1. Introduction

The number of internet users in Korea has increased tremendously over the last few years. Already, as of January 2000, the number of internet users in Korea was estimated to be 10 million out of a total population of 47 million. Due to this phenomenon, as in other countries, e-commerce through the internet and e-commerce transactions have greatly increased. In order to support the development in the e-commerce sector, the relevant government agencies, beginning in 1997, established and revised e-commerce regulations, culminating in the enactment of the Framework Act on Electronic Trade (“FAET”) and the Electronic Signature Act (“ESA”) in July 1999. In regulating e-commerce, Korea has applied the theories of the existing legal system by analogy, but if application by analogy is unworkable, then it has either revised the existing laws or enacted specific statutes. Therefore, in order to understand the legal framework applied to e-commerce, one must look at whether the laws of a particular legal field applies by analogy, whether an existing law has been revised and whether a specific statute exists. The rest of this article examines the regulation of e-commerce by going through the various relevant legal fields.

2. On-line Contract

In the case of e-commerce, the contract is entered into by an offer and an acceptance made on the internet or other on-line networks. The basic law in e-commerce, the FAET, declares that electronic documents have the same legal effect as regular written documents. The effective point in time for transactions concluded by electronic means depends on when the electronic message (i.e. offer or acceptance) arrived at the
counterpart’s computer. The ESA provides that electronic signatures certified by government approved certification authorities have the same legal effect as handwritten signatures. There are also certification institutions, which are not approved by the government. However, the mere fact that an electronic signature has not been certified does not necessarily mean that the electronic signature has no legal effect or can not be used as evidence in court proceedings. If documents supporting the authenticity and identity of the signature is provided and there is proof that the content of the electronic document has not been altered, the electronic document still has legal effect.

Unfortunately, there is at least one aspect of contract formation which the FAET fails to cover. The FAET defines when an offer and acceptance has been transmitted and received. However, the FAET leaves it to the laws and precedents of the existing legal system to determine when a contract has been concluded, thus leaving some room for uncertainty in the contract formation. In Korea, under the current legal system, if the offeror and offeree are “conversing” (i.e. the two parties are directly conversing with each other, face to face, through telephone or other means) then the contract is deemed to be concluded when the offeror receives the offeree’s acceptance. If the offeror and offeree are “remote” (e.g. the two parties are communicating through mail) then the contract is deemed to be concluded when the offeree mails/sends the acceptance. The problem is whether a contract formed online will be deemed to be between “conversing” parties or “remote” parties. A related problem is that despite rapid advances in the technology of electronic communication, there are still lapses in reliability. One can imagine a situation where the offeree has indicated acceptance of the offer (i.e. clicked the accept button) but due to one of a numerous possible errors the accept signal does not reach the offeror. As yet, there are no laws or accepted legal theories under which one can analyze whether a contract has been effectively concluded. Assuming a contract has not been effectively concluded, it is unclear who bears the burden of proving such fact.

There are no specific laws or regulations determining the place of execution of a contract in e-commerce, the governing law or jurisdiction. Due to the cross-border nature of e-commerce such issues could be problematic. One must apply existing laws by analogy in analyzing such issues.

3. Electronic Payment Methods
Currently, there are no laws or regulations on electronic payment methods specifically relating to e-commerce. There is a move in Korea to have an electronic currency to take the place of credit cards in electronic transactions but there are no laws to support such a change.

4. Intellectual Property

The existing intellectual property legal system was designed with only the off-line transactions in mind. It was found that certain aspects of the existing system did not suit the on-line transactions taking place in e-commerce, so the relevant laws have been revised accordingly.

(1) Copyright Act

Revised in 1999, the Copyright Act provides that an online transmission or use of copyrighted material must be approved by the copyright holder. This is in accordance with Article 8 (Right of Communication to the Public) of the WIPO Copyright Treaty adopted by the Diplomatic Conference, Geneva, 1996. The previously existing law was inadequate because it only protected copyrights in broadcast and copy/distribution but did not include online transmission. In addition, regulations on the definition of database have been revised so that now one can secure copyright protection for databases. The concept of digital copying has also been added, thus strengthening online copyright protection. However, a deficiency of the Act is that protection of online transmission extends only to the original copyright holder, not to those who have neighboring rights (i.e. the performer who performs the copyrighted material).

(2) Computer Programs Protection Act

The Computer Programs Protection Act was revised in late 1998 to comply with the WIPO Copyright Treaty. The Act now recognizes the copyright holder’s right of communication to the public and penalizes the removal or modification of copyright management information (information on the copyrighted material, copyright holder and conditions of use, which appear when the program is installed or transmitted online.).
(3) Patent Law

Korea also recognizes business model patents. There are no separate rules regarding business model patents, instead the existing patent laws are interpreted a more flexibly. In Korea, merely a “new idea” is not enough to obtain a business model patent. As with traditional technical patents, the patent application must show novelty, as well as a technical aspect, i.e. utility.

(4) Domain Name

Korea also recognizes a domain name has value as an asset and disputes over domain names are rising rapidly. However, there are no separate laws on domain names. Instead the courts use the existing trademark laws, prevention of unfair competition prevention laws and trade secrets laws to rule on domain name cases. The Korea Network Information Center (“KRNIC”), a private organization appointed by the ministry of information and telecommunications, handles the management of URLs in Korea and accepts applications for registration of domain names ending in “.kr”. The registration procedure is on a first come, first served basis. A foreigner or a foreign company with no presence in Korea may not register a domain name with the KRNIC.

5. Consumer Protection & Privacy

If a company has any local presence in Korea, there are a number of consumer protection regulations which would apply. However, if a company does not have any local presence in Korea, it is unclear whether the consumer protection regulations would apply. When the regulations are literally interpreted, foreign companies which conduct business in Korea, whether through the internet or other means, are also subject to the regulations. Specifically, the Guideline to Consumer Protection in Electronic Transactions (a document promulgated under the FAET on January 6, 2000 by the Korean Fair Trade Commission that does not have the force of law; “Guideline”) provides that even the business operator is located outside of Korea, Korean law should govern in case of disputes with Korean consumers. However, as a practical matter, it would be very difficult for the Korean
government to enforce Korean laws on a foreign company without any presence in Korea. In fact, it is very rare for the Korean government to apply Korean laws to a foreign company which operates its business in Korea only through the internet. In order to review the laws protecting consumers in e-commerce, one must review the various relevant fields of law. The following is a partial list of the applicable consumer protection laws.

(1) FAET

This Act applies to any and all transactions carried out through an electronic document. An electronic document means any information or data which is stored, transmitted or processed in an electronic form by a data processing device, including a computer. The Act provides that a party to an electronic transaction (including its telecommunication equipment provider and computer service provider) who collects personal information with regard to such transaction, must express the purpose of such collection to the relevant person. Unless the relevant person consents or there is a special regulation, the party can not use the collected personal information for any purpose other than the disclosed purpose and may not provide it to a third party. The Act also provides that an operator of a “Cyber Mall” (defined as a virtual office or store where good or services are transacted through computers and information technology facilities) must disclose its name (including the name of its representative), address and telephone number. Furthermore, a party to an electronic transaction or an operator of a Cyber Mall must establish and manage an appropriate system to receive opinions and complaints from the consumers and compensate damages to consumers. The Guideline provides that the party or operator must take measures for the security and reliability of the electronic transaction, including the security and reliability of the consumer’s canceling or modifying the electronic transaction.

(2) Door to Door Sales Act

This Act applies to a person who conducts mail-order sales as a business. Under the Act, a sale that takes place due to an order placed online is deemed to be a mail-order sale so transactions in e-commerce are, in principle, governed by this Act. The Act provides that a person who wishes to conduct mail-order sales shall register with either the mayor or provincial governor. The Act gives the consumers the right to cancel an order
under certain circumstances and requires the operators of online stores to abide by the contents of the advertisements of the products sold in the online stores.

(3) Standard Terms and Conditions

Another important legislation on this issue is the Act on the Regulation of Standard Terms and Conditions. Under the Act, the term “standard contract” is defined as the general terms and conditions of a contract, prepared in advance by one party in a certain form for the purpose of entering into a contract with a large number of consumers. The overwhelming majority of terms and conditions of contracts taking place in e-commerce are likely to be deemed standard contracts under this Act. The Act provides that any provision of the standard contract that is grossly unfavorable to the consumers will become null and void.

(4) Other Laws

In addition to the above, there are other consumer protection laws related to e-commerce which should be considered, including, the Consumer Protection Act, Fair Label and Advertisement Act and Installment Transactions Act.

(5) Privacy

Similar to consumer protection, there are privacy protection laws in the existing legal system which applies to e-commerce and also privacy protection laws specifically aimed at e-commerce. Relevant laws include Telecommunications Secrecy Act, Act on Use and Protection of Credit Information, FAET, The Act on Promotion of Information and Telecommunication Network Utilization (“AIPITNU”) and others. These laws serve different purposes but all require the e-commerce operators to give notice when collecting consumer information and prevent disclosure of a consumer’s various private information without the consent of the consumer and, if such consent is obtained, the use of the information for a purpose other than the consented purpose.
6. Website Content

Regulations on website content are also covered by a number of laws. These include the Patent Act, Copyright Act, Unfair Competition and Trade Secret Protection Act (“Unfair Competition Prevention Act”), compensation claim due to a tortious act under the Civil Code. There are also laws specifically related to telecommunications. For example, the AIPITNU prohibits acts of sending or transferring advertisements and the like against the user’s will, threatening national security, harming the public or social morals and good manners, destroying national economic order, threatening economic development, and any other breach which is a crime under other regulations. The Telecommunications Business Act provides that the business operator may not violate a consumer’s rights, may not engage in unfair trade practices with regard to the furnishing of information and should prevent a consumer from engaging in online acts which harm the public or social morals and good manners. Besides the above, there are other laws which apply to website content, such as the Criminal Code (which prohibits gambling, lottery (special permission required); the production, sale and exhibition of obscene or lewd materials of any kind; defamatory materials regarding a person or person’s credit, etc.) and the National Security Act (which prohibits the act of producing, importing, copying, possessing, distributing, selling and obtaining documents, drawings and other presentations, including websites, for the purpose of promoting and praising anti-national corps or organizations.) Under the Copyright Act, Computer Programs Protection Act and Unfair Competition Prevention Act, if the content of a website violate a copyright or trade secret, the author of the contents is liable for the damages and/or criminal penalties. A recent hot topic has been when the content of a website violates a copyright, whether the operator of the web service is also responsible for such violation.

7. Tax and Tariffs

An attempt to get a hold of taxation rights with respect to foreign companies selling goods or services over the internet is a worldwide trend and a movement toward expanding or amending the concept of permanent establishment is an example of this trend. The Korean government has not yet taken any position on whether to expand or amend the concept of permanent establishment with respect to electronic commerce and its seems the Korean government will follow the decision of the OECD. Besides the general income tax that is required from a permanent establishment, there are other taxes that may apply,
depending on the web service. With regard to tariffs, the Korean government still imposes tariffs on the importation of off-line goods accompanying an on-line transaction (e.g. buying books from overseas cyber mall operators and having them shipped to Korea) but does not impose tariffs when the online transaction are completed without off-line delivery, such as software, music or video sales.

8. Dispute Resolution

Although a choice of law clause is generally effective in Korea, there are certain important exceptions. The Guideline includes some provisions relating to disputes between Korean consumers and e-business companies. We expect the Korean government to introduce new legislation on this issue in the near future. A dispute between online store operators and consumers may be resolved by either arbitration by the Electronic Trade Dispute Arbitration Commission (“ETDAC”) or the Korean court having jurisdiction, in accordance with Korean civil procedure, applying Korean law. The ETDAC was established in April 2000 under the FAET as an alternative dispute resolution forum for those who wish to avoid costly and lengthy trials. Due to its short existence, it is too early to pass judgement on the Commission but the fact that the Commission’s rulings are not binding on the parties to the dispute makes one wonder how effective a forum the Commission will become. On May 1, 2000, the Ministry of Information and Communication established the Guideline on Personal Information Protection which regulates in relative detail the collection, use, management and release of personal information. In connection with this, the Personal Information Dispute Arbitration Commission was inaugurated on June 1, 2000. Also, the Domain Dispute Commission was established to resolve disputes over .kr domain names. As yet, the Domain Dispute Arbitration Commission has not been officially inaugurated but is expected to become active shortly.

9. Conclusion

The work of supplementing the existing legal system in Korea to accommodate e-commerce is still continuing so it is unclear to what extent one should rely on the existing legal system when analyzing e-commerce related issues. However, this problem appears to exist in other countries as well. Currently, the Korean government, legislature and courts
are trying to formulate an appropriate legal system for electronic transactions and trade. Developments in technology will always outpace developments in law so it would be too much to expect a perfect legal system for cyberspace. But it seems that it will take a few more years for the revisions in the legal system to reach even a relatively satisfactory level. Until then, we can only invoke the various regulations of the current legal system to the best of our ability.