *see* also art. 141(2).
[22] *Id*., art. 87(3).

established by law or contract. The Code provides that a citizen may acquire lifetime possession rights to land under state ownership in accordance with the grounds and procedures established by law, as well as the right to transfer that land by inheritance. Moreover, unless otherwise provided by law or contract, a citizen with the right to lifetime inheritable possession may transfer the land to another's use subject to its utilization and terms.[23]

The Code states that "unless otherwise provided by law," a legal person (entities or organizations) may be granted the right to use land under state ownership for an indefinite period. Owners of buildings and other immovable property on land owned by another may also acquire the right to use the land for an indefinite period. The specific attributes of possession rights and of use rights are not detailed in the Civil Code, although it appears that possession rights are superior to use rights. The Code does contain relatively greater detail on limited use rights (servitudes) and lease rights.[24]

The Code's provisions for leasing of property, notably, are located in Part Four of the Code titled "Contractual Liabilities," rather than in Part Two titled "Property Law" like the above-mentioned provisions. This is important because it appears to provide a distinction between the possession and use rights in the property law section and these lease rights in the contract law section.[25] If the law is interpreted to make this distinction and "possession rights" and "use rights" in the property law portion are not "lease rights," then two important implications follow (one positive and one negative for the non-owning land right holder).

First, according to civil law theory and civil law as recognized in most countries, property rights (ownership rights, possession rights, and use rights) typically have several important advantages over contract rights, including

[23] *Id*., art. 103(3).
[24] *Id*., arts. 265-281.
[25] Article 281 of the Civil Code states that "[t]he procedures for leasing land shall be established by law." The Mongolian Law on Land, however, does contain the word "lease" (but it does address possession rights and use rights in detail). *See* discussion of Land Law below.

lease rights. For example, property rights have the nature of confronting all persons and legal persons, while contact rights can be asserted only against the specific person who is the party to the contractual relationship. This means that a holder of a property right can invoke state protection against interference from all the world and can assert his right against any infringer or trespasser. A contract right is a right against an individual party. If the party who holds a contract right is somehow prevented from performing it by actions of a third party, the holder of the right has no action against the third party.

Furthermore, property rights have priority over contract rights if both rights exist on one item of property at the same time. In cases of mortgage, for example, a holder of a property right will have preferential rights relative to a holder of a contract right.

The second consequence of an interpretation distinguishing possession and use rights from lease rights is that the Civil Code's provisions governing lease (Articles 265-281) may not apply to possession and use rights. Some of these provisions provide real benefits to the non-owning right holder such as Article 274 which gives lessees preemptive rights if the property is subleased or sold.[26]

With regard to the State's compulsory acquisition of land for special public needs, the Code essentially repeats, with some additional detail, the constitutional provisions. The Code allows the State to "take over" land on the grounds of "special public need" and land that has been granted for construction of agricultural dwellings, houses, or other buildings and facilities if it is not used according to its designated utilization.[27]The taking must be based on a government decision. The State must provide compensation or (if the parties agree) other land. Unless otherwise provided by law or contract, the compensation shall include the value of the land and immovable property on it as well as other expenses incurred as a result of the taking. Any disputes

[26] This means that if the property being leased is sold by the owner to another party, the lessee must first be given the opportunity to purchase it on the same terms.
[27] Civil Code of Mongolia, arts. 112-113.

concerning the taking or compensation are to be decided by a court.[28]

Potential Problems or Ambiguities

1. Distinctions between possession and use rights in the property law section and lease rights in the contract law section are not clear. Are possession rights and use rights as defined in the property law section also "lease rights" as defined by the contractual liabilities section? Do the provisions concerning lease in the contractual liabilities section apply to possession rights and use rights? The Civil Code should provide explicit answers as it will have important consequences for the nature of these rights, as discussed above.

1.3 The Mongolian Law on Land

The Land Law was adopted in 1994 and became effective in April 1995. The law's stated purpose is to regulate the possession, use, and other related issues of land by citizens, economic entities, and organizations.[29] In general, the law is a decent piece of legislation, although it does appear to contain some problems and ambiguities. From a comparative perspective and considering Mongolian needs, the law can serve Mongolia quite well if it is: (1) slightly revised; (2) followed with well-drafted accompanying regulations; and (3) effectively implemented.

The Law on Land defines six classifications for land: agricultural land, urban and settlement land, public infrastructure land, forest land, water resources land, reserve lands. The law also defines the institutional rights and responsibilities of various central, regional, and local governmental bodies concerning land relations.

The law provides for and further defines four types of land rights: ownership rights, possession rights, use rights, and limited use rights. Notably,

[28] *Id*., 113(4).
[29] The Mongolian Law on Land (1994), art. 1.

it does not include any provisions on lease rights. The remainder of this section is arranged along topical lines.

It will discuss important Law on Land provisions concerning: land ownership rights; possession rights; use rights; limited use rights and common use; allocating non ownership rights; land fees; land rights of foreigners; land use regulations; compulsory acquisition; land records; and land disputes. Each subsection will first discuss the law's important provisions concerning the topic and then list and discuss potential problems related to those provisions.

A. Land Ownership Rights

Land ownership is defined as "the management of land with the right to dispose thereof within the framework allowed by law."[30] It generally repeats the Civil Code provisions in stating that land, other than that owned by Mongolian citizens, is owned by the State. It does not allow for land ownership by legal persons or for foreign citizens. Mongolian citizens are given the right to own land other than pastures, common-use land, and "land for state special needs."

The hierarchy of non-ownership rights to land provided in the Land Law starts with possession rights, then use rights, and then limited use rights. They are discussed below.

B. Possession Rights

Possession rights may be held by citizens, economic entities, and organizations of Mongolia.[31] All are given the preferential right to possess land in the district (sum or duureg) where they reside.

Holders of possession rights may keep them for a period of up to sixty years, and have the right to extend the duration for up to forty-year periods if they have complied with the terms of land legislation and the land possession

[30] The Mongolian Law on Land (1994), art. 3(2).
[31] *Id* arts. 27(1), 6(1). Foreign citizens and legal persons may not hold possession rights.

contract. An exception exists for cultivated land. The initial possession (or use) term for cultivated land cannot exceed twenty-five years and cannot be less than five years (although it appears that extensions may be up to forty years).[32]

The law places limits on the size and location of land to be possessed. The size of the fenced ger or house land to be possessed by a citizen for family needs is not to exceed 500 square meters.[33] In addition to the fenced ger or house land, citizens may possess up to another 1,000 square meters of land for family needs such as vegetable, fruit, and fodder cultivation. Note that these limits apply to each citizen, not to households.

The law states that the Government "shall establish" the maximum size of land to be possessed by economic entities.[34] Importantly, holders of possession rights do have some ability to transfer their rights.

This is somewhat confusing and has been misinterpreted by several international consultants who have stated that possession rights are not transferable. The term "land possession" is defined in Article 3 of the Land Law as a management right with "no right to dispose thereof." Article 33, however, in listing the land possessor's rights provides that possessors have the important right "to partially or completely transfer the land possessed for use by others" pursuant to approval by the body which granted the possession contract. Note that a possessor cannot transfer or "dispose" the possession right, but can transfer a use right to another. Importantly, a citizen holding a possessory right may transfer it through inheritance. Holders of possession rights have the rights to use the land according to the purposes in the possession contract, the same right held by land users. However, holders of land possessory rights, unlike holders of use rights, can require violators to compensate for damaging the land.[35]

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[32] *Id*., art. 53(2).
[33] *Id*., art. 28(1).
[34] *Id*., art. 28(5). *Sum* and *duureg* governors are to establish the siz e and location of land to be possessed by economic entities and organizations. *Id*., art. 28(6),(7).
[35] Expanding Transferability of Possession Rights to Land.

The Law on Land also places numerous obligations on land possessors including complying with the land use provisions in the land legislation, paying land fees in a timely manner, and respecting the rights and legal interests of others concerning land possession and use.

Possession rights can end by expiration or termination. Expiration occurs when the contract term ends, the land possessor dies or disappears without heirs, and when the possessor requests that the contract be ended. The person who provided the land possession contract (often the sum or duureg governor) can also terminate the right "pursuant to administrative procedures" if: (1) the possessor consistently or seriously violates legislative and contract obligations; (2) the possessor uses land in a manner inconsistent with human health, environmental protection, and national security interests; or (3) the land is taken for State special needs.[36] The termination issues are discussed below in the subsection

Potential Problems or Ambiguities

1. Possession rights to cultivated land are shorter than for other types of land. The law only allows twenty-five-year possession rights to cultivated land (for the initial term), while sixty-year rights are allowed on other land. Long-term rights to cultivated land are at least as important, if not more important, than such rights on other land because farmers need the motivation of long-term tenure security in order to make investments on the land.

2. Limited transferability of possession rights. The law allows holders of possession rights to transfer rights, but contains two limiting conditions. First, the holder of the possession right may only transfer use rights, which cannot be further transferred. Second, the possessor must obtain permission from the body that initially granted the possession right. Lawmakers in Mongolia should consider whether each or both of these restrictions are necessary. What purposes do these restrictions serve, and can those purposes be served with less

[36] *Id*., art. 34(2).

limiting restrictions? Presently, these restrictions place a significant impediment to the ability of individual economic actors to effectively respond to what is sure to remain a very fluid economic situation by transferring or obtaining rights to land.

3. Low ceilings for land possessed for residence. The 500 square meter limit per citizen for fenced ger or house land and the 1,000 square meter limit for household garden or fodder land is too low. Many existing fenced ger and house plots, especially in rural settlements, are considerably larger, often between 0.10 and 0.15 hectares. The successful "Green Revolution" Program, currently offers possession rights to up to 2.0 hectares for garden plots. The existing size restrictions should at least be increased to accommodate the situation on the ground. Moreover, lawmakers consider distinguishing between ceilings on land acquired directly from the government and that obtain through a secondary market.

4. Lack of clarity on whether legal persons can have possession rights of indefinite term.

Article 104 of the Civil Code provides for indefinite terms for legal persons unless otherwise provided by law. Article 29 of the Law on Land states that land may be possessed by "citizens, economic entities, and organizations of Mongolia for a period of up to sixty years." Taking both of these together, it is not clear whether legal persons that are not "economic entities" or "organizations" can have rights of an indefinite term.

C. Use Rights

Use rights to state-owned land may be held by citizens, economic entities, and organizations pursuant to the specific purposes, duration, and conditions established by contract and in accordance with legislation. Use rights may be obtained directly from sum or duureg governors, or by contract from those who hold possession rights. Land users are subject to the same obligations as land possessors, but they have lesser rights. In particular, land users may not: (1)

require violators to compensate damage caused to the land; (2) transfer their land rights; or (3) extend their contract upon expiration of the contract term.

Although the Land Law limits the duration of possession rights and the amount of land that may be held with possession rights, the law does not explicitly limit the duration of use rights nor the amount of land that may be held with use rights.

Potential Problems

1. Use rights cannot be transferred. Lawmakers should consider allowing transfers of use rights with the approval of the body that granted the use right.

2. No limit on term or size of land held under use rights. The law places limits on the duration of possession rights and the size of land held under possession rights, but places no corresponding limits for use rights.[37]

D. Land Rights of Foreign Citizens and Legal Entities

The Land Law does not allow foreign citizens and legal persons to hold ownership or possession rights to land in Mongolia. Foreign citizens and legal entities may hold use rights to certain types of land. The Land Law does not specially restrict the purposes for which foreign legal entities may use land, the duration of the use term, or the amount of land used. The law does, however, place such restrictions on land use by foreign citizens. First, only foreign citizens (and stateless persons) "permanently" residing in Mongolia can use land for household or production purposes. Second, land may be used by foreign citizens for terms of up to five years (with extensions not to exceed five years). Third, foreign citizens may not use land for livestock husbandry or crop cultivation.[38]

[37] The limit on the term length for possession rights will itself limit the term for use rights that derive from possession rights. However, use rights may also be granted directly from the government in which case no duration limits exist.

[38] *Id*., art. 47(3).

Potential Problems

1. Use restrictions for foreign citizens are significantly different than those for foreign legal persons. The law contains significant use restrictions for foreign citizens that do not exist for foreign legal persons. The reasons for the differing treatment are not clear. Moreover, lawmakers should consider the possibility that foreign citizens might easily avoid the restrictions by forming a legal entity.

The law requires the "Certified Organization" to prepare a "state certificate on land characteristics and quality" for all land.

The certificate is to include a substantial amount of information, including thickness of the fertile soil layer, contents of decomposition, soil and chemical pollution, changes in land surface characteristics, changes in vegetation cover, and changes in the composition of pasture and hayfield plant species.[39]

These certificates (and the associated evaluations and measurements) are to be conducted once every five years and also upon the expiration of possession and use rights. The expenses for the initial state certificate on a given land parcel will be financed from government budgets, but land possessors and users will be required to finance the expenses of subsequent certificates. Indicators on land characteristics and quality gathered from the periodic evaluations will be compared to the initial indicators to determine if the land has decreased in quality. If land or environmental quality has decreased, those responsible face punishment, up to and including confiscation of the land.

E. Land Records and Registration

The land records provisions in the Law on Land (except for the provisions on state certificates on land characteristics and quality) are fairly general and broad, and thus will likely require more detailed regulations to govern specific implementation. Article 26 states that Unified Land Territory records should

[39] *Id*., art. 55(2).

include information concerning allocation status to land possessors and users, land size, assessment, payment, characteristics, and protective activities in the administrative and territorial units.[40]

These records are to include a map. Each year, the sum and duureg governors are to write a current Unified Land Territory report, and submit it to the aimag governors who, in turn prepare a report and submit it to "the authorized government organization." This organization must then present a unified report to the government.[41]

Potential Problems

1. Relationship or interface between the land records and the State Registry is unclear.

The law calls for the establishment of "Records on Unified Land Territory" and requires registration of possession contracts with the "State Registry," but it is unclear how or whether the information in the land records will interface with the land information in the State Registry.

F. Land Dispute Resolution

Article 56 of the law provides the general rules for settlement of land disputes. Any, if not most types of disputes are to be settled administratively without a defined role for the courts. The article categorizes disputes into four categories. First, land disputes involving possession or use rights between a governor and a citizen, economic entity, or organization are settled by the organization or official of a level higher than the governor involved. The second category involves disputes concerning possession or use rights between citizens, economic entities, and organizations. They are to be settled by the governor of the corresponding level. The third category is disputes concerning land characteristics and quality and the efficient and rational use of land and its

[40] *Id*., art. 26(1).
[41] *Id*., art. 56(1)(1).

protection. These disputes are to be settled by the official in charge of the appropriate certified organization or the governor of the corresponding level.

The final category involves limited use right (easement and servitude) disputes and [“land property”] disputes. These disputes are to be settled by the courts. If a party to a dispute in the first three categories disagrees with the decision, they may appeal to an official or organization of a level higher than the original decision-maker.

Potential Problems

1. No role for courts in most land disputes. Disputes in three of the four categories are to be resolved administratively, and even the single appeal allowed by law is an administrative appeal. The law should explicitly allow parties to appeal these administrative decisions to the courts. For disputes involving takings of land, this would be consistent with Article 113(4) of the Civil Code.

2. Disputes on land characteristics, quality, and protection can be resolved by a party to the dispute. Many, if not most, disputes on land characteristics, land quality, efficient and rational use, and land protection are likely to be between a land possessor and either the certified organization charged with monitoring land use and quality or the governor who allocated the possession right. Yet the law provides that such disputes are to be settled by the official in charge of the certified organization or the governor.

This creates a clear conflict of interest and concentrated, unchecked power in the hands of the certified organization and the governor.

2. The Legal Regulation of Hypothec in Korea

In order to provide a background for an in depth investment analysis of mortgage, this chapter examines the Korean mortgage market and issued mortgages and looks into recent trends in the housing market. It also

investigates the regulatory frameworks under which the real estate markets operate and mortgages are securitized.

From 1967 to 1997 the right to issue mortgages was exclusive to the government – owned Housing and Construction Bank (H&CB). After the financial crisis, the H&Cb was privatized and the market was deregulated, leading to a fierce competition over market share in the highly profitable mortgage market. Today, both the public and the private sectors are engaged in the market.

The Korean mortgage market has changed rapidly since the financial crisis in December 1997. In the primary mortgage market, the competition between lenders has become intense; the proportion of long-term mortgage loans has decreased; mortgage interest rates have dropped; and prepayments have increased.

In the secondary mortgage market, the government enacted the Mortgage-Backed Securitization Company Act (MBS Company Act) and established Korea Mortgage Corporation (KoMoCo) in 1999. KoMoCo has issued Mortgage-Backed Securities (MBS) seven times, a total amount of 2.5 trillion Korean won as of December 2002.

The government's market share in the mortgage is far from the exclusive control it enjoyed up to 1997. The public sector is divided among two major institutions: the National Housing Fund (NHF) and the public Korea Housing and Finance Corporation (KHFC). The NHF was established in July 1981 based on the Housing Construction Promotion Law, with the objective of supporting housing purchases by non-homeowners.[42] The Fund's funding is secured through a number of measures, including interest profits on mortgages, a housing lottery, and the issuance of housing mortgage bonds and mortgage-backed securities. The Korea Housing Finance Corporation was launched on March 2, 2004 as a public corporation operating under the Korea Housing

[42] Ministry of Construction and Transportation (2006)

Finance Corporation Ac of 2003.[43] Mortgage loans issued by the KHFC are subject to a number of conditions, but the degree of restrictiveness does not match that of NHF mortgages. The private mortgage sector is highly dominated by commercial banks. After the liberalization of the mortgage market, the previously high market share of Kookmin bank, including H&CB, was challenged by a large number of commercial banks entering the market.

There are two laws that govern mortgage securitization in Korea: the Asset- Backed Securitization Act (ABS Act) and the Mortgage-Backed Securitization Company Act (MBS Company Act).

The ABS law was developed to support all asset-backed securities, including mortgages. The MBS law was specially drafted for mortgage-backed securities. These laws permit securitization of mortgages for the first time in Korea. MBS Company Act adopted in 1999 allows for an establishment of special purpose corporations to issue MBS in Korea. The Ministry of Finance and Economy planned to deduct a portion of the tax rate for small-sum purchasers of MBS to attract institutional, as well as retail, investors to the MBS market. As far as mortgage securitization is concerned, the MBS Company Act forms a basic framework of mortgage Securitization.

The main contents of the law are as follows: First, an MBS Company can be founded only if it receives authorization from the Financial Supervisory Commission (FSC). Authorization can be obtained when it satisfies certain specified conditions, such as 25 billion Korean won or more of equity capital and 8% or more of BIS capital adequacy ratio and entity as a corporation. Second, an MBS Company is required to register the plan of mortgage securitization with FSC to securitize mortgage loans. To take over the mortgage loans from a financial institution and to establish a trust that designates it as a trustee, the MBS Company is required to register the transfer and trust of mortgage loans with the FSC. Third, as the MBS Company is not allowed to run mortgage portfolio investment business, an MBS Company's

[43] Korea Housing Finance Corporation (2006a)

function is restricted to acting as a conduit for securitization. Fourth, an MBS Company issues an MBS by establishing a trust and designating itself as a trustee. In other words, when it trusts the purchased mortgage loans to a trust account that is legally separated from its account, the same trust issues the MBS. Fifth, the MBS Company Act prescribes the requirements of 'True Sale' to prevent legal disputes and clarify accounting treatments. Sixth, the MBS Company Act stipulates some special exceptions to the Civil Law regarding countermeasures against the transfer of credit and acquisition of mortgages. Seventh, an MBS Company can guarantee the payment of principal and interest of the MBS within the limit of 30 times of its equity capital.

It can also issue corporate bonds within the limit of 10 times of its equity capital, and may borrow within the limit of its equity capital.[44]

The main contents of the regulatory framework are as follows: (i) An MBS Company should meet management guidance ratios such as the BIS capital adequacy ratio, otherwise, prompt correction measures should be conducted; (ii) An MBS company classifies its assets into five according to their soundness, and should accumulate a bad debt reserve and payment guarantee reserve based on the standards set by supervisory authorities; (iii) An MBS Company should make a public notice regarding its major management indicators. Also, when non-performing loans or financial incidents are made or prompt correction measures are taken, public disclosure should be made. From a legal perspective, although no entry barrier exists in the secondary mortgage market, there is no other MBS Company except KoMoCo that operates in the market.

In the Korean legal system, there are two types of liens: consensual and statutory. There are three typical types of consensual liens enumerated in the real property law section of the civil code: mortgages, pledges, and leases. The mortgage is called the "king of liens", and is the type used most frequently in

[44] Kinsey, Mark A. and H. James Schwing (2001), "Regulation of the U.S. Secondary Mortgage Market", Housing Finance International, September.

business financing. For statutory liens like rights of retention, there are specific provisions in the civil code (for instance, in the commercial code). The Provisional Lien Registration Act (or Act Relating to Security by Provisional Registration) and the Factory Estate Mortgage Act are good examples of special laws that created new liens or modified already existing liens. A secured creditor can file a petition with the court for foreclosure.

The procedure is very efficient with respect to both time and money. However, while a mortgage creditor does not have this extra-judicial power of sale, it is often the secured creditors, and not the mortgagees, who negotiate with debtors about selling the encumbered property to satisfy the secured claim when the debtor fails to pay. To initiate a civil execution procedure, an unsecured creditor must first seek a court judgment. Unsecured creditors may try to obtain a pre-judgment attachment if they can locate the debtor's assets.[45] The cost of obtaining an attachment is very low and there is no requirement for the court to hear the debtor prior to ordering the attachment, so this method of obtaining some measure of security is widely used.

In Korea, lawsuits filed by financial institutions like banks to collect non-performing debts generally proceed very quickly.

This is mainly because transactions in which financial entities are involved are well-documented, so that the fact-finding process is very easy.

When unsecured creditors fail to find assets of the debtor to seize, they become suspicious that a debtor might have in fact registered the assets under a third party's name and sometimes accuse the debtor of fraud. To prevent such problems, the Act on the Registration of Real Estate under the Actual Titleholder's Name and the Act on Real Name Financial Transactions and Guarantee of Secrecy were put into force; and an order to search property was introduced into the new Civil Execution Act.

A mortgage is the archetypal security for real property. To create a mortgage requires, first, that the mortgagor and mortgagee execute a mortgage

[45] World Bank Global Judges Forum (Malibu, 2003)

agreement and, second, that the mortgage be recorded in an appropriate registry. The application for recording is filed jointly by the mortgagor and the mortgagee; it must be accompanied by the mortgage agreement as well as proof of the reason for the mortgage. In bank transactions, an executed copy of the loan agreement is generally used to provide such proof.[46]

A mortgage gives the mortgagee a right in the burdened property, without requiring that he take possession. Once recorded, such a right gives the mortgagee a priority interest in the mortgaged property from which he may satisfy his claims before subsequent mortgagees or other subsequent security holders and the mortgagor's general creditors.[47] Formerly, tax obligations falling due within one year after a mortgage was recorded used to take priority over the mortgage, but this exception was struck down by the constitutional court in 1990.

The mortgage can provide security not only for the principal amount of the loan, but also for any interest, fixed penalties, or default interest arising from non-performance. However, only default interest incurred during the one-year period following the date on which the secured principal became due can be used as security, unless the mortgage is a kun mortgage (Civil Code Art. 357; see below).[48]

The primary method for enforcing a mortgage when a debtor cannot pay is judicial foreclosure, which is governed by the Civil Execution Act. Any extra-judicial foreclosure agreement entered into prior to default is valid as long as the agreement provides that the mortgagee must return to the mortgagor any value received for the encumbered property in excess of the mortgagee's claim, whether the agreement is for straightforward foreclosure or for a power of sale.[49]

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[46] Youngmoo Kim & Thomas H. McGowan, *Taking of Security over Movable Property*, in *Introduction To The Law And Legal System Of Korea* 461 (Kyoung Mun Sa 1983).
[47] *Id*. at 462
[48] Id.
[49] Hyosoon Nam, *Civil Code Art. 363*, in *Minbub Joohae VII* 103-106 (Bak Young Sa, 2001).

As for the types of mortgage, two types – a joint mortgage and a kun mortgage – are noteworthy. A joint mortgage is a single mortgage that covers several items of property. A kun mortgage is a mortgage that secures debts arising from a series of transactions, up to a certain fixed maximum amount to be reached on a day in the future.[50]

There are also laws providing for special mortgages. Someof them are – the Factory Estate Mortgage Law and the Mine Estate Mortgage Law – enable the entire estate of a business, including land, buildings, equipments and intangible property, to be the object of a single mortgage. Others – the Ship Registration Law, the Vehicle Mortgage Law, Aircraft Mortgage Law, and the Equipment Mortgage Law – recognize chattels as the object of a mortgage.[51]

Content of Mortgage under Civil act is defined in Article 356 that "A mortgagee is entitled to obtain satisfaction of his claim in preference to other creditors out of the immovable which has been furnished by the debtor or by a third person as security without transferring its possession."

As stated in Article 358 of Civil act "The effect of a mortgage shall extend to all things which are attached to the immovable that is mortgaged including its accessories: Provided, that this shall not apply to cases if otherwise provided by Acts or agreed in the act of creation". Whereas it is prescribed in Article 165.6 of Civil code of Mongolia that "If otherwise provided by agreement, interest, tort, damage caused and Court costs, in addition to main obligations, shall be deducted from the price of immovable property that is a hypothec object." It is defined in Article 360 of Civil Act of Korea as "A mortgage shall secure not only the main obligation but also the interest, penalty, damages arising from the nonperformance of the obligation, and the expense for the enforcement of the mortgage.

Where the compensation for damages is delayed, a mortgage can be exercised only as regards the payments due in respect of one year after the

[50] Kim & McGowan, *supra* n.3, at 464.
[51] Gyeiwon Jeon, *Mortgage recognized by Special Laws*, in *Minbub Joohae VII* 241-263 (Bak Young Sa, 2001).

lapse of time for the performance of the principal." Whereas it is prescribed in Civil code of Mongolia that "maximum price of immovable property that may satisfy the demand of the creditor shall be identified and noted in the State register." Article 357 of Civil Act of Korea states "A mortgage can be created by settling only the maximum amount of the debt to be secured and reserving the determination of the debt in the future. In such case the extinction or transfer of the debt which occurred before the debt is determined cannot be effective against the mortgage." And also "the interest of the debt shall be considered to be included in the maximum amount of the debt."

Utilization of Mortgage Insurance

The average LTV ratio in Korea has steadily increased to record 40.7% in 5 years before. However, it is still very low compared with advanced countries. The average LTV ratio is expected to continuously increase as mortgage loans are expanded, but it may be difficult to attain the level of advanced countries in the near future. One of the most important reasons is the matter of repayment burden due to the high level of housing prices-to-income ratio. The other is a problem unique to Korea, which involves a small amount leasehold deposit system. This small amount leasehold deposit always holds priority over a mortgage lien. For this reason, all mortgage lenders deduct the small amount leasehold deposit from the collateral value when calculating the loanable amount. Therefore, the loanable amount substantially diminishes. Putting aside the issue of repayment burden, and assuming the decrease in housing price and cost of auction as 30% of the housing price, as well as the small amount leasehold deposit as 10~20% of the housing price, a maximum LTV ratio cannot exceed 50~60% in Korea. Accordingly, mortgage insurance needs to be utilized to enhance overall LTV ratio from the mid- and long-term point of view. Once mortgage insurance is widely used, those people who do not have a sufficient down payment can borrow as much money as they want. Mortgage lenders also can expand mortgage loans since they can avoid default risks. If

the LTV ratio becomes 20% higher through mortgage insurance, it will rise up to 70~80%. Therefore, as is the case in advanced countries, home ownership will be possible with a down payment of only 20~30% of the house value.[52]

According to Registration of Real estate act, Article 2 "A registration is made with regard to indication of partitioned building, and to establishment, preservation, transfer, change, restriction of the disposal, or termination of rights falling under ownership, superficies, Servitude, Chonsegwon/ registered lease on deposit basis/, mortgage, pledge of rights and lease." And in Article 2..1.a of Act on the Registration of Real estate under actual titleholder's name "where a creditor has a real right to any estate transferred, or makes a provisional registration of it, to secure a performance of obligation."

Those provisions I mentioned above provide the suitable condition for the enhancing mortgage legislation.

And it seems also impressive that Real estate investment act was adopted in 2001 in Korea for the purpose of to contribute to the development of national economy by prescribing the matters concerning the establishment of a real estate investment company, the management methods of assets thereof and the protection of investors therein to provide citizens at large with more opportunities to invest in the real estate as well as to vitalize the sound investment therein.

This act, I assume has many advantages. Such as the planning of city is strengthened, real estate price is stabilized, and the quality of real estate can be controlled and since a real estate investment company shall be a stock company, the equity and proper connection between state and private entities has commenced and followed by securities related to real estate has been developed and has been the great contribution to mortgage law development.

In contrary, whereas any company can carry out their business in real estate, but also poor-organized and bad-quality buildings and apartments are overbuilt in Mongolia but also it has become one of the hindrance to develop

[52] Lee, Joong-hee, Mortgage securitization in Korea, Housing Finance International , 2003, at 3

the mortgage and mortgage –backed security. It shows the separate act or controlling mechanism to real estate market itself which is the source of mortgage needs to done.

It is shown what kinds of rights except real estate ownership rights are registered in following 18 countries as below:

Name of State / Rights to be registered	Austria	Belgium	Swizerlandвейцарь	Germany	Finland	Greece	Croatia	Litvian	Latvia	Denmark	Norweign	Poland	Russia	Korea	Sweden	Slovenia	Great Britian	Ukrain	Mongolia
Notice	+	-	+	-	+	+	-	+	-	+	-	+	+	-	+	+	+	-	
Pledge of land	+	+	+	+	+	+	+	+	+	+	+	+	-	+		-	+	+	+
Right to construction	+	+	+	-	-	-	+	+	-	+	+	-	-	+	-	-	-	-	+
Servitude	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Lease	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Mining rights	+	+	+	+	+	+	-	-	-	-	-	-	-	+	-	-	+	-	-
Mortgage rights	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Right to purchase	+	-	+	+	-	-	+	-	-	+	+	+	+	+	+	+	-	-	
Use and limitation	+	-	+	+	+	-	+	+	+	+	+	+	-	+	+	+	+	+	-
Profit rights	+	+	+	+	-	+	-	-	-	+	+	+	+	-	-	-	+	-	-
Censor	+	-	+	-	+	+	-	+	-	+	+	+	+	+	+	-	-	+	-
Joint property percentage	+	-	+	+	+	+	+	+	+	+	+	+	-	-	+	-	+	+	-
Uzufruct	+	+	+	+	+	+	+	+	-	+	+	+	+	+	+	-	-	+	+

Conclusion

Even though the importance of land differs in the history of both countries on the basis of social and cultural specialty which whereas Korea has had a agricultural background, there has been a long tradition of nomadic civilization in Mongolia which had no experience of land ownership, nowadays such terminologies including land and real estate ownership, pledge, mortgage, mortgage-backed security are recognized as important issues to be legalized in order to provide economic development and human rights in both countries.

Despite its recognized economic and social importance, housing finance often remains under-developed in emerging economies. Residential lending is typically small, poorly accessible and depository-based. Lenders remain vulnerable to significant credit, liquidity and interest rate risks. As a result, housing finance is relatively expensive and often rationed. The importance of developing robust systems of housing finance is paramount as emerging economy governments struggle to cope with population growth, rapid urbanization, and rising expectations from a growing middle class.

The capital markets in many economies provide an attractive and potentially large source of long-term funding for housing.

Pension and insurance reform has created large and rapidly growing pools of funds. The advent of institutional investors has given rise to skills necessary to manage the complex risks associated with housing finance. The creation of mortgage-related securities (bonds, pass-throughs and more complex structured finance instruments) has provided the multiple instruments by which housing finance providers can access these important sources of funds and better manage and allocate part of their risks.

The use of mortgage-related securities to fund housing has a long and rich history in industrial countries. Mortgage bonds were first introduced in Europe in the late 18th century and are a major component of housing finance today [EMF 2002]. Mortgage pass-through securities were introduced in the United States in the early 1970s and along with more complex structured finance

instruments now fund more than 50% of outstanding debt in that country [Lea 1999]. Today, mortgage-related securities have been issued in almost all developed countries.

There have been numerous attempts to develop mortgage securities to secure longer term funding for housing in emerging economies. The view has been that such instruments can help lenders more efficiently mobilize domestic savings for housing, much as they do in industrial countries. In addition, mortgage securities are pursued to develop and diversify fixed-income markets as a supplement to government bonds for institutional investors.

Despite the strong appeal of financing housing through the capital markets, there are significant barriers to the development of mortgage securities in emerging markets.

Their success is dependent on many factors, starting with a strong legal and regulatory framework and liberalized financial sector, and including a developed primary mortgage market. Perhaps not surprisingly, the experience in developing mortgage securities in emerging markets has been mixed.

Mortgage securities can perform a number of valuable functions in emerging economies. Their introduction and use can improve housing affordability, increase the flow of funds to the housing sector and better allocate the risks inherent in housing finance. In economies with pools of contractual savings funds, mortgage securities can tap new funds for housing.

Institutional investors (pension, insurance funds) with long term liabilities are potentially important sources of funds for housing as they can manage the liquidity risk of housing loans more effectively than short-funded depository institutions.

Traditionally, American mortgage lenders operated on a narrowly defined geographic basis, lending only to those clients and in those markets in which they could efficiently gather information on borrowers and properties. In case of Mongolia whereas the registration of citizens has not been developed it needs more comprehensive regulation on mortgage and its registration.

Generally speaking, mortgage capital markets are not the proper solution for weak legal protection of property rights and mortgage lending.

In comparing to Mongolia, Korea has a certain experiences on this field.

The Korean government has developed policies and improved institutions by modeling the domestic housing finance system after those found in advanced countries. One of these measures is the mortgage securitization system introduced in 1999. The fact that Korean government and KoMoCo have successfully created a secondary mortgage market within 3 years can be highly evaluated.

There are still, however, a great deal of challenges. The Korea Mortgage Corporation (KoMoCo) was set up as a joint venture by the Ministry of Construction and Transportation (MOCT), the Housing and Construction Bank, Kookmin Bank, Korea Exchange Bank and Samsung Life Insurance Co. at the end of 1999.

In 2000, the International Finance Corporation (IFC) and Merrill Lynch became foreign investors in KoMoCo. Along with the equity investment, these foreign investors brought technical assistance to KoMoCo from Countrywide International Consulting Services and Fannie Mae in the areas of business, operations and technology development.

KoMoCo's mission was to securitize the National Housing Fund (NHF) loans as well as private sector mortgages originated by commercial banks and other special finance companies. KoMoCo's bonds are not guaranteed by the Korean government, but are still considered a safe instrument due to the government involvement (i.e., an implicit guarantee).

There is no doubt that most basis of it was advanced registration system and proper legislation adopted on the basis of long term research and study.

Since Korea has a development on this field, even though Mongolian Housing Funding Corporation and Mongolian Hypothecation Corporations were established under Government of Mongolia their functions and the involvement of Government are still not clear and legal regulation is still in a

pending.

Mongolia currently has no mortgage law, no way to register titles, and no clear method for recovering on any debt. There exists a patchwork of laws that may or may not apply, making lending on local security risky. Banks frequently complain that onerous foreclosure rules are barely workable and unfair to the creditor. As a consequence, while possible to make secured loans, it is currently not possible to make mortgages.

The judges have no statutory guidance upon which to base their rulings. This opens an avenue for appeals based on the technical illegality of a decision enforcing the rights of a creditor or protecting the rights of debtor. Judges not wanting to be called to account for making faulty rulings make vague decisions, using provisions that do not exactly fit the particular aspects of mortgages.[53]

However, commerce should be burdened with few legal formalities. Modern commerce requires simplicity and uniformity in creating security in movables. Transaction costs – in the form of staff time, professional time, government fees – must be minimal.

But often the law is replete with rules and regulations. Equipment, inventory, and receivables financing should be commonplace in Mongolian commerce. Equipment financing is most frequent, especially where the financial lease can be employed.

Inventory financing is not common, as the hypothecation agreement offers very weak security from a legal point of view.

Rules for creating security are uncertain, often complicated, and more often opposed to commercial needs. Except for the pledge, there is no statutory basis for the forms of transactions in use in Mongolia.

When the time comes to enforce a secured loan, Mongolian law and procedure favor the debtor. Various studies have documented the tactics debtors may use to delay, add expense to, frustrate, and nearly certainly deny the creditor's ability to get value from collateral. No effort is made here to re-

[53] http://www.state.gov/e/eeb/ifd

confirm these facts, or to suggest remedial reform measures in judicial procedures.

It will suffice to observe that the high risks and costs of enforcement are a significant deterrent to credit. The potential risk and cost must be factored into every loan decision, including those decisions about borrowers who eventually pay their debts in full and on time. Everyone pays the price, not only the defaulters. Less money is lent, more collateral is demanded, and higher interest rates are charged.

The scope here will merely be to propose rules specific to the secured credit regime which, if enforced, would improve the climate for secured credit. Upon default, the creditor must have the right to take possession or control of the collateral. No such right exists today. Many are quick to point out that the transfer of property act guarantees a creditor the right to take possession of collateral upon the debtor's default, but the transfer of property act applies to immovable property, not movable property. Even when the creditor holds legal title to the goods, such as under a financial lease where the creditor's rights are presumably the strongest, the creditor is rarely able to take possession of the goods.

With no effective right to possess the goods, enforcement against movable property ends in judicial sale of the asset, in those rare cases in which there is enforcement at all. Judicial sale, of course, is the most expensive and time consuming of all available procedures, usually yielding a disappointing price, at best.

Under modern secured credit laws, the creditor has the right to possession of the collateral upon default. Further, the creditor has the right to dispose of the collateral in any manner that is commercially reasonable, public or private, to get value from the collateral to apply toward the secured debt. If the debtor does not contest, the creditor may take the collateral without judicial process, saving time and expense. If the creditor does not agree to the transfer, the creditor has a right to a speedy and relatively inexpensive court order, under

which the authorities are to remove the collateral from the control of the debtor and give it to the creditor. When the creditor disposes of the collateral, all rights in the collateral are transferred to the buyer. The creditor has options other than sale of the collateral. The creditor may lease, license, exchange or otherwise dispose of the collateral in a commercially reasonable manner. The creditor may even retain the collateral if the creditor agrees to discharge the secured debt. Maximum flexibility for the creditor leads to maximum reduction of the secured debt.

Granting creditors such rights would strengthen Mongolian law. Stronger law would improve the climate for credit. Care should be taken to maximize the chance that the debtor will agree to transfer the collateral to the creditor. Expedited procedures are required. Where judicial process is absolutely required, creditors should be entitled to interlocutory orders (orders in advance of the final determination of the case) granting the creditor possession of the collateral. Such a rule would help the creditor to preserve the value of the collateral and weaken the resolve of the debtor to resist the action. When debtors know that creditor rights will be enforced, they are likely to become more cooperative with the creditor upon default. More cooperative debtors are likely to find more cooperative creditors, and together they may find ways to work around the default.

Debtors must have rights in the process, too. Debtors must have the right to take the collateral back if the default is cured, provided that any expenses incurred by the creditor in taking the collateral and pursuing enforcement measures. Debtors should have recourse against a creditor who disposes of collateral in an unreasonable manner.

Hypothecation relation is between owner of mortgage, obligator, state registration and on other side this relation is commenced upon registered in state registration authority, namely it differs from other civil relations with the character of legal procedure of registration.

Where the civil relation is regulated by dipositive method the

hypothecation relation is commenced upon registration procedure and is regulated by imperative method. The legal norms regulating state registration of Hypothecation shall refer to special part of legislation on real estate registration.

It can be concluded that state registration is the bridge of the hypothecation relation. It would be appropriate to set up the state registration not only state level but also in every single local units as it exists in USA. Whereas the specific acts regulating mortgage relation in Korea were adopted in comformity with Civil act since the Law on non- judicial disclosure of mortgage was repealed on the basis of contradicting with civil code of Mongolia there is no any more specific act on mortgage was adopted in Mongolia.

For the demand of social and economic relations, the specific law on mortgage and its registration should be adopted in comformity with Civil code of Mongolia.

But it should be done in very comprehensive and advanced level on the basis of broad research and survey among experiences and legislations of developed countries where some of deficiencies have been already appeared. The purpose would not only be the just acts but they should be the “alive acts”.

Annex 1

AGREEMENT
ON THE PROMOTION AND PROTECTION OF INVESTMENTS
BETWEEN
THE GOVERNMENT OF REPUBLIC OF KOREA
AND
THE GOVERNMENT OF MONGOLIA

The Government of the Republic of korea and the Government of Mongolia (hereinafter referred to as the "Contracting Parties")

In the hope of intensifying economic co-operation of the Contracting Parties for mutual benefit,

Desiring to create and maintain favorable conditions for investments by investors of either Contracting Party in the territory of the other Contracting Party,

Recognizing the need to promote and protect investments with the aim of fostering the economic prosperity of the Contracting Parties,

Hoping that investments and economic co-operation will be promoted and strengthened in accordance with the principles of sovereignty, equality, mutual benefit, mutual respect and mutual confidence,

Have agreed as follows;

Article 1. Definition

In this agreement

1. The "investment" means every kind of assets invested by an Investor of either Contracting Party in the territory of the other Contracting Party, in accordance with the laws and regulations of the latter, and includes, in particular, though not exclusive;

1) Movable and immovable property as well as any other property rights such as mortgages and pledges,
2) Shares, stocks and debentures of companies or any other kind of participation in a company,
3) Claims to money or right to any performance of an economic value,
4) Intellectual property rights, patents, tradename, know-how, technological process and good will,
5) Any rights of economic value conferred by laws and contract, and by economic activities, including the rights of business concessions, exploration and exploitation of natural resources, and production, utilization and sale of products, and
6) Activities related to investment such as provision and acquisition of business facilities and organization and operation for test, disposition of property right, fund raising, buying and selling of foreign currency.

Any alteration of the form in which assets are invested shall not affect their character as investment.

2. The term "Investor" means as follows:
1) A natural person who, in accordance with the law of either Contracting Party, is considered to be its national or permanent resident
2) Legal entity, including companies, economic associations or other organizations which are established or organized under the law and regulation of either Contracting Party and which perform real economic activities having their seats in the territory of either Contracting Party.

3. The term "Return" means the financial gains from an investement, including profits, dividends, interests, capital gains, rents, payments related to intellectual property rights, and other legitimate income.

4. The term " Territory" means:
1) In respect of the Republic of Korea, the territorial land, territorial waters, territorial airspace, continental shelf and exclusive maritime zone over which it exercises sovereign rights or jurisdiction in accordance with the domestic and international laws.
2) In respect of Mongolia, the territorial land over which Mongolia has sovereignty or jurisdiction;

Article 2. Promotion and Protection of Investment

1. Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations.

2. Each Contracting Party shall grant assistance in and provide facilities for obtaining visa and work permit to nationals of the other Contracting Party engaging in the investment activities within the territory of either Contracting Party in accordance with its laws and regulations.

3. The investments by investors of either Contracting Party shall, in the territory of the other Contracting Party, enjoy long-term protection and security.

4. Unless otherwise contradictory to its laws and regulations, each Contracting Party shall not adopt any unjust or discriminatory measures to the management, maintenance, utilization, enjoyment or disposal of investments by investors of either Contracting Party, effected in its territory.

Article 3. Investment Treatment

1. Investments, returns and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment in the territory of the other Contracting party.

The above mentioned treatment shall not be less favorable than that accorded to investors of any third country.

2. Each Contracting Party shall, in its territory, accord to investors of the other Contracting Party as regards the management, maintenance, utilization, enjoyment or disposal of their investments, the treatment which is fair and equitable and not less favorable than that is accorded to its own investors or to investors of any third country.

3. The treatment and protection referred to in paragraphs (1) and (2) of this article shall not include the benefit of preferences or privileges which may be accorded to any investors of a third country by virtue of any customs union or a free trade zone, to which either Contracting Party is or shall become a member, and as a result of conclusion of agreement on double taxation prevention to which both Contracting Parties are or shall become members.

Article 4. Expropriation and Indemnification

1. The investments made by investors of the either Contracting Party shall

not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting Party, except for the measures taken in the public interest or on a non-discriminatory basis, for immediate, effective and adequate indemnification.

Such indemnification shall be equivalent to the fair market value of investment immediately prior to expropriation or impending expropriation became publicly notified, and shall be paid without delay and by freely convertible currency including the accrued interests based on the reasonable commercial interest rate applicable in the territory of either Contracting Party.

2. The investors of either Contracting Party, in case of all or part of own investment being nationalized or expropriated, shall have a right to inquire on the occurrence of expropriation as well as revaluation of investment value to independent judicial or administrative authority of the other Contracting Party.

Article 5. Compensation for Losses

In case investors of either Contracting Party suffer losses in the investment realized in the territory of the other Contracting Party owing to war, armed conflicts, a state of emergency, revolution, revolt, civil disturbance, riot or other similar events in the territory of the other Contracting Party, the latter shall accord adequate indemnification, compensation, restoration to the original state or indemnify in a different method, and such indemnification should not be less favorable than that it grants to its own nationals or to investors of any third country.

All payments shall be prompt, adequate, effective and freely transferable.

Article 6. Transfer of Investments and Returns

1. Each Contracting Party shall grant transfer of investments and returns that investors of the other Contracting Party proceeds in its territory under its laws and regulations including as follows;

1) Profits, interests, dividends and other lawful income.
2) Returns gained by sale of whole or part of investment, or result of clearing off.
3) Payments made pursuant to a loan agreement in connection with investments.
4) Payments which occur from the rights stipulated in paragraph 1. 4), article 1 of this agreement.

5) Wages or legal income earned by persons employed from foreign countries with respect to investment.

2. Transfer of payments of this Article 1 shall be made without delay at the public exchange rate of the day of transfer.

Article 7. Subrogation

When either Contracting Party or its agency makes a payment to its own investor under a guarantee accorded in respect of investments progressed by its own investor in the territory of the other Contracting Party, the other Contracting Party shall recognize the transfer of any right or claim of such an investor to the former Contracting Party or its Agency and recognize the subrogation of the former Contracting Party or its Agency to such right or claim. The subrogated right or claim shall not be greater than the original right or claim of said investor.

Article 8. Settlement of Disputes between Contracting Parties

1. Any disputes that may arise between the Contracting Parties concerning this agreement, shall be settled, as far as possible, by consultation through diplomatic channel.

2. If Contracting Parties do not reach an agreement within a period of six months after the occurrence of a dispute, it shall, at the request of either Contracting Party, be submitted to an arbitral tribunal to be composed of 3 members in the following procedure;

1) Within 60 days of the receipt of the request for arbitration, each Contracting Party shall appoint one arbitrator and the two appointed arbitrators, within 60 days from the date of appointment or according to agreement, shall nominate a national of a third country having diplomatic relations with both Contracting parties.
2) Within 60 days from the date of the appointment of the third arbitrator, the Contracting Parties shall recognize the third arbitrator as Chairperson of the arbitral tribunal.

3. If the necessary appointment or approval have not been made as appropriate within the periods specified in paragraph 2 of this article, either Contracting Party shall request the President of the International Court of Justice for the relevant appointments.

If the president of International Court of Justice is a national of either

Contracting Party or he/she is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the appointment of necessary members.

If the Vice-President is a national of either Contracting Party or also prevented from discharging the said function, the next most senior member of the International Court of Justice who is not a national of either Contracting Party shall be invited to make the necessary appointment of necessary members.

4. The arbitral tribunal shall work in accordance with the articles of this Agreement and other agreements between the Contracting Parties and based on the principles of the prevailing international laws.

The arbitral tribunal shall reach its decision by a majority of votes.

The decisions of the arbitral tribunal shall be final and binding upon each Contracting Party.

5. Each Contracting Party shall bear the cost of its own arbitrator and arbitral participation.

The costs of the chairperson and the other costs shall be borne in equal parts by the Contracting Parties.

Article 9. Settlement of Disputes between an Investor of a Contracting Party and the other Contracting Party

1. Any dispute between an investor of either Contracting Party and the other Contracting Party in connection with an investment shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

2. If the dispute cannot be settled in a friendly manner within a period of six months from the date when the request for the settlement of disputes is raised, an investor is entitled to submit the case to the following authorities;

1) Authoritative courts or administrative bodies of Contracting Party in the territory where the investment is made.
2) An ad-hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law. (UNCITRAL)

3. An Ad-hoc Court of Arbitration shall make a decision by a majority of votes.

The decision shall be final and binding upon the parties in the dispute.

Each contracting Party is under an obligation to execute the decision.

4. The parties in the dispute shall bear the cost of its own arbitrator and its representatives who took part in the arbitration.

The cost of the chairperson and other costs shall be borne in equal parts by

the Parties in the dispute.

At the time of judgement, the arbitral tribunal may ask a party of dispute to bear relatively higher cost than the other party.

Article 10. Application of Other Rules

If the provisions of the law of either Contracting Party or the provisions of an international agreement which exist or shall be concluded in the future between the Contracting Parties include also the provision(s) which accords more favorable treatment to the investment of either Contracting Party than that is provided under this Agreement, such provision(s) shall not be affected by this Agreement and can be extended to a more favorable treatment.

Article 11. Consultation, Amendment, Supplement

1. Either Contracting Party may propose to the other Contracting Party to have consultation with respect to any problem having effect on the application of this Agreement; such consultation, at the suggestion of either Contracting Party, shall proceed at a place and time to be agreed upon through diplomatic channels.

2. Each Contracting Party, may amend, modify and supplement this Agreement by mutual agreement if necessary.

Article 12. Application of the Agreement

The articles of this Agreement shall apply to all investments which investors of either Contracting Party made before or after its entry into force under the laws and regulations of the other Contracting Party in the territory of the other Contracting Party.

This Agreement shall not apply to any disagreement or disputes which occurred prior to its entry into force.

Article 13. Entry into Force, Duration, Termination

1. This Agreement shall enter into force from the first date of next month when the Contracting Parties have notified each other in writing that their domestic legal proceedings have been completed and the validity

period shall be for 10 years.

2. Unless either Contracting Party notifies to terminate this agreement to the other Contracting Party in writing one year before its expiration of available period defined in paragraph (1) of this article, the validity of this Agreement shall extend automatically for another period of 10 years and so forth.

3. After the expiration of the validity of the first 10 years expired, either Contracting Party may terminate this Agreement at any time but must inform in writing to the other Contracting Party at least one year in advance.

4. The articles from 1 to 13 of this Agreement shall continue to be effective for the further period of 10 years from the date of termination of this Agreement with respect to the investment made before the date of its termination.

The representatives authorized by their respective governments, signed this agreement.

Done in on day, 1991 in duplicate each in Korean, Mongolian and English languages, all three texts being equally authentic.

In case of divergence of interpretation, the English text shall prevail.

On behalf of the Government of Republic of Korea	**On behalf of the Government of Mongolia**

ANNEX 2

LAW OF MONGOLIA

January 10, 2002 Ulaanbaatar city

CIVIL CODE
Sub-chapter three
Mortgage of immovable property

Article 165. Hypothec

165.1. Creditor's mortgage of certain immovable property in order to have his/her demand satisfied first before all the other creditors shall be hypothec.

165.2. Maximum price of immovable property that may satisfy the demand of the creditor shall be identified and noted in the State register.

165.3. Possessor and creditor may mutually agree to replace the demand secured by hypothec with other demand, and in this case they shall have respective changes registered with state registration.

165.4. If demand of creditor is to be satisfied with hypothecs of several immovable property, each immovable property shall be used for entire satisfaction of demand concerned and the creditor may chose any of immovable property for having his/her demand satisfied.

165.5. Hypothec shall be equally applied to component of and benefit from immovable property, which was acquired by irregular commercial operations, or which having not been transferred to ownership of others although it was acquired by standard commercial operations.

165.6. If otherwise provided by agreement, interest, tort, damage caused and Court costs, in addition to main obligations, shall be deducted from the

price of immovable property that is a hypothec object.

Article 166. Registration of hypothec

166.1. Hypothec is created with its registration with the State register.

166.2. Possessor, debtor and creditor of immovable property shall make a document certifying the amount of demand secured by hypothec, its interest, and period of performing the demand. The owner and creditor of the immovable property shall have hypothec registered in conformity with procedures set forth in the law.

Article 167. Secured hypothec

167.1. Creditor may agree to have his/her rights to hypothec exercised by proving own demands only, without making the registration of rights to hypothec as a proof. This hypothec shall be registered with the State register as secured hypothec.

167.2. Hypothec may be determined for demand concerning payment obligations of non-bearer or inscribed/bearer securities. In this case it shall not be necessary to have the hypothec secured.

Article 168. Transfer of hypothec to owner

168.1. Hypothec shall be transferred to owner of immovable property by the termination of creditor's demand or if the creditor refused from his/her demands.

168.2. In the case referred to Item 168.1. of this Law, the owner shall terminate the hypothec and write off the State register or may transfer it to another person, retaining the registration order.

168.3. If owner of immovable property is liable before a third person for terminating the hypothec, or the immovable property or hypothec should be transferred to the same person, then it may be noted in the State register in advance.

168.4. Unless owner of the immovable property is obligated before the pledgee in person, s/he shall exercise the same rights as the person, who is obligated in person, and he/she shall be entitled to request the demand to be considered invalid or have a the requested amount reduced.

Article 169. Satisfaction of creditor demand

169.1. Owner of the immovable property shall be obligated to satisfy the demand of creditor if period of satisfaction of creditor's demand is due, or from the time when the obligation performer acquires the right to perform the obligation.

169.2. If the owner satisfied the demand of creditor, then s/he shall have rights to demand the creditor to provide him/her with documents necessary for making changes in the State register or termination of hypothec.

169.3. Unless owner is obligated in person, s/he may transfer the obligations from debtor to him/herself with the consent of pledger.

Article 170. Protection of creditor rights

170.1. Owner shall be obligated to have the value of immovable property, serving as hypothec, determined realistically.

170.2. If a situation endangering the immovable property emerges, creditor may set a period of time for owner to eliminate the danger. If owner did not take actions to eliminate the danger by expiration of the period, then creditor shall be entitled to have his/her demands immediately satisfied from the property concerned.

170.3. If immovable property is insured, then in the event of emerging insurance, insurer shall be obligated to notify the creditor and then provide insurance compensation to insured.

170.4. If there grounds exist to consider that insurance compensation shall not be used for rehabilitation or restoration purposes, then the creditor shall be entitled to take necessary measures not to let insured receiving insurance compensation.

170.5. If it is determined that the owner failed to perform obligations with regard to safety and soundness of immovable property serving as hypothec, then the creditor shall be entitled to demand the transfer of immovable property to his/her ownership.

Article 171. Non-restriction of owner transaction right

171.1. Transaction, obligating the owner not to use the immovable property serving as a hypothec, not to transfer it to ownership of others, and not to otherwise entitle rights to it to third party, shall be invalid.

171.2. Validity of the transaction concluded by hypothec owner with a third party shall depend on the creditor's permission.

171.3. Transaction about agreeing that right to ownership of immovable property shall be transferred to creditor unless the latter demand is satisfied completely or partially, shall be invalid.

Article 172. Transfer of hypothec and demand

172.1. Hypothec and demand serving as its grounds may be transferred together to others only in a case referred to in Item 87.1. of this Law.

172.2. Demand is considered as transferred if documents of hypothec certified with notary is transferred to a new creditor and this new creditor is registered with State register.

172.3. If obligation performer executed his/her obligations before the previous creditor after the transfer of demand to the new creditor, but was not unaware of such a transfer, then the previous creditor shall perform obligations before the new creditor to the extent to which obligation was performed by debtor.

172.4. Hypothec and demand shall be transferred to new creditor in the same amount as the previous creditor had.

172.5. Document that is registered with the State register and certifies the transfer of hypothec to new creditor shall be considered true and reliable. Debtor shall not be entitled to make demand with regard to it.

If new creditor was aware of a mistake in the registration, then this provision shall not apply to such a case.

172.6. If rights and legitimate interests of a third party were damaged as a result of a hypothec, the person concerned shall be entitled to satisfy the demand of creditor and transfer the hypothec rights to him/herself.

172.7. If a third party satisfied the creditor's demand according to provision of Item 172.6. of this Law, then s/he shall be entitled to transfer the pertaining documents and registration into her/his name.

172.8. If hypothec was transferred to a person who satisfied the creditor's demand as referred to in Item172.6 of this Law, then s/he shall be entitled to demand the owner to compensate the damages caused.

172.9. If a creditor, who is entitled to demand, has the same amount of obligations as the obligation performer, then their demands maybe considered as mutually satisfied.

Article 173. Hypothec refusal and rights to demand

173.1. If creditor renounces the demand and hypothec and have this refusal registered with the State register according to appropriate procedures, hypothec shall be transferred to the owner of the property concerned.

173.2. If creditor declined the hypothec, but retained his/her demand valid, then debtor shall be exempt from obligation to the extent s/he already paid the compensation for damages caused by hypothec.

173.3. Owner of the immovable property shall be entitled to demand the creditor to decline the hypothec, in case the hypothec becomes impossible to use for long-term with her/his acquisition of the right to dispute.

Article 174. Demand on sale of immovable property

174.1. Creditor shall be entitled to demand to sell the immovable property, in case the debtor exceeded the period of satisfaction of hypothec demand.

174.2. Provision of this law shall be applied for sales of immovable property, and regulations of this law shall be deemed more detailed.

Article 175. Forced sale of pledge based on Court ruling

175.1. In case the obligation performer failed to fulfill obligations when demanded as provided by Article 174 of this Law, immovable property serving as hypothec shall be subject to forced sales at the decision of Court, unless otherwise provided by law.

175.2. Court may determine other forms of sales of immovable property based on the claims from owner of the immovable property and creditor, and considering proposals made by authorized parties.

175.3. Creditor, debtor and owner shall be entitled to take part in the auction.

175.4. Debtor shall lose his/her rights to keep the benefit from the property by issuance of decision on sales of immovable property at auction.

175.5. If debtor lives with his/her family members in a house or in a room of the house, that serves hypothec, s/he shall become lessee by the moment of issuance of Court decision on forced sales of immovable property and shall be obligated to pay the rent to creditor at the current rate.

175.6. Person, who assigned by Court to lead the auction, shall carry out the auction within 30 days from issuance of Court decision.

175.7. Person assigned by Court to lead the auction shall notify the public of the event through the mass media 14 days prior to it.

Article 176. Suspending and postponing auction

176.1. In case the owner or third person, whose rights may be affected by carrying out the auction, satisfies the creditor's demand in advance, then the auction may be suspended.

176.2. Court may postpone the auction based on the request from the owner and having considered proposals by parties entitled to ownership rights

by up to six months in the following cases:

176.2.1. if it is possible to postpone the auction depending on the nature of debt to be paid by debtor;

176.2.2. if it is necessary to consider the personal and commercial relations of owner.

176.3. If Court deems that temporary postponement of auction, stated in Article 176.2 of this Law, may potentially create an explicitly negative consequences for the creditor, it may decline the owner's request.

Article 177. Auction price

177.1. The price, offered for real estate to be auctioned, shall be mutually agreed and fixed jointly by obligation performer, obligation assigner and owner, but if no agreement was reached, the competent auctioneer shall determine the price based on expert's opinion. The expert shall be nominated by the auctioneer.

177.2. If no price offer was up to the level of the price offered at the initial auction, or no one participated in the auction, the second auction shall be conducted.

177.3. Second auction shall be organized within 30 days after the first one. Second auction shall be publicly announced as provided by law.

177.4. The price offered by auction participants shall be sufficient to cover the costs related to organizing the auction and meeting the creditor's requirements.
If the price was not high enough, it shall be considered that the auction did not take place.

Article 178. Ownership right over auctioned item

178.1. The buyer, offered the highest price, shall be liable to transfer to the competent person conducted the auction the price, from which the auction conducting cost shall be deducted.

178.2. Buyer shall become the owner of the property from the time of paying fully the price of the auctioned property.

178.3. All limited rights for property and other hypothecs, registered after the hypothec, enforced by the creditor, shall be terminated with transferring the ownership right.

178.4. Nonetheless, other limited rights to be exercised with regard to that particular immovable property, shall remain valid.

178.5. New owner bought the immovable property, shall become a party to the contract valid during transferring the ownership right.

Article 179. Distribution of auction proceeds

179.1. If the obligation assignor /creditor is the sole person registered with the State register with hypothec right, or if the auction proceeds were sufficient to satisfy the needs of all obligation assignors, after deducting from it the cost related to organizing the auction, the competent person, organized the auction, shall distribute the remaining proceeds, after deducting from it all costs among obligation assignors according to proper order and procedures, and transfer the residuals to the owner participated in the auction

179.2. If the price at which the immovable property was sold not enough to satisfy requirements of obligation assignors, the competent auction organizer shall deduct the cost of organizing the auction, deposit the remaining amount on a special account and distribute it among obligation assignors in the order they were registered with the State register.

Article 180. Auction organizer's liability

180.1. If damages were caused to others due to the failure of a competent person nominated to organize the auction properly fulfill the obligations, the damages shall be compensated as provided by Article 497 of this Law.

Article 181. Transfer of immovable property

181.1. Court may rule to transfer the property for others' management instead of auctioning it based on the request of obligation assignor with hypothec claiming rights. In this case, Court may nominate a competent person to manage the immovable property or transfer this right to the owner.

181.2. Before making decision provided by Article 181.1., Court shall be liable to consider the opinions of all competent persons registered with the State register, whose rights and legitimate interests might be affected with forced transfer of the property for others' management.

181.3. Court shall rule as provided in Article 181.1. only in case, the proceeds from transferring for others' management would be more than the costs related to its management.

181.4. If the obligation performer and her/his family reside in the building or its part, which was forced to be transferred for others' management, s/he shall pay the rent at the rate prevailing at that particular time.

181.5. Competent person managing the immovable property shall get all benefits from the property, deduct from it all management and other related costs according to own proposal approved by Court, and dispose of the residuals at the end of the year.

181.6. If the obligation assignor's requirements were met, the competent person managing the immovable property shall return the immovable property to its owner.

181.7. If it became obvious that the obligation assignor's requirements cannot be met by forced management, it shall be terminated and the immovable property shall be sold through auction.

ANNEX 3

CIVIL ACT OF KOREA

Act No.471, Feb.22, 1958

CHAPTER IX MORTGAGE

Article 356 (Contents of Mortgage)

A mortgagee is entitled to obtain satisfaction of his claim in preference to other creditors out of the immovable which has been furnished by the debtor or by a third person as security without transferring its possession.

Article 357 (Floating Sum Mortgage)

(1) A mortgage can be created by settling only the maximum amount of the debt to be secured and reserving the determination of the debt in the future. In such case the extinction or transfer of the debt which occurred before the debt is determined cannot be effective against the mortgage.

(2) In the case of the preceding paragraph the interest of the debt shall be considered to be included in the maximum amount of the debt.

Article 358 (Scope of Effect of Mortgage)

The effect of a mortgage shall extend to all things which are attached to the immovable that is mortgaged including its accessories: *Provided*, That this shall not apply to cases if otherwise provided by Acts or agreed in the act of creation.

Article 359 (Effect upon Fruits)

A mortgage shall be effective against the fruits which the mortgager has obtained or can obtain out of the mortgaged immovable after an attachment has been levied on it: *Provided*, That this cannot be set up against the third person who has obtained the ownership of a superficies or *chonsegwon* on the

mortgaged immovable unless the mortgagee has notified him of the attachment.

Article 360 (Scope of Claim Secured)

A mortgage shall secure the principal, interest, penalty, damages arising from the nonperformance of the obligation, and the expense for the enforcement of the mortgage. Where the compensation for damages is delayed, a mortgage can be exercised only as regards the payments due in respect of one year after the lapse of time for the performance of the principal.

Article 361 (Limits on Disposition of Mortgage)

A mortgage cannot be assigned separately from its secured claim and also cannot be made the security of another claim.

Article 362 (Supplement of Property Mortgaged)

When the value of the property mortgaged has been conspicuously decreased by the acts attributable to a mortgager, a mortgagee may claim for recovery to the original state or the offer of reasonable security.

Article 363 (Claim of Mortgagee for Auction Bidders)

(1) A mortgagee may sell the mortgaged property by auction to obtain satisfaction of his claim.

(2) A third person who has obtained the ownership of the mortgaged property may also bid at the auction.

Article 364 (Payment of Debt by Third Party Purchaser)

A third person who has obtained the ownership of a superficies or *chonsegwon* on the mortgaged immovable may make a claim for the extinction of the mortgage by payment of the debt to the mortgagee.

Article 365 (Claim for Auction of Building on Mortgaged Land)

Where the mortgagor has constructed a building on the land after a mortgage was created over the land, the mortgagee may sell such building by auction together with the land: *Provided*, That he has no right to obtain payment out of the auction proceeds of the building in preference to all others.

Article 366 (Legal Superficies)

Where the land and the building on it belong to different persons by reason of the auction sale of the mortgaged property, the owner of the land is deemed to have created a superficies for the owner of the building: *Provided*, That in such case the rent shall be determined by the court on the application of the party concerned.

Article 367 (Claim of Third Party Purchaser for Reimbursement of Expenses)

If the third party purchaser of the property mortgaged has defrayed necessary or useful expenses to preserve and improve the property, he may obtain reimbursement out of the proceeds of the auction sale of the property in preference to all others, according to the provisions of Article 203 (1) and (2).

Article 368 (Joint Mortgages and Dividend of Proceeds thereof, Subrogation of Mortgagee Next in Priority)

(1) Where two or more immovables are mortgaged to secure one claim and the proceeds of the auction are to be applied simultaneously to its satisfaction, the burdens in respect of the obligation shall be divided in proportion to the proceeds of the auction sale of each immovable.

(2) If the proceeds of the auction sale of part of the immovables mentioned in the preceding paragraph are to be applied, the mortgagee may obtain full satisfaction of his claim out of the same; in such case the mortgagee next in priority may exercise the right of the prior mortgages by subrogation to the extent of the amount which the latter would have received out of other immovables in accordance with the provisions of the preceding paragraph.

Article 369 (Appendant Nature)

When the claim secured by a mortgage becomes extinct by completion of prescription or by any other reason, the mortgage shall also lapse with it. **Article 370 (Provisions Applied** *Mutatis Mutandis***)** The provisions of Articles 214, 321, 333, 340, 341 and 342 shall apply *mutatis mutandis* to mortgages.

Article 371 (Superficies and Chonsegwon Mortgaged)

(1) The provisions of this Chapter shall apply *mutatis mutandis* to the case where a superficies or *chonsegwon* has been mortgaged.

(2) A mortgagor who mortgaged a superficies or *chonsegwon* cannot take

action to extinguish them without the consent of the mortgagee.

Article 372 (Mortgages under Other Acts)

The provisions of this Chapter shall apply *mutatis mutandis* to mortgages created by the provisions of other Acts.

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